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Introduction

Some 90% of the population of Kenya lives in the rural areas and depends on agriculture, in most cases small-holder agriculture, for its livelihood. Patterns of land use and land distribution vary enormously throughout the country and, in particular, the effects of the segregationist land policies of the colonial administration continue to be significant today, twenty years after the legal barriers between the African Reserves and the Scheduled Areas (reserved exclusively for Europeans) were dismantled. In the former Scheduled Areas the main thrust of the government's policy has been to secure the transfer of farms in African ownership. In the early years after Independence many of such farms were bought by the government and subdivided for various types of settlement, though in more recent years it has become increasingly common for Africans to purchase European farms, either as individuals or forming companies or partnerships for the purpose. However, while the land transfer programme in general and the establishment of settlement schemes in particular represent a significant component of Kenyan land policy, they remain outside the scope of this paper.[1] I am solely concerned here with the former African Reserves and with the attempts that have been made to use tenurial reforms to promote agricultural development in these areas. The expression "land reform" in the title of this paper refers to the land adjudication programme, i.e., the process in the course of which customary land rights are adjudicated, land holdings consolidated (where appropriate) and registers of title drawn up.

The programme was first implemented in the Kikuyu Land Unit in the mid fifties.[2] At this time the Kikuyu Land Unit was seriously overcrowded and was suffering increasingly both from soil erosion and from the fragmentation of holdings. While agricultural officers did take measures to secure good land use and to encourage the voluntary consolidation of holdings, it was only in the conditions of the Emergency that a more radical land policy evolved. With a view to weaning the Kikuyu away from their allegi nce to the Mau Mau guerillas based in the forests bordering the Land Unit, the Colonial government took two related courses of action. It confiscated the land of activists and those suspected of aiding the activists, with the intention of distributing it to the loyalists and, secondly, it embarked upon a compulsory villagisation policy, as security was difficult to maintain while the Kikuyu continued to live in scattered settlements. It

was realised at the same time that this would be an appropriate moment to press ahead with large-scale, compulsory land consolidation schemes, especially since this would provide an opportunity of rewarding loyalists with larger and better holdings.

At first little attention was given to the exact nature of the title which the "owner" of a consolidated holding would acquire. Influential Kikuyu had for a long time been demanding individual titles and while certain colonial officers concerned about the social implications of acceding to their demands, agricultural experts saw customary land law as an obstacle to development, particularly since the traditional rules relating to the allocation and inheritance of land were largely responsible for fragmentation of holdings that had occurred. Thus the Swynnerton Plan proposed that

> the African farmer...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 for financial credits. [3]

The East Africa Royal Commission endorsed this proposal, recommending specifically the adjudication and registration of individual titles in suitable areas, and in 1959 the Native Lands Registration Ordinance was passed which provided processes for the consolidation of land;[4] and for registration of title to apply to consolidated land, and for adjudication of disputes.

This system, embodied today in the Registered Land Act 1963,[5] is based on the English land registration system. It is, however, important to note that the Ordinance introduced a complete code for land registered under its provisions. Only intestate succession to registered land continues to be governed by customary law. No attempt was made to reproduce customary forms of landholdings by providing for some kind of group title or family representative title,[6] nor was consideration given to the possibility of establishing producer cooperatives or state farms. The individual smallholder was seen as the key to rural development. Accordingly, registration of a person as proprietor of a piece of land operated to vest in him absolute ownership of that land, free from all other interests and claims, but subject only to registered interests and such other overriding interests in the land.[7]

Since Independence the government of Kenya has implemented the land adjudication programme with great vigour since it sees it "as a major precondition for increasing land productivity by preventing uneconomic fragmentation, by encouraging long-term investments in the land, and by creating the collateral for farm credit."[8] By mid 1977, 4.8 million hectares of

trust land had been adjudicated and the government plans to raise the total to 8.4 million hectares by 1983.[9] The programme covers virtually all the agricultural areas of Kenya and since 1968 it has been extended to the pastoral areas, particularly to Masailand. As it was neither practical nor desirable to register individual titles throughout the pastoral areas, this extension required legislation enabling the registration of some form of group title. The Land (Group Representatives) Act 1968, which vests title to land in group representatives, was therefore passed to provide a legal foundation for the establishment of group ranches in these areas.[10]

As has been seen, the arguments advanced in favour of the programme are many and varied. At the very least it is designed to put an end to boundary disputes, to make titles secure and to introduce a safe, simple and cheap system of conveyancing. It is also hoped that it will encourage farmers to invest labour and profits in their holdings, that it will enable them to offer registered titles as security for credit and that, by creating a land market, it will put an end to the uneconomic parcellation and fragmentation of landholdings. However, while the programme is commonly presented as merely providing a legal framework within which greater agricultural productivity may be achieved, its political and social implications cannot be ignored. After all, it was designed at the outset as a way of rewarding those loyal to the government (often the wealthier farmers) at the expense of its opponents (often the land-hungry). Moreover, Swynnerton predicted that as a consequence of land registration "...energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class," a process which he welcomed as "a normal step in the evolution of a country."[11] The extent to which the programme can be said to have resulted in increased socio-economic stratification in the rural areas will receive comment.

However, this paper is primarily designed to give an overview of the land reform programme: to describe the legal structuring of the programme, to assess the extent to which it has achieved its objectives and, in particular, to consider the lessons that a study of the programme can teach us about the use of law as an instrument of social change. Although lip-service is occasionally paid to the importance of preserving communal values and the other virtues of the traditional African way of life,[12] official rhetoric in Kenya sees customary law as an obstacle to development and to the creation of a strong united nation. The decentralised, variable and inarticulate nature of customary law makes it an inappropriate instrument for implementing modernising policies. The government of Kenya has therefore sought, in a number of instances, to replace customary law by a unified system of law based largely on English legal concepts, thereby indicating its belief in the effectiveness of legislation as a mode of achieving its objectives.[13] However, it is now a cliche of law and social change studies

that there is often a serious discrepancy between the law in books and the law in action; indeed we may perhaps find it more surprising that the mere enactment of statute has any effect at all, particularly where, as in the case of the Kenya land reform programme, considerable changes of behaviour are required on the part of those at whom it is directed.

The land adjudication process.

A distinctive feature of the land reform programme is its use of elected, unpaid local committees at all stages of the adjudication process and particularly in the settlement of disputes. An executive officer is usually appointed by the land adjudication department to act as a kind of general secretary to the committee, advising members on points of law and procedure and enjoying responsibility for the preparation of the adjudication record. As the land register is based on the adjudication record, the success of the adjudication process largely depends on the thoroughness and honesty with which the committee sets about its task. While the Land Adjudication Act establishes a rather complex appeals' system, it does not provide for an appeal to the courts; at the apex of the system is the Minister of Lands and Settlement, and his order is final.[14] Once all the appeals procedures have been exhausted, the land register is drawn up and it should, of course, act as a mirror providing an accurate and complete reflection of all interests that subsist in relation to a given place of land. Registration of title is not intended to effect any change in substantive rights; indeed, "(I)t is... a cardinal principle of adjudication that it recognises and confirms rights which actually exist."[15] Nevertheless, it is clear that the land adjudication process operates to confer on some people more extensive rights than they fromerly enjoyed while depriving others of their customary rights. There are two reasons for this. One is inherent in the technical alien nature of the system which is being introduced and the other arises from the manifold opportunities offered to individuals to manipulate the adjudication process to their own advantage.

It is clear that a heavy burden of responsibility rests on the officer charged with preparing the adjudication record. If he is satisfied that any person has, under recognised customary law, exercised rights in or over land which should be recognised as ownership, he is required to determine that person to be owner of that land.[16] In addition he must record the names of those entitled to any interest not amounting to ownership, including any lease, right of occupation, charge or other encumbrance, whether by virtue of recognised customary law or otherwise.[17] These provisions rest on two questionable assumptions. They assume that it is possible to equate rights over land recognised by customary law with rights recognised by the Registered Land Act 1963 and they assume that those persons

responsible for preparing the adjudication record have the time and expertise necessary to secure the protection of customary rights. If these assumptions are not well founded, as will be argued here, then land adjudication will have the effect of rearranging land rights and increasing the probability of disputes arising at a later date.

The use of technical legal terminology specific to one legal system to describe the incidents of another very different legal system, must inevitably create a distorted picture.[18] Certainly writings in English about customary land tenure abound in spurious correlations of this kind. The truth is that institutions like the Leviritic Union, the Jadak (Luo) or Muhoi (Kikuyu), the "redeemable sale" (Kikuyu) and so on, do not fit very comfortably within the structure of English land law; there are no exact equivalents to be found. An even more serious problem arises from the difficulty of defining adequately the interests of individual family members in land occupied and farmed by the family, for it is clear that on the registration of, say, the household-head as absolute owner, the rights of his mother, wives and children, etc., will be extinguished, if no way is devised to protect them. In practice, the adjudication authorities are only concerned with identifying the "owner" of a piece of land and make no attempt to record lesser interests. This is hardly surprising as neither the committee nor the recording officer have the expertise or time required to carry out such a task. They are generally men of limited education, totally ill-equipped to handle sophisticated English legal concepts (e.g., trusts, contractual licences, overriding interests), and they are pressed to complete the adjudication process as swiftly as possible. The result, however, is that the process deprives some people of their customary rights while conferring new rights on others. As it is seldom clear at the time that this is what is happening and as those concerned lack legal advice and have, themselves, only the vaguest understanding of the implications of land registration, it is usually some time before the inevitable disputes break out.

The facts of Esiroyo v. Esiroyo and another[19] are fairly typical of the sort of dispute that arises. Here the plaintiff was the registered proprietor of a twenty-two acre plot of land on which he lived with his family. A few years previously he had allocated some ten acres of the plot to two of his sons (the defendants), but after a number of quarrels, one of which had culminated in the plaintiff entering on the land occupied by the defendants and damaging their crops, he brought an action in trespass against them and applied for a perpetual injunction to restrain them from continuing or repeating their acts of trespass. The court gave judgment for the plaintiff on the grounds that, although the defendants did have rights of occupation under customary law, such rights were not overriding interests and they

were extinguished on the registration of the plaintiff as the owner of the whole plot.[20] While it is submitted that the case was rightly decided, it is difficult not to sympathise with the fate of the Esiroyo sons. However, the courts have found ways of remedying the injustices sometimes caused by land registration, where an applicant claims that he should have been registered as the proprietor of a piece of land. While the courts are not permitted to order rectification of the land register in the case of first registration, they have clearly resented this limitation on their powers and have frequently avoided its harsher implications by a flexible and robust use of the trust concept. Thus where a court finds that an applicant was, according to customary law, the "owner" of a piece of land but that for one reason or another (e.g., the applicant's youth or absence at the time of land adjudication) the defendant (often a close relative of the applicant) was registered as the owner, it will not hesitate to declare that the defendant holds the land on trust for the applicant and to order the defendant to convey the land to him.[22] Indeed, the Esiroyo sons might, paradoxically, have been successful if they had claimed that their father held the ten acre plot on trust for them. While the efforts of the courts to do justice in such cases may be welcome, it should be noted that they are in effect adjudicating land titles and providing an alternative system of appeal from the decisions of the land adjudication authorities. Yet this is exactly what the provision prohibiting the rectification of first registration was designed to avoid.

It has been suggested in the three preceding paragraphs that it is to a large extent inherent in the land adjudication process that there will be "winners" and "losers," but there is also some evidence that certain individuals may manipulate the process to their own advantage. During the colonial period there were, of course, a number of farmers, often distinguished from their neighbours by their possession of money and know-how, who were accumulating land, fencing it and developing it, and it was just such farmers who appreciated the advantages of land consolidation and who took every opportunity to extend their holdings in shrewd anticipation of the day when individual titles would be granted. In other words the prospect of land adjudication may encourage land accumulation on the part of those who understand its implications.[23] Moreover, throughout the adjudication process the odds are heavily weighted against the poor, the uneducated and those unfamiliar with bureaucratic ways. It is not simply that it may be necessary to bribe members of the adjudication committee, but that at all stages of the process calls are being made on skills and funds that most people lack. A lot depends on knowing one's rights and being able to prosecute them effectively. A system which requires the concise and articulate presentation of a case, where summonses have to be answered, where appeals have to be made in writing and within strict time limits, where fees

are payable at every stage of the process, clearly favours certain individuals at the expense of others.

The effectiveness of the register.[24] Land adjudication does put an end to boundary disputes and it is arguable that disputes about first registration will die out as people resign themselves to the new state of affairs. From this viewpoint the problems caused by faulty land adjudication are only temporary, whereas the benefits of land registration are permanent and indisputable. The former uncertainties of customary law have disappeared, to be replaced by a system where title is secure, where transactions are safe and where rights in land are relatively easy to define both by reference to the Registered Land Act 1963 itself and to the large body of case-law to be derived from other jurisdictions, particularly from England. These are three direct consequences of any system of registration of title, and important consequences they are. The title of the registered proprietor is, generally speaking, unimpeachable and no person dealing with him is concerned to go behind the register; customary procedures for transferring interests in land have been superseded and customary restraints on alienation have no legal effect.

However, the realisation of these advantages depends on the registration system operating effectively, i.e., on the readiness and ability of those involved, both farmers and civil servants, to cooperate with the system. If, for example, registered proprietors continue to deal with their land according to customary law instead of following the procedures laid down in the Registered Land Act 1963, then clearly the system is not operating effectively. Of course, unregistered dealings will generally be devoid of legal effect, but as long as those involved behave as though they had such validity, customary law will continue to operate de facto. When such dealings are eventually challenged by someone prepared to assert his strict legal rights under the Act, the courts will be faced by the same complex situations that characterised land disputes in the colonial period for which land registration was designed to eliminate. It is interesting, therefore, to consider the extent to which the land registers do reflect the state of affairs on the ground.

Not surprisingly, customary law continues to determine the way in which a household-head divides his land among his family, so that a single piece of registered land will be sub-divided on the ground between the registered proprietor and the members of his family. As such subdivisions are rarely registered, these members will be mere licensees liable to be evicted at any time by the registered proprietor. In spite of such subdivisions the land register remains an accurate record of title upon which a prospective purchaser may rely. Unregistered sales and successions do pose a serious threat to the registration system and there is evidence that

they are occurring on a large scale. Thus in one area studied by the present writer at least 30% of all land sales and at least 96.5% of successions took place off the register. As this was a relatively "advanced" part of Kenya, there is no reason to believe that the system is working much more effectively elsewhere.[25] Such figures should give the authorities considerable cause for concern, since they suggest either that people are not aware of the need to register their dealings or that they do not see the advantage of doing so. Admittedly, in a country where the legal profession is small and concentrated in the big cities and where there is no tradition of employing experts to handle conveyancing, it is not surprising that unregistered dealings occur. Of course, there are Kenyans who appreciate the need to register dealings and the relatively high proportion of sales registered may be attributed to the fact that the purchasers were generally men of education and experience.[26] Moreover, it is not clear why people should perceive cooperation with the system as being to their advantage, particularly where, as in the case of successions to land, they are dealing with relatives or friends. There is simply no incentive to spend time and money observing the complex procedures laid down in the Registered Land Act 1963 for the ascertainment of heirs and the registration of successions.

Efforts have been made to educate the public about the significance of land registration; posters are prominently featured on the walls of land registries warning of the dangers of not registering land dealings, and chiefs frequently repeat the same warnings at their meetings. The effect of such exhortations is unclear. An alternative approach would be to make use of certain statutory provisions. Thus, parties to an unregistered dealing are almost certainly committing an offence under the Land Control Act 1967.[27] Moreover, the land Registrar is empowered to summon people "...to appear and give any information or explanation respecting land..."[28] and also to compel registration of instruments registrable under the Registered Land Act 1963.[29] The government seems to favour greater use of these powers,[30] but, political and moral scruples apart, this would hardly be an effective way of dealing with the problem as it would depend on the land control board or the land Registrar becoming aware of the unregistered dealing in the first place. It is the opinion of the present writer that unregistered dealings (especially successions) will continue to occur on a large scale with the result that the land register will increasingly fail to reflect the true state of affairs on the ground. As disputes become more frequent, the courts will, in effect, be faced with the task of readjudicating land titles. If this is the case, then the wisdom of the whole registration programme is called into question.[31]

Some economic consequences.

The problems discussed in the last two sections have perhaps been insufficiently appreciated by the government, partly because they are regarded as temporary, as the "growing pains" of the system which will disappear as the adjudication machinery becomes more efficient and landowners more sophisticated, and partly because the justification of the land reform programme has almost invariably been argued in economic terms. The economic benefits which the programme is claimed to bring about seem to fall into two categories. In the first place, it is argued that as landowners now enjoy security of tenure, they have an incentive to invest in their farms. Money that may previously have been spent on litigation over boundaries can now be productively employed in introducing new crops, purchasing new equipment and generally developing their land. Farmers are more likely to make use of the agricultural extension services and, most important of all, they will be able to raise loans on the security of their registered titles.[32] The claim that registration of title leads to increased investment in the land has been made on numerous occasions and seems, indeed, to be the most important single consideration in the minds of the programme's advocates. It is a claim which is obviously difficult to prove. There can be no necessary connection between registration of title and economic development. Moreover, it is difficult to attribute any development that has occurred to a single factor, particularly since the last twenty years have seen an enormous expansion in many fields of government activity, in communications, in education, in the provision of extension services and so forth. The second kind of economic benefit that is credited to the land reform programme relates to the pattern of landholding. It is argued that the fragmentation and the parcellation of landholdings have an adverse effect on agricultural productivity and it is hoped that, as a result of the introduction of the registration system, a land market will emerge which will enable farmers to sell off uneconomic pieces of land to those able to farm them more effectively. That the existence of a land market might result in certain farmers accumulating land at the expense of making others landless has rarely been a cause for concern in Kenya.

While no discussion of the land reform programme would be complete without some examination of its economic implications, the issues involved are highly complex and it is obviously impossible here to treat them in the detail that they deserve. However, although the discussion will necessarily be superficial and many of the conclusions tentative, it will be argued that the justification of the land reform programme in terms of its economic consequences is difficult to sustain.

(i) Credit. There are a large number of organisations operating within Kenya today which provide credit to farmers, and they differ both in the criteria they employ, in the kinds of security they require and in the control they exercise over the use of their loans. While, therefore, it is difficult to make any generalisations about the provision of credit and its role in smallholder agriculture, such studies that exist indicate that there is no reason to attribute much of the agricultural development that has occurred in Kenya's smallholder areas over the last fifteen years to the farmer's newly-acquired power to raise loans by charging his land. In the first place, a mere glance at the land registers shows how rare it is for farmers to charge their lands; thus in two separate areas studied by the present writer (both relatively "advanced" areas) only about 9% of land-owners had raised money by charging their lands and this was over a period of 11/15 years. It is not that farmers are ignorant of the possibility of raising loans on the security of their land, but that the supply of credit falls a long way short of the demand for it.[33]

It is pertinent, therefore, to ask which farmers do have access to credit, and here the evidence is unanimous that lending institutions tend to favour the better farmers, particularly those (e.g., traders or government servants) who enjoy off-farm incomes. Thus applications for Agricultural Finance Corporation Loans are channelled through the local Agricultural Officer after the applicant has received a visit from one of the extension staff and a farm plan drawn up. Shortage of staff, however, makes it impossible for even the most conscientious Agricultural Assistant to visit all the farms in his area in the course of a year and in practice they tend to concentrate on the better farmers, partly perhaps because these farmers are the men who could influence their career prospects, but mainly because it is widely believed in the extension services that, as resources are limited, they should be distributed where the rewards are likely to be the greatest, i.e., among the better farmers.[34] This strategy of "betting on the strong" combined with the A.F.C.'s increased emphasis on the credit-worthiness of an applicant for a loan, results in the differential provision of agricultural credit and ultimately, of course, in the heightening of rural inequality. In the more highly developed areas, where banks may be a more important source of credit than government agencies, the picture is similar; while the banks almost invariably require the borrower to charge his land in their favour and to deposit his land certificate with them, they (understandably) favour farmers with off-farm incomes.[35]

Although it is generally agreed that it is largely the better farmers, particularly those with independent sources of income, who have been able to raise loans on the security of their registered titles, it is not clear that this has always secured agricultural development. The majority of bank

loans, for example, do not appear to be used for agricultural purposes at all. Moreover, even where the loans are used for agricultural purposes, as are A.F.C. loans, it might be argued that agricultural productivity would be more effectively promoted by channelling them to the poorer rather than the richer farmers and that a government subsidised loans system should take more account of a farmer's need for credit than of his credit-worthiness.

The importance attached by lending institutions to an applicant's credit-worthiness is explained by the fact that a registered title does not in practice constitute good security. There is evidence that the banks, in particular, are extremely reluctant to realise their security, preferring to write off a debt rather than incur the odium to which the exercise of their statutory power of sale would expose them. It has been suggested that their main motive in taking a charge on a borrower's land is to induce the farmer to take seriously the commitments he has entered into.[36] Moreover, other forms of security do exist and may prove more effective; in particular, the irrevocable letter of instruction to a marketing cooperative may prove an appropriate alternative to the charge of land.

Finally, it should be noted that the common belief, shared by the government, that it is primarily lack of credit that has retarded agricultural development has been questioned by a writer with considerable experience of smallholder agriculture in Kenya. She concludes:

> There is evidence from many parts of Kenya of the successful and widespread adoption of new practices, some of which involve substantial investment expenditures, without the provision of credit, and there is evidence of plentiful supplies of rural savings. It is certainly possible that the important requirements are the technical information, the extension advice, the farmer education, the availability of inputs, and other elements making for high returns to investment....It may well be that alternative measures to aid smallholders would represent more effective uses of scarce development resources than programmes of subsidised credit.[37]

However, even assuming that the availability of credit is an important precondition of agricultural development, it seems hard to justify the land registration programme in terms of the amount of credit for agricultural investment that has been given to farmers on the security of their registered titles.[38] Development which has occurred in recent years may in

part be attributable to that security of title which is conferred by registration and which may provide an incentive to invest in the land.[39] But the role of credit does not seem very significant.

(ii) Pattern of landholding. It had been hoped that the security of title conferred by land registration would create a land market enabling farmers owning unworkable plots or fragments to sell them to others who would be in a position to develop them more efficiently. The pattern of landholding would naturally be affected; holdings would become larger and consequently, it was argued, more productive. The promotion of agricultural development seemed to be the main concern and little thought was given to the fate of those who would become landless in the process.

It had been seen that the land registration programme had its roots in the various schemes set up in the nineteen-fifties to consolidate holdings in the Kikuyu Land Unit, and there can be no doubt that the sort of fragmentation that existed then, when a single family might have literally dozens of tiny plots, had an adverse effect on agricultural productivity. No other areas suffered as badly from fragmentation as the Kikuyu Land Unit and over the last fifteen years it has been the policy of the government to encourage the voluntary consolidation of holdings where appropriate.[40] The land consolidation programme has been generally successful and, as far as one can judge from the scanty evidence that exists, there is little likelihood that a process of refragmentation will occur on an alarming sale. It is true that the sale of a plot of land is likely to result in increased fragmentation of ownership, but it is less likely to result in increased fragmentation of use (e.g., because the purchaser is buying the land for his son). Moreover, even where fragmentation of use does occur, agricultural productivity may not be adversely affected, if only because it is the better farmers, often farmers who can afford to hire labour, that tend to purchase land.[41]

The parcellation of holdings presents a more serious problem. Even at the time of land registration there were in many areas a large number of plots that were too small to be economically viable and the situation has since deteriorated owing to the continued operation of the customary law relating to the allocation and inheritance of land.[42] Farm profits decline as the number of people dependent on the land increases, and credit becomes harder to raise as plots become smaller and more congested. A number of ways of breaking this vicious circle have been proposed, though none of them has proved very successful. One device has been to determine the minimum acreage required to make a holding in a given area economically viable and to prohibit the registration of holdings which are smaller than this minimum. Thus the Land Control Act 1967 provides that

a land control board ought generally to refuse its consent to the division of land into two or more parcels where the division would be likely to reduce the productivity of the land.[43] The local agricultural officer, often himself a member of the board, will generally determine the minimum acreage for a particular locality. This system has not proved very effective for a variety of reasons. Firstly, it is useless to set minimum acreages without taking into account the number of people who live on the land and depend on it for their livelihood. Secondly, the minimum acreages set by the agricultural officer often exceed the average size of holdings at the completion of land registration. Thirdly, the land control boards in practice tend to ignore such considerations. Finally, it is extremely rare for subdivisions to be referred to the boards; instead, the land is subdivided illegally on the ground.

Another attempt to control land parcellation was made by the Registered Land Act 1963 which empowers the Minister of Lands and Settlement to prescribe for any registration section the maximum number of persons who are allowed to be registered in the same register as proprietors[44] and provides that until he does so prescribe, no dealing shall be registered which, if registered, would have the effect of vesting any parcel of land in more than five proprietors.[45] Although this provision is partly designed to facilitate conveyancing, the fact that the Minister may prescribe different maximum numbers of coproprietors for different areas clearly indicates that the section was also intended to prevent the unlimited subdivision of land. Moreover, provision is made for the compensation of an heir who is prevented by this section from being registered as coproprietor of land to which he is entitled under customary law.[46] This has not proved a very successful device for controlling land parcellation. In the first place, it is hardly a very satisfactory solution that heirs should be compensated with other property, especially as the land will constitute the principal if not the only asset of the estate. Secondly, in cases where there are more than five heirs it would be possible to register the land in the names of five of the heirs to hold it on trust for themselves and the remaining heirs. However, the main reason why S. 101 (4) has proved a dead letter is that so few successions to land are registered.

It remains to consider the extent to which land registration has created a situation where the owners of plots that are not economically viable are prepared to sell them to bigger farmers in a position to develop them more effectively; after all, this was commonly seen to be the consequence of the establishment of a land market free from customary restraints on alienation. In fact the very opposite seems to be the case, and as far as it is possible to generalise, it would appear that the smaller the amount of land which a person owns the more reluctant he becomes to sell

it. Thus, in areas of acute land shortage the market in land begins to stagnate. Interestingly enough, traditional residence patterns may be abandoned and new forms of cooperation adopted in an attempt to make the most of the available land. It is likely, however, that gradually fields devoted to cash crops will be turned over to subsistence crops or used for residential purposes. Agricultural productivity will obviously suffer, but in most cases the landowner will be most reluctant to leave the land which provides him with the only security that he has. Nor will he be prepared to hand over his land to a single heir, at least without making adequate provision for the others. The customary duty of a man to provide land for his sons must still be carried out.

It is appropriate to conclude this section with a brief look at the identity of those who are buying and selling land, with a view to testing the truth of Swynnerton's prediction that the land reform programme would create both a landed and a landless class. It has already been noted that during the colonial period certain farmers (the "better" farmers) were accumulating relatively large areas of land and that the prospect of land adjudication often operated to accelerate this process. Such evidence that exists suggests that it is the same people, the better farmers and those enjoying off-farm incomes, who are purchasing land today and it is the poorer farmers who are selling land, with the result that the pattern of landholding is being radically transformed, even though it may still be premature, at least in most areas, to talk of the creation of a landed and a landless class. Thus, in a study of forty-one sales of land in an area of Western Kenya the present writer found that in thirty-six cases the purchasers had off-farm incomes and that in two other classes they were wealthy farmers; only in three cases could the purchasers be described as ordinary farmers.[47] Of the forty-one vendors only two had off-farm incomes and twenty-nine admitted selling their land in order to meet some pressing demand for cash. In three of these twenty-nine instances the sales had made the vendors landless. Crude as these statistics admittedly are, they do suggest that Swynnerton's prediction was correct and that insofar as the land reform programme has stimulated the growth of a land market, it has resulted in increasing disparities of landholding. The government does not seem to regard this situation with any concern; certainly the provision in the Land Contract Act 1967 to the effect that the board should generally refuse its consent to a transaction where the purchaser already has sufficient agricultural land is totally disregarded.[48]

One consequence of the process described in the previous paragraph is the growing use of paid labour on farms. It is, predictably, the better farmers and those landowners with off-farm incomes who tend to hire labour. Similarly, it is generally the poorer farmers who find themselves

compelled to seek paid employment away from their farms, and many of them will take work as labourers on the farms of their richer neighbours. Such labourers are not, strictly speaking, landless; they have access to land in the area, but their plots are small enough or their families large enough to enable them to work elsewhere during the daytime. It is, therefore, probably too early to talk about the emergence of a class of landless labourers in the former Trust Lands, though there can be little doubt that this is likely to occur over the next few decades.

Conclusions

An attempt has been made in the foregoing pages to present a general picture of the Kenya land reform programme and to assess its achievements in the light of its declared objectives. It represents a highly ambitious experiment in the use of law to engineer social change, since it assumes that the statutory introduction of a new tenurial regime will automatically trigger off certain responses from which a number of desired ends (legal, social and economic) will surely flow. However, a study of the working of the programme not only suggests that this assumption is not justified, but also throws light on the complex relationship between law and development. It is simply not sufficient to conclude that the programme provides yet another example of "soft development[49] and to attribute this to the innate conservativism of the people concerned.[50] After all, we are not dealing with a case of "fantasy law."[51] Far from being a dead letter, the programme has had a variety of consequences, both direct and indirect, and it therefore provokes us to try and identify the factors that enhance or limit the effectiveness of law as a developmental tool.

First, there is the question of communication, for it is obviously unrealistic to expect bureaucrats and farmers to change their behaviour in conformity with the law unless they are made aware of the sort of behaviour that is required. In the absence of any institutionalised channels for the flow of information the task of communication inevitably lies with the bureaucracy, as indeed it did during the colonial era, and its success in carrying out this task will clearly depend on a number of factors including its own understanding of the information, its resources in relation to the size of the task and its susceptibility to countervailing pressures. It has been seen that, in the case of the land reform programme, communication has often been unsatisfactory. Thus the land adjudication authorities are not fulfilling all their statutory duties. This may in part be due to a scarcity of resources and to competing considerations of speed and convenience, but should principally be attributed to the highly technical nature of the information to be communicated. It is unlikely

that senior officials of the Land Adjudication Department fully grasp the complexities of the adjudication process and it is therefore not surprising that local adjudication officers, not to mention the committee members, should have an imperfect idea of the nature of their powers and duties. Similarly, it would seem that the bureaucracy has not been wholly successful in communicating to landowners the nature of the system of registration of title and, in particular, the need for them to register dispositions of and successions to registered land. Here again the reason lies partly in the scarcity of resources but mainly in the abstruse nature of the information to be communicated.[52]

Even assuming that the necessary information has been effectively communicated to those whose behaviour it is desired to change, it is unlikely that they will conform unless they perceive it to be in their interest to do so, and the greater the changes in behaviour required, the greater the need for measures to induce conformity. Such measures fall broadly into two categories, those that rely on sanctions and those that rely on rewards. The use of sanctions to secure developmental ends has not had a very encouraging record. It is not simply that their use tends to increase bureaucratic power and to undermine the government's legitimacy, but they do not even work very effectively, especially where, as in the case of the land reform programme, considerable changes of behaviour are required on the part of a substantial number of people. The criminal law, in particular, is a singularly blunt instrument and it is not surprising that, as we have seen, the authorities have not resorted to its use to secure conformity with the programme. Enforcement machinery on a scale unthinkable in present circumstances would be required to ensure that landowners register dispositions and successions, that they submit their dealings to the land control board and abide by its decision, that semi-nomadic Masai herdsmen respect the newly-established ranch boundaries and so on.

The rewards strategy is certainly a more appropriate way of attaining developmental goals. Thus, if agricultural credit was more widely available, landowners would have greater incentive to keep their land registers up to date. If membership of a group ranch was seen to confer distinct benefits, the Masai herdsmen might choose to respect ranch boundaries and obey ranch bylaws. The problem is that the "rewards" are frequently limited to quantity and also that they are seldom universally appreciated, with the result that their distribution depends on self-selection by a relatively small number of individuals. The present study has provided several examples of this process. It has been argued that there exists a recognisable group of landowners,[53] the better farmers--often men with off-farm incomes, who have clearly

benefited from the programme. It was they who were accumulating land before, and often in anticipation of, land adjudication. It was they who were able to manipulate the adjudication process to their advantage. It is they who today are extending their holdings by purchase now that the disappearance of customary restraint on alienation has led to the emergence of an open market in land. It is they who enjoy privileged access to credit and extension services. Here again the role of the bureaucracy is important and it is not surprising that even where they have not consciously adopted a policy of "betting on the strong," they are likely to favour those farmers who share their goals and who could influence their careers. Moreover, the legitimacy of the government is undermined to the extent that the bureaucracy is hierarchical, undemocratic and lacking in adequate feedback channels of communication.

There are those who find neither strategy attractive and who maintain that, as widespread non-conformity with a law brings the whole law into disrespect, a government should do nothing until near-total conformity is assured. Thus it might be argued that the introduction of a system of registration of title should have been delayed until farmers and bureaucrats understood its implications and appreciated its advantages. However, reliance in the meantime on the evolution of customary land law through the medium of the courts is hardly a feasible option for an African government. Governments are in a hurry and the imperatives of development preclude the possibility of inaction. The choice of policy lies between two poles, between socialism and capitalism, between reliance on Plan and reliance of market incentives, between the use of sanctions and the use of rewards. The policy of the Kenyan government tends to be situated near the latter pole and this is clearly demonstrated by the land reform programme.[54] Indeed, it has been persuasively argued that the individualisation of land tenure and the differential provision of credit were the devices used to mould the structure of the peasant farming economy and to bring it within the wider framework of periphery capitalism.[55] On this analysis the increasing stratification on socio-economic lines to be found in rural Kenya is an inevitable consequence of the government's decision to accept the general structure of the colonial economy. From this perspective the programme not only illustrates the limits of law as an agent of social change, but also demonstrates the way in which the law may be used to promote the development of class interests.

FOOTNOTES

1. They have attracted a great deal of discussion. See, for example, J.W. Harbeson, Nation-Building in Kenya (Northwestern University Press, Evanston, 1973).

2. For a detailed account of the early history of the programme see M.P.K. Sorrenson, Land Reform in the Kikuyu Country (Nairobi, 1967).

3. R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, 1954, s. 13.

4. These provisions are largely embodied today in the Land Consolidation Act (Cap. 283) and the Land Adjudication Act (Cap. 284).

5. Cap. 300, the Kenya legislation closely follows the Sudan Land Settlement and Registration Ordinance 1925.

6. Cf. Land (Group Representatives) Act 1968, infra and Malawi Registered Land Act 1967, s. 121.

7. Registered Land Act 1963, ss. 27-28.

8. Republic of Kenya, Development Plan 1979-1983, Part I, para 6. 247.

9. Ibid.

10. An article by the present writer entitled, "The registration of group ranches among the Masai of Kenya: some legal problems," is to be published shortly in the Journal of Legal Pluralism.

11. R.J.M. Swynnerton, op. cit., s. 14.

12. One Kenyan politician claimed that the government had "....the challenge of finding a formula by which people could be given title without destroying the communal system." T. Mboya, Freedom and After (London, 1963), p. 170.

13. E.g., the abolition of customary criminal offences; the Law of Succession Act 1972; the Marriage Bill.

14. Land Adjudication Act 1968, s. 29(1).

15. Republic of Kenya, Report of the Mission on Land Consolidation and Registration in Kenya, 1965-1966, para. 161. This report will be cited as the Lawrance Mission Report after its chairman, Mr. J.C.D. Lawrance.

16. Land Adjudication Act 1968, s. 23(2)(a).

17. Ibid., s. 23(2)(e).

18. The points raised in this section are dealt with at greater length in S.F.R. Coldham, "The effect of registration of title upon customary land sights in Kenya" [1979] J.A.L. 91.

19. [1973] E.A. 388.

20. The court approved and followed the reasoning in Obiero v Opiyo and others [1972] E.A. 227, where the facts were similar.

21. Registered Land Act 1963, s. 143(1). Moreover, s. 144(1)(b) of that Act denies the right to an indemnity to a person who suffers damage by reason of a mistake or omission in a first registration. The reasons for these unusual provisions lay in the political desirability, in the late fifties and early sixties, of putting an end to all land claims.

22. See, e.g., Limuli v Sabayi [1979] J.A.L. 187.

23. See, e.g., D. Brokensha and J. Glazier, "Land Reform among the Mbeese of Central Kenya," Africa, vol. XLIII, 1973, p. 182 at pp. 196-9.

24. Some of the points mentioned in this section are discussed at greater length in S.F.R. Coldham, "Land-Tenure Reform in Kenya: the Limits of Law," Journal of Modern African Studies, vol. 17, no. 4 (1979), p. 615.

25. After four years of full registration in the prosperous district of Kiambu, a government officer noted that over 3,000 titles were still registered in the names of deceased persons. F.D. Homa, "Succession to Registered Land in the African Areas of Kenya," Journal of Local Administration Overseas, vol. II, no. 1, January 1963, p. 50.

26. See text at footnote 47.

27. Cap. 302, s. 22.

28. Registered Land Act 1963, s. 8(b).

29. Ibid., s. 41(1). It is an offence not to comply with orders made under this section, ibid., s. 41(2).

30. Republic of Kenya, Ministry of Lands and Settlement, The Registered Land Act 1963, A Handbook for the guidance of land registers (June 1969), p. 55.

31. The Kenyan government shows remarkable lack of concern about the prospect of repeating the whole land adjudication programme. ".... the present land adjudication system only serves one generation; when the land is passed on to an owner's heirs, it is subdivided once again unofficially, and often illegally. If ownership is to act as an incentive to invest in land improvements and since it is a requirement for obtaining public services, then the adjudication procedure must be repeated." Republic of Kenya, Development Plan 1979-1983, Part I, para. 6.239.

32. The British Government made its offer to help finance the land reform programme conditional on the Kenya government's ability to obtain funds for agricultural credit and to provide the necessary advisory services. Republic if Kenya, Lawrance Mission Report, para. 404.

33. Lawrance Mission Report, para. 431.

34. One writer, who has made a detailed study of this subject, sees the way in which extension attention is "very greatly skewed in favour of the more progressive and wealthier farmers" as part of a deliberate, though ill-conceived strategy. Unlike some other commentators, however, he finds no evidence for the hypothesis that the unequal distribution of agricultural services arises from a social class alliance between extension staff and the wealthier farmers. See D.K. Leonard, Reaching the Peasant Farmer (Chicago, 1977), pp. 177 et seq.

35. Two small samples taken by the present writer indicated that slightly less than one-sixth of the recipients of bank loans had no other source of income.

36. Lawrance Mission Report, para. 427.

37. J. Heyer, "Smallholder credit in Kenya agriculture," University of Nairobi, Institute for Development Studies, Working Paper No. 85 (unpublished), February 1973, p. 29.

38. The Lawrance Mission understands the position when it states that "the limited scale of credit available has hitherto meant that the greatest possible advantage has not been taken of the costly programme of land reform." Lawrance Mission Report, para. 421.

39. One economist of considerable field work experience in Kenya found no evidence that registration of title provided such an incentive. R.J.A. Wilson, "Land Tenure and Economic Development: a study of the economic consequences of land registration in Kenya's smallholder areas," unpublished paper given to the Statistical and Social Inquiry Society of Ireland, April 1972.

40. The Land Adjudication Act 1968 was passed primarily to provide a more straightforward procedure for use in areas where no wholesale compulsory consolidation of holdings was planned.

41. Discussing the refragmentation of holdings that is occurring in Nyeri district, one writer stresses that "the circumstances are different this time because it is the more prosperous farmers who now tend to have more than one unconnected piece of land in the same area." J. Ascroft, "The Tetu Extension Pilot Project," University of Nairobi, unpublished paper presented at the workshop on strategies for improving rural welfare, 31 May 1971, p. 21.

42. In one area studied by the present writer the average size of a plot was 2.02 acres and an average of about eight persons resided on each plot.

43. Land Control Act 1967, s. 9(1)(b)(iv).

44. Registered Land Act 1963, s. 101(3)(a). The Minister has never made use of these powers.

45. Ibid., s. 101(4).

46. Ibid., s. 120(7)(a).

47. It is unlikely that more than 10% of landowners in the area enjoyed off-farm incomes.

48. Land Control Act 1967, s. 9(1)(b)(i)(c). For a detailed survey of the working of the land control system, see S.F.R. Coldham, "Land Control in Kenya" [1978] J.A.L., p. 63. An amendment to the Land Control Bill proposing the introduction of a ceiling on landholdings was rejected. Republic of Kenya, National Assembly Debates, 1967-8, Vol. 13, col. 2765.

49. Professor Seidman uses this expression to describe the situation that occurs where development rhetoric surpasses development in action. The discussion that follows will demonstrate the present writer's indebtedness to Seidman's many stimulating writings on this issue.

50. One writer seems to attribute "soft development" to people's natural resistance to change. A.N. Allott, "The Limits of Law" (London 1980), pp. 196ff. Such an explanation oversimplifies the matter.

51. I.e., a law passed on the understanding that it would or could not be applied. The expression was coined by R. Abel, "Comparative Law and Social Theory" (1978) 26 A.J.C.L. 219.

52. A further example would be provided by the failure of the bureaucracy to communicate to group representatives and ranch members the rather elaborate system of group ranches introduced in the late nineteen-sixties.

53. One writer refers to this group as a peasant leadership or élite. G. Lamb, Peasant Politics (London, 1974). Class formation is at an embryonic stage and it seems more appropriate to employ imprecise terminology of this kind to describe a rather loosely-knit and diffusely-motivated group.

54. Cf. land policy in Tanzania.

55. C. Leys, Underdevelopment in Kenya: the political economy of neo-colonialism 1964-1971 (London, 1975), especially Ch. 3.