

Raymond Apthorpe.

(Available also to MISR  
Rural Economy Workshop,  
July, 1968).

(Second Draft of a lecture given to  
the M.O.F. Land Law Reform Seminar,  
Kampala, June, 1968)

Land law and land law policy in Eastern Africa.

In each of the four countries of Eastern Africa represented at this Seminar there is the spectacle of a central government engaged, highly self-consciously, in formulating a planned economy which the arm of central government extends, with varying degrees of spread and effectiveness, into the rural areas. Some policies succeed, others fail. If the social scientist is called in at all, for example to assess a case of failure, he is expected to report on what the pre-existing social conditions in the rural area were which could be blamed - perhaps even there would have been a social survey of the 'baseline' before the operation started. And there, usually, the task for sociology or social anthropology ends.

The point of view from which the present paper has been written is a rather different one in emphasis. Where the arm of government with a helping hand at the end of it has not succeeded in the tasks expected of it, sociologically it is open to question that perhaps this was because of a policy failure to match ends to means, or means to ends. The extended hand might have descended more like a mailed fist. Failure in economic development must be attributed to organizational or administrative weakness, unclear aims, inadequate consideration of the problem and use of the wrong models in planning, as much as to the other factors. Indeed, in the planned economies of Eastern Africa I would go so far as to say that it is policy failure, rather than unresponsive reactionary social structures so to speak 'at the receiving end' of the planning process, that probably is the most crucial variable in short run success or failure. Local social values may be more causally significant in this regard where development policies are more gradualist than transformational. Questions of land law, land law reform, and economic development in Eastern Africa tend to raise more transformational than gradualist issues. With this preamble, to show the general indication of the position from which the following line of argument will be developed, I may proceed to the agenda.

Case Studies

The topic allotted to me is a very broad one. The normal course of action that a sociologist would take towards it would be to scale it down to selected case studies. It does not appear to me, however, that the purpose of this Seminar would be best served at that level

of particularities. I take it that we should all address ourselves to some of the more general issues involved. The available case studies, however, do provide me with a convenient starting point.

Changes in land holding introduced not by central government but 'from below' in the locality immediately concerned may in all cases of scarcity conditions have been introduced as a means for the rapid accumulation of wealth by persons who have the best opportunity to manipulate the system to their own gain, perhaps the biggest asset for this being a high position in a local political system that has been overtaken by national events. However, a common theme running through some case studies of land 'reform' is that it is particularly in the domestic sector of social relationships, and especially with regard to the pattern of authority within the family, that the social effects of land policies like consolidation and registration of titles tend to be most strongly felt. By the same token, if policies for such land reform often originate in the locality concerned rather than a central government office this may be because of social changes already effected or desired in the residential or domestic social system in that locality. The wider political context, except where clientship is an important aspect of social structure and, as among the Haya of Tanzania,<sup>(1)</sup> this is achieved through the control of land or some type of land, may be less significant.

I have to point out, however, that this is only a first level hypothesis, which is as yet unverified. And it is not to the exclusion of other types of explanation.

One of the effects of consolidation and registration in Kenya, for example, has amounted to a form of expropriation admittedly of "lesser rights' not amounting to ownership" but nonetheless rights of members of the family "recognised under customary law to use a separate piece of land at their own discretion, such as married sons and widows"<sup>(2)</sup> to cite from a paper presented to the Makerere Institute of Social Research by a lawyer, Herr H. Fliedner, who carried out a short study of the subject in 1962 or 1963. As others before and after him observed, Fliedner too realized that the concept of ownership that prevailed in Kenya at the time was a complex one, and not a matter of single rights vested wholly in a group or an individual. It was, he said, and perhaps this sums up the situation for the whole of Eastern Africa "... not so much a matter of logic as of convention who we call the owner." Most probably the planners concerned did not intend to extinguish these lesser rights, but extinguished they were. Perhaps this was partly because the policy formulators did not know about them

before launching out on a new policy and that they had some kind of Western European model of "ownership" in mind in which such lesser rights did not exist. But, at the same time, usually any land law reform calls for some over-simplification of the realities of rights and obligations because of the difficulty that would otherwise be presented of consulting absolutely all interested parties.

### Three Variables

It is not my purpose here however, especially at this late stage in this Seminar to open up again what may, and what may not be, meant by "ownership" in African Land Law. Rather I wish to make altogether another point, namely, that Government approaches to land and law and reform in the colonial period and afterwards in Eastern Africa show evidence<sup>of</sup> what I call 'ownership-fixation', may parallel to what Mr. Sawyerr in his study of the conflict of laws in Kenya and Tanzania<sup>(3)</sup> calls jurisdiction-fixation and similarly traceable back to the circumstances of the metropolitan country. What I wish to explore here is that ownership, however this is defined or interpreted, is not the most apposite universe of reference within which all land law and land reform directed towards economic development should be discussed. I will suggest for instance by way of conclusion that 'the problem of land subdivision on inheritance' which crops up in various contexts in all four Eastern African countries, is not necessarily a problem of ownership regulations at all. But before that let me describe my general point of view more fully.

It is perhaps with regard to a very wide range of circumstances relevant to policy formation, that a distinction should be drawn between three, rather than the more usual two, variables which may vary independently of one another so far as land matters are concerned; land ownership, land use and land transactions (disposal and acquisition). If this view is correct then it may be perfectly possible, without undue social and other problems following in the wake of the new policy, to introduce changes selectively. A required change in land use policy for instance, could be effected without it necessarily being entailed at the same time to attempt to change the prevailing norms either of land ownership (whatever precisely these are) or land transactions. Again, land use could be regulated without issues of either land titles or land conveying regulations being involved at all. It all depends on what precisely the planners wish to do.

By 'ownership' I mean here simply security against eviction. By 'use' the manner of say agricultural or residential occupation, or the reservation of areas for the cultivation of special crops



rather than others. By 'transactions', sales, presents, bequests, loans, inheritances, pledges, etc.

I am not suggesting that these distinctions are not known to the government planners responsible. Rather the contrary because, as many of the contributions at this Seminar have shown already, a wide variety of legislation now exists aimed at economic development on the land. But it does not appear to me that the process of thinking with the aid of these distinctions has not gone far enough. Why?

### African Land Law

The colonial and the immediately post-colonial period in Eastern Africa was characterized by virtually all attempts to reform land law looking to what was imagined to be the prevailing 'traditional African land law' in the locality concerned as a kind of amalgam into which any change would have to be introduced. Explicitly or more often implicitly - the view taken of this pre-existing legal circumstance, hallowed by antiquity was a projection on to land and land matters of the stereotypes of 'traditional African society' that flowered for example in the Ujamaa ideology in Tanzania in the early 1960's.<sup>(4)</sup> A picture was painted of a small scale and commonly organised society, poor economically and bankrupt of all forms of social commerce other than those which were the unthinking transactions of custom. Specifically as regards land it was assumed that any such tripartite set of distinctions as I have described above for thinking, and acting, about land matters would be alien to 'traditional' African society. And so government legislation shied away from them.

I would contend here that just as a disproportionate emphasis on land 'ownership' has been true of land legislation, 'traditional African society' also has been too exclusively looked at through the same spectacles. No study of the land matters in Africa can afford to neglect the extent to which questions of ownership are distinct from those both of use and occupation, and those of disposal, acquisition. It is an important source of support for my general argument that the people on the land themselves tend to be perfectly familiar with this mode of thought and consequent action. Most people do not treat land transfer for instance on the same plane as land ownership, except in special circumstances. Changes in the form of the considerations for which land may exchange hands (a) do not necessarily interpenetrate with changes in ownership rights and (b) do not necessarily signify some major social change in and of themselves with regard even to the incidence and frequency of the various types of land transactions.

I would wish here to refer specifically for instance to the introduction of cash values with regard to the sale of land, and any government policy which may wish to foster these as a means for opening up the market in land. In most societies in Eastern Africa it is perfectly normal rather than abnormal for land rights - or rights in cattle or in water depending on what the basic mode of livelihood is - to be changing hands frequently, in different ways and for different purposes, however isolated or near subsistence economically a particular society may be. This has been explicitly stated with regard to Zambia by the former Land Tenure Officer to the Government, Mr.C.M.N. White.<sup>(5)</sup> But it holds true for a wider area in Eastern Africa. A so-called subsistence economy is not the complete antithesis of a cash economy in this and many other regards as well.

Government planners and others hold for dear life to their pre-conceptions of what 'traditional Africa' was like. I certainly do not wish to add to the confusion by airing ideas of my own on the subject especially as sociology and social anthropology cling to their stereotypes just as much as planners do. But with regard to land matters I do wish to emphasise that however one goes about the task, generalization is very difficult. The customary pattern of land holding was or is not a static one, with rights only very seldom changing hands in the context of inheritance only. Land was not always a matter for control by chiefs - where, that is, there were chiefs. Land could be and was treated domestically rather than politically for domestic rather than political purposes. Land could even be treated in a religious context which was distinct from either a political or a domestic one (and it has sometimes seemed to me as if the religious control over land in 'traditional' African social systems once comes closest to what we now know as freehold).

Specifically as regards present practice in the rural areas of our region, whether traceable back over many years or not, it is equally easy to cover generalize from non-random cases. But whatever the social context concerned, the causal effects of registration may or may not have been on the subsequent productivity of lands in some areas of Kenya, for example, we all know of other instances where: land (eg. in Kenya and Tanzania) taken up on settlement schemes for instance is developed by the settlers without waiting for questions of titles to be settled first; occupational fees or rents (as in Uganda) are not regarded by tenants as restricting them in any way as regards either use or subdivision of the plots; eligibilities for titles (in Uganda) have simply not been taken up: vast acreages under customary tenure (in Zambia) are highly productive without registration. If by 'ownership' one refers to security from eviction subject only to the jurisdictional authority of whatever political system the land

comes within so that land is 'territory' rather than 'soil', a notion of ownership is certainly not entirely absent from these situations. So it is not entirely irrelevant. But at the same time, it is not very prominent in a wide range of social situations.

I would also differ from the point of view that considers for example lack of land litigation, where this occurs, to be due simply to land holders being unaware of the law and therefore not having recourse to it. Land law does not equate solely with the domain of ownership imponderables.

Policy considerations

Environmental determinism, which would argue that land scarcity due to population pressure should provide a straightforward basis for policy in several regards is misleading and any discussion of policy conveniently starts here. In some areas of land pressure (for example in Uganda) where labour migrants do not retain land rights while away from home, land can be easily acquired for cash by those who want it, subject only to rather vague local social preferences for lineage members to live more or less in the same neighbourhood. Where absence from one's home area (for example Zambia) does not mean loss of land rights such that on return one has to acquire them all over again, the picture is different again. How then could a land policy be formulated?

I suggest some policy dilemmas could perhaps be approached as follows.

Land policies which aim to build the nation out of the political kingdom, interpreting as they do land within the political concept of territory, should revolve round the notion of citizenship. Land as territory clearly should be subject to the Constitution of the Polity concerned and jurisdiction consequent on this in accordance with whatever form of individualism or collectivism is written into the Constitution.

Land policies which aim at greater economic productivity should control use, in relation to ecological zones as far as these can be defined, rather than ownership or negotiation. Plot boundaries <sup>in themselves</sup> are more relevant to ownership questions than economic potential.

Land policies which aim to bring greater equity in the distribution of wealth should perhaps aim to regulate land transactions, the taxation of which would not necessarily have the adverse effect on the present over-all economic development of the land as taxation on land tends to have. And this would obviate taxation officers having to solve the complication of defining who owns what in the case of taxation imposed on land holdings.



Here it is certainly not my intention to suggest that taxation either is or should be unrelated altogether to land ownership or land use. The point is rather that, depending on the policy objectives, perhaps taxation policy should stand in different relationships to ownership, use and transactions, or sub classes of these rather than a uniform one. The main burden of my argument is not to suggest any particular taxation policy (which is a matter obviously for experts in that field which is completely outside the scope of the present Seminar) but rather some of the various possibilities, with regard to land, that may exist.

One advantage of working out a land policy on the basis of such ideas would be, I think, that a conceptually uniform land policy could apply to rural as well as urban areas. This would have the advantage that the one sector is not legally sharply and completely separated off from the other. In social relations there tends to be close inter-relation between rural and urban life in all four Eastern African countries.

### False Trails

I think it would make better sociological sense to approach the study of land reform from such a point of departure than from some of the other points of view raised in this Seminar. To comment briefly on some of these land law reform: cannot by itself 'abolish tribalism', or establish socialism, or promote national unification because much more than legal action is called for in the realm; cannot by itself lead to any form as the basis of any ideology, of social stability and, indeed, stability in the sense of freezing the status quo is far from necessarily socially desirable as an object of policy itself; cannot necessarily decrease even litigation about land, not to mention the volume of litigation altogether, (and I know of no connection between litigation and levels of farming productivity): cannot by itself set up 'economic units' on the basis of 'target' incomes for instance because the selection of these targets is heavily subjective on the part of the planners and however appropriate (from their point of view) they may appear to be at the time, times change quickly if the desired economic growth is achieved rapidly. The very success of a target incomes policy contains the seeds of its failure in the next phase.

Of course the very approach to any forms of planned social and economic change through land reform (or for that matter any law reform) is itself much to be questioned in the context of a regime which is firmly established already on the basis of administration and public control. In such circumstances, as Mr. McAuslan suggest in his study of Tanzania and Kenya,<sup>(6)</sup> it may be that the essential part to be played by law and the courts is more with regard to checking abuses of the system than ordering the system itself. But I take it that this Seminar is not appropriately composed for means recommendations.

The variables in any social situation are diverse but for many purposes one can sometimes reduce these to a minimum comprising of two sets. As said in the preamble to this paper there are the social values of the peoples in the locality concerned and the likely instances or receptivities that can be expected from these. Second, there is the effectiveness or adequacy or otherwise of the administrative, organizational and management apparatus that government sets up (or intends to set up) to implement the new policy.

Of course the distinction between these two sets of variables is a very diffuse one because all the while the 'social values' at the receiving end of government policies—from-above are in process of change, following the normal accumulation of experience that is a constant in any community however isolated or economically poor. And I take it that the aims of a policy, and its means for its implementation, should never be static — and can never be static if it has any results at all, but especially if it is beneficial. Furthermore, our two sets of variables inter-relate to a great extent because policy effects can and do reshape social values and, in turn, those responsible for local execution of policies may take local social circumstances into account even when presenting central government policies locally. And so a policy that perhaps has been conceived monolithically at the centre, eg. codifications, does not emerge at the other end of the pipeline exactly in the form in which it was put in.

I think this is inevitable. The pipeline is a human one comprising people with social values of their own, multiple memberships in social organizations, different career objectives and different possibilities of upward mobility. However well they have been 'trained' in a law school it is likely in the present circumstances in Eastern Africa at any rate that it will be magistrates who will provide the weak link in the implementation of codified land law in rural areas, if it is the courts which are to effect this. And planners will have to take this into consideration in proposing new legislation in the first place.

#### 'The Problem' of Subdivision.

To conclude, let me attempt to apply the set of distinctions discussed earlier, between ownership, use and transactions, to a 'problem of land reform' that lawyers, administrators, social anthropologists and others tend to say 'is insoluble', namely, subdivision of ownership on inheritance especially when this results in fragmentation. Such subdivision is said to be seriously contrary to overall economic development.

To take the latter first, and briefly because it is highly speculative and only marginally within the scope of this Seminar — not as regards



our topic but our composition - subdivision is seen somehow to be contrary to social evolution and therefore somehow economically retrogressive at the same time. For instance, M. Meister's analysis of economic development in Eastern Africa<sup>(7)</sup> takes the view that as subdivisinal settlement schemes so to speak reverse the 'normal' pattern of larger scale holdings evolving from smaller the whole operation is bound to be economically counterproductive. But, as this Seminar has already heard, production statistics for the Kenya highlands are not in support of this: for one reason, the settlement operation there took place on the margin of an extensive farming economy and resulted in more labour intensive activities.

On the error of equating social with economic growth, another Seminar could be held. But as there is no necessary connection between the two the matter need not delay us here.

Concerning subdivision of ownership as a serious problem it turns out, on inspection of all the various arrangements produced in support of this that essentially this turns on the supposition that subdivision is either itself a cause of poor land use or a discouragement to capitalization which is thought to have the same effect. But the confusions here are several. For one thing any limitation to capitalization may be imaginary rather than real in the circumstances of labour intensive agriculture. Second, rather than a particular ownership system being causal to a particular system of land use, could it not be rather that the same motivation that results in a desire for consolidation and registration is responsible also for the greater productivity (when this occurs)? If so, then it is this motivation that is the moving force, not the registration of titles as such.

Also it is perfectly possible that a desire for registration/consolidation springs from the desire simply to have exclusive access to something that is valuable in itself irrespective of its agricultural (or other) productivity. Instances around, perhaps particularly in Kenya, of the title holder or would-be title holder evincing at any rate no intention of producing anything from the land - no cash crops, just cash. It becomes thus not so much a form of social as financial security, but an all - or - nothing one as by the same token of consolidation that produced the security so it is undivisible. That titles may not be readily convertible into collateral in the sense that (as in parts of Uganda) banks may not be inclined to advance loans on them because of difficulties in realising them does not affect the sale or the potential sale value of the land. And, in any event as Dr. Van Arcadie mentioned, bank loans to small holders are not very significant sources of agricultural credit in Eastern Africa at the present time.

Mr. Kanyeihamba reported that magistrates in Kigezi in Uganda have a tendency, when they seem to have no other option, to issue attachment orders on the land and thus there is a 'modern legal' cause of fragmentation to be placed alongside the others. But this again is a different situation from one in which farmers themselves may tend to foreclose.

The essential confusion with subdivision, however, would appear to be simply the indistinction of two universes of discourse, 'ownership' and 'use'. If 'the problem' is one of land use, then it may well be insoluble if the policy applied to it attempts to control something other than use.

Ideological dispute about land registration as in Kenya is concerned with the effects of this which deprive certain people of their rights in the interests of entrenching others. Such registration has, so to speak, enhanced differential ownership rather than nullified it. Of course any land policy whether it focused on ownerships or not would similarly raise ideological questions. It is far from my purpose here to argue for a policy that would be without ideological implications at all, because I doubt if such could be possible especially in Eastern Africa at the present time. The burden of the present argument is simply to plead for clarity in posing the questions.

### Epilogue

The various land policies in our region in the colonial period tended to view the obtaining social systems in the rural areas as 'based on land'. Land tenure, therefore, was seen as having a special relationship to 'social cohesion'. It was part of this view that, as regards land matters especially, such transactions as did occur were thought to be few and inextert. In economic and other terms people did not know how to handle situations to their own advantage but, so the story went acted only on inherited norms. Yet all social systems are based on people, not this or that factor of production or source of social security, and in most societies there are numerous transactions of various kinds not excluding economic ones. Fragmentation, for instance, is said by the people who practise it at the same time to maximise gain and to minimise risk in the agricultural sector by taking full advantage of the relevant resource variations in the material environment.

From such a point of view it seemed only logical to abhor the introduction of cash values with regard to land. It was felt this would not only increase the frequency of such transactions but would also lead to economic as well as social chaos. There was a strong contrast between planners' attitudes to land in an

agriculture-based economy and to cattle in pastoralism-based economies. Yet, in their respective contexts, there are many similarities between land and cattle as, bases for modes of livelihood. Both (and not cattle alone) have material and ritual-aesthetic value and are subject to intersecting rights between persons in respect of them. Probably both would respond to the same main factors as regards entry into a market economy, namely, marketing opportunities. Why it is difficult to understand, except from the point of view above, that the sale of land seemed so disruptive of the social structure of agriculture-based societies while the sale of the cattle, by the pastoralists, so desirable in itself. Of course the analogy cannot be pushed too far but it is, nonetheless, a suggestive one. It is not self-evident, at any rate, why a market should not be introduced in land, that is to say, that why a land policy oriented to facilitating and at the same time controlling land transactions should not lead to rural development.

Earlier it was argued that ownership should not be confused with use in conceptual thinking about land. Similarly, use should not be confounded with transactions (though both ownership and transactions could, from another point of view, be seen as subspecies of use). But again it is not the purpose of this paper actually to propose any policy, rather it has been attempted simply to distinguish between some of the variables that such a policy might consider and thus to broaden the range of possible models.

#### Footnotes.

- (1) P.C. Reining 'Haya Land Tenure : Landholding and tenancy' Anthropological Quarterly, Vol. 35 No.2 April 1962 pp 58-73.
- (2) H. Fliedner, Makerere Institute for Social Research (formerly EAISR) Annual Conferences, 1963.
- (3) G. F. A. Sawyerr 'Internal conflict of laws in East Africa' in G. F. A. Sawyerr (editor) East African Law and Social Change, 1967 pp 306, at p 115.
- (4) J. K. Nyerere Ujamaa, 1963.
- (5) C. M. N. White  
Journal of African Administration.
- (6) J. P. W. B. McAuslan 'Control of land and agricultural development in Kenya and Tanzania in G. F. A. Sawyerr opcit 1967.
- (7) Meister.





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