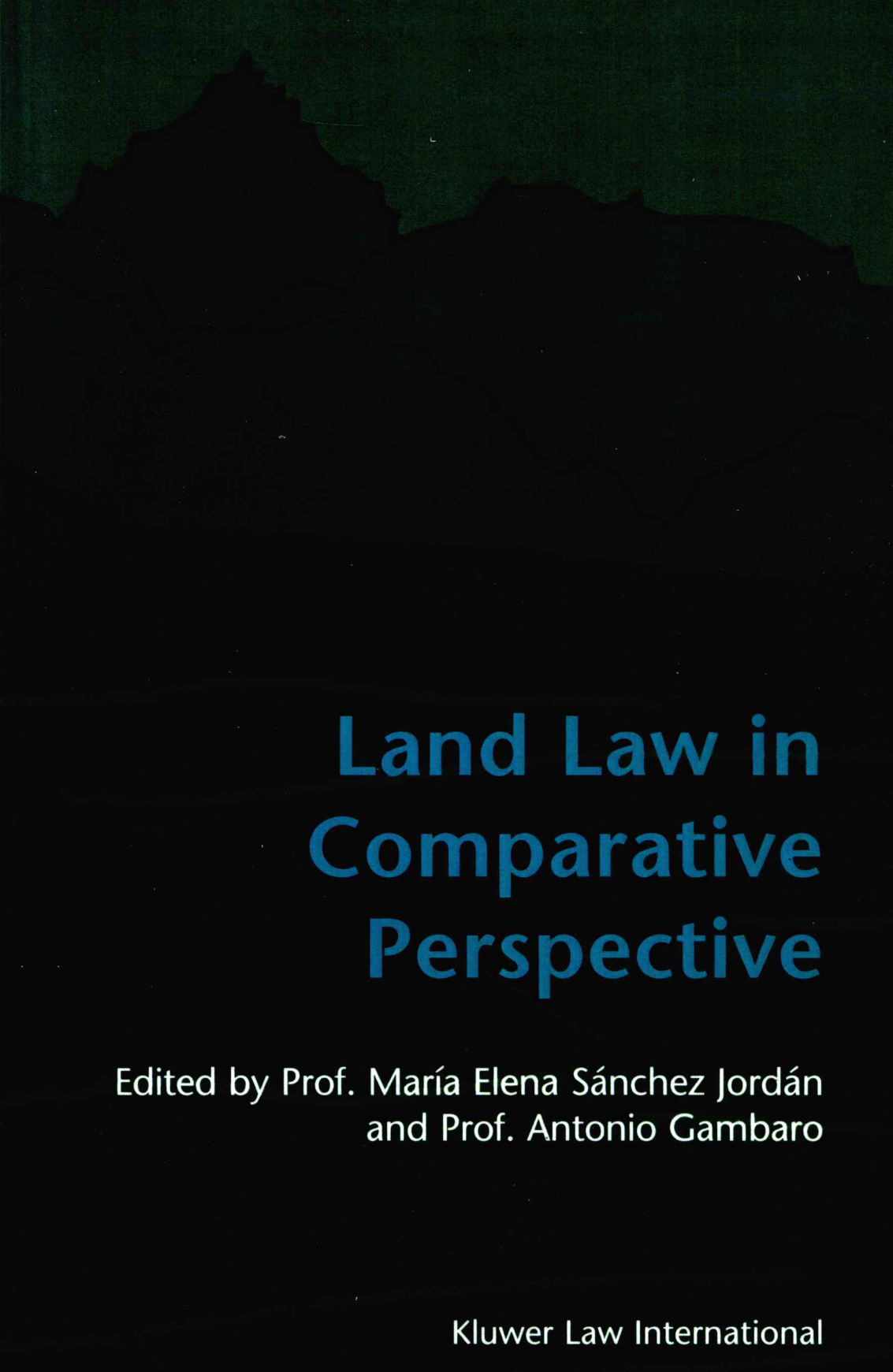

Land Law in Comparative Perspective

Edited by Prof. María Elena Sánchez Jordán
and Prof. Antonio Gambaro

Kluwer Law International

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PREFACE

The 2001 Annual Colloquium of the International Association of Legal Science has taken place in Santa Cruz de Tenerife, Canary Islands, on October 4–6, 2001. The Faculty of Law of the Universidad de La Laguna hosted the event. The subject of the Colloquium was "Land Law in Comparative Perspective".

Land law has proved to be both a very difficult subject and an extremely stimulating one from a comparative viewpoint. Difficult because, at least at a first glance, profound differences still exist between the main legal traditions in the field of property law. As Professor Sacco pointed out during the first day, although differences also exist in the field of contract law and in the field of torts, they do not seem as radical as in the field of property, where discouraging differences appear both in the legal terminology and in the basic legal concepts.

Stimulating, because land law is gradually changing, becoming more and more fragmented over time. Recently, we had the impression that land law is also becoming more and more localized. This contrasts the general trend towards uniformity brought about by globalization. Moreover, land uses have been reshaped by legislation and regulations in line with locally felt necessities. Professor Upham has directed our attention to legal instruments establishing private residential governments, which are old in legal terminology but post-modern in their social impact and Professor Villar Rojas has pointed out how far the land use in the Canary Islands is linked with the specific necessities of this magnificent part of the world.

This implies that we have accumulated an enormous amount of different solutions and legal techniques. This is a kind of intellectual wealth that comparative law is able to use effectively. In order to achieve this kind of ability, the comparatist must surrender certain categories, or certain ways of thinking that may be useful in internal law but are useless or worse than useless in a comparative landscape.

The distinction between public and private property is, for instance, a classificatory tool that is misleading. It possibly lies at the origin of a certain aphasia of the jurist when he faces modern problems of land use control. Professor Guadagni, on his part, has underlined that the opposition between customary law and State law may lead to misleading conclusions when it is applied to many African countries where the State is simply too weak to be an alternative to progressive development of customary law. Back to the western world, Professor Monica Hinteregger has shown the double face of property when it is protected against polluting interference, and thus it is a tool for environmental

protection, and when it is limited for environmental or naturistic purposes. On this last issue, the problem is that of constitutional protection of property rights, and the question mark is to what extent private property is protected against excessive burden for general welfare.

In a comparative perspective, this issue is connected to the traditional legal vision of the object of private property. Regulatory takings are a relevant issue in the American experience, but it comes as no surprise that the same issue can be solved following quite different approaches where traditional property law shapes ownership and where ownership is considered to be shaped only by general public laws. In the common law experience, as Professor Upham reminded us, the fee simple absolute may be shaped by private arrangement and becomes a fee simple determined. In civil law this is quite unthinkable, the shaping of property right being strictly a matter of *ordre public*. In some civil law traditions, ownership can be conceived only on corporeal objects, as § 90 B.G.B. provides, consequent property is not taken if the corporeal object, i.e. the land, remains in the possession of the owner.

It is true that from a static point of view, ownership is an extremely compact institution, on the other hand in the transfer process ownership is normally fragmented. Professor Carrasco Perera has outlined the many different ways in which a transfer of property may be organized. Unfortunately, these ways are present in the laws of European countries and this may be an obstacle to the organization of a single market in Europe.

The same problem exists in the field of securities. Professor Van Erp outlined all the painful attempts to bring unity in a field in which national laws have created the greatest fragmentation. Nevertheless, he added some words of hope, at least at the European level in which the necessity of a single market is deeply felt.

Nevertheless, the focus of the essays collected here remains on land law in the usual perspective of property rights. Land law is today the result of land use control. Urban planning has been the front runner of all different types of regulations. We may approach urban planning from different points of view. One is to look at a superior principle, such as the social function of private property, another is to look at the practical results of urban planning. Professor Schill has deliberately taken this second point of view, dealing with affordability of better housing and better urban environments. This approach shows that the poorest are the least inclined to support strict regulations while the people that can afford it are more and more the upper classes. This brings our attention to the social effect of regulations and sheds light on the fact that they are legal tools of a social conflict. While, on the other hand, too general a formula such as the social function of private property tends to obscure this social dimension.

Social dimension that may also be illustrated following a historical perspective as it has been done in the final reports of Professor Orduña Moreno, Professor Fanlo Loras and Professor Macías Hernández, dealing respectively

with the problems of agricultural land uses in a mature economic system and with the problems of riparian rights.

For all these reasons, this rich collection of essays focusing on the law of property in a comparative and global perspective represents an extremely valuable contribution to the emerging comparative legal literature concerning land law.

Antonio Gambaro, editor

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PUBLIC vs. PRIVATE LAND PROPERTY? OR COMPLEX REGIMES OF RIGHTS ON LAND?

1. The very idea of centering an academic debate around the opposition between "public property" and "private property" might be perceived as an attempt to conjure up an old theme that supposedly had gone forever.

From an intellectual point of view, during the second half of the 20th century we have learned that the differences between public and private property are not so relevant and deep. Felix Cohen strongly argued that the difference between the property of the US Steel corporation and the property of a soviet Kombinat cannot be conceived as a matter related to individual rights and, therefore, to the structure of the society as a whole.

From a political point of view, the upheaval of the socialist block in the nineties has forced us to the conclusion that an Era that witnessed the confrontation between two systems characterized by different forms of property came to an end. Nevertheless, as concerns land property, the debate is still going on in several legal experiences. In this paper, I will underline how the debate seems to be intellectually conditioned by recent history.

2. Nowadays, in the Western world, a large number of issues related to land property concerns lawsuits on wetlands, protection of endangered species, landmarks preservation, land use and zoning. That is to say: issues related to *public control of private property.*

In other words, as far as legal rules are concerned, the central issue has shifted from "*title*" to "*land use control*".

But if we focus our attention on land property, the first issue that shapes the theoretical presentation of the matter seems to be rooted in the past debate. If we look at the American literature, we are able to observe that, in property matters, the arguments used in support of one view or another are still the same that were once used in order to justify the existence of private property as a legal institution.

The Lockean vision is still a very powerful source of ideas and arguments in favor of the protection of private property as a constitutional and political value. Economic efficiency, political freedom and personal autonomy are mainly political categories, strictly connected with a mentality that can be traced back

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to the Natural-Law School.[1] It is also worth noting that if we look at the recent French literature, we find that John Locke and Samuel Pufendorf are ubiquitously present in the reflections of modern political scientists.[2]

This means that the major change in political theory brought about by the 20th century's debate is constituted by a more widespread use of the economic approach, while the bulk of the discourse is merely a second or third-hand reading of the Natural-Law framework developed in the 17th and 18th centuries.

3. To a certain extent, a divergence between legal and political approaches to the understanding of property rights has always existed.[3] The problem is the current magnitude of the disparity.

It could be argued that, whenever the free use of land by private parties is restricted in order to protect the habitat of kangaroo rats,[4] or whenever a building is designated as historical landmark, or whenever a swamp is classified as protected wetland, the relevant issue is still that of: *Private vs. Public Use of Land.*

The public interest here lies in the preservation of endangered animal species, memories of the past, open species and wildlife refuges. By contrast, the private interest lies in the lifting of restrictions on land use, in order to be able to pursue the most profitable activities on the land, without any external limitation.

It is not surprising that an old rhetoric is widely used as an offensive weapon in such a dialectical conflict. Pure private interest can be labeled "insensitive development", "selfish behavior", "*abus de droit*". On the other hand, restrictions are conceived as "overbearing", "unjust", "unfair" etc. This is the rhetoric with which lawyers live. Therefore, it should not be surprising that such arguments are flourishing in legal discourses.

4. The issue however is not connected with a possible explanation of the present type of legal discourses, rather it is connected with the reason why they are so poor in terms of technical legal terminology. If we look back in legal history from a comparative viewpoint, we are able to observe that the law of real property has been all over the fertile mother of legal jargon. That is to say that lawyers were able to put the complexities of legal arrangements in an

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1 See E. Keynes, *Liberty, Property, and Privacy. Toward a Jurisprudence of Substantive Due Process*, Penn State University Press, 1996; J.W. Ely Jr., *The Guardian of Every Other Right. A Constitutional History of Property Rights*, Oxford University Press, 1992.

2 See R. Castel and C. Haroche, *Propriété privée, propriété sociale, propriété de soi*, Paris, Fayard, 2001; F. Dagognet, *Philosophie de la propriété*, L'avoir, Paris, Puf, 1992; G. Koubi (ed.) *Propriété & Révolution*, Paris- Toulouse, ed. du CNRS, 1990.

3 See Candian, Gambaro, Pozzo, *Property. Propriété, Eigentum*, Padova, Cedam, 1992.

4 See J.V. DeLong, *Property Matters, The Free Press*, 1997, p. 13.

order of their own. To name things and concepts implies, as Michel Foucault told us, to bring an order to them.

As mentioned at the outset, the main problem posed by land property today can be framed in terms of conflicting interests and it is expressed by the growing concern over the allocation of entitlements between the various parties to the conflict. The types of entitlements, moreover, are extremely variant. The right to cultivate the land vs. the interest to preserve animals' habitat. The right to build up a radio station vs. the neighbors' concerns for their own health. The right to place a billboard vs. the right to contemplate a quiet view from the highway. The classical legal terminology has no names for all these entitlements. The ancient category of nuisance, or "troubles de voisinage", or "*Einwirkungen*", is too broad to be significant, and, more importantly, it does not provide any answer to the basic question: "who causes a nuisance to whom in the above cases?".

Externality is a more common expression, since at least there is an economic theory behind it. Lawyers began to use political and economic categories because they perceived that traditional legal language was no longer fit for describing legal issues after the concept of ownership has been dissolved in the idea of bundle of rights.

In other words, lawyers couple a factual terminology with an old political rhetoric because they have no longer a legal vocabulary, that is to say: a vision of their own. What is worth exploring are the reasons why a legal vision of land property matters disappeared in the 20th century.

5. In the 19th century, the dichotomy private vs. public property had a clear meaning. The meaning derived from the belief that the use of property was determined by its holding. When Tocqueville made the famous remark saying that in the next century "*le champ de bataille serà la propriété*", he had in mind not only the problem of wealth distribution, but also the assumption that a public property implies a use in the public interest, i.e. the interest of the people at large, while private property necessarily leads to a selfish use, but for the very same reason, it also leads to the most fruitful and profitable uses.

This belief was deeply rooted in legal thought. Domat has linked the "*droit de police sur les choses*" with the nature of things, stating that regulations are required because they are "*destinées aux usages communes*". But: "*Quique l'usage des mers soit commun à tous, la liberté de cet usage doit avoir ses bornes, pour prévenir les inconvéniens qui arriveraint, si chacun usant comme il entendrait*".[5]

Chapter III of the second book of the French Code civil is entitled: "*Des biens dans leur rapports avec ceux qui les possèdent*", but the seven articles contained therein are dealing with the distinction between private and public property.

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[5] See J. Domat, *Les quattre livres du droit public* (1697), Reimp. Caen CNRS, 1989, p. 154.

But the construction of this main distinction was not limited to the nature of the legal entity holding public property.

The concept of "*domaine*" has been split in two different ideas: "*domaine privé*" and "*domaine public*". In Colin–Capitant,[6] one of the most popular and outstanding hornbook published in the first half of the 20th century, we read: "*une distinction toute rationelle et familière à nos esprits domine la matière du domaine: domaine public et domaine privé. Le domaine privé comprend les biens que l'Etat possède et gère comme un particulier. ... Le domaine public, au contraire* (..) *ce sont les biens qui servent à l'usage de tous* (..). *On ne peut même dire que l'Etat en soit propriétaire. En effet, la propriété se compose de trois éléments, l'usus ou droit d'usage, le fructus ou droit de recueillir les fruits et revenus, l'abusus ou droit d'aliener. Or de ces trois éléments, l'usus n'appartient pas à l'Etat mais au public, à tout le monde, même aux étrangers.*"

That is to say that "*le domaine public*" was not even property. Indeed, the concept of property was bound to the idea of private holding. The public domain in the civil law sense, instead, was bound to the idea of community holding, a position that – in the Natural-Law School vision – was an antecedent to the establishment of private property.

6. From a legal point of view, in the civil law tradition the regulation of public domain was a matter of administrative law and not a matter of private law.

From a political point of view it was the paradigm of community holding, because it was understood in the light of its archetype. As a consequence, the political debate that took place in the 20th century was framed outside the technical legal tradition. In the former Soviet Union and in other socialist States, legal scholars have struggled against death in order to build up a consistent legal theory concerning public property. However, at the end of the day the problem was still unresolved. The so-called operative administrative rights of structural divisions and State enterprises – the accepted Venediktov's solution – was far from clear. Social organization ownership was put onto the same plane with State and cooperative ownership.[7] The crucial point was that the State as a law giver prevailed over the community by means of its administrative regulations that were, of course, perceived as strictly mandatory rules. As a consequence, there was as much attention for the interest of the people at large as the political system allowed, but the theory was framed in property terminology and by consequence it suggested that there could be no division between the owner and user.

7. In the western world the evolution of legal thought, being strictly connected

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[6] See A. Colin and H. Capitant, *Cours élémentaire de droit civil français*, 7[eme] ed., Paris, Dalloz, 1931, t. I, pag. 725–26.

[7] See G.M. Aiani, *La proprietà delle organizzazioni sociali nel diritto dei paesi socialisti*, Milano, Giuffré, 1988, with summary in English.

with the ongoing political debate, came to a deadlock. Dealing with: "*Les trasformations générales du droit privé depuis le Code Napoléon*" – nothing less – Léon Duguit suggested the idea that private property was a social institution that must be put in line with the necessities of the time. To the question aimed at discovering what were the necessities of his time in the area of property, with a special emphasis on land property, he answered: "*Il est trés simple et apparaît dans toute societé: c'est le besoin d'affecter certaines richesses à des buts individuels ou collectifs définis.* (..) *Si l'on protége l'affectation individuelle d'une richesse, c'est uniquement en considération de l'individu; c'est uniquement l'utilité individuelle que l'on à en vue. Or, aujourd'hui nous avons la conscience trés nette que l'individue n'est pas une fin, mais un moyen, que l'individue n'est qu'un ruage de la vaste machine qu'est le corps social*".[8]

Strange as it was, this idea made an outstanding career through the 20th century (although it was rejected within the socialist legal tradition). Such idea brought about an important benefit: it managed to show that holding was no longer an issue. But the cost of this improvement has been quite high. Indeed, in this perspective, the interest of the owner becomes irrelevant because it is deprived of legitimacy in every form of social ordering. The legal writers that followed the idea of the social function of property rights have indeed solved the difficult problem of accommodating private and public interests in land making reliance on the unspoken assumption that the only legitimate interest in land was the public one. There was an alternative perspective: to conjure up the idea of social function with the nature of things in order to find out the proper regulation for each; but this perspective was outclassed by the overwhelming political vision.

8. During the 20th century, legal scholars have certainly struggled with the complexities of the law of property. However, such complexities did not grow much over time; they always existed. The problem is to have a comprehensive theory to put complex phenomenon in order. When such a theory is missing, lawyers are obliged to make reference to the traditional vision. Because the traditional vision was obviously inadequate, in order to preserve it the private law of property has been kept far away from real problems. These were assigned to public regulations. Regulators started to perform their job by paying little attention to the cultural aspects of the legal tradition. This added to the legal dimension a difference in language and mentality. Regulations are normally drafted by people who have not been trained as jurists, but then they must be taken into account by lawyers. Therefore, they had to shift to the political and constitutional dimension in order to find a framework broad enough to cover

[8] See L. Duguit, *Les trasformations générales du droit privé depuis le Code Napoléon*, Paris, 1912, reimp. Éditions de la mémoire, 1999, pp. 150, 156.

all the points of view. Probably it has not been the more sensible solution, but it was the only one available.

The public law perspective was pervaded by the idea that public holding is the natural way of pursuing general interests. However, when this vision was dismantled, there remained little to learn from the public law tradition.

In the meantime, the political debate on the opposition between public and private property was moving with increasing tiredness. When it came to an end, legal scholars who were looking at political science in order to learn something useful felt like Adam: they discovered to be alone.

Public and private interests in land have always coexisted; the magnitude of the gap between them mainly depends on our ability to bridge it. At the beginning of the 21st century this ability does not seem to be very high. The only learning we have received from recent past is that thinking of public and private ownership in land as an opposition between two different social arrangements is quite a misconception and, in any way, it does not help legal analysis.

Marco Guadagni

TRENDS IN CUSTOMARY LAND PROPERTY

NEW ATTITUDES

If we look at the rural population of the world as a whole, for the vast majority of people, customary law is the normal system of land tenure. Despite this fact, customary land tenure has little recognition or no mention at all in the national legal system of almost all contemporary countries. It is not uncommon among academicians to regard it as a field of study for anthropologists or ethnologists rather than for legal scholars. Things seem to be changing now. Until recently, customary law was mainly considered as a vestige of the past bound for complete extinction. Today it is authoritatively suggested that it should be regarded as an underground resource to be rediscovered and exploited in order to contribute to the economic development of poor countries. Under this respect the World Bank's Development Report for the year 2002 (*Building Institutions for Markets*) echoes Hermando de Soto's theories (*The Mystery of Capital*, New York 2000).

CONSTITUTIONAL LAW

It is well known that customary land tenure has a constitutional value for the community concerned. It does not deal with "private" rights of landowners, or with "administrative" rules on land use. It reflects and supports the very social and political organisation of the community itself, for which it provides a basic constituent element. In customary land tenure there is no clear dichotomy between individual and communal rights, although land rights reflect a combination of individual and communal interests in land (sometimes referred to as "hierarchy of estates"). Of course, the individual here is not so much a single person, but rather the representative of a family group, comparable to the *pater familias* of Roman law.

As is common for constitutional amendments elsewhere, in a traditional African community, changes in the customary land tenure system entail a special ritual/procedure. Here the community assembly (seldom including women) must reach general consensus (not unanimity).

In the past, so many attempts of state imposition of transplanted law reforms have failed – among other reasons – for lack of co-operation by rural populations. It is now suggested that local people be involved in decision making and

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that care be taken that constitutional principles of customary law are both coherent with the new "democratic" claims of African states, and expedient for actual implementation on the ground.

LOCAL AUTONOMY

African countries are often a jigsaw puzzle of various communities having different customs and living in different environments. In the past, all-country land nationalisation (mainly directed against tribal land) was a common measure to affirm national unity and to allow the state a free hand in land planning and exploitation. Both the latter are now regarded as better served by respecting the different local land tenure systems, even with the theoretical nationalisation measure often remaining unrepealed. Unless state priorities (such as national parks) or international legal standards (such as equal rights for women) require central reforms, local customary land tenure systems may be regarded not as hindrances but as instruments for rural development. After the patent failure of centralism for development in Africa, "local empowerment" is now the internationally suggested path, involving local communities in planning, deciding and implementing land improvements based on a better administration of traditional tenure systems.

REPEALING, CHANGING, PRESERVING CUSTOMARY LAW

As one cannot immobilise a flowing river so one cannot "preserve" customary law in any codified or restated form (as a few African countries tried to do). As one cannot deprive a tree of its lymph other than by drying it by cutting the roots and killing the tree itself, "repealing" customary law (as some countries did) is a dramatic and often fruitless measure. It is now internationally suggested that customary land tenure is neither to be destroyed nor to be sanctified, but to be adjusted to the needs of a gradual and participated transition towards economic and social development.

Despite its name, traditional law was never a static and unchangeable set of rules. Its oral form contributed toward its adaptation to changing circumstances, both internal and external. Customary land tenure has proved to be able to accommodate phenomena as different as modern agriculture (colonial tree plantation in West Africa) and war-displaced populations (Eastern and Southern Africa).

Rules not only *may*, but also *have* to change if customary law has to keep pursuing its role of peace keeping in changing circumstances. What should be retained are the basic principles of equality, participation, mediation, consensus, etc., although they too need to adjust to modern needs, such as equality and participation for women as well.

LAND REGISTRATION

It is pointed out that oral (uncertain) customary land rights cause frequent litigation and are a "dead capital", as they are unsuitable for economic transactions such as sales and loans: de Soto calculates that such an unused capital amounts to almost $10 trillion on a world scale (almost 100 times the total aid given to third world countries in the past three decades).

Registration of customary land rights would give them certainty. So far, however, a Western oriented view of land registration has created more problems than benefits. Registration is only the tip of an iceberg of techniques, rules and institutions (to identify, qualify, demarcate, adjudicate and certify land rights) that hardly any African country can afford to have and to make function properly. The need to convert customary rights into Western ones and communal interests into individual properties has proved to be a task which is most difficult for the state and very much resented by rural communities.

A less Western oriented view is now internationally suggested allowing for registering customary land rights as such (both communal and individual ones) with local authorities, without issuing negotiable titles. The system would not allow for the transfer of land outside the community, but would diminish litigation, provide information for distribution of aid to rural development, facilitate micro-credit guaranteed by community control.

TRANSFER OF LAND

Customary tenure systems do not ignore transfer of land. When rotation is used for land redistribution it solves problems of transferring improvements made on the land by the previous holder. The most revealing example, however, concerns land transfer to outsiders. It is not an economic transaction, but a social one. With the land the newcomer acquires the rights and duties involved in living in the community according to the rules it has laid down. In Africa the customary right to land is like the modern right to vote: foreigners may not buy it in any other way than by acquiring citizenship (or residence, in some cases).

This situation is quite understandable in subsistence economies of small communities, where the land is the only source of livelihood and the community the only source of social security. With the advent of the market economy customary land tenure loses much of its role, as land is destined to become an economic and negotiable good, while social security becomes the task of modern institutions. However, unless the economic and the social process go together (which has rarely happened in Africa so far) the transformation of customary land rights into negotiable land titles is going to create landless peasants with no social security supporting them in case of need.