THE LAND TENURE REVOLUTION IN KENYA, 1954 - 1959: LEGAL AND POLITICAL IMPLICATIONS

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I. Kenya's Land Problems

This paper will not be concerned with the details of historical constitutional development in Kenya, nor will it examine the present political scene.[1] In this sense it is not an analysis of the contemporary setting with the objective of factual political prediction for the immediate future. Rather the essay is a description of the main economic changes in land tenure and usage between 1954 and 1959 and an examination of some of the legal and political implications which in one sphere clearly indicate the new direction embarked upon and in the other perhaps only enable a departure from the old. It is the special inter-relationship of land tenure, governmental administrative and legal policy, and political evolution which gives Kenya its peculiar flavor.

Agriculture, for both Europeans and Africans, is the staple of economic life. Historically it has been the privileged European position in this land sphere, and the reasons given in its justification, which have led to continued political minority control. Communal, as opposed to individual, political representation has echoed and been mutually reinforced by a policy of tribal or communal restrictions on the evolution of indigenous land tenure.

Until 1959, the law which governed land held by Europeans was totally different from that regulating Africans. The Kenya Government had been unwilling to recognize formally the evolution of African customary land law. However,

changes in land tenure and usage were continually receiving informal acknowledgement through both the African court structure and through the British administrative officers who preformed executive and judicial local government functions. The 1959 legal changes obviously atler the statutory framework regarding land in Kenya. And further, they will have repercussions throughout the country via the court and administrative structures. These latter two, in turn, will determine the nature and degree of the effect. The legal changes, by healing the previous duality of land law, make possible an equality of landholding status between European and African. And the cumulative changes have the added psychological effect of enabling this new equality to find expression in Kenya politics.

The middle decades of the twentieth century are seeing the "winds of change" transform the landscape of Africa. In the place of liquidated colonial empires stand a growing number of independent African states. Where colonial control remains, rankling problems are at last receiving searching consideration often followed by concrete proposals for action. Equivocation is at last giving way to firm governmental decision by most of the colonial powers.

One of the most complex and serious of the colonial problems in Africa is that of land tenure. For most Africans land still forms the matrix of a man's existence. Its protection, perpetuation, and beneficial use give the basic cohesion and unity of purpose to a family, clan, or tribe

and are the sanctions of the political, judicial, and social power and prestige of the elder, headman, or chief. In predominantly agricultural countries, land can be the visible symbol of status - African or European - in the community. Differing ideologies of land and/or the perpetuation of such differences can alienate tribe from tribe as well as race from race inAfrica. Thus, one of the basic administrative decisions of a colonial government must be its position on the nature of indigenous land tenure which it will recognize and the desired direction and extent of its evolution. This decision may, in effect, spell out the nature of indigenous political development at a later period.

The scope of this essay will be geographically limited to the British colony of Kenya, although some of the methods of solution and the actual answers themselves to the dilemma of land tenure and land use have far wider applicability. Moreover, the paper will focus on a limited time span. The five years from 1954 to 1959 would appear to be revolutionary ones in the history of land tenure policy in Kenya for several reasons. Factually there have been the initiation in 1954 of the Swynnerton Plan "To Intensify the Development of African Agriculture in Kenya" and its logical and very important legal supplements, the Report of the East Africa Royal Commission 1953-1955, and the Government of Kenya's decision in 1959 to open the previously racially sacrosanct "White Highlands" to occupation and farming on a non-racial basis. These signal pronouncements will be dis-

cussed singly and will form one section of this paper. Together they have important substantive and conceptual implications for African, Asian, and European in Kenya.

Economically, the "revolution" means recognition and encouragement of the evolution from communal to individual land tenure. Consolidation and registration of landholdings are the basis for issuance of an "individual" freehold title to this new parcel of land, a negotiable title which conveys new mobility in land transfer and disposition. Mandatory is the concomittant institution of modern techniques of farm planning both for mixed farming and predominantly stocking areas to achieve the economic use of the available land in Kenya. The possibility of land alienation to non-tribal and non-racial buyers or leasees is introduced. And finally, the emergence of a landless class (something unimaginable in traditional native law and custom) through accumulation of landholdings and imprudent sale or mortgaging of land to raise capital or to pay debts becomes a distinct probability.

Given the above, pioneering legal and administrative decisions had to be taken by the Kenya Government and the Colonial Office. Thecharacter and administration of the law in a countryare tangible symbols of the normative pattern to which a society aspires. The tension produced by separate but unequal legal systems is especially acute in a colonial situation where movement from the jurisdiction of one law to the other is controlled by the policy of the superior power, i.e. the Colonial Government. The attainment of at least

legal equality within a territory has become an elemental drive. So, formal and informal legal changes in Kenya are of vital importance. In Kenya an example may be found of the duality of law which exists whenever an external power enters a country and imposes its legal system - for whatever benevolent or malevolent reasons - over and above the broad base of pre-existing native law and custom. The course espoused by the Government since 1954 has led to the possibility of a coherent land system and a healing of the legal plurality in the sphere of land law. Certain legal questions with grave social repercussions remain as yet unsolved, such as the problems of inheritance and succession and of the making of wills. It will also be necessary to see to what degree and in what way the historical British policy of native administration and native courts in Kenya has allowed, as regards land, for the impingement of English legal concepts on native law and custom.

Further, the entire pattern of African economic and legal forms, juxtaposed against those of the European settlers, has had ramifications for the nature and form of African political development. The European land alienation which led to the creation of Reserves has had a particularly direct and potent effect on Kikuyu political movements since the 1920's. The Kikuyu lost good land, and Kikuyu population has burgeoned. Compensation with other, inferior, land has failed to quell the enmity which grew and festered over the years. The Young Kikuyu Association, The Kikuyu Central

Association, and The Kenya African Union have all been motivated basically by a virulent feeling of land hunger and frustration.[2] Mau Mau might be called one consequence of the failure to evolve a truly non-racial or tribal economic pattern. The Kikuyu grievances and Mau Mau will not be discussed here except to mention that one of the paramount aims of the Swynnerton Plan and its concurrent legal outgrowths must be to break the disastrous bond between land anguish and political expression which has wrecked such havoc in Kenya. To eliminate one of the root causes of previous destructive Kikuyu politics would indeed be a cardinal achievement.

As for the more general political implications with which this essay will be concerned, isolation of both white and black "tribes" to "Land Units" or Reserves as an administrative policy may be seen as enhancing racial and tribal separateness in Kenya. Consequent economic, social, and cultural compartmentalization is reflected in "communalism" in political and governmental evolution. That is, constitutional and political representation in the Government of Kenya, when it finally came in 1957, was on the basis of the group, the racial community, rather than the qualified individual. In 1960 important political changes occurred. These changes were made possible at least partly by the new political atmosphere which the economic and legal changes engendered.

Since the economic revolution is pivotal in this study,

the Swynnerton Plan, which initiated pragmatic changes in land tenure and in the laws that governed the process, will be discussed first.

FOOTNOTES

1 In the coastal belt of Kenya, territory permanently leased from His Highness the Sultan of Zanzibar and administered as a Protectorate by the Government of Kenya, the land situation is in a state of confusion partly because of a great variety of social conditions and consequently tenures, and partly because a scheme of settlement had been begun by the Government and had never been brought to completion. The general factors are not applicable to Kenya land as a whole, and so this area will be eliminated from consideration in this essay.

2 For an excellent article on this subject, see Martin L. Kilson, "Land and the Kikuyu: A Study of the Relationship between Land and Kikuyu Political Movements," Journal of Negro History, Vol. 40, No. 2 (April 1955), pp. 103-153.

II. The Swynnerton Plan

The factors which make the land problem so important are numerous and complex. Perhaps basic is the geographical (latitudinal), landform, and climatic pattern of Kenya which limits the economic potentiality of the country. It is generally true in Kenya that any land suitable for settlement has already been occupied, often very densely - although for political reasons this is not true of Masai, Mau-Narok, and Trans Mara. Of the remainder of the Colony, three-quarters is semi-arid and, except in limited areas, occupied by pastoral tribes.[1] Given the almost exclusive dependence of the population directly or indirectly on agriculture, and given the relative sparseness of a raw material base for industrial development (although much terrain remains unsurveyed) and the small percentage presently employed as wage earners in manufacturing industries (3.97% of the economically active population according to the African Labour Survey, I.L.O., 1958), there is a consequent long-range concentration of any plan for economic betterment on Kenya's greatest assets - her land, water, and forests. Superimposed upon, and in a sense determined by, this factor is a fabric of African society in which tenure and use of land and ownership of stock are inextricably interwoven with clan and family obligations, with birth, marriage, and death, and with the beliefs and observances of each tribal community. Dealing with a situation in which land is tantamount to life, the

British have been hesitant to burn any more fingers by probing too deeply to determine the causes of land problems and to rectify a deteriorating situation. Indeed, their trepidity is understandable in view of the acquisition of land by alien settlers on terms different from and unattainable by the indigenous population.

First consideration will be given to the Swynnerton Plan "To Intensify the Development of African Agriculture in Kenya," and within that to the implications of the proposals vis-a-vis land tenure and use. This full-scale attack on an economic problem proved to be the beginning of a re-examination of governmental policies in the legal and political fields as well. Through the Swynnerton Plan, Kenya moved from a position of virtual neglect or impeding of African agricultural advance to the forefront among African territories regarding indigenous development. Thus 1954 is a key date for ideological and practical change in Kenya.

Since the War it had been clear to the Kenya Government and the Colonial Office that the condition and productivity of the African lands needed immediate and drastic attention. The traditional system of succession and inheritance had produced small fragmented landholdings on which it was impossible, even if the knowledge existed, to use modern more intensively productive agricultural techniques. Constant sub-division of family plots by ridges or gullies invited drastic soil leaching. With less land available due to population pressures, the soil was further robbed of its nutrients by

constant use with no fallow or reconstitutive resting period. Africans were more and more frustrated by their inability to break out of this subsistence cycle. Moreover, the Colony as a whole suffered from this enormous handicap to greater economic viability. Consequently, R.J.M. Swynnerton, the Assistant Director of Agriculture, prepared a plan which would achieve a basic economic reorientation in the African Land Units and which would solve some of the issues pinpointed in 1947 by Governor Mitchell's despatch to the Colonial Office on The Agrarian Problem in Kenya (Nairobi). Swynnerton, himself a career agricultural officer with substantial service in Kenya prior to 1954, has received praise and support inside and outside Kenya for the conception of this extremely significant plan.

Swynnerton's systematic proposals provided a firm foundation for more recent happenings (the 1956 Native Land Tenure Rules and Ordinance Nos. 27 and 28 of 1959)[2] which were not only implied in the Plan but which constitute in large measure its historical and practical importance.

The timed arrival of the Plan may be attributed largely to the Mau Mau Emergency. This situation gave rise to conditions which had not existed before. Where voluntary consolidation of fragmented landholdings was not accepted, Swynnerton's policy for creating economic farm units was imposed upon the African peasants. Once in operation, its beneficial results were almost always applauded by the Africans involved. But the emergency provided the climate in

which this initial experiment could be sown, germinate, and reap fruit which all could see and want for themselves. Not to be forgotten was the honest British desire to spread to the loyal Kenya Africans some of the bounty and technical advice and concern which was then being lavished on the Kikuyu. Its phenomenal success may be explained in part by certain historical and agricultural exigencies, in part by the "ripeness of time" in 1954, and in part by the dedication of many agricultural officers throughout Kenya. And any temporary setbacks or disappointments in the workings of the Plan point to the need for voluntary acceptance by the Kenya Africans, for an awareness of the legal, political, social, and even psychological ramifications of such a scheme, and finally for a many-pronged approach and a thoughtful and thorough analysis of overall economic needs which improvement in one phase of a country's economic development may necessitate.

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The Swynnerton Plan embodied the aims of one strand of British land tenure policy in Africa. It is necessary to view it in its historical context to see its revolutionary import as well as its continuity with the past. Customary African land tenure practices have undergone several mutations. The traditional pattern has been altered by some purely economic factors as the people move slowly from a subsistence to an exchange economy. In addition its direction

and expression have been stultified by tribalism and skewed by colonial politics which has hesitated between advocating an "individualist" and a "reservationist" policy, at once giving the example but denying the substance and natural extension of the system of land tenure currently applicable to their own British countrymen within Kenya.

Though British west and Central Africa experienced a period in their early colonial history of "bold" official advocacy of encouraging and facilitating the development of individual (sometimes called personal) title for those natives who aspired to it and showed economic enterprise, East Africa missed out on this. Perhaps it was because she fell to British authority later in Britain's colonial experience when new administrative ideas concerning "native policy" were in vogue. Throughout most of British colonial control in Kenya, it has been her consistent policy not to interfere with or even encourage change in customs and manner of life, economic, social, or religious, except where these were repugnant to western concepts of justice or morality. It was felt that land could be best protected by reserves where the communal or tribal tenure of land - whether these be rights of tribes, clans, families, or individuals - would continue and which would be isolated from all dangers of the effects of white settlement. Indeed, this did prevent agricultural indebtedness by Africans to other races. But such negative security, however well-intentioned, was short-sighted and economically naive. It

was sure to be severely strained, or even disappear, when the land within the Reserve was no longer adequate to contain a shifting agricultural pattern and the growing population. Moreover, the traditional inheritance system had caused uneconomic fragmentation of holdings. Even as late as 1933, the Kenya Land Commission (Sir Morris Carter, Chairman), while recognizing "that the proper development and improvement of the reserves was no less important than their security,"[4] felt it necessary to give first priority to their statutory protection as the "patrimony" of the African community and to the settlement of tribal claims of injustice arising from prior alienation of land to Europeans (limited in extent but of enduring psychological significance). It would be incorrect and unfair to accuse the British of creating communal jealousies, but they must bear the responsibility for intensifying the feeling of exclusiveness reflected in the relations of one territory with another, and among the African tribes themselves, "each of whom wished to be self-sufficient and sovereign in its own allocated piece of Africa in order to maintain a security that seemed to elude them in the new commercialized societies that were growing around them."[5] Being loathe to threaten the security of native lands, and being unwilling to anticipate public opinion concerning the breakdown of tribal and racial boundaries and the recognition of the evolution of native law and custom toward individualization, the Government did nothing and abdicated its obligation of leadership. There is serious doubt that native lands

under the present system of reservation do in fact still provide a security that it not illusory and that can furnish the means of substantial economic advancement.

> In a number of instances it is in fact now possible to say that from being primarily 'protective' the reservation policy has become definitely 'exploitative' in the sense that many individuals have been made subject to serious economic disabilities as a result of not being able to acquire and use land essential for agricultural, professional, commercial or domestic purposes. [6]

Certainly the prior de facto prohibition from the growing of certain cash crops (such as coffee) in the African Reserves did not spring from an appreciation of the true ecological character of the country and the development of its fullest economic potentialities, as the Swynnerton Plan clearly implies.[7]

A "reservationist" native land policy per se cannot cause the rapid deterioriation of tribal agricultural land in Kenya. And an "individualist" tenure policy stressing mobility of transfer cannot cure it. But the governmental refusal to go outside the tribal system of land tenure and usage and decisively to alter it by adopting methods external and strange to the customary pattern has given the previous isolated rehabilitation and betterment schemes restricted value. It is this decision deliberately to alter the traditional pattern and to provide the basis for its future governance by a legal and substantive non-tribal code which has reoriented African agriculture in Kenya. The rubric is still one of "tribal" - African - development in the Swynnerton Plan, but the intent, this writer thinks, and the

results, it is clear, have been much more far-reaching.

The comprehensive five-year plan for African Land Development which was submitted by Mr. Swynnerton combined the need to find schemes to provide employment for Kikuyu repatriates both in the Reserves and on development projects with the main objective of raising the agricultural productivity and the human and stock-carrying capacity of the land. Significant also was the decision to accelerate agricultural development of the Native Land Units in the other (than Central) provinces of Kenya.[8] The previous Ten-Year Plan (1946-1955); the unguided purely economically-induced changes, especially concerning transfer of land, which imply in principle an assertion of individual as against group rights, among the Kikuyu and the Kamba agriculturalists, and among the Kipsigis pastoralist/agriculturalists who have enclosed land as they have settled down; and the Mau Mau Emergency which gave great impetus to tenurial reforms especially in the Central Province - these factors contributed to the "ripeness of time" for an acceptance of the Swynnerton Plan.

> The Mau Mau revolt has provoked a profound reaction in the social life of the tribe, and historians may well see it as the final cause of 'villagization' and land consolidation in Kikuyu. Though consolidation of holdings was often mooted in the past by administrative officers, tradition would never allow such a complex and far-reaching change and the old men of the tribe would not co-operate in such a project. [Clearly this traditionalism was reinforced by the British decision to operate only within the framework of native law and custom.] Today the conditions are changed and the de facto recognition of 'villagization' as a social success has made land consolidation possible.[10]

Stress is placed on the voluntary nature of participation in the consolidation scheme, and flexibility is maintained to allow for different degrees of endorsement of the idea of consolidation and "individualization." The African proclivity for extensive agricultural development was to be transformed into an intensive pattern.

The Plan divides African land into four large groups for consideration. First are (1) the areas suitable for balanced mixed farming. Given soudd farming techniques and the evolution of a satisfactory system of land tenure, these lands, which usually contain high population densities, have high potential productivity. Next are the (2) lands on which the intensity of cultivation may be raised or which may be freshly brought into production by irrigation, swamp reclamation, or flood control. In the third broad category are the (3) semi-arid pastoral areas covering three-fourths of Kenya, primarily in the north extending to the Somalia-Ethiopia border. Here some food requirements may normally be grown, but the greatest boon would be a constant and valuable flow of livestock and their products resulting from control of stock numbers, a planned grid of water supplies, and sound grazing management. And finally are the (4) lands which require special treatment, such as tree crop development, tsetse reclamation, and afforestation.[11]

It then copes with nine farming problems and needs which it feels to be decisive for the more intensive development. These could be classified generally as: the creation

of economic units through consolidation of fragmented holdings of enclosure of communal land; provision of security of "individual" title; farm planning and introduction of cash crops; livestock and water problems; marketing and credit facilities; and agricultural education. This section will deal with each problem individually, focusing on the first three, primarily as they apply to the land areas of high productivity. The bulk of the African population lies in areas suited to intensive or semi-intensive farming and the order of the contribution to the economy of the Colony should aim at raising the surplus output of 600,000 families from £10 or so per annum to £100 or more apiece. The bulk of the 6,000,000 head of cattle in Kenya lie in the pastoral areas, in the main semi-arid. If the value of the bulk of the necessary annual take-off of 650,000 head can be raised from £2 to £10-£15 apiece, that gives some idea of the potential value of stock in these areas.[12]

The context within which this goal is to be approached is that of the small consolidated landholding with a ley and a small area of cash crop. It is hoped that this alternative to the customary land tenure and use system will ameliorate and ultimately eliminate its three most destructive tendencies: the lack of integration between animals and the land, insufficiency of the resting period in the cultivation cycle, and fragmentation.

> With family herds restricted to their own grazing land there is incentive to improve both land and stock; there is a chance to begin thinking of income and savings without

> irresponsibility about land; a permanently stable resting period and manuring replace the lack of fallow and manuring (impossible in the fragmented plots) in the old system.

Attack on these faults striked at the core of the problem of intensified African agriculture which is the inability of the tribal and clan custom to meet the modern intensive needs.[13] Since a radical departure from traditional methods is recommended, it is necessary to consider the essential features of traditional African land tenure and use.

The basis of Bantu land tenure is the individual having inheritable rights of user in his arable lands, while elsewhere in the grazing lands, the forests, the salt licks, he shares with his fellows of clan/tribe the beneficial use of such natural sources of wealth that have come into the possession of the tribe either by conquest or by original occupation.[14] This does not imply individual ownership of fields, nor individual right to misuse land. Ownership, in so far as there is such a concept, is usually vested in the ancestor spirits who play a very real part in the life of the African and who symbolize his community past, present, and future. There is the right of each clan member to claim support from the clan land, either through the "shifting agriculture" based on individual shambas, or among pastoral tribes through the unrestricted individual right to run stock on what is regarded as communal land (with the accompanying lack of animal integration with cultivation). The individual's right is more a pre-emptive possessory right than one of property. Sale is normally forbidden and may be actually

unthinkable.

> What was originally a fair social practice to assure that each descendant was provided for, becomes in the end agriculturally an obstruction, for the inheritance of a number of small fragments in widely scattered places gives no chance of bringing modern techniques, whether of manuring, or mixed farming, or machinery, or management, economically to the aid of the peasant. The continuous cultivation leads to erosion and the hundreds of little boundaries become storm gullies. 15

Such a system, despite often perceptive adaptations to the environment, is inherently incapable of supporting either a high population or a high standard of living, one of which already exists and the other of which is the aim of the Swynnerton Plan. Sheer economic pressure on the land and the serious need to make full use of this major African asset have induced a favorable African disposition toward consolidation and individualization on a large scale.

> Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family at a level...comparable with other occupations. He must be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against financial credits that he may wish to secure from such sources as may be open to him. 16

A system of soundly planned mixed farming on a consolidated holding makes extra demands on the knowledge, time, and energy of the African farmer. Accordingly it is especially essential to eliminate one main fault of the old pattern, namely a combination of communal with individual interests which left neither with the responsibility for the effects of its actions

on the land, and also to reinstate a secure title to ownership to make such expenditure of energy desirable.

Swynnerton saw the reversal of present Government policy on native land as a prerequisite to and foundation for a solution of the nine problems his plan enumerates. The first task was to provide the farmer with a holding of a size economic for his purpose, brought about by consolidation of fragmented holdings or by enclosure of communal lands.[17] The consolidation itself is a complex matter and is proceeding at different speeds in various areas. Fragmentation traditionally results from African tribal inheritance patterns of land division among male heirs. One writer stresses the "sociological need for fragmentation arising from an inbred experience of fertility variation (heterogeneity of the soil) unaccompanied by any serious knowledge of how to lessen these variations by improving farming practice."[18] Consolidation would in turn remove the cause of the plethora of litigational suits in the Native Courts concerning land boundaries. In trying to discover a suitable farm size, the criteria of providing a reasonable living and of creating a layout giving permanent fertility and stability were used. Since the amount a family can cultivate, the rainfall, and the general fertility of the area are interrelated variables, the minimum individual unit may vary from 8 acres[19] in fertile Kikuyu to 25 acres in marginal Kamba country. An examination of three selected tribal experiences will make clear the methods used, the progress achieved, the setbacks encountered, and the

extent of this amazing revolution.

In the Kikuyu districts of the Central Province (Fort Hall, Nyeri, and Kiambu) the response has been most enthusiastic. These people have a long history of European contact and living proximity. The Emergency gave stimulation not only through resettlement and development work for the "detainees," but through governmental "villagization"[20] schemes undertaken to bring together isolated loyal Kikuyu in a planned, centralized, and protected area. In Kikuyuland, as in all areas, land reallocation is undertaken ideally only after the whole population of a selected area is found to be in agreement as to its desirability. After conducting large "barazas" in which questions were answered and information on the ultimate economic value of the Plan and the title to be acquired was given, the tribal elders - the traditional land authorities - were given most of the responsibility for informally adjudicating family/individual hodlings and encouraging agreement on the final compact holding. In Fort Hall, the area chosen for initial experiment was the location of the most progressive chief. The ituura (the geographical area looked after by a headman under the locational chief) was selected as the basic unit for consolidation as it was large enough to provide good visual effect and small enough to be completed in a reasonable length of time.[21]

The land survey teams, headed by a British Agricultural Officer and staffed by specially trained African recorders and measurers and British and African farm planners, measure

and consolidate scattered holdings upon the advice of the local people. Meanwhile a topographical map of the area is made on which is drawn a soil conservation plan. After village, tree nurseries, coffee and tea factories, etc. have been located on the map, the new consolidated holdings (each containing a proportion of arable, cash-crop and grazing land) are laid out. Allocations of under three acres are closest to the village (and will contain the future village artisans and shopkeepers), then holdings of three to six acres (to encourage the buying of adjacent allotments to increase a holding to an economic size), and finally those of over six acres.[22] Swynnerton proposed as an immediate start, survey teams in 12 districts of Kenya (North, Central and South Nyanza, Kericho, Nandi, Elgeyo cum West Suk, Meru, Embu, Fort Hall, Nyeri, Kiambu, and Teita Hills). While surveys should be as accurate as possible so that they can be tied to the Cadastral Survey of Kenya, they also need to be rapid and should not be delayed solely on grounds of accuracy. With service in full operation, 80,000-120,000 acres (8,000-12,000 holdings) should be surveyed and planned in a year. This is the general method of consolidation.

Among the Kipsigis, too, a revolutionary change, started by the increased maize acreage during World War II, has taken place. Almost every square inch of land is now individually, as opposed to communally, owned. In 75% of the district these individual holdings have been enclosed by hedges of either Mauritius thorn or a species of euphorbia.

Farm crops of maize, English potatoes, millet, beans, wheat, and onions replace maize monoculture; cash crops of coffee, pyrethrum and a small tea area have been introduced; each farm includes a portion of bush-free grazing land holding a now reduced stock load (given supplementary feeding in the dry season by silage and green crops); contour plowing with ox-plow is already giving way to the small tractor (about 20 tractor companies operate locally).[23] During this 15 year period of evolution, only two Agricultural Officers served, an illustration of how personnel continuity can provide stability and smooth but steady agricultural development.

The most serious opposition to land consolidation has come from densely populated Central Nyanza, especially among the Luo, whose need is greatest but where misunderstanding and suspicion of Government intentions have been fanned by political agitation.[24]

Clearly consolidation, which involves adjudication and registration, is only a beginning. But it would seem to be very important that land consolidation on the basis of an economic unit should be a sine qua non for the receipt of individual title. Only on this basis would sound farm planning and cash cropping be fruitful and justifiable. Swynnerton stresses that the able African should always be encouraged to acquire and farm units above the minimum for the area.[25] The resulting landed class - enabled by the new ability to borrow money against the security of land - will inevitably and naturally be counterbalanced by a landless

group. It is sound that the dangers of this trend be faced on their merits rather than dam up a normal evolutionary step for fear of its consequences. Indeed, in time the landlords so created may play an important part in the commercial and industrial development of the Colony as they did in eighteenth century England. Clearly this will call for a multi-faceted manufacturing and industrial plan to absorb the new landless.

The second concern of Swynnerton was to provide the farmer with security of tenure through issuance of a title to his land after adjudication, consolidation, demarcation, and registration of the holding. This title will give stability to the individual agricultural unit, whether the ownership is vested in a single individual or in a unit containing a maximum of five family members. Land may be improved without fear of loosing it in the future. From customary tenure in a rapidly wasting asset to "individualization" is a natural world wide trend, certainly not peculiarly African. A charge for registration of titles and farm planning would be made to cover the cost of the services. The fee for registration proposed is 200 Shillings (the East African Shilling being equal to a British Shilling, or about $.14 U.S.). Just twice as much as the present fee payable before taking a land case to the courts! The Plan concluded: "Not only would a 'cheap' title not be valued, but at least in the Central Province, a Kikuyu would gladly pay two to three times the registration fee for an indefeasible title to his land." The District Land Registries should be run by

local boards on behalf of the Government, thus eliminating any perhaps prejudicial personal interests of members of the African District Councils. It is vital that these registries should also be generally available for consultation by any interested individual.

The third and fourth problems tackled concerned the furnishing of technical assistance to plan ecologically sound farming patterns, and the introduction of high-priced cash crops both as an incentive to propagate the scheme and as a source for the money required to meet expanding family needs and farm expenses. Neither consolidation of holdings nor security through "individual" tenure per se can assure proper land use. For this reason farm planning and introduction of cash crops are a pivotal part of the entire Swynnerton Plan and should apply whatever the tenurial provisions.[27] Obvious economic need, with the inducement of cash crop growing and the visible monetary success of planned holdings, has sparked the enthusiasm for consolidation as a basis for a secure title and these tangible rewards.

Here the biggest single factor which will intensify farming on soundly planned lines is the scale of staff assistance. Although an African staff is preferable, this is a long-range proposition. The first men with agricultural degrees are not out of Makerere until 1963. In addition the education of the East African peasant is not so far along as is that of the West African. So considerable European staff will have to be injected, with the concomittant danger that

the initiative will be theirs and that the high level of initial return will decline when such constant supervision is removed. In 1954 there was one European Assistant Agricultural Officer availabel for 83,000 people, and the proposal is to provide enough to post one per 50,000 (6,000-10,000 families). The cost of the necessary European and African field staff over the five-year period will be 407,45. In this sphere where the time factor is so obviously limiting, one can see the dangers for long-range success in allowing a racial and anti-colonial outburst to determine the real initiation, tempo, and form of agricultural reform.

The initial step in farm planning in Kikuyu area was to demarcate land with a slope between 0° and 20° as arable (with the farmer choosing his crop), that from 20° to 35° as suitable for bench-terracing and planting with cash crops, and that with a slope above 35° to be reserved for grass.[28] This suffices as an interim measure to raise agricultural production without delay. The original farm planning scheme - including instruction in the best division of land between crops, cycle of rotation, ideal homestead layout, accesss paths, paddocks, etc. - was found to be too complex, too expensive, and too demanding of supervision for the initial stage.[29] So this has been simplified, however retaining the salient features. Again, without sufficient time, the full-scale operation of this significant aspect of agricultural education may be indefinitely postponed to the detriment of all Kenya.

The extension of large-scale cash cropping to African areas, both as an inducement to join the scheme and as a source of capital for further farm investment (in stock, fencing, water supplies, etc.), seems a welcome psychological reorientation on behalf of the Government. Crucial also is its overdue realization, and willingness to act upon, the need for overall Kenyan agricultural development on sound ecological lines. Swynnerton quite rightly advises of the problems and dangers: the possibility of disease catastrophy, ex. coffee berry; sensitivity of tropical export cash crops to fluctuations in the world market and thus price instability and parallel development of finance difficulties. A particularly sensitive aspect is the problem of maintaining high quality in a competitive export market, of safeguarding the "Kenya" name. Here is has been found that, admitting the book of younger trees, African yields in amount and in quality have surpassed those on many European farms, thus laying bare the fallacious basis of previous prohibitions on African cash cropping. Further concerns are: the need for long-term, not piecemeal, integrated development which will coordinate and ensure provision for expansion of staff, finance, nurseries, processing factories, and marketing facilities; the need for research as to the type of factory requisite for peasant scale development of cash crops such as sugar cane and tea (here there is particular need for caution), the effect of increased production on the pyrethrum market, etc. Without doubt, the development of large scale

cash crop industries will benefit a wide cross-section of the African community. The wealth of the growers, the coffers of the African District Councils, and the income of the Colony from exports will increase. The increased demand for employment in new derivative occupations, the increase in teachers, tradesmen, artisans, employees in social services, will help to relieve the number of landless and unemployed which is an unavoidable creation of consolidation of an economic holding and issuance of "individual" title.

The next two concerns of the Plan are for instruction of the farmer or pastoralist in the rearing, managing, feeding, selecting and breeding of livestock and the provision of ready access to water as a protection against disease and unproductive trekking. In pastoral areas, the marketing of stock occupies a paramount position in the problem of land usage.[30] In the areas suited to mixed farming, inorder to make stock keeping profitable and not merely traditional, the African farmer must secure as big an income as possible from his resting grass leys. A ley, as opposed to the bush fallow process, necessitates discovering the most efficient grasses for the grazing land so that a productive income in milk, cream, and meat products may be obtained from the land (through the cattle) while it is lying fallow. Stock feeding and management is of immediate signal importance to raise productivity, while stock breeding must be relegated to a later stage of agricultural and veterinary knowledgability. In areas where farm planning is evolving rapidly, as in Kipsigis

and Nyeri, provision of water supplies should be an integral part of the planned layout of the individual farm or adjacent small group of farms. LOan sources should be made available. In one district, close to 1,000 pressured pumps were sold in one year for spraying cattle against ticks and disease.

In the seventh place, the farmer should have adequate marketing facilities, preferably cooperative, to give him secure and profitable outlets for his crop and stock produce. What could be a major setback for the Swynnerton Plan occurred in a marketing problem which arose at Thika, serving Fort Hall and Kimabu, in 1957. At the height of the pineapple canning season, production had to be stopped and African and European pineapples left to rot because the British market was adequatelysupplied and the buyers were holding off.[31] To encourage increased production without sufficient market research and organization to absorb the output is not only to court disaster for a Plan which depends greatly on racial trust for success , but also to exhibit a short-sighted and wasteful approach to intensified agricultural development.

Although Kenya's first Co-operative Societies Ordinance was passed in 1929, it was not until a New Ordinance in 1945 provided a Registrar and a small staff that a remarkable expansion has been witnessed. In 1957 there were 310 African societies, 11 European and multi-racial, and 12 Asian societies.[32] The value of such a training ground for responsible leadership would extend beyond the purely economic into the political sphere.

Moreover, a farmer needs access to sources of agricultural credit big enough to meet the requirements of very large numbers of very small farmers, administered preferably through district land development boards and cooperative societies. Under the program for intensified farming, the cost of developing an economic holding on a planned lay-out, defraying planning and registration fees, planting of hedges, buildings for livestock, purchasing planting material for cash crops and grass seeds, implements, etc., an African farmer could usefully invest £150-£300. At least in Kikuyu, loan agreements have montained a condition aimed at limitation of sub-division by the recipient farmer and his heirs.[33]

And finally, Swynnerton regarded it essential to give African farm children an agricultural bias in their education to give them a progressive outlook on farming, as well as to provide expanded facilities for those who farm the land now and those who do the teaching.

This chapter has been focused on the geographical areas of greatest potential productivity, and within this area on the changes in land tenure and use, because it is here that the Plan seems to be having its most revolutionary effects. The semi-arid pastoral areas (with correct stocking and management, animals should command Sh.200-Sh. 300 rather than the present Sh.30-Sh. 50), the projects for irrigation and swamp reclamation (where much use is being made of Mau Mau detainees), and the settlement ranching and tsetse reclamation schemes are undeniably important. But their orientation,

by nature of the problems confronted, is more similar to the colonial development approach prior to the formulation of the Swynnerton Plan. Indeed, the Plan's flexibility in dealing with all types of areas, all varieties of tenure, and all speeds of evolution is one of its major assets.

In computing the total cost of the Plan, Swynnerton found that the final sum (though a large loan category would be ultimately recoverable) would considerably exceed the £5,000,000 grant from the United Kingdom. Other possible sources of revenue had to be investigated. From the start of the Plan in April 1954, until 30 June 1957, the expenditure on the Swynnerton Plan by the African Land Development Board (Non-Scheduled Areas) had amounted to £2,022,979.[34]

To conclude this discussion of the Swynnerton Plan, some sort of evaluation is necessary. It would be easy to claim for the Plan a pre-eminent place in African agricultural development in Kenya which would imply a denial of <u>any</u> prior development, British enlightenment, or attempt to tackle the problem. This is patently untrue.[35] But to argue that the Swynnerton Plan is no more than a continuation of the post-war agricultural policy with considerably more resources behind it is also an oversimplification. This writer thinks it fails to recognize the deliberate reversal of Government policy on land tenure and use which ensued. For the first time the Government gave evidence of a conscious systematic determination to remold African traditional land tenure on principles external and foreign to that system

as it was previously recognized. Here was interference par excellence with "native land," and involvement in some knotty legal problems which were becoming only more complex with time. And undoubtedly the British themselves would not deny that intense soil deterioration due to precipitous change toward a money economy without proper technical knowledge, extreme land fragmentation, and most of all the fact of the Mau Mau Emergency had much to do with the hasty formulation of the Plan. Nonetheless, it is attempting to deal with economic problems through economic measures, perhaps less tainted than ever before with racial undertones.

Of course the Plan is only a good beginning. Its concern is purely with African agriculture and its evolution within this context. The aim is self-sufficiency in food production and a cash surplus for each farmer. This is logical given the gap between the African and European level and practices. In purely ecological terms, the East Africa Royal Commission Report points out that on a country-wide basis there are excellent possibilities for more intense crop specialization and surplus food production by the African sector.[36] What the Swynnerton Plan does, in bringing prior chaotic and sporadic attempts at land betterment, consolidation, and security of title into a unified whole, is exactly to furnish a viable background for such future progress. Implicit in the Swynnerton, this writer feels, was a drive to weaken or eliminate the economic justifications in which racial antipathies were clothed and on which the social

system of Kenya was built.

Happily, concerted governmental effort has been met by enthusiastic African response in most districts. Demarcation and consolidation expected to take fifteen to twenty years have been accomplished in three to four. To date a million and a half acres have been brought under the scheme. Some 200,000 farmers in Central Province, 1,000 in Nandi District, and 120 in Elgeyo country are now registered as freehold owners of their land.[37] To expect a lineal development with no setbacks is to be naive and to forget the complex problems involved. The success of such an agricultural revolution may take years to cement. It is perhaps too optimistic to hope that the nationalistic ferment will allow the requisite time. And yet it may be that in an independent Kenya the program will move ahead even more quickly and with fewer high-level recriminations as to the less-than-voluntary methods used in pursuance of its aims.[38] A system of compact small-holdings practicing mixed farming has three distinct but related purposes: expansion of rural economies through more intensive and diversified farming practices, maintenance of soil fertility, and procurement of social stability.[39] Since psychological factors contribute so heavily to social stability, the recent evidences of agricultural goodwill, trust, and cooperation between Africans and Europeans where the Plan is understood and not thwarted by undue political disruption are good testimony to the effectiveness and significance of the Swynnerton Plan.

This is the economic core of the transformations initiated between 1954 and 1959. On this core will be built notable legal changes which will have wide juridical and political implications.

FOOTNOTES

1 A Plan to Intensify the Development of African Agriculture in Kenya (Nairobi, 1954), p. 17. Hereafter cited as the Swynnerton Plan.

2 The Native Land Registration Bill and the Land Control (Native Land) Bill presented as draft legislation by the Working Party on African Land Tenure in Kenya 1957/58 and later enacted into law in Kenya and reported in the Journal of African Administration, XI (October, 1959).

3 L. Branney, "Towards the Systematic Individualization of African Land Tenure," Ibid., p. 211.

4 Ibid., p. 212.

5 T.P. Soper, "East Africa's Economic Problems," African World, February 1957, p. 11.

6 INCIDI Report on Ethnic and Cultural Pluralism in Inter-tropical Communities (Bruxelles 1957), p. 305.

7 The motives seem to have been political and economic, but ultimately racial.

8 Swynnerton Plan, p. (i).

9 Lord Hailey, An African Survey: Revised 1956 (London 1957), p. 784.

10 "Agrarian Revolution at Work in Kikuyuland," The Times British Colonies Review (Second Quarter, 1957), p. 12. Bracketed sentence not in the original.

11 Swynnerton Plan, p. 7.

12 Swynnerton Plan, p. 62. Mr. Wilfred Achila, a farmer and member of the Central Nyanza African District Council, took a leading part in initiating consolidation and farm planning in his area about five years ago. His crops now

give him a gross return of £300 annually (£100 from vegetables alone), and his coffee will come into full bearing in two years. Justus Olouch, "Successful Nyanza Farmer," Kenya Today, 5 (December, 1959), pp. 22-24.

13 William A. Hance, African Economic Development (New York, 1958), p. 201.

14 Norman Humphrey, The Liguru and the Land (Nairobi, 1947), p. 23.

15 East Africa Royal Commission 1953-1955 Report (London, 1955, Cmd. 9475), p. 287.

16 Swynnerton Plan, p. 9.

17 This and the following enumerated points are taken from the Swynnerton Plan, pp. 8-9.

18 Humphrey, p. 25.

19 In Kikuyu Land Units, the consolidation plan begun in 1955 has led to average farm acreages of 5.6, 7.2, and 6.4 acres in different areas. R.C. Wilson, "Land Consolidation in theFort Hall District of Kenya," Journal of African Administration, VIII (July, 1956), p. 145.

20 In Nyeri district, land consolidation was linked to the "villagization" scheme. In Nyeri and Fort Hall 35,000 Africans have been brought out of isolated huts into specially built villages. Maurice Whitlow, "Double-Sided Progress in Kenya," African World (October 1957), p. 9.

21 Wilson, p. 146.

22 G.J.W. Pedraza, "Land Consolidation in the Kikuyu Area of Kenya," Journal of African Administration, VIII (April 1956), pp. 84-85.

23 C.W. Barwell, "A Note on Some Changes in the Economy of the Kipsigis Tribe," Journal of African Administration, Ibid., p. 98.

24 "African Land in Kenya," Manchester Guardian (July 20, 1957). However, in Teso Location, Elgon Nyanza, and North Nyanza there has been encouraging progress. Kenya Annual Report 1957, p. 59.

25 This brings up the problem of inheritance and possible refragmentation when the owner dies. It will be discussed in Chapter VII of this paper.

26 Several commentators report that land consolidation in

the Central Province does not seem so far (1959) to have resulted in large numbers of landless land-hungry people; paid employment has absorbed many while others have migrated to areas free of the restrictions associated with resettlement schemes. In fact one curious result of survey and replanning was that about 25% more land seemed to be available in total than the sum of the parts; such was the importance of odd waste corners, paths, and bits of unused ground around buildings. Ronald E. Wraith, East African Citizen (London 1959), p. 86.

27 Land use and husbandry should be dealt with by laws separate from those dealing with tenure and registration. Report of the Conference on African Land Tenure in East and Central Africa (Arusha, Tanganyika. 1956). Hereafter cited as Arusha Conference.

28 Pedraza, p. 86.

29 E.S. Clayton, "Safeguarding Agrarian Development in Kenya," Journal of African Administration, XI (July 1959), p. 148.

30 Hance, p. 200.

31 African World, April 1957. p. 32.

32 Charles Hays, "Co-operative Movement in Kenya," African World (May 1957), p. 7.

33 Pedraza, p. 86.

34 Kenya Annual Report 1957, p. 66.

35 Clayton, p. 148.

36 East Africa Royal..., p. 320.

37 African World, January 1960, p. 20.

38 Messrs. Muliro (Nyanza North), Muimi (Kitui), and Kiano (Central Provine South) - among others - have continually reiterated complaints in the Legislative Council that agricultural teams may be using indirect means to force people to consolidate. The method not the principle seems to be in question. But evaluation is difficult since in most of Kenya consolidation is still young and in Central Province much was done under abnormal Emergency conditions with some initial compulsion, at least. Legislative Council Debates, LXXIV (November 1957), Columns 811-821.

39 Clayton, op.cit. Writing in the Journal of African Administration, VI (October 1954), Sir Olaf Caroe is concerned

with the weaving together of the two patterns of land tenure and the franchise in an effort to find a common denominator to regulate both; this seeks to align political development with changes in the customary law of African land tenure. While this might have been practicable 10-15 years earlier, anticipatory to constitutional advance of any kind, its validity would seem to have been obsolete at the time of Sir Olaf's writing.

III. Ordinance Nos. 27 and 28 of 1959

The reorganization, consolidation, and adjudication of holdings prior to the registration of rights thus has its own agricultural value as well as its socio-economic role of providing "security in individual tenure in place of insecurity in the chaos of communal tenure and individual tenure which had evolved."[1] What has given practical effect to the logical implications of the Swynnerton Plan are several statutory enactments on land passed by the Legislative Council in 1959 as the Native Lands Registration Ordinance (No. 27), the Land Control (Native Lands) Ordinance (No. 28), and the Land Titles (Amendment) Ordinance. As these are the legal mechanisms which - at least for the expanding sector of the population possessing individual freehold tenure - have fused native law and custom with English land law into a new unified Kenya Land law, it is necessary to look both at their historical antecedents and at their actual content and meaning.

A condensed schematic presentation of the legal status of land in Kenya will not show, as one might expect, an original dichotomy between land held in European and in African customary tenure being gradually narrowed geographically by statute and finally healed by the 1959 ordinances. Instead, the picture is ultimately one of a Colonial Government manipulating, by legal definition, the status of land

in response to growing African sensitivity over alienation. But never does it actually alter the working assumptions regarding the proper division of land between the races in Kenya. One cannot doubt that the early rather unsavory history of European alienation and subsequent further impingement due to mineral discoveries in northwestern Kenya led the Government to feel that the safeguarding of tribal land and its future use within the secure framework of native law and custom was a "protective" necessity for its Kenya Africans. Also one cannot doubt that the Government was under constant, and largely successful,[2] pressure to maintain the economic and thus political and thus ultimately racial hegemony of the White Settler.

> If there is one conclusion to be drawn from a study of British policy in Kenya, it is that all policy has been guided and directed by the one aim of establishing a white colony there.. ..Although British authorities did not establish the protectorate because of the demands of settlers, they have annexed the territory, and have aided the settlers by providing labor, communications, transportation, and other services. In addition they have allowed discrimination against other racial groups for their advantage.[3]

Consequently, though there has in fact been a shift in certain areas of the African Land Units from communal to "individual" tenure, the change has been a legal fiction from the governmental standpoint until 1959.

Early land policy in Kenya showed little consistency. From the first, the Government had been anxious to avoid encroachment on Native Lands and to provide sufficient land for native requirements. However, "all the available evidence

tended to show that there were very large areas which were not in any kind of Native occupancy,"[4] so land was given to European farmers who were encouraged to come to Kenya to settle. The problems then centered around Reserves to be set aside for natives and around the areas to be deemed "Crown Lands" over which His Majesty's Government would exercise control. "Settlers did not wish to shut natives in Reserves thus removing them from white contact and from white farms. Neither did they wish to limit their own chance to expand by reserving land for the exclusive use of natives."[5] Five native reserves were established in 1906 - Kikuyu, Masai, Ulu, Kikumbuli, and Kitui - but continued alienations were made with the approval of the Colonial Secretary. Lord Hailey places the primary responsibility for the uncertainties and tension over land with the British Government. "It proved itself to be unable to plan ahead for the control of the operations involved in the policy of colonization, or to take a firm stand on the decisions at which it arrived."[6]

Under the 1915 Crown Lands Ordinance, Crown Lands were held to include "all public lands in the Colony which are for the time being subject to the control of His Majesty," including all lands occupied by, or reserved for the use of, the native tribes of the Colony. Since none of the varieties of traditional African tenure under native law and custom were admitted as a "recognized private title" of English land law, their protection was subject to the vagaries of interpretation of "Crown Lands." Evidence of the insecurity is

clearly seen in a 1921 Colonial Court decision in a case between two Kikuyu[7] (one of whom claimed to have acquired land in individual tenure by purchase from a member of another tribe). The Judge held that all private rights had disappeared through the 1915 Ordinance, and that the legal position of the Native in the Reserves was that of a tenant-at-will of the Crown. According to Hailey, this was "an unfortunate instance of the application of terms of English law to a situation which had no real parallel with that law."[8]

In 1930 the Reserves, which had finally been formally gazetted in 1926, were declared to be "set aside for the benefit of the Native tribes for ever" and were placed under a Native Lands Trust Board. The security of African tenure received an additional statement in the Orders in Council of 1938-39 (Native(Highlands) Order in Council, 1939; Kenya (Native Areas) Order in Council, 1939; Crown Lands (Amendment) Ordinance No. 27 of 1938; Native Lands Trust Ordinance No. 28 of 1938) which implemented the main recommendations of the Kenya Land Commission of 1933 headed by Sir Morris Carter:

> Native lands as a whole are to be styled not Crown Lands / since Africans had always claimed their own ownership / but Native Lands, the <u>nuda proprietas</u> being deemed to be with the native population generally, but vested in a trust and subject to the sovereignty of the Crown and its general powers of control.[9]

The following categories of land emerged: European Highlands, to be defined in the same manner as tribal reserves; Native lands (Class A lands), the existing Native Reserves with amended boundaries; Native Reserves (Class B lands), additions

made to native lands on economic grounds; Temporary Native Reserves (Class B2 lands), additions made for reasons of a temporary character; Native Leasehold Areas (Class C lands), where a private form of tenure suitable for detribalized natives would be made available; and Areas (D lands) in which natives would have equal rights with other races in the acquisition of land.

An important part of the Native Lands Trust Ordinance is section 70 which provides for the formal extinguishment of all native rights in land outside the boundaries of the native areas. This applied especially to the European Highlands, chiefly in the Kiambu and Limuru areas, where the Land Commission had established the fact that there were many Africans living on European-owned farms who had been in occupation long before the farms had been allotted for European settlement.[10]

With only slight restatement in 1944, these laws have constituted and defined the status of native land law and custom, the rubric within which African tenurial concepts have been viewed until the 1950's. This administrative act of defining black and white tribal boundaries has not only set up a physical barrier to free movement for the acquisition of land, but has imposed this peculiar racial picture on the minds of the people of Kenya.

Both the Kikuyu Land Commission of 1929 and the Carter Commission were interested in examining and regularizing the various types of landholding which they had found to exist

within the indigenous system. But since their investigations had no formal legal recognition at the time, we will discuss their findings in a subsequent chapter (VII) of this paper which will be concerned with the more informal pressures causing the evolution of native customary land law.

By the 1950's, the Second World War, economic, and other pressures had given rise to increasing claims of land transactions involving "individual freehold tenure" which demanded recognition. Even in 1948, Dr. Lucy Mair had warned that the Government must decide what type of transaction the courts would uphold. She emphasized that this unavoidably meant influencing "the direction of culture change towards ends which [governments] consider socially desirable, above all, preventing the destructive utilization of land and its reckless alienation."[11] In 1950 a Sub-Committee of the Kenya African Affairs Committee published a report containing its proposals for devising some means of providing a better title to land in the Native Land Units.[12] The group advocated the creation of a "special title" with certain restrictions as to sbu-division and inheritance. The title would set out the holder's rights in the land as they existed at the time under customary law. Since there were no prior methods for reorganization or consolidation of uneconomic holdings, these recommendations could only protect some of the land which had not already suffered from the evils of fragmentation and uneconomic sub-division - a drawback recognized by the Sub-Committee. Moreover, the members

wished to make it

> perfectly clear that we in no way advocate as an ultimate objective the issue of individual titles to all land in the Native Land Units [and that] the written title would clearly state that it in no way interferes with the statutory vestment of land in the Native Lands Trust Board. 13

Obviously there had been as yet no break-through of the existing legal framework within which African land law could evolve.

The Mau Mau Emergency and the promulgation of the Swynnerton Plan described in Chapter II of this paper revolutionized the atmosphere as well as the landscape. The Conference on African Land Tenure in East and Central Africa held at Arusha, Tanganyika in February, 1956 could say:

> We feel that where it is a question of providing legal backing for policies which are already being put into effect in the field, it is of utmost importance that legislative action should be taken without delay. The ideal to aim at would undoubtedly be a statutory land code and an adjudication and registration of titles ordinance for each territory suited to local needs, 14

and have this followed in October of that year by the issuance of the Native Land Tenure Rules - based on Part II of the Sudan Registration Ordinance - to govern the process of systematic adjudication. Throughout the period from consolidation to final registration and issuance of title under the Swynnerton Plan, no legal sanction to the operations existed. The entire scheme was still open to anyone to appeal to the native courts against any supposed injustice under the new system. These Rules proved to be a very satisfactory instrument for the practical execution of the Plan, although the

unwelcome expedient had to be adopted of suspending any land suits in the native courts (save in exceptional cases) during the transitional period through the African Courts (Suspension of Land Suits) Ordinance of January, 1957.

This historical survey serves as a background for an examination of the meaning and implication of the Ordinance Nos. 27 and 28 of 1959. As proposed by the Working Party on African Land Tenure in its Report 1957-1958 and later enacted with only minor changes, the Native Lands Registration Ordinance, the Land Control (Native Lands) Ordinance, and the Land Titles (Amendment) Ordinance set out a procedure and a law for the ascertainment and record of de facto rights plus a formal and modern system of registration of title. Titles are not only given a legal force and definiteness which native law, from its very nature and obsolescence, could not give, but also the certainty and indefeasibility of the English registration system together with its simplicity as the source of title and means of transfer.[15] There is no grant of title to Africans (they have consistently maintained that the land was theirs); registration will simply confer on their de facto right a legal force. Land so registered will be withdrawn from the jurisdiction of the Native Lands Trust Board (thus superseding native law and custom for this expandable group of landholders) and will fall under the same purview as that regulating European settler land. Any litigation involving this land will be handled in the Supreme/Subordinate Courts, not in the African Courts. In fact,

controlled alienation of African land (through leases) to other-tribal Africans and non-Africans, one of the most controversial aspects of the entire land tenure revolution and one of the strongest recommendations of the East Africa Royal Commission, now has legal sanction.

The Land Control Ordinance sets up Provincial Control Boards, which have consent or refusal powers over interracial transfers of land, and District Control Boards consisting almost entirely of local Africans whose consent must be obtained for any land transactions. The aim is to prevent uneconomic fragmentation of registered land again taking place, but also to prevent accretion of unduly large holdings and misuse in general of the powers which statutory individual tenure gives. Thus there is an attempt to maintain some sort of "community" control of the traditional kind at this time.

The British have been perplexed as to how to transform their early Crown Lands idea legally within the English legal system. Their puzzlement was due to the fact that types of indigenous tenures were never acknowledged as falling within the category of "recognized private title" of English law and thus outside the definition of Crown Lands. This solution previously described which they have adopted allows a reconciliation between the rights of the Crown as sovereign and those of the African both as occupier and inhabitant of the country. Without offending any sensibilities and without any formal act, the Crown has divested itself of its rights.[16]

Thus native "communal tenure", fulfilling the appropriate prerequisites, can actually be recognized as the "individual freehold title" which it had come to approximate in most ways. The legal device is ingenious and has constitutional applicability far beyond Kenya, as does the Swynnerton Plan.

FOOTNOTES

1 Arusha Conference, p. 4.

2 An assumption supported by Margery Perham in her book with Elspeth Huxley, Race and Politics in Kenya (London 1956), p. 147.

3 Marjorie Ruth Dilley, British Policy in Kenya Colony (New York 1937), p. 275.

4 Hailey, p. 713.

5 Dilley, p. 249.

6 Hailey, p. 715.

7 Isaka Wainaina and another v. Murito wa Indangara and others, Original Civil Case 626/1921, East Africa Law Report, IX, pp. 102-105.

8 Hailey, p. 717.

9 Report of the Kenya Land Commission, 1933 (cmd. 4556), para. 1639.

10 C.K. Meek, Land Law and Custom in the Colonies (London 1946), p. 87.

11 L.P. Mair, "Modern Developments in African Land Tenure: An Aspect of Culture Change," Africa, XVIII (July 1948), p. 184.

12 Land Titles in Native Land Units, A Report by a Sub-Committee of the Kenya African Affairs Committee, Journal of African Administration, II (April 1950), p. 19.

13 Ibid., pp. 19 and 20.

14 Arusha Conference, p. 18.

15 L. Branney, "Commentary on the Report of the Working Party on African Land Tenure in Kenya 1957-58," Journal of African Administration, XI (October 1959), p. 216.

16 In his commentary on the Report of the Working Party, Mr. Branney answers very effectively, I think, the criticisms leveled against the new Ordinances and describes their provisions regarding: emancipation from native law; the dangers of freehold title (he mentions the safeguards embedded in the new law); alienation to non-Africans; the problem of joint ownership and subdivision of holdings; lesser interests in land, ex. customary tenancies such as the ahoi of the Kikuyu. To my mind, as to his, the gravest danger is that these Ordinances may have the effect of fixing and permanently "sterilizing" all rights in land which, at the time of registration, have not developed into near-ownership. It is hoped that Paragraph 119 under Chapter XIV-Common Land and Land Set Apart Under the Native Land Trust Ordinance (p. 51 of the Report of the Working Party on African Land Tenure 1957-1958 (Nairobi 1958) will provide the scope for "future allocation to individuals when circumstances so require," as specified in the law.

IV. East Africa Royal Commission 1953-1955 Report

While the Swynnerton Plan was inits initial stages, the now famous East Africa Royal Commission (Sir Hugh Dow, Chairman; Sally Herbert Frankel, Arthur Gaitskell, Rowland S. Hudson, Daniel T. Jack, Frank Sykes, Sir Frederick Seaford, and Chief Kidah Makwaia) was meeting to prepare a report which, since its publication in 1955, has been widely quoted as well as contested. One of the really significant colonial papers in recent times, the Royal Commission Report achieved notariety by its fresh approach to the complex economic problems of the region, by its refusal to be bound by the older agricultural concepts which had notably failed to solve the dilemma.

It called for a complete economic reorientation. Of prime importance was a basic alteration of the present pattern of land tenure among Africans by gradually breaking down the stultifying restrictionism that is implicit in a land reservation policy based ultimately on racial exclusiveness.

> We think that there is no hope of progress for Kenya except by its development as an integrated economic unit. By the present policy of exclusive tribal reservations, and under the various obligations by treaty agreement and formal declaration of which we were instructed to take account in our deliberations, Kenya in particular has been divided up into a number of watertight compartments, none of which is or can be made economically self-sufficient, and the frustrations of the last twenty years have been largely due to the failure to recognize that fact. It is therefore that we think it necessary to encourage the breaking down of tribal and racial boundaries, and to replace them by confirming

> individual titles to land where they exist and to encourage their acquisition where they do not. [1]

The group examined the "dilemma of security" which under traditional land tenure and use required constant availability of new lands. While recognizing that the Colonial Governments were anxious to preserve among Africans that form of security which prevailed where each individual had access to land in his own tribal area for subsistence purposes, they noted two important qualifications. Not only are tribal restrictions on economic mobility a serious impediment to economic advance, but also the growth of the population has seriously undermined the static 'security' which the tribal subsistence economy provided.[2] Previous commissions and special enquiries had failed to realize the difficulty of reconciling the principle of non-disturbance of customary land tenure with the need to increase African production.

> Tribal and...racial rigidities affecting land have in many parts of East Africa brought about a situation of increasing tension, the basis of which is fear. Those who occupy land fear that they may lose it or be deprived of it without compensation and with no opportunity to purchase other land in its place. Those who have no land fear that they will never be able to acquire it. Thus those who occupy land cling to it irrespective of their ability to use it properly. Those who have too little land for proper economic production on modern methods cannot easily extend their holdings, while those who have too much are not permitted to dispose of it for economic purposes at its appropriate price without consulting authorities, whose DECISION will not be made on the basis of economic considerations but on the basis of the old conceptions of tribal, clan, or family security. [3]

The Commission feels that the rigidities of African tribal society are, in the last resort, political rigidities; and that this political authority, where it is obstructive, must not be allowed to hamper the fullest possible development of modern economic institutions. Tribal and racial barriers have prevented the migration of skill, enterprise, and capital, have prevented large-scale development of mineral and agricultural wealth, have retarded the development of communications, and have restricted markets for local industrial and specialized agricutlrual and export products.[4] For the goal of expanded productivity, a new conception of land rights and tenure is essential.

Policy concerning the tenure and disposition of land should aim at the individualization of land ownership, and at a degree of mobility in the transfer and disposition of land which, without ignoring existing property rights, will enable access to land for its economic use.[5] Land need for subsistence production is to be abandoned as the criterion on which claims to land are to be entertained. The economic security of the society no longer depends on the subsistence which each individual attempts in isolation to wring from the environment with the unaided efforts of the family or kinship group. Rather, it is contingent upon a combination of the highly specialized efforts of the community as a whole. In parts of East Africa land is already acquiring a monetary value due to the impinging market economy "despite the fact that there is no general legal recognition of land sales and

and no legal means of registering freehold ownership on tenant rights."[6]

> For the security which rests on tribal exclusiveness, or on customs which prevent dealings with land as a negotiable asset, is the illusory security of the subsistence economy within which no economic advance is possible.[7]

From this and the statement of the Arusha Conference quoted on page 44 of this paper, it seems obvious that the Swynnerton Plan was initiated without clear and decisive thought as to the direction in which its results should most desirably lead. Freehold tenure for Africans was still looked upon by many with a large degree of apprehension, and mobility of transfer was seen to have the gravest of consequences. In this atmosphere, the publication of the Royal Commission Report was of great psychological import. Its combination of ingredients, and the general public and private reaction to this bombshell, probably acted as a catalyst on the indecisiveness of the Kenya Government and the Colonial Office. The Commission appealed for interpenetration of lands and vitiation of racial and tribal exclusiveness. It proposed alienation of land to any Kenyan (controlled, at least at first) whatever his race on the basis of economic criteria. Finally, it was eager to instill a general psychological reorientation regarding land by stripping it steadily of its racial implications which had caused great tension and frustration especially among the more competent and active African farmers. Top priority should be given to a country-wide view by adopting a policy emphasizing the use

to which land is put and not the protection of the interests of particular communities.

While his reaction was generally favorable, the Governor of Kenya, Sir Evelyn Baring, felt

> it would be most injudicious for the Kenya Government to try to move faster than public opinion allowed towards the breaking down of tribal and racial boundaries, particularly those boundaries which distinguish the various areas of land assigned to separate communities and separate tribal groups....[Moreover] we feel that the Commission have under-estimated the probable psychological impact of the economic changes suggested and that the time is not yet ripe for the removalof those safeguards which have been developed over the last half century. [8]

Indeed, one wonders who is to lead if the Government abdicates this role. For surely the pattern of the past has not been an epitome of success. Moreover, the Commission itself has not minimized the new problems which must be faced or the safeguards which must be erected. But it has explicitly tried not to allow the dangers to block out from consideration a new conceptual approach which it regards as so vital at this time.

Thus the Report of the East Africa Royal Commission played an essential factual but especially pivotal psychological role. "The central theme running through all the recommendations is that a more willing acceptance and a greater stimulation of economic forces provide the keys not only to the economic, but to the human problems besetting the area."[9] In the absense of proof to the contrary, it can be regarded as the persistent catalyst which precipitated the

legal break-through already described as well as the October, 1959 decision regarding the "White Highlands" which will be reviewed in Chapter V.

FOOTNOTES

1 East Africa Royal..., p. 56.

2 Ibid., p. 50.

3 Ibid., p. 51.

4 Hance, p. 196.

5 East Africa Royal..., p. 346.

6 Ibid., p. 49.

7 Hance, p. 209.

8 Despatches from the Governors of Kenya, Uganda, and Tanganyika and from the Administrator, East Africa High Commission, commenting on the East Africa Royal Commission 1953-1955 Report (London 1956, Cmd. 9801), pp. 2,4.

9 Hance, p. 196.

V. The White Highlands Decision of 1959

Contrary to its fluctuating policy regarding African land status, tenure, and use, the British Government's position on the alienated area set aside for European settlement - known as the European or White Highlands - has been consistent over a long period of time. Already in 1908 Lord Elgin, while placing no legal restrictions on any part of the community, laid it down that as a "matter of administrative convenience" grants of land in the uplands should not be made to Asiatics.[1] This restriction was subsequently extended "for convenience" to cover the African population. For fifty years, the Settlers themselves have generally been in agreement on their two paramount aims: preservation of the White Highlands and maintenance of European political domination. To the European the Highlands are a symbol of his position in the territory and his right to live, among his own people, a life of the kind to which he has been used. To the Indian the White Highlands are a symbol of racial exclusiveness and intolerance. To the African the sight of undeveloped land which he may not purchase must be galling, particularly if he lives in an area such as Kikuyu which is over-crowded.[2] The bitterness and sense of injustice felt by the African might be generalized into a retort such as: What possible justification have the British had for keeping Kenya land half-cultivated in the offchance that some Englishman, Italian, or Norwegian may want to take some of it over

KENYA LAND STATISTICS

as of 31 December 1958 [1]

CROWN LAND	(including African priority areas, National Parks, Crown land earmarked for natives, and water).....	153,518 sq.miles
AFRICAN LAND	(including 731 sq.miles of forest, 36 sq.miles of alienated land, and 86 sq. miles of water).....	52,271 sq.miles
LAND ALIENATED	(including municipalities, townships, and Government Reserves).....	13,998 sq.miles
CROWN FORESTS.....		5,173 sq.miles
TOTAL AREA OF KENYA COLONY AND PROTECTORATE		224,960 sq.miles

(HIGHLANDS - 16,196 sq.miles, included above)

1 Great Britain. Colonial Office Report on Kenya for 1958 (London 1959), p. 33.

some day ? It is because possession of the power position enables the dominant segment to structure the norms and values of the operating society, that one group wants desperately to hold on to its status while the other groups want equally to break into it.

Unquestionably, the economic value of the Settlers' contribution has been and continues to be very great. Nevertheless, when a mythology grows up to justify the prolongation of racial exclusiveness in one area, one may with reason examine some of the basic assumptions of this superiority. A signal concern of the Kenya Government has always been to secure "beneficial occupation" of the land. And it has been the contention of the Settlers that their agricultural knowledge and technical skill enables them to maintain high standards of development and land use. Of course this is true in many cases, but not invariably or necessarily so. It is obvious and has been openly admitted that there is a sizeable portion of undeveloped land in the Kenya Highlands. At the time of the Kenya Land Commission, 27.5% of the 10,345 square miles alienated to Europeans was not in use; in 1944 only 1,350 of the 2,031 square miles in the Highlands suitable for cultivation were actually under cultivation; and in 1959 less than one-seventh of the agricultural acreage was under crops. Meek affirmed that "the amount of undeveloped land is so extensive that the Government has been considering the necessity of introducing a tax on undeveloped land."[3] It is the existence and sight of such lands that has created the

frustration so often reported to the East Africa Royal Commissioners.

Moreover, a strong case for the modification of the present pattern of European settlement might be made on purely agrarian and economic grounds. One writer feels that "most of the White Highlands are underfarmed, understocked, and only too often badly farmed."[4] Rawcliffe further feels that many Settlers embarked on a deliberate policy of 'land-mining' for quick porfits. And he asserts that this is a widespread practice today with large areas still being cropped continuously with wheat or maize, producing diminishing yields year by year, with livestock maintained on the unploughed portion of the land. Afurther point is that the system of large-scale farming is seriously retarding the full agricultural development of the area. This is because the Settlers have neither the capital, the trained labor, the experience, the numbers or, usually, the desire to increase productivity and conserve their soil by a changeover to a system of balanced mixed agricutlure and husbandry.

In 1953 Commissioner L.G. Troup made an "Inquiry into the General Economy of Farming in the Highlands."[5] His findings supported implicitly and often explicitly many of the points made by Mr. Rawcliffe and others. Troup recommended reducing the size of the farms from an average of over 2,000 acres to between 400 and 1,000 as an optimum holding (and certainly breaking up those of 5,000-30,000 acres, though there are few in this category). He would

increase the number of cattle, sheep, pigs, and poultry to make full use of the ley and permanent grass (he saw an increase of as much as 250% in 10 years as desirable), and require more intensive agricultural training at Egerton College in Kenya. Finally he recommended increased immigration[6] - a policy certain to displease Asians and Africans. Clearly all of Kenya was faced with serious agricultural (not to mention political, racial, and psychological) problems, although the deterioration and misuse of African lands had progressed to a far more alarming extent.

Reacting to the psychological importance as well as to the purely logical economics of the situation, the Kenya Government sent to the Legislative Council on October 13, 1959 as historic and highly controversial proposal to open the White Highlands to Asians, Africans, and any others of proved competence as farmers.[7] The most revolutionary part of the new proposals is that there will be a definite statement of policy that leases of land in the Highlands are to be made according to farming capacities of would-be tenants, not their race. Appeal on denial of land could be made to the Governor. The new standards would be strict since the aim is to improve the standard of farming as well as to reduce discrimination.

The Sessional Paper which contained these welcome recommendations made specific mention of the impact of the East Africa Royal Commission Report.[8] Without doubt it was its bold abandonment of the traditional policy of land re-

servation and safeguarding of special group interests in the face of their patent failure as solutions which enabled and, indeed, almost necessitated an emotional reorientation to land ideology. Following its plea to look at land as a national economic asset, the Government made the goals of the Swynnerton Plan meaningful and desirable by the recognition in modern legal terms of African rights in native lands. And in turn, the logic demanded a change in the Highlands policy.

The Paper proposes first that all holders of 999 year leases be able to buy full freehold of their land for the equivalent of 20 years' rent; and that there be no change for 99 year leases or for non-agricultural land. If agricultural land is converted for industrial or residential use, freehold will be surrendered for short Crown Leases to provide the needed flexibility for public planning and development.

In the second place, the Highlands and Land Control Boards, previously advising the Governor and actually controlling land transfers, will disappear. Instead, a system of two-tiered area control boards, chosen by agricultural committees, will be set up to control land transactions. A Land Trust Corporation will be constituted solely to scrutinize proposed transfers of freehold between peoples of different races. If it does not sanction a transfer, it will be obliged to assume the freehold itself and issue a 999 year lease to the "buyer." As mentioned before, the Native Lands

Trust Board will be stripped of its 'protective' and 'control' functions for advanced areas of native lands and reorganized to contain a majority of Africans, one Asian, and one European. It will retain its present functions in more backward areas.

And last a Central Advisory Board - six Europeans, six Africans, five Asians, and one Arab - will be created to advise the Governor on carrying forward the new land policy and on future changes of policy affecting land.

If conscientiously adopted, these proposals will end the sanctity of the White Highlands. There is optimism that the emotional sting will at last be drawn from the historically tense land problems whose most volatile and violent expression has been the Mau Mau movement. Sufficient controls remain to assure the maintenance of high farming standards, and "to ensure for all Kenyans the best use of the land, wherever it may be, as a national asset regardless of race, creed and tribe."[10] This completes a description of the substantive changes between 1954 and 1959. A short summary will bring the revolution into sharper focus before this paper takes up a study of some of its legal and political ramifications.

FOOTNOTES

1 Tenure of Land in the East African Protectorate (London 1908, Cmd. 4117), p. 25.

2 Philip Mason, "The Plural Society of Kenya," INCIDI, op. cit., p. 333.

3 Meek, p. 79.

4 D.H. Rawcliffe, The Struggle for Kenya (London 1954), p. 167.

5 (Nairobi 1953), 76pp.

6 Ibid., p. 29.

7 Reported in Africa Special Report, 4 (October 1959), p. 5.

8 Land Tenure and Control Outside the Native Lands, Sessional Paper No. 10 of 1958/59 (Nairobi 1959).

9 Ibid., p. 10.

10 "Reports," Journal of African Administration, XII (Jan. 1960), p. 56.

VI. The Legal and Economic Revolution between 1954 and 1959

In the predeeding chapters the nature and scope of what has been termed the legal and economic "revolution" in Kenya between 1954 and 1959 have been examined in some detail. As suggested, the problem in Kenya is also largely psychological- the barriers to economic progress often being emotional preconceptions and predilections. The time seemed ripe for the exposure of the various concatenated historical factors to the catalytic action of the new-to-Kenya economic ideology of the East Africa Royal Commission.

Crucial in the Kenya situation is land. Because of its particular significance to African, Asian, and European, its tenure and use is peculiarly susceptible to manipulation and control (directly or indirectly) by economic, legal, and administrative political forces. So tightly interwoven are these three factors that the complex situation seemed impervious to solution save by some ingenious new device. Agricultural acumen often served as a veiled racial justification to the European for his continued economic exclusiveness and dominance on which his political power was based. By commanding political power, i.e. the mechanism for initiating social change, the European hoped to keep the pace of this change within his own control. Implicit, perhaps unconsciously this writer thinks, in the Swynnerton Plan was the desire to sweep away this foundation upon which differential development and tenurial institutions had been rationalized.

The Kenya Government and Colonial Office decision to recognize African individual tenure and sale of land which had evolved, and to aim at a gradual healing of the duality of land law in Kenya marked a radical departure from the former reserve policy within which only recognized native law and custom was to receive official sanction. The 1959 Ordinances put a small but expanding segment of the African populace on a legal and agricultural basis equal to that of the European Settler. To make this revolution meaningful and just in national terms, intense emphasis has been placed upon the teaching and practice of modern and highly productive farm planning techniques. The Sessional Paper outlining the proposals for the Highlands and Ordinance Nos. 27 and 28 of 1959 were the culmination of the new agricultural pattern.

It is difficult to evaluate the exact significance of the economic core with such little historical perspective and from such great geographical distance. The enthusiastic response would seem both general and genuine, but there is undoubtedly an unavoidable bias in the materials available here for study. Only familiarity with the personalities caught up on the movement and with the actual scene can unravel the personal bias, if any, contained in the remarks of members of the Kenya Legislative Council during debates on economic policies. For these reasons this paper will again forsake contemporaneity.

Nonetheless, the real value of this study will not suffer greatly since a chief concern is an examination of

some of the general legal and political repercussions and implications of the basic economic revolution. To this the next chapters of the essay will turn.

VII. Direct and Indirect Legal Implications

Already mentioned in some detail have been the formal legal ramifications of a quite astonishing agricultural revolution centered around land tenure and use. Also sparked was the unification of a previously dual law regarding land. What happens in any area of the world when an alien culture imposes itself upon an indigenous population and attempts to regulate the relations of a mixed people ? Study of culture conflict has long occupied colonial administrators and anthropologists - among others - but it is only more recently that these people and legal scholars in the African field have begun to investigate the nature of African law, its evolution, and especially the concrete results of its contact with European legal systems.

Not only did the British colonial government bring its own English civil land law to Kenya, but it brought or created its own court structure to uphold these laws. For that sector of the population which did not fall under the jurisdiction of English law, a separate and lower system of courts was instituted. Throughout East Africa this pluralism is made more complex by the presence of Muslim law; but since its influence in Kenya is most prominent only in the coastal and several urban areas, we shall restrict our discussion to the dichotomy between African customary law and English-derived law, not stressing the particularistic de-

tails of either, but concentrating on their interaction and the implications for a new legal synthesis. Thus we have a dual law and dual courts, which have created certain conditions under which the two cultural and legal patterns may meet, and placed certain limitations on the evolution of the subordinate legal system.

Contrary to some opinion, native law and custom regarding land was not static. It did evolve - though slowly and at differential speeds in various areas. What role did European legal concepts actually play in this evolution ? Was their influence felt directly through the courts ? Or was the pressure a more indirect and subtle one through the personal medium of the administrative officer ? Did administrative influence always point in one direction, e.g. always toward a greater introduction of Western concepts and procedures, or were there alternative approaches ? Though the research material outside of Kenya is not extensive (much priceless information doubtless reposes in the files of District Officers), some tentative answers are possible.

The legal repercussions from the economic revolution in the field of land law have had and will have further reverberations in other spheres of native customary law, for example those regarding inheritance, succession, and wills. The replacement of some customary land law by statutory regulations will of course alter the power and prestige position of those traditional elders who act as administrators and trustees of family, clan, or tribal land. But more

important, such a significant removal from the traditional purview may sap the vitality of native law and custom itself both directly and more indirectly through the further alteration of the social system in which the older pattern had thrived and around which it was oriented.

Concluding the chapter will be a short summary of the formal and informal ramifications of the changes initiated between 1954 and 1959.

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The hierarchy of the court structure in a pluralistic legal and cultural milieu can be a factor of major importance in determining the degree and speed of interpenetration of legal principles themselves as well as of alien techniques and procedures. The pattern in Kenya has fluctuated slightly at different periods of colonial control. This must be traced since such policy decisions reflect the roles which officials envisage indigenous and non-indigenous law as playing at that time and for an unspecified future period.

At the apex of the court organization has always been the Supreme Court with full jurisdiction, both civil and criminal, over all persons and all matters in the Colony, "including Admiralty jurisdiction arising on the high sea and elsewhere and subordinate courts constituted under the provisions of the Courts Ordinance."[1] This court and its law are the ultimate sanctions in Kenya Colony. Appeal from the decisions of the Supreme Court lies to the Court of Appeal

for Eastern Africa and thence to the Privy Council in London.

The basic law is the common law, the doctrines of equity, and the statutes of general application in force in England on August 12, 1897 subject to the necessary qualifications of the circumstances of the Colony and its inhabitants. Again quoting from the 1958 Kenya Annual Report:

> The enacted law of the Colony consists of Imperial Orders in Council relating to the Colony, certain English and Indian Acts applied wholly or in part, and Ordinances of the local legislature and regulations and rules made thereunder....In all civil and criminal cases to which Africans are parties, every court is guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council, Ordinance, regulation or rule made under any Order inCouncil or Ordinance, and decides all such cases according to substantial justice without undue regard to technicalities or procedure. [2]

Enactments of the local legislature comprise the largest part of the statutory law administered by the Supreme Court structure; what has been described above as the original or basic law has tended to assume the character of a "residual law, still operative within certain limited fields (as for example the law on contract and of tort), but providing elsewhere guiding principles rather than substantive law."[3] In addition, there is considerable subsidiary statute law, in the form of Rules made by the Native Authorities under statutory sanction, and unwritten customary law embodying primarily the personal law of the various indigenous communities - both of which categories are administered by the African Courts.

Beneath the Supreme Court are Subordinate Courts which are presided over by Magistrates, that is, administrative officers of the Government of Kenya acting in their judicial, not executive or administrative, capacity. The rank (first, second, or third class) of the subordinate court and its jurisdiction generally depend on the rank of the Magistrate presiding.[4] In addition there are Muslim Subordinate Courts which are presided over by Liwalis, Cadis, or Mudirs (these are Muslim officials with either wholly judicial or a combination of executive and judicial functions).

Below these are the 146 African Courts most of which are located in the native lands although there are urban courts in Nairobi Extra-Provincial District, and each larger township in the settled (i.e. European) areas has its own African Court. The governing ordinance is the African Courts Ordinance of 1951 which specifies that the Courts shall consist of benches of Elders appointed by the Provincial Commissioner concerned and shall have jurisdiction only over Africans. In civil matters the Courts administer native customary law, but they also have fairly extensive criminal jurisdiction and are authorized to hear charges under a considerable number of Ordinances. Their recent growing familiarity with statutory enactments as well as unwritten customary law has been accelerated by the exigencies of the Mau Mau Emergency and the need to relieve the Magistrate Subordinate Courts of the more routine judicial matters. The African Courts are supervised by Administrative Officers,

the District Officer and Provincial Commissioner, although their powers of revision and transfer of cases to other courts are now shared with the newly instituted Provincial African Courts Officers and the African Courts Officer for the Colony as a whole, who is a member of the Ministry of African Affairs of the Government of Kenya. This officer receives the monthly reviews for all courts. These reviews operate as an automatic appeal on behalf of every convicted person.

The 1951 Ordinance made provisions for a new hierarchy of appeal. A case in the first instance between Africans goes to an African Court, then to an African Appeals Court, then - with certain restrictions - to the District Officer, and finally to a new Court of Review which is the highest and final appeal in the African Court system. The Chairman of the Court of Review is a person who has held, but does not still hold, a high judicial office. Thus, unlike Tanganyika, where the Central Court of Appeal is at least presided over by a Judge of the High Court of Tanganyika, there is an absolute severance between the African Courts and the Supreme/Subordinate Courts in Kenya.

The path of appeal is the pivotal joint in the hierarchy. It determines whether the Colony will have an "integrated" or a "parallel" system of courts. At issue is whether the non-indigenous courts and legal concepts will be superimposed at the top with open legal channels down to the lowest tribal court, or whether the non-indigenous and in-

digenous systems will exist side by side in splendid isolation. Clearly an "integrated" system in which decisions of the higher courts would be binding on all those subordinate to it would foster more direct and immediate changes in the nature of the law administered throughout the entire hierarchy. If one's aim were total legal assimilation or very consciously directed evolution - seen as ultimately more desirable and more just although initially painful to the indigenous population during the transition - some degree of court integration would be sought even though this might mean acute social disorientation at the lower levels. Of course one may also favor a "parallel" structure as more immediately suitable to the tightly interwoven political-juridical-social African conditions and still envisage an ultimate unity of courts and law. Both have dangers. A lack of formal touch with European legal concepts due to "parallel" court organization may lead to frustration and tension deriving from an inability to obtain formal recognition for patterns evolved in emulation of, or from direct economic contact with, Europeans. The African Courts Ordinance of 1951 created a fully "parallel" pattern in Kenya. However, this has not always been so, and it is valuable to look at the change and its possible implications.

Initially, the traditional tribunals, which received statutory recognition in 1897 under the East African Protectorate, were fully integrated with the main judicial system in that "there was a normal avenue of appeal from them

to the Magistrates' Courts and the Supreme Court." [6] With the Native Tribunals Ordinance of 1930, appeal moved from the Native Tribunals of first instance to Appeal Tribunals, to District Officer, to Provincial Commissioner, and finally in only special cases to the Supreme Court. Ostensibly these changes were introduced mainly to "cut down the technicalities and costliness in appellate courts." [7] However, Phillips records the following comment in a case in the Court of Appeal for Eastern Africa some years later, when Abrahams, C.J. remarked:

> This case, where a modest sum was claimed in the final resort, has passed through a series of vicissitudes and been investigated by a hierarchy of tribunals and other authorities to parallel which we might search the pages of Dickens in vain. Would it have been more mischievous and costly to have provided for the usual appeals granted in non-native cases ? [8]

One must note that the main channel for control was switched to the revisionary powers and appellate jurisdiction of administrative officers rather than through judicial personnel. One of the most compelling reasons for the change was stated succinctly to a Committee investigating native land tenure in Kikuyu Province in 1929 by Fort Hall Africans:

> We are very much concerned in our minds about land cases being taken in Nairobi and decided by judges who know nothing whatsoever about native law and custom and cannot understand the points in the cases. Judgements which have been given in the Native Reserves by the authorities on the spot, who do know the native law and custom, are revised on appeal on technical points of English law which are entirely inapplicable. We ask that native land cases be removed from the jurisdiction of the Supreme Court and placed under the District Commissioners. [9]

Although complaints about land law were perhaps more frequent because of their sociological significance, the logic of placing control with officials who possessed more exact and sympathetic knowledge of African law was equally pertinent to other spheres of tribal litigation. In traditional society the law

> was not enthroned as an absolute objective standard by which the validity of any decision could be tested; it was simply what the group, acting through its representatives, and constrained by the 'weight of custom' decided. An individual could not appeal to 'the law' in defence of his 'rights'; for it did not guarantee such rights. In many native languages there is no word for 'law'. [10]

Implicit was a difference in outlook on the nature of justice and the part to be played by the machinery of justice in maintaining the social order. The African juridical process was more concerned to bring a disrupted social situation back to some sort of new balance or equilibrium. It was arbitrational is form and restitutive rather than punitive in motive. Consequently, an administrative officer would have far less trouble in reconciling these variations in his approach than would a European trained in, and believing in, the efficacy of European legal concepts and procedures. Fear of disrupting the entire social organization during a transitional period was thus a factor in the 1930 change to only a "quasi-integrated" court hierarchy which reached its apogee in 1951.

Such a colonial policy change implied certain assumptions. Perhaps one was the conviction that there is some-

thing of value in the indigenous procedure for the adjudication of disputes which must be preserved and even strengthened to avoid the hazards of social collapse and to maintain the sanctions which enable the smooth functioning of a society and continued obedience to its norms and values. In order to insure a degree of social stability, one tries to isolate an organism from too much outside pressure too quickly and hopes that it will evolve - slowly, if at all - within its own rubric, i.e. that of native law and custom. There may be wisdom in this approach, but only if the framework is expressly stated to be transitional and if latitude and direction can be given to the inevitable evolution of the indigenous law in some other way. Without this freedom, the end result may certainly be stagnation. But very much more importantly it will mean chaos from the simultaneous pursuit of various policies by different administrative officers and native councils, and frustration from the arbitrary putting short of the natural evolution of land law. Blocking an evolutionary approach in one field will not insure social stability - for economic, political, and psychological factors cannot all be contained. Social disintegration is a legitimate concern, but all culture contact gives rise to complex reorientation and reinstitutionalizing of norms, and wisdom would seem to lie in providing channels for directed evolution. Tension may and does become very great in the event that seeming racial overtones are added to the continued circumscription of a majority segment of

the population by the power of a colonial minority. Thus, the nature of the court structure in Kenya has placed the burden on the more indirect channels for the guidance of native law and custom, in this case especially land law.

Despite the formal legal limitations, there has been a constant evolution of traditional land law and custom throughout the history of Kenya Colony. The complexity, chaos, and uncertainty of the land situation by the mid-twentieth century was largely a result of a lack of machinery to recognize and implement the changes in tenure and use which had taken place. The vehicles for change in Kenya have been economic and demographic pressures, and the indirect and more subtle influences of the native courts and native councils (local colonial administrative and executive agencies) directed along one line or another by the administrative policies of District Officers.

> Native land law is constantly being modified by the day-to-day decisions of the Native Courts which, based as they are on equity rather than on precedent, automatically reflect the changes that occur unconsciously in the social and economic structure. Native law is affected by the decisions of Administrative Officers who act as supervisors of Native Courts and themselves, in their own executive capacity, settle innumerable disputes concerning land. The decisions of British courts, the influence of English legal procedure and English conceptions of real property, coupled with the use, in many areas, of English forms of conveyancing all tend to modify the character of the native law of land. [11]

It is only the final sentence which the Kenya court system has prevented from having its full effect.

From the beginning the Native Court has been an integral part of the Native Authority system largely because in African usage the sources of judicial and executive authority are not separable. In Kenya, where inter-clan or -tribal political organization was very loose or non-existent, clan elders (usually of a certain "age grade," the criterion of semiority and responsibility) informally arbitrated intra-clan disputes and guided the "self-help" techniques used in extra-clan or tribal altercations. Hailey feels that "much of the benefit that has accrued from the use of the Native Authority system could not have been realized had not the Native Court been a recognized part of its organization."[12] Native Authorities were enabled to make Rules and Orders on matters vital to the welfare of the people (such as soil conservation or protection against famine) any breaches of which were brought to trial in the Native Courts.

Aside from this functional use, the Native Court system may provide a bridge for a reconciliation between the European-African legal dualism. This bridge may be constructed in several complimentary ways. In the field of procedure, the courts may provide the regular means of adjudication of such civil law matters of land tenure, marriage, and succession (in the criminal field the British, like the French, may adopt a uniform Penal Code for Kenya as they did in India). The competency of the courts may be extended to include wider and wider jurisdiction of more statutory regulations. Or the personnel of the courts may

be altered in the direction of the complete separation of the judicial and executive functions which is foreign to traditional practice. In Kenya the "Chiefs" have already been excluded from the tribunals, and many courts are presided over by a permanent "President" who is assisted by a "bench" of very qualified men. A complete "professionalization" could lead to integration of Native Courts into the Supreme/Subordinate Court hierarchy and a passing from the administrative into the judicial regime. However, the situation in Kenya is complex. The present court structure, as previously seen, vitiates this "bridge" function of the Native Courts, and there seem to be no immediate plans for a formal movement toward structural integration. Further, until the 1954-1959 period, lack of direction in the tribunals as to the nature of land tenure concepts to recognize made the situation even more fluid and uncertain.

It is among the Kikuyu that traditional land law has evolved farthest from the concept of some sort of group rights and beneficial usufruct toward that of individual freehold tenure and irredeemable sale. Accordingly it will be instructive to examine briefly the history of the evolutionary process in that area first. The Kikuyu Land Unit comprises five main districts of the Central Province: Embu, Meru, Fort Hall, Nyeri, and Kiambu, with the Kikuyu tribe itself inhabiting the last three. And even among the Kikuyu, those in Kiambu have moved farther toward individualization and the breakdown of the githaka system (the ithaka is the

customary unit of land tenure) than those in Nyeri or Fort Hall. The Kiambu Kikuyu claim to have bought their land by an irredeemable purchase from the Ndorobo hunters who previously inhabited the district; they claim that this had begun to take place prior to the European arrival and independent of European influence. Apropos of this, the Kenya Land Commission of 1933 comments:

> The time at which the Kikuyu ceased making payments to the Dorobo in respect of the land is uncertain, but in the southern part of the district the practice evidently continued until after Kinanjuri was chief and we regard it as probable that the idea was an innovation introduced by him and copied from Europeans. Nevertheless, it is probable that in the northern part of the district the Dorobo had already become absorbed, or driven out, and payments, if they were ever made, had ceased.[13]

"By a process which consisted partly of alliance and partnership and partly of adoption and absorption, partly of payment, and largely of force and chicanery,"[14] the Kikuyu had already absorbed or displaced the Dorobo by 1887. It seemed likely to the Commissioners that what had passed from the Ndorobo to the Kikuyu was not a number of agrarian estates, but a succession of seignories along the ridges of the countryside; that a githaka system was so new in 1902, when land alienation to European settlers was begun in the Limuru area and some of these ithaka were lost, that their existence was never mentioned to the officer who would have payed compensation.

After taking evidence on land tenure in the Kikuyu Province, the 1929 Committee concluded that native opinion was everywhere united in asking that the githaka be recognized

in the three Kikuyu districts. But while in Nyeri and Fort Hall the motive apparently was that the ithaka should retain their essential character as land of a family group, which must be preserved for them, the motive in Kiambu seems to have been that sub-division and sale should be facilitated and at least that ithaka should be registered.[15] It has been suggested by H.E. Lambert that, in their evidence before the 1929 and 1933 Commissions, the Kikuyu were deliberately lying for political purposes.[16] At stake was the basis of their claim that their own individually owned land had been alienated for European settlement in the Highlands. Under these circumstances they might well have felt that it was necessary to claim that outright sale of land was customary in Kiambu because of the Kikuyu purchase from the Ndorobo. Nonetheless, Dr. L.S.B. Leakey, an eminent authority on the Kikuyu, is absolutely certain that payments to the Ndorobo involved an irredeemable transfer of land ownership equivalent to a sale of the freehold in our system.[17]

Whatever the exact legal or practical status, all the Commissioners could at least agree that individual tenure was well in sight in 1933 in Kiambu Kikuyu, and that it would be neither wise nor practicable to try and prevent it. The Land Commission stated that since the Government, by the very act of governing, had created some of the outstanding land problems, it was not unreasonable to expect that the Government should take the lead in initiating a policy which could lead to a solution. It recommended that:

> the tenure of each reserve should be built on the basis of the native custom obtaining therein, but that it should be progressively guided in the direction of private tenure, proceeding through group and the family towards the individual holding.
>
> While we do not consider that either the Native Councils or the Native Tribunals should have the power to alter custom in respect of the tenure of land, we can see some utility in the Native Council having the power, subject to the prescribed sanctions, to make a formal declaration that custom has become altered in any respect. In this way, when a change in practice has been adopted and has become customary with the main body of the natives, there would be a means of proclaiming it, which would have some effect of bringing the stragglers into line. 18

The Kenya Government, however, did not take an effective position on the desirable direction of the evolution of African land law. Ten years later Phillips could quote the following from the report of a District Commissioner:

> The idea of private ownership, combined with outright sale and purchase of land, has for many years been taking shape in the minds of Kiambu Kikuyu....Hundreds, possibly even thousands of acres have changed hands by 'irredeemable sale' during the past 10-15 years, and most of this has gone into the hands of a very few people, including chiefs, tribal elders and the educated minority...Native law and custom is not codified, nor is it static, nor is there any authority duly empowered to adjust it to changing conditions. It purports to be administered by the native tribunals, but the judgements of the tribunals have never been recorded - merely the effect - and their frequent departure from the old law has too often passed unnoticed. Consequently although the Githaka system is still recognized, it is bent or broken as occasion arises, to suit the will of the influential and the landless class is springing up in the reserve at a far greater pace. 19

The position of the Local Native Councils and Native Tribunals in the evolution of traditional land law is am-

bivalent. Although the legal powers of the Councils do not give them the specific function of making Rules which may have the effect of defining or modifying native customary land tenure and law, some of the Councils have passed Resolutions which - despite the Governmental refusal to confirm them and thus give them the force of byelaws - are nevertheless accepted as valid and welcomed by the Local Native Tribunals who are faced with a deluge of land litigation. The Fort Hall Council passed a Resolution providing that all transactions for pledging land entered into before 1899 should be regarded as irredeemable.[20] The Kiambu Local Native Council has passed a Resolution in favor of registration of land titles, the South Nyeri Council in favor of registering all transactions including outright purchases (this was put into action without being submitted to the Government, to supplement the system of voluntary registration which had been adopted in Nyeri in 1942 after the recommendations of the 1929 Committee), the Fort Hall and Meru Councils in favor of registering transactions other than outright purchase, and the Embu Native Council in favor of regulations covering the relationship of landlords and tenants.[21] Kiambu District has passed a resolution that land should not be attached for debt.[22] Many more could be cited. Although these are illegal practices, it is obvious that they are having a very direct bearing on the development of the customary Kikuyu law relating to landholding.

Among the Kamba, a Soil Conservation Resolution passed

by the Machakos Local Native Council in March, 1938, markedly encouraged the development of an "ownership" concept regarding isese (grazing land) by requiring that all rightholders should demarcate their holdings with a suitable material and/or enclose by fences or hedges. This made the kisese appear to be a much more defined and heritable object than it was in its origin as exclusive grazing ground.[23] The same author mentions a Circular of the Local Native Council of 30 October 1946 (MLNC/MISC/[illegible]/11.12) clarifying and extending the rules regarding sale of land, which has become established case law enforced and welcomed by the Tribunals.

Clearly the point is made without reiterating the numerous further references made by Lord Hailey even ten years ago to similar types of occurrences over a wider range of land subjects in Coast, Rift Valley, and Nyanza Provinces. Local Native Councils have made continual efforts to clarify the law for their Native Tribunals which are faced with an exploding number of land cases due to a combination of economic, political, demographic, and social pressures on a not-always-certain traditional land law. Regardless of the unrecognized legal status of the changes, this path must be acknowledged as one of the avenues enabling informal evolution of the law.

Another source of influence on the nature of traditional African law is the administrative officer. Phillips points out that both in their appellate and revisionary jurisdictions as well as in the less formal character of

supervisory authority, this influence "is of the highest importance, and will undoubtedly continue for many years to be a major factor in the guidance and education of the tribunals."[24] He cites the ruling of the Provincial Commissioner, Nyanza, that "land cases should only be heard as between one individual and another, and not between one clan and another" as an excellent example. Penwill mentions a 1937 clarification by a Machakos District Commissioner (which has since become established custom) that if land has changed hands and a consideration of reasonable value has passed in exchange for it, the presumption is for outright sale rather than paying as a borrower.[25] Perhaps an obvious point is the introduction of the concept of a land register. This English importation and the manner in which land is registered can often determine the nature of the rights which emerge thereafter. In addition, a number of Administrative Officers have drawn up "Guides" for the benefit of Native Tribunals in their districts which have been flooded with litigation arising from the transfer of land rights. In these there are

> clauses dealing in detail with the procedure to be adopted in issues involving the redemption of pledges, or outright sale, or the relations of landlords and tenants, in particular as regards the payment of compensation for improvements when a holding is resumed by the title holder.[26]

In fact this paper has quoted from one such "Guide" of Kamba Customary Law prepared by Mr. Penwill.

Lacking any central governmental direction, a variety

of policies have been espoused by district officers throughout the Colony as a result of personal preference and inclination. Much of what follows regarding various and sometimes conflicting land policies will be a summary and paraphrase of material presented by Phillips. Some people envisage the native reserves of the future as a patchwork of model smallholdings, and advocate a policy which would, in hastening the realization of this idea, cut right across native law and custom. Such a policy would necessitate a process of enclosures, the complete readjustment of boundaries, the assurance of absolute security to the individual smallholder, the prevention of fragmentation by the application of primogeniture to land inheritance (at the expense of the growth of a large landless class) and a host of other legal consequences inseparable from the introduction of European ideas of individual land tenure./ Of course many, but not all of these policies have been initiated in the more advanced areas tempered in spirit by a retention of some of the older concepts.

Mr. Colin Maher, in 1945 the Officer in Charge of the Soil Conservation Service, saw in the "nationalization of tribal lands," the establishment of collective farms, the employment of modern technical and capital resources, the absorption of surplus rural population in industry, etc. as the only hope of a satisfactory solution to Kenya's land problems. He felt this was also more in harmony with t' basic African concepts of landholding. Along ther

Margery Perham felt that it might prove unfortunate if British African Governments should succeed in pressing their peasantry toward full economic individualism at the very time when the conception was being modified in Europe. Some administrative officers supported these ideas without being willing to take the traditional African scene largely as it was or had been.

Receiving little numerical support but forceful statement was Mr. H.E. Lambert's recommendation that the object of a sound land policy should be to maintain the spiritual bond (the "land-blood-uthoni complex") which held traditional society together. Implicit was the need to subordinate the individual to the group; to preserve the spirit of the githaka system intact which would include resisting the treatment of land as subject to outright and final sale; to return to the indigenous system of handling land disputes in the traditional tribunals. Lambert stated elsewhere that he felt it was the "genius of the untouched native system that it preserves a stable equilibrium between the two[community or kinship and individual rights/.[27] Although he might be accused of keeping the "Kiambu Kikuyu in subjection to an outmoded moribund code involved in the days of primitive tribalism," Lambert felt that these stringent controls were a transitional necessity in a district which he called "an abomination of dissolution." Nonetheless, the District Commissioners of the surrounding Kikuyu districts of Fort Hall and Nyeri continued to adhere to the policy of gradually

modernizing the native tribunals. Thus a sharp policy anomaly has existed in one of the focal areas of Kenya.

Phillips himself felt that it was "not practicable to put the clock back at this stage." Change- even fundamental change - was inevitable and also dangerous in the transitional stages. But the danger might be greater of one incited chaos, tension, and frustration by closing the channels through which change received recognition.

> In dealing with tribes whose indigenous institutions were of the Group B [28] type, tribes which have, moreover, become accustomed during the last fifty years to a system of organized central authority, and which as a result of the intensive operation of external influences have undergone rapid and far-reaching changes in respect of their social system and economic life - in dealing with such tribes [most Kenya Africans], the policy of partial or complete reversion to indigenous judicial methods does not, in my opinion, offer any reasonable prospect of success. [29]

Social stability could most effectively be achieved, in his view, by the direct method of concentrating on the attainment of <u>certainty</u> in the law. Without certain standards on which to adjudicate, with an unwritten law which was capable of reversing itself from one case to the next depending on the particular personnel of the tribunal concerned, and with no means for giving any territorial or even tribal regularity to the indigenous system, the increasing land litigation was being handled less and less effectively. Verdicts, too, received dimihished sanction from all segments of the community. "It is difficult to see how greater control over the development of native law, attainment of greater certainty in the law, and effective coordination of various sources of

law can be achieved without resort to legislation." [30] In short, administrative officers need some sort of guidance.

One must remember that a law-making process is actually going on all the time; customary law is evolving by interpretation even in the absence of legal machinery for its recognition, regularization, or control. The Government of Kenya has said that the Local Native Councils shall not serve this function. Unaccountably it has failed to provide any alternative path, and so the councils are pressed into service anyway.

> In one district we see customary law being reshaped by public opinion and powerful interests without either encouragement or hindrance; that is what is happening when there is a purely laissez-faire policy, and the result seems invariably to be a trend towards individualism. In another district we find a policy in force which seeks neither to accelerate nor to retard the spontaneous individualistic movement, but which does attempt to guide and regularize it [Nyeri].... In yet another district we see a policy which, whatever its vision of the distant future may be, is based on the deliberate aim of applying a brake to what are regarded as - at the present stage, at any rate - dangerous individualistic tendencies. In each of these cases law is, consciously or unconsciously, being made - whether by tacit acquiescence, by administrative guidance, or by refusal to recognize any departure from the principles of the indigenous system. [31]

Prior to 1959 the accretions to African land law which had or were becoming established native custom were in the akward position of possibly differing from the native custom which official Government policy was willing to uphold. Patent[ly] the formal and informal legal machinery of the Colon[y] determined and structured in degree and type of[ficial] the hierarchy of the Kenya court structure - playe[d]

tremely significant anticipatory role in the basic agricultural revolution in land use of the 1950's. This revolution, in turn, made absolutely essential the enactment of laws redefining African land tenure with more subsequent inevitable reverberations throughout the system.

Some of the trends of the evolution of African land law toward individualization can be seen: increments due to native tribunals and local administrative officers and councils, changes due to visual propinquity to European forms of tenure, alterations from numerous economic factors such as the growth of permanent cash crops. Indeed, the strength of the concept of collective ownership always varied from tribe to tribe - the Kikuyu always being more individualistic than the Kipsigis or the Luo. But the process was always halted short when its logical implications appeared to challenge the exclusive land basis of European power in the country. It seems reasonable to suggest that pressures from the Settlers were one vital facet of the official willingness to allow the evolution in native law and custom to go unrecognized. It has been a group economic, and thus secure group land status which had undergirded the political power position of the European commun ity. And a significant change in the indigenous land pattern would have implications which would be political and psychological as well as legal and economic. In effect, African law was not allowed to bring whatever flexibility it possessed into full play as a social foundation perhaps capable of mitigating racial

tensions by imperceptible but steady degrees.

Ordinance Nos. 27 and 28 of 1959 replaced unwritten customary jurisdiction with statutory jurisdiction for certain Africans under certain conditions of landholding. These new land statutes will be enforceable in the Supreme/Subordinate Court structure of the Colony, not in the African Courts. This will lessen the direct legal effect on the evolution of customary tenure in the less advanced areas, but the mere decision per se will have large indirect effect through the local administrative councils and courts. Certainty as to direction will undoubtedly expedite the evolution.

Immediately Kenya is faced with other complex legal problems. Changes in the concept and law of land tenure and use and the emergence of new types of property will revolutionize the traditional patterns of inheritance and succession, and perhaps more subtly, those of marriage. While it is true that the regularization of customary succession or marriage laws comes about largely through their being administered in the same courts as statutory law (and this is impossible at the present time in Kenya since most statutory law is still under the jurisdiction of the Supreme Court system), yet there will still be enormous repercussions just from the emergence of one sphere of statutory land law which will not even be administered in the African Courts.

There are several alternative approaches to the replacement of the inadequate traditional process of inheritance (which so exacerbated the land problem by allowing excessive

fragmentation of holdings). First, one could modify the existing native law and custom in the direction of primogeniture through substantive legislation. This has received little support either on its own merits (England legally abandoned this concept thirty years ago) of because of its radical departure from the older pattern and consequent injustice to other family inheritors who see this as their only security.[32] Or second, one could enable Africans to make wills in respect of their immovable property. This is impossible at the present time. The making of wills in Kenya is governed by the Indian Succession Act, 1865, the Indian Hindu Wills Act, 1870, the Indian Probate and Administration Act, 1881, and the Hindu and Mohammedan Marriage, Divorce and Succession Ordinances. It has been held by the Colonial Courts that these laws do not apply to Africans (except under certain conditions when the African is a Muslim), who consequently cannot make wills to which effect will be given by the courts. Although land sales and transfers inter vivos are not unusual among the Kikuyu of Kiambu, the Kamba of Machakos, and the Maragoli of North Nyanza, the effect and scope of such transactions are still uncertain and the ramifications of the new ordinances cannot yet be definitely observed. So basic is the land-family bond that, even though a man may secure a title to his holding, succession upon death will still follow the old law and custom rigidly. However, already more freedom and mobility are challenging tradition. A further danger is surely the creation of a privi-

loged class exempt from the ordinary law and jurisdiction of the ordinary courts of the African community. The problem remains unsolved. No real departures from native law and custom have been made in these fields, but one may be sure that they are in sight.

When one examines the vast legal ramifications for the African of the changes in land tenure and use, one can legitimately ask whether land law will become the opening wedge for the eventual substantive statutory alteration, and thus possible elimination of native law and custom. This query is especially pertinent in its most sacrosanct personal spheres of marriage, family law, and succession which are least amenable to change. What does the synthesis of the two separate streams into a unified Kenya land law mean ?

In attempting to heal a legal duality, the uncritical importation of English land law holds as many dangers as the stubborn insistence on retention of the indigenous tradition. In the non-Native lands of Kenya, the basic territorial land law is the applied Indian Transfer of Property Act as supplemented by local ordinances and with a background of the English common law as it was in 1897. So already this is not English land law per se. The Conference on Land Tenure at Arusha in 1956 noted three sources of the obscurity it found in this legal framework.[33] To begin with, the body of English law includes obsolete English statutes, with judicial decisions thereon, which have since been replaced in England by more modern legislation. It is not an easy matter to

ascertain precisely how English law stood 30,40, 50 or more years ago. Further, over large areas native law and custom is the only repository of land law. With the rapidly changing circumstances of today in which it has to be applied, there may often be uncertainty as to what the law or custom is on a particular point surely a vast understatement . And finally a borderline exists at which there is an overlap between applied English law and native law and custom. In such cases it is difficult to ascertain which law applies to a particular piece of land. Thus an untempered English land law is unsound in Kenya and actually has always yielded to a "colonial" land law. Now this, too, is in need of further change.

From the African point of view, it is obvious that land is a particularly conservative sphere of tradition. Although moderate African opinion does accept continuous change, it is concerned to have it registered through judicial decisions of those who have acknowledged positions as interpretors of traditional usage. Lord Hailey stresses a point which most sources also voice, namely the importance of using assessors or clan elders to give the District Commissioner advice on land disputes.[34] Consequently African (Kenya) conditions must be given adequate recognition. A new land law must not be purely authoritarian; it must obtain its effective sanction by invoking favorable response from those to whom it is applied.

Both the Arusha Conference and the Judicial Advisers

Conferences of 1953 and 1956 had no doubt that the ultimate aim should be a single body of law for each territory applying to all land. They favored "integration" rather than "parallelism" as the desirable goal for the court structure of the Colony. The new Kenya land law of 1959 points to the probable direction of future legal development in all fields, unquestionably in those of criminal penal law and civil commercial relations. Certainly the result is a synthesis of the two previously juxtaposed legal systems. But the synthesis is heavily weighted on the side of the non-indigenous legal concepts. One can make a tentative prediction that other spheres of African law will also change in this direction and to this degree. However, this land law does not seem to be an example of uncritical importation of an alien law. There has been gerrymandering to fit the colonial, especially Kenya, situation; and provisions for the safeguarding of traditional concepts such as that of the muhoi-mugori (tenant-landlord) relationship have been included in the statutes. Even if, as now looks likely, a very strongly European-influenced Kenya land law will ultimately emerge, attention to unique and vital local concepts is essential for any degree of transitional social stability. The repercussions of the unified law would be even more penetrating given a movement towards an "integrated" court hierarchy.

In summary, some quite substantial implications of the agricultural land tenure revolution can be found in the legal field. Direct legal effect throughout Kenya will be

greatly hampered by the peculiar "parallel" structure of the courts. Nonetheless, the indirect ramifications through the administrative pattern of local councils and courts will, as previously, continue to be great. Embodying, as the Ordinances do, a belated governmental decision to perform an active guiding function with flexibility, this legal consumation of agricultural change should go far toward solving Kenya's historically explosive land problems. These changes, in turn, are interwoven with the political problems of the Colony.

FOOTNOTES

1 Colonial Office Report on Kenya for 1958 (London 1959), p. 69.

2 Ibid., p. 77.

3 Hailey, pp. 597-598.

4 There has been talk of substituting a class of "professional" Magistrates for the juridical functions of this administrative cadre, but no action has been taken. This is a part of the same wish to effectively separate the executive from the judicial functions which has been felt desirable at the Native Court level. Hailey, p. 612.

5 Another variation is an "integrated" court structure with separate classes of court personnel administering different laws to different litigants.

6 J.B. Carson, "Further Notes on the African Court System in Kenya," Journal of African Administration, X (January 1958), p. 34.

7 Carson, op. cit.

8 Arthur Phillips, Report on Native Tribunals (Nairobi 1945), pp. 197-198.

9 Report of the Committee on Native Land Tenure in Kikuyu Province (Nairobi 1929), p. 40.

10 Phillips, p. 276.

11 Meek, p. 290.

12 Hailey, p. 631.

13 Report of the Kenya Land Commission, 1933, p. 92.

14 Ibid., p. 93.

15 Report of the Committee on Native Land Tenure in Kikuyu Province, p. 40.

16 H.E. Lambert, The Systems of Land Tenure in the Kikuyu Land Unit (Capetown 1950), p. 79.

17 L.S.B. Leakey, Mau Mau and the Kikuyu (London 1952), p. 8

18 Report of the Kenya Land Commission, 1933, pp. 420-421.

19 Phillips, p. 59.

20 Lord Hailey, Native Administration in the British African Territories (London 1950), p. 193.

21 Meek, p. 98.

22 Hailey, African Survey, p. 785.

23 D.J. Penwill, Kamba Customary Law (London 1951), p. 37.

24 Phillips, p. 209.

25 Penwill, p. 49.

26 Hailey, Native Administration, p. 193.

27 H.E. Lambert and P. Wyn Harris, The Kikuyu Lands:Memorandum on Policy in Regard to Land Tenure in the Native Lands of Kenya (Nairobi 1945), p. 62.

28 "Those societies which lack centralized authority, adminsstrative machinery, and constituted judicial institutions-in short which lack government." M. Fortes and E.E. Evans-Pritchard, African Political Systems (London 1940),p. 5.

29 Phillips, p. 178.

30 Ibid., p. 287.

31 Ibid., pp. 286-287.

32 F.D. Homan, "Inheritance in the Kenya Native Land Units," Journal of African Administration, X (July 1958), p. 131.

33 Arusha Conference, p. 17.

34 Hailey, Native Administration, special mention of the tribunals in Nyanza and Central Provinces, pp. 161 and 132 respectively.

VIII. General Political Implications

The final chapter will deal in a very general way with a few of the political implications of the legal and economic "revolution" in Kenya. These are less tangible, more elusive, largely psychological, and impossible to predict with certainty.

> The most immediate results [of changes in land tenure] are in the economic and social fields, but clearly the ultimate influence is on the character of the elements which will be represented in the political constitution of the country. Much of modern agrarian legislation in Continental Europe, while primarily designed to secure a more equal distribution of landed property, has also been largely influenced by a desire to readjust the political forces resulting from the manner in which property is held. [1]

The vituperative quality of the political struggles in Kenya derives in part from the acute nature of the present power conflict. Historically the European ruling minority, under strong pressure from the White Settlers, has grasped the overall necessity of maintaining the political and economic status quo as the only guarantee of their continued power hegemony.

Early in the twentieth century a policy was originated, to become later the basis of the status quo, which seemed valuable at the time and gave promise of being able to contain, or at least temper future political and racial threats to the White status position. This was, of course, the Reserve policy. As to immediate benefit, the Delamere Land Board of

1905 shrewdly pointed out that "should the main body of the tribe living within the reserve increase and overflow its boundaries, such overflow would be available to meet the demands of the general labour market of the country."[2] Another commentator stated that the European settler

> cannot be content with mere access to the land's resources: for he can neither farm, mine, nor trade with his own hands. His economic existence depends on social control over the indigenous labourer on his own terms.[3]

In long-range terms, it was clear that a Reserve policy gave the greatest hope for the retention of political and economic power. For implicit in the "Reserve" idea was the handling of a particular population segment as a tribal or racial group. The intention has been to secure representation of interests as opposed to individuals. Sheer logic of numbers made it obvious that the Europeans (who usually saw themselves as a group sharing common political, economic, and social interests) needed to impose, or rather reinforce a like kind of communal ideology on each of the groups in the Colony. For without doubt, individual tribal cohesion has always been a social fact of the African milieu. Any political participation in the government of the Colony would be on a communal basis: the European community represented as a group, and similarly the African, Asian, and Arab communities. Only within such a communal framework could the Europeans, who claimed their group interest to be dominant because of their economic, educational, medical,etc. contributions to the country, hope to perpetuate their

position of power and prestige. Only under such a communal system could a tiny minority claim equality of, if not preponderant, influence with an enormous majority. The conflict is one of Burkian representation of communal interests against Benthamite representation on an individual basis, a view which recognizes differences of ability, property, and moral worth but which counts these as politically irrelevant.[4] Because the non-indigenous community has seen these characteristics as of ultimate relevancy, the group interest concept was espoused as the only viable and reasonably secure foundation for political power. For certainly the other groups would ultimately be represented directly and this would constitute a controlable method for satisfying these foreseeable demands.

The creation of tribal reserves had several implications for the development of African political consciousness. Before mentioning these, it must be stated unequivocably that many administrators embraced the reserve policy and championed the reinforcement of the traditional political structure from the honest conviction that this was the only way to ensure social stability and a kind of slow practicable evolution. Perhaps many were also revolted by the current ethnocentricism which lauded everything British as good and desirable, and everything indigenous as "primitive" and to be erased as quickly as possible. The point is that the conscious motives were complex and not always baldly racialistic per se. Nonetheless, the paternalism which developed proved also to be

basically inflexible in adjusting to real changes that occurred through the years in all spheres of African development.

One of the implications was that political expression was to remain, as before, part of the texture of the local social group whether it be on a family, clan, or tribal level. In Africa, as all over the world, the tribe was a prime, and usually in Kenya the largest, focus of group loyalty. So it would be foolish as well as incorrect to say that the British "caused" the tribal compartmentalization which often creates such complex problems for national unity. However, a policy of reserves and native land units did have the effect of reinforcing and even strengthening tribal loyalties even in the face of some social and economic pressures for their softening. Tribal divisions would not let a South Kikuyu Association penetrate into northern Kikuyu areas. Early in their colonial rule the British realized that unless they encouraged tribal development, they would in effect be "encouraging the native to enter into detribalized combinations such as Harry Thuku started / the East Africa Native Association - a breakoff of the Mission-started South Kikuyu Association when that failed to cross tribal boundaries /, combinations whose chief purpose of existence, unlike that of a tribe, is opposition to Europeans." [5]

Another of the results of the policy of land reservation and alienation was the impetus given to tribal animosity. Both African enmity toward the European "tribe", and African

KENYA POPULATION STATISTICS

Population - 1958 Estimate[1]

African	6,080,000
Indo-Pakistani and Goan	165,000
European	64,700
Arab	35,500
Other	5,700
TOTAL -	6,350,900

Tribal Breakdown - 1956[2]

Tribe	Province	Population
Kikuyu	Central	1,155,000
Luo	Nyanza	852,000
Baluhya	Nyanza	736,000
Kamba	Central / Southern	689,000
Meru	Central	366,000
Nyika	Coast	333,000
Kisii	Nyanza	287,000
Embu	Central	230,000
Kipsigis	Nyanza	180,000
Nandi	Rift Valley	132,000

1 Great Britain. Colonial Office Report on Kenya for 1958 (London 1959), p. 7.

2 W.J.M. Mackenzie and Kenneth Robinson. Five Elections in Africa (London 1960), p. 391. Province category not part of the quotation.

distrust of African tribe. European impingement on Kikuyu lands in the early 1900's and upon the land of the Kavirondo tribes in the 1930's after the discovery of gold, has caused acute sensitivity about land in both Central and Nyanza Provinces. Historically Kikuyu sense of injustice at the hands of British land grabbers has inspired an anglophobia which erupted in its strongest and most complex form in the 1952 Mau Mau outbreak.

During the Emergency and largely for security and correctional purposes, the Kikuyu received much assistance in farm reorganization and planning. Neighboring tribes, who generally disliked the Kikuyu anyway, were angered by the seeming "favored" treatment and even considered this to be another aspect of the British "divide and rule" approach to colonial government. The Swynnerton Plan was partially an attempt to redress the balance of economic development. During a Legislative Council debate on the success of the Swynnerton Plan, there was quite a difference of opinion among the Africans, which Mr. Swynnerton attributed to the fact that

> to a certain extent the Akamba are jealous of the Kikuyu tribe...At the present time progress in the Central Province is going ahead so fast that it si going to leave the Nyanza tribes behind by something of the order of 10, 15, or even 20 years...In Nyanza it has been necessary to go through the whole rigmarole and gamut of pilot schemes, of abandoning pilot schemes and of being asked to come back to them again. 6

Psychological implications are significant. Initially there may have been few conscious racial overtones ot the

land policy. But by 1954 when the Lyttleton Constitution was promulgated and in 1957 when the first African representatives were elected to the Legislative Council of Kenya, the picture was somewhat different. The Constitution

> took the hazardous step of extending the communal system; established precedent suggested that the election of African representatives be put on the same communal basis. The racial theory of colonial politics is once more the culprit; African opinion is no more an undivided whole than European or Asian opinion, unless perhaps when it is sharply pitted against such other abstractions. Communal representation at the centre inevitably focuses the politics of Kenya more than ever on its racial rivalries. [7]

By choosing a communal rather than a common electoral roll, Kenya - unlike Tanganyika - decided to have group representatives selectdd by and from within each racial community. The results have been manifestly different in the two countries, but then so were the emotional climates and antecedents.

Admittedly, communal electoral rolls exacerbate racial tensions. Such a system marks off one citizen from another in a way which suggests that loyalty to a community comes first, loyalty to the state comes second. There is a distinction of persons which is incompatible with the equality of all before the law.[8] Separate rolls imply that one is best and most elevated and can usually be found to be rigged so as to insure permanent domination by those in the "best" roll.[9] The other primary objection to the communal roll is that it inhibits a smooth constitutional shift in power from communal rolls to one of responsible government - "a communal majority will represent the rule of one community over another,

not the verdict of a majority of the citizens who are all equal in their allegiance to the state."[10] It is the white community which holds this communal political power which is the mechanism that ultimately controls the initiation of social change. So a communal ideology forces the battle for political hegemony into racial channels.

Thus, self-imposed communal and even tribal rigidities have long been a part of the Kenya landscape. Because of the historical framework of political development, the recent elections are also partially responsible for encouraging them. By prohibiting trans-tribal and trans-reserve political associations, the Government has caused electoral campaigns to concentrate on appeals to intense tribal loyalty and on incitement of tribal rivalries and real and imaginary, past and present feelings of injustice.

A strong caveat must be entered concerning all remarks about political development since 1952. The proclamation of the Emergency after the Mau Mau activities has undeniably skewed the nature and form of African political associations. Territory-wide political groups were proscribed by the Registration of Societies Ordinance No. 52 of 1952, and the strictures on party purposes were only partially relaxed in 1955. So this is merely another factor which has served to exagerate and prolong the already existing tribalism. But it can hardly be blamed solely or directly on stubborn British racial or tribal policies. The ending of the Emergency early in 1960 will remove this factor and will probably sig-

nal a major Kikuyu political resurgence.

Will the older patterns of Kikuyu political activity persist ? A major previous anxiety has focused on constantly rekindled feelings of land hunger and frustration. Has the economic and legal revolution instigated by the Swynnerton Plan assuaged this sense of injustice ? Unless the answer is "yes", the Kikuyu resurgence may be directed into the old wasteful channels. It is hoped that the economic and psychological revolution will enable the Kikuyu, and all Kenya Africans, to break through old patterns, will permit them to combine in new ways for new national purposes.

Even in 1957 the acute and penetrating British journalist, Basil Davidson, could write that the Europeans' triple objectives still remained: to shift responsibility for Kenya from Whitehall to Nairobi (that is, from the Colonial Office to an internally self-governing position in Kenya or even to independence); to build into any conceivable future constitution a cast-iron guarantee that they, the Europeans, shall remain the real government of the country; and to concede to Africans no more than the shadow and the fringe of what Africans want in terms of land and livelihood, social and political rights, unquestioned equality of human rights. He noted the brutal fact that after Mau Mau and constitutional changes, the political balance of power in Kenya had not changed at all. And he quoted Tom Mboya (a Kenya African political and trade union leader) saying that the best way to perpetuate and enflame racialism is to insist on "multi-

racial" government with its connotation of group not individual rights."[11] Mboya has said that democracy is the one logical, reasonable, and just alternative for government in Kenya. By "democracy" he means recognition of the individual as against the present groups; integration instead of partnership; according of individual citizenship rights and protection instead of minority safeguards and group privileges.[12] In 1957 Kenya politics and parties were still what they were before - a flimsy camoflage for European autocracy based on the old racial economic and land interests.

A brief mention of the circumstances surrounding the 1957 election will pinpoint some of the factors. The information which follows has been gleaned from the recently published Five Elections in Africa (Oxford 1960) by Mackenzie and Robinson. When the elections took place in March, 1957 there were about 10 political associations (not really 'parties' due to the essentially local character of the groups) either registered or pending registration in Kenya. Of these, the Nairobi District African Congress (N.D.A.C.) headed by Mr. Argwings-Kodhek, was the best known and probably the best organized, though its paid up membership was only 367 as of 14 April 1957. Lacking certain conditions of environment, organization, and information/mass communication media, for the time being "all parties tend to become tribal parties...local inbreeding is reinforced by strong tribal sentiments." The Central Province provides good evidence of strong tribal voting. Mr. Eliud Mathu, a Kikuyu

and an outstanding African leader, was unable to overcome the handicap of a relatively large Meru electorate supporting Mr. Bernard Mate (21,145 out of 35,644 registered electors, although the Meru constitute only 20% of the population of the constituency). Mr. Mate's victory was thus partly due to the energy of the Meru District Commissioner during registration, partly due to the fact that the Meru were less deeply involved than the Kikuyu in Mau Mau and thus gained proportionately more loyalty certificates (necessary to validate a voter's registration), and effectively due to tribal loyalty.

And yet in 1959 and 1960 a decisive political change occurred. At the next Kenya election in late 1960, political power is to be transferred into African hands. Over half of the Legislative Council seats will be filled by election on a common roll with a fairly wide franchise (though seats will still be reserved for the three minority racial communities).[13] And it is in this connection that this writer thinks the political ramifications of the legal and economic revolution of 1954-1959 are to be seen. Because the events are so close to us in time, these conclusions will necessarily be tentative. It would be convenient for this paper if one could postulate direct political results of the economic reorientation. However, it seems to this writer that the implications are more of an indirect psychological kind, although the events described are so closely concatenated that direct influence is possible. The emotional atmosphere

has seemed to change. It has become permissive, enabling an escape from the previous imposed pattern of "political" development. In the new type of community enabled by the new economic and legal patterns, ethnic antitheses will gradually be replaced by class antitheses. Here the effect of the revolution may be quite direct. The psychological lever has been found which is beginning to permit a new framework of political activity.

This latter phenomonon is, of course, also related to the changing world context, the rising tide of African nationalism and the disappearance of colonial empires throughout Africa, and the "winds of change" regarding racial ideologies. But admission of these does not deny the important psychological role of this crucial five year period in Kenya. The Report of the East Africa Royal Commission deserves especially priminent mention in this connection.

Local ramifications are similar in nature to those at the central national level - a new permissive and enabling political atmosphere. Historically the colonial regime had actually done two things at once on the local level: it had inadvertently and also consciously introduced individualizing values, which weakened traditional communal ties, and concurrently it chose to recognize only native law and custom as the framework for African development. Thus it weakened one base and refused to regularize a new one. However, the economic and legal land tenure revolution will have more explicit political effects on the tribal society in which a

majority of the African population of Kenya is still embedded. Traditionally in many parts of Africa, the right to the use of land is dependent upon allegiance to a chief. The authority of chiefs, sub-chiefs, and heads of clans and families is bound up with the land. The grant, therefore, to individuals of absolute rights of ownership may disrupt the native polity by removing from the chief's control segments of land previously subject to his reallocation for "beneficial use" through his powers as land administrator and trustee. This would be true in Kenya even though the nature of African tribal society there has necessitated a different colonial administrative approach than in other areas of East Africa.

In general, the African tribes of Kenya fall into the previously mentioned Group B category of societies which lack centralized authority, administrative machinery, and constituted judicial institutions - that is, which lack government. When the British set up their administrative policy in Kenya, they consequently had to use "Appointed" authorities, which they paid, as agencies of local rule. This differed from classic Indirect Rule which simply meant government through the traditional native authorities where tribal societies were found with such centralized political structures (Group A). Nonetheless, the traditional clan elders who adjudicated land disputes of administered land for their clan families were given a prominent place in the councils which were to assist the "chiefs" and to provide liason between the appointed "chiefs" or "headmen" and the

particular clans. Since these powers have usually been most jealously guarded, the alteration of the power balance of the components of tribal organization by the removal of areas of individual tenure from their control will be important at this local level. With less political power, there may be more local reliance on the center at Nairobi for political direction. And, further, with more legal freedom from traditional considerations, there may be more scope for political party activity to reach out to these new individuals as a "grass roots" base.

Thus, both in the reserve and at the center, the legal and economic revolution of 1954-1959 has contributed vitally to an emotional and psychological reorientation, has provided a permissive atmosphere enabling more flexibility in political evolution.

FOOTNOTES

1 Hailey, Introduction to Meek, p. xviii.

2 R.L. Buell, The Native Problem in Africa, I (New York 1928), p. 316.

3 Thomas R. Adam, Modern Colonialism: Institutions and Policies (New York 1955), p. 78.

4 Thomas Hodgkin, Nationalism in Colonial Africa (New York 1957), pp. 44-45.

5 Buell, p. 369.

6 Legislative Council Debates, LXXIV (Nairobi 1957), Column 821.

7 W.M. Macmillan, The Road to Self-Rule (London 1959), p. 241.

8 Constitutional Development Committee (Dar Es Salaam 1953), p. 70.

9 Joseph Oldham, New Hope in Africa (London 1955), p. 65.

10 Constitutional Development Committee, op. cit.

11 Basil Davidson, "The Kenya Crisis," Africa South, 1 (April-June 1957), pp. 70-72.

12 Tom Mboya, Kenya Faces the Future (New York 1959), p. 32.

13 Reported in Africa Special Report, 5 (February 1960), p. 11.

IX. A Reorientation in Kenya

The conclusions to be drawn from this essay lie in the nature and potency of the legal and political implications of the "revolutionary" reorientation in the economic sphere of land tenure and land use in Kenya.

> If one considers how important the agrarian-juridical structure is in the configuration of indigenous societies, it will be realized how significant these changes are, not only from an economic point of view, but also in relation to the prevailing political...conceptions. [1]

First consideration was given to the goals and methods of the Swynnerton Plan "To Intensify the Development of African Agriculture" in some detail since they constitute the core of the new economic approach. This, in turn, was bold enough in impact to force the Government to make several legal decisions that had been held in abeyance for forty years.

> Changes in tenure may be produced by many causes. Pressure of population may necessitate a switch from shifting cultivation on many scattered holdings to intensive cultivation on a consolidated holding; or it may lead to excessive subdivision, soil erosion, and eventual abandonment. New methods of agriculture and of marketing may demand new methods of holding land. The introduction of a money crop may give a money value to land which it did not possess before. It may necessitate a new security of tenure which would be incompatible with any form of collective ownership; or it may, on the contrary, require an expenditure of capital beyond the means of any single proprietor....Again, changes in tenure may be produced by the direct action of the local Colonial Governments, which, even if they have

> not assumed the ownership of the land and prescribed the manner by which it shall be held, may yet have assumed other forms of control. [2]

On the basis of the available information, it seems justifiable to conclude that it was the success of the economic experiment - coupled with the impact of the East Affica Royal CommissionReport - which made at least the legal breakthrough possible. Even in 1956 at the time of the Arusha Conference, the Government had not yet formally committed itself to a policy which would recognize and regularize the emergence of African "individual freehold tenure" and land sale. An awareness of the dangers involved in making land decisions in a colonial situation had surely prolonged the caution. But by 1959 many external pressures had materialized which stressed the folly of failing to provide channels for the implementation of African desires. One wonders whether the use of the economic arena for the break-through was merely due to the inherent logic of the historical situation or whether the choice was conscious and deliberate. Certainly the economic needs were patently obvious to all and the criteria of judgement were perhaps more objective. For those who were not acutely aware of the political power implications of land, the emotional stumbling blocks in the form of implications may have been veiled until a denial of the inherent logic of the new economic approach was almost impossible. Thus the essay discussed first the economic revolution in land use and tenure because it seems valid to conclude that these concerted economic changes were largely

responsible for the decision to revise the legal framework of African land tenure. And it seems valid to conclude that the Swynnerton Plan did, in fact, initiate a "revolution" not only within its own rubric, but also in retrospect because of the legal and political repercussions and changes to which it gave an impetus.

Next the paper traced the history and described the meaning of the statutory enactments (Ordinance Nos. 27 and 28 of 1959) for the adjudication, registration, and issuance of freehold title to the holders of "individual" rights in land. This was done at first briefly for chronological sequence, and in a later chapter quite fully in terms of the Kenya court hierarchy, of the evolution of native law and custom, and finally of the creation of a new legal synthesis out of the previous pluralism of land law. It seems valid to conclude that the statutory legal changes will have ramifications at the local level primarily through the administrative channels of direction given by the District Commissioners to the district courts and councils. What changes the African courts themselves will consequently be willing to recognize and regularize in traditional land law is the other prime consideration. It further seems valid to conclude that the unification of land law itself will have an influence on, and probably already points the direction to, the nature and form of any future Kenya legal system which is adopted in other civil and personal law spheres. The tangible results may not yet be terribly wide-spread, but

the ideological tools have been prepared. And the very desirable healing of the legal duality enables the formal attainment of one of the most passionate of African desires - that for equality of status.

The salient recommendations and the mood of the Report of the East Africa Royal Commission were presented to show the psychological impact owing to a fresh approach to, and logical analysis of, some of Kenya's most pressing problems. The need for real security (not the "vanishing security of a wasting asset," i.e. tribal land) and the racial fears and tensions were exposed as the basic dilemmas.

Following this, attention was drawn to the added psychological significance of the 1959 decision to open the White Highlands to farmers of proven competence without regard to race.

> To say that the settlers' retention of out-of-date social and political attitudes is the cause of Kenya's present troubles would be carrying a generalization too far...But no amount of sympathetic analysis can disguise that the settlers are bent on preserving their privileged way of life regardless of African interests. 3

The native reserves, which were originally established to keep the white man out, had come to be looked upon by the African as some place to keep him in. Through an ironic reversal, this became a method of preventing him from taking part in the development of land in another "tribal" area which he not only regarded as his in some part, but which he often saw lying unused or seriously under-developed. It

would obviously be naive to assume that a formal policy change would produce a new de facto situation and emotional atmosphere over night. However, the change - if not too late - may have enabled a welcome breathing space.

The fusion of all these factors, supplemented by other internal pressures and the strong external force of the "winds of change", have produced a change in the political power situation in Kenya in 1960. It is of vital significance to note that the concept of communal power is perhaps the most important aspect of the previous interrelationship between land tenure and politics. Since the London Conference in January 1960, it is accepted that there will be a common electoral roll, not communal, used in the selection of at least 33 of the 65 members of the new Legislative Council. A facile conclusion could be that the new permissive, enabling atmosphere created by the economic and legal changes worked so perfectly and well as to instigate political changes almost immediately.

Here it is essential to recognize the play of other factors which this paper has not tried to examine. External events such as the coming internal self-government of Tanganyika, the independence of the Belgian Congo and Somalia - all near neighbors of Kenya - have contributed powerfully to growing African assurance. And then there are personal factors such as a new Colonial Secretary, Mr. Ian Macleod; the active role of moderate Europeans such as Michael Blundell; the growing international prestige of Kenya African leaders

such as Tom Mboya after his successful trip to the United States in 1959. The internal change toward equality of status in land tenure may have given the African leaders the feeling that they were now in a position to force a compromise whatever the legal framework.

Nevertheless, while it is difficult to assess the exact role of the revolution, it is the conclusion of this paper that this consideration must not be excluded. In one emergent African country after another we see economics being shaped by politics and not vice versa. And yet the assumption seems valid that changes in economic approach, because of the implied changes in communal power status, may be symptomatic of future permissible alterations in political assumptions.

How profound and durable are these cumulative changes ? For several reasons a final answer is not possible at this time. Kenya is a British colony. As such, the Colonial Office remains the ultimate authority on all matters of policy. It can impose unacceptable solutions if it chooses to do so and is willing to use the requisite physical force, Only with Kenya independence under the auspices of an African majority will any reply be validated. The reaction to this direction and form of land development could be deprecatory. On the other hand, energetic espousal would certainly overcome present obstacles of a political creation (it seems to be African nationalist political pressure which has hampered the success of the Swynnerton Plan among the

Luo, for example) and colonial inertia, and transform the landscape with welcome alacrity. Complete or partial rejection is a possibility, as reversal of the direction toward European-like land law and other legal concepts is a possibility. But this writer does not consider it a real probability.

Perhaps the ultimate value of this study is threefold: first, the pertinence and applicability of the underlying legal and agricultural solution adopted by Kenya to a much wider area of Africa. Tanganyika and Uganda have already asked for help and training to initiate a similar program for revising their framework of land tenure and land use (though of course the internal situations, especially regarding settlers or a reserve policy, are vastly different and one is a Trust Territory). Second, the overriding urgency of evolving a suitable framework for interracial cooperation and for reconciling the traditional authorities to the growth of modern political power. And thirdly within Kenya, an indication that a valid solution to the land and legal problems could render obsolete the raison d'etre of ruinous tribal political and ideological policies (Mau Mau) and enable progressive and constructive political participation on a national level. The "revolutionary" changes in Kenya - if not too late - give evidence of a new step in British colonial policy. And still the future of Kenya is uncertain.

FOOTNOTES

1 P.J. Idenburg, Land Tenure Symposium Amsterdam 1950 (Leiden 1951), p. xi.

2 Meek, pp. 289-290.

3 Rawcliffe, p. 35.

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