International Journal of Law in Context, 4,2 pp. 135–148 (2008) Cambridge University Press
DOI: 10.1017/S1744552308002036 Printed in the United Kingdom

Informal formality: tenantries, *ejidos* and family land

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Abstract

Formality and informality in housing is a continuum, rather than an either/or proposition, with many examples along the continuum. This paper focuses on three examples of housing solutions – Barbados tenantries, Mexican ejidos and Saint Lucia family land – which are situated at the fulcrum of the continuum, at the point where it tips from formality to informality, and attempts to unravel their formal and informal elements. While the starting hypothesis was that each is informal from a public law point of view but formal from a private law one, closer examination suggests that their private law aspects are more nuanced than first appeared.

Introduction

In his oft-cited book, *The Mystery of Capital* (2000), Hernando de Soto uses the image of a bell jar to explain the difference between formal and informal property. Those who hold formal title to their property are under the protective cover of the bell jar, while those with informal title are outside it, looking enviously in.

However, formality and informality in housing is not an either/or proposition, as de Soto's bell jar image suggests. It is rather a continuum, with many points along it representing varying degrees of formality and informality. At one end of the continuum is fully formal housing – that is, housing built in a manner conforming to all public sector requirements, by or for the registered owner on his or her own land, using money borrowed from the formal sector and secured by a registered mortgage. It is the norm in developed countries, and the law relating to it makes up a significant part of a typical law school curriculum: property law, wills and estates, real estate transactions, mortgages, land use planning and so on. At the other end of the continuum is squatter housing – that is, housing built without permission on land belonging to another, using money borrowed from the informal sector, in a manner that probably does not conform to public sector requirements. It is prevalent in many developing countries, and receives much institutional and academic attention (e.g. de Soto, 2000; Gilbert, 2002; Home, 2004; Manders, 2004; Unruh, 2007).

The continuum thus ranges from housing that is formal from the point of view of both private law and public law through to housing that is informal in regard to both areas of law. At the formal end of the continuum, public and private law usually reinforce each other to ensure a fully integrated formal package. In Ontario, for example, only those with a valid private law title to land may apply

* This is a revised version of a paper presented at a Workshop on 'Squatters or Settlers: Rethinking Ownership, Occupation and Use in Land Law' held at the International Institute for the Sociology of Law, Oñati, Spain, in June 2005, and subsequently at the 8th Annual International Development Workshop, Canadian Bar Association Annual Meeting, St. John's, Newfoundland, in August 2006. It is part of a larger project on access to housing by the urban poor in selected Caribbean basin countries, which is supported by the Social Sciences and Humanities Research Council of Canada. I am grateful to Professor Robert Home for organising the Oñati Workshop and for his helpful comments and suggestions on an earlier draft of the paper. The usual disclaimer applies.

for public law subdivision approval (Planning Act, s 51(16));[1] and those who purchase land in a subdivision that has not received public law approval will not receive a valid private law title regardless of the validity of their vendor's title (s 50(21)).[2] Nor will they be able to use their property as collateral for a formal sector loan, as lending institutions insist on public law planning permission (Mohammed, 1989) as well as private law title. At the informal end of the continuum, there is usually a disjuncture between the two areas of law. In fact, it is often the inappropriateness of formal public law requirements for the housing needs of the poor that drives them to informal private law solutions (Matthews Glenn and Wolfe, 1996).

There are many examples of housing solutions found along the continuum, and this paper focuses on three examples situated at its fulcrum, at the point where the continuum tips from formality to informality. These are tenantries in Barbados, *ejidos* in Mexico and family land in Saint Lucia.

The purpose of this paper is to analyse each of these housing solutions with a view to unravelling their formal and informal elements. While the starting hypothesis for the research was that each is informal from a public law point of view but formal from a private law one, it would appear that their private law aspects are more nuanced than first appeared.

As we shall see, the three types of tenure have certain things in common. Each was agricultural in origin; each is subject to complex property law rules which affect their transmissibility; this complexity clouds their title and makes them a housing solution for the poor; and each has been the subject of neoliberal reforms in the 1980s and 1990s intended to clarify and individualise title.

Origins and purpose

All three types of land tenure were agricultural in origin but varied in purpose. Barbados tenantries were a means of ensuring plantation owners access to labour after Emancipation; Mexico *ejidos* were created to give agricultural labourers access to land after the Revolution; and Saint Lucia family land was somewhere between, in that it was both a reaction to efforts to ensure plantation owners ongoing access to labour and became a means of giving agricultural labourers access to land.

Barbados tenantries grew out of the desire of plantation owners to maintain a supply of labour after the emancipation of the slaves in 1834–1838 (e.g. Heuman, 1999, pp. 480–482). Barbados was the oldest and most profitable sugar colony in the West Indies and, at the time of Emancipation, almost the entire island was in private hands and under cultivation. Unlike the larger islands, therefore, where there was ample public land on which former slaves could live, usually without permission, the former slaves in Barbados had nowhere else to go. Many stayed on the plantations, and the plantation owners would rent them a 'house-spot' upon which they could build a house and live there as long as they worked on the plantation (Barnes, 1998, p. 4).[3] This gave rise to the traditional 'chattel house', a small wooden structure occasionally decorated with attractive gingerbread fretwork, designed to be moved from one location to another without being dismantled if the labourer changed jobs. Subsequently, owners of rural and urban plots of land began also to let out house-spots upon which tenants could put their chattel houses, so that tenantries in Barbados now comprise plantation and non-plantation (rural and urban) tenantries.

Mexico *ejidos*, in contrast, were directed at providing agricultural labourers with access to land. They are a product of the 1910–1916 Mexican Revolution, which had as an objective the break-up of

1 Application must be made by an 'owner of land or the owner's agent duly authorized in writing'.

2 Conveyance 'does not create or convey any interest in land'.

3 Generally speaking, the house-spots were located on non arable (or 'rab') land, which could include the brow of a hill or beach-front property, making some plantation tenantries desirable locations today.

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

large landholdings (*latifundias*) and their redistribution to the landless poor, either as individually owned private smallholdings or as collectively owned communal property, mainly *ejidos*.[4] A typical *ejido* consists of the village nucleus surrounded by agricultural land which is either farmed collectively or, more often, parcelled out in individual plots to the *ejidatarios* (members of the *ejido*) who farm them separately. In both cases, however, title is held collectively by the *ejido*. *Ejidos* are governed by an Assembly made up of the (mainly male) *ejidatarios*.

The origins and purpose of family land[5] in Saint Lucia and elsewhere in the Caribbean are less clear. Some attribute it to restrictive land acquisition policies adopted by plantation-controlled island governments after Emancipation in an effort to deny former slaves access to land and thus tie them to the plantations; extended families had to pool their resources to be able to afford the land being sold at prohibitively high prices, and the land thus acquired was regarded as belonging to the family, both present and future (Barrow, 1992, pp. 14–16). Others attribute it, at least in part, to the difference in inheritance patterns under French (shared succession) and English (single succession) law (Vargas and Stanfield, 2003, pp. 283, 284; Barrow, 1992, pp. 16–19). Still others explain it as an ongoing echo of customary land tenure in West Africa, the ancestral homeland of the former slaves (Yelvington, 2001). But whatever the explanation, the result is that land which has been in a family for several generations and regarded as family land is available for use by any heir of the original owner or owners. Their numbers increase with each passing generation.

Legal regime

In each of the three cases, the private law relationship between the property owners and their land is complex, and requires careful unravelling. This is made more interesting by the fact that the private law regime in each jurisdiction represents a different legal tradition. For obvious historical reasons, Mexican private law is drawn from Spanish civil law (first colonised in the sixteenth century); Barbados private law is based on English common law (seventeenth century); and the Saint Lucia Civil Code is a codification of French customary law (eighteenth century).[6]

Barbados tenantries

The formal private law governing the proprietary relationship in Barbados tenantries is perhaps the clearest, as it is essentially a landlord–tenant relationship, with the tenants being tenants at will. A tenancy at will is one which may continue indefinitely or may be ended by either party at any time

4 The word *ejido (*from the Latin word *exitus*) was used in feudal Spain to designate a communal pasture area (akin to the 'commons' or 'waste' of an English manor) on the outskirts (i.e. at the exit) of a village (Sanchez Noriega, 1994, p. 187); this meaning carried over into colonial Spain, where it referred particularly to pasturage used by the indigenous population (Ponce de Leon Armenta, 1993, p. 134). It took on its present, uniquely Mexican, meaning after the Revolution, which echoes not only this colonial origin but also pre-colonial indigenous communal agricultural traditions (e.g. Aztec *capuli*) (Zamora *et al.*, 2004, p. 437).

A second form of communally owned land in Mexico, *comunidades*, involves land retained by indigenous groups or restored to them after having been wrongfully taken in the pre-revolutionary period (i.e. somewhat akin to aboriginal title land, although the historical imperatives are not as strong). The essential difference is thus between restored land (*comunidades*) and granted land (*ejidos*). *Comunidades* are more numerous in the south of Mexico than in the north, but *ejidos* are considerably more numerous overall.

5 Also known as 'heirs' property' in the United States, particularly South Carolina.

6 Saint Lucia's Code is sometimes said to be based on the Napoleonic Code. However, this Code never applied in Saint Lucia as the island came under British control in 1803, a year prior to the adoption of the Napoleonic Code. The applicable private law at that time in Saint Lucia, which continued in force in the British colony, was the Coutume de Paris and related edicts and regulations making up French customary law. The codification eventually adopted in Saint Lucia in 1879 was based on the 1866 Civil Code of Lower Canada (i.e. Quebec) which was itself a codification of French customary law (Matthews Glenn, 1997; see also Cenac, nd, pp. 5–8).

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

(Megarry and Wade, 2000, pp. 792–794). In other words, English common law recognises that tenants in Barbados tenantries have a right to remain on their house-spots, but only until they are asked to leave by the landlord (because they cease to work on the plantation, for example, or stop paying any rent due) or because they decide to leave.[7]

The transmissibility of a tenant's interest, either *inter vivos* or on death, is limited. This flows from the indefiniteness of duration of a tenancy at will which, in the eyes of the common law, means that the tenant does not have an estate in the land and therefore has nothing which can be alienated (Megarry and Wade, 2000, p. 794). Moreover, because tenancies at will also end on the death of either party, a tenantry house-spot is not an inheritable interest. That said, house-spots often do remain in a family for generations, and they are sometimes rented and occasionally sold. In that case, formal law would treat continued occupation by the heir or purchaser as being with the consent of the landlord, and thus entailing the creation of a new tenancy at will. Finally, a tenancy at will does not survive a sale by the landlord of his proprietary interest, although the new owner may allow the tenants to stay under a new tenancy at will.

Ownership of the house on the house-spot can be a contentious issue. If a chattel house retains its essential attribute of mobility, it remains the personal property of the tenant; but if it is affixed to the soil and loses its mobility, it becomes part of the realty and thus the property of the landlord. This is the common law's approach to 'fixtures', and its application has been the subject of a number of court cases and academic articles in Barbados and elsewhere in the Commonwealth Caribbean (McIntosh, 1996; Matthews Glenn and Toppin-Allahar, 1997). The law of fixtures is a fact-based, bright-line rule – an object is either a fixture or it is not (and having houses resting on their own weight, unattached to the land in any way, is probably not a good idea in a hurricane-prone area[8]).

While tenantries are thus generally formal in terms of private law, this is not the case for public law, as both rural and urban tenantries usually run afoul of land use planning requirements. They might be built in places where residential uses are not permitted; the house-spots are often well below the minimum lot size set out in the subdivision regulations; and they are usually woefully under-serviced.[9] This is a matter of ongoing concern, and the Barbados government has set up two commissions, one rural and one urban, which have tenantry upgrading as one of their mandates.

Saint Lucia family land

The private law rules governing family land are also clear, although their application is often not as factually crisp – due to indeterminacy of heirs – as is the case with Barbados tenantries. Family land is held in a form of co-ownership (or in indivision, to use the civil law term) which is roughly equivalent to the common law's tenancy in common (Cenac, nd, pp. 13–18; Marler, 1932, pp. 44–48). This means that all of the co-owners share in the ownership of the property at the same time. Each owns an individual intangible proprietary right, or share, in the land, but all of them together own the tangible asset, the land itself. Each has a right to the use of the land, but each must be prepared to share the use with the other co-owners. In practice in Saint Lucia, some co-owners live on and farm the land; but those who do not do so nevertheless have a right to come back and farm if they wish

7 Watson and Potter note that Barbados' Master and Servant Act of 1840 supplements the common law position by guaranteeing plantation labourers a right to occupy the house-spot in return for their exclusive labour at stipulated prices (Watson and Potter, 1997, pp. 33–34).

8 Although the slope of the roof of a traditional chattel house is apparently more hurricane-proof than more modern constructions.

9 'Bridgetown's tenantries constitute the country's most deteriorated, slum-like housing. Not subject to normal subdivision standards of development, tenantries are usually occupied haphazardly, with high densities and substandard infrastructure. Moreover, given the instability of tenure and low level of income of the tenants, their dwellings are ... poorly built or deteriorated, frequently lacking waterborne sanitary facilities.' (IDB, 1997).

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(e.g. Besson, 1987, 27–30), and this is readily accepted in time of need. In this way, family land is a social and economic safety net.

A co-owner's share is both alienable and inheritable, but not the land itself. More precisely, each co-owner is permitted at law to transfer (sell or give) his or her own share to someone else, but only all of them together can transfer the land to another. When a co-owner dies, his or her heirs inherit the share, and they then have their own proprietary shares in the property along with the other co-owners. The title picture can rapidly become complicated as co-owners die and leave varying numbers of heirs, which leads to varying sizes of shares; and the difficulty of unravelling a title is compounded if the estate of a deceased co-owner remains unprobated or unadministered, or if some co-owners live outside Saint Lucia, both of which can cause problems in identifying the co-owners at any given time.[10]

Co-ownership in land is voluntary, in the sense that no one can be forced to remain in it, and the law recognises that any co-owner can request that it be ended at any time through partition, which in practical terms means sale of the land and division of the proceeds. This requires a court order unless all of the parties agree, both of which become more difficult as the number of co-owners increases.

Formal private law thus stresses the intergenerational, communal aspects of family land but nevertheless recognises extensive property rights to individual family members: a right to come onto the land, a right to sell one's own share in the land, a right to chose one's own heir by will, and a right to apply to end the co-ownership by partition. However, informal law frowns upon individual recourse to formal law for reasons that are contrary to the spirit and purpose of family land,[11] and informally limits the formally recognised private law rights.

As for public law, a residential use of family land, with more than one housing unit built on it, would likely be contrary to land use planning and development rules in ways similar to Barbadian tenantries, although on a lesser scale.

Mexico *ejidos*

The creation of *ejidos* was first provided for in the Agrarian Law of 1915, and was raised to constitutional status in 1934 by an amendment to Article 27 of the Constitution of 1917, which deals with property issues. The basic rules governing *ejidos* were first set out in the Agrarian Code of 1934, which reaffirmed the inalienable quality of ejidal land (see generally Rivera Rodríguez, 1993).

Formal private law therefore plays a limited role in relation to ejidal land, as such land falls outside the ambit of the general civil law, and is governed by a separate, autonomous agrarian code. Prior to the 1992 reforms, property dealings between individual persons, either within or without the *ejido*, were severely constrained (see particularly Brown, 2004). Because subdivision of parcels was not permitted, inheritance rights were limited to single heirs chosen from amongst immediate family members; lease rights were limited, as the land rights of *ejidatarios* were personal and subject to forfeiture after two years' absence; and sale of ejidal land was forbidden, not only by individual *ejidatarios* but also by the *ejido* as a whole acting through its governing body. All transfers of land outside the *ejido* had to use a public law modality, that of expropriation by presidential decree for a public purpose.

Informally, however, the practice was different, as an *ejidatario* often designated all sons as heirs to their own plots on his agricultural parcel; informal rental did take place, especially to family members or other residents of the *ejido*; sale of the parcel was not uncommon, either to other *ejidatarios* or to outsiders; and even informal mortgages were sometimes made as collateral for

10 The number of claimants over time might be reduced by what has been described as 'genealogical amnesia' (Barrow, 1992, p. 46, citing Besson, 1979, p. 107).

11 This has been derogatorily described as 'crab antics' (Wilson, 1973, cited in Besson, 1987, p. 33).

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

loans from friends and family (Brown, 2004, pp. 20–26; Diego Quintana, Concheiro Bórquez and Pérez Aviles, 1998, pp. 8, 10–11; Nuijten, 2003b; see also Lewis, 2002).

Public law was also present at a local level, as the Assembly decided on matters of land layout and use, provision of infrastructure and services and so on in a manner similar to regular municipalities,[12] albeit under the watchful eye of the Secretary for Agrarian Reform. These decisions did not have to respect the general land use planning requirements, as the fact that *ejidos* were governed by agrarian law also placed them outside the reach of urban law, although urban authorities have gradually assumed a larger informal role (Jones and Ward, 1998, p. 81). Finally, land withdrawn from the *ejido* for a public purpose (such as public works and infrastructure, land reserves for urban development and regularisation of informal settlements) then fell under general public law (and the individual plots would be governed by general private law once sold or regularised).

Housing the poor

Somewhat paradoxically, the very complexity of the private law applicable to each of the three types of land tenure made them a source of housing for the urban poor. A clouded title is a cheaper title, if one does not go to the expense of unravelling it.

Mexican *ejidos* play a well-recognised and well-documented role in housing the urban poor (e.g. Jones and Ward, 1998; Azuela and Duhau, 1998). Urban growth and sprawl has brought many formerly rural *ejidos* into the urban shadow of the major urban centres, including Mexico City and regional cities such as Puebla (Jones, 1991; Cymet, 1992; Melé, 1996). Its conversion to housing is sometimes done formally, as one of the purposes for which ejidal land can be expropriated is land-banking, that is, to provide a land reserve for future housing or other urban needs. The amount of compensation paid to the *ejido* reflects the (usually lower) value of the land for agricultural purposes rather than the (usually higher) value for urban uses (Jones and Ward, 1998, p. 80), and it is possible that when the land is developed for housing, some or all of this saving is passed on to the ultimate purchasers. More often than not, however, the conversion of *ejidos* to housing takes place informally, with tracts of land being sold, usually to middlemen, either by the *ejido* itself or by individual *ejidatarios* dealing with the property controlled by them. In either case, the sale would be illegal as neither the *ejido* itself nor the individual *ejidatarios* have the right to alienate ejidal land, so that the purchasers would not acquire a formal title from the vendor and thus would not have a formal title to pass on to subsequent purchasers (see generally Varley, 2002). This is most certainly the case for conversions before the 1992 reforms, and probably the case for most transactions after.

Ejidal subdivisions can remain in this state of informality, with the *ejido* still having the formal title and the residents having an informal title, or the government can, and often does, intervene by expropriating the land for a public purpose (the regularisation of informal settlements). The procedure follows the logic of agrarian law, which treats the informal sales as inexistent (Azuela and Duhau, 1998, pp. 159–160; see also Varley, 2002, p. 454).[13] The government would thus compensate the *ejido* (at agricultural rates) for the value of the land taken, and the residents would acquire a formal title (at urban rates) for their own plots. As a result, the *ejido* would be compensated twice for the land (once at the informal sale and a second time upon expropriation), and the residents could end up paying twice (once for the informal purchase and a second time to acquire the formal

12 All *ejidatarios* had a right to vote at the Assembly, but not all residents of the *ejido* were necessarily *ejidatarios*, such as the spouses and adult children of *ejitatarios* and non-members (*avecinados*) who were allowed to live there. This points to a 'democratic deficit', as non-members would be affected by decisions over which they had no say (Azuela, 1995, pp. 496–498).

13 Regularisation was done through a variety of government organisations, notably CORETT (Comisión para la Regularización de la Tenencia de la Tierra), established in 1973.

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

title). They therefore do not necessarily go through the final step, in which case formal title remains with the government.

On a more modest scale, both Barbados tenantries and Saint Lucia family land also play a role in housing the poor. In Barbados, the plantation tenantry concept of separate ownership of house-spot (the landowner) and house (the tenant) became a general housing option throughout the island. The arrangement between landowner and tenant could be either commercial, as in the renting of house-spots in urban tenantries, or personal, as when landowners allow family members or friends to locate on their lands.

Similarly in Saint Lucia, some transactions involving family land take place outside the formal sector. While transactions involving unrelated individuals, commercial developments or construction in areas of high land value are likely to be done formally because of the need to establish clear title, intra-family transfers of housing sites can be done informally if there is no pressing need to demonstrate ownership (unless a loan or mortgage is planned, for example). The impact of family land on housing in Saint Lucia is therefore most significant in regard to single housing units, and does not extend to large-scale subdivisions as in Mexico.

Titling reforms

Each of the three tenure types was the subject of neoliberal statutory reforms in the 1980s and 1990s, which were intended to simplify their legal complexities and to individualise title. These reforms addressed agricultural concerns in the cases of Mexico and Saint Lucia and housing concerns in the case of Barbados.

Barbados tenantries

Barbados was the first of the three jurisdictions to undertake major titling reforms for tenantries, through two separate sets of legislation (see generally Maynard, 2003). The first set, adopted prior to Independence, ironed out some of the wrinkles in the landlord–tenant relationship. The Security of Tenure of Small Holdings Act of 1955 ensures to chattel (and other) tenants a minimum notice period (basically six months) for termination of a tenancy to a house-spot;[14] and the Tenantries Control Act of 1965 increases the tenants' security of tenure by providing that a tenancy can only be ended for cause (e.g. non payment of rent, creating a nuisance, etc.). It also prohibits the division or sale of lots in the tenantry if the minister responsible is not satisfied that permission to do so 'will not cause undue hardship to any tenant or tenants' (s. 3(3)), further increasing a tenant's security. A 1974 amendment adds a measure of rent control, thereby providing protection from 'economic eviction' as a necessary complement to the security of tenure provisions.

The second set of legislative reforms went further, and added a potential vendor–purchaser relationship to the existing landlord–tenant one. This was mainly through the Tenantries Freehold Purchase Act of 1980, which gives sitting tenants[15] in inland (i.e. non-foreshore) tenantries a statutory right to purchase the house-spot at a controlled price,[16] although resale is prohibited for a further five years (s. 21). This reform has been quite successful. As of 2003, an estimated 10,000

14 The Landlord and Tenant Act of 1897 had provided for one month's notice (Watson and Potter, 1997, p. 34).

15 I.e. tenants who have been residing on the lot for the preceding five consecutive years (or for five of the preceding seven years), with residency being defined as using it as one's own habitation or as a habitation for one's spouse, child, brother, sister or parent (s. 4).

16 I.e. US$0.05 (B$0.10) per square foot in rural tenantries, with a minimum price of US$150 (B$300); originally fair market value minus tenant improvement for urban tenantries, which was changed in 2001 to US$1.25 (B$2.50) per square foot for the first 5,000 square feet and market value for unimproved land for the rest, with the government to make up any shortfall between the statutory price and market value on the first 5,000 square feet (Maynard, 2003, pp. 366–367; Barnes, 1998, p. 7).

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

tenants (6,000 in the 300-odd plantation tenantries and 4,000 in the non-plantation tenantries) had purchased their house-spots, and a further 2,000 were entitled to do so. This means that about one-sixth of the total population of Barbados now lives in homes purchased under the Act (Maynard, 2003, p. s367).

One of the effects of the Tenantries Freehold Purchase Act has been to encourage tenants to make improvements to their houses, with better sanitary connections, as they no longer fear a transfer of ownership of the house to the landowner through the operation of the law of fixtures. Their living conditions have been further improved under the Tenantries Development Act, adopted in 1980 as companion legislation to the Tenantries Freehold Purchase Act. It provides for infrastructure upgrading (roads, water and sewerage, electricity, etc.) as well as improving community services (community centres, playing fields, etc.), housing and the environment.

The 1980 legislative package, therefore, has moved Barbadian tenantry housing further towards the formal end of the informal/formal continuum, both in terms of private law and public law.

Saint Lucia family land

Saint Lucia was the next of the three countries to adopt titling reform (see generally Vargas and Stanfield, 2003). The National Land Registration and Titling Programme was developed in the early 1980s with financial assistance from USAID (United States Agency for International Development) as part of an agricultural structural adjustment project. A study by the Saint Lucia Land Reform Commission in the late 1970s had set the scene for the programme, and the legal framework for its implementation was provided in an integrated legislative package adopted in 1984, consisting principally of the Land Registration Act, the Land Adjudication Act and the Land Surveyors Act.[17]

Land registration reform involved a change from a deeds registry system to a Torrens-based title registry system. The essential difference between the two is that under the former, the government simply provides a secure repository for titling documents, the assessment of which is the responsibility of individual persons, whereas under the latter, the government assesses the documents and guarantees the validity of registered titles.

Land adjudication is thus a necessary prerequisite to initial registration under a title registration system. In Saint Lucia, it involved lot identification and surveying, on the one hand, and title adjudication, on the other. Persons claiming not only title to property but also more limited interests such as leases, mortgages and servitudes were encouraged to come forward, and any disputes were resolved in a relatively expeditious manner involving an administrative level (initial decision by a single officer, with a possible appeal to a three-member panel) and a judicial overlay (possible further appeal to the Eastern Caribbean Court of Appeals) (Vargas and Stanfield, 2003, p. 292; see also Cenac, nd, pp. 61–79). Those who could produce a good paper title or had been in possession for at least thirty years were awarded an absolute title, and those in possession for less than thirty years were awarded a provisional title which could be made absolute twelve years after the programme came into effect.

As for family land, the 1984 reform package envisaged that title to family land would be individualised in one of two ways. One was to facilitate transfer of family land to third parties, by providing under the Land Registration Act that one or more members of the family could be registered on title as trustees having the authority to sell or mortgage the property (i.e. a 'trust for sale') (Cenac, nd, pp. 88–93). Purchasers dealing with them would have the assurance that they would be obtaining a good title to the land without having to obtain the consent of all family members. Although there is resistance to this mechanism, some family land has been conveyed using the trust for sale (Vargas and Stanfield, 2003, p. 292). The second method of individualising title to family land

17 A fourth statute, the Agricultural Small Tenancies Act, is less relevant to the issue of family land titling.

was to be the provision of financial assistance in the form of advantageous loans to one or more family members (presumably the ones most actively farming the land) to permit them to buy out the other members and thus convert the property from family land to individual ownership. This was provided for in the Land Registration and Titling Programme, but it ran into two major difficulties – family members did not particularly wish to sell, and the purchasing heir or heirs could not afford the loan repayments – so that this aspect of the titling programme did not go forward (Vargas and Stanfield, 2003, pp. 294–295).

Family land remains an important feature of Saint Lucia land tenure. One study reports about 30 percent of agricultural land as being held as family land, with the number of parcels staying constant at just over 45 percent; some 50 percent of these parcels have been awarded absolute title under the land registration and titling programme (Vargas and Stanfield, 2003, pp. 287, 300), which is actually quite a large number given the complexity of unravelling claims. A second, later, study looked in detail at the effect of the titling programme and questions the neoliberal principles behind titling reform. It reports a level of comfort with provisional titles, as some 75 percent of such title-holders have not converted to absolute titles once entitled to so; it notes a lack of interest in keeping the land registry up to date, as some 25 percent of subsequent dealings with registered titles (notably inheritances) were not been recorded, a tendency which could ultimately undo the titling reform; and it observes an increase rather than a decrease in the amount of family land since the titling programme came into effect (Barnes and Griffith-Charles, 2007).

At best, therefore, the 1984 Saint Lucia reforms nudged family land slightly further along the informal/formal continuum in terms of private law. It did not address their public law informality.

Mexico *ejidos*

Mexico reformed the ejidal property regime in 1992 when it amended Article 27 of the Constitution and followed it up with a new Agrarian Law. The reform package had three basic effects on ejidal land: it modified the internal governance and external administrative structure for *ejidos*; it ended the ongoing historical process of ejidal land distribution; and it provided for the granting of security of tenure and possible individualisation[18] of ejidal land. The last two effects are interrelated in that the ending of land distribution made security of tenure a priority (Appendini, 2001, p. 16).

Mexico's security of tenure programme, like Saint Lucia's, comprises land adjudication and land registration. Land adjudication – both boundary demarcation and rights assessment – is a necessary first step, and this is being undertaken in Mexico under the aegis of a Programme for the Certification of Ejidal Land Rights, or PROCEDE (*Programa de Certificación y Titulación de Derechos Ejidales*) (e.g. Nuijten, 2003a; Brown, 2004, pp. 15–20). This is done on an *ejido*-by-*ejido* basis, and participation of each *ejido* in the Programme is decided by the ejidal Assembly and approved by PROCEDE. Boundary demarcation takes place both at the ejidal level (as their boundaries were historically inadequately mapped and recorded) and at the individual parcel level; it has thus an external and an internal dimension. Rights claims are internal, with inheritance issues being the major source of dispute. Land adjudication decisions must be approved by the Assembly, and outstanding conflicts concerning boundaries or rights are sometimes resolved consensually at this stage. Otherwise, they are resolved through government-assisted conciliation and arbitration or ultimately by decision of the agrarian courts.[19]

18 As Jones and Ward point out (1998, p. 79), the word 'privatisation', with its connotation of moving from public ownership to private ownership, is not appropriate in the case of ejidal land, as the land was not owned by the state but rather by the *ejido* as a collectivity. The Saint Lucia term 'individualisation' captures more clearly the notion of change from collective to individual ownership.

19 In regard to external boundary disputes in particular, the process has been described as 'not so much removing existing injustices as ratifying them' (Gledhill, 1997, p. 6, as cited in Nuitjen, 2003a, p. 491).

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The immediate titling result of the PROCEDE process is that *ejido* members receive a certificate of rights to their individual parcels (*certificado parcelario*) and a certificate of use over common land. These are recorded in the National Agrarian Registry. Parcel certificates may be converted to full title (*dominio pleno*, governed by general private law) either for the *ejido* as a whole (on application of the Assembly), or for individual parcels (on application of the individual and with permission of the Assembly). A certificate of rights entitles the holder to chose a non-family member as the (still) single heir, and to rent or sell his (or less often, her) parcel to other members of the *ejido*;[20] and full title entitles rental, mortgaging or sale to outsiders (although in the case of sale, insiders – family members, other *ejijatarios*, etc. – have a 30-day right of first refusal). However, these changes have not affected the way *ejidatarios* deal with their land, and informal inheritance, rentals and sales, as in the past, are still being effected by those with the more limited certificate of rights (Brown, 2004, pp. 20–26; Johnson, 2001).

By 1999 some 85 percent of *ejidos* had entered the PROCEDE programme and about 65 percent had completed it (Appendini, 2001, p. 24); by 2002 the number of completions had risen to 75 percent (Pisa, 2002, p. 16). But this does not mean that *ejido* property is now individually owned. General disestablishment of *ejidos* has not occurred, and individual *ejidatarios* have usually not followed the titling procedure through to the end. About half of Mexico's agricultural land continues to be held in ejidal or communal tenure.

What is the impact of the 1992 reforms on the urbanisation process? According to Jones and Ward (1998, pp. 82–85), it is largely 'business as usual'. They identify three ways in which urbanisation of ejidal lands could take place formally under the reforms: through an urban development company; through an *ejido*–private sector joint venture; or through extension of the *ejido*'s urban zone, which would require the approval of the municipal planning authorities under a new Human Settlements Law adopted in 1993. None of these appears to have happened in any meaningful way, and informal transfers – either by *ejidos* or by individual members – without first obtaining full title continue to be the norm.

And even transfers that are formally valid under private law, because the transferor has *dominio pleno*, can result in informal settlements, if the general public law requirements concerning lot sizes, minimum frontages, servicing and so on are not complied with.

As in Saint Lucia, Mexico's 1992 reforms have thus facilitated increased private law formality of *ejidos*, but left their public law informality pretty much alone.

Conclusions

This paper has attempted to unravel the formal and informal elements of three disparate tenure regimes, in Barbados, Mexico and Saint Lucia. What conclusions can be drawn from this unravelling?

The first and most obvious is that it is inappropriate to think of property rights in terms of individual full ownership, as international lending institutions are wont to do (e.g. Deininger, 2003). Property comprises a panoply of use rights and transmission rights, and this is the case for property situated at any point along the informal/formal continuum. (Matthews Glenn and Bélanger, 2003, applying Harris, 1996). Different property owners value different property rights, so that the entire panoply is not necessary in every situation.

Use rights comprise basically two aspects: a right to use and a right to exclude others. The right to use in each of the three examples is a composite of agriculture and residential uses: in Barbados tenantries, the dominant use is now residential, although the residential use was initially ancillary to an agricultural purpose; in both Saint Lucia family land and Mexico *ejidos*, the dominant use is still regarded as being agricultural, with residential uses ancillary, although *ejidos* on the outskirts of

20 Formal mortgaging is also a theoretical possibility, but unlikely in practice as lenders are unhappy with less than full title as security (Brown, 2004, pp. 25–26).

https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press

urban areas serve an important housing purpose. As for the right to exclude others, Barbados tenants have the greatest degree of exclusivity, even against the landlord, as long as the tenancy lasts. In Saint Lucia, the co-owners do not enjoy similar exclusivity of enjoyment as none of the co-owners can be excluded by the others (although there are informal rules governing entitlement to crops). In Mexico, *ejidos* were initially conceived of as communal agriculture, but use rights have become increasingly individualised, and hence exclusive, over time.

In all three examples, the use rights are formally subject to public law restrictions, but these are informally often ignored, particularly in regard to urbanised ejidal land.

Transmissions rights consist essentially of inheritance rights (i.e. the right to transmit to one's heirs) and rights to rent, sell and mortgage the property. Tenants in Barbados tenantries have the most severely constrained formal transmission rights, as the inherently personal nature of the relationship between landlord and tenant under a tenancy at will means that tenants have no property interest which they can pass to another, either to their heirs when they die or to family members or others during their lifetime. Informally, however, their transmission rights are extensive, with informal inheritance, rental and sale (but probably not mortgaging) occurring frequently; these are usually accepted by the landlord, sometimes expressly but more often tacitly, which implies the creation of new tenancies at will. Purchasing the freehold under the 1980 legislation will simply permit tenants to do formally what they now do informally, and one suspects that the statutory five-year restraint on resale will be ineffective.

Mexican *ejidatarios* were subject to similar constraints on transmission rights prior to the 1992 reforms, as they were formally denied the right to rent, sell or mortgage their individual parcels, although a restricted right of inheritance by a single family member was recognised. As in Barbados, these formal limitations were largely ignored and *ejidatarios* exercised informal rights of rental and sale (and even mortgaging), and chose a wider range of family members to inherit their property. Even after 1992, some formal restrictions remain, but these are being informally ignored, as in the past.

In contrast, co-owners of family land in Saint Lucia have unrestricted formal transmission rights, both on death and *inter vivos*. Together, they can deal with the tangible asset, the land, as fully as any owner, and the 1984 statutory 'trust for sale' reinforces this. Individually, they can each deal fully with their own intangible proprietary interest, their share: they can choose their heirs, who can be single or multiple, family members or outsiders; they can rent or sell to whomever they want; and they can even mortgage their share if they find a taker. But their formal transmission rights over their own share are subject to informal restrictions, as the ethos of family land requires that the land remain in the family, available to all the descendants of the original owner.

This consideration of transmission rights leads to a second general conclusion, which is that not all restraints on alienation are problematic, as the literature sometimes suggests. Formal restraints on alienation, as in Barbados and Mexico, are externally imposed and are likely to be ignored. This causes a subset of liberal informal rules to be grafted onto the restrictive formal rules. Informal restraints, on the other hand, as in Saint Lucia, are internally imposed and can be effective. Proponents of liberal reforms ignore them at their peril.

A final general conclusion, therefore, is that property regimes are rarely, if ever, either wholly formal or wholly informal. Formal rules are sometimes overridden, sometimes underpinned, by informal rules, and which way round it is depends on the extent to which the formal rules reflect the hopes and concerns of the society in which they operate. This suggests that the most successful tenure reforms are not necessarily the most extensive one, but rather the ones in which the range of property rights provided (particularly transmission rights) most closely reflects the values and needs of the people affected. In this way, the need for informal law to correct inappropriate formal law will be kept to a minimum, and the formal law will play a correspondingly larger role. This is borne out by the examples of Barbados tenantries, Mexico *ejidos* and Saint Lucia family land, each with its own blend of formality and informality.

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https://doi.org/10.1017/S1744552308002036 Published online by Cambridge University Press