A REVIEW OF THE LITERATURE ON LAND TENURE SYSTEMS IN SUB-SAHARAN AFRICA

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July 19, 1985

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PREFACE

This work was undertaken with the enthusiasm of youth but without its energy. My debt to all those who encouraged its completion, and were subjected to the perusal of drafts are all the greater. I acknowledge, with gratitude, the comments on an earlier version of this paper received from Dennis Anderson, David A.wood, John Bruce, Francois Falloux, Jeremy Lawrance, Francis Lethem, Don Pickering, John Russell, David Steeds and James Thomson. H. Patricia Broemser unlocked the mysteries of the literature in French and Joy Green opened the vaults of USAID and the Land Tenure Center, University of Wisconsin-Madison. Without their assistance I would have remained ignorant of these vast resources. My greatest debt of gratitude is owed to Hans Binswanger and Gershon Feder. They initiated the project, encouraged me when my energies flagged (on many occasions), and their confidence in me gave the necessary assurance that I would reach the end within a "reasonable" time. To them and to those who have assisted me their satisfaction, even partial, at reading this will suffice. They are not, however, responsible for any errors of interpretation or fact that may have crept in, or which I have held to in my ignorance.
SUMMARY

1. Despite the title, which may seem over-ambitious, this paper has three main goals: first, to clarify land tenure concepts; second, to examine changes in patterns of the land tenure in the light of historical evidence; and, finally to provide a background for further action - whether this be in the realms of research, policy or project design.

2. Literature on land tenure systems in sub-Saharan Africa has generally used the term "communal tenure" with such imprecision that it has muddied, rather than clarified, the meaning of the term. This confusion has been compounded by the equation of the term "communal tenure" with "customary", "traditional" and "backward". These equations tend to reinforce preconceptions about the relative merits of either individual or communal tenure and to cloud objective judgement. In the process the variety of manifestations of either system have been lost sight of. It would be preferable, given the pejorative connotation that the term "communal tenure" often brings to mind, to substitute the phrase with the term "indigenous tenure". This term would cover all land tenure systems (whether or not they approximated to notions of "individual" tenure under Western law) which evolved locally in contrast to systems which are received or imposed from outside.
The direction of change

3. It would have been a happy event if one could have discovered, in the course of this review, a neat, ordered sequence of change which could support a theoretical framework. Fortunately, there is none. There are no stages of growth, no irreversible evolutionary sequence. We think that this is fortunate since much of the literature has been undermined by the desire to fit facts into a theoretical framework; concepts have often peverted an appreciation of what was happening on the ground. The result, as Spencer once defined it, has been a tragedy.

4. One can point, however, to directions: the results of human adjustments to the same situation can differ, there is no identical response — compare, for example, the difference in responses to the drought by the Mossi (of Upper Volta) and the Bambara (Mali), the Maures (Mauritania) and the Serrakole (Senegal). At all times, in discussing change, climate and soil, the presence of disease and its control have to be considered — they set the outer limits within which human choices are made.

5. With these notes of caution, then, what are the directions that one perceives? For analytical purposes, and for those purposes alone, the directions appear to follow three main stages of tenurial change.
(i) Land "freely" available

6. This first stage coincides with the pre-colonial era and the first few decades of colonialism (ending about the 1930s).

(a) Land is freely available, that is, new lands can be opened up whenever the population in a locality grows beyond the local capacities of the land or leaves a group as a result of disputes. Land, therefore, has "no value". It is labor that is important since that is the only way in which land can be made productive.

(b) Since labor is the most important factor, strangers are welcomed and incorporated in the group. The definition of a "member" of the group is loose, fictitious geneologies are created, residence provides the basis of membership, marriage cements bonds, ritual provides the higher justification for group cooperation.

(c) Since technology is simple, there is no rigid classification of lands: cultivated lands are used seasonally and abandoned as soon as their productivity decreases. Individualization of land is futile. Boundaries between different groups, and of cultivated lands are ill-defined. The group uses land and group membership is a fluctuating number.

(d) It is mainly personal skills that determine leadership.
(ii) Land partially available

7. The stage covers a period from about the mid-1930s to the mid-1950s.

(a) Increasing population and colonial acquisitions of land result in relative scarcity. New lands can be opened up in regions freed from disease, and other marginal lands. Colonial governments close borders, encourage ethnicity.

(b) Differentiation of lands on the basis of productivity and gradual appropriation by families. Lands differentiated on the basis of quality and access to water. The best lands are appropriated, tenure rules more rigidly applied to these lands.

(c) Land differentiation combined with difference in crops grown: cash crops grown on well-watered lands, or in compounds; subsistence crops on lands where shifting cultivation practised.

(d) Tree crops planted to affirm title to (that is, control over) land and to lengthen the period of control.

(e) Migration to new lands still possible, but reduced and result in the more continued use of marginal lands. Fallows decrease.

(f) Grazing areas cover lands of inferior quality. But area is reduced.
(g) Labor still a problem - increased because of demands of colonial regimes, the need for cash, opportunities in industry and the urban areas.

(h) Strangers still welcome but given inferior lands, payments for land gradually converted to cash payments. Rights of tenants increasingly restricted: cannot grow certain types of crops which might allow them to claim title.

(i) The major source of credit still informal, but increasing inability to obtain credit from administrative and commercial sources under certain conditions (mainly formal title which is not widespread in rural areas).

(j) Land values increase: growing scarcity of better land, development of communications and access to markets, urban competition for land.

(k) Land "sales" now a regular feature - whether legally recognized or not.

(l) Increased control of land results in more closely defined inheritance patterns: tree-crop lands and lands with water sources confined mainly to extended family.
(m) Even extended families now subject to economic strains -- fission.

(n) The use of higher level technology, first for cash crops.

(o) Land disputes increase -- with declining ability of customary procedures of settlement to determine these.

3. Land scarcity

(a) All arable lands now taken up, increasing movement into marginal areas with the consequent reduction of grazing areas.

(b) Distinctions and control first applied to better lands (those with access to water, or compound lands) now extended to subsistence areas. Areas for subsistence cultivation reduced by increasing use of these lands for cash crop cultivation.

(c) Inheritance rights restricted further -- primarily to nuclear family members.

(d) Land disputes, formerly mainly between families and villages, now within families as well.

(e) Stranger farmers no longer welcomed; rights of tenants further restricted no longer any rights to land.
(f) Sales continue - those recognized in law provide an opportunity for the locally powerful, urban residents, and civil servants to acquire lands.

(g) Landlessness becomes apparent.

(h) Labor still a problem, but with reduction in numbers of stranger farmers and tenants farmers faced with choice between increasing use of technology and paying for labor. Decline, and almost total disappearance, of customary cooperative labor groups.

(i) Landholding still the major test of status with greater disparities between the landed and the landless, and, among the landed skewed distribution of lands apparent.

(j) Rise in the numbers of absentee male farmers, women often become the main cultivators but their rights are not recognized in law, and customary allocations of land decrease.

(k) The rule that every member of a group has access to land is recognized more in theory than in practice.

(l) Movement of crop cultivation into grazing areas further reduces these areas and exerbes conflicts between herdsmen and cultivators.
(m) Increased sources of commercial credit, mainly utilised by the influential, the large landlord, the businessman with rural land not necessarily accepted as adequate collateral.

(n) The rise of parastatal agencies which are not covered by legislation relating to land ceilings.

(o) Increased insecurities of tenure for individual land holders as a result of legislation: frequently amended, providing power to the State to acquire land for public purposes, complexity of formalities to be complied with. One type of response by farmers: to cultivate more lands than they need by planting tree crops; demarcation of land boundaries.

(p) Distinction between settled farming and transhumance blurred: increasing numbers of farmers keep livestock, mainly as an investment.

9. It would be readily appreciated that the changes have not taken place at the same time in sub-Saharan Africa, nor is the change unidirectional (there are reverses). Further, where land is still available, the customary rule that "land belongs to the person who clears it, in the absence of any other prior claim" still applies.

10. This brings to the fore the question of soils, climate, and the technology used for cultivation. It also means, as pointed out earlier, that in considering the direction of change, account must be taken of the technology which can be employed. For instance, over the broad Sahelian
belt the introduction of tractors together with the absence of permanent water sources for the vast majority would not be feasible. It is equally doubtful whether the same technology can be used in the forested areas of the Congo. Further, given the level of technology used for cultivation presently employed in the Congo cooperation is essential and shifting cultivation continues. Therefore, though there are instances of individual tenure, these are rare. The observer would still tend to class the tenures as "comunal", even though there is individual appropriation of the products of the soil and well-organized rights to exclusive use while the defined parcel of land is being used.

11. To what extent does the literature support the definition of stages and the developments regarding tenure that have been outlined above? An ideal situation would have been to recover a mass of data resulting from repeated studies in time of each of the different groups. These are extremely rare. Most of the literature is the result, quite understandably, of reconstructions. Since the majority of the literature reviewed falls into the category of reconstructions, it would be useful to review some of the factors that induce tenurial change — all of these are referred to in the "stages" described earlier.

Factors inducing tenurial change

12. Population is undoubtedly, the most important factor. But its importance must be weighed in the light of other options: ability to find alternative lands, alternative employment opportunities, and the level of technology used.
13. The type of land and, most importantly, access to water, increase land values inducing appropriation by individuals and families. Irrigation projects, for example, increase the values of land and induce speculation.

14. Access to communication facilities provide the basis for surplus production and sale, particularly since communications developments coincide with market development. Access to communications facilities increases land values, encourages population growth near these facilities, increases individualization of land holding and the development of permanent cultivation.

15. Climatic variability, drought in particular, has a drastic impact on land use patterns.

16. The introduction of cash crops (including tree crops) significantly results in tenurial change in the direction of individual appropriation of land.

17. Formal law has served more as a facilitator for those who learned the idiom and who use it to plan strategies to preserve or acquire control over land than as a major instrument of change, since there is uneven penetration of this law to the rural areas. Thus there often is a difference between formal law and what is taking place on the ground, the law often works in ways unanticipated by law makers and, therefore, two areas with identical legal systems may have different land-use and tenure patterns.
18. Government policies, however, at times expressed in formal legislation could have a major impact on tenure. For example, the program of villagization in Tanzania has resulted in increased semi-permanent cultivation and the almost total disappearance of shifting cultivation. So too, in irrigation projects. At times, however, as in the case of programs for herders, government activities do not change tenurial patterns.

19. Three areas for research appear most fruitful:

1. Land tenure systems as constraints on development: In the extensive debate about the relative merits of communal and individual tenures, there is little hard evidence that either system provides greater security of possession, or leads to higher productivity per se. The evidence that formal title might provide access, if only to commercial credit, is inadequate. Nor is there evidence that formal title to land removes constraints on long-term investments in land improvement and in physical capital. Even though there is some evidence that under the 'communal' system there may be greater social control on dealings in land, the evidence is sketchy. Further, formal legislation introduced by some sub-Saharan nations controlling land acquisition and transfers may create uncertainty and add constraints not present under the indigenous system. It would, therefore, be useful to determine the extent of the constraints in land markets through purposeful data collection. It would be equally important to determine the impact of such constraints on efficiency. It
has been suggested, for instance with reference to Kenya, that constraints on land dealings, together with other imperfections (in the labor and capital markets) do result in the loss of efficiency. This hypothesis deserves rigorous testing.

2. Crop livestock interaction in the Sudano-Guinean zone. Over the past three decades there has been a radical change in farming systems in the Sudano-Guinean zones of sub-Saharan Africa: the separation between sedentary agriculture and livestock herding have become increasingly blurred with increasing investment in livestock by farmers, businessmen, and civil servants. These investments have significant consequences for future cropping and herding patterns in the entire area. It is a direction of change not unknown in other parts of the world — Asia, for instance. The experience in other areas can be utilized to analyze (and, possibly predict) the future direction of change in sub-Saharan Africa. The investments in livestock have important consequences as well for transhumants — the areas of grazing are reduced, they may secure a more acceptable role as livestock specialists; but their dependence on, and conflicts with, settled farmers could also increase.

The basic premise of a research project would be that with rapid population growth cultivation would extend over most arable lands resulting in the reduction of grazing lands. What the project would attempt to document and evaluate — through a comparative review of the literature and project experience both in sub-Saharan Africa and elsewhere — are the
options available, the factors determining land allocations between cropping and grazing, the distributional impact of such allocations, and the types of tenure that would promote both equity and investment while at the same time minimizing conflicts.

3. **Protection of the rights of pastoralists in zones which are marginal for crop production.** The future of farming and land systems in areas of lower and more erratic rainfall are less clear. The extension of agriculture into these areas may both reduce the rights of pastoralists (in areas where herding is more appropriate) and also add to erosion potential. Two research issues follow: (1) what measures are necessary to protect pastoralists from the loss of lands most suitable for grazing; and (2) what are the development options for pastoralists (and agriculturists) who cannot be productively absorbed in the agricultural sectors of these regions. The answer to the first question could be obtained through a comparative review of pastoral experiences under conditions of rising population pressures in Africa and other parts of the world. The second issue encompasses far more than research merely into land rights issues.
1. Every paper needs some justification, even before its merits are assessed. The first question which must be answered is "why is this paper being written?" Two reasons provide the initial justification: first, the need for such a paper; and, second, the importance of the subject it covers.

2. There is increasing recognition of the need to understand land tenure systems in sub-Saharan Africa. Within the Bank, USAID, and other aid organizations there is the realization that an appreciation of the ways in which land is held, used (or abused), transferred, succeeded to or inherited plays a vital role in raising agricultural production, developing policy (both with regard to "urban" and "rural" land use and control), and affecting relations between individuals and groups. Not much, however, is known about the subject. The project officer or policy maker within aid organizations is faced with a complex and vast literature; works that are often at variance with each other; and the loose use of terminology to describe the many ways in which people use land. Despair is often the answer to such bewildering complexity. And yet, the phrase "land tenure", like the griot, returns to haunt those involved in development. Land tenure patterns that are said to prevail are often viewed as a brake on development, a reason why some projects fail. But is it necessary to change these patterns to set the infrastructure for progress? Can the patterns be altered? If they are altered would the changed patterns engender progress? These questions can be answered only if more is known about land tenure systems.
3. Rights to land and the ways in which it is enjoyed or exploited are important since land provides a base of power and status. Land use patterns reflect the philosophy of a group, its level of technology. When the supply of land was apparently abundant in sub-Saharan Africa, and vast areas unused — an apparent lack of use that was questionable (see Biebuyck 1963, Monod 1975) — an examination of land tenure systems was not viewed as a necessity. Now, however, as Eicher and Baker point out, "land tenure and land use policy issues will be of strategic importance in the 1980s and 1990s as the frontier phase is exhausted and the intensification of agriculture proceeds" (1982:98). It is not only in agriculture that tenure systems will be of strategic importance but also in urban areas. Urban areas are expanding rapidly into the rural periphery and within the urban area the systems of land holding are a mixture of the formal-legal and the customary. It is difficult to distinguish where urban areas begin and the rural periphery ends and the land tenure patterns within each cannot, today, be understood without reference to each other.

4. At this stage it would be advisable to point to some of the problems that we face in preparing this paper, now that its justification has been stated. The literature is vast and growing, especially with the increasing availability of records and documents relating to the colonial periods. But, since facts do not have any inherent order the authors' frames of reference tend to constrain both the "facts" deemed significant for presentation and their interpretation. In Eastern Africa, the most common frames of interpretation fall within theories of "development" and "underdevelopment" (see Leys 1975, Palmer and Parsons 1977 as examples),
both different sides of the same interpretive coin (Hopkins 1973). In West Africa "marxist" interpretations abound (Meillassoux 1964, Michaillof 1984, and Snyder 1981 are examples). The impression conveyed is that of a passive African peasant subject to inexorable change in response to exogenous forces over which the peasant has little control and is reacting, in the manner of Pavlov's dogs, to "metropolitan" or "capitalist" machinations to be either proletarianized or bound in eternal bonds to external market forces. Such interpretations add to the difficulty of sifting for facts. Further, the available literature is uneven, both in quantity and quality. Much, for instance, has been written about Kenya, S. Rhodesia (Zimbabwe), Mali, Nigeria, Upper Volta, Senegal and the Ivory Coast. Much less about Mozambique, Angola, Somalia and Madagascar. This review reflects the unevenness in the literature. Even when a vast amount of studies on a country were available, many were discarded on account of the poverty of their contents or their irrelevance to this study. Time and language constraints contributed to the elimination of references to former Portuguese colonies. The Republic of S. Africa has been excluded since the nation is not a borrower from most international aid organizations.

5. Even more subtly dangerous is the dichotomy between "traditional" and "modern" that is to be found in much of the literature on the subject. When juxtaposed, the former connotes "backward", inefficient, non-innovative, inflexible, and an archaic set of relations. The main distinguishing elements are "status versus contract", and group interests predominating over individual interests and qualifications. By definition, the "modern" is viewed as a more evolved, higher level of socioeconomic organization.
A corollary of the "traditional-modern" dichotomy is the allocation of "communal" tenures to the former, and "individual" tenures to the latter stage of development. The literature in this regard enters the realm of belief systems where the participants are either true believers or heretics, depending on the view held, for there is little empirical evidence to afford sustenance for either view.

This paper will eschew theorizing and avoid labels. It is open to the reader to find confirmation (or otherwise) for any theories that find favor. Despite the title, which some may deem over-ambitious, the goals of this paper are modest. There are three major goals: (1) to clarify land tenure concepts; (2) to examine changes in land tenure patterns in the light of historical evidence; and (3) to provide a background for further action — whether this be in research, policy, or project design. A word of caution is, however, necessary. Although generalization in the context of sub-Saharan Africa is dangerous, given the compass of this paper it cannot be avoided. The canvas is too brief to prevent broad strokes of the brush. Both brevity and generalization have an advantage: An implicit goal of this paper is to provoke discussion, to encourage the questioning of statements. If that is one of the results of this paper, much will have been served.

The following chapters will attempt to attain the three goals. First, in Chapter 2, land tenure patterns prior to the advent of the colonial powers are analyzed. Chapter 3 reviews the colonial era; the following chapter assesses the effects of colonial contact with the indigenous populations. Chapter 5 carries forward the discussion of land
tenure systems through the post-independence era. In a separate chapter (Chapter 6) pastoral systems are examined, not because there is no symbiosis between pastoralism and agriculture (or that pastoralism is not well adapted to some climatic zones) but because land tenure systems among pastoralists are fundamentally different from those of agriculturists. Chapter 7 discusses a topic over which there has been significant debate, individual tenures and registration systems. The final chapter examines areas where further data, or policy changes, might bear fruit.

II. PRE-COLONIAL ECONOMIES: THROUGH A GLASS DARKLY

9. Over the past few decades the picture of the pre-colonial economies of sub-Saharan Africa has changed radically. The earlier view of self-sufficient villages, relying mainly on subsistence agriculture, without trade relations between groups, has been discarded. It is now recognized that from at least the 12th century there was flourishing trade in West Africa, and, in the East too from almost the same period. Intergroup relations, then, were common and it was only a question of degrees of trade that differentiated one group from another (see Bates 1981; Hopkins 1973).

10. More importantly, from the point of view of this paper, we are concerned with the ways in which land was held, distributed and exploited. This is an area where the evidence is not as clear. Anthropologists, as Bennett (1984) points out, have tended to write in the "ethnographic present". That is, they have often tried to imagine what indigenous
patterns of life were prior to colonial contact, based on their examination of these patterns at the time of their studies, and then presented the resulting reconstructions as if they truly depicted pre-colonial life. This makes it difficult to separate fact from fiction. Again, many of the constructs of societies as they were are depictions of "ideal types" -- of the normative elements, rather than reality.

11. Possibly the only way of disentangling fact from fiction is to examine the levels of political organization of groups before the advent of colonial powers. A distinction is usually drawn between societies with states and stateless societies. The word "state" may seem artificial, given the modern connotation, but is here meant to imply a locus of power, as opposed to acephalous societies (groups lacking a head or chief). In West Africa there were significant states before colonialism: the Maure empire, the kingdoms at Macina (Mali), the Yoruba, the Ashanti. In the East with the exception of Ethiopia 1/, the Bantu kingdoms in Uganda and Rwanda, and the Lozi (Zambia) few groups had a political organization that would even qualify for the appellation "state". The characteristic of all these groups, whether statless or not, was the relative impermanence of their boundaries. Disputes around the territorial margins were common, local wars a routine feature of existence. A state of flux marked the histories of groups (Colson 1969, Kitching 1980). Group territories,

1/ Ethiopia has been included to accord with the scope of this paper although it is realized that the country was never colonized.
therefore, did not have the permanence they later achieved under colonialism. There is some question also whether ethnic groups and affiliations were as rigid as they later became.

12. Boundaries did not need to be precisely defined because land was abundant. Disputes, "overpopulation" within a group in one area could be easily resolved by the migration of a segment to another area. In disputes between groups the conquered, after some executions, were usually incorporated into the conqueror's fold as slave or full member. Strangers usually did not find it difficult to obtain land from the host group. It was the control of labor, not land, that was the most important base of power, of production. This control could be achieved through a variety of techniques: slaves, large families, stranger farmers, and labor-sharing arrangements within the group. The importance of labor was related both to the type of cultivation and the level of technology: largely a bush fallow system and the hoe. Labor was essential for clearing and without labor there could be no extended cultivation.

13. Some groups, such as the Divo (Ivory Coast), the Bunyoro (Uganda), the Kikuyu (Kenya), attained their labor requirements through loose organization and reciprocity; others, such as the Mossi (Upper Volta), the Diola (Senegal) or the Bambara (Mali) encrusted labor sharing with ritual, office and stratification — the earth priest, the rights of a compound head. Among the Hausa, the gandu system developed, originally applicable only to slaves and later restricted to the requirement that family members and servants devote a prescribed number of hours assisting in the cultivation of the farms of the family head.
14. This is not to suggest that there were no instances of permanent cultivation prior to colonialism. Ludwig (1968) cites numerous instances of intensely cultivated areas, terracing, sophisticated methods of cultivation, and high population densities. Scott (1979) quotes travellers' accounts about food self-sufficiency and agricultural sophistication around the ancient city of Ghana and the environs of Zaria and Kano in Nigeria. This sophistication and knowledge of the environment was not limited to intensively cultivated areas but extended to include systems of shifting cultivation as well (Miracle 1967).

15. Generally, agricultural systems were adapted to the soil, climate, prevalence of disease and level of technology. In the Sahelian zones pastoral societies predominated; gradually giving way to crop cultivation in areas of greater and less variable rainfall. Disease kept most pastoral societies out of forested belts. There was an interface between farmer and herder with grazing on stubble at the end of the crop season. Products were exchanged - meat and milk for foodgrains.

16. The question is what were the rights to land. A few principles are clear from the vast literature on this question (see, as examples, Biebuyck 1963, Elias 1956, Lewis 1979, Maini 1967, Meek 1949, ORSTOM 1979, Snyder 1981 and Thomson 1976). First, the original person to clear the land was entitled to claim and use it in the absence of any other superior (read "more powerful") counterclaim. This person is often referred to in the literature as the "maitre du feu". Where there was a superior claim,
the land could be cleared and used with the superior's permission - rarely withheld. At times, rights to land clearing and use (subsidiary to those of the "maître du feu") were additionally controlled by the descendants of persons who were the first to settle in the area. The permission of these descendants to clear and use land had also to be obtained. Permission was usually given. Second, a person was entitled to land by virtue of his membership within the group. The term "member" was a loose term and included persons who traced their descent from a common ancestor (often putative), as in the case of lineage-based societies, or persons who were outsiders admitted to the group, and at times included slaves. Third, land, or the entitlement to land was inherited. Fourth, land could be exchanged or gifted. In a land abundant situation then rights were hardly conducive to the development of reciprocal obligations. Fifth, customary land tenures easily accommodated concurrent and successive use of the same piece of land by different persons or groups. For instance, one person could have rights of cultivation, while at the same time another could have rights to the trees, or the land could be used by cultivators in the crop season, and as grazing land by herders in the off-season. Sixth, since land was abundant, given the technology used the crucial element for cultivation and control over land was the acquisition and retention of labor. As Akabane (1970) points out, the communal basis of land use patterns is probably to be found in the continuing need for collective labor to clear new areas of forest or bush as older fields were allowed to remain idle. Labor sharing was then a matter of necessity and the person who withdrew from participation faced the ultimate sanction of lack of sufficient labor for subsistence cultivation. Communal work parties as in Sierra Leone (Donald 1970, Levi 1976) and in many other areas were a matter
of necessity. In more stratified societies systems of control and ritual were developed to reinforce labor sharing. These systems also served as redistributive mechanisms through requirements that a portion of the produce be handed over to compound heads or leaders with more extensive authority. This produce was usually redistributed by the recipients thereby cementing reciprocal obligations. At times, as in the mafisa system among the Ngwato of Botswana (Palmer 1977), cattle were farmed out by the rulers to the ruled and "this formed the contractual basis of political relations" (1977:114).

17. Islamic law which, through conquest and influence, spread over Mauritania, Niger, Northern Nigeria, and Mali in West Africa and to Zanzibar, Ethiopia, Sudan and Somalia in the East differed little in the first principle enunciated above. Under Islamic law, land belonged to the "person who vivified it" (Anderson 1954, Middleton 1961). Thus any person had a right to use resources found in their natural state: grasslands, rivers, natural wells. The act of cultivation or boring and enclosure of underlying streams amounted to appropriation and change of resources giving the person doing so a right of ownership - a right which only conquest or sale could divest. It was the manner of inheritance of these rights where the theoretical norms of Islam differed from other customary systems (Coulson 1971). By providing for defined shares for both male and female heirs and residuaries under the prevalent Maliki school of Islamic law, the system differed from customary systems in which only the patrilineal or matrilineal heirs could inherit rights. In practice, however, shares of females were either purchased or distribution was postponed.
18. Tenancies or crop-sharing arrangements are not common in pre-colonial Africa. Their presence is limited to Ethiopia and Mauritania - from the Emperor through the balabat and to the peasant in the former country (Crummy 1981, Hoben 1973); the distinction between the haratin and bedan in the latter country. It is understandable that in a land abundant country tenancies were unnecessary. In other areas - Mali, Senegal, Niger, Upper Volta, Ghana, Botswana and among the Lozi (Zambia) chiefs and lineage and compound heads could demand labor for crop cultivation though this cannot be strictly called tenancy.

19. Among pastoralists levels of decision-making, use and control differed from the agriculturist. The extended family was the decision-maker with regard to the size of the herd; the camp (a group of extended families) determined herding practices and time of transhumance; the wider group (lineage heads and tribal chiefs) controlled access to watering points and grazing (Lefebure 1978, Monod 1975). Though pastures and watering points were said to be owned by the entire tribe or lineage, access to these was carefully controlled. Riddell (1982) provides an example in the code (dina) instituted by Cheikou Ahmadou for the Peuhl of Macina (Mali). Rules of access were based on the type of pasture and seasonal requirements; sanctions were enforced. Other examples are not lacking (see Brokensha, Horowitz and Scudder 1974, Horowitz 1975, Lawry, Riddell and Bennett 1984). The important point to note in the literature is that although grazing and water points were said to be owned in common, access was limited to specific groups. Further, pastoralists had well-defined transhumant routes and institutionalized relationships with cultivators.
20. Trees formed a separate category. Here the distinction was based on trees growing through natural regeneration or in forest areas, and planted trees. Access to the former class was open to any person; the ownership of the latter was strictly defined. Oil palm trees in the wild could be used by any person, so too can a baobab; but a cultivated baobab (including in the term "cultivation" mere tree pruning), planted kola nut trees, the Acacia albida and Acacia Senegal were individually owned. Inheritance of these trees often passed along different lines from that of land (see Lewis 1979, Middleton 1961). Further, since trees do not form part of the land (notwithstanding statements to the contrary in James 1971), in theory there could be joint use of land with rights of access to the owner of a tree who might well be a person different from the cultivator. Where, in fact, there was uncertainty about rights to land one of the most effective ways of perfecting possession was tree planting.

21. Reviewing tenurial systems before colonial intervention the term "communal" is loosely used. The term covers a full-blown system like that of the diesa in northern Ethiopia where there was common ownership by members with defined shares and allocation of land for cultivation by lottery (Nadel, 1946), to individual use of lands within an area said to be "owned" by the group. The latter, more common phenomenon, gave the user

1/ James apparently confuses the situation in Tanzania after 1923 - when the rule of English Law that trees form part of the land was adopted - with customary rules prior to that year in areas to which the 1923 law applied.
exclusive possession and rights of inheritance by heirs. Rights of land allocation vested in chiefs or compound heads in practice did not appear to include the ability to refuse an application for land in a country with no land shortage. Exclusive possession was subject to two qualifications: the right of access to trees that did not belong to the cultivator and which were planted by some other person; and the right of grazing in the off-season. Unallocated land was open to all for grazing, wood cutting, and the collection of fruits. There does not appear to be any correlation between the technology of land exploitation and the type of social organization. Matrilineal and patrilineal societies, stateless and acephalous groups are spread throughout the sub-Saharan area and coexist within the same ecological zone.

22. The general state of the agricultural scene "before the scramble" at the end of the 19th Century was that of groups adapted to and knowledgeable about their environment. In some cases these groups were already involved in a cash economy (the Baule of the Ivory Coast (Chaveau 1979) and in Calabar (Nigeria)) in oil palm plantations (Hopkins 1978), innovative and accepting of new crops (see Miracle 1967 for a list of the crops introduced into Africa before colonialism), and seemingly waiting to introduce tree crops to harden claims for individual rights to land.

III. THE COLONIAL ERA: THE EYES OF THE BEHOLDER

23. By the end of the 19th Century most of the major European powers were involved in Africa either directly or through merchant companies.
Their areas of influence and the division of spoils in Africa were
determined more by power struggles on the European continent than by special
relationships with African countries. In 1890, for instance, Kenya and
Tanganyika were arbitrarily divided between the British and the Germans
resulting in the bisecting of the Maasai. The Somalis were divided between
Djibouti, Ethiopia, Somalia and Kenya. Madagascar was given to the
French. An arbitrary division was also imposed on Gambia and Senegal.
European, not native, interests predominated. Each of these powers brought
with them their own philosophies of government; their perspectives of human
relations limited by their own cultural backgrounds. By the time colonial
rule was consolidated in the 1920s the British in particular would be
influenced both by Maine's Ancient Law and their experience in the earlier
founded colonies — particularly India and Fiji. Even more subtle in
European estimations of African society would be the influence of Darwin
and Spencer. Theories of social evolution would color assessments of
levels of the evolutionary status of African societies, of racial
capacities. These assessments would affect the development of land tenure
patterns through a firm conviction that communal land tenure was the
prevalent form of tenure and consequent non-recognition of land sales and
increasing appropriation of land by nuclear families to the exclusion of
others. Individual tenure was considered the highest stage in the
evolutionary sequence. Human groups at a lower level — which it was
believed was where the African was — had to evolve, first, through
communal tenure, then feudalism before reaching individual tenure.
24. The colonial powers stabilized the continent. Intergroup rivalries could no longer be expressed through open war for land or labor. Administrative boundaries were drawn and passage across these became increasingly difficult save for migratory labor and the pastoralists. Gradually, alien forms of law and procedures were imposed.

25. The British philosophy of government in Africa has been summed up under the phrase "indirect rule": the appointment of traditional leaders as intermediaries between the people and the colonial administration, invested with powers covering decisions with regard to customary practices in land, personal laws (inheritance, succession, marriage and divorce), but excluding criminal codes and the recovery of taxes. The French pursued a philosophy of assimilation. Tinged, initially, with ideas of equality, fraternity and liberty, no differentiation was made between metropolitan France and its dependencies; appointed "native chiefs" derived their powers from and were subject to the metropolitan government. When Belgium took over the Congo Free State the Charte Coloniale did not mention the status of the colony but stated that the colony was under the sovereignty of Belgium with a separate legal personality and laws. Christianity permeated the Portuguese policy of assimilation. In Sierra Leone the influence of the "creoles" was largely limited to Freetown and its vicinity; little was altered in the protectorate, as it then was. In Liberia, however, the American born Liberians succeeded in gaining control over the coastal areas and also exercised a much looser influence over the northern tribes (the Mandingo, Gissi and Kpwesi). In Ethiopia too the conquest of the Oromo in the southern regions by Menelik II turned the conquered peasants into
tenants and sharecroppers. Despite the varying philosophies of the colonial powers and Ethiopia, African realities and the difficulty of rule gradually reduced differences between the varying approaches to administration. Belgium, possibly was an exception in that the metropolitan country always gave primacy to economic development; political development, they believed, would follow.

26. At this stage a distinction must also be drawn between "settler colonies" and "peasant export colonies" for law, land tenure patterns, the introduction of cash crops and labor practices received different treatment depending on whether the colony fell under either class. Following Mosley the former is the "colonisation of underdeveloped areas by European producers who became economically dependent on the indigenous population"; the latter, "where the white immigrant population was purely administrative..." (1983:237 n1). Examples of the former are Kenya, most of Northern Rhodesia (Zambia, except Barotseland), Southern Rhodesia (Zimbabwe), the Union of South Africa; of the latter, Gold Coast, Nigeria, Sierra Leone, the Gambia and Uganda.

27. For convenience, the analysis of colonial impacts that follows is divided under five major heads: the reduction of lands available to Africans, the imposition of taxes, the development of labor pools, administrative convenience and the appointment of "chiefs", and the introduction and sponsoring of export crop cultivation.
A. The concept of "vacant" lands or "terres vacantes et sans maître" ¹

28. The policy with regard to land was probably the most important factor in determining the relationship between colonial governments and the Africans. In each case "various juridical considerations have been put forward both in attack and defence of the policies adopted in this matter... but the extent of the appropriation of indigenous lands has depended more on factors of climate or soil than on juridical arguments. It is considerations of climate and soil which have directed the stream of European settlement to southern and eastern rather than to western Africa". (Hailey 1957:686).

British policy and practice

29. For analytical clarity it is necessary to divide British policies and practices with regard to land in sub-Saharan Africa into two types of countries, recognizing that there is some overlap between the categories: (1) settler and (2) non-settler and trust territories. The reason for this division lies in that in settler economies, the ingenuity of the colonial masters was strained to provide reasons why settlers should get preferential treatment through being allotted lands of better quality, inputs for agricultural and livestock production, subsidies for outputs, indirect control over types of crops cultivated and relatively cheap labor to assist in settler farm operations. These measures had a much greater impact on African farm production and labor availability than in

¹/ Those interested in details of legislation and policy among the British colonies and protectorates, the French in Cameroon and the Belgians in Rwanda-Urundi are referred to Appendix A.
non-settler economies. Further, there is in the ultimate analysis, little to distinguish British policies in non-settler economies from those of the French and Belgians. Hailey was right when he said that the main criteria for settlement were considerations of climate and soil, but once the settlers were attracted measures had to be devised to make them stay.

30. The legislative measures that marked the colonial regime in settler economies have well-defined elements, although the sequence in time in each of these countries does not coincide, nor is there any attempt to suggest a rigid evolutionary sequence. The main elements were: first, determination of the "unoccupied" areas; second, restrictions on the land market, attained, if necessary, by closing incipient developments in land sales among Africans; third, restrictions on contact between settler and non-settler, if necessary by creating "reserves" to which non-settlers were confined in different tribal groups - the area for reserves being determined not with reference to actual patterns or systems of cultivation, but on a notional basis of what was necessary given sedentary patterns of cultivation; fourth, a realization that land transactions were taking place despite prohibitions in law; fifth, recognition that population growth and overstocking of livestock were contributing to serious erosion; sixth, introduction of measures to assist non-settlers in raising levels of agricultural and livestock productivity and, finally agreement that the encouragement of individual tenure and title was not only possible, but essential for development. By then, of course, political events, which do not necessarily fall within the compass of this discussion, had overtaken the purely economic.

31. Following "pacification" of African groups, the prime task was
the determination of "unoccupied" lands. The method adopted for this purpose for the settler economies of Kenya and S. Rhodesia, were no different from those used in non-settler economies. Only land under active cultivation was deemed to be "occupied". This resulted in the loss of land by shifting cultivators and, more importantly, by transhumants. Unoccupied lands were classed as Crown Lands. This was done in Kenya in 1901. A later Kenya Ordinance in 1915 clarified that Crown Lands included "all lands reserved for the use of any Native tribe". As a result of this inclusion, an attempt by an African in 1915 to prove that he had obtained individual title by purchase of 'ands from another African, but within the area demarcated as Crown Lands failed on the ground that the court held that Africans were mere tenants-at-will of the Crown on the reserves. Lands, other than Native reserves (land occupied by Africans), and lands set apart for Africans but not used could be leased to settlers. These leases, originally for a period of 99 years, were extended, in Kenya in 1915 to 999 years. In Kenya, by 1920 nearly 3 million ha had been alienated to settlers, with only 60,000 ha of these actually being cultivated.

32. The second element was the introduction of restrictions of land sales (and purchases) by Africans. In Kenya, land sales between Africans and Europeans were common. These were prohibited by the Crown Lands Ordinance, 1902. In S. Rhodesia, sales were only stopped on the recommendation of the Land Commission, 1925. The justification in Kenya was the prevention of exploitation of the African; in S. Rhodesia, it was felt that the prohibition was necessary "until the native has advanced much farther on the paths of civilization" (Hailey 1957:703). With this
justification, supported by evolutionary theories that the African was at an earlier stage of human evolution than the European and was still at the stage of communal tenure, all developments in the indigenous land market were stifled; the growth of individual tenure, aborted.

33. The concessions and prohibitions failed to satisfy settlers. Agitation for final demarcation of "European" and "Native" areas could not be halted. Demarcation had been attempted by the British South Africa Company in S. Rhodesia, even before it had been divested of control by the Crown. One-sixth of the country had already been disposed of to white settlers by 1896. Later attempts to create Native Reserves were failures. But by 1914 reserves amounting to 9 million ha had been created (with 1.2 million ha of these totally unsuitable for settlement). An estimated 500,000 of a total African population of 834,000 were already living in these reserves at that time. The legalization of these reserves, however, had to wait a couple of decades. This was provided by the Land Commission, 1925, in S. Rhodesia and given effect to in the Land Apportionment Act, 1930. In S. Rhodesia 20.4 million ha were set apart as European reserves; Native Reserves, intermingled with the European, totalled about 11.8 million ha (of which 3.1 million ha were reserved for purchase by Africans on individual tenure) and an additional 7.4 million ha were classed as "unallocated" - most being barren, rocky and without any agricultural potential (Mosley 1983). The settler goal for final demarcation of European and Native areas was achieved in Kenya after the Morris Carter Commission made its recommendations - the same judge who had sat on the
Uganda and S. Rhodesia land commissions. The Commission approached the assessment of lands necessary for Africans on the basis of a system of intensive, permanent cultivation, not on prevailing systems which were based on shifting cultivation where a major portion of the land would be under fallow. As a result of the Commission only an additional 0.3 million ha was set apart as Native Reserves (to be under the direction of a Native Lands Trust Board), the area available for European settlement was fixed at 10.7 million ha and 0.6 million ha were set aside for lease to Africans under individual tenure. The pleas of the Kikuyu for individual land title and evidence of sales in the Kiambu area were ignored. The Ordinance of 1940, pursuant to the recommendations of the Carter Commission, expressly enjoined the Native Lands Trust Board to protect existing customs "so that tribes with a custom of communal tenure for instance, could never proceed to another kind". The lands comprising the Native Reserves were divided and allocated to the main tribes - thereby reinforcing tribal separation and separate identities.

34. The confinement of Africans to reserves together with population growth and, in S. Rhodesia, increasing sales to settlers in the inter-war period gradually exacerbated pressures on land. In S. Rhodesia, this led in part to squatting on lands which Africans deemed were their right. Two pieces of legislation - the Resident Native Laborers Ordinance and the Private Locations Ordinance did little to lessen squatter numbers. By 1948, the African population was estimated at 1.7 million of whom 270,000 were living on European reserves (a third of them on unalienated land).
After the War a program for squatter removal was started. Over a million ha were transferred (mainly from the Native Purchase area) in 1950. The program, however, did not stem the tide of subdivision and land transactions among Africans. Nor did the restoration of the powers of the chiefs, between 1930-1945, serve to improve agriculture in the Native Reserves on the basis of communal tenure. Conditions in the Native Reserves in S. Rhodesia had deteriorated to such an extent that they were no longer self-sustaining. In Kenya, the African population grew from 2.5 million in 1921 to 5.4 million in 1951; population density on Native Reserves during the same period rose from 51.6 to 112.1 per square mile. By 1945, the government had noted increasing numbers of individual titles—a process related to population pressure and assisted by the rapid increase in cash cropping during the War.

35. The final element in the cycle of measures now faced the governments of both countries: the decision to recognize the reality of land transactions and provide for the registration of title. In Kenya, registration, land consolidation and enclosure within reserves was undertaken if all the residents within a village area requested this. Numerous applications were made. Litigation, however continued to rise. Finally, the East Africa Royal Commission (1953-55) gave authoritative support for the introduction and registration of titles in areas where individual titles had grown. This was justified on the ground that individual titles were essential for the development of progressive agriculture in Kenya. The recommendations were put into effect by a
Working Party and embodied in the Registered Land Act, 1963. In 1961, all restrictions on the African purchase of lands within the European Reserves were abrogated. In S. Rhodesia an intermediate step was chosen with the passage of the Native Land Husbandry Act, 1951. The Act was passed at a time when labor supplies were scarce and nearly 85,000 African families had been removed from European Reserves, where they had not been gainfully employed, and resettled on Native Reserves. It was believed that the Act would reduce population pressure on the land and also improve agriculture, since the Africans would be re-settled on lands to which the Act applied. The Act provided farming and grazing rights to individuals in order to provide the security which it was believed customary tenures did not offer — which "indicated a lack of appreciation of the nature of security in the tribal areas" (Yudelman 1964:119). Grazing rights were to be exercised in common and the number of cattle per household was to be fixed on the basis of pasture carrying capacity estimates. Farming and grazing rights were non-heritable (a further difference from customary rights), but were transferable — which was believed to be the key to encouraging Africans to enter the labor market since it was thought that surplus labor would find off-farm employment. Finally, the right of land allocation was taken away from the chiefs and vested in the District Commissioner. Between the passage of the Act and its implementation in 1955 several other events took place: The Native Land Board decided to restrict applications only to Africans who qualified as "master farmers". Second, the post-war boom ended and off-farm employment remained static after 1955 (so that the assumption that labor surplus could find off-farm employment was no longer
valid). Third, the land requirements fell far short of the land available so that only 70 percent of the qualifying applicants could be accommodated. These problems led to the suspension of registration under the Act by the mid 60s. What the Act, however, had inadvertently achieved was to give irrevocable legislative fiat to the concept of land transferability.

36. In the non-settler economies and trust territories where, except for Zambia (N. Rhodesia), there were no compulsions to acquire lands for settlement, lands acquired commercial value much earlier among the Africans and litigation (a useful index of such commercialization) commenced early in the first decade of this century. There were, however, similarities of philosophy and consequent legislation between settler economies and non-settler economies and trust territories. These similarities were, first, the continued belief that Africans were divided into tribal groups with chiefs who "owned" the land. This resulted in the creation of new tenure systems (as in Uganda and Tanzania), or strengthened the powers of chiefs just when these powers were waning. A further consequence was that, in a manner similar to that in the settler economies, the growth of individual tenure was stifled. The second object of British policy was the need to separate the African from the non-African. Physical separation, not possible in non-settler economies (except, again, for Zambia) was to be achieved through the prohibition of sales of land by Africans to non-Africans. The basic justification again for this policy was the prevention of exploitation of the Africans. Third, in Trust Territories
(acquired after the first World War) the British were further constrained by the provisions of the Trusteeship Mandate which specifically charged the trustee with care and continuance of native customs and land use practices. Each of these aspects will be examined further, after a brief diversion.

37. The early period of colonial history in Zambia is bound up with the activities of the Borotse king, Lewanika, and the British South Africa Company (BSAC). Starting with only mineral and commercial rights concessions in 1890, BSAC gradually extended these concessions, acquired property and rights of administration (in the west) over most of Zambia (except Barotseland whose special status continued till 1970, after independence) until 1923 when administration was handed over to the Crown. The company was required, under the terms of its concessions, to set aside land for Africans "sufficient for their use and occupation". The first of such reserves, for the Ngoni, was demarcated in 1904. No further reserves were demarcated until after 1924. The basis for such demarcation was that lands were excluded from the category of reserves on the subjective ground that they were "unsuited to native cultivation" and on the objective assessment as to whether the areas were known to contain minerals. In such cases, the lands were retained as Crown lands and African residents evicted. A further classification of land was "unassigned" land - land in the power of the administration to distribute to settlers - which, in 1937 accounted for more than 50 percent of the nation's lands. The hopes for a
settler influx never materialized. But the policy was reversed only in
1947, after the Pimm Commission had characterized the reserves policy as a
disaster. Thereafter, the lands were redefined as Crown land likely to be
required for settlement.

38. The only other non-settler country where there was a clamor for
demarcation and separation of European from African areas was Malawi (then
Nyasaland). The causes for this, and the end result differ, however.
Re-examination of concessions by chiefs after the declaration of Malawi as
a Protectorate left about 5 percent of the land alienated, not including
the 2.8 million acres which BSAC had ceded. A Commission in 1921 examined
the necessity for separation and came to the conclusion that any
restriction of land in African occupation would seriously prejudice their
welfare.

39. With the exception of those two countries, there was a remarkable
similarity of approach characterized, first, by the failure to understand
the nature of the African social organizations and the rights of
individuals to lands. This was strengthened by the expressed wish to see
lands used in accordance with native custom which was seen to mean a
hierarchy of estates with control of land allocation and use in the hands
of chiefs. The outcome, at times, was the creation of "rights which were
unknown before" (Mair 1934:165) as in Buganda where the Kabaka was treated
as a king with all feudal rights, a mistake which resulted in 1900 in
recognizing alodial (that is rights over which there is no superior lord)
rights to about 9,003 square miles of the most productive lands. The error
was repeated in agreements arrived at with the Toro kings and the King of Ankole (both in Uganda). In Tanganyika (mainland Tanzania) the British continued the error of the Germans, by affirming the nyarabunja tenure. This tenure had been treated by the Germans as a feudal customary relationship between tenants (who were more serfs, than tenants) and the Hayya chiefs. The tenants grew coffee and the profits were appropriated by the Hayya. The Hayya were neither entitled to the tenants' lands, nor the services they provided but, supported by powerful administrations, they were content to play their roles as feudal chiefs and land owners. The errors were repeated in Lesotho - where they accepted the theory that the paramount chiefs governing the people in accordance with the customary Laws of Lerotoli were owners of the land. In Barotseland (Zambia) a similar mistake saw Lewanika, the king, as owner. In Northern Nigeria, the British believed that they had taken over from the Fulani federation and that the lands would continue to be governed by native tenure. In the Gold Coast (now part of Ghana), the Ashanti Concessions Ordinance, 1903, expressly recognized the power of the Ashanti chiefs to allocate, control and dispose of land just at a time when these powers were being eroded. What the administration failed to appreciate was that there was that the nominal title, or claim, of kingship could not be equated with the sovereign powers of a king in mediaeval England. The "kings" in most cases were mere paternal sovereigns; the real power of allocation, re-allocation and control over lands was exercised at a much lower level - that of the ward or village chief (as he later became).
40. The effects of this policy were threefold: to strengthen the powers of the "chiefs"; stifle the development of individual tenures; and reduce the rights of individuals who did not belong to the category of chiefs. The recognition of *mailo* in Buganda did not result in the individual owners speedily investing in raising land productivity. The agreement of 1900 introduced the idea of land as a commodity and the owners rushed to sell their lands and develop a European life-style, educate their children and thereby gain an entrée into government and continue in positions of power (Richards 1963, West 1972). In Ghana it permitted chiefs to extend their powers from "stool" lands (lands attached to the office of chief) to family and individual lands and to control all sales thereafter. In the first two decades of this century these sales and mortgages were so numerous that the British got nervous about the number of chiefs being "destooled".

41. More importantly, the "pure native tenure" policy halted the development of the nascent land market. Particularly in West Africa (though it was not unknown in South-east and Southern Africa), land sales had already commenced before the turn of the century. One reason for this could be that, unlike the settler economies, export crop production was not reserved to the European (except with regard to tobacco in Zambia). With the growth of the market, land became more valuable and transfers of land became possible, thus sharpening differences over land control, giving rise to disputes and litigation at a much earlier period than in the settler economies. The British, however, refused to recognize both sales and the need for the grant of individual tenure with the same imperviousness as in settler colonies. For example, the Nyoro of Uganda petitioned in the 1920s
for the introduction of individual ownership in their areas. Their purpose
was not so much for economic development but in order to raise capital.
The petition was turned down. In Tanzania, the cultivation of marketable
crops and land sales were common among the Arusha, Sambaa, Hayya and
Chagga. The Sambaa did not even require the consent of kin to the sale
(Hailey 1957: 782). Sales among the Sukuma pre-dated the German occupation
in 1891, but were stopped by the Germans (Malcolm 1953:12). Among the
Kgatla of Botswana, the development of private boreholes resulted in
control over water supplies, increased ownership of livestock herds and
control over land (see Lawry 1983). In Malawi, although evidence of
individual sales and individual title to lands in the Marimba and West
Nyasa districts was led before the Land Commission in 1920, the Commission
refused to recommend the reservation of areas where Africans could acquire
individual title to land. In Nigeria, land sales had commenced in the
southern provinces even before the colony of Lagos was ceded in 1861. In
1921, the Privy Council held that although King Docemo had ceded all the
lands in the colony of Lagos to the Crown, the Crown held them subject to
the rights of the occupants of the land and that these rights were
equivalent to those of ownership - they were private rights, even though
many were of a "communal nature". In northern Nigeria, although evidence
was led before the West African Land Committee of numerous incidents of
sales where the village head functioned as a registration authority and not
as a person with power to control land allocations and sales, the Committee
did not find the evidence "conclusive" (Rowling 1946). In the Gold Coast,
sales had commenced at the turn of the century (Hill 1963, Miles 1979) and
had been given judicial recognition (Crier 1981). The West African Lands
Committee, however, in 1912 took the view that sales of land were inconsistent with African customs which should be enforced. The report was officially circulated in 1917, but only published in the 1950s. After 1917 neither the administration nor the judiciary would enforce sales by Africans. What perturbed the British and drove them to hold steadfastly to their view of African tenures was, as in the case of the settler countries, their Indian experience (fears of bankruptcy, landlessness and the growth of moneylenders) and the possibility that the same events would occur in Africa; the alarming growth of litigation (in Ghana and Uganda), and, in Ghana, the numbers of chiefs "destooled" (losing their chiefly office). Whatever the reasons, the growth of the land market was halted and transactions could only take place informally (illegally).

42. In another sense, the British approach also diminished individual rights. In Buganda, the creation of mailo tenure converted cultivators (whose heirs could inherit lands) into mere tenants-at-will (who could be turned out at any time and charged exorbitant rents) and it was not till the 1920s that legislation was introduced to protect them - the landlords got around this by charging a front-end fee! In other countries, the imposition of British notions of communal tenure reduced rights of individuals to exclusive possession of, and the ability to alienate their lands. The rush in the 1950s to promote individual tenure, as if it were the engine of economic growth, in Uganda, Tanzania, Ghana, Nigeria and the other colonies and protectorates was too late. So also was the retrospective validation of unofficial transfers of tenancy rights in Uganda.
43. Finally, the British separated Africans from non-Africans by prohibiting land transactions between the two groups. Again, protection from exploitation was the reason. This was justified by experience, particularly in the countries in southern Africa where chiefs had managed, as in Swaziland, to grant more concessions to land than the entire area of the country. Even the Buganda mailo holders were prevented from selling lands to non-Africans without permission. This was another method by which the land market was officially closed - since, except for chiefs, lands could not be sold by individuals within African groups and transactions could not take place between Africans and non-Africans.

44. In a final footnote on Zambia, when the tobacco boom in the post Second World War period provided the country with its first major export crop, settlers grew in numbers. They took farms on leasehold in Crown (later State) lands. The line of rail, the basic means of communications, and the main roads grew up round these farms (mostly white settlers). This concentration of communications affected both land tenure and development with individual tenure far more frequent in areas close to these.

French policy and practice

45. Explication of French policy with regard to land tenure is far simpler than an examination of British policy. The French confined mainly to West and Central Africa, with the exception of Madagascar, shared one aspect of policy with the British in West Africa. There was never any intention of creating settler colonies. African populations were
therefore, spared the contortions of logic in support of land reservation or separation and demarcation of African and non-African reserves. Two principles imbued French administration. The first was the belief in the integrity of the metropolitan area and dependency. As a result, direct rule was followed - although, in practice, it often became impossible to distinguish direct rule from the variety practised by the British. This meant, however, that local officials derived all their authority from their superior officers and were not, in theory, chiefs who had been recognized as having "traditional" authority. Second, influenced by the Code Napoleon, the French could conceive only of individual property, monogamy and the proof of title to land through registration.

46. With regard to land, the starting point is the celebrated Arrêté of Governor Faidherbe in March 1865 which proclaimed that all unregistered land (terrains vagues) belonged to the State and could form the subject of concessions. Two contrary streams arose thereafter: the demand of European entrepreneurs for monopolistic concessions which would enable them to develop lands which would vest freehold in them. Second, treaties with African chiefs in which the French guaranteed the chiefs' rights over land and regarding which treaties had been issued in 1899.

47. In 1904, the year when the Afrique Occidentale Francaise (AOF) was formed (comprising Mauritania, present-day Mali, Ivory Coast, French Guinea, Upper Volta, Niger, Dahomey and Senegal), the decree of 1865 was confirmed by a similar decree applicable to AOF, again without clarification of the meaning of the term "vacant lands". The decree
appeared to result from a misapprehension of the nature of chieftainship in West Africa in that the French believed that the chief was a feudal monarch to whose rights they had succeeded by conquest. This decree meant that an African occupier of lands had no rights without title registration notwithstanding the length of time he had occupied the land. This interpretation was confirmed by two decisions of AOF courts of appeal in 1907 and 1915. The decree of 1904 was applied to Cameroon in 1920.

48. Although the French followed the Code Napoleon, the decrees were widely criticized. It was said, for instance, that in Mali, not very densely populated, there was "not an inch of land without a master". The decree varied in application between AOF and French Equatorial Africa (FEA, which comprised Gabon, Middle Congo, Oubang Chari and Chad) formed in 1910. In AOF it became an accepted principle after 1904 that concessions of land belonging to a group of Africans could only be made under an order of the Lieutenant-Governor. Further, in Niger, a decree in 1924 provided that Natives could not be evicted without their consent; in Mali, however, all that the African occupier was entitled to was compensation.

49. In FEA the grant of concessions, commencing in 1899, resulted in concessionaire monopoly rights over nearly two-thirds the land area divided among about 40 companies. The concessions provided a 30-year monopoly over forest produce and low annual rents together with payment of 15 percent of the profits. Complaints by British traders resulted in the receipt of sizeable compensations from the French. But a court also held that until demarcation of areas occupied by Africans and definition of their rights
(all of which were conditions of the grant of the monopoly) the entire area which was subject to concessions was subject to the rights of the concessionaires, not the Africans. Native lands had been earlier defined with reference only to areas necessary for food production. Later, these areas were defined as equal to one-tenth the ceded territory. As the lands ceded were not surveyed, the reservations for Africans were meaningless. Criticism led to renegotiation of the concessions. It was agreed that in return for a reduction in area ceded there would be, first, a grant to concessionaires of a monopoly of rubber collection for a period of ten years. This would be followed by a grant of freehold over the area under cultivation by concessionaires together with a monopoly of rubber collection over an area equal to ten times the freehold area for a further ten years. At the end of the second ten years the area under cultivation would also become Company freehold. At tremendous cost to African cultivators, the State thereby recovered nearly 78.7 million acres out of the 217.5 million acres said to have been alienated to concessionaires as of 1899. A decree of 1926 provided that the power to grant concessions up to 25,000 acres was subject to payment of compensation to African occupiers at such rate as the administration determined. Labor problems suspended grant of most concessions over 50 acres between 1938 and 1945.

The nature and scope of the term "vacant lands without a master" was clarified by the Arrêté of 1935. The decree gave tacit recognition to customary systems of tenure in that it provided that lands uncultivated and unoccupied for a period of ten years became state property. But the burden of proof of cultivation within that period was on the African. In 1947 the
constituency of elected councils in the French territories gave those bodies a voice in the disposal of State lands.

51. Further conditions of concessions grants were introduced. The terms of the concession had to indicate which areas were occupied by, or reserved for, Africans. Second, land under cultivation could only be acquired on payment of compensation. Third, in rural areas, concessionaires received only a provisional title subject to development conditions. In AOF as of 1949, there were 20 titles held on "definitive" tenure covering an area of 3,120 acres; 993 on provisional tenure covered a total area of 114,317 acres. The majority of the concessions were in the Ivory Coast and French Guinea and were planted with bananas, rice and coffee. In 1951, concessions in FEA covered an area of 330,000 acres.

52. The 1955 consolidating and amending Order which provided for the issue of a *livret foncier* (document of title) sought to remedy the problems which had been created by non-recognition of customary tenures at the earliest stage, and the failure of widespread acceptance of systems of *immatriculation* and *constatation* 1/. The Order applied to both AOF and FEA and was applied by separate statutes to the Trust Territories of Cameroon and Togo.

53. Applications for *constatation*, which provided only security of

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1/ "Immatriculation: registration procedures which confirmed title to the registered land". "Constatation": Also a registration procedure which, however, confirmed possession but unlike the former did not guarantee title.
possession against any action other than judicial decision and also continued the application of customary law to the land, were largely confined to the cocoa lands in the Ivory Coast and to urban properties there. In French Togo, the urban African preferred the costlier procedure of *immatriculation* which confirmed title. In Cameroon where land speculation had already commenced by the 1950s, there had been 1224 cases of the grant of *livret foncier* covering 15,887 acres of rural land and 1,027 acres of urban land.

54. Briefly, the Order of 1955 set out the following principles (see Verhelst 1968). First, it recognized customary systems of tenure over lands, whether these rights were exercised collectively or by individuals, and even though the lands over which these rights were exercised were not owned under the Civil Code or registered under the *immatriculation* procedures contained in the 1925 Order. The right to continue to use the lands in the customary manner was confirmed subject to the right of acquisition for public purposes and on payment of compensation. Second, these customary rights could, after public examination, be recorded. Third, if the record of these rights included the right to dispose of the lands or the right to transfer occupancy of buildings on the land, the transfer could be negated only by registration of the immoveable property by the ultimate owner. The occupier too was given the right to register the property if his rights included the right of disposal and permanent occupation signified by the presence of buildings or "regular developments". Fourth, no unrecorded customary rights could be registered but the individual or group could continue to hold and exercise those
rights subject to the bounds of customary law. Those rights, however, could be abandoned. Fifth, concessions could be granted only if, after public hearing, the land was found to be unencumbered by customary rights or where the customary right holders renounced those rights in favor of the applicant for a concession. Concession certificates were initially granted on a provisional basis and were subject to development conditions. Fulfilment of the development conditions entitled the concession holder to apply for registration. Sixth, when perimeter expropriation was contemplated, enquiries had to be instituted to determine whether the unregistered land, or lands not covered by the Civil Code, were included in the area proposed to be expropriated and, if so, whether these lands were encumbered by customary rules of use.

Belgian policy and practice

55. Belgian policy with regard to "vacant land" was similar to that of the French. Discussion about African rights to land, and African land use patterns commenced in 1885 after the introduction of a State monopoly over collection of rubber and ivory. The question was whether African collection of rubber in the Belgian Congo had existed prior to that year. In 1891 a memorandum recognized African rights to collect rubber in forest areas contiguous to their villages provided such collection was continuous. The formal conclusion arrived at was that nearly the entire area of Native land was "unoccupied". The Free State then proceeded to grant land concessions on the basis that the land was unoccupied. Concessions were given to the Companie du Congo, the Katanga concession, to
Railway Companies, and concessions for the collection and marketing of forest produce. The concessions were granted on condition that the areas occupied by Natives be assessed and that, thereafter, a Reserve equivalent to three times the occupied area be set aside for African use. The difficulty of demarcating areas occupied where shifting cultivation was practised led to the abandonment of reserve demarcation. The concessions usually contained grants of freehold up to one-third of the area brought under the control of the concessionaire. It is estimated that the area covered by the concessions, excluding those given for collection and marketing of forest produce, amounted to over 136 million acres. When Belgium annexed the Congo Free State in 1908, the area granted in freehold was estimated at 67.8 million acres. As a result of later negotiations about 25 million acres reverted to the State.

56. The concession policy continued under the Belgian Government. Concessions, however, were given with conditions of development. One of the largest of these concessions was made to the Huileries du Congo Belge in 1911. Under this concession the Company was granted the right to lease a maximum of 1.88 million acres, divided among five circles, each with a radius of 60km, the amount leased in each circle depending on the erection of palm oil mills with a given capacity and the lands had to be free of African use rights. As it was impossible to find any areas free of African use and rights within the original zones, a new agreement was made in 1938.

57. Even though concessions had provided for delimitation of African lands, no general delimitation was made. The procedure adopted was to go
over the concession area, mark off the areas in use by Africans and come to terms regarding compensation payable. In later concessions these measures did protect African interest in land to some extent. In the earlier concessions, which were the largest, constant complaints of trespass by Africans were the result of inadequate demarcation and failure to take into account African patterns of land use. Thus even in 1955, when the area in African occupation and to which Africans were entitled (domaine land) was said to be 120.5 million acres, and the area alienated to non-Africans was estimated at 51 million acres, it was unclear how much of the latter area was actually used by Africans.

58. By 1934, following a visit by King Leopold III, it was believed that a system of peasant proprietorship was the best means of securing African economic advancement. The draft Decree in that year proposed that Africans should be permitted to reach peasant proprietorship in three stages: in stage 1, the adoption of an approved farming system for three consecutive years would entitle the occupant to a droit individuel d'occupation; in stage 2, a further ten years' continuous occupation would result in the grant of a certificate of propriété agraire; the final stage of full title could only be reached through a process of immatriculation and registration. At the last stage the occupant would be governed by the code civil and possess legal title.

59. In 1953 the right of all Africans to obtain titles of any kind was recognized. Under the Decree of 1953, however, succession to land held under documentary title was in the direct line according to European
principles. In fact, however, most tribes in the Congo followed matrilineal succession. There were also provisions aimed at preventing subdivision on the holder’s death. In the meantime, the government adopted another design for development. The plan adopted in 1948 provided for a policy of extensive village settlement. Within these villages demarcated holdings were allocated to family groups — a system of paysannat indigene. The plan envisaged the settlement of 385,000 families by 1958. Demarcation was sometimes effected on lands already occupied, at others, lands deemed to be surplus were to be demarcated and handed over to "stranger" farmers. In determining the surplus, enquiries were to be made of existing use rights. The effectiveness of these enquiries varied and, as result, lands which were claimed by individuals as being used by them were handed over. At the end of 1954 a total of 158,825 holdings had been demarcated, covering over nearly 8 million acres. By 1955 the scheme was discontinued and its success questioned. The emphasis on targets led to the neglect of land tenure studies, selection of poor lands and crops that were ill-adapted to the soils. By 1959 only 194,000 farmers, half the planned number, were living on scheme lands.

Summary

Colonial approaches to land had both similarities and dissimilarities. The major similarity was in their definition of "vacant" land. The definition was based on notions of settled agriculture and did not take account of systems of shifting cultivation which covered most of the continent. As a result, vast areas of land were deemed to be available
for settlement or acquisition. In settler economies (Kenya and Zimbabwe) the definition allowed the administration to move Africans off lands which they had farmed for generations, or which had been used by transhumant groups.

62. The dissimilarities between colonial administration mainly lie in their assessment of African systems of tenure. While the British claimed to affirm these systems in fact they stifled customary change with their view of what the tenure system was. The emphasis on "comunal" tenure as characterizing most systems with a hierarchy of chiefs (all endowed with rights) was convenient for administrative purposes, but little reflected what was actually on the ground. In British colonies, the re-affirmation of communal tenures till the mid-1950s constricted the legal acceptance of individual tenures which, though they continued to spread, obtained no administrative support.

63. In the French and Belgian colonies, the reverse process took place. At the outset only individual tenure was recognized, or seen to exist. Through experience, however, concessions to the existence of a different type of tenure were made. In these colonies too, as in the British, the concessions were too little and too late.

64. In all the colonies, little notice of the impact of land policy on the Africans was taken until the 1930s. The best lands had been alienated. To rely on the percentage of lands alienated in relation to the total land area of a country would present a misleading picture. The
percentages of land alienated ranged (see Hailey 1957:687) from 0.5 percent to 49 percent (Zimbabwe and Swaziland). In Kenya the area was 7 percent; in the Belgian Congo, 9 percent; in Zambia, 3 percent; and in Botswana, 6 percent. These figures do not tell us the type of land alienated. For instance, in Zimbabwe 81.5 percent of class I lands (very good agricultural potential) were alienated. In Zambia, the best lands were alienated and the line of rail ran through these lands. In Kenya, it was the more fertile and higher rainfall highlands area. In Swaziland too, in addition to the lands lost before the country came under the British, the best lands remained in foreign hands. In Uganda, the creation of mailo allowed the allottees to choose "virtually all the land in Class I-III in which the productivity for both annual and perennial crops ranges from 'very high' to 'moderate'..." (West 1972:40). It is unnecessary to provide further examples to confirm that particularly in settler economies, the best lands went to the non-African with administrative support, and most Africans were left, with rising populations, to farm on lands of inferior quality.

Ethiopia

65. The literature on tenure systems in Ethiopia is almost as vast as the types of tenures (Brietzke 1975, 1976, Bruce 1976, Cohen 1973, Hoben 1973 are examples) — in Wollo Province alone there are an estimated 111 tenure systems. At the cost, therefore, of some depth, the main types will be described. In the southern provinces, where 60 percent of the peasants live, the major system could be described as feudal, with "gult" prevailing. "Gult" developed as a result of the conquests of Menelik II in the late nineteenth century. Vast areas were confiscated and distributed
among the emperor's supporters. The former land owners became tenants to
the new landlords and were required to pay rent and taxes, perform labor
services and quarter troops. In the central and northern parts of the
country, tenures approximating to rist and rest prevailed. Though both
these are characterized as being "communal" they were not. Under rist land
rights both were inheritable and saleable, giving rise to invariable
litigation, the results of which depended often on the power of the purse.
Rest differed from the former type of tenure in that on the death of the
holder the occupied lands formed part of a common pool. Heirs could then
claim a share. Another type of land tenure was the chiguraf-gwoses, more
genuinely "communal" than all the others, found also in the north.
Entitlement was based on village membership; lands being redistributed
every seven years or so, allocations being based on the type of land and
the needs of the family. Both chiguraf-gwoses and rest did lead to
fragmentation which farmers did not necessarily view as being a
disadvantage since it also allowed risk diversification. The other types
of tenure followed by transhumant groups are discussed in a later chapter.

66. The Land Tax Proclamation of 1944, which had as one of its goals
the simplification of the agrarian tax structure, actually succeeded in
increasing the incidence of taxation on farmers, widespread evasion and the
clamor of the large landowners. The Civil Code, drafted by two French
advisors and introduced in 1960, provided for even greater burdens payable
by the farmers — the rent payable was fixed at two-thirds of the harvest.
Customary rules, however, prescribed a maximum of one-half. The Code also
abolished all customary tenures with the stroke of the legislative pen.
The Code was generally ignored, as had been most legislative decrees which barely penetrated down to the rural areas. Most of the development activity, sponsored before the revolution, tended to favor the large landlord and had a major impact (particularly the irrigation schemes) on transhumant groups. For this reason these activities will also be discussed later.

B. The Imposition of Taxes

67. All colonial administrations shared the imposition of taxes as a means of revenue generation — sometimes also justified, as in Kenya and Mali, on the ground that taxation would compel the African to work. It is not that taxes and tribute were unknown in pre-colonial times. In countries such as Mauritania, Senegal, Sudan, and in Northern Nigeria, influenced by, or under Islamic rules, a tax of ten percent (tithe) of income (variously termed zakkat, assakal) was common. In other areas, tribute in the form of offerings in kind (to lineage heads, to groups, to chiefs) and labor (in Uganda, and Rwanda) were also prevalent. The difference was two-fold under colonial administrations: an assessment based on numbers of individuals, and payment in cash (though, at first, payment was allowed to be made in kind). The need to acquire cash for payment, therefore, necessitated the use of convertible commodities: crops and wage labor.

68. In British colonies and High Commission territories, the first tax introduced was a "hut tax" which, as a result of cultural practice, generally excluded unmarried men. This was gradually substituted, after
1910, by a "poll" tax, based on numbers of adults which included unmarried men for the first time. The amount payable under the poll tax was computed on the basis of the head of the family with one wife (for each wife above that number, an additional payment was levied)\textsuperscript{1}. In Zimbabwe, for instance, the amount payable in 1904 was £1 with an additional 10s for each wife after the first. This rate should be contrasted with the fact that in 1952 (when the tax remained almost the same) the average annual farm income of the African farmer was £10 (Mosley 1983:243 n.81). Later, additional development taxes were added. From 1934, a hut tax was also levied on women in Kenya. In Nigeria, the northern region was differentiated by the first land revenue tax imposed on the close-settled zone around Kano where the tax was based on soil quality. In Uganda the tax was based on tenancies in mailo lands. Taxes were collected by the appointed chiefs.

69. In French territories the system was a poll tax, levied on all villages, collected by the village chief who held each head of a household responsible. The system was introduced in parts of Senegal as early as 1861. Initially, the tax was payable in kind. This was later converted to payment in cash alone. For example, in Mali cash payments came into being around 1904 when the cowrie disappeared as a medium of exchange. LePrince reports that the French philosophy was that the "obligation to pay tax will be excellent for trade because, forced to obtain cash, (Africans) will at

\textsuperscript{1} After criticizing the imposition of taxes on supplementary wives, Hailey notes "it is doubtful whether the tax really did much to discourage polygamy" (1957:676).
the same time be forced to work" (quoted in Synder 1981:119). Failure to pay taxes permitted the administration to take men from villages for forced labor — under the indigenat — and there are reports of heads of villages and heads of families offering men for labor in lieu of tax payments (see Meillassoux 1964, Ward 1977).

70. In the Belgian territories taxes were imposed on adult males (with a supplementary tax for each additional wife after the first) in 1910 along with the requirement that they be paid in cash. The plural wives tax was gradually abolished after 1940. In 1951 it disappeared since polygamy was no longer recognized at law. In addition, cooperative authorities were authorized to impose a surcharge which could be equivalent to maximum of the base tax. Defaulters could be punished with upto two months of labor on public works. The numbers of defaulters were, usually, low. In 1951 it was estimated that only 3 percent of all taxpayers were in default.

71. Various effects have been attributed to the imposition of direct taxes and the requirement that they be paid in cash: the initiation of migration for wage labor (Ward 1977), the movement of women into urban areas for work (Snyder 1981), labor in mines (Palmer and Parsons 1977), the introduction of cash crops (Pelissier 1966). In fact, it is difficult to disentangle the effects of the direct tax, from labor taxes and compulsory labor requirements. An assessment of the effects of all these taxes will accordingly be reserved for discussion after describing the labor taxes levied.
C. The development of labor pools

72. Despite the various descriptive terms, and the justifications offered, all colonial regimes devised means by which African labor could be comandeered at cheap rates for the administration and, in settler economies, for settlers. It is true that in all cases payment could be made in lieu of labor but for most this was not possible. The colonial regimes thus withdrew labor to suit their convenience and without reference to the needs for labor on African farms.

British colonies and territories

73 Labor conscription was a common feature in British colonies generally for public works construction in the first forty years and for essential services during wartime. In Uganda, for example, the Native Authority Ordinance, 1919, authorised the use of compulsory paid labor for sixty days in the year generally for road construction. The Gold Coast Labor Ordinance of 1935 authorized Provincial Commissioners to call upon able-bodied men to render 24 days' paid labor a year on public works projects. In Nigeria, labor requirements for railway construction were obtained through "political labor" - each province had to supply prescribed quotas. In Kenya the need for railway construction labor was greatest in the early 1920s. Between 1921-1923 it was estimated that one-eighth of the entire labor force was conscripted for this purpose. This was, fortunately, not a period when agriculture experienced labor shortage since both agricultural production and prices were depressed (Mosley 1983: 257 n.35). In Zimbabwe, there was far less labor conscription. Requests made
for labor in mines and farms were sent to the Chief Native Commissioner.

74. Conscription was re-introduced during the second World War. In Kenya the conscripts were used as labor on plantations producing commodities needed in the war. Conscription amounted to 10 percent of the labor force. In Tanganyika, conscripts took away one-twelfth of the labor force. There was also compulsory recruitment to the East African Military Labor Service Unit which was formed in 1940 to provide unskilled labor. In Zambia there was compulsory recruitment for agricultural purposes. In Nigeria conscription was mainly to provide labor for the tin mines.

75. The impact on African Labor was most noticeable in Ordinances of the settler economies of Kenya and Zimbabwe relating to "squatter" labor on European farms. Alienation of land to Europeans had resulted in shortages of land for Africans, at least for those who had been turned off the lands they had occupied for generations. They tended, however, to continue to squat on these lands. European farms generally experienced chronic labor shortages. Legislation would then match the squatter and settler needs. In 1908 when Zimbabwe imposed a rental on Crown (Unalienated) land the Private Locations Ordinance prescribing the maximum numbers of Africans who could reside on European land was also passed. The effect of the two measures was either to induce Africans to return to their reserves, or to seek employment on European farms. The measure succeeded admirably, even though the African was not at first required to work for any specified period. This deficiency was corrected when the Land Apportionment Act was passed in 1930 making labor agreements compulsory for Africans squatting on
alienated land. In Kenya, the Resident Native Ordinance was passed in 1919, a time of acute labor shortages. Under the Kenya Ordinance, all Africans resident on European lands had to provide three months' service a year for their employer. From 1916 to 1946 Africans in Kenya and Zimbabwe were required to carry identity cards - a "pass" when they were outside their reserves. The legislation and the requirement of identity cards were designed to provide a supply of labor at low prices. In a careful analysis Mosley, however, concludes that both were short-term measures which did not succeed in breaking the link between the supply of labor and wage rates (see Mosley 1983:135). In Malawi, between 1901-1921, Africans who did not work for a white employer for a month a year were taxed at double the standard rate.

76. The third aspect of the development of labor pools was recruitment of African labor for work in mines and on farms. Native reserves were viewed primarily as labor reservoirs and pressure was usually exerted on Chiefs to supply labor. This pressure was most acute in Lesotho, Botswana, Zambia, Swaziland, and Malawi. And, as Hailey remarks, "it is clear that the levy of the Native poll tax was regarded as an important factor in stimulating recruitment" (Hailey 1957:1400). In most colonies recruitment was managed by private recruitment organisations (sometimes affiliated with the company for which they recruited), at times with the assistance of the administration - "Official Headmen", and officials. The official assistance was often justified by the view that unless Africans accustomed themselves to regular work there would be no possibility for their advancement. The private recruiting agents would tap
the rural supply which, once it had agreed to work, had no choice as to the company for which it worked. The flow of labor to South Africa soon converted Swaziland into a "remittance economy", Lesotho did not lag far behind, nor Botswana. In Zimbabwe, an estimated 45 percent of the labor force worked off African farms in 1950. Once under contract, labor was under penal sanctions for desertion, failure to carry out the contract according to the contract terms, and failure to work under the contract.

77. Labor recruitment was not confined to adult males. The recruitment of women and children was also prevalent. It is an aspect of recruitment to which much attention has not been devoted. Statistics are inadequate largely because their employment did not initially cause much official concern, and they filled the adult male labor supply gaps at lower rates. In Lesotho, for example, by 1952 it was estimated that nearly one-third of the female labor force was employed outside their villages. They were cheap, employable at between 30 to 50 percent of the adult male wage rate. They were employed in agriculture, mining and manufacture. During periods of increased labor demand their employment did not raise the overall cost structure. Mosley adds, "and indeed the newspapers and legislative council debates of the period 1940-55 in both (S. Rhodesia and Kenya) are full of moral and practical justifications of its use" (1983:142).

78. Finally, there is the aspect of "voluntary" migration of labor for work in other districts and countries. Immigrants came into Zimbabwe mainly from Malawi, Zambia and Mozambique. In Zambia, in the 1950s, immigrants constituted over 22 percent of the Africans employed in the
mines and large commercial undertakings. In Uganda immigrants came to work on cotton and coffee farms. Most of these were from Rwanda Urundi (a 1938 estimate fixed the number at about 100,000 annually). Seasonal migrants into Gold Coast, Nigeria and Sierra Leone were very high. In the Gambia, "stranger" farmers regularly came in from Mali and Senegal.

French colonies and territories

79. In the French territories there were three forms of compulsory labor: prestations, corvée, and the indigénat (although the third is added as an indirect method of acquiring labor). Prestations were taxes payable in the form of labor. Some of these were redeemable by cash payments. Theoretically limited to 10 days' a year it was applicable, with few exceptions, to all inhabitants. The justification attempted was that prestations were known to African social systems and the Germans and the Free Congo State had used the system. Prestations provided labor for road and rail construction. The labor had to be rounded up by village chiefs who prepared lists of labor available. The names on the list were rarely chosen impartially. The corvée, the second type of compulsory labor was also used to obtain labor for public works. A convenient source of forced labor were the villages de liberté, first established in Mali in 1887. The inhabitants of these villages comprised freed slaves who were a cheap source of labor for administrations as porters or in railroad construction. The indigénat was a penal system of sanctions for "offenses alleged to be harmful" was left to the subjective discretion of the individual administrator and included offenses such as failing to appear
for obligatory medical treatment and "insulting France" or its representatives. In 1941, the indigenat was replaced by the Code pénal indigène. Forced labor was one of the punishments for infractions of this code.

The second means of creating a labor pool was through recruitment for labor on plantations. In this regard the French administration never assisted in labor recruitment wholeheartedly. To a degree the administration did provide labor for some trading and agricultural firms and companies operating forest concessions in the Ivory Coast. But, after 1928, all requests for assistance were refused. The French adopted a policy under which they believed that the first obligation of African labor was for the production of subsistence and marketable crops; then, for the military; and finally, after all other demands had been met, for other private companies. This is in contrast to the operations under the systems of forced labor described above. It is to be noted that those systems of compulsory labor were only abolished in 1946.

The French colonies also saw the employment of women and children in compulsory labor. Villages were held hostage for failure to pay taxes; women joined the labor force in order to pay for release from prestations. Here again, as in the British colonies, data on the numbers of women and children employed are extremely sketchy.

Belgian colonies and territories

Belgium soon abolished the labor tax that had been imposed by the
Free Congo State - the collection of rubber to be delivered to concessionaires or state agents estimated to take in theory 40 hours per month. After 1922 the main laws relating to compulsory labor provided for the employment of paid labor as porters or paddlers for a period not exceeding 15 days a month or 25 days a year. Compulsory labor could also be raised to combat infectious diseases or famine. Like the French, compulsion was used mainly to force Africans to grow specified crops. This will be dealt with below.

83. The main impact on African society in the Belgian Congo was through the recruitment policies and procedures of the concessionaires. Labor was essential for the mining and forest concessionaires. European recruiters and their African assistants scoured the countryside, cajoling chiefs (with payments and veiled threats) to produce the required labor. The conscripts "often included client dependants, victims of private vendettas and paupers". It was not unusual, in the early days to see long lines of would-be workers with ropes around their necks. The system of recruitment created animosities within the village, accusations of witchcraft, and allegations that the chiefs had accepted conscription bonuses (which was often the case). Initially, recruitment to the mines was mainly from British controlled territories since most Katanga labor would not accept short-term contracts. With the gradual development of roads and railways, Katanga itself provided the labor since with the advent of these means of communication the industrial, administrative and commercial regions became densely populated, while the hinterland rural areas were hardly connected by rail or road. Although not willing partners
in the processes of recruitment adopted by the concessionaires, the Belgians shared the British philosophy that regular work would provide the path to development, and away from being underemployed on the farm. Tribute or tax had to be paid, and work for the concessionaires was one of the ways in which income could be earned to pay the taxes. The result on village life was documented in a 1935 report which pointed out that returning workers found that they had lost access to land. Instead of farming, they too became tax collectors, policemen or head hunters for more workers. Between 1920-25, there was massive recruitment for the Katanga copper and tin mines. The prime labor source was the Luba - "one finds plentiful, strapping Baluba who can be used as workers in mining operations". By 1936 it was estimated that nearly 200,000 persons were passing the medical tests to keep a full roster of 18,000 mine employees. In areas where gold mines were located the company either produced its own food for the workers, or bought food in nearby markets which were, at times, able to feed the laborers. From 1912 African farmers were settled close to the diamond mines. By 1932 the colony had several hundred thousand residents and fed 25,000 workers as well. The company's villages were sited along the road system built by American engineers and maintained under compulsory labor. By the beginning of the 1930s migratory labor patterns were well established. In order to sustain its labor force, the companies encouraged reserves based on indigenous agriculture. The success of this policy was exemplified by the development of manganese mines which took place at the end of World War II. Although the company only recruited 700 workers, within 10 years nearly 20,000 Africans resided in the vicinity.
84. In Ruanda Urundi after the Belgians took over the administration, the labor to be provided by tenants was reduced from two days in every five, to one day in seven. This was further reduced, in 1933, to thirteen days per year. Payment of tribute in kind had been abolished in 1931 and payment in cash substituted. In 1949, after the first visit of the UN Mission, labor payments were substituted by cash payments. In 1954 the system of gifts of cattle to avoid labor for Batutsi was abolished. Reintsma, however, points out (1981:11) that the success of these new laws is not known. She suggests two reasons for doubting their success: local lack of literacy, and the fact that the implementers of the new laws were the patron class who had a vested interest in non-implementation.

Assessment

85. It is not easy to separate out the effects of the direct taxes from the "indirect". For example, a farmer could migrate to avoid payment of taxes or to seek employment to pay both the direct taxes and avoid prestation. There are, however, several undisputed facts - which can be variously attributed to the imposition of, and increases in, direct taxes, or the need to labor to obtain cash income to pay taxes. The most obvious effect is the withdrawal of male labor from agriculture. An increasing burden then falls on the women and, notwithstanding the fact that most agricultural operations are carried on by women, the heavy work (clearing) was done by men. The effect on output and on farming practices is significant (Hailey, without quoting any figures for the statement, 1957:1986). This is a plausible explanation since women and children could
also be rounded up for failure to pay taxes and could be forced to assist in the construction and maintenance of roads. In addition, with shifting cultivation, bush clearing (the work of men) could no longer be undertaken, reducing the amount of land under cultivation (see Colson 1963). During the peak agricultural season, with men absent, women provided for both the old and the infant.

Many students of AOF also believe that the introduction of taxes was the catalyst creating a stream of mobile, migratory labor (see, as examples, Meillassoux 1964, Snyder 1981). In his study of the Banjal of Senegal (a sub-group of the Diola) Snyder found that 75 percent of the men, and 33 percent of the women in the sample village had done forced labor, primarily in the 1920s and 1930s. In former slave societies (in Senegal and Mali), some managed to escape compulsory labor by sending their slaves. Once taxes were required to be paid in cash, however, reliance on grain surpluses or cattle was not sufficient unless these could be converted into cash. This could have been the initial basis of wage employment. For instance, in 1904 a report on Bamako cercle (Mali) noted that Africans were being forced to seek employment with the French because of the increased tax burden. Migrants to capitals in search of work also increased. Further, the poll (and hut) tax were levied on the head of the household. The result was that it was in the interest of both the head and the members of the household to reduce numbers of resident members. In Mali, Senegal and Chad it has been suggested that this responsibility encouraged the gradual break-up of compounds and their reduction to smaller groups. Again, the use of the indigenat provided labor for the
administration without reference to the needs of the farming population and thereby reduced labor for agriculture. In Chad the code resulted in 2015 years of prison for a population of less than a million-and-a-half between 1911-20. Finally, recruitment for work in concessionaire companies removed able-bodied males from the agricultural scene. These returned, not necessarily wealthier, to face population growth in their villages and increasing difficulty in obtaining access to land.

D. Administrative convenience and the appointment of "chiefs"

87. Two aspects of group life in pre-colonial Africa must be recounted here. First, territorial boundaries between groups were ill-defined and in a state of flux. Life was not lived in "villages" in the modern sense of the term. Further, population increase or disputes led to group fission or member abandonment without many problems – land was abundant. There were towns, to be sure. But these were few: trading centres, populations gathered around the few kingdoms. Second, the notions of chiefs in the sense of monarchs, with hereditary succession, were fairly uncommon. Even in the few kingdoms, principles of succession generally depended more on personal skills and political intrigue than on any divinely ordained theory of succession such as took root in mediaeval Europe. For the rest, in the lineage-dominated groups and the bands, personal talents predominated. Age was undoubtedly an important factor in leadership for, by definition, only the skilled could survive and experience was an invaluable guide. The term "chief", therefore, is a loose description of leadership with a wide range of attributes, power and
authority and usually quite ephemeral. It was to this world that the colonial powers came with their own visions and philosophies. Although there was a theoretical distinction between 'indirect' and 'direct' rule, in the ultimate analysis the need for revenue and the shortage of expatriate administrative staff touched all the colonial regimes with the same brush - they were unable to proceed with direct rule and had to rely on Africans. Two aspects of colonial rule had important impacts on land tenure systems. They are: first, the development of administrative boundaries based on convenience; and, second, governance through Africans (whether they were termed 'chiefs' 'chef', or 'chefs de secteur').

88. There never was a 'rational' carving up of African territories by the major colonial powers. The control that they exercised over different areas reflected more the competition in Europe than African needs. The division of the country was based on securing territory for commerce and extended to protect that commerce. In retrospect, the division did not take into account the territories of 'tribes' or of groups. Witness the artificial division of Senegal and the Gambia (with the Wolof in the former country still claiming 'customary' rights over lands in the latter), or the bifurcation of the Hausa between Niger and Nigeria, or of the Somalis between Djibouti, Somalia, Ethiopia and Kenya, again, the division between Portuguese territory on the west coast and Zambia. The movement of African groups between areas which later came to be ruled by different colonial regimes was constant. What colonial rule did, in the first instance, was to establish boundaries. Movement across those boundaries by different groups become increasingly difficult - although the pastoralists were, and are not even today, respecters of boundaries. For the sedentary
groups, however, it was no longer possible to move across national boundaries in pursuit of shifting cultivation. They now had to make do with the lands within the country.

89. The second imprint of colonial rule was the stabilization of life. Early in the regimes' histories, the slave trade (particularly in West Africa) was stopped. Not only was a source of profit thereby eliminated, but it also terminated the conflicts between groups in search for, or defending themselves against, the taking of slaves. Whether one describes the process as the spread of "Pax Britannica" or "pacification", wars and conflicts were no longer a regular feature of life.

90. The third aspect of colonial administration was the division of the areas under each colonial power's rule into districts, cercles, or chefferies. Like so many other matters, the British thought of these divisions as part of normal rule. Administration in India had been successfully divided into districts, so too in Africa the District Officer would become part of the normal process of administration. Combined, however, with the appointment of chiefs, and the creation of reserves, district rule and the freezing of ethnic boundaries that had been quite dynamic before colonialism would mould an ethnic consciousness that would carry over into independence as a divisive element. For the French, the basis of administration was the cercle. An administrative area deliberately created without "regard to tribal boundaries, on the ground that any other course might encourage 'separatist traditions'." (Hailey 1957:545). Added to this was the process of "villagization" - the
deliberate grouping together of different communities solely on the ground that dispersion enhanced the problems of control. Hecht (1982) describes the effects of this "villagization" on the Dida of Divo (Ivory Coast). Before villagization, the Dida were organized into loose hunting bands. Affiliation to a band was based on common nets used for hunting, leadership depended on individual hunting skills. The group was small, membership fluctuated. The boundaries between contiguous bands were ill-defined and inter-marriage was common. As a result of French pacification these bands were brought together and confined to a village. The band, then became a lineage group, defined by a head with the hunting net as a symbol of their unity. The shape of the band had been solidified and had now been converted into a group whose membership boundaries were no longer flexible. Villagization was common in French territories. In the Belgian territories, the Decree of 1906 created the chefferie since it was believed that all Africans belonged to a tribe occupying a definite area and led by a chief. The boundaries of each chefferie were to be drawn along the lines of control of each chief and individuals (believed to belong to the same tribe) within the administrative area had to carry carte d'identité which would specify their tribal area of residence. Africans wishing to leave their chefferie had to obtain permission in writing if the absence was to be for more than thirty days. In 1917, the number of chefferies had grown to 6,095 making administration difficult. In 1920 chefferies were therefore re-grouped into secteurs (with several chefferies comprising a secteur). The underlying rationale for administrative regrouping in all colonies was not only the facilitation of control but also the collection of revenue. The latter, in fact, was the more important, though less
publicized reason. All colonies, with limited subventions from metropolitan governments, had to be financially solvent. With the creation of secteurs the original principle of grouping Africans by tribal affiliation was lost and it was obvious that administrative convenience was the paramount consideration.

91. Linked to the creation of administrative sub-divisions was the appointment of chiefs. For the British, this was the natural consequence of indirect rule and the view that no groups were devoid of leaders. Lost in the analogy was the fact that leadership was not based on immutable principles of succession. At times, the leaders were evident, even if they had come to power only recently - a Lewanika among the Lozi, Moshoeshoe in Lesotho, the Fulani Emirates in Northern Nigeria, Asantahene of the Ashanti, the Kabaka of Buganda, Khama III of the Ngwato in Botswana. At others, they had to strain to find "chiefs". In Kenya, the British appointed "Official Headmen" under the Ordinance of 1902, who came in the course of time to be called "chiefs". They had similar problems among the Bunyoro (Uganda). Notwithstanding problems, chiefs were appointed. The appointment incorporated the chiefs into the administration system, and they had at each successive stage to be recognized by the administration. This meant that recalcitrant or unbending chiefs could be (and were) removed and others appointed. The removal of chiefs did, at times, create administrative problems and result in their reinstatement. For instance, Asantahene was exiled after the eight-year war with the British. Attempts to reduce the power of his throne failed. Asantahene returned in 1925 and, in 1935, was reappointed when the British decided that the Gold Coast
Colony would prosper if he was restored. Similarly, in 1897, the British exiled the Oba of Benin who was considered mainly responsible for resistance to the British. After 17 years, however, he was restored to the throne, though with diminished powers, when British interests deemed it necessary.

92. The British looked upon the appointed chiefs as the agents of their rule. The chiefs were entrusted with revenue collection and, more particularly, with the administration of native affairs (subject to supervision). The administration of native affairs included from the earliest stages, control over and management of land allocation and land use in rural, "native" areas. Chiefs were also responsible for providing labor for public works. An additional right given to the Kabaka and Ganda chiefs in Uganda was the right to obtain labor assistance from Africans. Native courts administered justice (land disputes).

93. French administrative philosophy, direct rule, differed from that of the British. After administrative reorganization of the territories into cercles, the shortage of colonials necessitated the appointment of Africans to assist in colonial rule. The appointed officials were initially chosen, where possible, from among those recognized by local custom as chiefs. Later, however, other qualifications such as army service came to be important tests for appointment. There were three classes of chiefs: chefs de province or chefs supérieurs; chefs de canton (a purely administrative creation); and chefs de village. The last was the cornerstone of French administration and in a sense the real representative
of the people. But the French chef, unlike the British counterpart, derived no authority independent of the administration. He was an assistant to the Commandant, an instrument of French authority who acted only in the name of the administration. He could also, like the British chief be removed. Here too, like the British, the French did have their problems. The outstanding example of this were the relations between the French and the Sultan of Zinder (Niger).

94. The chef de village was responsible for tax collection, the maintenance of law and order, the arrest of criminals, the production of export cash crops, and the supply of labor for public works (including prestations).

95. In the Belgian territories, other than Ruanda Urundi, the decree of 1906 envisaged the formation of chefferies indigènes, a regular organization headed by tribal chiefs. While the proposal was similar to that adopted by the British in Northern Nigeria, circumstances in the Belgian Congo were quite different. Wars, the slave trade, and the activities of the Free Congo State, had quite decimated many of the chiefdoms. Nonetheless, chiefs were appointed and given power to control land dealings, administer justice regarding customary matters, and the most important power to control the movement of Africans in and out of the chefferie.

96. In Ruanda Urundi the Germans had designated the Mwami of Ruanda and the Mwami of Urundi, both Tutsi chiefs, as "sultans" under the misapprehension that both were quasi-feudal rulers, which they were not.
Urundi was not a centralized state after the pattern of Ruanda. The mistake was continued by the Belgians who recognized both "sul'um" and confirmed their powers of rule, subject to supervision by Residents acting as advisors. They were entitled to appoint subordinate chiefs, to collect tribute and, through hill chiefs, to demarcate and control allocations of unused land.

97. The common effects of the colonial appointment of chiefs can now be considered. First, the system introduced rigidity into patterns of chiefly succession, where there were chiefs prior to colonial regimes. The system also froze the territorial boundaries which had hitherto fluctuated according to power. Where there were no chiefs, temporary leaders were recognized as chiefs. Alteration of the system was only possible through administrative change. Second, the incorporation into the administrative system while, in some senses, lowering the prestige of chiefs, nevertheless provided administrative support for their actions, the color of office one might say. Third, it vested enormous power in the hands of individuals, either explicitly under the British and Belgian systems or implicitly under the French. The power to collect revenue carried with it the power to demand exactions, the ability to profit (even when, as in the French, Belgian, and some British territories the chief received a salary). Revenue collection, even in kind, had never been general in pre-colonial times. Further, there were always techniques of flight, or removal of chiefs who were arbitrary. These techniques could be used no longer. The power to raise compulsory labor carried the power to select individuals for work, an instrument for potential discrimination. When crops had to be
raised under the French and Belgian regimes, the chief had additional powers to punish the defaulter. Under Belgian colonialism, the chief also had the power to control the movement of individuals whom the administration considered "members" of his tribe. The British notion of "communal" tenures and the delegation of power to deal with land issues gave (though it sometimes only reinforced waning) powers to the chiefs to control land allocations — another convenient source of profit best exemplified by the Ashanti and northern Ghana chiefs' land sales. Although the French and Belgians never actively entered the relationship between individuals and land, except for the confirmation of chiefs in powers that they never had in Ruanda Urundi, their views too of communal tenure halted the evolution of systems would thereafter continue without official sanction and, ultimately, with grudging official recognition. Africans were labelled as members of tribes, access to land in reserves was granted on this basis, censuses were conducted on the basis of tribal affiliations, concessions were made on that basis too, the "pass" system re-affirmed tribal identity. All benefits, it would seem, would only flow through the acknowledgement of that identity. Ethnic consciousness, if not born through colonialism, was re-affirmed and strengthened.

E. The introduction and encouragement of export crops

98. The title of this section might convey the misleading impression that the export crops produced in Africa south of the Sahara, were introduced by colonial regimes. With the possible exception of groundnuts, it is doubtful whether it can be said that the regimes were the first to
provide the seeds or saplings for the cultivation of crops designated for export. Even a casual survey would show that most of the crops for export had already been introduced and were in place by the time colonial regimes were established. What is meant here is that cultivation of export crops was spread widely, through persuasion and compulsion, and inducements were offered (through subsidies, or construction of means of communication) for their cultivation. There was undoubtedly discrimination in the inducements offered to the African producer and the non-African in settler colonies, with the latter group receiving favored treatment. Generally, however, there was a concerted effort to encourage export crop cultivation. If one looks at Africa in 1960 in the years before independence, the continent produced 91 percent of the world supply of palm-kernel oil (West Africa accounting for 80 percent of this). Africa produced 76 percent of the world supply of cocoa (which came mainly from three countries: Ghana, Nigeria and the Ivory Coast). Finally, although Africa produced only 29 percent of the world supply of groundnuts, Nigeria was the world's largest producer, closely followed by Senegal. Coffee, tea, cashewnuts, cotton and rubber were also major exports. These were the results of the concerted effort discussed above to produce export crops.

99. **British** administrative support of export and cash crop cultivation was influenced by two considerations: the needs of metropolitan-based merchants, and the division between settler and non-settler economies (see Bates 1981). But there was never any officially sanctioned coercion. The methods employed were always "legal": prohibitions on the cultivation of certain crops, subsidies for the cultivation of others, the development of means of communication (in the
early years this was mainly the line of rail), legalizing the government purchase of crops at fixed rates. In the territories in East Africa these distinctions can be seen in the differences in administration approaches in the settler colonies (the Rhodesias and Kenya) compared to other colonies and territories. From the 1920s the cultivation of coffee and cotton were encouraged in Uganda. In Kikuyuland, Kenya, only whites could grow coffee till the 1950s even though coffee was grown in Meru, and Embu from the 1930s.

100. The most important export crop in the Rhodesias was tobacco; in Kenya, coffee, tea and pyrethrum. The only official way of discouraging production of these commodities without calling the attention of the Colonial Office was to require an expensive licence, or to make administrative arrangements which would discourage African entry. *With regard to tobacco the methods used were administrative - Africans could not cultivate tea, or purchase tobacco-curing barns without administrative assistance, which was not forthcoming; tobacco, further, was exported by a producers' cooperative which expressly set standards preventing Africans from joining*. Pyrethrum production was discouraged by a licence fee equal to an estimated half of the average annual African income in 1947.

1/ I am indebted to John Russell (World Bank) who points out that the restrictions on tobacco growing in Malawi, Zambia and Zimbabwe were far more subtle and complex: "Virginia", the tobacco with the highest export value and which required curing, was reserved mainly for the settler; "Burley" for tenanted "sharecropper estates" (owned by non-Africans); and "Turkish and Western dark fired" (which were not cured) could be cultivated by Africans.
Efforts by the Native Department in Zimbabwe to encourage the cultivation of cotton and wheat during the inter-war years, and which had been partly successful, were reduced by higher administration officials. The official argument in support of these policies restricting cash crop cultivation by Africans "was that they helped to safeguard the African's food supplies, in face of his defective "telescopic faculty". Later this ideology acquired a couple of embellishments: cash-crop development led to land erosion and exposed the African to price inflations with which he could not be expected to cope" (Mosley 1983:40). All this despite the success of coffee and cotton cultivation in Uganda, and tobacco in Malawi. There were two other products where the techniques of discrimination were further refined: maize and cattle. With regard to beef, the policy was effected through the use of the quarantine till the 1930s. The second, in Zimbabwe, was to grant concessions to European Companies, with the right of purchase of local stock. The third, was the creation of Marketing Boards with the sole right to purchase stock from Africans at fixed prices. In maize, the Control Board method was tried as early as 1931 in Zimbabwe. Entrusted with the sole purchase of maize, discrimination was based on the charges levied the African producer and the subsidies received by the European producer ("for export"). This was particularly done after 1934 when the Maize Control Amendment distinguished between an export pool and a local pool. In Kenya the request for the establishment of a similar Board came from the sole exporter of maize, the Kenya Farmers' Association (an "all white" association). The request was refused initially, but in 1937 a renewed request led to the creation of a Maize Control Board, with powers to give a guaranteed minimum price to producers for the European market - that is, only the Kenya Farmers' Association. Charges (for new bags, quality
differences, and the creation of a fund to combat soil erosion, the new ideology of discrimination) resulted in Africans receiving lower prices than Europeans. After World War II, European maize farmers realized that the local market could absorb the entire crop. But the price differential had still to be retained. This was done through agreements under which the price received by the African farmer was calculated on the alleged "European price" with deductions. The Boards were retained, although both Uganda and Tanganyika had abolished them.

101. In West Africa, the British approach was quite different. There was no need to protect the settler. What was, however, necessary was to favor the exporter. In the last decade of the 19th Century most of the export trade was in the hands of the African. This left the control and destination of export crops in the hands of individuals who need not have the interests of the metropolis at heart - the needs of Manchester, and commercial interests such as Leverhulme. Gradually, and with administrative support, Chambers of Commerce came to be dominated by Europeans and the trade was left to them.

102. French influence on export and cash crop cultivation was based on the attempt to compulsorily introduce crop cultivation. Attempts were made to introduce cotton cultivation in Mali in the years after 1910, in Chad in the 1920s. Groundnuts had already been encouraged by Faidherbe in Senegal in the early half of the Century and soon produced enormous revenues through taxation. Although the initial attempts were not based on compulsion, coercion soon came to play a role. In Cameroon in the 1920s, chiefs compelled their subjects to work on collective fields to grow the
assigned quota of cotton. The chiefs were assisted by militiamen and especially trained boys-cotton. In the 1930s cotton was grown on individual fields but the chiefs still acted as supervisors and controlled produce marketing. The feeling that the crop was being grown for the government (le coton du commandant) resulted in an ambivalence about the crop before independence in French Cameroon and Chad. Cotton growing was also accepted reluctantly in Upper Volta. Cocoa cultivation was first introduced in northwest Cameroon by German plantation owners. After thousands of forcibly recruited plantation workers died, and African producers were prevented from cocoa cropping, it became obvious that the crop could be grown by Africans at much lower cost. European planters then started to concentrate on oil-palm, Hevea rubber and banana cultivation all of which required intensive cultivation together with the integration of processing and transport. With the abolition of forced labor in 1946, Cameroonians entered the new field of coffee cultivation. As in Ghana cocoa was first cultivated in the Ivory Coast by Africans, it was in the 1920s that the French attempted to encourage the spread of cultivation.

103. Another aspect of French policy in crop production was the levy of food crops from local cultivators to feed labor and the militia. The main crops commandeered were millet, and sorghum. In the 1930s, though famine was widespread in Niger and Mali, the French nevertheless continued to levy food crop quotas.

104. Belgian policy was similar to the French till 1933. Before the first World War, villages were expected to produce food for workers and to grow cotton. During the first World War the productive capacities of
indigenous agriculture were severely tested: regions east of the Lomani had to supply foodstuffs for the army and porters. At the same time, farmers were expected to feed mine-workers of Katanga and railway construction gangs. The first compulsory growing of cotton, on an experimental scale, commenced in 1917. In the 1920s large expatriate companies entered the commercial scene — the Congo Cotton Company is a prime example. But as far as crop production went, two conflicting schools of thought existed: one favored compulsory crop cultivation; the other, a free market.

105. In 1933 the former view prevailed. The decree in that year repeated previous legislation which permitted the use of compulsion for crop cultivation. It described this cultivation as a *titre educatif*. The legislation permitted administrative decision regarding the number of acres to be planted by each cultivator. The main export crop for which compulsion was employed was cotton. This was purchased by the Congo Cotton Company under conditions similar to those in French Cameroon — a parastatal company which provided seed and encouraged the expansion of export crop cultivation. The price paid to the producer was fixed, with the companies paying part of the difference between the purchase and the market price to a fund which would help stabilize the rates received by producers over a number of years. The compulsion was, later, also applied to coffee growing. Although in the course of time many cultivators willingly took up cotton and coffee cultivation, it is worth noting that as late as 1949 23,000 persons were sentenced for failure to comply with the 1933 decree. In the Trust territory of Ruanda Urundi, compulsory cotton growing continued till 1943 when the regulation permitting this compulsory "educative" process was revoked. In independent Zaire, the compulsory growing of cotton is still enforced in some areas.
The compulsory process of growing export crops and prescribing the number of acres to be cropped was followed by the paysannat scheme which has been discussed earlier (see paras 59-60)

IV. THE AFRICAN RESPONSE: ADAPTATION AND ADOPTION

106. Colonial contact with Sub-Saharan Africa did not produce a knee jerk response. It was not the case of force being applied to a completely malleable object, with every response exactly proportionate to the amount of force applied. Responses varied, and one of the major aspects of this variance was the ability of Africans to assess their own advantages; to progress within a new framework. This chapter will analyze these responses particularly focussing on their effects on land tenure patterns.

The selective adoption of cash and export crops

107. Except for the forced cultivation of crops, the African response to new crops was always selective. There were assessments of labor, profit, land availability. When one looks at the range of export and cash crops, most had been introduced before the advent of colonial regimes; their spread was facilitated by the growth of systems of communication, access to markets, and the gradual resolution of rights to land. Groundnuts were not, at first, accepted in Mali; cotton was accepted with reluctance at first in Cameroon, Upper Volta and Chad. There are numerous examples of the economic rationality of farmers which are amply documented and do not need repetition here (see, for example, Jones 1970, Hill 1963, Hopkins 1973).
108. Curiously, tree crops have been very closely connected with the changes in cropping patterns. These require even greater risk-taking than annual crops, but are better suited to the humid tropics and, once established, do not require annual land preparation that is very labor intensive. As Hopkins remarks about cocoa planting:

"...it was a time of qualitative change and discontinuity, when the foundations of what was an entirely novel agricultural enterprise were laid down... the decision to try out a new product, and one, moreover, which is not indigenous to Africa; the risks involved, both in the initial stages and during the economic life of the tree, which extends over twenty-five years; the postponement of present consumption for future returns, since the tree yields little fruit during the first five years of growth and does not reach maturity until it is ten to fifteen years old; the mobilization of productive factors, and the process of capital formation involved in making cocoa farms; the managerial problems connected with growing cocoa and coordinating it with other farming activities..." (1978:87).

109. Who were the innovators? Most of the studies relate to West Africa. But, generally, it is apparent that colonial governments were rarely innovators. They did, in some cases, encourage new crops - a Faidherbe in Senegal, the British encouraging cotton and coffee growing in Uganda. It was individuals who were the risk-takers, the innovators. The Mourides in Senegal (who control most of the groundnut cultivation) (Pelissier 1966, O'Brien 1971); Davis and Coker risking cocoa cultivation in Nigeria (Hopkins 1978); the Krobo and Ga cultivating cocoa in eastern Ghana (Hill 1963, Miles 1978) and immigrants into the southern Ivory Coast
cultivating cocoa (Hecht 1982, Meillassoux 1964); the chiefs in Uganda who undertake cotton and coffee cultivation, assisted by labor that could be commandeered under the labor laws then in force. Two characteristics stand out in most of the examples: they were individual innovators taking risks. Second, most were migrants - that is they immigrated into regions away from their social groups and undertook tree crop cultivation. The second factor appears to have some significance for changing land tenure patterns. When tree crops were first introduced in the areas of residence, the leaders alone had the power to ignore norms relating to cropping patterns and produce distribution - for instance, the Mourides, the Duala slave trader (Cameroon). The non-leader had, initially, to move away from his area of residence to escape social sanctions and obligations, if he wanted to plant trees.

The increased appropriation of land

110. Something else seems to have taken place along with the spread of cash and tree cropping. With tree crops it was essential to have a separate field; with cash crops (cotton, groundnuts, tobacco) rotation with annual crops is possible. Further, access to and control of water gains importance in cash cropping. There was a differentiation of fields on the basis of both quality of soil and access to water and type of crop. Thus among the Zande of southern Sudan there is a distinction between the garden and the field which pre-dates cash cropping. In the former they grew pineapples, papaya, citrus trees, mulberry, guava, mango; in the latter, cassava, eleusine, maize and groundnuts (Reining 1970). Among the Hausa of
Nigeria and Niger there are three types of lands: the **karkara** (surrounding the village and which have been permanently cultivated for some time), the **gonar daji** (bush land some distance away) and more recently with incentives for cash cropping and pressure on food crop land, **fadama** (land lying in depressions, or along the banks of rivers, streams, and the like). On the first and second, the Hausa grow foodcrop grains, cowpeas and beans and groundnuts. On the third, "specialty crops such as rice, wheat, onions, sugarcane, tomatoes, guava and mango are grown" (Starns 1974). Among the Gwembe Tonga in the Zambezi Valley a distinction is drawn between cultivation in valley bottoms and uplands. In the valley bottom cash crops are grown; on the slopes and uplands, subsistence crops (Colson 1969). The Serrer of Senegal distinguish between seasonally flooded **oualo** (woloo) and **dyeri** (jeeri) rain-fed uplands - a distinction which corresponds to the Hausa division between karkara and fadama. The former lands are reserved for sorghum cultivation, the latter for millet (Pelissier 1966). The Toucouleur of Senegal and Mauritania have a similar distinction among types of land. Among the Maures, the major distinction is between oasis land and non-oasis land. Among the Wakara of Tanzania, rice, the main cash crop is grown in or near the valley bottom; cassava and millet are grown on higher slopes (Ludwig 1968). Among the Ngulu of Tanzania, rice (a cash crop) is grown in the floodplain area or along small streams; maize and millet in the upland areas (Pitblado 1981). Malcolm (1953) discusses how Sukuma (Tanzania) land use patterns are related to the type of soil and water retention capabilities. In the plateau area, the best land, closest to the homestead there is **bibanja** land use with the cultivation of coffee and banana. On poorer soils, but still within the **bibanja** area and down slope,
annual food crops are cultivated right down to the valley bottom where vegetables and, at times, rice are added. As the soil deteriorates up-slope, it is classed as emisiri and shifting cultivation is common. Finally, on the plateau there is grassland and grazing land. In Lesotho, specialized crops and tree crops are grown in gardens; subsistence crops are grown in field plots (Doggett 1980). In swamps, where cash crops are grown under partial irrigation (rice being the main cash crop) in Sierra Leone they are grown by men; subsistence rice cultivation by women takes place in the uplands (Donald 1970).

The examples can be multiplied, but it is unnecessary to do so. Several principles flow from these examples. They are: first, when a distinction is drawn between types of land, the most essential subsistence crops are grown near the homestead and on better land. As a farmer moves into cash cropping, usually appropriate and more fertile lands are selected for this. Second, the location of types of crops has some relationship with the ability to protect the crops. By implication one could assume that since subsistence crops are grown by all groups, these can be grown where protection from human interference is minimal, though protection from birds and animals may be necessary. Third, the introduction of cash crops often changes the division of labor with regard to cropping: men tend to do cash cropping, women, subsistence cropping. This principle, however, is subject to the availability of men. In Swaziland, Lesotho, Zimbabwe, Zambia, Mali, Ghana, and Chad migration has withdrawn many men from the agricultural labor pool. Women, therefore, are also involved in cash cropping. Fourth, it is generally assumed that the reason why men are
usually involved in cash and tree cropping is the result of the introduction of these crops by men. This is not always the case. In southern Mozambique, "women who were 'traditional' both ritually and agriculturally were experimenting with the cultivation of new crops and sale of their produce. Sisal production, which had been encouraged among colonos during the First World War, began to be grown by women. In addition they gathered cashews...expanded their production of groundnuts. Initial exchanges in some areas were for cloth and clothes, but increasingly the women demanded cash..." (Young 1977). The same position obtains in Swaziland and may be related to the absence of men.

Trees and the redefinition of tenure

112. Something must have happened to those seemingly immutable principles of "communal" land tenure which were said to blanket the whole continent when the colonials arrived. After all, it is difficult to conceive of how and why distinctions are drawn between types of land, and how trees can be planted on "communal" land without some changes in tenure occurring. This is not the stage where all the principles of tenure will be discussed. We are still examining processes.

113. The relationship between changes in tenure and adoption of new crops was first brought to the notice of the English-speaking world by Hill's work on Ghana (1963). In this, she pointed out that migrant farmers who had taken to cocoa cultivation had bought the land and held it under individual tenure. Her claim was doubted. After all, land sales were said
to be impossible under "African" tenure. But earlier work by Kobben, on
the Bete and Dida of the Ivory Coast showed that in fact land sales had
taken place and that the land was held under individual tenure (1956,
1963). Later work by Girard on the western Ivory Coast confirmed these
findings, although Girard (1967) points out that the social structure of
the groups results in a differential rates of adoption - a conclusion Hecht
(1982) doubts. There was a gradual change of attitude in which it came to
be accepted that the seemingly changeless society, ruled by legislation
that only countenanced "communal" tenure, was in fact changing.

114. Some further explanation of tree crop growing in redefining
tenure terms is necessary. It will be easily appreciated that tree
planting is like annual crop planting. In principle, both are crops.
However, annual crops only occupy the field for a season (3-9 months or so)
whereas trees occupy it perennially and almost permanently in terms of
human life. Now the customary rules of tenure provide that the field is
"occupied" when crops are grown. Since trees are crops, as long as they
are standing on the field, the field is "occupied". This is a natural
extension of the customary principle. This general statement, however,
must be accommodated within another general principle: trees do not,
usually, pass with the land in Africa. That is, one homestead may be
entitled to the crop cultivation of the field, while another may be
entitled to the trees standing on the land. How can these two principles
be reconciled? Especially since trees can be inherited in a manner
different from land.

115. It is to be noticed that there are no examples in literature.
of tree growing under the "pure" shifting cultivation system — where the entire group moves its residence when cultivating new fields. In the bush-fallow system, however, only the fields are changed, not the residence. Therefore, it will also be seen that where such a system prevails, tree planting takes place within gardens — that is, areas which can be controlled. Even at this stage the inheritance of trees along lines different from access to fields occurs since trees provide more stable benefits to the homestead and land is freely available. Where, however, commercial trees are grown, primarily for profit, two principles appear to apply, at the early stages of tree-growing: first, it appears advantageous to get away from political power and social control, so migrations seem to be essential: the individual cuts himself off from group control (and thus the necessity for sharing the produce or the income). This is done often for any form of cash cropping but especially for tree crops. In the new area, the rules of tenure followed previously do not apply since there is no group to enforce it, and no group to either demand sharing or threaten to hold back assistance in subsistence crop cultivation. This would explain why it is migrants in West Africa who started oil palm and cocoa cultivation when they were neither politically powerful, nor had control over the land for some time. Equally, this also explains why the Buganda chiefs, and the Duala were able to grow coffee within their areas of residence and control — they were "big men" who could innovate without being challenged.

116. For the use of trees as a means of staking a claim to land, other developments must also take place. These are referred to below.
Other principles of land tenure

117. Other aspects of land tenure gradually come into focus. Is there any connection between the development of cash and tree cropping and tenure rights? In every case cited above, tenurial principles are likely to be more strictly enforced with regard to land of better than inferior quality. Distinctions are coming to be drawn in land "values". Bush lands are open to any member of the group. They are generally of inferior quality. The rules with regard to rain-fed land vary in their strictness depending on the quality of the land and the variability of rainfall. Where rainfall is not erratic and the quality of the land is good, controls are generally more strictly exercised. Finally, land which is situated in flood plain areas, or with access to water is usually the most valuable and control over it is most strictly exercised.

118. A few examples will clarify these principles. Among the Valley Tonga controls are more strictly exercised for valley bottom land; among the Serrer and Toucouleur of Senegal and Mauritania oualo land, and among the Hausa, fadama land are controlled within homesteads. All these produce higher value crops; all involve water control.

119. There is a further principle of differentiation which must now be referred to. Where systems of bush fallow are practised, the subsequent clearing of lands left fallow and intended to be cultivated require far greater labor than where permanent cultivation (of annual crops) is possible. But it is to be noted that labor requirements are related both
to the type of crop cultivated and the level of technology employed. Therefore, at this stage, the principle just stated must be taken with caution. At any rate, a quick survey of areas cultivated and types of cultivation at the commencement of, and during the colonial era would confirm the principles stated above.

**Labor**

120. At the commencement of the colonial era the control of labor was more important than the control of land. At the end of the period, both labor and land were factors that had to be controlled. How was this control exercised? The lowest principle is that where an individual does not join with the neighbors ("members" of the group) to assist in land clearing, no one would help the individual who refuses to join. This is the basis of the women's communal work parties in Sierra Leone where neighbors holding contiguous plots join in land preparation. A similar principle also applies in forest area clearing by the Krobo in the Ivory Coast and in many other places.

121. A second method of controlling labor is to be found in stratified societies or where the resident population is differentiated on the basis of the date when residence is taken up in the area. Examples of the former are to be found among the Bambara (Mali), the Wolof (Senegal), the Maures (Maritania); among the Malinke (Gambia) of the latter. Stratification is usually reinforced by ritual and by principles of "surplus" redistribution. Among the Bambara the distinction rests on princely families, free born,
slaves, and occupational castes; among the Wolof a similar distinction also exists with the griot being added to the last group. Among the Maures, the distinction is between white Maures and black Maures, the latter belonging to the former slave group. In the Gambia, although there were slaves and occupational classes rights to labor were more influenced by the date of land occupation than by class. The right to labor is further reinforced by principles of "prestations" of crops and redistribution. A distinction is drawn between "communal" compound lands and individually cropped lands (both being cropped by a family within a compound) the produce from the former being subject to redistribution within all families in the compound and also to a defined percentage of the crop being handed over to the ward chief, the village chief, and the lineage chief; and the latter accruing only to the individual family. These personages then have a store of produce which is used by them for redistribution among families that have not produced sufficient to meet subsistence requirements, for feasts, for visitors. The redistribution serves to enhance prestige and strengthen the number of followers who can be counted on in disputes or for labor. Where the principle of priority of residence is used, the first right to labor assistance is for those who trace their descent to village founders, followed by free-born but later arrivals and finally the slaves and occupational castes. This priority is expressed both in the ability to obtain labor assistance and the imputed costs of labor - for "payment" for labor has to be made in kind and more is demanded of slaves and occupational castes than for descendants of village founders. The right to call upon labor, beyond that of the compound, is usually accompanied by the development of age class associations (informal, yet well-defined) - the ton in Mali, the kafo in Gambia. These age-sex
groups cut across lineage lines and serve another purpose as well: they reinforce the general notion of solidarity of the entire group. At the same time, the manner in which their services can be requested forms a basis for the inequality of different strata.

122. What the colonial regimes added to the strains of controlling labor was the requirement for compulsory labor service—whether this was a general right of compulsion or the right to demand a specific number of days a year. Under the French and Belgian regimes there was the added compulsion to grow specified crops. Generally, there was the right to commandeer food crops—for the army, for workers (in public works and in industrial ventures) and in wartime.

123. The final element reducing the amount of labor available was the need for payment of taxes in cash. Although these taxes may not appear high, relative to the annual income they were very high. There were two aspects to the taxation system. First, the payment of taxes in cash made it imperative that some members of a compound leave for urban areas, wage labor (with the government or on plantations and in mines) or turn to cash cropping. Second, the liability of the head to pay for all the persons eligible for tax in the compound added strains to living together in compounds. This was particularly so in Chad, Upper Volta, Mali, Niger where the tax had to be paid for men, women and children above the age of fourteen. Younger members were encouraged to leave the compound, especially when no means for tax evasion could be found. The reduction in labor serves to both underline the need to be able to control labor and,
now, land. Further, if the alternative chosen was the adoption of cash
cropping, the crop chosen would be influenced by the availability of labor
and determined by the development of, and access to, markets. Upon these
strains regarding labor availability and control was added another, growing
population.

Population

124. There are widely varying estimates of population in pre-colonial
sub-Sahara Africa. The reasons are not hard to understand: conflicting
estimates of the decimations of population due to slavery, disease and war;
and the lack of reliable censuses (till the fourth decade of this century
census figures relate to urban populations and Europeans). But, with
regard to West Africa, Hopkins remarks that "It seems safe to say on a
conservative estimate the total population has doubled in about fifty
years" (1973:224). This, between 1910-1960. In Zimbabwe, African
population went up from an estimated 490,000 in 1901 to a census estimate
of 3.1 million in 1962; and, in Kenya, from 4 million in 1901 to 8.4
million in the census of 1962 (Mosley 1983:112). Political stabilization
and the spread of preventive medicine was largely responsible for this
increase. The rapid rise in population was highest from about 1936 onwards
- possibly due to more accurate population counts - and has continued to
increase in most sub-Saharan African countries, reaching four percent a year
in Kenya, Zimbabwe and Mali today.

125. The impact of population growth must be seen against the
background of reduced land availability. This reduced availability was not merely the consequence of population growth but also of two other factors. First, the amount of available land had been reduced as a result of the policy of colonial governments in the determination of "vacant" land, settlement policies, and the grant of land to concessionaires. Second, under colonial regimes the possibilities of dealing with population growth through migration of groups or individuals to other lands was also severely curtailed. This was the result of the development of national boundaries, the development of reserves, the promulgation of a "pass" system. As a result of these administrative measures, movement was restricted to areas within a country and, at times, even this was not easily possible. Besides, there were further pressures on agricultural land through the development of urban areas.

Urban growth

126. Urban areas in Africa are not a phenomenon peculiar to the colonial era. Indigenous populations were already concentrated in Nairobi, Kampala, Mwanza, Kisuma, Dar-es-Salaam, Mombasa, Kano, Ibadan to mention a few. What is remarkable about the colonial era is the rapid growth of population in these cities and in others that were developed by the colonials. The population of Dakar, estimated at 90,000 in 1936 was said to be 300,000 in 1950; Leopoldville had grown from 46,500 in 1939 to about 300,000 in 1953. Mining towns in Zambia had equally spectacular growth rates. The growth of these cities was largely uncontrolled - except that the French appear to have paid greater attention to planning and lay-out
than others. At times, partly influenced by settler economies, the concept of reserved areas was carried over into cities. Africans in cities tended to follow well-defined patterns of residence: the urban immigrants generally stayed in areas populated by members of their ethnic groups. This pattern has been found in Nigeria (Kano, Idaban), Ghana, in the southeast Ivory Coast (where Mossi, Baoula, Diola immigrants form separate communities alongside the Anyi), Nairobi. Population growth results in the gradual spread of urban areas. The development of towns adds a new form of competition for agricultural land in the hinterland: land valuable as building sites. In Kano (Nigeria), Yaounde (Cameroon), and Sierra Leone the growth of cities and towns (in Sierra Leone) have resulted in the loss of agricultural land (see Falloux 1983, Frishman 1977). In fact, there has been no available karkara land around the close-settled zones of Kano and Sokoto (Nigeria) for some time (see Rowling 1946, Starns 1974). The loss of agricultural land to urban areas around towns and cities is a general pattern and agriculturists generally lose out against the high prices offered for land for urban use. Urban growth is competition for rural land and the development of subsidies for urban populations at the expense of rural populations.

The rise of the new elite: "learning the idiom"

Those best place to take advantage of the new regimes were the "chiefs" and their families. Placed in positions of power, they rarely failed to exercise these powers without consideration of self-interest. As collectors of revenue they were not loth to add some to their own. As
intermediaries between the population and the new masters, they were on the one hand, spokesmen; on the other, interpreters. In the English colonies, as arbiters of land tenure systems, they took advantage of the return to a golden age when they allegedly had power to control land allocation, to deny transfers and to demand tribute (in the form of goods, labor or cash). They studied the idiom of the masters and discovered how they could best advance their own fortunes under the new regime. As Richards remarks of the Buganda, by the time the rest of the population tried to emulate them, the chiefs were twenty years ahead. They had sold their lands, educated their children, adopted the European styles of life and were already well-settled in government employment, at the bar and in education. This pattern is repeated whether one looks at Tanzania, Zambia, Lesotho, Botswana, Senegal, Mali. In Nigeria the conservatism and power of the Emirs altered little with the imposition of indirect rule. The apparent belief that "communal tenure" prevailed strengthened the hands of the chiefs. When independence came it was often difficult to downgrade their powers. Fallers sums up the position of the Soga chiefs well.

They were able, during British rule to enhance their economic position. With the introduction and spread of cotton as a cash crop came a transformation in the traditional forms of tribute. Subjects could either give their chiefs money or contribute free labor on his cotton plots. As a result the influx of money allowed the chiefs to indulge in a new life style (clothes, houses, education). By the mid-1950s these new resources had been converted into status, influence and - within the limits of the colonial situation - even power. The position of the rulers or chiefs in traditional Soga society was not particularly secure. Under colonial rule, not only were the traditional authorities backed by the superior power of the British administrators, but they were also able to enhance their economic position.
This early period thus saw the development of a new kind of elite position for the traditional political authorities of Soga society. With greater power and increasing wealth differential, they now stood above the common people in ways that had not been possible for them in pre-administration times. (1955:299)

This statement could be extended to a greater or lesser degree to most of the other "chiefs" who had found administrative favor in colonial times.

Summing up the land process

128. Between the advent of colonial rule and its termination, land became scarcer and it became more valuable. It became scarcer on account of population growth and the expropriation of land by colonial regimes; it also became more valuable for those reasons and because it could be put to alternative uses - agricultural land for subsistence or cash crops or building land as urban areas advanced. The first thing to do, then, was to increase control over land. This was influenced by the amount of labor and the type of cropping pattern, enhanced by the value of the soil and climatic conditions.

129. The best method of exercising control over land was to plant trees. As a member of the group an individual could not be deprived of access to land over which the group exercised control. What was not certain was (except perhaps in Mauritania and Swaziland) whether the individual would be entitled to the same or better piece of land when the period of fallow was over. Under the law, of both the colonial regime and customarily, the individual had a right to cultivate the land. Control could now be exercised by tree planting on the land or through demarcating boundaries. Thus, there are a spate of examples where economically valuable trees are grown not primarily to profit from their produce to
affirm title to land - the small-holder coffee grower in Cameroon, Liberia, the Imenti of Meru, the clove and kola plantation in Zanzibar, cocoa in Ghana (Bieouyck 1973, Cobb et al 1980, Levin 1976).

130. Another way of looking at this affirmation of rights in a situation of growing scarcity of land is to find out what tenants, or "stranger" farmers (navettanes) can and cannot do. When land was more freely available, the tenant or stranger farmer could, generally, obtain land within the community in which he resided with the permission of the landlord. He was not only a sharer in the produce, but usually was accepted as a member of the community. The process over a hundred years was to gradually restrict the rights of these stranger farmers - first, by granting them lands of inferior quality, then when land became a scarce resource eliminating this right altogether (see Benneh 1974, Haswell 1973, Hecht 1982). Increasing restrictions were placed on the types of crops that tenants could cultivate. In Ghana, they are not permitted to plant cash crops (Adegboye 1974); in Zanzibar, they cannot plant trees (particularly kola trees) - Middleton 1961. In Cameroon too, tenants are not allowed to grow cash crops (Dravi 1984). Thus there are increasing restrictions on the rights of tenants - restrictions based on the necessity of preventing tenants from claiming title to land (by tree planting, for example, which could extend tenant possession and gradually support a claim to title).

131. There were other strategies for evading the closing circle of poverty and malnutrition as land to support traditional subsistence systems
became insufficient: migration, changing the mix of labor and technology inputs in cultivation, increasing cash cropping to raise incomes which could be used for purchase of food and extension of the areas of cultivation.

Migration

132. The term here is restricted to movement out of agriculture to earn a wage - whether in urban areas or the mining industry. It is a strategy that can be quite successful. Patterson (1984) looked at migration as a response to increasing land shortages among the Abanyole in the Kakmeka District (Kenya). Population growth among the 200 families surveyed has resulted in an average land holding of one acre per family (average size 6+), too many to support through traditional methods of agriculture. A few have adopted innovations or extended the cultivated area to permit higher production. But among the vast majority of families, members have found employment in the cash economy as this spread the risk and gave greater assurance of an income to survive. As a result of a strong kinship network that keeps members informed about employment opportunities and assistance in obtaining employment, this strategy has been quite successful.

133. Migration is a well-known phenomenon in West Africa as well as in the East. The Sonninke of the Upper Senegal Valley have made a fine art of migration (USAID/RBDO 1982). In 1960, migration out of Niger (to Ghana, Nigeria, Ivory Coast, mainly) was estimated at 60,000 persons a year
(University of Arizona 1979). In Lesotho, 60 percent of the adult males are out of the country, working in mines (Doggett 1980). While migration may be a useful strategy for earning a wage, its impact on agriculture, however, is incalculable. The result of leaving older men, and women in the village reduces the areas that can be cultivated, and the types of crops that can be grown unless remittances enable inputs and labor to be purchased for cash crop production.

134. The opportunities for migration for work in urban areas or with government are increasingly limited. There is little industrialization in sub-Saharan Africa. The scope is linked with the development of national economies. Since economic growth in most sub-Saharan countries is proceeding at a pace slower than population growth, the number of employment opportunities continues to fall below the number of persons offering themselves for work. Equally limited is the potential for employment in mining industries. The demand is, again, linked to world market prices. Fluctuations downward result in the loss of employment of vast numbers of unskilled labor who form the largest labor force employed in mines. In the 1930s, when migrants lost their jobs, governments sent them back to the reserves. Similar problems could occur again. Migration, therefore, is a useful strategy only for those who are entrenched or have the skills. For the vast majority there is continued reliance on the land.

Changing the labor/technology input mix

135. The second option to maintain levels of production in the face of increasing land shortages is to change the levels of technology, or the
amounts of labor, employed. Boserup (1967) who points out that increasing population pressure on land leads to the adoption of technological innovations has been increasingly interpreted in a deterministic fashion. Boserup did not suggest that such adoption were inevitable and recognized that it was possible to conceive of regressions to increased amounts of labor used. The deterministic interpretations have, however, been fostered by her emphasis on one avenue of adaptation. Nor is the deterministic approach supported by universal evidence. Although the adoption of technological innovations is the most common method cited in the literature, it is not the only avenue out of the impasse created by dwindling land availability and increasing population.

136. It is necessary, however, to cite some examples in support of the variable choice of options and examine, where possible, the underlying reasons. Mosley (1983:73ff) tests Boserup's thesis against the background of events in Kenya and Zimbabwe. The main conclusions he arrives at are the following. First, the adoption of an innovation—in the instant case, a plough—depends on the capacity to acquire the innovation. The ability to purchase a plough was limited to a few (see also Benini n.d., Haswell 1973 for a similar conclusion regarding the adoption of the plough in the Gambia). Therefore, the mere fact that the plough first became widespread in areas of Kenya and Zimbabwe where population density was the highest is not, of itself, conclusive. Second, more detailed examination shows that the plough was adopted not so much to increase yields (land productivity) but rather to increase labor productivity. The adoption was accompanied by an increase in the area of land cultivated. Third, an important factor
restraining the adoption of the innovation in settler colonies was the fact that it was believed, particularly by the Kikuyu, that if improved methods of agriculture were adopted, the increased production would prove to the administration that less land was required for subsistence production. Surplus lands would be taken away. Mosley found a very high correlation between areas where lands had already been taken under settler policy and reluctance to adopt innovations which would be conducive to higher productivity. Fourth, although the later response was the adoption of the plough, the earliest response was the adoption of non-capital expenditure techniques: earlier planting and weeding, crop rotation, use of farmyard manure. Fifth, although this appears to be a special case, extensive shallow ploughing could be related to the nature of the soils cultivated which even if it "gave low yields per acre, might yet be a more effective element in a survival algorithm than the deep ploughing favored by the agricultural officers, as the retention of the tree-stumps gave protection against soil erosion" (ibid:79). Sixth, migration was an important factor in reducing the number of persons attached to, and dependent on the land. Finally, by 1961, "the relative intensity of African cash-cropping by region, which was partly a political and partly a climatic variable, had come to exert a dominant influence on the inter-regional pattern of agricultural prosperity" (ibid.:90).

137. Another factor, not mentioned by Mosley because it was unnecessary to his argument, which could constrain the use of innovations in agricultural operations (particularly livestock), is the prevalence of disease. In a broad belt in Central Africa, the prevalence of
trypanosomiasis and other livestock diseases militates against the keeping and use of livestock. This constraint was also prevalent on a far wider scale than today in the lowland riverine areas. The prevalence of disease was a factor, too, in the movements of livestock along with their transhumant herders.

Finally, the adoption of innovations in technology can take place without population pressure. In other words, population pressure is one cause, not a pre-condition. An example from sub-Saharan Africa is the Yalunka of Sierra Leone. Mechanical cultivation of rice has been increasingly adopted. This adoption has not been caused by population pressures or land shortages. They have none. Mechanical cultivation permits a higher income for expenditure on consumer items. Further, among the Yalunka, nearly 21 percent of the males migrated to the diamond mines in 1963. Here, again, migration was not the result of the push from land pressure but from the opportunity for higher incomes (Donald 1970).

Undertaking cash-cropping

Cash cropping very rarely takes place without other concomitant developments. Crucial among these are the development of a system of communications and the growth of a market. Without a system there is no easy access to a market, and no knowledge about demand and prices. Cash cropping develops most rapidly along the line of rail and the road, though which comes first depends on circumstances. In the settler economies, rail lines and roadways grew to serve settler needs. In export oriented
economies, the development of cash crop farms took place near communications lines - rivers, railways, and roads. Zambia provides an example of the location of commercial farms near the line of rail. As one moves away from this line, and communications become more difficult, cash cropping plays a smaller and smaller role in the farm crop pattern. A simultaneous effect is felt on the price of land. Land becomes more valuable because of its location and the fact that cash crops can be obtained from the land. One of the adverse effects of cash cropping is that its very profitability would reduce the attention given to subsistence cropping and therefore affect the food balance - a conflict between individual profit and a country's need to feed its population. This has happened in the Gambia, Senegal, Ivory Coast. As Haswell remarks, "the Achilles heel of colonial governments was almost without exception the insecurity of their dependent territories in their own food supply" (1973:142). This was largely due to the encouragement given to export crops and the lack of attention paid, till the 1940s, to the improvement of subsistence crops.

Extension of areas put under cultivation

140. The final method of solving, or at least alleviating, pressures of land caused by population increases is for the farming unit to seek additional lands for cultivation. This can be done either by increasing areas within, or near, residential areas or by migrating in search of other lands. The attempt first made is to try to find lands close to the place of residence. This means that increasingly inferior lands are put under
cultivation or the fallow period is shortened in either case with consequent decreases in returns. The movement is from the better lands to more inferior, but cultivable lands, then to marginal lands and finally lands formerly treated as common land. Simultaneously, there is a reduction in the fallow cycle and increasing pressure to demarcate boundaries (lines of control). The two processes are not to be viewed as alternative, but combined effects depending on circumstances. If a common residence is maintained, the search for additional lands results in greater distances to be traversed and, ultimately, leads to fission of the unit. Examples of both types of movement are to be found. In Liberia, for instance, the development of roads affected the price of lands which became more valuable because of their location. Local elites and civil servants bought up land near the road. The sellers were increasingly forced into the bush onto inferior lands or those with less access to inputs and markets (Cobb et al 1980). In Niger, population pressures have resulted in the movement of population in search of farm land beyond the north 15°L (beyond which cultivation is very risky in many years and even though they are prohibited by law from such advances). In Sudan, population growth moves the search into increasingly inhospitable and arid lands. Decreasing returns increase the compulsion to go further in search of new lands. Trees are felled and pastures destroyed. The net result is increasing conflict, the reduction of the yearly cycle of visits by transhumant pastoralists, less manure for the soil and further decreasing fertility (see Monod 1975).

Effects on land tenure patterns

141. Land becomes more valuable as a result of the combined effects of
population growth, the development of communications, the rise of markets and the adoption of new technology and innovations. The increasing value of land means that it must be held on to for as long as possible so that the benefits of increased value can be retained and captured. Till the colonial era, land could be inherited and gifted; in the first decades of the colonial regimes there were already examples of land sales; land exchange and pledging of land also came into being (this only coincided partly with the development of both cash and tree crops). With the establishment and extension of control of the colonial powers former expedients to relieve shortages were no longer easy - movement into new lands if they were across new boundaries. So, increasingly, this movement was confined to lands within nations. Since we are still concerned with process, let us look at a few more components of land tenure in addition to those to which reference has already been made (see paras 112-9, 128-31 above). First, there is an increasing appropriation of lands to use by compounds (extended families), then nuclear families, on a permanent basis. The process, quite understandably, involves the appropriation of the best lands - the most fertile, cuvettes (depressions that hold moisture), oualo, fadama, land at valley bottoms, land close to residences, land on which cash crops are grown. Innovations in technology (the use of the plough, mechanized cultivation of rice) increase the value

1/ The term "privatization" commonly used in the literature is not used here since it does result in semantic confusion. Does "privatization", for instance mean "security". If so, this existed under "communal" tenure as well. Further, the use was generally that of compounds and families.
of the land and therefore the need for appropriation. Thereafter
restrictions are placed on the persons who are entitled to obtain land.
Where strangers could formerly get land without much difficulty, they are
assigned inferior lands and then cannot obtain further land except through
"purchases". Increasing restrictions are also placed on tenants so as to
prevent them from claiming rights to land. Finally, even acknowledged
"members" of the group have problems in obtaining land. This is clearly
seen in the revisions of the Laws of Leretholi, that compendium of
indigenous rules in Lesotho. The obligation placed on chiefs to grant
lands to married men in the 1920s had been changed in the 1940s to a
non-mandatory discretion: the principle of the right to land was affirmed
but it is subject to the availability of land for distribution. The
increasing migration of rural dwellers to urban areas in sub-Saharan Africa
is in part a reflection of the lack of sufficient lands for distribution.

142. Another process, to which not much attention has been given, also
takes place: changes in the patterns of inheritance. These changes refer
in particular to the transition from matrilineal to patrilineal
inheritance. While the change may have been encouraged by formal law and
the colonial administration, the basis for the change is deeper. The Lozi
(Zambia), for example, were bilateral (that is, inheritance could, for
different purposes, be traced through the mother or the father) but became
patrilineal. So too, the Ngoni in Zambia and Malawi. The reason for the
transition is simple, which is probably why it is not studied in depth.
Matrilineal succession loosens the nuclear family solidarity since property
is not inherited by members of the nuclear family but the persons whose
rights to inherit are traced through females. These persons are outside the nuclear family (usually the mother's brother's son or other children). In patrilineal succession, the right to inherit would, in the first instance, inhere among the children of the deceased father - whether the rule of primogeniture is followed, or the children are equally entitled. The fruits of labor of the family would not, therefore, go outside the nuclear family. The cocoa farmers of Ghana moved from matrilineal to patrilineal succession (Hill 1963)\(^1\).

143. Further, changes in cropping patterns (to annual cash crops or tree crops), and the introduction of technological innovations also bring in alterations in the traditional division of labor, which tend to reinforce patrilineal succession: men cultivate annual cash and tree crops. For example, with the introduction of the plough men generally take over cultivation from women (Dyson-Hudson 1970). The introduction of swamp rice cultivation in the Gambia and Sierra Leone leaves men in charge (Haswell 1973).

\(^1\) This transition is not peculiar to sub-Saharan Africa. In PNG, for example, the introduction of coffee and cocoa cultivation has led to the practice of sons planting perennial crops on the father's matrilineage lands, with the father's consent, so as to prevent the land from passing, under the matrilineal system which prevails, to the father's sister's son. See Brookfield, H.C., 1968, "The tree on which money grows", Australian Geographical Studies, 6, 97-119.
144. Finally, land "sales" increase\(^1\). This statement needs elaboration. One could start with the distinction drawn by Coquery-Vidrovitch (1982) between land alienation and circulation of lands. She points out that because land is inalienable it does not follow that land does not circulate. Ownership rights do not circulate, but exploitation does. There were two types of land circulation well recognized under indigenous systems: first, exchanges and gifts of land; second, changes in plots cultivated under a shifting cultivation system. But the literature generally suggests that "sales" were neither recognized, nor possible. Is this true?

145. An answer to the question just raised involves an examination of three interrelated aspects of property transfer: the power of the authority alleged to be able to prohibit sales, or whose sanction is necessary for sales to take place; whether in fact sales do take place and whether these transactions are carried on under cover of a different description (for instance, a value attached, ostensibly to buildings on land, or trees, but not the land itself); and, finally the parties to these transactions.

146. It is assumed for the purposes of this discussion that land has some economic value— that is, a price capable of being expressed in a range of commodities (cattle, for instance) or in other units of value.

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\(^{1/}\) "Sales" is initially placed between inverted commas to distinguish transactions that take place outside formal legal systems from those permitted under the law.
If it does not - either because it is so plentiful that it almost is in the nature of a "free good" or because it is a socially enjoined transaction (exchange of land, or bride-price) then such transactions do not enter within the realm of this analysis.

147. Turning, first, to the nature of the authority who can prohibit or sanction sales. The literature repeatedly affirms the principle that no sales can take place under "communal" tenure. Further, where there are chiefs or kings, that they are trustees of the land, have the right of allocation of land, create subordinate estates in which they delegate their rights to land to lesser chiefs down to the head of the compound, and that abandoned lands or lands left by anyone without an heir, revert to the pool of lands which the chief holds in trust only to be redistributed. Let us see to what extent the literature supports these statements in cases where the actual practice of these rights have been examined.

148. In northern Nigeria where the principles are said to apply, Rowling (1946) looked into how rights to land were acquired or transferred. One of the methods noted was purchase. He also found that though in theory the consent of the chief or his delegate was said to be necessary, in fact the consent was not sought. In addition to the examples of sales cited in Chapter III there are others. In Niger, the powers of the village chief (Mai gari) include allocation of uncultivated village land, redistribution of abandoned land and dispossession of individuals in the interest of the village. But "though possessed, clearly of considerable power and
authority, he cannot stop a mai gida, or chief of a compound, from selling or loaning land to strangers" (University of Arizona 1979). Thomson (1976) states that one of the three critical rules, deduced from case law regarding land appropriation in the Inuwa District, Niger, is "private individuals can legally abandon, sell or entrust land to one another without reference to any officials, or to the transactors' jurisdiction of residence" (p. 240). This statement must, however, be accepted with caution since it may refer to those professing the Islamic faith who by Maliki law are the owners of land and can sell it. Irvine, writing about the Wolof of Kir Matar, Senegal says "The chief of Kir Matar is the residual owner of all land in the region; any land whose owners' family had died out would revert to him (or so it is said; no actual cases were observed)" (1974: 387-8). Haswell notes about the Mandinka in Genieri village, the Gambia, that "the village headman was in legal theory regarded as having control over village land in relation to strangers; but it was the compound head who exercised greatest control over land" (1973:36). Although it would be unwise to generalize from such a few examples, it must be said that the examples prove that a distinction should be drawn between the reporting of norms (rules) and the practice of those rules. In most cases, the literature seems to report only the norms, since there is hardly any examination of what is taking place on the ground. Further, when the literature relies mainly on cases, as Gluckman does, the deduction of principles from those cases does not make it clear whether or not they correspond to the norms or are part of the normal development of indigenous law-making. Again, the reporting of what are supposed to be practices could be merely statements based on an assessment of what should,
ideally, take place under "comunal" tenure systems - the misinterpretation of Kikuyu tenure systems is an example (see Sorrenson 1967). Another example is "Gluckman's image of a well ordered, highly centralised, hierarchical state apparatus" from which he derived his entire range of principles about the hierarchy of estates in land and which "has survived unchallenged this long because historians have not studied and understood the context of the creation of their source materials. The problem is not unique to Bulozi although so far it has not received the attention it deserves. Dr. Twaddle has shown convincingly how an image of Ganda society which projected order and clear organisational form was invented to meet a specific set of political needs and the same thing happened in Bulozi" (Prins 1980:32). When such doubts are cast about views of groups which have been the staple of historians, lawyers and anthropologists, general caution is called for. This caution is reinforced by the fact that chiefs, with a vested interest in preserving their view of their rights and obligations have been the informants of many anthropologists and administrators.1/

1/ Discussing his field work methods, and those of Gluckman, Prins remarks, "The reasons why I never paid for information except in unsolicited ways with transport, food or medical treatment was that, again, I felt that non-monetary motives were the easier ones to comprehend. In particular, I was frightened by the career of one of my predecessors in Bulozi who reportedly paid freely for information. In consequence he received a great deal from needy and greedy people, cooked to his taste as they understood it; he was also given a Lozi nickname which means, in free translation, 'the recklessly generous river'." (Prins 1980:247).

2/ This is not unknown. The British received their ideas about Hindu law from Brahmins. Ideas which emphasized Brahmin primacy and the rigidities of caste, often unrelated to reality.
149. The need for maintaining a clear distinction between law as a norm and law in practice is also supported when we turn to the second point to be examined: the instances of sales (see also Thomson 1976).

150. The terms "sales" is used here to cover only sales to non-lineage members (that is, to outsiders), not to other members of the group (which have been allowed by custom, or rules regarding pre-emption such as are contained in the shari'a).

151. There are numerous examples again cited in Chapter III which do not need to be repeated here.

152. In Ethiopia, the tenure chiguraf-gwoses is, theoretically, a form of "comunal" tenure in which only the members of the village have a right to share. In theory too, only descendants of members should have the right to share. In recent years, however, outsiders have been purchasing shares in the common land (Bruce 1976).

153. In Uganda, mailo lands could be sold, but the kibanja (traditionally cultivated plot) held by a tenant could not under law be transferred or sub-let. The practice of sale and sub-letting (in urban areas) grew, notwithstanding the prohibition, and is now subject only to the consent of the mailo owner. "This consent is granted usually on payment of a "fine". The sale is normally carried out without documentation, other than a receipt for cash, and if necessary it is excused on the grounds that the tenancy has ceased to be a kibanja within
the meaning of the law; or that it is not the kibanja but the tenant's improvements that are being sold; or that the transaction is nothing more than a re-allocation by the mailo owner." (West 1972:77).

154. It is obvious that sales of land have taken place. It is difficult to obtain evidence of these transactions because most of them are prohibited by law. This is a risk which the purchaser takes. Therefore, an attempt to lower the risk includes the presence of witnesses when the transaction is carried out, or a description that it is not land that is being sold but buildings or "improvements" to the land, or structures are erected on the land as soon as the sale is completed.

155. Finally, the history of tenure during the colonial regime shows a gradual emphasis on individual (or family) appropriation of land for its own use. An element of permanence of holding ensues - though this is not universal. Further, another trend is also seen: with the increasing value of land there is the potential for sales to non-members of the group. In this process, what the "stranger farmer" or the outsider could acquire as a result of the goodwill of landholders, often without any services in kind being rendered as conditions precedent, the outsider now has to pay for in cash.

156. How can one reconcile the fact that land is in fact being sold when there is also the claim that "traditional" systems are being still
followed? One method is to state that it is not land, but structures or trees that are being conveyed. Another, is to claim that the ultimate reversionary rights still belong to the group. This is often the claim, though practice belies it. Dozon is worth citing in this regard:

Deux sociétés dont les mécanismes fonciers traditionnels sont à peu près identiques, Gouro et Bété par exemple, n'ont pas la même attitude devant l'aliénation des terres. Il n'y a que des situations locales et, dans ce cas, le modèle précolonial n'est que de peu d'utilité.

Mais plus encore, la critique doit porter sur l'usage du modèle précolonial. Celui-ci sert d'explication à l'analyse, alors qu'il participe d'une pratique et surtout d'une légitimation de cette pratique par les intéressés, par les agents sociaux eux-mêmes. Le recours aux formes du droit traditionnel est une pratique qui s'inscrit dans les rapports de forces actuels. Dans certains cas il n'apparaît absolument pas.

...Les Bété ont vendu massivement leurs terres (sous la houlette des "notables"). Bien loin d'admettre ce fait, ils développent une idéologie d'autochtonie ("la terre est celle de nos ancêtres"). Cette prise de conscience collective est ainsi en contradiction avec les pratiques individuelles. On parle de dépossession, de colonisation, alors qu'il y a eu aliénation. Cette "fausse conscience" et ce recours au droit des premiers arrivants, n'explicitent pas la réalité de ce droit dans la sphère précoloniale, mais la conscience d'un échec. (1982:59).

157. The third aspect – parties to the transactions – does not need much elaboration. Since "gifts" are still permitted under the law, the sales are generally between landholders and outsiders (that is, non-members of the group). There is an element of risk in these transactions, since
the law would support a devious seller to affirm that the transaction was not a "sale". A method of minimizing this risk, which will be discussed in a later chapter, is for the parties to register the sale.

V. INDEPENDENCE AND AFTER: AMBIVALENCE AND CHANGE

158. In the 1960s a flood of African nations joined the ranks of independent countries. It is difficult to determine any consistent approach to land that any nation adopted thereafter. It is, therefore, equally difficult to categorize any nation as falling entirely into the "individual tenure" or "communal tenure" camp. For example, Sierra Leone decided that individual tenure would be fostered since it was considered the only route to "progress". Customary tenures, however, continue and there has been subsequent re-examination about the possible effects of introducing widespread individual tenure. In Kenya too, the initial belief in the efficacy of individual tenure in promoting development has given way to doubts. Cameroon, in 1959, re-emphasized the importance of customary law in a "vehement assertion of tribal claims" (Mifsud 1967:6), only to turn back in 1963 and recognize the power of the State. In Botswana, the drive for tenure individualization has not been very successful; so too in Malawi. Uganda, implicitly excluded the consideration of customary tenures in the first constitution and yet customary use of land continues in the rural areas. Tanzania boldly adopted socialism, but ujaama has not been successful and since 1982, there has been a movement encouraging a return, at least partially, to individual
tenure. There are also movements backward from the socialism of Senegal and little data to assess the success of the Ethiopian revolution.

159. Despite the ambivalence of government policies, which undoubtedly affect tenure, there are some common strands which are discernible. First, a universal belief in the power of legislation to modify and control human behavior. Second, a growing distrust of courts as an arena for the settlement of land disputes, corresponding with an increasing belief in administrative integrity and the assurance that administrative personnel can decide land tenure disputes and entitlements. Third, a corollary of the second aspect, the proliferation of parastatal organizations, in a few cases as producers of cash crops, or more commonly as distributors of inputs and outlets for marketing\(^1\). Fourth, the growth of development "assistance" by multilateral and bilateral aid organizations - a trickle in the years before independence, but of increasing importance in the years after. Fifth, the continuing change in tenurial systems despite legislative intervention generally, though at times taking advantage of legislative enactments. There is also the confirmation of the old elite, with additions to these ranks from the "new" elite - the civil servant, the rich urban dweller, the merchant. Population growth and the official encouragement of agriculture also further erode the pastoral way of life, accelerated by the drought of the 1970s - a phenomenon that has recurred in the 1980s. These common strands are dealt with below.

\(^1\) This paper only discusses parastatal organizations insofar as these affect land tenure systems. These restrictions also apply to the activities of development agencies.
Legislation and Tenure 1/

160. Mvunga's comment about legislation in Zambia might, with justification, be extended, to a greater or lesser degree, to all African nations after independence. He said, "the whole land question appears to have been tackled on a piecemeal and ad hoc basis. Every issue that attracted immediate attention was disposed of on that basis" (1982:81). As a result, it is not easy to derive any consistent approach in policy. For the purpose of analysis, however, it is useful to classify African nations on the basis of their intentions at independence into two categories – those that subscribed to the view that the development of individual tenure would lead to economic growth; and other nations who saw in the socialist path the road to economic development2/. Under the first category come Kenya, Uganda, Malawi, Botswana, Madagascar, Nigeria, Ivory Coast, Rwanda, Liberia, Sierra Leone. Senegal, Tanzania, Congo, Sudan, Somalia and Ethiopia fall within the second group.

Individual Tenure

161. The grouping of countries that have been characterized as having opted, at independence, for individual tenure as the main path to economic development, does not imply identity. Within this category there are differences that are quite marked. Even more importantly, the evolution of

1/ Those interested in details regarding legislation can refer to Appendix "B".

2/ The word "socialist" is not an entirely felicitous choice but is meant to convey the view that individual tenure was not supported.
legislation in the years after independence has taken quite different paths. Changes in policy, re-appraisals of the first steps taken, difficulties in implementation, have given rise to new legislation that has, at times, meant a return to pre-independence patterns.

162. In Kenya one of the earliest African nations to expressly adopt individual tenure, legislation became an instrument of policy. The Native Land Tenure Rules, 1956, provided for adjudication, consolidation and redistribution of holdings. The procedure of systematic registration, recommended by the Working Party on African Tenure, was given effect in the Kenya Land Registration Ordinance, 1959. In pursuance of the policy of individualization of tenure, the Ordinance contained no provision for the recognition of group ownership (see Simpson 1976:200). Registration gave the individual an "absolute ownership" of the registered land. It was only in 1968, that the Registered Land Act, 1963 (which replaced those parts relating to registration contained in the 1959 Ordinance) was amended and references to group land registration were added. Not more than five persons can be registered as "owners" when the registration of a group, or the heirs of a deceased landowner seek registration. The consequences of the provisions of the Registered Land Act are, first, the land ownership is completely removed from the customary system; second, the social and economic consequence is that persons with an interest in the property whose names are not entered on the register are compelled either to squat on the land (to enforce their rights) or to migrate. In 1968, the Land (Group Representatives) Act passed which allows the representatives of a group to be appointed as a condition precedent to the registration of title to lands
used by the group for such purposes as ranching. While, however, legislation conferred "absolute ownership" with one hand, it added fetters on the incidents of ownership with another: In 1959 the Land Control (Native Lands) Ordinance was passed (later replaced by the Land Adjudication Act, 1968). This Ordinance provided that any land dealing required the consent of a Land Control Board (which included among its members the traditional elders). The justification for this statute was that the Boards would supervise land transactions and thereby ease the transition from customary to individual tenure. Latent, however, were the fears (expressed before, and dismissed by, the East African Royal Commission) that the rush to individual tenure could lead to landlessness and indebtedness. The trend towards fettered individual tenures was accompanied by the growing exclusion of the courts. The Land Adjudication Act was amended to provide that all appeals from the decision of an Adjudication Officer lay to the Minister whose decision is final. In 1981, the Magistrates' Jurisdiction (Amendment) Act excluded the jurisdiction of Magistrates in four types of land cases, including disputes regarding the beneficial ownership of land and claims to occupy or work land. These disputes would now be heard by "a panel of elders". Courts could only intervene when there were errors on the face of the record. The movement back to Land Committees (appointed under the Land Boards) and panels of elders is an implicit re-affirmation of customary modes of settlement.

163. Malawi adopted the philosophy and was influenced by the legislation of Kenya. Unlike Kenya, however, the Land Development Act, 1967, enables a family to be recorded as the owner of land under the name
of the "family head" - an enabling provision which gave rise to numerous disputes. Like Kenya, the Local Land Boards Act, 1967, prevents any person from selling, leasing, exchanging or partitioning and dealing with land without the permission of the Local Board. The Board, which is solely concerned with land governed by customary tenure, also has the power to partition land. Appeals from the Board lie to the Minister. In Malawi, both registration and adjudication have proceeded very slowly. In fact most registration has been carried out in areas covered by the several phases of the Bank-assisted Lilongwe project. Registration, however, is no longer included as a component in subsequent projects and could be an indication of Government's reconsideration of the entire program.

164. Two statutes in Sudan have changed the initial recognition of individual rights and the processes of land registration. In 1970, the Unregistered Lands Act converted all unregistered land to State land. The following year, the allocation of grazing lands in particular was taken out of the hands of the Omda (the sub-district chief in charge under Native Administration) and transferred to local or provincial councils. No system was, however, prescribed for allocation and control of grazing lands so that the former replaced practices still continue, but with far less security.

165. In Uganda, both customary law and private individual tenures are recognized. In rural areas, there is the continued use without lease or licence of public lands under customary tenures. Mailo lands were converted to freehold in 1969 two years after the special relationship between the State and Buganda and the other kingdoms had been terminated.
166. In Botswana, the Tribal Land Act, 1971, transferred the powers of land allocation from customary authorities (chiefs, ward headmen) to Land Boards. The Boards are empowered to create (or cancel) allocations of agricultural, residential and grazing lands. The most important effect of the Act was the transfer of power from chiefs - even though chiefs often continued as Board Chairmen or as advisers - to administrative authorities. It is unclear whether the powers of the Board extend to the right to approve sales as a precondition to the recognition of the validity of a sale. The Act did not affect customary rights of access to use land and to free grazing. The Government then adopted a Tribal Grazing Land Policy in 1975 to deal with this most important sector. It was believed that individual tenure together with credit and management training would provide the incentive for more rational management of herds. To achieve this goal grazing areas were to be divided into three zones: first, a commercial ranching area where leases would be granted in favor of individuals or groups; second, communal grazing areas; and, third, a reserved area for future needs. There were several lacunae in the implementation of the Policy which have now been identified and changes made to facilitate attainment of the Policy goals.

167. Though the Republic of Malagasay affirmed individual title in its constitution, an amendment in 1962 gives the State the right to acquire possession on “unexploited” or “derelict” property. The definition of the word “unexploited” is rather vague - a factor increasing insecurity of ownership. It would appear to cover the assumption that all land should be worked and that any person with more than five hectares of land who has
failed to work these lands for a period of five years loses his lands to the State without entitlement to compensation. The State is also empowered to declare rural development zones, managed by special organizations (AMVR), where land can be appropriated in the public interest. After consolidation, plots are allocated (with preference being given to persons resident in the area). Much in the manner of the Belgian paysannat schemes, the allottees have a prescribed cropping pattern and only provisional title for the first 10 years. No sub-division is allowed, nor can the land be mortgaged without permission. On the death of the allottee (or title holder) heirs must nominate a representative. Despite legislation, the system of crop sharing and other rental arrangements (metayage) continue.

168. In Rwanda, legislation has served more to confuse and obstruct land dealing than facilitate transactions. First, the independent nation affirmed the land tenure arrangements which had been introduced by the Belgian administration. Second, most of the written legislation was "provisional": introduced on the statute books without decisive action (for example, merely suspending private rights over pasture land in 1961). In 1976, a law appropriated all lands without documents of title to the State. Further, all lands (whether held under customary, or other, law) cannot be sold except with the Minister's express permission and after prior consultation with, and opinion of, the Communal council.

169. In Nigeria, the Land Use Decree, passed in 1978 vests all lands in the Federal Government (with provincial governors as trustees for each
State). In rural areas, the Decree recognizes the right of the occupant to continue in occupation and for his heirs to inherit that right, but there is no right to transfer, pledge or otherwise deal in land. In urban areas, land ceilings are imposed except for new allocations of urban land by government. Special treatment is accorded "commercial" agricultural producers who can acquire up to 500 ha for agriculture and up to 5,000 ha for grazing. Occupants are entitled to apply for Certificates of Occupancy which can be used to raise capital. The enquiry into and issue of these Certificates places an intolerable burden on an administration which is already overburdened and understaffed.

170. In Cameroon, the law of 1963 recognized four types of tenures, including customary and private lands. These can be registered, but customary lands cannot be sold for a period of five years after registration. The State's right of acquisition is limited to customary lands, with payment as compensation only for buildings and other fixtures and facilities, not land. There is, however, a cause for insecurity among private owners in that the law also provided that restrictions on private property could be introduced later "in order to fight speculation" (section 24). A later law, the Adjudication of Customary Rights, passed in 1964, dealt, however, only with the adjudication of individual rights, except where two or more persons were designated by name. Applications for adjudication have to be made within five years of the passage of the law. This could account for the surge of applications for registration, mainly by urban dwellers, creating a backlog of 150,000 applications (Falloux 1984). Plantations are exempt from land reform and are protected by the State for economic reasons.
171. **Ghana** recognizes both customary and individual tenures. The right of chiefs to declare what customary law is and recommend changes was recognized by the Ghana Chieftaincy Act, 1961, but the powers are subject to Ministerial approval. Recognizing the innumerable private sales that had taken place, the Ghana Farm Lands Protection Act, 1962, retrospectively validated such sales, provided the transaction had taken place in good faith and the lands had been farmed for at least eight years after acquisition. The Act covers only such transactions entered into after 1940 (possibly prescription could be claimed for prior acquisitions). In the same year the State Lands Act gave the State the right to acquire lands for a "public purpose" - a source of litigation, and an avenue for, at times, displaying preferences. At any rate, the powers of the chiefs to sell land (supported by the British who thereby obstructed the evolution of land transactions) are affirmed.

172. In **Liberia** too, both customary and individual tenurial systems are recognized. Sales of tribal lands, however, require the prior approval of the local elders, chiefs, county officials and, ultimately, the Head of State - a long process which few purchasers are willing to pursue.

173. **Niger** passed legislation in 1961 for the adjudication of the right of an individual to dispose of land under customary systems. The right was to be recognized if the individual had exploited the lands for a period of ten consecutive years. In the same year, attempts were made to prohibit agriculture beyond 15° N of the Equator. The regulations were revised in 1964, and the prohibition pushed further north. In 1962, the
customary privileges of "chiefdom lands" (lands attaching to the office of chief which were cultivated by "tenants") were abolished and the lands became the property of the cultivator; but the holder had no power to transfer these lands in any manner, although the lands were heritable. State power to acquire lands, particularly for the Office du Niger, are well settled.

174. The Ivory Coast has encouraged both immigration and individual tenure from the earliest days of independence. For the individual, the only source of insecurity lies in legislation passed before independence and continued thereafter. This law, first, enables the State to expropriate land (on payment of compensation) where a concessionaire grantee has failed to develop the land for a period of five years; second, to acquire lands for a "public purpose" including the development of commercial agriculture. Commercial agricultural undertakings are excluded from the purview of the land laws.

175. The belief in the necessity for the replacement of communal by individual tenure if economic development was to be secured was expressed in Sierra Leone's National Development Plan (1974/75-1978/79). Since then, however, only the Town and Country Planning Act, 1976, has been passed. This Act transferred the administration of four major provincial towns from the paramount chiefs to town councils and town management committees. The position is that in the Western part of Sierra Leone (Freetown and its urban periphery) land is registered in the registry of deeds. In other areas the control of land is vested in law in the paramount chiefs and is
governed by customary law. There are now increasing doubts about the necessity for adopting a system of individual tenure (see Njala 1980).

176. The basic land law in Mali continues to be that passed by the French administration in 1937. Four different types of land are "presumed to exist and legally recognized: traditional farm and pasture lands, on which the customary law of the area is recognized; vacant land, which belongs to the State and can be appropriated for development projects; concessions rurales, farm or truck gardening lands usually in peri-urban areas; registered homestead (mise en valeur), eventually to be provided with saleable title if all conditions are met; and concessions urbaines, similarly able to be titled if developed" (USAID/RBDO 1980: 114-5).

177. Lesotho has little internal impetus to promulgate land legislation since its economy is bolstered by, and mainly dependent on, remittances by Basotho working abroad (generally in the Republic of South Africa). In the last decade, however, rising unemployment and land shortages have compelled the government to act. The concept that all lands is vested in the nation, with the King as trustee was introduced by two laws passed in 1973: the Land Act (to control land allocation) and the Administration of Lands Act (to improve land administration). The former Act was replaced by the Lands Act, 1979. This Act transfers the power to allocate land from chiefs to land committees in the rural areas (partly comprised of elected and nominated officials, with the chief as chairman) under the guidance of the Minister. Three types of land rights can be granted under the Act. First, leases (up to 90 years) for urban land or
for modern farming in rural areas - these rights are transferable and can be used to obtain financing; second, in respect of agricultural land, allocations, now made heritable, which would encourage long-term investments in land; third, three-month licences to use agricultural land in urban areas. The Act also permits government to declare any area as a "selected development area" for development projects, including consolidation. The declaration extinguishes all rights to land within the area and land holders are entitled only to a new plot or compensation. Implementation of the Act has been slow and is so far confined mainly to urban areas (of which there are few). In the rural areas and in the highlands, the powers of the chiefs continue unabated - although there are few available lands for them to allocate for cultivation.

178. The case of Swaziland is the converse of that of Sierra Leone: there was an express declaration to return to the "customary system of land allocation" in rural areas, but little has been done to implement this declaration. Private farms purchased by government have been turned over to projects, parastatal companies and experimental farms. Only two pieces of legislation deal with land: the Land (Control of Speculation) Act, 1971 - which covers only dealings in land by aliens, not citizens who are the major dealers; and the Town Planning Act, 1961 regulating development in controlled areas. One of these controlled areas extends 400 yards on either side of the main road linking the Kingdom from its border to the main urban centres. Thus the law prevailing in Swaziland is customary law and pre-independence colonial law with most urban land and
the remaining "European"-owned farms comprising an area greater than all urban areas registered under individual tenure or held by the Crown.

179. In Zimbabwe, the land situation is in a state of flux. Pre-independence legislation had restored the authority of the chiefs to allocate land and the Land Apportionment Act, 1930 (which was amended 60 times between 1930-1978) was amended in 1977 to permit Africans to purchase lands in the commercial areas. The objectives of the Land Husbandry Act (abandoned by 1970) were reflected in subsequent Integrated Rural Development Areas (IRDAs). A Tribal Land Development Corporation (TILCOR) was created with residents as tenants, not mere occupants at the pleasure of the chiefs as under the previous Tribal Trust Land Authority. The Tribal Trust Land Act, 1979 - one of the many pieces of legislation inherited at independence - vested all tribal lands in the President and gave the Minister powers (on behalf of the President) to intervene in the exercise of traditional rights by chiefs and local councils in land management. In 1979, the Rural Land Act, which provided the basis for settlement schemes leaves virtually "all control over settlement in the hands of the government" (Harbeson 1981:14). There were already pressures on tribal trust land, significant de facto land management by women (with absentee husbands working elsewhere), and an erosion of the powers of chiefs. At independence, the private title area (PTA) covered about 16.5 million ha., the communal land area (former tribal trust areas) with about 660,000 families resident on about 16 million ha and the resettlement area. The PTA is governed by Roman-Dutch law of the Cape Colony in 1891,
as modified, and provides full title to the holder with registered title to land productively. With regard to the communal area, the Commission of Enquiry (1982) reported that over two-thirds were under population pressure and that 24 percent were under "excessive or intolerable pressure" (Heilbron 1983: Annex I, n.30). The Communal Land Act passed in 1982 changes the system of land allocation. This power is now vested in District Councils (which include chiefs or headmen among their members) with the right to consent to applicants who want to occupy communal lands. The council also have powers to regulate future occupancy and use (including pasture of animals) if the areas under their jurisdiction become overcrowded. The council is subject to ministerial control and to such model by-laws the Minister might frame. After passage of the Act, only those in occupation, or who had a pre-existing right to occupy the land (extended to a spouse, dependent relative, guest or employee) and persons in whose favor permits have been issued can reside on communal land. But the Act does not appear to contain any provision under which a Council can take action against a defaulting member. There are plans to resettle 162,000 families on some 9 million ha, but no uniform tenure system has been adopted for these areas.
Within eleven years of independence Zambia moved from a country which recognized individual title in fee simple to a nation in which all land is nationalized and vested in the President as trustee, following Tanzanian precedents. The move to nationalization ignored the recommendation of a Land Commission in 1967 which favored a gradual trend towards tenure individualization and release of lands under customary tenure for development. In 1970, the special status of Barotseland was extinguished and the lands placed in the same category as other reserves — a move facilitated by a constitutional amendment. Four years later, again following Tanzanian precedent, a much debated Leadership Code was passed in which leaders were limited in the lands they held (other than holdings under customary law) while in office, unless they decided not to accept salaries. This was followed, in 1975, by the Land (Conversion of Titles) Act which vested all land in the President. The Act, further, prohibited any sub-division, parting with possession of, or creating any interest in, or transferring of, land "without the prior consent in writing of the President" (s.13(1)). Consent could be granted conditionally, and the grant or withholding of consent is not subject to legal scrutiny. Further, the President can also determine the maximum amounts to be received in any land transaction, including acquisition proceedings. This amount relates only to the "unexhausted improvements", not the land itself which is without value. In urban areas, the failure to transfer vacant and undeveloped land to local authorities results in a "no-sale" situation. There are also some doubts whether the 1975 Act applies to rural areas and lands governed by customary tenure. Since, however, the Act expressly covers "land of any tenure", it would appear that sales of lands governed by customary tenure,
which do take place, are affected. The Act also diminished the rights of holders of land in freehold or fee simple by converting these rights and those of leaseholders for more than 100 years into statutory leases for not more than 100 years from July 1975. The impact of this legislation on mortgages and the use of land as collateral must be noted: since land has no value, it cannot be used as collateral nor can it be bought or sold; second, the value of a mortgage is impaired by the exclusion of land since the mortgage amount can only attach to the "unexhausted improvements". The Act was accompanied by other land reform measures: real estate agencies were closed; blocks of flats taken over by the local authorities; and, from 1975, no individuals could build housing for rental. For leases of agricultural lands 'scheduled' under the Agricultural Lands Act, 1960, a complex chain of permissions have to be obtained. Leases for more than a year have to be registered, requiring even more complex formalities before a final Certificate of Title is issued. It also appears that the distinction between former types of land ('reserves', 'trust land', State and private land) have disappeared since the Act of 1975 vests all land in the President and that, therefore, the provisions of the Lands and Deeds Registry Act will apply even to customary lands — requiring registration of transactions of these.

181. Although the above summary description of legislative developments in nations that recognized individual tenure at independence clearly evidences the lack of any uniform direction, a few general observations are nevertheless possible: First, with the exception of Uganda, the Ivory Coast and Cameroon, there is no unfettered power of sale by a holder of individual tenure. In Nigeria and Malawi land dealings
require the prior consent of Land Boards; in Niger, if a claim is made that
under the customary system an individual is entitled to sell lands, this
must be first adjudicated on. In Rwanda, there has to be consultation with
and an opinion of the Communal council, and the express permission of the
Minister. Second, there has been a minor trend towards nationalization of
land and the theory that land is without value. This means, in effect,
that land cannot be bought or sold and cannot be used as collateral
(though, as in Lesotho, it may be possible to use a lease as collateral).
Third, there has been a growth of administrative authority — usually at
the expense of the individual's ability to seek redress from, or
interpretation by, courts. Examples of this are to be found in the
legislation of Kenya, Malawi, Zambia. Fourth, there is a remarkable
ambivalence about policy with regard to customary authorities — while
removing them from their formal roles (by transferring, for example powers
of land allocation to committees, as in Botswana, Zimbabwe, Lesotho) these
authorities remain and, at times, are revived as in the 'panel of elders'
in Kenya. Fifth, there are examples of non-implementation of stated policy
or legislation: Sudan, Sierra Leone, and Swaziland. This does not
increase citizen confidence. At times non-implementation can be attributed
to administrative inability, or public resistance, or the resistance of the
customary chiefs, as in Lesotho, Malawi and Sierra Leone, respectively.
Lack of confidence (insecurity) is increased in the practical application
of the acquisition of lands for public purposes in an inconsistent manner
(as Bates 1983, points out with regard to Ghana), or the reservation of
lands that are exempt from land laws and land ceilings for parastatal
undertakings or commercial ventures as in Nigeria, Cameroon, Ghana, Niger,
Liberia and the Ivory Coast. These fears could also be engendered by
legislative threats — as in the Cameroon legislation which stated that constraints might be placed on individual title in order to prevent speculation, and in order to 'protect' the individual owner. Most of the constraints on the free exercise of the incidents of ownership are, in fact, justified on the ground that the individual owner needs protection — the underlying belief that individual tenure can lead to rootlessness, landlessness and indebtedness has not disappeared.

**Socialist Path**

182. As with nations that adopted goals of individual tenure, or permitted it, at independence, no discernible patterns emerge from an examination of those that adopted the socialist path. Two of the early proponents, Mauritania and Tanzania have undergone agonizing reappraisals: Mauritania has already stepped back; Tanzania is considering a re-interpretation of the Arusha Declaration (1967).

183. **Mauritania** passed the Land Ownership Law in 1960 under which all land "not used" was nationalized. The law ignored widely followed Islamic shari'a, and also the diverse customary tenures among the Soninke, Toucoulers, Maures and Wolof with their hierarchical ordering of tenurial rights. The law also abolished the payment of tithes (assakal) by tenants. Implementation of the law, however, created so many problems that a National Commission on Land Tenure was entrusted with the task of reconciling differences and recommending a law that would be nationally applicable. In 1983, the law on "Land Reform and Organization of Domain Lands" was declared which is radically different from the provisions of the
earlier law. The new law affirms the principles of Islamic shari'a (and thereby individual tenure, trusts, and the power of alienation), controls land sales and provides for registration.

184. Senegal combined both tenure and administrative reform in the Law of National Domain, 1964. The law, however, provided an opportunity for those owners whose title had not been registered or not entered in the books of the conservateur des hypothèques to register these within six months where buildings were also involved and within two years to re-register if they had been registered in the books of the conservateur. The right of occupancy in national and cultivated lands was confirmed. All lands formed part of the national domain and, after the period of six months, all unregistered land could only be deeded in the name of the State. The lands, amounting to nearly 7.5 million ha (out of 8 million ha) were then divided into four zones: urban areas, reserves, rural farmlands and pastures, and pioneer zones. A land to the tiller program resulted in the abolition of the payment of rents, tithes and taxes in rural areas for those who had cultivated land for two successive years. Pioneer zones were areas within the national domain, declared as such and could be ceded by the State to any organization willing to develop them. "On this basis, first the Delta, and later the entire Senegalese portion of the Senegal River Basin was allocated to SAED (Société d'amanagement et d'exploitation des terres du Delta) for development. This made SAED the arbiter of land distribution so far as the national legal structure was concerned" (USAID/RBDO 1982:115). Local communities were reconstituted into rural communities with partly elected rural councils. These councils control
land use, allocation and re-allocation (on the extinction of a lineage) but not, among other matters, the commercial exploitation of trees. Most of the 10,000 applications for registration made within six months after the law was passed related to urban land since rural dwellers were unaware of the need to register and were not notified that they should present their claims (Ibid., Verhelst 1968).

185. Congo was the second West African nation to nationalize all land in the 1970s. There is, however, little information available about the legislation or its impact.

186. Tanzania was the first East African nation to choose the socialist path to development. The direction had already been indicated in Nyerere's opposition to the proposal of the Government of Tanganyika that the recommendations of the East Africa Royal Commission to promote individual tenure should be adopted. The legislation passed by independent Tanzania gave effect to this opposition, although it eroded the concept of individual ownership and tenure gradually. The legislation covers three main categories: (1) legislation to convert title from freehold; (2) the development of ujamaa; (3) legislation relating to particular types of tenure, ownership or class of individuals.

187. In 1963, the Freehold Titles (Conversion and Government Leases) Act converted all estates in fee simple into government leasehold estates for a term of 99 years. The leases, additionally, had development conditions attached. Final appeals lay to the Minister. Six years later,
all leases were converted into rights of occupancy "for a term equal to the unexpired term of the government lease..." and the developmental conditions were made even more stringent. Contemporaneously with this process of conversion were enactments to grant land to both rural and urban occupiers — this was done to eliminate landlords. Here too, rights of appeal to district courts from decisions of Tribunals were abolished and the Minister was substituted as the ultimate arbiter. Along with the abolition of rights of appeal, the rights of customary land tribunals to adjudicate disputes between customary landlords and tenants was also withdrawn.

188. The second category of legislation related to the development of Ujamaa Vijijini. The foundations for this had already been laid in legislation, passed in 1965, to constitute cooperative farming villages. These settlement schemes were unsuccessful and the program was abandoned two years thereafter. The new program was to extend to all villages and this is where some of the problems arose. The first was the nature of tenure which existing villages would have. This was partly resolved in 1965 by the extinction of customary rights within an ujamaa area. But there was no decision taken with regard to the tenure to be held by these ujamaa villages. In 1975, legislation was enacted which granted occupancy rights to villages. Villages became bodies corporate and, in what is an apparent contradiction in terms, were given power to hold, purchase, manage and dispose of property. By 1984, more than 8,000 villages had corporate status and accounted for more than 93 percent of the country's population.
189. The third category of legislation covered specific classes of individuals or types of tenure or undertakings. Landlords were the first target and, in 1962, a Rent Restriction Act empowered tribunals to fix standard rents in urban areas. The next step, the grant of rights to urban and rural occupants of land has been referred to earlier. This effectively removed the landlords. Next, tenants on nyarabunja lands were given permanent occupancy rights and rental payments to landlords abolished. Coffee and sisal estates were nationalised and their management vested in the treasury registrar until such time as they could be transferred to 'specified organisations' — the latter were transferred to a parastatal body, the Tanzania Sisal Corporation.

190. Both internal and external pressures for re-examination of the working of the rural sector led to the appointment in 1982 of a Task Force on National Agricultural Policy. In its report the Task Force "questioned the validity of collective village farms and concluded that 'in general, individually owned farms perform better than collective village farms.' It called for private land ownership in the rural areas to replace the existing patterns of lands theoretically held by the villages but in practice held only on conditional discretionary terms" (Harbeson 1984:7). This report was followed by the government's policy paper: "1983 Agricultural Policy of Tanzania". This paper admits that insecurity at the level of the household has had a detrimental impact on agricultural production. Under the new policy, individual users would be granted leases from 33 to 99 years; villages would obtain 999-year leases with a right to sub-let lands for up to 99 years. Procedures for land allocation are to be
streamlined to avoid confusion that existing procedures often caused. It is as yet too early to judge the extent of implementation of the new policy or its impact on land tenure systems in the country. In May 1985 Nyerere announced that the nationalization of sisal estates had been a mistake and that the estates would be handed back to their former owners. Further, since it had also proved impossible for Government to construct adequate numbers of houses for rental, private developers would once more be permitted to do so.

191. In April 1975, a few months after the deposition of Haile Selassie, the new revolutionary government of Ethiopia issued a proclamation to provide for the Public Ownership of Rural Lands. The Proclamation deals with both tenure and the constitution of administrative mechanisms. Rural lands become the 'collective property' of the Ethiopian people — in effect, are nationalized. Only rights of possession are confirmed, with the right to inherit, but not to transfer. Land must be cultivated personally and land holding ceilings (up to ten acres) are imposed. Compensation is payable for moveable properties and permanent works on land, but not for land itself or forest and tree crops on land.

The law relating to land ceilings was applied only in the southern provinces; in the north, the peasant was given possessory rights over the land he tills. All dues and obligations payable to local officials or landlords were abolished. Compensation was only payable to landlords in respect of tools and oxen retained by tenants (unless the landlord required them for his personal use and had no tools or oxen). The law also created a three-tiered hierarchy of peasant associations; at the second tier of
which (the sub-direct level) the association could change lower association boundaries, distribute land and establish a judicial tribunal. Land cases were to be tried by locally established courts. Despite its generalities and the failure, often, to provide specific measures of enforcement, the thrust of the Proclamation was clearly aimed at remedying some of the ills that beset Ethiopian agriculture: onerous tenancy patterns, the widespread phenomenon of absentee landlordism, and, in the South the large estates. Over the past few years another problem, drought, has afflicted the nation and it is difficult to disentangle the impact of this natural calamity from the impact of the revolution on tenurial systems and agricultural production. Judgment has, therefore, to be suspended until this is possible.

192. Again, with nations that chose the socialist path, it is difficult to determine any uniform pattern of change after independence. The first blush of enthusiasm in Mauritania and Tanzania have been tempered by harsh realities; Senegal is similar to Cameroon and the Ivory Coast in its support of parastatal organizations.

The growth of administrative control

193. It is unnecessary to repat the various provisions in the numerous enactments which reflect the growing district of courts and the assumption of powers by administrations to determine land issues (without any right of appeal from these decisions). Two examples will suffice. In Kenya, the Land Adjudication Act provided for the appointment of a Committee,
comprising not less than 25 persons — many being the 'customary authorities' — presumably to guard against corruption and partiality. Registration and consolidation proceeded most slowly in Fort Hall (now Murang'a). As Lamb says:

During 1959 and 1960, it became plain that land reform in Fort Hall had been a fiasco. Aerial surveys showed large discrepancies between the consolidation register and ground maps...Political pressure and government enquiries gradually revealed evidence of substantial corruption, of fictitious fragments of land being recorded, and of repeated contravention of the appeals procedure laid down in the Land Tenure Rules. No prosecutions were ever instituted, the government being content to dismiss those officials under the strongest suspicion of corruption and ineptitude.

(1974:13)

Simpson continues:

It was in fact failure in supporting staff, both superior and subordinate, which vitiated five years' work...where certain persons 'bought' additional fragments from the measurers; that is they bribed the measurers to include fictitious fragments in the lists, so they received more land on reallocation than was their just entitlement. Since at the time the adjudication register was...final and unalterable, a special ordinance had to be enacted to enable the whole process to be repeated in respect of no less than 215,212 acres. The committees as such, cannot really be blamed for this disaster. It was the system that enabled laxity at the supervisory level and plain dishonesty in subordinate staff to pass unchecked, and it demonstrated with shocking clarity how vulnerable to corruption is this system of consolidation which perforce had to be carried out without the demarcation map to illustrate what actually existed on the ground at the adjudication stage...

(1976:289)\(^1\)

\(^1\) Simpson has an excellent section of the advantages and disadvantages of committees comprised mainly of elders: 1976:288-91.
194. The second example comes from Nigeria. In discussing the problems that could arise from the Land Use Decree, 1978, Fabiyi says:

Administrators are assumed to be disinterested and honest and to have complete and perfect knowledge of public goodness and perfectly defined objectives. It is difficult to sustain most of the above assumptions in view of the crises of confidence that arose in the allocation of public land in Victoria Island and South-West Ikoji and the findings of the various commissions of inquiry since independence — October 1, 1960...There will be delays in allocation due to the usual bureaucratic ineptitude (redtapism). Political manipulation of the allocation procedure is to be expected. Politicians are not likely to deny themselves the use of these instruments of power that has been put in their hands; by denying their political opponents or using it to secure party patronage. Also the politicisation of land allocation confers even more widespread power of patronage, on the bureaucrats than it does on the politicians...

(1979:550)

195. It is not necessary to multiply examples. This is not to suggest that courts and judges are incorruptible. There is, however, a perceptible difference between courts and administrative decisions. Judges are not usually elected in Africa, their tenure is secure, they can be removed only by special procedures, legislation can usually be introduced to correct judicial errors, and, most importantly, courts are open — hearings take place in public.1/ At the same time it should be remembered that most sub-Saharan countries possessed rudimentary land administration systems at Independence. The assumption of national land control has placed impossible burdens on these systems.

196. In Kenya there was a continuing debate about the necessity of permitting courts to exercise judicial supervision of administrative

1/ The wag might be reminded of the remark of Lord Hewart (once Chief Justice of England): "Our courts are open. Like the Ritz"!
actions which ended with a victory for proponents of the judicial approach in 1967 — the passage of the Magistrates Act. That was a watershed which has been increasingly eroded. The original draft legislation on the Land Adjudication Act provided for an appeal appeal to the High Court. This was amended to an appeal to the Minister. Coldham (1984) states that there is an enormous backlog of appeals to the Minister from the decisions of the Adjudication Officer — in 1974, only 12 appeals had been heard and more than 600 were pending. The trend, however, is continuing along with "Government's uncertainty whether to use traditional institutions or to rely entirely on appointed officials." The inclusion of elders in the land adjudication process is based on the doubtful assumption "that land is still allocated and that disputes are still settled by traditional authorities, which is not the case in many more developed parts of Kenya" (Coldham 1984:67). The last instance, in Kenya, was the Act amending the Magistrates Act which has already been referred to (see para 161 above). And yet, it is ironic that in the same year when the Magistrates Act was amended that the Law of Succession Act, 1972 was brought into operation "thereby abolishing customary succession and providing a more important role for the courts in the determination of heirs and the administration of estates" (ibid., 71).

Law and change: who wins, who loses

197. We are now left with two important questions: What impact has the post-independence legislation had on land tenure systems. Who has gained the most in the post-independence period. Two summary answers
start this section. Harbeson's comment on Zimbabwe could be extended with caveats to cover the sub-Saharan scene. He said "patterns of land tenure, insofar as they have changed markedly, appear to have evolved less in response to specific governmental policy initiatives than as a result of, and in conjunction with broader patterns of socio-economic change" (1981:14). Caveats will be spelled out later. As to those who gained most, the answer is the former elite with the addition of new members (the civil servant, the merchant, the large farmer; in brief, those who were aware of what was happening in law, could influence events and were schooled in the 'law ways'). The law was turned to the greatest advantage by these.

198. An answer to the first question regarding the impact of legislation on land tenure systems requires answers to several subsidiary questions: Were rural dwellers aware of the laws? Assuming that they were aware, did they change in response to the laws? Or, did changes take place irrespective of what the formal legal rules may have been — that is, did they continue to act 'illegally' or outside the framework of the law? To what can these changes be attributed.

199. Most of the evidence regarding awareness of the law is indirect. But there is some direct evidence regarding awareness, and the ability of some sections to manipulate the law to their advantage (this will be dealt with when the 'winners' are analyzed).
In Ethiopia before Haile Selassie was deposed the Civil Code repealed "all rules whether written or customary previously in force." As Brietzke, however, remarks, "In most of rural Ethiopia, effective everyday special control is maintained under traditional laws. Recourse to 'government law' only occurs in extraordinary cases — penal problems, tax disputes, and cases in which traditional dispute settlement has failed" (1976:47). In Senegal, under the Law on National Domain, 1964, residents were allowed to establish title and request registration within six months from the date of passage of the Law. However, "rural people, including those of the river basin, were generally unaware of this, and were not notified to present claims. Then all non-deeded lands became part of the National Domain..." (USAID/RBDO 1982:115).

Actions contrary to, or in spite of the law. Although the evidence of awareness of legislation is thin (partly because few have examined this aspect in-depth), evidence of actions in spite of legal prohibitions is plentiful.

1. Sales of land

In Tanzania sales of land are prohibited — land, in fact, has in theory no value. Yet Pitblado (1981) in his study of villages in the North Mkata Plain came across two villages, Kigugu and Madegho where the percentages of land acquired by purchase were 16 and 36 percent, respectively. In Lesotho where both urban and rural land is, in theory again, valued the same as a result of land scarcity "...a clandestine land
market had developed and the indiscriminate selling of arable land for residential and commercial sites has become uncontrollable...land hoarding and land speculation have become the norm in urban areas with virtually no means of control of development" (Mosaase 1984:90). In Zambia, where again land has, in law, no value "when State land along the line of rail becomes available, and is advertised, such a piece of land may have a hundred or more people applying for the leasehold" (Bruce and Dorner 1982:20). In Mali land is inalienable in theory. In fact, however, sales of less fertile land to stranger farmers take place. The price is 50,000 Malian Francs per hectare. Information on this point is difficult to obtain since "you are not going to find out by talking to farmers" (Satec 1973?). In Niger under customary rules land cannot be sold, yet these sales are increasing (University of Arizona 1979). In his survey of three villages in Zaria, Nigeria Ega found that 18 percent of those surveyed had acquired their lands by purchase. He says "...there is a significant prevalence of illegal commercial transactions in land and considerable mobility of land. In particular, purchase has become an important means of acquiring land. There seems to be a gradual orientation towards alienation and farmers behave as if they have discretionary power of disposal over their holdings. They transfer their holdings at will and more or less exercise individual ownership rights over them. This in spite of the fact that the law prohibits this practice. Indeed, the incidence of transactions such as purchase, pledge and rent suggests that the law is being vigorously violated and implies a lag between the law and the tenure system (1979: 291-2). Of the Volta Region in Ghana, Nukunya notes that "outright purchase...is becoming more and more common these days" (1974:4). In
theory, lands cannot be sold, except by a 'proper' party (the stool chief, or the head of the lineage). In Rwanda, where land sales require prior Ministerial permission. "There is evidence that land sales which are not strictly in accordance with (the) law do, in fact, take place...The shortage of land has given rise to an increase in the number of commercial land transactions, particularly in those prefectures, notably Ruhengeri and Butare, of greatest population density" (Reintsma 1981:17-8). All these are examples of 'illegal' sales (contrary to formal law or customary rules) that have taken place between ethnic groups or between outsiders and village 'owners'. In Liberia tribal land can only be bought with the prior approval of the local elders, chiefs, county officials and, ultimately, the Head of State. Despite this, "in the northeastern part of Liberia...where population density is high" there is a significant amount of land sales (Cobb et al. 1980). It should be noted that 'sales' take place only between members of different ethnic groups or residential areas. "Sales" between kin, or members of the same ethnic groups living within the same residential area can always be masked legally as "gifts" or "exchanges".

2. Pledges and renting

Borrowing and renting in of lands are likewise prohibited in many nations. These transactions, however, continue to occur. In Pitblado's (1981) survey, in the North Mkata Plain (Tanzania) there were instances of land borrowing in four villages (in one the amount of borrowed land accounted for 40 percent of the land farmed) and rented land accounted for three percent of the land farmed in one village. Ega (1979) found that 7
percent of the land farmed in the three Zaria villages in Nigeria had been obtained by pledge or rent. Further, despite customary rules to the contrary, pledges increasingly seem to mature into the right of sale of appropriation by the pledgee after a sufficient lapse of time (Abasiekong 1981). What is, however, a "sufficient lapse of time" is a matter of perception. Abasiekong also notes that despite the legal prohibition, pledging of oil palms continues unabated in Nigeria.

3. **Illegal tithe collection**

204. In Mauritania the Land law of 1960 abolished all payments of tithes and other customary payments. Notwithstanding this legal abolition there is evidence that "in many areas, tithes to traditional owners persist, regardless of the law, and on irrigated land, as on the Gorgol, they have simply doubled" (Islamic Republic of Mauritania 1980:75). The 1983 Law could, however, legalize these payments on the basis of Islamic shari'a. The same situation exists in Senegal River Valley where "Government technicians in the area believe that, although it is illegal, traditional share of the harvest in recognition of ownership rights continue to be paid" (USAID/RBDO 1982:118).

4. **Illegal subdivision of lands**

205. The first example comes from Zimbabwe. Land squatting is common in East Africa. At times, as with the Kikuyu, the reason was to acquire title to land by prescription. More often, however, persons squat on land used by their kin to enforce the customary obligation of kin to support their relatives. In Msengezi, near Harare, the capital of Zimbabwe,
settlement on African Purchase land (which Africans could purchase and to which they were given individual title) commenced in 1934 and was completed by 1949. "The original settlers, who came from all over Zimbabwe and beyond, created a polyethnic, new society in which traditional or customary expectations play little part in production or in local government. Yet in respect of usufructuary rights to land, one might initially be tempted to agree with the view of colonial administrations that Msengezi, like other purchase lands, is in the process of fragmenting its title rights to freehold land, in practice if not in law. During the 1972-3 season, half of the farms accommodated one or more people, in addition to the title-holder, who were growing crops. Eight years later this proportion had risen to nearly three-quarters, including four cases of land rental" (Cheater 1983:81). Further, not only were crop rights exercised by others in addition to the title-holder but herd ownership (and grazing rights as well) was also fragmented through marriage and inheritance. These were all informal arrangements working within the restricted framework of freehold title. "A few rest on the payment of rent...A somewhat larger number involve labor tenancy. All the rest reflect the discharge of economic obligations by landowners to their dependent kin, generally in return for labor. The vast majority are illegal in the eyes of the central government of Zimbabwe, and perhaps not all are approved by those landowners who actually take them" (ibid., 82).
206. An identical situation seems to have occurred in a Bank-assisted project to develop African farming in Rhodesia-Nyasaland (as it then was). The project was, among other matters, to have assisted in the settlement of Africans under the Native Land Husbandry Act. Under this legislation, the right to farm was personal to the right-holder (there could be no fragmentation or subdivision) and, further, on the death of the holder the Commissioner had the right to select one person as the heir (notwithstanding that the holder may have nominated someone else to be the beneficiary). One of the factors which frustrated project implementation was the suballocation of lands by rights-holders to kinsfolk and the resulting unauthorized subdivisions of land.

207. In Kenya the Swynnerton Plan aimed to consolidate lands, reallocate them, and create individual title to the granted lands. Fragmentation was not to be allowed: subdivision required the sanction of the Lands Committee and the official authorities (the Land Boards). Yet, a few years after, despite the Board's reluctance to grant applications for subdivision "all over Kikuyuland an examination of the cultivated areas reveals the presence of traditional boundary marks indicating that illegal subdivision is taking place " (Taylor in Thomas and Whittington 1967:480). A later study by Haugerud (1983) confirms this. Haugerud studied the Embu district near Kenya, an area with a lower population density than, say, Fort Hall. Since the 1960s the Embu have had freehold title to lands. Yet in 1981, despite the intentions of the reformers 'ownership titles in the land registry from the start have poorly reflected actual occupancy and

1/ Loan 253.
rights to use of land. Statutory law has not, even in the absence of severe population pressure, eclipsed kin relations as a basis for defining access to land... While demographic pressures in Embu are less severe, substantial population growth has occurred, and there is striking evidence of de facto subdivision of registered parcels" (1983: 72-3). To similar effect is Coldham's (1979) earlier study in the Central Province among the Kikuyu of the Gathinja sub-location, and in Nyanza among the Luo in the East Kadianga sub-location.

208. Coldham also studied the working of group ranches among the Maasai in Kenya. Although the titles issued under the Land (Group Representatives) Act, 1968, provided for the delimitation of boundaries and the sole use of the grazing land by members of the group ranch Coldham found several major deviations from the law. First, the boundaries set up under law "has absolutely no effect on the traditional grazing patterns. Where ranches cross customary migration routes, the boundaries are simply ignored" (ibid., 622). Second, because of traditional customs of hospitality numerous 'outsiders' reside on the ranch at the invitation of members. A recent Impact Evaluation of a Bank-assisted project in Kenya which had, as one of its components, the encouragement of group ranch development, confirms Coldham's views.1/ The report notes that "boundaries have become increasingly important on Phase I group ranches... Still, on most of the group ranches (especially in the south) there is some movement across boundaries without consulting the committee of the host ranch... it was not possible to record a single case of a member of a group ranch

being refused permission to graze his animals on another group ranch" (1981:37). The report also notes that the recognition of the limited grazing ground available appears to have influenced decisions not to register the next generation of maturing men. "Young unregistered men are particularly worried about their future. On the whole, they are pressing for immediate registration. Some of them are honest enough to admit, however, that as soon as they are registered they will press for subdivision" (ibid., 39).

209. It would appear from the foregoing discussion that formal law has penetrated the rural areas only partially and unevenly and that factors other than legislation have played a greater role in tenurial change.

210. The winners. One group that has managed to continue in power and entrench itself in the administrative network are the former chiefs. Although efforts (mainly legislative) have been made to diminish their standing they nevertheless continue to rise from a sea of administrative constraints. In Tanzania, for example, chieftainship was abolished and yet Miller (1968) found that many of them were occupying administrative positions. In Lesotho, the chiefs still cling to their powers tenuously, even though there is little land available for allocation. In Kenya, the 'elders' were resurrected in 1981, to determine land disputes. In Niger, the chiefs "have not remained aloof from change. In fact, they have often been at the center of events -- acting as much as being acted upon. To the extent that they are able to associate themselves with the modern bureaucratic state and the international market economy, chiefs are more likely to conserve their privileged status" (Robinson 1975:23). In Mubi
(Gongola State, Nigeria), "although one of the aims of the Local Government Reform Act, 1976, was to destroy the power of traditional governments and strip the Fulani ardo (chief) of his power, in the eyes of most of the local population the traditional system continues to retain its power and the (ardo) exists as a de facto political authority" (Noronha and Lethem 1983: 3). In Ghana, where the customary authority of the chief is still exercised, chiefs have been selling land for rice farming in the north, near Tamale. "Many chiefs have benefitted as a result of their control over land. Stranger farmers have helped them to acquire bank loans, tractors, or at least offered them free tractor services...Where benefits did accrue to chiefs, they were not redistributed within the chiefs' communities, with the result that the chiefs have become economically quite distinct from their subjects. At the same time the institution of chieftaincy has been reinforced at a regional level by this new wealth of its office-holders" (Shepherd 1981:177). In the New Halfa scheme in the Sudan, "the Shukriya elite, particularly those lineages associated with the traditional rulers, seem to have garnered much profit from their involvement in the Scheme, and the gap between them and the poorer members of the group has in fact greatly widened in consequence. Members of the elite have been able to accumulate tenancies and have thereby been able to maintain and even expand their livestock holdings by having access to Scheme lands after the harvest for dry season grazing" (Murdock 1979: 4-5). In Botswana, in fact, the ability of chiefs to afford borehole wells and who could obtain credit for these were able to quite easily control access to water, and, thereby, access to grazing. The result was that they developed a de facto right to the grazing areas (which was later confirmed in their possession) (see Lawry 1983, Peters 1983).
The second class of 'winners' include the big farmer (sometimes also represented by the former chief), the civil servant, those with knowledge of legislation who could manipulate the forum of law, the rich urban dweller, the merchant. In her study of African farmers in S. Rhodesia, Weinrich noted that no master farmers in her survey had holdings of less than four acres (compared to 37.6 percent of other cultivators who did). She notes that "while the Land Husbandry Act was still enforced, successful peasant cultivators were encouraged to acquire land holdings of their less successful neighbors who decided to migrate permanently to urban areas. Several master farmers did so...and this accounts for some larger holdings among master farmers" (1975:84). Of Embu district (Kenya) Haugerud says:

Even without the demographic pressures of Central Province, Embu today has a substantially unequal land distribution. Land ownership is concentrated to the degree that the 10 percent of the survey sample that own twenty-five acres or more own 40 percent of the total land owned by the sample...In Embu, as in Kikuyuland and elsewhere, land was accumulated by chiefs, headmen, clan elders, and other influential persons during the colonial period...individuals who had accumulated large holdings before land reform used government positions, political power, and earlier and better knowledge of the land reform procedures to acquire larger registered holdings during the reform process (1983:77-8)

Brokensha and Riley, and Njeru in their studies of land adjudication among the Mbere (neighbors of the Embu) come to similar conclusions. Njeru found that 68.3 percent of his sample who were the major beneficiaries of land
adjudication belong to the class of "rich, leaders, influentials, and those few clan members with large land areas." To be rich and influential is to command greater respect from the legal authorities. These groups were "more familiar with dealing with official routines than the old men who do not know how to read and/or write" (Njeru 1978:16). Brokensha and Riley noted that in one location (Gachoka) 14 percent of the population received two percent of the land while five percent of the population received 24 percent of the land. They add "the rich and influential usually receiving greater shares" (1980:263). Bates (1981:53-61) shows how the urban elite, the large farmer in Keya, Ghana, Nigeria have used existing legislation for their own profit — to acquire land, to obtain subsidies from the government (the same might be said of the mechanized farmer in the Sudan and the large-scale commercial farmer in pre-revolutionary Ethiopia). In the Cameroon it is the urban based Fulani who own the largest herds which are then given to transhumant Fulani (and, sometimes to Tuareg) for pasturing (Riddell 1984). In Mauritania, all herding is done by the Peuhls and Maures who herd the livestock of sedentary Sarrakoles (Soninke) who have been purchasing cattle in increasing numbers (USAID 1976). As a result of the drought big merchants and civil servants in Mauritania have been buying herds and turning herders into salaried help (Islamic Republic of Mauritania 1980). Hecht (1982) points out that among the Dida of the Ivory Coast those with the highest economic mobility are some Dida who still possess unexploited forest, civil servants and large-scale Diola traders who have access to loans and inputs. In fact, SODEPALM which had been granted forest reserves for agro-industrial development "allowed civil servants to appropriate sections of these forests for their own personal
cocoa and coffee farms, simply as a perquisite of government office" (ibid., 260-1).

212. In an interesting analysis of applications for the issue of occupancy certificates which had been acted upon under the Land Use Decree, 1978, in Bauchi and Kano States, Nigeria, Koehn comes to the following conclusion:  

The state authorities...have applied official regulations in a manner that prevents the urban and rural poor from securing statutory rights of occupancy. Most fundamentally, the vast majority of the population are denied even admission to the land-allocation process. Access is principally controlled through the imposition of the requirement that applicants must demonstrate sufficient financial capacity to complete appropriate improvements on a plot within a stipulated time period...This regulation provides the official grounds on which the 'process gatekeepers' refuse to consider numerous requests and discourage countless other potential applicants. The criteria used to determine a petitioner's ability to complete improvements -- namely, occupation and salary/income -- reinforced the exclusionary effect...according to a high-level official in Bauchi State who was directly involved in the process, most applicants for statutory rights of occupancy are prominent businessmen and senior civil servants.  

(1983:467)

Urban residents possessed superior access to the process. In Kano State persons living in the capital city submitted 74 percent of the applications for conversion of customary to statutory rights for agricultural purposes. "Although only 14 percent of these referred to land within the boundaries

1/ Koehn could not get access to applications not acted upon.
of the municipality, another 41 percent involved sites within the metropolitan planning area. These findings indicated that the state-allocation process had facilitated the efforts of urban dwellers and absentee farmers to obtain secure title over agricultural land both in the rural periphery and on the outskirts of the rapidly expanding city. As further evidence...only one person in the entire sample was exclusively engaged in agriculture" (ibid., 472). Of the applicants 38.6 percent belonged to the private commercial and construction sectors; 27.6 percent were in the public sector — state ministry.

213. Wallace, writing about the Kano River Project, Nigeria, says that the northern elite "can rent or buy their way into the lucrative land irrigation scheme. Men with prior information are buying land cheaply from farmers whose land (unknown to them) is scheduled to be irrigated in the future; one District Head has recently acquired over 200 acres through purchase and gifts from the Emir. Discussions in Kano reveal that directors of insurance companies and banks, businessmen and members of the elite are renting land from poorer farmers to grow wheat and tomatoes in the dry season" (1981:288). As Cobb et al say of Liberia,"...as soon as roads are announced — or even rumored — speculators rush to obtain deeds. After the more recent AID-financed Rural Roads...project was publicly announced...local people reported that large parcels in the Bopulu area were quickly deeded, primarily to outsiders...Those with personal connections or capital, usually both, can now legally purchase or obtain long term control over large areas of land..." (1980:13).
214. The growth of the absentee — "armchair" — farmer is endemic. In a Bank-assisted project in Kenya (Loan 303-KE), Leo found that "more than 40 percent" of the low-density scheme farmers interviewed "reported that they were engaged in a commercial enterprise or had an investment outside their low-density plot, and over 25 percent owned or had an interest in other land. More than 30 percent were employed for wages or salaries, while many farmers were engaged in two or more outside activities at the same time. As a result, a third of the plots were owned by absentee landlords. Another 18 percent of the owners managed their small-holding, but had a different full-time job as well, while 4 percent were engaged in part-time activity elsewhere" (1978:636). The absentee "investor-farmer" appears to be a common feature of irrigation projects whether they be in the Sudan, Nigeria, Senegal or Mauritania. He is usually the man in the urban area who farms by proxy — through tenants or paid labor. 

215. The losers. Two categories fall within the class of almost perennial losers: pastoral groups (particularly transhumants) and women. The former category are discussed in the following chapter.

216. Women are the other casualties in post-independence legislation and development. In Zimbabwe, Swaziland, and Lesotho they are de facto farmers and farm managers. The law does not, however, recognize them as such. In fact, the result of legislation (particularly legislation creating individual title, as in Kenya) has been to deny them their traditional right to a plot of land given by their husband. The spread of cash crops in Cameroon and the Gambia results in the loss of their income.
and inheritance (Dravi 1984, Haswell 1975). Further, they are no longer able to cultivate crops that brought an income, since they have to cultivate subsistence crops. Again, although entitled by Islamic shari'a to a specific share of inheritance, in most instances (except for the inheritance of livestock, as among the Afar of Ethiopia) the share due to them is given up or transferred to the husband, brothers or sons (see also Noronha and Lethem 1983, and Smale 1980, for other examples of the effect of legislation and development on women).
VI. PASTORALISM: DECLINE AND FALL

217. If the colonial approach to the land tenure systems of the sedentary agriculturist could be described as a misunderstanding of the nature of these tenures; their understanding of transhumant pastoralists was characterized by a narrowness of vision, almost bordering on blindness. The three exceptions were Mauritania, Somalia and Botswana (Bechuanaland). But these were more the result of circumstances — in all three countries, livestock holders were in power (and continue to be). The attitude of the colonial regimes to pastoral peoples, which has rubbed off on independent governments, was the belief that their life-style was 'primitive', 'degraded', 'idle in comparison with their settled neighbors', a 'burden on the State and inevitably destined to be changed into something more modern'. This attitude influenced many of the measures taken during the colonial era.

218. British policy. In Kenya and Uganda British policy with regard to pastoralists had two major impacts. First, in the definition of 'vacant lands' transhumance was not considered at all. Baker's comments on the delineation of lands for the Karamoja of Uganda can be applied to all the transhumant pastoralists in Uganda and Kenya

When investigations were made to delineate these boundaries they were carried out in the wet season when the tribes and their herds were concentrated in the a zone. This failure to

1/ The term used here, 'transhumant', describes the cyclical movement of groups between two well-defined points. The literature often does not distinguish between 'nomadism' and 'transhumance'. Nomadism is the movement of a group without any settled abode. Following the literature, both terms are used interchangeably here.
appreciate the transhumant nature of the pastoral system, in that the dry season grazing was as carefully delimited as the homestead area, led to a serious misjudgement: an error accentuated by the false impression of 'unused land' resulting from the decimation of the tribes by smallpox a few years before. Two major areas of dry season grazing were considered to be 'unoccupied' and were handed over to neighboring tribes. In the south-western plains large areas of perennial grass which had been grazed by Bokara and Pian herds were given to Iteso and in the south-east much of the country of Upe was given to the Suk (Pokot) of Kenya who promptly occupied it depriving the Pian and the Matheniko of valuable summer grasslands in times of hardship. As a consequence of this move, hostility has been marked in these border areas, worsening in recent years, while pressure was put on the central area belt by the marked reduction in total area of grazing.

(1975:192)

219. Since the pastoralists constituted, according to the administration, a 'law and order' problem they were to be confined to 'reserves' demarcated on the basis of the areas occupied during the wet season. The Maasai were the hardest hit by this. They lost their best land: the Kapitir plains, Donyo Sabuk, the Central Rift Valley, the Mau, Laikipia and Uasin Gishu Plateaus. What was left was in a lower and more erratic rainfall belt. They also lost access to their breeding reservoir — the 'Boran' bulls they used to obtain from the Samburu and Somali, for their boundaries were fixed and European settlement to the north prevented them from obtaining new bulls. Between 1912-1919, the Nandi lost an additional 147 square miles of their lands, 34 square miles of which were returned in 1934. The Kipsigis lost about 800 square miles of territory, some of which was given to settlers, the Maasai and the Gusii. At least the Kipsigis were left with well-watered lands. The Nandi, who later
including some of the best grazing lands. The Tugen were left with mostly barren, waterless land. And, in 1921, a section of the Samburu was moved to the Lol Kaikia hills.

220. The pastoralists not only lost their lands and were confined to reserves, but the law no longer recognized their ancient rights of passage along transhumant routes. Henceforward, if they moved, they would have to do so with increasing competition from sedentary agriculturists (private lands), or along lands belonging to government.

221. The second impact, mainly in Kenya and Zimbabwe, was the competition between the pastoralist and the settler. About 20 percent of the settlers in Kenya, and a lesser percentage in Zimbabwe, had taken to livestock herding. If herds from both the African and the settler were to reach the market, the settlers believed that stock prices would be depressed. A method to keep the 'native' herds off the market had to be designed so that the attention of the Colonial Office would not be aroused. The first way chosen was the quarantine. When settler herds were affected by disease, only the particular settler's herd affected would be quarantined. When disease was discovered in a herd owned by an African all herds on the reserve were quarantined. Veterinary services to the settler were also disproportionate compared with those to which the African had access. The quarantine, however, was only a short-term measure, ending in the late 1930s.
222. The second technique to reduce competition was the appointment of concessionaires. In Zimbabwe, the Liebig Company was successful in obtaining livestock at low rates. They had a monopoly both in the purchase of livestock, and cold storage facilities. In Kenya and Uganda, it was illegal for the African to take livestock outside the reserve for cash sales. The former marketing outlets both within the countries and outside were closed as a result. In Kenya, the attempts of Liebig Company to obtain a concession did not succeed. Despite these restrictions, African stock continued to grow. For the African did not see overstocking as the problem, only the fact that he was denied access to other pastures. The continued stocking led to the overconsumption of resources and consequent problems of erosion.

223. The recognition that overstocking had caused erosion led to two measures: the compulsory culling of animals (a short-lived solution), and the adoption of soil erosion control legislation.\(^1\) The compulsory culling of animals commenced in the Machakos District in 1937. Cattle were branded, removed from the reserve and sold by auction. Forcible confiscation commenced throughout the country in January 1938. The Kamba stock owners, some of whom lost nearly 80 percent of their herd as a result of confiscation, organized a political march to Government House. This brought the program to the attention of the Colonial Office. Confiscation was stopped in August 1938. Branding, however, commenced on a much smaller scale in the Samburu and Kumasia areas in May 1939.

\(^1\) It is remarkable how little Hailey's monumental work contains on pastoral systems. There is much more on soil erosion than the space devoted to transhumant groups. One is tempted to conjecture whether the attention devoted reflected colonial priorities in favor of agriculture.
The second World War saw the introduction of the Meat Commission and, in 1952, the African Livestock Marketing Organisation (ALMO) was constituted to stimulate livestock marketing, assist in destocking, and obtain meat at low prices for the Meat Commission. A parastatal organization, ALMO fixed minimum prices at which meat could be purchased. The 1940s also saw the growth of veterinary services in African reserves. The increase in services, was not caused by any appreciation of the indigenous pastoral systems. The contempt for the transhumant way of life, the determination to see that these groups were settled carried on through independence. "...in the early to mid-nineteenth century (East Africa) has been described as a 'sea' of pastoralism, surrounding a few 'islands' of agricultural production" but by the mid-twentieth century, "the 'sea' of pastoralism, although still considerable, has retreated before the new 'land mass' of settled agricultural production" (van Zwanenberg 1975:80-1).

In the other British territories and colonies the only measure, with the exception of Botswana, was the non-recognition under law of transhumant rights of passage along routes of transhumance. The encouragement given to agriculture and the growth of population resulted in the loss both of grazing grounds and of off-season grazing in cultivated plots. There were also attempts to demarcate reserve areas into grazing grounds and cultivable area. Where this succeeded was more a matter of accommodation than the recognition of rights. Like the agriculturist, the livestock herder also had to pay taxes fixed, usually, at twice the rate payable by an agriculturist — another indirect measure for hastening the movement towards a sedentary existence. In addition, in Nigeria, during
transhumance, the herder had to pay a cattle tax (*jangali*). Water charges were also levied at government constructed wells and boreholes.

226. **French policy.** The French treated pastoralists on the same footing as agriculturists: if they had individual title which could be registered they were recognized as "owners". Thus, vast grazing areas and transhumant routes became part of State domain. In other attitudes, however, they vacillated. For example, in Niger they initially preferred the Fulani to the Hausa, calling the latter group "lazy" and "stupid" (Roberts 1981). In addition to the head tax, they also collected 'pacage' a transhumance tax similar to the Nigerian *jangali*.

227. Quite early in the history of the colonial administration efforts were made to 'improve' pastoral systems. The French were bent on introducing ranching based on the American model. These ranches, it was felt, would both improve the breed and provide protein in a protein-poor diet. Demand, then, would take up the vast supply that would be available. The Dire Company was encouraged to import merinos with the hope of improving the local stock. Cattle projects used Charolais crossbreeds. By 1936 the projects had failed and there was growing respect for the African techniques of livestock management. It was then decided that the local economies should be stimulated so that the consumption of meat could double. "The way to do this was to overcome the inertia of tradition through experimental demonstration ranches, veterinary medicine, and, above all, pasture development" (Riddell 1982:7, quoting Giraud). These experiments were equal failures.
The French were as afflicted with myopia as their British counterparts. They neither understood pastoral systems, nor did they realize that these systems were location specific and that, therefore, a comprehension of the ways of one group did not necessarily result in universal understanding.

Pastoral systems

Understanding transhumance as a way of life is fundamental to an appreciation of pastoral tenure systems. The setting is best summed up by Lefebure.

It is probable that the structural specificity of nomadic pastoral societies resides in the distinctive combination of domestic and communal forms of production, characterised, on the one hand, by the importance of a domestic organization of production (household groups are in practice self-sufficient and autonomous) and, on the other hand, by a quality that could be attributed to communal organization (this last would appear to be the result of relations between autonomous domestic groups in production) ... each herdsman, although relatively autonomous, operates within a context in which the entire group of production units must have access to pasture, water and mineral salt resources, which are generally distributed over a more or less vast area and some of which, at least, undergo cycles of accessibility or availability...

(1978:131-2)

The quotation brings out three important elements of transhumance: the need for resources which are variable (mainly pasture, water and mineral salts); control of access to these resources; and the levels of decision-making, which brings into sharp focus the conflict between individual (domestic) decision-making and the control of resources.
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(communal). There are two other aspects which are missing from the quotation. They are the variable membership of sub-groups (a variability that is often correlated with variance in resource availability) and the fact that pastoral systems do not (except, possibly in the case of the Maasai) provide for all human needs. This adds another element of instability in pastoral systems: the need to develop relatively stable relationships with sedentary populations with defined systems of exchange — meat, milk, butter and manure in exchange for grains, cloth, utensils, and other articles of consumption (tea and tobacco, for example).

Pastoralists, like groups that practise shifting cultivation, can be classed as 'extensive' cultivators. They require pasture which is of variable growth and location; so too does the availability of water and mineral salts vary. Therefore, the area which can satisfy these needs and over which control must be maintained has to be vast. The variability of resources influences group size: when resources are comparatively plentiful, the size of the group (and their herds) is large; the group scatters into smaller groups when resource availability diminishes. Most importantly, the avoidance of disease which could decimate a herd quite easily, is a paramount consideration in herd movement. A broad tsetse belt covers the African continent from about Latitude 15°N to 15°S. And the movement of herds was closely related to the presence of the disease-carrying fly. Rinderpest was a later addition (about the last decade of the 19th century).¹ A change in these resources has an immediate impact on group and herd size.

¹/ There are disputes about who introduced rinderpest. Suffice it to say that the most popular view is that the disease was brought via the Blue Nile into East Africa.
It is impossible for an individual (or a family) to control access to the resources that would serve needs throughout a year, this requires a wider organization. It is in the difference between the need to have a wider organization controlling access to resources and the levels of decision-making that an inherent conflict in transhumance structure lies. There are, generally, three levels of decision-making: the 'tent' (an extended family) with regard to the acquisition, maintenance and use of animals; the 'camp' (a group of tents whose members usually trace relationship with each other) with regard to herding and the movement of herds; and a wider body which controls the access to pasture. The size of the camp varies and movement of tents between camps is relatively fluid. Membership of camps, therefore, varies. Two important criteria for this fluctuating membership and affiliation with different camps are the availability of resources and power. Since life depends on the survival of the herd the extent of access to resources is a vital consideration, so too calculations based on the powers of leaders. Decision as to access may be arrived at by consensus (as, for instance, among the Nuer, Dinka and Baggara of Sudan); on the other hand, as among the Maure, Fulani and Toucouleur, these decisions could be the result of hierarchical commands.

The term 'communal' when applied to the control of access needs clarification. As in the case of agriculturists, the body that actually controls access varies widely from the lineage head among the Ayt Atta of Morocco where grazing lands are allocated and redistributed each year (Lefebure 1979) to defined areas allocated to lineage segments, as among the Maasai (Jacobs 1975). On the other hand access to grazing lands may be
open to all members of the tribe (as in Lesotho and Botswana) but subject to the chiefs' restricting use. The general principle is that access is dependent, primarily, on both membership of the group (or sub-group) and residence. Most transhumant pastoralists trace membership through agnatic lineages — a common male ancestor related through the male line. It is the levels of allocation and use that differ. For example, among the Maasai grazing rights were, in theory, owned by sections of the tribe (olosho). In practice, it was the sub-sections (enkutoto) which had clearly demarcated boundaries for both wet- and dry-season grazing. Within these, Jacobs says

families practised an essentially transhumance (sic) mode of pastoralism...individual families secured rights to communal resources only by common residence with the same locality over long periods of time and by regular participation, involving specific obligations, in local age-set activities...the camp's herds (were) generally pastured and watered together (although owned by individual families)...Elders meet daily to discuss herd movements and to determine whose sons will act as herdboys and which elders will supervise them...

(1975:144-6)

Similarly, among the Tuareg, ownership of pasture nominally vests in the tribe. In practice, the smaller camping unit has the right of allocation within a defined pasture area (Bourgeot 1979). A distinction must, therefore, be drawn between nominal "ownership" and the definition and allocation of rights of use.

233. The "tent's" right to graze depends on membership and residence. Therefore, abandonment of the camp results in the loss of these rights. The control of pastures depends, however, both on the availability of
resources as well as the social structure and power of the wider group. Where resources are freely available rights are loosely defined. As resources grow scarce, controls are more strictly imposed. Tribes with weak social structures, such as the Kababish of Sudan, do not control access to grazing of even named sections of the tribe such that prior occupation provides no certainty of access in the following years. Sub-groups of tribes with centralized structures compete incessantly both for followers (an indication of power) and for grazing areas. Within these sub-groups individual rights to grazing are heritable, not transferable.

234. Generally, transhumant groups are not egalitarian societies. This stems from the levels of decision-making within transhumant societies. Decisions regarding herd size and maintenance are made at the level of the 'tent'. If there is this autonomy of decision then several risks have to be calculated: estimates must be made of optimal herd size in relation to the availability of pasture, water and salts; and, more importantly, decisions have to be made with regard to herd management. Herd management is a decision made by the camp, not the tent. Here, the first area of conflict arises. There is also the wider problem of drought and disease. The combination of all these factors tests the skills of the tent. Those who lose become 'nomads in waiting' — herdsmen for the more successful, dependents of the more powerful or herders for urban-based livestock owners. Or they settle down, as laborers for sedentary agriculturists, or take to agriculture themselves, as did the Nandi and sections of the Fulani in Niger. The more powerful, or skillful, tend to increase their power base by developing dependency relations among members
of the group — the mafisa arrangement in Lesotho and Botswana; the use of slaves to perform herding operations (the Maures); lending of cattle (Nuer, Dinka, Maasai, Tuareg, Toucouleur). What is initially a poor decision by individual tents is converted into a principle of stratification. While herd size is a source of prestige (skill), it is also an insurance against herd loss through disease and drought, and a source of convertible wealth.

235. Transhumance also brings with it the need to develop relations with the more settled population. These relations have to be developed for two reasons: the transhumant cycle involves passage through areas and along routes where settled populations reside; and, transhumancy does not satisfy all human consumption needs. The literature is replete with examples of the "symbiotic" relationship between transhumant and settled agriculturist. A few examples will provide sufficient illustration of the relationships. Both the culturally dissimilar Bambara and Diawara around Lake Debo in Niger had complex relationships with the transhumants (Peuhl, Tuareg, Maures) who annually visited the lake area floodplain with their millions of cattle. The Bambara and Diawara grow quick-maturing millet, rice and sorghum in the floodplains; the transhumants come there for the rich Borgus grass which the rise and fall of the Niger exposes. The cattle provide cowdung when they graze on the floodplain. Farmers can also get manure at the end of the harvest. On payment of a fee, either in cash or grain, transhumants will quarter their animals on farmer's fields. Over generations, the transhumants would build their temporary structures each year on the same fields, thereby strengthening economic and social relations (Morgan and Pugh 1969). There was an "intricate network of
relationships between the pastoral Fulbe and the Kanuri-speaking Manga and Mobeur in Niger, "involving the conveyance of herd and horticultural produce and access to pasture and water" (Horowitz 1975). In Nigeria, there was a similar relationship between the Fulani and the Hausa, and between the Fulani and Bambara in Mali (Brokensha, Horowitz and Scudder 1978). In northern Uganda a similar relationship existed between the Boran and settled agriculturists (Dahl 1979). The routes of transhumance were well-known and regularly passed along the boundaries of the fields of settled agriculturists.

236. The understanding of pastoral systems requires a holistic appreciation of a system: the relationship of groups to a harsh environment, the need to adapt to that environment, the competition for scarce resources, investment in cattle, management systems, the functional relationship between each aspect of environmental resource control and the size of the human population and the herd, the fluctuating sizes of herd and population and the need for interrelationship between transhumance and settled agriculture. The system was rarely appreciated. The consequence was an increasing struggle by transhumants to survive.

Factors of change

237. During the colonial era the combined effect of three factors served to reduce the status and power of the formerly powerful transhumants. They are, first, the loss of land and transhumant routes;
second, the encouragement of agriculture; and, finally, the development of the domestic herds.

238. Transhumants lost land in two ways: first, through their cofinement to reserves in settler economies; second, in the non-recognition of their rights to grazing lands. With the exception of Mauritania, all grazing lands became State, or Crown, lands. Ancient use of these lands was no defence and only occupation and actual use would serve to prove only an occupant's title.

239. The assistance and encouragement given to the settled agriculturist only served to strengthen the agriculturist at the expense of the herder. Agriculture spread into grazing areas in search of new lands for cultivation. The herder lost. Among the Plateau Tonga of Zambia who practised mixed farming, "there is a tendency for farmers to open up larger and larger acreages for arable purposes, and thus to make inroads into the amount of land available for grazing" (White 1963:367). According to Manger (1981), millet cultivation in the Sudan continues about 200 km too far north, making inroads into the grazing areas and increasing potential desertification. In Niger, cultivation has been extended beyond the 15°N latitude, encroaching on the former grazing grounds of the pastoralists, into an area of erratic and marginal rainfall (Monod 1975). Further, with major irrigation schemes which were introduced during the twilight days of colonialism, irrigation canals disrupted transhumant routes.
The final factor, which increased competition between the transhumant and the settled agriculturist was the development of domestic herds. Domestic herds have added to the livestock population in Botswana, Lesotho, Zambia, Kenya, Nigeria, Niger, Cameroon, Senegal and Chad. These herds form an important investment for the settled agriculturist, the returning migrant, the civil servant. More so when access to land is acknowledged only in principle, but not in practice — there being little available land for distribution. In Lesotho, Botswana and Zambia, it is the returned mine worker who invests in livestock; in Nigeria and Kenya, the civil servant. The existence of these domestic herds complicates use of the little grazing now left, and raises management problems. Among the Karamojo, for example, the domestic herd is sub-divided into a 'homestead' herd and a 'camp' herd. The latter herd is sent to wet season pastures for grazing in the care of young boys and a 'master herder'. In Niger and Cameroon, the herding of domestic animals is more complicated. Herding is left to the Fulbe who herd animals belonging to three groups: the Fulbe herds, those of farmer non-Fulbe and Fulbe, and of the urban Fulbe. The last class, well-settled and powerful, probably own the largest herds (see Riddell 1982). Therefore, there is a distinction between herd size and ownership. In many instances, as in Botswana, the herd does not belong to the herder — most may belong to the politically powerful town dweller or civil servant.
Pastoral responses

241. In the face of these inroads into territories that are being reduced and with little power to defend themselves, the pastoral transhumant's first option is to develop a settled base. The Bugaaje are an example of this (Thomson 1976). So too, the Fulbe who have a segment of the group settled and undertaking agriculture. The Maasai followed this procedure several decades back. The second alternative is to attach themselves as laborers to agriculturists — as in the Sudan, with the Suk and Kipsigis in Kenya.

242. It is also to be remembered that with the introduction of better measures of preventive medicine, transhumant numbers are also increasing. This led, at the beginning of the 20th Century, to the fission of groups in search of new grazing areas. But these are decreasing in area. In the Sudan, growing herder populations have increased southward movement into the savannah belt. The movement has resulted in tensions between herder and agriculturist (Ahmed 1980). Where land is still available, no conflict occurs when the pastoral group breaks up as a result of demographic pressures. An example of this type of migration is among the Bokkos Fulani of Nigeria, who live in an area 47 miles south of Jos. Since their pacification in the early 1900s, the Bokkos have lived in peace with their Ron neighbors. When the herds of the Bokkos grow beyond the carrying capacity of their reserves, younger sons migrate with a portion of the herd in search of new ares (Hickey 1975).
243. It is not that the colonial regimes tilted the balance entirely in favor of the agriculturist. Efforts were made, particularly from the 1940s, but they were too little and too late. What is more, as Baker aptly describes them, they treated symptoms, not the system. Veterinary medicine was provided particularly by the French. This removed one of the 'natural' restraints on herd increase and served to further enhance herd size. Bore hole wells were sunk, this again increased herd size and resulted in overgrazing around the wells since herds did not have to go on a transhumant cycle. The French dug wells in the Ferlo region of Senegal in the 1950s; the British had started in Botswana in the 1930s. The French also failed to take into account Islamic law under which since the State had vivified the land and spent money on building the wells, traditional means of control were ineffective — the leaders had not spent the money, the wells belonged to everyone.

244. Finally, it was during the colonial regimes that the indigenous systems of control finally broke down. The leaders could no longer control pasture to which transhumant rights were not recognized; the administration controlled both the management of the pastures and the movement of herds; law enforcement was in the hands of the administration (represented most often by agriculturists); the young were being pulled away by education and other opportunities — in Mauritania it was the mines that took away young able herders and left the old and the women (Bonte 1979). In Somalia, the truck partially replaced the camel; strategies for coping had to be developed under which one son took to herding, another to trading, a third (the most important) became a member of the administration (even if in the
lowly position of clerk) (see Salzman 1980). At any rate, indigenous authority had been emasculated so that calls for its revival would require a resurrection from the mortuary in most cases. Where livestock owners were still in power, their own interests would predominate over the interests of the wider group.

245. It is often thought, in romantic terms, that the life of a transhumant is one that would not be given up without extreme necessity. As is often the case with romantic depictions, the reality is different. Transhumance is a harsh life, demanding unremitting toil, skills in forecasting and unbounded energy. As an adaptation to a difficult environment it was probably unrivalled. The question, however, is whether transhumance could continue any longer in its 'pure' form. At the end of the colonial era, the answer was rarely in doubt. It was a negative answer. The reasons for the negative answer cannot be attributed entirely to the change in conditions before, and at the end of the colonial empires. Frantz, quoting Spooner, points out that there are no instances on record where nomads have declined to exploit agricultural resources. He continues:

Dupire also notes that pastoralists always welcome greater certainty about the availability of water, pasture, and protection and will undertake farming if wet-season camps become permanent. She adds, "le nomadisme n'est pas pour le Peul une mystique mais une soumission aux conditions de milieu physique et pas plus ne se laisse-t-il subjuguer par les avantages de la vie sedentaire." (1980:62)
246. In Ethiopia pastoral groups fared no better than under colonial regimes. Customary rights to grazing areas, and routes of transhumance were not recognized since they could "establish neither an ancient title based on Imperial grant, nor the customary rights associated with known traditional laws and payment of land taxes by sedentary agriculturists" (Brietzke 1976:642). The result was that the Afars, Issa, Galla (Oromo), Kereyu, mainly in the eastern and southern parts of Ethiopia were unadministered and lived according to their own devices. The lands they passed through, on the banks of rivers were fly-infested and hence liable to trypanosomiasis. The settled agricultural population was settled mainly in the upland plateaux. The Afar generally occupied the left and right banks of the Awash river; the Issa, the more arid regions to the east. Tribal boundaries were loosely defined and access to grazing areas was possible provided the user recognized the control of the tribe. Wells, however, could only be used by members of the tribe.

246. In the 1960s there was a thrust by the government towards the development of irrigation facilities, combined with the encouragement of commercial farming. These developments had a severe impact on the Afar and Issa since the lands near the river beds could be used for irrigation as well. With control of the tsetse fly, the Upper Awash Valley came to be settled by agriculturists who encroached on the lands of the Kereyu. The Awash National Park encroached on their lands as well. The Jile, lost their lands to the Wonji Sugar Estate (Asfaw 1975). Although there had been settled cultivators in the Lower Awash Valley for at least four-and-a-half centuries, it was not until the introduction of cotton cultivation in
the 1960s that problems beset the Afar. This was the Afar 'heartland' and while some benefitted from the introduction of cotton, others lost. Nearly half the area capable of irrigation was under irrigation by the end of the 1960s and, of this area irrigated, one-third had been developed by the Tendeho Plantation Share Company (TPSC). Apart from two other large landholders, the rest of the irrigated area was cultivated and owned by 'outgrowers' (Emmanuel 1975). The introduction of these schemes left the Afar with the choice of sedenterization or the further loss of herds. In both choices, however, land was lost.

248. After independence the main pieces of legislation are from Kenya and Tanzania, although there are a few bits and pieces from Mauritania and Ethiopia. The frustrated attempt of Niger to control the development of agriculture beyond L15°N has already been mentioned (see para 172).

249. It has already been noted that passage of the Land (Group Representatives) Act, 1968 in Kenya facilitated registration of land in the name of a group (see para 161 above). The basis of this Act was to provide security of tenure, particularly for the Maasai. In the 1950s and 1960s there was increasing encroachment on Maasai lands. Further, some of the more 'progressive' Maasai had already started enclosing "large areas of the best grazing land to form individual ranches" (Coldham 1979:621). There was the increasing possibility of loss of lands not only to outsiders, but by the vast majority to a few, more energetic Maasai. The Lawrance Mission therefore suggested that the only feasible solution would be the establishment of group ranches — since small individual ranches would be
neither economic nor socially possible. Briefly, where a group ranch is to be set up, the members are gathered together to pass a constitution (the provisions of this constitution are the subject of Ministerial order). Representatives are elected and these representatives are subsequently registered as body corporate owners of the land. The Act provides for the calling of members' meetings, the maintenance and submission of accounts.

The Kenya legislation seems to have been modelled on the Tanzania Range Development and Management Act, 1964. Seidman (1975) provides an illuminating discussion of the formulation of the Tanzanian legislation. He points out that:

That Act is the basis for a program to introduce an entirely new way of life to the pastoral Maasai... It purports to convert them from a nomadic existence... into sedentary cooperative villages producing cattle for the cash market. That program was born not out of solicitude for the Maasai and their place in a developing society, but out of a concern for conservation. The present revolutionary thrust of the statute came about mainly during the drafting stage. (1975:646-7)

Various measures had been suggested to deal with the problem of erosion. Among them: division of the district into zones, controls over the maximum number of stock, branding, prohibition of cultivation without permission. It was also recommended that a Competent Authority be appointed. The memorandum incorporating these ideas was sent to the Law Officers. In the meanwhile, a USAID mission reported on the methods of measuring animal numbers. At the end of its report there was a brief suggestion that the Maasai be organized into 'Ranching Associations Ltd, "as a device for creating units with whom the Government could deal, and in whom title to
land could be vested" (ibid., 648). Within the Ministry of Agriculture in Tanzania there was also a shift of opinion from conservation to raising economic productivity, and the gradual incorporation of the Maasai in the cash economy. Little thought was given to the problem of equity, which so concerned Nyerere, and to the fact that cattle holdings among the Maasai were normally unequal (the 'proof' of skills of different households?!). The Act that was finally passed overlooked all these questions. Under the Act, a Range Development Commission could be established for any particular area. This Commission has the power to determine (through advice to the Minister) entry into the areas and the control of cultivation. Further, it provides for the mandatory formation of Ranching Associations if sixty percent of the prospective members approve of it in the area controlled by a Range Commission. The association is then registered and is entitled either to land allocation or occupancy rights for a period of 99 years. With this allocation or grant, all customary titles in the area are extinguished. An individual can only use land in the area if he is a member of the association. The Minister has the power to prescribe the constitutions of these associations and their by-laws.

251. In Nigeria, the Grazing Reserves Act, 1964, was passed to deal with the problems of decreasing grazing land and land use decisions which tended to favor settled cultivators rather than transhumants. Under the legislation, the Federal and State governments are empowered to set aside grazing reserves along transhumant routes, and to allow controlled grazing in forest reserves. Initially, the creation of these reserves did not have much of an impact on the transhumants. It was said that a factor
facilitating continued transhumance was the imposition of the cattle tax (jangali). This tax was abolished in 1978 — much to the consternation of settled agriculturists who feared that transhumants would then occupy their agricultural lands. However, the establishment of grazing committees (comprising representatives of the herdsmen, officials, and representatives of the livestock industry) appears to have been partially successful in inducing some Fulani to settle. The Grazing Reserves Act is reported to have been drafted with the assistance of USAID livestock technicians.

252. In Mauritania, a poll tax was levied only on herds, not on rural land. Since the worst year of the drought (1973) no herd taxes have been collected.

253. With regard to Ethiopia, Brietzke says that the Proclamation of 1975 "abruptly shifts government policy by recognizing (in Article 24) that nomadic people shall have possessory rights over the land they customarily use for grazing or other purposes related to agriculture...the Proclamation leaves much to be regulated by traditional laws. Somewhat optimistically, nomadic associations are proclaimed under Article 26, and have the 'main function' of inducing co-operation in grazing and water use — the major sources of conflict in desert areas" (1976:648).

254. The condition of the transhumants has been worsened by the drought of the 1970s when herds were decimated. The phenomenon recurred in 1979-80 in Kenya, and this year in Ethiopia, Mali, Mauritania, Chad and Niger. Gradually squeezed out of their grazing lands by the development of
agriculture and the non-recognition in law of their rights to these lands or of their transhumant routes, increasing numbers of pastoralists have settled down. There is, according to some, a southward reverse migration. In doing so, the stories of conflicts between agriculturists and pastoralists have increased. The symbiotic relationship between agriculturist and transhumant, written about lyrically, increasingly appears to be a relationship of the past.

255. In Somalia, with the highest percentage of pastoralists (an estimated 70 percent — 1.5 million), there are increasing reports of conflicts over the use of water points (USAID 1982). In the Sudan, conflicts between different pastoral groups and between pastoralists and mechanized cultivation farmers are frequent and bloody. In 1977 and 1980 the Messoriya and the Dinka clashed when the Messoriya were moving south in search of water and pasture, "large areas normally inhabited by Bgok Dinka to the west and north of Abye have been evacuated this dry season" (USAID 1983:3). In the Ingessana Hill District, the conflict is mainly between the large-scale farmers in mechanized schemes and nomadic graziers (FAO 1984). In Niger, where an estimated 40 percent of the herds were lost due to drought, agriculture is creeping up beyond the 15°N. The pasture on the drained flooded areas is no longer open for grazing. Conflicts are common and the agriculturists are supported by the administration every time (University of Arizona 1979, see also Diarra 1975). In Mali, the Peuhls used the bourgoutières (flood recession area) for dry season pasture. With the extension of irrigated zones, these pasture areas are closed "which makes the problem of legal ownership of the lands especially
urgent as (there are) conflicts between official governmental provisions and traditional ancestral rights" (Traore in CILSS 1978:17). Fulani have now become nearly 36 percent of the male agricultural labor force. In the Gambia, the grazing areas are owned by sedentary farmers who hire herders (Fulani). Land pressure has increased conflicts between herders and farmers (Touray in CILSS 1978). In Mauritania and Senegal transhumants try to break through the irrigation canals to obtain access to water along their customary routes. This results in conflicts, which the transhumants usually lose.
255. One has to step very gently in this debate because we are in the realm of theology. There are "big men" on both sides of the debate, and charges of heresy abound depending, of course, on which side one takes. The arguments belong to a realm of belief systems since so few marshall any evidence in support of their claims — evidence that is the consequence of 'hard' research, where both methodology and data are open to independent scrutiny. This chapter will attempt to determine the answers to three questions: whether there is any evidence to indicate that, first, individual tenure affords greater security of possession, allows better access to capital markets for the use of land as collateral, facilitates greater freedom to alienate land (including bequests by will, or to heirs), and provides a greater incentive to raise productivity. Second, whether there is any need for registration of title to land, and the circumstances under which this need arises. Finally, when do indigenous systems have to be reinforced (for instance, by statute, or non-indigenous authorities, say, government or local administrations), restrained or replaced. Briefly, what is asked is whether the lesser constraints on individual tenure lead to greater productivity. The answers, however, may satisfy few.

256. Part of the problem, a large part, stems from loose definitions of "communal" and "individual" tenure. The problems have been compounded, historically by inaccurate perceptions about the stage of evolution of African tenure and the gratuitous classification of these tenures as "communal" (see Chapter III). The literature adds further confusion in the
inconsistent, contradictory and circular definition of terms such as "customary", "customary law", "traditional" and "modern".

257. The term "communal" obviously refers to a group of individuals. When the term "tenure" is added the literature uses the term in three main senses. First, to refer to common ownership, exploitation and management. Second, the right of all members of the group to use the same land — the "commons". Third, related to, but narrower than the first sense, to refer to the exercise of group controls on the use of land. Even greater confusion is caused in the search for an "owner". For instance, the "owner" is said to be an entire tribe, comprising departed members, the living and the unborn (variously attributed to chiefs in Ghana, Cameroon and Nigeria); a lineage (a group of persons claiming descent from a common ancestor), as among the Anlo Ewe (Ghana), Luo and Kikuyu (Kenya), Ndebele (Zimbabwe), Tuareg (Niger), Sere (Senegal), Tiv (Nigeria). As soon as the term "owner" is applied to these groups, notions of Western-law concepts of "ownership" intrude, leading to even greater misunderstanding of the nature of "communal" tenurial systems in sub-Saharan Africa. Mifsud suggests that the term "communal" should be restricted "to cases where the holding, use or enjoyment of a piece of land is shared by several individuals (or households) none of whom has exclusive rights to it..." (1967:33). While this may be acceptable in theory, it does not distinguish between "rights" in the abstract and "rights of possession". For instance, a group may own rights to the entire land but a member cultivating a parcel of group land may have exclusive possession of that land while it is being cultivated. In the latter case, use and enjoyment is individual though, in theory, the

1/ I am indebted to John Bruce (Land Tenure Center, University of Wisconsin-Madison) for this classification.
group has rights. This example would, presumably, exclude the land from classification as "communal" land. Nor does Mifsud's definition deal with the management aspect: Who manages the land? Is it the group in common? Representatives of the group? Or the individual cultivator?

**Communal tenures**

258. To clarify the situation, and in order to contrast communal with individual tenure, it is necessary to refer to the main elements of "communal ownership". Under a "pure" (theoretical) form of communal tenure there would be joint ownership, management, exploitation and distribution of products from land. An individual would obtain rights to land purely by virtue of membership within the group — that is, by status. No individual member would be able to claim a specific share in the property — shares would be subject to accretion (on the death of members or migration and abandonment of the group) or diminish as a result of increases in the number of members (through births, marriages, acceptance of outsiders as members). Nor could there be any appropriation of products to the exclusion of other members. This theoretical state, one which was posited by the evolutionists in the 19th century, does not exist in sub-Saharan Africa. It did not exist even at the time of European contact. What we have are gradations, combinations of different elements of the bundle of rights that in total go to make the concept of "ownership" in Western law. It is to these combinations that we now turn.

259. To ascribe the elements of "ownership" from the mere claim to ownership in communal tenures is futile and misleading. For instance, in
Botswana, Lesotho, Swaziland and among the Lozi (Zambia) it is said "all land belongs to the chief". Yet, further examination reveals that these "owners" do not exercise many of the incidents of ownership — they do not allocate lands, transfer, or except on very rare occasions (when there are gross insults to chiefs) revoke land allocations. They are, in effect, nominal owners. What must be examined much more closely are the following elements: who allocates, or can revoke the allocation of land; what is the period of use of the land allocated (a season, several seasons, several years); after allocation is the land used exclusively (is there, in other words, exclusive possession of land by the allottee), serially, or concurrently; who makes decisions with regard to the type of crops grown; when the fertility of the land is exhausted (in systems of shifting cultivation) is the allottee entitled to the same piece of cultivated land when fertility is restored, or to only a piece of land; is there a redistribution of lands based on needs; what are the consequences of the death of the allottee; during the period while land is being used by the allottee, or during the period of allotment, can the allottee gift, exchange, pledge the land (or standing crops) or sell the land.

The system which most closely approximates the theoretical model of communal tenure is the diesa (N. Ethiopia) where there is both common ownership and management of lands. Each season lands are allocated to members by lottery. But the system differs from the theoretical model in two important respects: first, each member has a defined share; second, once land is allotted the allottee has exclusive possession, management, and control over the type of crops grown. In another Ethiopian system, chiguraf gwoses, where there is said to be common ownership, the lands are
managed by elders, members have a right to defined shares of land. These shares are inherited. Although, in theory, no member could sell his share to outsiders, in recent years sales to non-member city dwellers have been increasing. Among the Kikuyu, although lands were said to be owned by the lineage in practice individual families used parcels of land exclusively, heirs inherited lands and sales commenced (both to outsiders and Kikuyu) early in this century. Among the Basotho, there is only a right to land (the traditional three parcels of land of varying size depending on estimates of need and land availability). Once, however, the land was allotted, the allottee had possession of the land as long as it was cultivated (allowing as well for a fallow cycle). Decisions with regard to cropping patterns were family decisions, but land was used serially: after a cropping season fences had to be pulled down and livestock were free to graze on stubble. Land was lost by abandonment, although the right to land then passed to heirs. In recent decades land sales (not allowed by law, or in theory) have taken place. In Swaziland, with patterns similar to those of the Lesotho, the main difference is that a right to land is not lost by migration. In Swaziland too, land sales to outsiders take place, although these are not recognized by law. Among the Arusha, Hayya and Chagga of Tanzania, there is exclusive possession of lands, which are hortiable, and sales of land have taken place since the turn of the century. In Malawi, land transfers took place before 1920. Among the Fulani (Wodaabe, Peuhl), land is parcelled out among sub-lineages and common grazing rights are available to members of the sub-lineage, but decisions with regard to the size of the herd are made by the extended family and herding is limited to the smaller camp. Rights to grazing lands, however, are not transferable although they are heritable. Among the Bambara, once land is allotted there is exclusive use by the compound whose head decides on cropping
patterns; rights to land are inherited and, in recent years, land sales have taken place increasingly. Among the Divo of the Ivory Coast, lands have been increasingly appropriated by individual families. Rights to land have been inherited from time immemorial (that is "beyond human memory"), and since the 1930s, land sales to outsiders are increasing. In Ghana, where, again, lands were said to belong to chiefs, lands are held and used exclusively by extended families who make cropping decisions and are capable of transferring the lands to outsiders.

261. It is unnecessary to multiply the examples, most of which have already been mentioned in earlier chapters, to emphasize the range of land tenure arrangements that have been subsumed under the description of "communal" tenure. What we now address are the elements which have been mentioned earlier (para 259) to determine whether there are any "principles" which can be discerned.

262. Who allots land. Although land is said to be owned by a chief, or king, or the tribe, the crucial decision with regard to allotment is in the hands of ward or village chiefs. At times, it is not even in their power. For example, among the Mossi of Upper Volta, allotment lies in the hands of the earth priest; similar powers are vested in the earth priests (the Tendana) of the Northern Ghana tribes, although the British ignored this. The parcelling out of lands, therefore, takes place at levels much lower than that of the king, or district chief. Among transhumant groups, the rights and allotment are at a higher level — that of the sub-lineage. Here, however, it must be remembered that we are concerned with pastures (finite resources which are consumed within a season) and a given state of
technology — transhumance, which does not necessarily concern itself with resource improvement or increase, but more often only with conservation. Even though it is the sub-lineage that allots grazing rights among transhumants there are occasions when a smaller group has exclusive grazing rights to portions within the control of the sub-lineage. For example, among the Maasai it is the smaller group, the enkutoto, that has exclusive rights to areas of grazing that are defined, although it is a matter of conjecture whether this exclusivity is a recent response to diminished grazing areas.

263. To whom is land allocated. The general principle is that a "member" of the group is entitled to be allocated land for cultivation. The term "member", however, includes those who claim descent, actual or putative, from other members, and strangers and migrants who are accepted as members of, and reside with, the group — as, for instance, the navettane in West Africa. There are further qualifications to this general rule. First, in stratified societies — the Toucelour, Sere are examples — the upper levels are entitled to parcels of greater size. Second, access to land (and labor) may be qualified by rules relating both to the period of residence in the area and the member's ancestry: if the member is a recent resident he may be entitled only to marginal lands and may have difficulties obtaining labor (as in the Gambia), or if the member can trace his ancestry back to the founders of the village (to the maitre du feu) he may be entitled to the best lands and entitled to employ surplus labor first (as in Senegal). Third, as land availability diminishes (which is both a question of fact and subjective assessment of land requirements) the circle of individuals who are entitled to access to land diminishes in
two respects: membership is more narrowly defined in that increasingly, only those who can trace actual descent are entitled to land -- the stranger being admitted more as a crop sharer or tenant or laborer without any right to land; and the type of land available for allocation to the newly-admitted member becomes increasingly marginal. Fourth, when land for allocation is no longer available, although a member's right to land may be affirmed, the member (narrowly defined) would have to wait till land becomes available for allocation, as in Lesotho today. At this stage, squatting on the land of a relative, or migration may be the only solutions to landlessness.

264. What is the effect of an allotment. The general principle is that the allottee has possession and use of the lands as long as they are being cultivated. Within the area allotted, the allottee may then make further distributions of land to wives and children. Note, however, that land allocation is not described as granting "exclusive possession". It is here that other elements must also be considered: type of system (shifting, sedentary), types of land (upland, lowland, marginal land, irrigated, rainfed) type of crop (subsistence, cash crop), location of land (near market, road, urban areas), form of social organization (stratified, quasi-egalitarian), methods of allotment (lottery, right to a parcel of land, right to the same piece of land) and levels of technology (hoe and dibble stick, plough, draft animals, tractors). Exclusive use of land is, then, qualified by other elements, the rule being that the more valuable the land, the greater the trend towards exclusive possession and control. Land, however, gains value when it becomes an economic good: scarce (because of location, type of land, and the demand for arable land is
greater than the land available). Historically, population growth, the inability to migrate, the closure of national (and even district) boundaries, the limitation of tribal movement, the development of markets and communication systems, the introduction of irrigation, and improved inputs (seeds, fertilizers) have increase land value and have been matched by corresponding developments over the control of land: the gradual wresting of lands from lineage, to sub-lineage, then to extended family, and, finally, to the nuclear family (including changes in the modes of transmission of lands from matrilineal to patrilineal succession). The process could take place through affirming continuous cultivation through tree planting, or the restriction of cash cropping to the best lands — the fadama, oualo, riverine lands; or through the "inefficient" cultivation of subsistence crops (for instance in Lesotho) or tree crops (as in the Ivory Coast) over an area greater than needed by a family so as to preserve lands for distribution to children or to prevent loss of lands through government acquisition. In land abundant areas¹/ — usually correlated with climatic zone, type of land, population density, and level of technology employed — exclusive possession of lands by an individual or family has no utility. The right to access to lands based on an assessment of needs and the ability to satisfy those needs suffices.

265. Further incidents of allocation. Once lands are allotted, could the allottee gift, exchange, pledge (the land or standing crops) or sell?

¹/ Land abundance should be distinguished from lack of title to land. As was noted several decades back, there is no land in sub-Saharan Africa without title (see Biebyuck 1963, Noronha and Lethem 1983).
Under indigenous systems gifts, exchanges, and pledges were usually possible. These were limited to defined groups of people, that is, within the group. At times, as in W. Africa, after the introduction of commercial crops, pledges to outsiders (that is, non-members of the group) were permitted. Pledges were usually enforced through possession by the pledgee (see Abasiekong 1981, Haswell 1975). It was, however, understood that possession of the land was not irrevocably lost by the pledgor, although both Haswell (1975) and Meek (1948) suggest that even under the indigenous system, if the money advanced was not repaid within a reasonable period, or the pledge not recovered through the produce from the land, the land could be lost.

A more difficult question is the incidence of sales and the capacity of an allottee to sell lands. The difficulty arises in part from the possibility that a sale, under communal tenure, to a member of the group could be disguised as a gift — which was generally permitted. It is evident from the discussion in the preceding chapters that even under so-called communal systems of tenure the incidence of sales has increased. What is more important in this regard is the extent of group control over these sales. Here practice belies theory. In theory, any sale of lands which would result in the removal of land from the control of the group should not be possible. These sales, however, do occur — see for instance, Nkunya (1974). Since sales take place, the next question is whether the seller obtains permission of the higher authorities (the village, district or other chiefs) who in theory "own" the land or are entrusted with its allocation. Increasingly, it does appear that
permission to sell lands is not sought:¹ see Bruce and Dorner 1982, Doggett 1980, Ega 1979, Haswell 1973, Nkunya 1974, Pitblado 1981, Rowling 1946, University of Arizona 1979. Again, historically, the increasing number of sales without permission are correlated with the extension of exclusive appropriation of land by extended or nuclear families.

267. The third incident of allotment are rights of succession to land. The right of heirs to a parcel of group land — not necessarily the same parcel that the ancestor cultivated — is generally recognized. Usually, the heirs would continue to cultivate lands being cultivated at the time of death of the allottee. These rights did not, however, generally extend to lands which had been cultivated by the allottee and which were fallow land at the time of the allottee's death. The area, however, granted would be subject to land availability. In Lesotho, for example, until the last two decades village chiefs had the power to acquire lands deemed surplus to requirements of a household and redistribute these among the more needy members — which is one reason why returns on land used for subsistence farming are low.

An exception. An exception to the general rule regarding land allotment and control by the wider group are garden lands — in Lesotho, among the Meru (Kenya), in Zanzibar, and among the Zande (Sudan and Congo). Garden lands were always deemed to belong to the family that

¹/ This could be related to a transitional period when land tenure systems are in a state of flux (due to conflicting provisions of indigenous and statutory laws, or areas of uncertainty between the two systems). Further, sales without permission or which are illegal could give rise to purchaser insecurity of possession. These aspects are discussed later (see paras 299-303).
cultivated them. Succession to these followed lines of succession different from those of non-garden land.

268. To sum up: communal tenure covers a wide variety of systems, adapted to climatic zone, level of technology, land needs, and type of crop cultivated. It generally provided security of possession and a right to land to the "member" of the group.

Individual tenure

269. In contrast to communal tenure, individual tenure would have all the attributes contrary to those of communal tenure: the right to land would be personal, a matter of contract; there would be exclusive appropriation and possession; the power to transfer, alienate, mortgage, gift, will away; the land would be a demarcated parcel; the owner would have the right to use or not to use the land; migration would not result in loss of ownership or be construed as abandonment. These incidents correspond to the popular image of ownership in the Western world. And yet, they are far removed from reality: the individual owner is subject to rights of way (easements which could be statutory as are the rights to lay sewers and electric cables, or under common law such as the right of another to cross over the land to reach his dwelling), to zoning and building codes, to laws of nuisance, to the potential that a mortgagee might foreclose for non-payment of mortgage installments, or sold for failing to pay rates and taxes, and, ultimately, to the power of the State to condemn the property or to exercise its sovereign power to acquire the property.
Discussions of communal and individual tenure are additionally confused by the loose use of terms such as "customary", "customary law" and "traditional"; and the further equation of "communal tenure" with "customary"/"traditional" systems, and "individual tenure" with "modern"/"formal-legal" or "statutory". Attempts to define the terms "customary" or "customary law" have usually been exercises in futility, leading to contradictory definitions and circularity (see Noronha and Lethem 1983). Systems of pasture ownership, management and use in the Swiss Alps are modern although they are both "communal" and "traditional". Again, the term "customary" does not necessarily stand in contradistinction to "formal-legal" since formal law can expressly recognize and enforce customary rules. Examples of this are the rules of Islamic shari'a and Hindu law. One school of Hindu law, the Mitakshara, shares many of the characteristics of "communal tenure": the right of a male member to share in joint family property commences at conception; the share, however is undefined and fluctuates, subject to increase or decrease as a result of deaths or births, respectively, of other males; the share is only defined on partition of the property. Islamic shari'a recognizes individual property, the right to alienate (subject to certain rights of preemption with regard to land), and the right to bequeath up to one-third of personal property. It is nonetheless both "customary" and "traditional". The important point, therefore, is that the type of tenure — "communal" or "individual" — can be "customary", "traditional", "modern", or "formal-legal". Further "customary" rules can be incorporated in statute. An
example are the rules developed by merchants during and after the industrial revolution which were incorporated in statutory form only in the 19th century. In view of the semantic confusion that has obfuscated all discussion about the nature of communal and individual tenure, and customary and modern tenurial systems, the most appropriate word to describe systems of land tenure which have evolved locally is "indigenous". This term would then distinguish between systems which have evolved locally from those which have been received or imposed from without. It would also avoid the straitjacket of a time dimension (is it "ancient" and if so, how far backward in time is it necessary for the practice to have come into being for it to be so classed?) to determine whether a system is "traditional" or "customary". Further, adoption of the term would reduce the intrusion of a priori prejudices about the efficiency of individual tenure systems as opposed to communal tenure systems (or vice-versa), and permit a more objective perspective about the functional utility of each type of system under diverse conditions.

271. We are now in a better position to examine the relative merits (and demerits) of both communal and individual tenure systems.

272. The main criticism of communal tenure can be summarized as follows (see Cohen 1980 for an analysis of the literature): (1) the system does not provide security of tenure; (2) as a result of this insecurity there is no incentive to invest in physical capital and land improvement; (3) nor can land be used to raise credit, that is, land cannot be used as
collateral in consequence restricting the ability to invest; and (4) communal tenure is less efficient than individual tenure since the latter is not circumscribed by constraints (1) and (2). Protagonists of communal tenure deny that these deficiencies exist and add that communal tenure provides security for the individual while individual tenure encourages rootlessness (the individual is cut off from the community), landlessness, increases the gap between the rich and poor, and raises indebtedness.

273. The phrase *insecurity of tenure* has several meanings.¹ In its first sense it connotes "insecurity of possession:" — the lack of certainty, first, as to the period during which the cultivator can hold possession of the land; and, second, lack of exclusive possession (where trees on the land are owned by a person other than the cultivator, the owner of the trees has the right to enter on the land, or the land is used for grazing by others during the off-season). In a second sense, the term refers to a lack of certainty about the title under which the land is cultivated. The cultivator, it is said, does not possess the land in his own right but merely because he is a member of the group (status). The cultivator has only usufructuary rights (to the produce of the land). Under communal tenure, the cultivator cannot sell the land. Further, inheritance of the land is uncertain, and members of the cultivator's family have no assurance that the lands will pass to them on the death of the cultivator.

274. Is there really insecurity of possession in that land can be taken away from the cultivator at the mere whim of the person who has

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¹ Another important meaning of the phrase — whether indigenous systems of tenure can provide security of tenure under conditions of rapid change today — is discussed later (see paras 299–303).
allotted the land? Or are there well-defined rules when lands can be taken? It is quite clear that in most African societies land under cultivation cannot be taken away from the cultivator. This was the situation even in Lesotho and Upper Volta where fallow lands form part of the common pot (that is, the cultivator does not have the right to the same piece of land once fertility has been restored). Nor was this the case in the diesa system in Northern Ethiopia. Eckhert (1980) notes that in Lesotho the average period of landholding is about 18 years which, adds Doggett, is "more than that prevailing in the United States" (1980:20). There are well-defined rules under which land can be taken away: In Lesotho, when the lands held were deemed to be surplus to requirements. Second, in other societies characterized by stratification, for gross insults — which in modern day equivalence would amount to a denial of the paramount power or sovereignty of the State (giving rise to escheat, forfeiture, for crimes). Third, when the land was deemed to be abandoned. While under cultivation, however, except in cases of gross insult, land could not be taken. The rule generally applies whether one refers to annual crops, or, later, tree crops.

Concurrent use of land is a more difficult situation. Fortunately, however, the examples are rare. In Mali, where trees are inherited along different lines from land (and, within the category of trees, different species follow different lines of succession) it must be noted that this only applies to trees within, or near, the family compound (Lewis 1979). In Zanzibar (Middleton 1961) access to trees (particularly commercially valuable species like the Kola tree) created problems for the cultivator. In recent times, however, tenants are prevented from
cultivating trees and it is the owner who has access to both land and trees. With serial use of land the system is, in essence, one where both technology and fertility do not permit double cropping. In effect, lands are idle during the off-season and their fertility is enhanced by the manure of animals grazing on the land, as in Nigeria. The more important question is whether the cultivator regains possession during the cultivating season. This appears to be the case, except when the land is left fallow for several seasons.

276. Critics of communal tenure are guilty of confusing several manifestations of communal tenure. First, they confuse a system of land usage with title. The conclusion drawn from the practice of shifting cultivation is that it leads to insecurity and possession. As Gershenberg (1970) points out, what is being criticized is not so much land law as a form of land usage — shifting cultivation — which "is not intimately related to or dependent upon customary land law. This kind of usage reflects a relative abundance of land and a relative poverty of soils" (1970:56) as well as minimal use of other inputs (such as fertilizers).

The type of title to land has no necessary and inseparable relationship with the form of land use. A sharecropper may have no title to land in a system of permanent land cultivation (for example, the sharecropper tenants in the Gezira Scheme in the Sudan) while a shifting cultivator may have title to land. For instance, the Kofyar (Nigeria) were settled, permanent cultivators of plateau lands. A few decades back they extended cultivation to the slopes and adopted shifting cultivation for the slope areas because they believed that the system was more appropriate to these. This extension did not change the nature of the title to the new areas. It
continued to be family farmed and owned (see Netting 1965, FAO 1984). The second error of critics of communal tenure is to suggest that individual tenures did not, and could not exist under a system of communal tenure (which is confused, in this instance, with "customary tenure"). Ruthenberg (1968) and Ludwig (1968) cite numerous examples of well-settled, permanent, plot cultivation, terracing and irrigation. Ludwig, particularly, points to individual ownership of land in Tanzania. The debate about the relative merits of communal and individual tenure is often obscured by the non-recognition that systems which are categorized as "communal tenure"/"customary" systems also include patterns of "individual" tenure which closely approximate systems in Western law.

The entire discussion on security of possession may be summed up in the words of Mair who said "it is rarely the case that persons in occupation of land which they hold in accordance with native custom -- that is as members of a hereditary right-holding group -- consider that they have insufficient security" (1951:58). If there are deficiencies in the system of customary tenure, insecurity of possession was not one of them.

In another sense, insecurity of title denotes lack of certainty of title of the person in possession of the land: the cultivator does not possess land in his own right but solely by virtue of membership of the group. Further, the cultivator's interest in the land, it is said, amounts only to a usufructuary right. Nor can the cultivator sell the land, and his heirs have no assurance that they will succeed to the lands. These objections are not based on fact. First, possession of land in most cases (even in Western law) is personal — whether as a result of contract, or
"status. Merely because land is possessed as a result of membership is no indication of title in and of itself. Second, the cultivator possesses land as long as it is being cultivated. Third, there is no instance in which heirs do not inherit rights to land. Fourth, there are numerous instances of sales of land under communal tenure. It is generally accepted that land can be exchanged and gifted — these transactions are usually confined to members of the group and at times are disguised sales. "Sales" usually relate to transactions between members of a landholding group and non-members ("outsiders"). For these to take place certain preconditions must be met. The most important is that land must have some value. In land abundant situations (and, typically, where labor is a constraint and the level of technology low) land has no value. There would be no market in land. It is only when land becomes scarce that one can examine whether sales take place even under communal tenure systems. There is sufficient evidence that they do occur: Land sales in the Ivory Coast in the late 19th Century; sales of land around Kano; sales in Ghana (which were, at first, recognized by the courts and, later, not recognized); land sales among the Kikuyu. In the early decades of this century sales transactions may have merely involved payments in kind — beer, maize, an annual share of the produce as a token of recognition.1/ But these were nonetheless sales even though at first limited to sales by chiefs or important persons.2/ As groups became increasingly involved in the cash economy

1/ It might be remembered that the island of Manhattan was sold for a few bead necklaces, but was still believed to be a sale.
2/ Political power appears to have been an essential ingredient in the transition. At the initial stages the ability to "sell" appears, generally, to have been confined to "chiefs". It is only with the reduction in the powers of the chiefs, rising land values, and the increasing inability to control land dealing that individuals (and extended/nuclear families) could alienate land.
payments were made in money. Practice, therefore, belies the theory that there were no sales under communal tenure systems.

279. The critics of communal tenure neglect several facts. First, political stability did not come to sub-Saharan Africa until the second decade of this century. Until that time, groups obtained land mainly through conflict. Second, land availability was not a problem until about the third decade of this century. The communal tenure system adapted to these changing circumstances: increasing appropriation of land by families together with increasing freedom from interference by "customary" authorities in declining with land.

280. The right of a cultivator under communal systems, though personal, cannot be termed a usufructuary right. Possession was that of the cultivator; the land could be exchanged or gifted and, more recently, alienated; heirs had a right to land though not necessarily the same parcel of land which had been cultivated by their ancestor and which was under fallow. The term "usufructuary" should strictly be limited to the use of land as a result of status: the status of son, wife or that of chief (as in Niger where certain lands attached to the office, not the estate, of chief).

281. The second major line of criticism of communal tenure systems is that the system does not provide an incentive to invest. Under systems of shifting cultivation, for instance, where the allottee ("member") is not necessarily entitled to receive the same plot cultivated previously after the fallow period, there is little incentive to invest in long-term land improvement or in capital equipment — for example, terracing or tractor
purchase, respectively. In many respects this is one of the deficiencies of "communal" tenures although, at times, the criticism does not take into account land use and soil quality in areas where shifting cultivation is practiced.

282. An important argument about the relative merits of communal and individual tenure lies in the realm of credit-worthiness. Can an individual who holds land under a communal tenure system use land as collateral (whether the loan was needed to undertake agricultural improvements or for other purposes, such as education for the individual's children)? What were the sources? What are the costs? It would appear that it is in this regard that the holder of a registered individual title has an advantage. The holder under communal tenure could only rely on informal sources: kinsfolk, indigenous money-lenders, traders (see DeWilde 1967). Even here, however, informal sources of credit carefully assess the extent of exclusive possession and capacity to repay.

283. The greater constraint on the use of land as collateral has been the result of statutory interventions in recent decades. For a landowner to be creditworthy, land must have some value, otherwise it cannot be offered as security for a loan or as collateral. In Zambia, Lesotho, Tanzania, Mali, Somalia, Nigeria, Swaziland, Rwanda (without Ministerial permission), and, till 1983, in Mauritania, as a result of legislation, land has "no value" — it is only "unexhausted improvements" to land that can be sold, or buildings or trees standing on the land that can be offered as collateral. In these circumstances, land cannot be offered as collateral and transactions in land can only take place under the guise of
sale of "improvements" or in an "illegal" market.

284. Governments may also intervene to assist land-using groups that advance favored government policies. Thus, although Tanzania now permits both public and private joint enterprises (with foreign capital) and will issue permits to individuals to use lands for up to 99 years, "credit facilities are more readily available to cooperatives and ujamaa villages than to individual private landowners" (Mkatte 1984:103). In these circumstances, private landowners would have to rely mainly on an informal market for credit.

285. There is, however, evidence that the possession of even a mere certificate of rights of individual occupancy could confer an advantage with regard to access to credit. In Nigeria, Seidman says that possession of a statutory certificate of occupancy confers private economic advantages: "...major financing institutions treat these certificates as a necessary collateral against various types of loans, including bank mortgages, and commercial and agricultural credit. Therefore, holders of statutory titles can gain access to domestic money markets and secure loans at favorable terms which can be utilised for private capital accumulation and investment" (1983:462). But the evidence of the sufficiency of certificates of occupancy or even title to agricultural land as collateral is not uniform. In Kenya where registered individual title to land is recognized, banks do not accept title to agricultural land as sufficient collateral. Banks found it almost impossible to foreclose on agricultural land to recover loans. The result is that "the original theory that title deeds are sufficient for the acquisition of loans has given way to a
formula that effectively excludes all but those who are in a position to offer substantial collateral such as urban properties, attachment of salaries and other forms of valuable property" (Okoth-Odengo 1976:175). In a Bank-assisted project in Zambia, it was thought that the 'occupancy licences' given to project beneficiaries would suffice as collateral for loans and housing allowances. Financial institutions and the Personnel Division of the office of the Prime Minister, however, did not accept the licences as sufficient collateral, or proof of eligibility for allowances, respectively. In this case, however, it is unclear whether the holders of licences could transfer them, or whether they were rights limited only to the holders. In any event, no uniform conclusion can be drawn about the effectiveness of title in obtaining credit.

The final question is whether in countries that permit agricultural leases (such as Zambia) or where individual title to registered land is recognized, it is easy to obtain leases, or to transfer title to land. In Zambia, as pointed out earlier (see para 180) a contract to lease land requires a chain of permissions and complex procedures. In many urban areas where land is even more valuable most "sellers" and transferees are unwilling to go through these formalities. In Kenya under the Land Control (Native Lands) Ordinance, 1959 (later replaced by the Registered Land Act, 1963), the permission of the Land Board has to be obtained for any dealing in land. Because it is often doubtful whether sanction for sales will be granted, there are many 'sales' which take place without permission (Coldham 1975, Haugerud 1983). In Zambia, all transfers (including mortgages) require Presidential permission which few

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are willing to seek in areas where land is scarce and valuable. Land dealings are, therefore, not necessarily simpler with individual rather than communal tenure, if the formal legal system controls land dealings through complex beauracratic preconditions, the results of which are not susceptible to prediction.

287. The final question for examination relates to the greater efficiency of individual tenure over communal tenure. The argument, in substance, is that individual tenure is more efficient in that productivity is higher since decision-making is not diffused among many persons, there are greater incentives to produce more since the produce does not have to be distributed in accordance with social rules, incentives for investment are stronger and credit is more easily obtained. Some of the assumptions underlying the conclusion have already been dealt with above. The term "efficient" is used as used in the literature reviewed is somewhat ambiguous. The main thrust appears to be that individual tenure provides the basis for higher productivity per unit of land.

288. The debate is clouded by the fact that most of it proceeds on the basis of a priori principles with little evidence to support the conclusions. Two examples are worth discussing. Ike tested the hypothesis that "a communal land tenure system is inherently inferior to a system characterized by the presence of fee-simple rights, in short, a freehold land tenure system" (1977:187) in a study of land tenure systems in Ibadan and Ife, Western Nigeria. The sample comprised 200 farmers selected from 25 villages. Of these, 137 farmed communal land, 33 freehold land and 18
had long-term land leases. On the basis of the farmers' average incomes, Ike came to the conclusion that those farming freehold land were superior to farmers on communal land (an average of £536.9 for the former, versus £339.1 for the latter). This, Ike claims, points to greater incentive in working the land — the freehold farmer worked longer hours on the average than the communal farmer. This conclusion, however, cannot be unreservedly accepted. Among these reservations are: the representativeness of the sample, the absence of any data indicating that the study controlled for differential access to inputs and extension (other than differences related to land-tenure status), quality of land and access to labor. In 1979, Koehn claimed that after the Ethiopian revolution production had gone up, despite inclement weather. Koehn attributes this to the abolition of tenancies and the rights of occupancy which the farmers received. According to him this security of tenure created an incentive to work the land more efficiently. While the conclusion may be correct, the data provided in support are insufficient to warrant any generalization. Further, the article does not provide any information about changes in the availability of inputs or of any other factors which might have resulted in higher production.

289. Stryker is a protagonist of communal tenure and notes that:

...of major interest is the finding of the PPS (Production Primaire au Sahel) that the production of animal protein per hectare in the livestock sector of Mali is about equal to that found in similar zones (500 mm of rainfall or less) of Australia and the United States. Only in areas where rainfall is more plentiful does milk and meat production per hectare in Australia and the United States exceed that of Mali. (1984:188)
There are considerable doubts about the energy calculations in arriving at this conclusion which would, again, rouse defenders of both opposing views.

290. This is the literature that makes some effort to support claims for one side or the other. Most of the other literature, claiming mainly that individual tenure is necessary uses data that are suspect: claims, for example, that European farm production in Kenya or Zimbabwe were more efficient than African farm or livestock production fail to examine comparable units — that is, for instance, both African and white farms that received the same subsidies, or had equal access to the same inputs (extension, veterinary assistance, marketing facilities) and farmed land of the same quality.

291. In the debate about individual title in the African context many advocates assume that the grant of title automatically ensures greater production and efficiency. Is this really true? In many instances the evidence is to the contrary. First, there is significant absentee ownership when title has been obtained (see the examples in para 214) which could be related to diminished incentives and lower productivity. Second, white farmers in Kenya and Zimbabwe with access to better lands, subsidies and inputs underutilised their farms — an estimated 20 percent was utilized. In Zambia, the white areas reserved for farming were known as "the silent lands" (see Bruce and Dorner 1982). Leo's (1978) comparison of the differences in production between 'low density' farmers (assisted by a Bank project) and 'high-density' farmers in Kenya is instructive. The low-density farmers with larger farms and better quality land received
greater subsidies and assistance: fewer farmers to extension agents, input supplies. The high-density scheme, on the other hand, was doomed to failure in the minds of many administration officials. Yet, a few years later, the high density farmers were as productive as the low-density farmers. Leo attributes this to a commitment: this was the first piece of land that the high-density farmers ever had, they were bent on making a success of farming to keep the land and avoided any involvement which would take time away from their land. The Leo study related to farmers all of whom had title to land. One possible explanation for the low production of low density farmers, which Leo did not investigate, was "that this group saw land not as a productive asset but only as an asset whose price would inevitably rise even if it were not farmed well at all."\(^1\)

It is therefore a moot point whether grant of individual title alone automatically guarantees greater efficiency or higher productivity. As Yudelman says:

The expectation is that higher productivity will come in part from changes in the tenurial system and that the 'security' of individual ownership of land will encourage a much higher rate of on-farm investment than before.

The assumption that producers will invest at a much higher rate than in the past is open to challenge. While this hypothesis has yet to be studied in detail, there is some experience in Southern Rhodesia to contradict the view that private ownership per se encourages much greater investment. A small number of privately owned farms have been held by Africans for over 20 years. Private ownership has not led to raised levels of output.

\(^1\) David Atwood (USAID), 1984. Personal communication.
compared with the output of communally held farms in the adjacent areas. There are significant differences in the levels of production between farms under different tenurial systems, but... the major determinants lie not in the tenurial arrangements but in managerial ability. (1964:128-9)

293. In Chad, where there were inequities in land distribution, exploitation of cultivators by chiefs (who used peasant labor to construct dikes and sold the polders, thereafter, mainly to well-to-do herders), and insecurity of ownership, Verlet et al say:

The distribution of parcels and assurances of stability of possession of the land (each cultivator receiving a certificate of ownership) was the deciding impetus in the installation and attraction of numerous families around the polders... They are motivated by an interest in getting full ownership of polder parcels rather than by the desire to give themselves over to intensive cultivation. (1963:30)

294. In assessing the strengths of indigenous tenure the main elements stressed are: First, that they provide a bond of identification with the community, that binding relationship between the ancestor, the present and the future. This is a belief (the statement variously being attributed to chiefs from Nigeria, Ghana and Cameroon) on which there are inadequate data to rest a case. Implicit, too, in this belief are the two principles, over which much argument is founded, on the need to return to the halcyon days of communal tenure: that every member has access to land by virtue of group membership; second, that communal society is egalitarian.
295. Commencing, first, with the principle of access. This is constantly repeated as a hallmark of communal tenures. Effective implementation of the principle however, depends on land availability. To test it, it would be unrealistic to refer to countries that were 'settler economies' like Kenya or Zimbabwe. Lesotho provides a useful test case since indigenous tenure has prevailed there. In Lesotho, the Laws of Leretholi have been amended to provide that the chiefs shall endeavor to provide land to married adults (an act that was considered obligatory in the 1920s edition of the Laws). There is increasing landlessness — it was 8.7 percent in 1960, and climbed to 12.7 percent in 1970. The reason is obvious: there is insufficient land to abide by that rule of access. Therefore, while in principle access may be a hallmark of indigenous systems of tenure, in practice its implementation could be effective only when there was no land scarcity. Similarly, in Malawi, there is just not enough land available for distribution among all the landless. In Kenya landlessness may have had its origins in the settler policy but today it is due in part to land scarcity. Examples do not need to be multiplied to show that the principle of access by any member to lands was only possible when land was available. Many sub-Saharan countries are past the stage when this is true today.

296. But, the argument that land is scarce does not take into account the distribution of land between members of the group. There is still, in other words, the claim that indigenous systems are more egalitarian, that no member was left without land. Therefore, if a member was without land, the member would be given land (as a gift, or loan after the member had 'begged' for it). Here again we are dealing with previous history and
theory. And, even as history, it is only partially accurate. There could be no landlessness when there is enough land. Further, it is also true that land was borrowed, gifts of land were made. But it is difficult to draw the conclusion from these practices that communal tenure made for egalitarian society. There was inequality among the Barotse, the Tonga, the Kikuyu, the Maasai, the Bambara, the Hausa, the Mossi, the Diola, the Tuareg, the Fulani, the Serrr, the Toucouleur, the Maures, the Yoruba, the Ibo, and the list can continue almost indefinitely. Possibly, the only group that might be called completely egalitarian is the Ituri Pygmy of the Congo. The reasons are not hard to see: the extent of land available, the low level of technology, the need for cooperative labor. In the rain forest, few possessions survive to glorify immortality or to pass on to the next generation. There is differentiation even among them, based on skills. What might be ventured, and is yet to be tested, is that these societies were less inegalitarian than modern societies where individual tenure predominates.

It is therefore difficult to accept the statement that "land shortage increases the possibility of permanent differentiation between those with and without land rights...This occurs at or near the stage of permanent cultivation, not at the stage of shifting agriculture" (FAO 1984:42) if by the statement it is meant that stratification of society did not exist among shifting cultivators and that all the ills of permanent differentiation can be attributed to the 'curse' of permanent cultivation. Permanent cultivation did not create the barriers, they were already present (stratification, systems of inheritance), subsequent population growth and land scarcity have only exacerbated this situation.
298. The ability to manipulate the law has its advantages. After adjudication in the Mbere division, Embu district (Kenya) land sales increased with many of the poorer residents selling land to the richer residents in the hope that "they would establish some useful patron-client relationship from which they might benefit" (Njeru 1978:19). Landlessness increased and outsiders (Embú, Kikuyu) bought up land. In their study of five villages in the Rungwe District, Tanzania, where there was no registration of commercial lands, van Hekken and van Velzen (1972) estimated that 19 percent, 34 percent, 6 percent, 50 percent and 3 percent, respectively, of the total population did not have access to land. This lack of access was the result of the working of the indigenous system alone and not the grant of individual title, since Tanzania had not adopted any system of land adjudication. The argument, then, that 'individualization' of tenure creates (or increases) landlessness is not entirely supportable.

299. There is one important question yet unresolved: Even in areas where indigenous systems of tenure provided security of possession and, generally, access to land by members of the group in the past, do they continue to do so today? Phrased differently, the question is at what point does the system no longer have the capacity to provide security necessitating intervention by non-indigenous institutional arrangements and structures?
300. Hailey provides an example of one cause of insecurity:

If there is any feeling of insecurity in (the cultivators) right of occupation it arises not so much in fear of interference by members of his own community but from the apprehension that the Government may, for its own purposes (such as the need of land for public use or for alienation to colonists), disturb him in the possession of his holding.

(1957:807)

This is the insecurity of possession and use that arises not from customary tenure but from situations of conflict of laws — the clash between the formal legislation and customary rights. It is the insecurity that flows from frequent amendment of formal laws and the absence of any ability to forecast what might happen next — as in the case of the African in Zimbabwe in the colonial era where the Land Apportionment Act was amended on 60 occasions. It arises when the 'law' is in a state of transition and the individual can then take advantage of two systems: the customary rule that recognizes the right to possession so long as land is being cultivated, and the formal law which will grant individual tenure, as in the case of tree planting in Cameroon. In Liberia "when land purchasing through the national government was introduced to encourage more intensive commercial uses of the land, many farmers viewed these suggestions as merely another ploy to extort money from them by 'civilized' Monrovians. It is becoming increasingly obvious, though too late for many, that land boundaries must be safeguarded with more than termite mounds. Consequently, many farmers have... turned to planting tree crops to
stabilize claims to the land" (Cobb et al 1980:14). It is the fear of expropriation by Government that makes the cultivator in Ivory Coast plant more coffee and cocoa, with very wide spacing, so that the returns are 'inefficient' and the ten hectares planted produce what could have been obtained from three hectares of close-spaced trees. The cultivator is afraid of the lands being acquired and future generations suffering from land shortages (Lena 1979). It is the fear of further encroachment that makes the Maasai accept titling of land in Kenya (see Coldham 1979). As Koehn says "statutory rights of occupancy over urban or rural plots of land are valuable assets in contemporary Nigeria since they provide a measure of legal, state-enforced security of tenure that is not afforded by customary rights, squatting or land purchases on the secondary market" (1983:461, see also Frishman 1977). Problems regarding purchases on this 'secondary market' arise only when there is a question of selling the property (see Haugerud 1983), or raising loans from commercial lenders (Abasiekong 1981, Haswell 1975). That is why also in unofficial (that is, 'illegal') purchases there is a need both for witnesses and the commencement of some construction (Ahene 1983, Nukunya 1974).

301. It is interesting to look at the areas for which applications for registration (or constatation) were made, and the litigation that commenced. The applications and the litigation relate first to land that had commercial value; second, where there was uncertainty as to whether the indigenous system would afford security of title and possession. Now, to the examples: Urban land constituted most of the areas for which applications for registration were made. In the rural areas, however, the
applications mainly covered areas where tree crops had been introduced. In Ghana where litigation was held to be 'higher than in any other African territory' the disputes mainly related to "claims to 'stool' lands, namely the unallocated areas which are a potential source of revenue from Concessions, or from the 'tribute' paid by; 'stranger' cocoa planters...The problems created by the uncertainty of individual titles increase in proportion as more farmers take up land in areas to which they are 'strangers', and they have been intensified by the search for new cocoa lands...In Ashanti...there is litigation over boundaries..." (Hailey 1957:793-4). In the French territories, applications for constatation were mainly confined to cocoa lands and urban areas in the initial stages.

302. With increasing commercialization of land and continuing uncertainty about the effectiveness of title, litigation and applications for registration increase. As Simpson remarks, "a high incidence of land litigation is a fairly remarkable indication of the uncertainties of customary land law" (1976:230). In Uganda the complex Land Registration Ordinance, 1922, which remained "untranslated and untranslatable" into Luganda as late as 1951 was a fertile enactment for litigation. Delays in surveys and registration gave rise to the remarkable system of sales of 'paper acres' (deeds which were caricatures of English conveyancing transferring part of mailo lands and which documents were used to transfer
lands). A significant increase in litigation relating to land was noted in 1931. Between 1953-5 more than half the cases filed in the principal court of Buganda related to land, and there were no apparent signs of decrease in 1965. "Sources of conflict are many and include actions by mailo-owners to evict bibanja (traditional holders) on the grounds that they had entered into occupation on the authority only of a proprietor of an unascertained portion who had himself later been obliged to relinquish the land when boundaries were finally surveyed" (West 1972:177).

303. The two countries are not unique with regard to the growth of litigation concerning land. In the Embu District (Kenya) "conflict over inheritance (of land) is common; and with growing population pressure on the land, competition among male agnates and unattached females and their children is increasingly likely to provoke disputes, beatings, withcraft accusations, and even murder" (Haugerud 1983:69). Among the Mbere of Kenya, family disputes over land have increased and "interpersonal confrontations outside the family environment...involving conflicting interests over a common piece of land" (Njeru 1978:22). Njeru analyzes the causes of 84 disputes. Sixty-two percent of these disputes relate to land. Simpson records that "in one district of Kenya in 1964 land litigation cost more than £25,000 and wasted more than 32,000 man-days. (In the same year no land cases were recorded in the Central Province where all the land had been registered)" (1976:230). In Tanzania, "more than
half of the 30 land conflicts (in the five villages of the Rungwe District where land was not registered) concerned ownership of land. The remainder concerned the correct delineation of the boundary between fields or house plots" (van Hekken and van Velzen 1972:98-9). In Serbewel, Cameroon, disputes as to land ownership are common (Reyner 1974).

304. Simpson's note about the absence of cases relating to land in the Central Province of Kenya seems to suggest the need for a change from an indigenous system to one which includes registration and titling of land. There is additional evidence from Zambia and Malawi in support of this. In Zambia, opinions regarding the need for 'modern' titling and registration systems, as opposed to the 'security' offered by the traditional system, differ. "Those whose experience concerns areas where the many other preconditions for commercialization such as credit, new inputs and markets are not available, quite rightly deny that insecurity generated by land tenure is a constraint. Others, including some farmers interviewed in Eastern, Central and Southern Provinces, where those preconditions are being met, assert that it is indeed a constraint" (Bruce and Dorner 1982:29). In Malawi, where registration was one of the components of the Bank-assisted Lilongwe project, it was noted that "the smallholders have indicated strong approval of the scheme with the security it has given to family units in the face of increasing land pressure."1/ There is also a growing demand for titling in Cameroon which has already been mentioned.

1/ Report No. 3414, April 17, 1981.
To sum up: The need for re-examination of the effectiveness of the indigenous system of land tenure arises, primarily, when there are dual systems of law (one indigenous and the other, the formal-legal) and there are uncertainties as to the application of indigenous rules. Second, when, as a result of government policy the powers of indigenous authorities have been reduced or replaced by other administrative controls — the appointment, for instance, of district committees (comprised only partly of 'chiefs') to allocate land or to approve land transactions. Third, when purchasers of land are uncertain about the validity of their purchase and need re-affirmation of title, or need credit. A useful index of the weakening of indigenous controls is the rise in litigation. This appears to follow a fairly consistent pattern: It commences with disputes about 'tribal' boundaries, followed by disputes about inter-village boundaries, thereafter, by disputes about family land boundaries, and, finally, disputes over land within families. Insecurities are increased by seemingly random government action — acquisition of land, frequent changes in laws, legislation that declares that "land has no value." We reserve, however, the final answers to the questions after the discussion on registration which follows.

Land registration

Closely allied to the arguments in favor of individualization of tenures are the reasons offered for introducing registration of land ownership (whether for individuals, families or wider groups): certainty, ability to deal in land, the development of land with assured title, and
credit worthiness. And, from Government's viewpoint: control of land speculation, provision of data for planning and land reforms, introduction of taxation, etc. Many of these reasons have already been dealt with but it is necessary to trace some of the developments in legislation relating to registration and to determine their effectiveness. It must be remembered throughout the following discussion that the crux of the claims of those who favor registration is based on certainty — that persons who deal with landowners must have the assurance that the person with whom they are dealing has the ability and power to enter into the land transaction. An underlying assumption, felicitously expressed by the Lawrance Mission, is the "almost universal assumption, that registration of title...will itself automatically produce good development and indeed is essential to it" (quoted in Simpson 1976:229).

307. To add another example: the case of Sudan is often cited in support of the need for registration. But there are several points to be noted in this regard. First, in the Sudan, Islamic law had already laid the groundwork for the acceptance of individual title. Second, title registration was limited to the urban areas and the riverine areas (where individual appropriation of parcels had already taken place). Third, even in the Sudan the problems with the failure to update the registers (which must be constantly maintained) were apparent. This is particularly important because "it highlights what can happen if registration of title is introduced into areas where there is no dealing and nobody takes an interest in bringing the register up to date when a proprietor dies. (Thus,
in the Sudan, there was land in the Gezira which had been adjudicated in the first decade of this century but which was not taken into the cotton-growing scheme until some forty years later. By that time the registers consisted mainly of the names of proprietors long since dead, and the law of prescription had also affected title in the intervening years. A process of re-adjudication was required to bring the registers up to date.) Simpson 1976:637

308. Registration of title in sub-Saharan Africa is not a recent innovation. It was introduced in the Belgian Congo in 1886; in Senegal, French Guinea, Mali, and the Ivory Coast in 1906. In the former British territories, Sudan was the earliest nation to pass legislation in 1899 — for the settlement of rights to land in the three towns of Khartoum, Berber and Dongola; and a second, in the same year for the settlement of disputes as to title 'elsewhere'. The complex processes for the immatriculation of property under the French system did not make much headway: after nine years it was found, in 1915, that only 1,267 titles had been issued, most of which were in respect of urban property. It should also be remembered that immatriculation removed the lands from the system of customary law and placed them under the French Civil Code. In 1925 a simpler procedure of constatation was introduced into AOF (and later extended to other French territories). Although simpler, constatation required local enquiries, publication, and, where contested, a decision of the Native Tribunal. It resulted in the delivery of a livret foncier (certificate of title) which protected the person in possession from physical dispossession except by a court decree and left the land still subject to customary law. There was no flood of applications for constatation, and the system was abolished in 1955. Nor were registration applications numerous in the former British territories.
309. Do the examples of increasing litigation, applications for registration, and uncertainty cited earlier provide sufficient justification for nation-wide registration of title? The problem is very real, and is confounded in African nations by unofficial subdivisions and customary practices. Already in Kenya the registers do not reflect what is happening on the ground -- partly because the law limits the maximum number of persons in whose names land can be registered to five, others with rights squat on and sub-divide lands; and partly because there are 'sales' which might not get the sanction of the Land Boards (Coldham 1975, Haugerud 1983). Nor is this problem confined to Africa. In Trinidad, where registration of titles was made compulsory, a similar situation prevailed in 1979 (Harrison 1979).

310. It could, rightly, be pointed out that the problem of failure to register, or maintain registers is 'administrative', one that can be cured by increased appointment of trained staff. Assuming that this is so, could nationwide registration be introduced? There is one general answer given by Simpson:

We must...once again stress the need for selective application. Adjudication is an expensive and involved operation; it should only be undertaken when the likely economic or social benefits are sufficient to justify the trouble and cost. In countries where, as in many parts of Africa, gross inequalities of population density and development result from natural factors such as inadequate rainfall or the presence of tsetse-fly, it is inconceivable that there can be justification for registering title throughout the whole country in the foreseeable future. This point requires emphasis. For example, it appears to have overlooked in Kenya, as the Lawrance Mission remarked:
...We do not wish to decry registration of title as a useful, indeed necessary process, but we must get it into the right perspective. It is not a panacea for all tenurial ills, not(sic) indeed is it, as so many seem to think, an end .n itself. We feel we must make this clear because, in making it an aim of policy to apply registration of title unselectively to all areas capable of development throughout the whole country, the Kenya Government is not only attempting a task of unparalleled magnitude but could in many places be merely handing a stone to a man who is asking for bread.


These remarks are even more pertinent in countries where, as in Kenya, registration is used as an instrument of policy.

311. To end the discussion here would be to end on a negative note. What, then, are the circumstances, or conditions, which would justify the introduction of a system of registration and land titling? To rely on Simpson, again: the system should not only be introduced because it is desirable; it must also be practicable. Simpson quotes the conclusions of the 1956 Conference at Arusha in Tanzania where the subject was discussed at length. The Conference concluded that "registration should not be undertaken unless:

(a) it has a reasonable measure of support and is not opposed by any substantial proportion of the persons whose land will form the subject of the record;
(b) the requisite staff and organizational ability with which to set up, and operate continuously, the working records of the system are available;
(c) adequate survey facilities are available to carry out cadastral work of the required degree of accuracy;
(d) the expense and complexity of the operation embarked upon are fully appreciated; and
(e) the areas of land within which adjudication and registration are to be initiated are recognizable and definable."

Simpson 1976:231
312. The conclusions concentrate more on the mechanics, important though these are, than the circumstances under which registration and titling can be successful. Of far greater practical significance, with regard to the circumstances are Mifsud's conclusions based on the experience in pilot schemes in Kigezi, Uganda. He points to the following necessary conditions:

The presence of all or any of the following factors is relevant: a high degree of population density, with a corresponding scarcity of land; the growth of perennial cash crops on a wide scale; the prevalence of land sales; frequent and increasing litigation in land matters, indicating uncertainty in the customary law. The decisive factor in Kigezi (and it is a circumstance deserving of consideration when similar schemes are contemplated elsewhere) was the general public demand for individual titles, which was supported by the District Council resolution...and confirmed by the volume of applications received...Another feature of the Kigezi scheme was that it was carried out only in areas of individual 'ownership', and not in respect of family or clan land...


313. In all this discussion one important fact has not been carefully considered by both protagonists and antagonists: the nature of the enterprise. What type of land use, in effect, are we discussing? Is registration and individualization of title suitable for trashumant systems, for shifting cultivation? A partial answer has been given in a Bank report with regard to transhumant systems:1/

There is a clear assumption that private property rights are preferable to communal resource exploitation, and that land tenure reform from public towards private ownership is necessary for economic and environmental improvement. This rather than a preoccupation with a ranch model of production is the most western aspect of the plan: though it is indeed implicit in the 'ranch' notion. It is doubtful if anyone could successfully have disagreed with that notion at the time and been taken seriously. By general consent, collective ownership was the root cause of environmental degradation on the range (an over-simplified view which became opaquely concise as 'the tragedy of the commons'). It is also unlikely that IDA would have lent without some version of tenure...Views of tenure were consistent with two other features of the plan...As such, the issue of tenure became a prime example of how different parties to a project may agree but for widely different expectations and very varied consequences. For some of the Maasai...it was sufficient that group ranches, by means of titles to land, would keep their land safe from the expected incursions of a newly dominant agricultural elite...and insofar as it had done so, then...they would declare the...Project to be a success. That oversimplifies: land registration made the acquisition of holdings (by outsiders) easier...and considerable stretches of Maasai-land now belong to outsiders. At this point in time, it seems possible that land reform towards restricted title is not the necessary precondition it might have seemed and may well have too many undesirable side effects to be embarked upon at an early stage or range livestock development.

(italics mine)

Hailey's comments are equally worth quoting:

It must be recognized also that nature has created certain obstacles to the extension of the system of individual holdings. It is not readily applicable to pasture lands, save where the holdings of individuals are of wide extent...or where the climate provides for a more or less continuous renewal of the grazing. There are, therefore, likely to remain large areas of commonage. It is true that the commonage may have to be divided between different units on a family or group basis, and this operation will not be...easy.

Again, the system of individual holdings is not readily applicable to conditions where shifting cultivation or bush fallowing is habitual. There it would be unwise to seek to introduce a system of individualization until the local economy had passed beyond the stage in which the practice of bush fallowing is a necessary of routine cultivation.

1957:806

Read together, the remarks provide the basis for determining the conditions where registration and individualization (or even group title) may be
considered. Unfortunately, the 'areas of commonage' are fast disappearing.

314. There were three important issues for determination and which were referred to at the commencement of this chapter. The answers to these are as follows:

1. There is no hard evidence to support the view that individual tenure is inherently superior to communal tenure (or vice-versa) in that one afforded greater security of possession.

2. Likewise, the evidence to support the view that individual tenure is conducive to higher productivity is inconclusive.

3. Individual tenure apparently provides an advantage where long-term investments are considered — such as physical capital investment or improvements to land (terracing is an example). For these investments to be undertaken under a communal tenure system it appears to be a pre-requisite that exclusive possession is possible and that this possession continues over a number of years (as, for instance, in the case of tree crops). There are, however, no apparent obstacles to the adoption of short-term innovations, particularly sesonal crops.

4. On balance it would appear that there are fewer controls on land alienation in individual tenure than in communal tenure. This statement must be confined only to "sales" to non-members of the group. The pattern of sales to outsiders in areas governed by communal tenure appears to proceed along fairly consistent lines in which, at the initial
stages, sellers are mainly drawn from the class of chiefs or important persons (such as slave traders). This pattern could be the result of colonial emphasis on communal tenure and the misconception that tribes had chiefs who were the sole "owners" of the land. Historically, however, it is only with the gradual spread of formal legislation, and the growth of dual systems of controls (indigenous and formal) that the capacity to sell is extended to individual members without regard to status.

5. There is evidence, though not entirely uniform, to indicate that evidence of title to land (even an occupancy certificate) can facilitate commercial credit.

6. The need for land titling (and registration) arises when there are growing uncertainties about the application and effectiveness of indigenous systems to control land transactions. This takes place most often when there are dual systems of control both of which cover land transactions, areas of uncertainty between the two systems, growing land values and pressures on land, and the potential use of land for commercial gain. Useful indicia are the rise in litigation and widespread recognition of the need for formalization of the land titling system.

7. This does not, however, mean that nationwide registration and titling is called for. There is no need for land titling in land abundant areas where land has no commercial value and other factors are absent (markets, communication systems, inputs). In such cases — as with the mailo system in Uganda — registration would be costly and premature. Similar considerations should be weighed in assessing whether title should be adjudicated in systems of shifting cultivation and transhumance.
8. Before a decision with regard to registration is finally made, the comparative costs of continuing with the informal (indigenous) system or replacing it with a formal system, must be considered. It is often not recognized how cheaply indigenous systems control land and land transactions. The alternative of proceeding with formal registration and titling is costly in terms of manpower, training and maintenance. Once a decision has been made to proceed with a formal system, registration and titling should be proceeded with systematically — that is, all lands within a selected area must be titled and registered.

9. Whether individual or group titles are preferable in a particular case depends to a great extent on the nature of the undertaking — for example, seasonal cropping as against livestock management.

10. Inconsistent government policies, frequent legislative changes, random land acquisition, add to insecurities regarding possession of land and reduce the ability to make decisions about long-term investments in land.
VIII. AN END AND A BEGINNING

315. It is now time to pull together some of the ideas that have coursed through this paper. In that sense, this is the end. But it is also a beginning since there are unanswered questions. These questions, which deserve further research, are examined in this chapter.

Areas for further research

316. Three areas for research appear to be most fruitful:

1. Land tenure systems as constraints on development: The debate about the relative merits of communal and individual tenures has generated more heat than light. There is little hard evidence that either system provides greater security of possession, or leads to higher productivity per se. On the other hand, there is some evidence to indicate that a formal document of title to land may provide advantageous — if only access to commercial credit — that a mere informal title to land (even if evidenced by possession and the agreement of the community) does not. Further, although it is also possible that lack of formal title could be a constraint on long-term investments in land improvement and in physical capital, there is no evidence to support or refute this premise. There appears to be some evidence that the social controls on transfers of land are greater under "communal" than "individual" tenure, but evidence is sketchy. On the other hand, there are indications that the introduction by some sub-Saharan governments of formal legislation regulating land
acquisition and transfers may create uncertainty and add constraints which were not present under the indigenous system.

Because of these complexities, it would be useful to determine the extent of constraints in land markets by purposeful data collection. Further, it is important to determine the impact that such constraints have on efficiency. Collier (1983) in his discussion of the Kenya land market suggests that constraints on land dealings, together with other imperfections (in the labor and capital markets) do result in the loss of efficiency. This hypothesis needs rigorous testing.

2. Crop livestock interaction in the the Sudano-Guinean zones.
There is a fundamental instability inherent in transhumant pastoralism systems of production because they are dependent on the presence of pasture (a finite resource), water and mineral salts. In land abundant situations it was generally possible for them to find these resources -- systems of shifting cultivation usually permitted grazing on stubble in the off-season; areas of commonage were far greater and the herd numbers smaller. This situation has altered dramatically. Over the past three decades there has been a radical change in farming systems in the Sudano-Guinean zones of sub-Saharan Africa: the separation between sedentary agriculture and livestock herding has become increasingly blurred. Farmers, businessmen, civil servants have invested increasingly in livestock -- whether as the most stable form of investment or because of the improved markets for livestock is still a moot point. But the facts of investment cannot be denied and this has significant consequences for future cropping and herding patterns in the whole area. It is a direction
of change that is quite familiar from other parts of the world — Asia, for instance. The experience in other countries and continents can be brought to bear to analyze (and, possibly, predict) the future direction of change in sub-Saharan Africa. The investment in livestock also has important consequences for transhumant groups. In a negative sense, local livestock get preference both for grazing on pasture and on stubble; the resources available to transhumants are thereby diminished. A positive effect, however, is that transhumants gain a more acceptable role in society in that herding is seen as their special area of competence and village owned herds are left to their care. In many cases they also become sedentary farmers themselves. But these processes are also often associated with increasing dependency on, or increasing conflict with, the settled agriculturalist.

The primary premise of a research project would be that with rapid population growth cultivation would take up most of the arable land in these areas and consequently grazing areas will diminish. A project, therefore, would attempt to document and evaluate the following: (a) the technological options for fodder production and management under rapidly diminishing grazing areas; (b) the determinants of the allocation of land between cropping and grazing, and the speed of transition from one use to another; (c) the actual allocation of land between different groups/users, specifically between farmers and herders; (d) distributional consequences of the various property right regimes; and (e) types of tenure that promote equity and investments in land, and minimize conflicts.

Such a research project would consist of a comparative review of literature and project experience in various countries in sub-Saharan
Africa and similar agro-climatic zones in Asia which have reached higher population densities earlier.

3. **Protection of pastoralists' rights in zones which are marginal for crop production.** While the direction of change of both farming systems and property rights is fairly clear for the Sudano-Guinean zones, the situation is less clear in the lower rainfall zones. Cultivators are encroaching into more and more marginal lands, lands which may be required for efficient herding. Moreover these marginal zones may also be subject to severe erosion under cultivation. Technology options to increase productivity in either herding or crop production are very meager as well. Two major research issues arise: (1) how to protect the rights of pastoralists from loss of the best grazing land; and (2) what are the development options for pastoralists (and agriculturists) who cannot be productively absorbed in the agricultural sectors of these regions. The first to be answerable by a comparative review of experience of pastoralist groups under rising population pressure in Africa as well as other parts of the world. The second issue goes way beyond research on land rights issues.

**Envoi**

If anything, the review of the literature shows the dynamism, adaptability and opportunism of the African farmer. Far removed from ivory-tower concepts. One might end with a quotation from Hopkin's classic work that a review of the literature "serves as a reminder that the concept of traditional law, like the concept of traditional society, is a
convenient fiction which achieves order at the expense of reality" (Hopkins 1973:39). In fact the stereotyping of land tenure practices into 'traditional' and 'modern' is a false dichotomy; one that totally ignores that strategies of survival incorporate both newer features and the older, depending on a calculation of which will provide the greatest security and advancement. The settled farmer is no less rational when he cultivates cash crops and then invests the profits in livestock largely because although the former activity might be classed as 'modern' and the latter, 'traditional' there is an assessment of a more constant return from livestock purchases (Schneider 1984). This also means that there is truth in the statement — however distressing for those who dream of the golden age of communal tenure and seek a return to those days — that "there are not many recorded cases where someone who was invited to dispose of land for a profitable consideration has invoked such principles (as, for instance, ancestral spirits, custom, etc.) as a ground for refusal" (Mair 1948:184).
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APPENDIX A: LAND POLICIES DURING THE COLONIAL ERA

British Policy and Practice

1. Land policies in Rhodesia (Zambia and Zimbabwe) and Kenya differed in detail and extent from those in Uganda and Tanganyika for two reasons: both S. Rhodesia and Kenya were deemed suitable for European settlement, and British rule in Tanganyika flowed from its Trust mandate when it was transferred after World War I from the Germans. Initially, however, Rhodesia had been viewed purely as a gold-mining concession, and Kenya as a convenient route to Uganda and the headwaters of the Nile.

2. In Kenya, after previous attempts to settle Indians, Jews and Finns in the Kenya highlands had failed, it was decided that these areas would be ideal for settlement. The lands appeared to be unoccupied, the Maasai had been pacified and the Kikuyu confined mainly to the slopes. The area was lush and free from disease. To achieve the goal of settlement the East Africa (Lands) Order in Council was passed in 1901. Under this legislation all "public lands" were converted into Crown Lands and would vest in the administration. Public land was defined as "unoccupied" land without any further guidance as to the distinction between occupied and unoccupied land. In practice the term "occupied" was applied only to lands under active agricultural cultivation. In consequence, application of the Ordinance effectively reduced the areas under shifting cultivation and, more importantly, the areas the Maasai (with the livestock and human populations reduced in numbers by rinderpest and smallpox, respectively) treated as the rangelands and transhumance routes. In 1902 the
Crown Lands Ordinance prescribed the terms under which lands for settlement could be granted and also prohibited the sales of lands between Africans and settlers in the interest of "preventing the exploitation" of the former group. As a result, the administration commenced to define the extent of native lands: lands set apart for Africans or in their actual occupation. Leases could be granted of native or reserve lands if they were not actually occupied. A later Ordinance in 1915 clarified that Crown lands included "all lands reserved for the use of any Native tribe" within the scope of Crown lands.

3. Leases to settlers had been converted by 1915 from 99 years to 999 years (almost the equivalent of a "fee simple"). By 1920 nearly 3 million hectares had been alienated to settlers, only 60,000 of which were under cultivation. Further, the inclusion of native lands within the definition of Crown lands in 1915 effectively extinguished all individual rights in land — courts declared in a suit filed by an African claiming to have acquired land within the reserve in individual tenure by purchase from a member of another tribe that in law Africans were mere tenants-at-will of the Crown on the reserves. As a result of settler agitation, a commission under Morris Carter (who had also sat as Chairman of the Rhodesia commission in 1925) recommended final demarcation of European and African areas. As a result of the Commission's recommendations the area set apart for European settlement was fixed at 10.7 million acres; added 0.3 million acres to the reserves (thereafter to be called Native Reserves and under the direction of a Native Lands Trust Board); and also set aside 0.6 million acres for lease to Africans on individual tenure. A further recommendation, which was given effect to in an Ordinance in 1940, was that all native rights outside the reserves should be extinguished. At the time when the Commission sat, land use with the European settlement area was: cultivation —
11.8%, stock — 40.7%; occupied by Native squatters — 20%; and unused 27.5%.

Land within the reserves was to be used "in accordance with native custom". In evidence led before the Commission it was shown that demarcation had resulted in the loss by the Kikuyu to settlers of nearly 107 square miles of lands. Hailey, however, suggests that "alienation was shown to have affected directly only a relatively small part of the country actually lying within tribal boundaries" (1957:719). On the other hand, the approach of the Carter commission in determining the area of reserve land to be allocated to Africans was not based on a system of extensive cultivation (where a major portion of the land would be fallow) but on a system of intensive cultivation. As the report stated:

> The greater the margin by which the population falls short of the optimum density requirements (sc. for intensive cultivation), the greater is the justification of Government for regarding unoccupied land as waste land of which it has the right and duty to make disposal in the way which it deemed best for the country at large. (Quoted by Mosley 1983:27.)

4. Two direct effects of the reservation of areas for European settlement were the prevention of expansion of tribes into other areas when tribal populations grew. Second, the reduction in available land and consequently increasing scarcity of land. The scarcity first reflected itself in subdivision of lands, and soon thereafter, in land being treated as a commodity which could be traded.

5. Before the turn of the century land sales between Africans and Europeans were common.¹/ But in order to provide cheap land for the settler, the incipient free market, where prices were far higher, had to be stopped.

¹/ In 1897 a missionary remarked of the Dagoretti region (ten miles west of modern Nairobi): "All the land here is privately owned by some [sic] or more of the natives and now they have learned to ask high prices." (Quoted in Mosley 1983:15.)
This was achieved through the 1902 Ordinance which implicitly legalized prior sales. Again, in the 1920s, the Luo memorandum to government asked, among other matters, for individual titles to land though the main reason was "... protect the land from European encroachment... (and) an overwhelming number felt that individual titles to land would be the most secure method of retaining the land" (Reed 1957:49). Kikuyu agitation for individual tenures had commenced even earlier largely because of the administration's misunderstanding of the nature of Kikuyu tenures and lumping together of different systems under the term "communal" tenure. Even though evidence was led before the Carter Commission of the numerous instances of outright land sales in the Kiambu area, it was thought the time was not yet ripe for the recognition of individual tenure. In this, the attitudes towards the evolution of the "native" reflected in a memo by Ainsworth (who later became Chief Native Commissioner) and Hobley had not died out.\footnote{"In dealing with African savage tribes we are dealing with a people who are practically at the genesis of things...and we cannot expect to lift them in a few years from this present state to that of a highly civilized European...The evolution of the races must necessarily take centuries to accomplish satisfactorily." (Quoted in Sorrenson 1967:27.) Sorrenson continues, "Just as races were supposed to evolve from a primitive 'state of nature', so too was land tenure expected to evolve from the simple form of tribal ownership to individual ownership." (Ibid.)} The Ordinance following on the recommendations of the Carter Commission expressly enjoined the Native Lands Trust Board to protect existing customs "so that tribes with a custom of communal tenure, for instance, could never proceed to another kind" (emphasis mine). The lands comprising the Native Reserve were divided into nine units and allocated to the main tribes.

6. The African population of Kenya between 1921 to 1951 grew from 2.6 million to 5.4 million; the population density on Native Reserves during the same period went from 51.6 per square mile to 112.1 causing increasing pressures
on the land. Even earlier, by 1945, the government noted the increasing numbers of individual titles, a process related to population pressure and assisted by the increase in cash cropping during World War II. A partial attempt to stem the tide was made by permitting a process of registration, land consolidation and enclosure within the reserves, if all the villagers wanted it. Numerous applications were made. Land litigation grew, with all the expense involved. The East Africa Royal Commission (1953-55) gave authoritative support for the introduction and registration of titles in areas where individual titles had grown. The Commission proposed the change on the ground that individual titles were essential for the development of progressive agriculture in Kenya. The proposals were put into effect by a Working Party and given legislative effect in the Registered Land Act, 1963. The Commission also recommended the abrogation of restrictions on African purchase of lands within the European Reserve. This was effected in 1961.

7. In Southern Rhodesia, the need to cater to the interests of the settler population resulted in greater alienation of lands to non-Africans and the development of segregated areas earlier than in Kenya. The mounting costs of military expenditures and the failure of the expected gold reserves led to the grant of large-scale concessions to white immigrants and companies. By this means nearly one-sixth of the country had been disposed of between 1890-1896. Even before the Crown divested the British South Africa Company of control, an attempt had been made to create Native Reserves. The attempt to create these and confine Africans to two large reserves was a failure. By 1914, however, reserves amounting to about 9 million hectares had been created (of which 1.2 million hectares were totally unsuitable for settlement). The African popula-
tion at that time was estimated at 834,000, of whom about 500,000 were already living in the reserve areas.

8. Concessions had been made on an ad hoc basis. And, until 1930, there was an open market in land of which some Africans and Indians took advantage. After World War I, agitation for a closed land market, supported by missionaries and the majority of Africans interviewed, the 1925 Land Commission recommended the extinction of all African rights to purchase land in the existing European areas. The Commission supported this recommendation by the argument that it was desirable to separate the two communities "until the Native has advanced much farther on the paths of civilization" (Quoted in Hailey 1957:703.) The Land Apportionment Act, 1930, gave legislative effect to the recommendation. A total of about 20.4 million hectares was set apart as European Reserves; Native Reserves, intermingled with the European Reserves, totalled 11.8 million hectares (of which about 3.1 million hectares were reserved for purchase on individual tenure); and an additional 7.4 million hectares were scheduled as "unallocated" land most of which was "rocky, waterless and virtually unusable for agricultural purposes" (Mosley 1983:24). When the Act was passed no time limit was prescribed for the removal of Africans on European Reserve lands. The numbers of African "squatters" on European Reserves grew along with settler pressures for stricter controls. And while before 1914 the settlers gained more from cheap labor than they lost, in the inter-war years the numbers of settlers grew, as did also the African squatters. The two pieces of legislation introduced — The Resident Native Laborers Ordinance and the Private Locations Ordinance — did little to lessen numbers. In 1948 the African population had reached an estimated 1.7 million. Of these 270,000 were living on European Reserves (a third of them on unalienated land). One of the aspects of settle-
ment policy which came into prominence after the War was the removal of squatters who were not part of the regular labor force from the European Reserves. Nearly a million hectares transferred from mainly the Native Purchase Area in 1950, and another 150,000 hectares transferred to the Special Native Area in 1951 (this was largely because of the discovery that nearly 750,000 hectares in the Native Reserves had become useless on account of the spread of tsetse and hence trypanosomiasis) failed to stem the tide of subdivision and land transactions among the Africans. The tide was also not stemmed by the hope that the restoration of powers to the chiefs between 1930 to 1945 would improve agriculture in the Native Reserves on the basis of communal tenure. Conditions in the Native Reserves had deteriorated to such an extent that they were no longer self-sustaining. And in 1951 the administration finally chose the option to free the land market.

9. In Southern Rhodesia the option was embodied in the Native Land Husbandry Act, 1951. Prior to the passage of the Act nearly 85,000 African families had been moved from European Reserves where they were not gainfully employed to the Native Reserves. The Act, passed at a time when labor supplies were scarce, was only implemented from 1955. In the intervening period between enactment and implementation, the Native Land Board decided to insist on the standard of "master farmer" as a pre-qualification for candidates who were to obtain rights under the Act. This Act provided farming and grazing rights to individuals — the extent of each being in inverse proportion to the fertility of the land. Farming rights were granted to individuals not to attain the goal of abolition of customary tenure but to provide security which it was believed customary tenures did not offer — which "indicated a lack of appreciation of the nature of security in the tribal areas" (Yudelman 1964:119). Grazing rights
were to be exercised in common and, based on estimates of the carrying capacity of the grazing areas, the number of cattle per household was fixed at an average of five. The grazing right, however, was negotiable and cattle owners could increase herd sizes if they could find others willing to sell their rights. Both farming and grazing rights were non-heritable (a further difference from customary rights). Tenure was also dependent on the adoption of "good farming practices" (erosion control and conservation measures, livestock limitation, and the continued presence of a male cultivator). Farming rights were also transferable and this was to be the key to encouraging Africans to enter the land market — it was believed surplus labor would find off-farm employment. Finally, the right of allocation of land was taken over from the chiefs by the District Commissioner. Assessments of land ratios and the total land requirements were far short of the land actually available. Off-farm employment remained static after 1955 and the numbers that could be accommodated on the available land was about 70 percent of actual requirements. These problems soon led to the suspension of registration under the Act in the mid 60s. By then, however, the concept of land transferability had received irrevocable legislative fiat.

10. In Uganda the British "created rights which were unknown before" (Mair 1937:165). When Sir Harry Johnston arrived in the country in 1899, previous covenants between the British and the Kabaka had merely provided that there would be no alienation of lands to Europeans. The years before Johnston arrived saw disputes and wars between Protestants, Catholics and Muslims. Johnston was mainly concerned with political settlement and seemed to care little about customary practices with regard to land or about notions of ownership. In fact, the Kabaka was not the owner of the land. He had a "kind of paternal
sovereignty rather than an articulate right of property" (Denman, quoted in West 1972:12). The Kabaka had been deposed a few years before and negotiations were carried out on behalf of the infant successor by the bakungu (territorial governors). Johnston "saw individual property rights as a fundamental principle of civilisation and social order". And he was faced in Buganda with a settled regime, feudalistic in organization.

11. Land was still so plentiful that specific rights of ownership of one part rather than another was still generally unnecessary. The bakopi (cultivators) were the lowest level in a hierarchy of appointed territorial governors, benefice holders (batangole) and hereditary kinship chiefs (bataka). The offices of bakungu and batangole were not hereditary. Though, theoretically, they and the bataka had the power to evict the peasant from his holding, in practice the ability of the cultivator to leave the territory and affiliate himself with another office holder put restrictions on the exercise of these powers. Only bataka rights of land control passed to successors, subject, however, to the confirmation of the successor by the Kabaka. The rights of bakungu and batangole lapsed on death; the successor received only the movable property.

12. The bakopi had to render respect, obedience, military service and assist in the building of roads and houses for their overlords — not to cultivate the lands of their lords. Additionally, the bakungu and batangole were also entitled to tribute in kind — paid in barkcloth and beer. "Traditionally, the right to settle on land and to cultivate it could be acquired only by grant from a superior; though forest-clearance, long occupation and, in particular, the burial of the dead, could greatly strengthen a claim to the continued holding" (West 1972:13) of the land. Although cultivation rights were "not
negotiable" they passed, on death, to the cultivator's successor.

13. With the stroke of a pen, the Uganda Agreement, 1900, recognized rights of ownership by the Kabaka and chiefs of, as was later found, about 9,003 square miles of land — mailo lands as they have since been called.\(^1\) The cultivators' rights were ignored. The chiefs were permitted to choose the lands over which ownership was claimed. Knowing the land as well as they did, the lands first taken were the most fertile (lands already being cultivated with bananas by the bakopi); then, fertile but virgin land; and, finally, isolated pockets of better land. Rainfall patterns were the major factor in the choice of land. Also, a broad belt following the lakeshore areas.

14. A few months after the agreement with the Buganda, agreements were arrived at with the Toro Kings, and, in 1901, with the King of the Ankole.

15. There is some confusion in the literature about the nature of the rights under mailo. They have often been referred to as "quasi-freehold", which is erroneous. The 1900 Agreement, and subsequent legislation recognized allodial title (title which is paramount and has no title superior to it) of the chiefs. Mailo holders (that is, persons who were recognized as land owners under the 1900 Agreement, their successors and transferees) were entitled to the soil, to the minerals and water below, to transfer and deal with the land, to cultivate or improve it (or the converse). These rights, subject to the restriction on sale of the lands to Europeans, were different from holders under the Crown in whom all non-mailo lands vested. Holders under the Crown obtained an "estate in fee simple" subject to the Crown's rights of acquisition or expropriation for failure to improve the land. They also had no right to the minerals or underground watercourses.

\(^1\) All rights to land were expressed in square miles or fractions thereof.
16. It might be assumed under popular theory, that once the mailo holders had acquired individual ownership, the powers of the Kabaka had been curtailed (particularly the right of arbitrary eviction and confiscation), and with ownership divorced from office, that the owners would speedily invest in raising the productivity of their land. The Agreement, however, introduced the idea of land as a commodity. There was a rush to sell lands and to use the income from sales to develop a European life-style. More importantly, to educate their children and thereby gain an entrée into government and continue in positions of power (see Richards 1963, West 1972). By 1952, where there had been 3,700 original allottees, there were 52,000 registered properties and nearly 8,000 persons whose claims were still to be investigated. According to West:

Under the conditions obtaining in Buganda at that time the recognition of individual property rights could not act as an immediate economic stimulus and it is pointless to complain now that it should have done so. The mailo allottees were not chosen for their industry or knowledge of agriculture; there was no fund of managerial skill and experience; working capital was non-existent; above all there was lacking amongst the new landowners any incentive to transcend the traditional form of subsistence cultivation, and Johnston's settlement could not in itself create that initiative (1972:29).

Others, however, less fortunate were introduced to the idea that through hard work and savings they could invest in land; that land was the most dependable means of securing the future.

17. While mailo lands were mainly confined to subsistence cultivation, with growing irregular patches of coffee and cotton cultivation, most of the areas sold as freehold were planted to rubber, coffee, tea or sugar plantations. These were mainly owned by farmers with higher levels of managerial skill and greater resources.
18. The Agreement of 1900 and subsequent legislation converted the cultivator into a tenant-at-will. This position permitted the mailo owner to evict the cultivator unless he paid increasingly higher rental fees — a payment, equivalent to 10 percent of the value, on cash crops grown, particularly cotton and coffee; and a further payment in lieu of a month's service for the landowner. By the 1920s, with the interests of the mailo no longer paramount in the philosophy of the administration, legislation was passed restricting the amounts payable. The legislation, passed in 1928 and regarded as "probably the first instance of a rent restriction act in tropical Africa" (Thomas and Spencer, quoted in West 1972:71), was deficient in that it applied only to the first three acres planted to cash crops. Further, with amendments, the restriction also applied only to maize, cotton and coffee and not other cash crops. Despite these deficiencies the legislation was the first attempt at providing security of tenure and the grounds on which tenants could be evicted. The legislation continued till Independence. The mailo owners, nevertheless, took advantage of the loopholes in the law and soon developed the practice of asking for a front-end fee which, in their estimate, would make up the difference between the statutory rent chargeable and the market price.

19. The legislation had two important effects. First, in divorcing office from land control, it strengthened the identification of a family with a particular parcel of land at the expense of clan loyalties. Second, in requiring land demarcation it provided a record of the actual and potential use of Crown Land as also an assessment of other land resources. The idea of individual ownership, born of ignorance and primarily political motives nevertheless took root in Buganda.
20. The approach of the British in areas not governed by the Agreements of 1900 and 1901, had the familiar pattern of the demarcation of Crown Land on the basis of unoccupied lands (and waste lands) -- an assessment based on administration beliefs of what was "occupied", and of native lands. These areas too were influenced by the practices of the Buganda. The Nyoro and other groups requested that individual ownership be introduced in their areas. The request was based, not so much on the idea of individual ownership being conducive to economic development but as the means by which capital could be raised. The request was turned down in the 1920s. Occupants of Crown Lands (which comprised most of the non-mailo lands), however, went ahead and proceeded to deal with the lands in their occupancy through leases and sales. Although these transactions would never be recognized at law, the administration, faced with an anomalous situation, decided in 1956 to officially declare all these lands as African Lands and to make provision for the grant of a registrable title to all those who wanted it. This followed the recommendation of the East Africa Royal Commission 1953-55 for the general extension of individual ownership of land. There was some reluctance, however, to allow the right of transfer to registered holders. Such permission was left to the decision of local Land Boards which were subsequently created.

21. The British also recognized a new type of tenure in Tanganyika (mainland Tanzania today). Tanganyika had been a German colony from 1891 when the Imperial German government took over from the German East Africa Company. An Imperial Ordinance of 1895 provided that all unowned land would become Crown Land. Ownership could, by the Decree of the same year, only be proved through documentary evidence. The Decree also provided that where there were native settlements on Crown Land areas should be reserved which were "sufficient for
native cultivation or other use, regard being had to future increase of population" (quoted in Pitblado 1970:5). The area deemed sufficient was determined as at least four times the land under cultivation. Further, native rights in these lands were not to be transferred to non-natives without the prior consent of the authorities. In practice, however, "very little delimitation of Native lands was carried out and, in the north-eastern highlands, dispossession took place to an extent that dangerously reduced the areas cultivated by the local tribes" (Hailey 1957:726). It was in these north-eastern areas that the British subsequently recognized a type of tenure that had been a German creation. Although there is some confusion about the origin of the feudal relationship (see James 1971:70-1, Pitblado 1970:17), nyarabunja found in the West Lake region involved a relationship in which the cultivators were tenants of the Haya chiefs. The tenants had no security of tenure, paid tribute to their landlord in kind (beer, barkcloth, bananas and later, coffee), and provided service (cleaning the landlord's plantation, construction, firewood cutting and cattle herding) for a month a year. To prevent the acquisition of land in freehold which was left undeveloped in 1903 lands were leased at first subject to the condition that development commence within a year of the lease. Thereafter, if half the land was developed the lessee could convert his right into ownership by purchase or continue with the 25-year lease.

22. The British took over under the League of Nations Mandate for East Africa and the obligations later imposed by the U.N. Trusteeship Agreement. The Articles of these Agreements, among other matters, specifically provided

In forming laws relating to the holding or transfer of land and natural resources the Administrative Authority shall take into consideration native laws and customs and shall respect the rights and safeguard the interests...of the
native population. No native land or natural resources may be transferred except between natives, save with the previous consent of the competent authority. No real rights over native land or natural resources in favor of non-natives may be created except with the same consent (quoted in Pitblado 1970:7).

The Land Ordinance, 1923, followed the Northern Nigeria model. It declared that the lands of the entire territory, with the exception of lands over which title had already been acquired, to be public lands. Two types of "rights of occupancy" were envisaged: first, the right of Africans to occupy the land by virtue of custom; second, non-Africans could obtain a certificate of occupancy for a period of 99 years. No transfers were valid without the consent of the Governor. The legislation, however, recognized as freehold most of the estates created during German colonization. These were estimated at 1.9 million acres. In the same year the Land (Law of Property and Conveyancing) Ordinance applied the English law of property in force on January 1, 1922 to the territory, with the exception of those areas held under native law and custom. Land covered by grant and in the occupancy of non-Africans was required to be registered under the Land Registry Ordinance, 1923 (and subsequent amendments in 1924 and 1954); land held under customary law was not required to be registered.

23. Attempts to encourage settlement in Tanganyika did not meet with much success. By 1951 a total of 2.3 million acres (including areas which had been resumed from German occupiers) had been alienated, amounting to a little over one percent of the lands of the territory. Development conditions were attached to these grants, although the conditions were often quite ineffective.

24. By 1955 Hailey remarked, "The cultivation of marketable crops has...led to...The sale of land...among the Arusha, Sambaa, Haya and Chagga...(among the Sambaa) the seller is not required to obtain the consent of
his kinsmen or of any superior authority. The right of preemption by the kin
group is still recognized in Arusha, but is frequently disregarded among the
Haya" (1957:782). The Chagga also recognized landlord-tenant relationships.
Increasing numbers of applications were being made by Africans for Crown Lands
in the vicinity of towns. Sales of land among the Sukuma date back to the years
before the German occupation and were said to have been stopped by the Germans
(Malcolm 1953:12). In 1958, the Review of Land Tenure Policy followed the Royal
Commission in recommending the legislative provision of individual "freehold"
tenure and the encouragement of conversion of native customary tenure into
"freehold". These recommendations were condemned by the Tanganyika African
National Union (TANU) which was then attracting an increasing number of members.

25. Zanzibar was a British Protectorate where, by the Public Land Decree
of 1921, all waste, unoccupied lands and land occupied under local or tribal
custom were vested in the Sultan. The islands of Zanzibar and Pemba had a mix
of both Islamic and native customary laws. From 1870 onwards, the application
of customary law was modified by the strict application of the Islamic shari'a
with the introduction of Islamic law judges into the indigenous areas. The
result was an amalgam of customary and shari'a law. Rights to new land could be
created by the planting of trees. This then became the kitongo. Descendants of
this first planter treated the land as if it were in the nature of trust land
with each descendant entitled to specific shares. The area was marked by the
houses and graves of members, and demarcated from other areas by double lines of
coconut palms. Rights of preemption prevailed but, on sale, a member could
always become a tenant within the lands. Absence did not extinguish rights.
Kitongo could only be alienated to non-members through agreement by every
member. In most cases this never took place. With increasing fragmentation,
the more valuable land and rights thereto were jealously guarded (see Middleton
1961). Islamic law governed grants of land through the Sultan, lands in towns,
and lands held by non-Africans (non-Shirazi) who were not native to the
islands. This provided for two main types of tenure: individual ownership and
ownership under wakfs (trust lands for the benefit of mosques, graveyards, or
families if there was an ultimate bequest to God). An owner could will away up
to one-third of his estate, and heirs (both male and female) received specific
shares in an estate either as heirs or residuaries. The right of preemption (to
kin or a neighbor) prevailed. But the inheritance of specific shares was
conducive to fragmentation of holdings.

26. Land tenure patterns in the former High Commission territories of
Basutoland (Lesotho), Swaziland and Bechuanaland (Botsana) reflect their
checkered histories in the 19th and early 20th Centuries. Lesotho is character-
ized, as is Swaziland, by ethnic homogeneity. Moshoeshoe I welded his nation,
Lesotho, from the remnants of smaller tribes scattered by Bantu, Boer and
British expeditions. When it appeared that the Boers would win, Moshoeshoe
appealed to Queen Victoria. The result was the establishment of the Protecor-
ate in 1868. Under the Aliwal Convention, however, in 1869 choice agricultural
lands taken over by Boer farmers in the Orange Free State were lost to the
nation. The only compensation was the recovery of some maize lands. The result
was a nation, with one of the highest population densities today, crowded into a
narrow strip of land between the Caledon River and the Maluti Mountains.

27. The Regulations of 1870 vested the right of land allocation in the
High Commissioner. In practice, however, land allocation and use was governed
by the Paramount Chiefs in accordance with the Laws of Leroloe — a code of
customary laws revised from time to time (see Doggett 1980, Eckert 1980). Under
the Laws, on marriage a male is entitled to be allocated three fields (one each for maize, sorghum and wheat) and additional land for each wife. Entitlement to use the land is secure unless, among other reasons, the land is not cultivated for a period of five years (the norm, rarely enforced, is two years of non-cultivation). Livestock graze on the fields in the off-season and the exercise of this right cannot be prevented by the erection of fences on crop land. One form of share-cropping was also recognized: between a person who owned lands and another who owned oxen. Each would be entitled to equal shares of the crop. Another form of sharing, in livestock, was embodied in the mafisa system. Under this system a stockholder would lend out animals to others for care, entitling the herders to milk and draught power. The basis of the system was the development of reciprocal obligations between stockholder and herder. The system also allowed the stockholder to own many more cattle than he could maintain and provide extended access to grazing lands.

28. In Swaziland, a landlocked country like Lesotho, the initial problem was the sorting out of various rights to land that had been created by the chiefs. When the British took over the territory in 1903, a calculation showed that the concessions granted exceeded the territorial area of the country. A Commission's report resulted in passage of the Swaziland Crown Lands Order in Council in 1907 and the Concessions Partition Proclamation in the same year. Under the legislation and Proclamation a third of the entire territory (about 1.64 million acres) was declared as a Native area, another 1.1 million acres as Crown Land, and the balance was left in the hands of European Concession holders who received freehold title. The chiefs' claim that what had been transferred under the various concessions was only the right to use the land was denied. Over the years following the Proclamation lands under European concession were
bought back (mainly under the Lifa Fund). At independence, however, 43 percent of the land was, and continues to be, in the hands of concessionaires. Swazi Nation Land, which today includes both the former Native area and Crown Lands, contains most of the lands of inferior quality — 87 percent of this land is suitable only for grazing, 13 percent is used for homesteads and agriculture.

29. Indigenous land tenure patterns in Swaziland are similar to those in Lesotho. There is the right of access to land by virtue of membership in the community, and the right to share in the grazing lands. But a difference between tenure patterns in Lesotho and Swaziland is that the right to land is not extinguished by abandonment, or expulsion — the heirs of the person who abandons, or is expelled, can claim the right. The allocation of lands in the Native areas was left in the hands of the chiefs.

30. From 1946 under a settlement scheme started by the administration, lands were allotted to about 1,750 families on "permanent lease". No rent was charged, the settler could only be evicted only for failure to develop the land, and rights under the lease were not heritable (save that in practice the lease was usually renewed in favor of members of the family of the deceased).

31. Land tenure patterns in Botswana (former Bechuanaland) are similar to those in Swaziland and Lesotho, with a hierarchy of rights. Land is nominally owned by the paramount chief, rights are then distributed, in increasingly smaller areas to lesser chiefs, ward chiefs and household heads. When the Protectorate was declared in 1885 waste lands were vested in the chiefs. Ten years later, the British acquired rights to a "railway strip" that was needed for the operations of the British South Africa Company. In the last decade of the 19th Century it was announced that tribal claims to land would be entertained only if they were based on occupation prior to the declaration of the
Protectorate or, if the occupation was subsequent, with the assent of the High Commissioner. Nine reserves were created (for the Kwenya, Tswana, Kgatla, Ngwatketse, Ngwato, Malete, Tati and, by implication, for the Tlokwa). Most of the tribal population resided within the reserves which accounted for 102,000 square miles, out of a total of 275,000 square miles. Within these areas it was the declared policy of the British that "all land...belongs to the Chief and of the tribe occupying the areas" (Hailey 1957:699). The rest of the areas were divided among Crown Lands (165,500 square miles) and alienated areas (7,500 square miles).

32. Cattle play a vital role in the economy of Botswana, although the numbers are not as great as those in Swaziland. Land for agriculture was selected on the basis of soil suitability and proximity to habitations. The pattern was more or less in the nature of concentric rings with villages surrounded by fields and grazing areas. Land would be distributed to households by ward chiefs on the basis of need and, further allocations would then be made to sons and wives. Rights to cultivated land were heritable. Grazing lands were allocated on a different principle.

33. To appreciate changes in grazing patterns and rights it is necessary, first, to distinguish between the types of areas grazed. Up to the 1930s there was seasonal transhumance with clustering around perennial water sources during the dry season in the hardveld. During the rains, the herds moved to take advantage of grasses and shallow pools in pans in the sandveld. Rights to grazing were allocated to wards in blocks. Each large block had an overseer whose main function was not necessarily that of range manager but to ensure that group members used the grazing area, that they established cattleposts there and that these cattle posts were adequately spaced "so as to inhibit isolated over-
grazing" (Lawry 1983:8). The effectiveness of the overseer was limited and varied from area to area. Gradually, however, the system broke down. The ability of outsiders to use grazing areas on request and the limited grazing areas provided the initial impetus. With the blurring of ward boundaries the powers of the overseer, limited though they were, were eroded.

34. Two other factors served to destroy the system. First, as in Lesotho and Swaziland, the prevalence of the mafisa system, used as a means of securing alliances, meant that the herder or grazier did not actually own all the cattle. Second, the introduction of more advanced well-digging technology changed previous systems of water-use rights. The previous system, much in the manner of Islamic law, distinguished between water flowing naturally (which was open to use by everybody) and water brought to the surface through mechanical means (in other words, the expenditure of cash or labor or both). The latter wells belonged to the person who provided the outlay. Hand-dug wells before the 1930s were ephemeral constructions rarely giving rise to the development of new rights. The introduction of deep well boring technology in the 1930s and thereafter changed grazing patterns not only in that grazing throughout the year was possible in one location, but also in that control of grazing was now possible by the owner of the well. Since inadequacy of water supplies were seen as the great problem with regard to livestock in the decades following the 1930s government assisted in the process of range degeneration through the construction of hundreds of boreholes. From an estimated 600,000 livestock in 1940, the size of the nation's herds grew to 1.5 million at Independence in 1960.

35. The development of private boreholes also added impetus to the already skewed distribution of livestock herds. For example, among the Kgatla a quarter
of the tribe's herd was owned by five men in 1932. In 1975 it was found that 45 percent of all rural households owned no livestock, 40 percent owned up to 50 head of cattle, and 15 percent owned 75 percent of the cattle herd (Lawry 1983:6).

36. In Zambia (formerly Northern Rhodesia), the history of the early period of colonialism is bound up in the relations between Lewanika, the king of the Bulozi, and the British South Africa Company. Lewanika ruled from 1878 to 1916, bringing together diverse peoples in Barotseland (a separate Protectorate within the Crown Colony). Four other important ethnic groups are the Shona, Ngoni, Tonga and Luvale. The Company had obtained a mineral and commercial rights concession in 1890. Nine years later an Order in Council gave the Company powers of administration in the west. This was followed by another concession, in 1900, giving the Company exclusive mineral and commercial rights over North-Western Rhodesia, except for Barotse Valley proper. This concession, together with the concession in 1909, was affirmed in 1923 when administration was handed over to the Crown. The acquisition of 2.5 million acres by the Company in North-Eastern Rhodesia was also recognized by the Crown in 1928 and the area was partly purchased by (about 1.8 million acres), and partly gifted to the government in 1938.

37. The North-Eastern Rhodesia Order in Council required the Company to set aside lands for the occupation of Natives, sufficient for their use and occupation. Similar provisions were contained in the agreement amalgamating North-Western and North-Eastern Rhodesia in 1911. The first of such reserves for the Ngoni was demarcated in 1904. After 1924, various commissions made recommendations regarding demarcation. The basis of such demarcation was that exclusions from the category of reserves depended on the subjective judgment
that they were "unsuited to native cultivation" and the objective assessment whether the areas were known to contain minerals. In these cases the land was retained as Crown Land. African residents on Crown Land were evicted. A further classification of land was "unassigned" land, land in the power of the administration to distribute to potential settlers. In 1937, unassigned land accounted for more than 50 percent of the nation's lands. Hopes for an influx of settlers never materialized. After the Pimm Commission had characterized the Reserve policy as a disaster, the policy of reserves was reversed in 1947. An Order in Council that year redefined Crown Land as land likely to be required for settlement. The Order transferred the formerly unassigned land to land for African use under a new category — Trust Land. Apart from Forest and Game Land (only accounting for 0.5% of the land), the main categories in 1950 were Reserve Land (71 million acres), Trust Land (100 million acres), Crown Land divided into European Land (4.6 million acres) and Unalienated Crown Land (4.7 million acres). This classification continued in the post-independence period, with Crown Land renamed State Land.

38. The post Second World War period saw an influx of settlers as the tobacco boom provided Zambia with its first major export crop. Over a thousand white farms sprang up in the Crown (later State) Lands. These farms were taken on leasehold. The basis of communications in colonial Zambia was the railway. And it was close to the line of rail that townships grew, where the main road was constructed, and where most of the white settlers had their farms. This concentration of communications within a narrow area influenced both development and land tenure.

39. The colonial history of Nyasaland (now Malawi) parallels that of Zambia, with the addition of the thangata system (a system of forced labor).
Concessions by chiefs accounted for nearly 15 percent of the land when a Protectorate was declared in 1891. The concessions, vigorously contested by the chiefs, finally left about five percent of the land area which was deemed to be validly alienated and for which certificates of claim were issued. This five percent, however, excluded areas ceded by the British South Africa Company in return for retention of mineral rights. This last area amounted to nearly 2.8 million acres.

40. As was common in colonial British East Africa, a clamor was soon raised for the demarcation of European and African. A Commission in 1921, however, opposed such delimitation on the ground that any restriction of land in African occupation "would seriously prejudice the welfare of communities who are obliged, owing to shortage of water and other local circumstances to live in scattered villages" (Hailey 1957:710). The Commission recommended that land first be set aside for African use and, thereafter, for European settlement. The Commission's further recommendation that a Native Lands Trust Board be constituted was given legislative effect in 1927. But in 1936 the nation's lands were finally demarcated into Crown Lands (lands for public purposes), Reserved Lands (lands in townships, forest reserves, and lands already alienated) and Native Trust Lands (which included most of the area formerly classed as Crown Land). These Trust Lands could be leased for up to 99 years by the administration after consulting the Native Authorities.

I. No special areas were set aside for the acquisition of individual title to lands by Africans despite the fact that evidence of such transfers in the Marimba and West Nyasa districts had already been led before the Land Commission in 1920. The only inference is that the growth of individual titles was stifled by indirect rule. In 1953 only 43 Africans held lands in freehold
and the area was 4,600 acres. Earlier, however, the cultivation of tobacco on farms had led to successful resistance by farmers when chiefs tried to resume lands on the ground that they were required for landless fellow-tribesmen. The recommendations of the Land Commission, 1946, that Africans who wished to cultivate commercial crops should be required to obtain certificates of occupancy (on the same terms as non-Africans) was not seriously pursued.

42. The history of British colonialism in West Africa differs in a major respect from that in East Africa: there was never any intention to encourage European (or other) settlement in West Africa. The competition for land or for export crop cultivation was, therefore, never between settler and African. In another important respect, however, there was an identical approach to land tenure — the view that land was held in common, subject to the control of "chiefs". With some exceptions, legislation and policy, reinforced by the theory of indirect rule, supported this view.

43. In Nigeria the main distinctions were based on whether the land formed part of a colony, or a protectorate. In the latter category there was a further distinction based on different approaches to the North and the South.

44. The colony of Lagos was ceded in 1861. Even before the cession various grants of land had been made, some purporting to be under English law, others under Native custom. These were called in and regularized in 1863. But the extent of African (or non-African) rights in other lands which were not the subject of grants were the subject of some discussion until 1921. In that year the Privy Council held that although all other lands had been ceded by King Docemo to the Crown, the Crown held those lands subject to the rights of the occupants of the land. These rights, it was further held, were equivalent to that of ownership. They were private rights, even though many were of a "communal nature".
In Southern Nigeria the main goal of the British was the control of sales of land by non-Africans to Africans. In 1900 the British took over the rights of the Royal Niger Company. Apart from recognizing the claims of the Company to mineral concessions and freehold over trading stations, the administration did not assert a claim over African lands on the ground that these appeared to be in effective occupation. In Benin, after creating some leases, control over the land was handed over to the Oba when it was restored in 1914. Control over land sales to non-Africans found expression in the Proclamations of 1900 and 1903, and, partly modified, in the Ordinance of 1917. Land sales required the approval of the Governor, which was given mainly in urban areas. Crown Lands were originally defined to include all public lands subject to the control of the Crown (which included land occupied by Africans). It was only in 1945 that lands in the undisturbed possession of Africans were excluded both from the definition of Crown Land and lands acquired from the Royal Niger Company. The pleas of commercial expatriate interests did not go unheeded. The efforts of Leverhulme to obtain freehold for the development of oil palm plantations were not successful. In the course of the debate, however, it was believed that the real objection was to the grant of permanent rights, not leasehold. To bolster this view it was further mooted that the introduction of palm cultivation on a scientific basis on vacant land would benefit the country. Ultimately, leases were granted to the United Africa Company for oil palm plantations, and to other interests for timber exploitation. The leases were either in respect of reserved forest areas or other areas with the consent of the Native Authorities.
The course of British involvement in Northern Nigeria was determined by different historical antecedents. Northern Nigeria had been under the influence of Islam for centuries. In the 19th Century, as the result of Dan Fodio's conquests most of the northern area was under the control of Emirs. The Fulani dominated administration, the Hausa played a pre-eminent role in trade and agriculture. The Fulani were to be found (as woDaabe or Peuhl) in Niger, Chad, Cameroon, Mali, Senegal and Mauritania. The Hausa spread north into Niger, and east into Cameroon. The treaties entered into between the Royal Niger Company and the Emirs in northern Nigeria gave the Company no general rights over land. The British in 1900 saw an African administration well organized and, most importantly, recovering taxes. The theoretical norms of Islam that land obtained through conquest became trust lands to be retained only by those professing Islam when under cultivation had been adapted to include customary tenures. By the letter of Appointment and Proclamation in 1900 the British took over all the rights of the Fulani conquerors in the lands. The Northern Nigeria Land Committee in 1910 affirmed that the rights of the Fulani had passed to the British administration by conquest, but recommended that these rights should be used for the benefit of Africans in accordance with native custom. Native custom, despite evidence to the contrary before the Committee, was seen to mean a hierarchy of estates with control of land allocation and use in the hands of chiefs. The Land and Native Rights Ordinance of 1910 gave effect to the Committee's recommendations in that all lands, whether occupied or not, were declared to be Native lands subject to the Governor's disposition and to be administered for the benefit and use of Africans. Native law and custom was to govern the grant of occupancy rights and limits were placed on the area for which non-Africans
could obtain occupancy certificates. The administration of land law and settlement of land disputes were left in the hands of the Native Authorities. This legislation effectively restored power to the chiefs when, in fact, there had been a growing trend towards the development of individual tenure. In theory, the legislation did not prevent the sale, transfer or bequest of land to relatives. What it sought to control was land transfer to non-Africans.

47. In 1912, as a result of a request that the Government consider the extension of the Land and Native Rights Ordinance to Southern Nigeria, the West African Land Committee could come to no conclusion.

48. Fears of the dangers of affording legislative fiat to individual ownership resulting in the creation of landlessness and widespread indebtedness, rather than a realistic view seems to have influenced the administration. These fears were strengthened by the British experience in India. And yet the evidence of individual sales and ownership was abundant. Even though judicial recognition was not necessarily given, claims of individual ownership and examples of sales were already prevalent in Lagos and Yoruba country. Renting of land for cash was common in Eastern Nigeria. In towns (Kano, Kaduna, Lokoja, Zaria and Jos) mortgages were common, leases were judicially recognized, and sales also took place, even though these did not gain the recognition of the Emirs. With regard to the main systems prevalent evidence had already been led before the Northern Nigeria Lands Committee that holdings were on a family basis both in the north and in the Yoruba areas. As Rowling says "The committee found plenty of evidence that transfers were taking place. Indeed 'sale' of farms, houses, and building sites long anterior to our occupation may readily be confirmed by 'case histories'." (1946:5). Rowling continues
Evidence before the Lands Committee was not conclusive whether these transactions required the 'consent of the chief or his delegate'. Enquiry now suggests they did not. Except in special circumstances the function of the village heads was and is that of a 'registration authority'. Lease, sharecropping or loan does not, in a straightforward case, raise the issue of title and these transactions are not therefore even reported. Inheritance, gift, purchase, or pledge all however pass either the whole or a substantial portion of the rights affected. The last three are accordingly never entered into except in the presence of witnesses and, it is probably safe to say, are always sealed by final report to the village or ward head, except perhaps in the case of rich city traders operating in the districts and persons of royal blood who are apt to deal in house property as though themselves above this formality (ibid:6).

The administration also neglected the fact that Islamic law (the adherents were mainly governed by the Maliki school) fostered individual rights, individual holdings, and land fragmentation. Further, a true believer could dispose of his entire property during his lifetime (subject to the right of preemption), and will away one-third of it. The law, however, as administered did not countenance practice.

49. History also restricted the choices open to British involvement in the Gold Coast, Ashantiland, and the Northern Territories (all today constituting Ghana). Early British contact with the Ashanti and Fanti-speaking peoples in the first decades of the 19th Century were mainly limited to trade and contact with "Head Chiefs" (later called Paramount Chiefs). The kingdoms had largely been built on slave trade which gradually declined in the area after 1810. Land was held in matrilineages or patrilineages and controlled by chiefs with the assistance of councils comprising the heads of constituent sub-lineages. Nominally the chief and council were trustees of the land. Lineage membership entitled a person to land allocation. The fruits of the land were the property
of the cultivator. In a land abundant situation, "ownership" rights were of little consequence. The British treated the Fanti as allies who, by the Bond of 1844, agreed that certain criminal offences should be tried by British magistrates and that Fanti customs should be moulded in conformity with the general principles of British law. The coastal Fanti, however, saw in the British their greatest protectors against Ashanti raids.

50. In the mid-1800s, the "pure" system of native tenure began to display cracks. Oil palm demand had increased. With the decline in the slave trade, powerful chiefs and traders who had grown fat on slaves now had an opportunity to substitute palm oil as an export commodity. Palm oil trees grew wild in Southern Ghana. Slaves were now used to gather and process the nuts and to carry the oil for export to the coast. With increasing demand, deliberate cultivation of oil palm commenced. It was the coastal Krobo and Akwapim who entered export crop cultivation first. With money raised by families they ventured into non-Krobo areas, purchased lands and cut down the virgin forest for palm cultivation. Little family labor was used; it was usually hired labor in the early stages and former slaves (see Hill 1963, Miles 1979). At the early stages too, most of the sales were between chiefs and related to "stool" lands' -- lands attached to the office of chief. The migrant purchasers owing no allegiance to the selling chiefs or individuals, and cut off from control by their own groups regarded the lands purchased as individual lands. There was increasing pressure for recognition of this right and courts did give recognition to a form of ownership equivalent to the English fee simple (see Meek 1948:180). In 1874 the British declared the Fanti Confederation area as the Gold Coast Colony although the formal act of annexation would only be made in 1901. The British were also desirous of containing the Ashanti whom they saw as
a threat to their commercial interests and the security of the Colony. After numerous attempts at pacification, Annexation and Protection Orders in Council were finally issued in 1901-1902.

51. In the meanwhile, sales of land had grown apace. The title acquired received judicial recognition in 1897 when it was ruled "that the continuous occupation of land for long periods of time (forty years in the case..) with a permanent crop like cocoa removed the land from the category of stool land, over which the chief had ultimate disposition, to the category of individual (or family) land. (It was) further ruled that individual tenure carried with it the right of mortgage and the risk of seizure in execution of a debt. So definite and so common a practice was the sale of land between the indigenous people of the Gold Coast Colony by the end of the nineteenth century that Griffith...could say that 'he never had occasion to consider the question'." (Grier 1981:33).

What concerned the British was the increasing number of sales of stool land by the Chiefs. The transfer of mineral rights (with the possibility of gold being discovered) caused even greater concern. The first effort to regulate these transactions was a Bill to vest all waste lands, forests and mineral rights in the Crown. The Bill, published in 1894, met with such opposition that it was not pressed. Efforts by the Government to investigate African land rights in 1895 produced an inconclusive report. A further measure, the Public Lands Bill, sought, among other matters, to encourage settlement by recognizing a right of proprietorship over lands which had been continuously occupied for a number of years. The Bill met with the united opposition of the chiefs, now joined by African lawyers. The next measure of control attempted was the Concessions Ordinance of 1900 which provided that all concessions had to be validated by the
Supreme Court. The machinery for enforcement of this Ordinance was inadequate and, more importantly, it did not control the disposition of stool lands by the chiefs.

52. The numbers of chiefs "destooled" during the first decades of the 20th Century increased British concern about the political consequences in the Gold Coast Colony. Added to this was the increase in litigation, the numbers of farmers who lost their property through mortgage sales, and growing scarcity of lands in the Eastern Region in the Colony where cocoa production and land sales by chiefs restricted the extension of cash crop cultivation. In 1912, investigation of the laws in force relating to land alienation were entrusted to the West African Lands Committee. The report was officially circulated in 1917, but only published in the 1950s. The Committee generally took the view that sales of land were inconsistent with African customs which should be enforced. Courts were also criticized for having given judicial recognition to the sale and individualization of land. Individual tenure, the Committee stated, was a concept unknown to customary law; equally unknown was the concept of a mortgage. Following the report both administrative and judicial policy no longer recognized individual sales or ownership.

53. The Ashanti Concessions Ordinance, 1903, provided that government could regulate the procedure in concession acquisitions. This provision was used to require that negotiations be carried on through the District Commissioner. In practice, chiefs were encouraged only to lease, not sell, lands. Administrative support of what was believed to be "pure native tenure" with its emphasis on the "communal" nature of landholdings and control vested in chiefs, greatly enhanced the powers of the chiefs, just at a time when these powers were being eroded (if ever they possessed more than an "ultimate" theoretical right...
to control lands). Chiefs extended their control to family lands as well, and added the power to control the entry of stranger farmers. Unlike the chiefs in the Colony, the Ashanti chiefs enlarged the range of their powers.

54. In 1951 it was estimated that the total mineral concessions validated by the High Court amounted to about 0.5 percent of the area of the Colony, and nearly 10 percent of the Ashanti area. No records were, however, available regarding sales or "leases" for cocoa cultivation:

55. In the northern territories, few powerful chiefs existed to thwart the administration. The policy adopted, based on the Northern Nigeria experience, was one of "indirect rule" through the recognition of local Native Authorities as the agents of the administration. The territories were not deemed suitable for export crop cultivation, nor was there any prospect of mineral discoveries. External pressures were, therefore, far lower than in Ashanti or the Colony. Thus there was no opposition to the Crown asserting claims to mineral rights and the control of prospecting. To further control land, and to reinforce the administration's view regarding native tenure, the Northern Territories and Native Rights Ordinance was passed in 1927. Under this Ordinance, all lands were declared to be public lands with a proviso that existing titles would be recognized if proved within three years. Certificates of occupancy were to be issued which conferred no rights to the minerals; sales by Africans to non-Africans were prohibited. By amendment in 1931, the term "native" was substituted for "public" lands and the governor was entrusted with the disposal of the lands "for the use and common benefit" of the African, occupancy rights were limited to a maximum of 99 years and the governor was empowered to levy rents for rural, in addition to urban areas. It was later realized in the Northern
Territories that the allocation of land was not the prerogative of the chiefs but that of the earth priests, the Tendana. The native administration by that time refused to associate earth priests with the process of land leases and occupancy rights.

56. The efforts to stem the tide of land sales were too little and too late. Further, boundary disputes, disputes over the rights of stranger farmers, and lack of judicial recognition only served to encourage a spate of litigation. Hailey's comments are worth quoting:

In the Colony area and Ashanti commercial transactions in land are even more common than in the corresponding parts of Nigeria. In the Colony particularly the wide use made by the Chiefs of their powers to grant Concessions over "stool" lands, the increase in land values resulting from the expansion of the cocoa industry, added to the widespread use of English documentary forms of transfer, were described as long ago as 1931 as having virtually destroyed the customary system.

The volume of litigation regarding land is said to be greater in the Gold Coast than in any other African territory. This is largely connected with disputed claims to "stool" lands, namely the unallocated areas which are a potential source of revenue from Concessions or from the "tribute" paid by "stranger" cocoa planters...

The problems created by the uncertainty of individual titles increase in proportion as more farmers take up land in areas to which they are "strangers", and they have been intensified by the search for new cocoa land....About half the population of Manya Krobo State, for instance, are now farming in the Akwamu and Akim Abuakwa States, and whole tracts of Akim Abuakwa land have also been acquired by Akwapims. There are many similar instances. (1957:739-40.)

57. In the Gambia no action was taken to enforce the rights ambiguously defined in the Protectorate Ordinance of 1896. The legislation that replaced the Ordinance in 1945 declared that all lands were vested in the Native
Authorities and the rights of the Crown to acquire land for a limited term, on payment of compensation, were also affirmed. The 1945 Ordinance further affirmed that native occupation of lands was governed by customary law, and that "non-indigenes" could only occupy the land with the consent of the Native Authorities. But the Native Authorities were not necessarily persons traditionally entitled to allocate land. Village elders were the effective land authorities. Only when there was a question of the grants of rights to "non-indigenes" — generally immigrants from the neighboring French territories — were controls legally exercised by District Heads. Even here too, local right-holders usually allotted land to immigrants in return for on-farm assistance.

58. In Sierra Leone, as in the Gambia, the Protectorate Ordinance of 1927, vested land in the Tribal Authorities. The limits of disposition of these lands were, however, controlled by two Ordinances. The Ordinance of 1931 required the Governor's sanction for concessions to non-natives up to 1,000 acres said to be for the benefit of the Chiefdom. For concessions over 5,000 acres for the benefit of the country, the sanction of the Secretary of State was required. This Ordinance resulted from the failure of the government to encourage Africans to grow oil palm and sell the products to foreign enterprises. The Palm Oil Ordinance of 1913 provided that concessions could be made to foreign enterprises (of not more than 10 square miles, for a period of up to 21 years), with exclusive rights to construct oil mills, but with no rights to land, and non-exclusive rights to purchase produce. The African was unwilling to sell palm oil at prices which were often lower than could be obtained in the open market. It was therefore urged that foreign concessionaires could not depend on African will-
ingness to sell palm oil fruit. The Ordinance of 1931 accepted the concessionaire argument. The second measure, the Ordinance of 1927, controlled the tenancy rights of "stranger Natives". Prior consent of the Tribal Authority was required, and the occupancy was temporary unless covered by a lease which could extend for a maximum of 50 years. The administration believed that land-use policy controlled by the Tribal Authorities was appropriate since these Authorities generally coincided with the heads of the principal land-owning families. By the 1930s, however, the extension of rice cultivation in swamp lands eroded chiefly power. Pledging, with money-lenders advancing substantial amounts of money, became common. The right to redeem pledged land became more restricted (since the pledgee at times pledged the land again) and this gave rise to litigation. It was suggested, as in Ghana, that title registration might provide a remedy to cut through the confused title claims. This, however, was not pursued since it was also felt that registration could only be effective if it was both compulsory and universal and accompanied by an adequate cadastral survey.

59. The British Cameroons were created after World War I, when the British took over German interests in the area. As in Tanganyika, the Germans had declared as Crown Land all lands for which there was no proof of title. A number of these concessions were determined as being invalid — the largest of these was the North-West Cameroon Concession which transferred all land which might become Crown Land. German-owned estates after the war covered some 258,000 acres. Most of these were auctioned and a large number repurchased by their former holders in 1925. After World War II the estates were purchased by the Nigerian Government and leased to the Cameroons Development Corporation. The area covered by the lease amounted to nearly 495 square miles.
An Ordinance in 1925 extended the land law applicable to Northern Nigeria to the Cameroons. To all intents and purposes the British were mainly concerned to control the transfer of lands to non-Africans. And, where the administration required land it usually paid compensation to the occupants rather than acquire it. The development of cocoa cultivation in Cameroon had similar repercussions on the tenurial system as in the Gold Coast and Ghana. Land came to be available for lease (or taken on lease) for rents payable in kind (a share in the crop) or in cash. The right of prescription creating title in the pledgee also came to be recognized by the Native Courts — even though these courts did not follow any uniform principles. And "though sale is not recognized as legal, in the eastern districts of Mamfe land is sold publicly in the market place" (Hailey 1957:792). The purchasers or lessees were generally "strangers".

French Policy and Practice in French Cameroon

French Cameroon came into being after World War I, when the French took over the eastern part of the country as Trustees from the Germans. The Germans had followed the same principles with regard to recognition of rights to land as in Tanganyika. Concessions, however, in the Cameroon were for rubber collection. In south Cameroon a concession, entered into in 1898, comprised 18 million acres. In northwest Cameroon the concession was for nearly 11.8 million acres. Both concessions were made to companies and were subject to native rights in the areas. The area covered by the southern concession was later reduced to nearly 3.8 million acres and the northwest concession cancelled. After the war, concessions, including individual grants were auctioned and, unlike British Cameroon, most were purchased by non-Germans. The Order of 1904
was extended to French Cameroon in 1920. The definition of "vacant lands without a master" was protested to the U.N. Trusteeship Council and, as a result, a commission was appointed in 1950 to redefine the scope of that term. It was agreed that three types of indigenous ("Native") rights should be recognized: individual (over land used for cash crops), family (land used for food crops), and collective (bush land, subject to hunting and collecting rights). The last category was classified as domaine communal to be administered by regional officers of the administration in consultation with local Councils. In 1931 all lands in the neighborhood of villages were classified as Reserves. These lands could be acquired by the State on payment of compensation. Cameroonians, however, living on these lands had only occupancy rights with the ability to use the produce, but no rights to alienate.

Cameroon was once considered a country where settlers should be encouraged to reside. Climatic and other reasons prevented large settlement. Only a few grants were made for settlement. These, in 1951, totalled about 259,000 acres and were used mainly for banana and coffee cultivation. In 1955, the Order recognizing local tenures (referred to earlier) was applied to French Cameroon.

C. Belgian Policy and Practice in Rwanda-Urundi

When the Germans occupied Rwanda Urundi in 1898, they found two feudal kingdoms whose development had already commenced in the middle of this millennium in defence against the slave trade (Jones and Egli 1984). The Batutsi were in political control, and the Bahutu in control of the land till the end of the last century. Until Rwabugiri came to power in 1860, two clientage systems prevailed. The first, between Batutsi chiefs and their clients, which involved
gifts of cattle; and that between Bahutu lineage heads and their kin which involved gifts of beer and labor. With the advent of Rwabugiri, the separate systems were merged with the Bahutu occupying an inferior role and control was centralized in the Batutsi court. Bahutu lineage chiefs (and family heads) were stripped of their right to allocate land, settling disputes, and collecting tribute. These rights were now transferred to a new layer in the hierarchy—the hill chiefs (mainly Batutsi) who were appointed by the Batutsi court. The appointment of hill chiefs resulted in the development of dependency relations of Bahutu on Batutsi. Bahutu had to pay tribute (in beer or crops or labor for two days in a five-day week). Bahutu most resented payment of tribute in the form of labor which could only be avoided through the gift of cattle (Maquet 1967, Reintsma 1981).

64. During the German period, which continued until 1917, the power of the Batutsi court was reinforced by continued permission to appoint hill chiefs. The Belgian Government, which took over Rwanda Urundi after World War I further reinforced Batutsi paramountcy. Until the administrative reforms between 1926-1930, two systems were in operation: one arising from the dependency of Bahutu on Batutsi chiefs (a relationship between individuals); the second, based on rights in land vested in lineage heads. With regard to land, there were three ways in which land could be obtained: by inheritance (male succession), from a chief (with payments of tribute), and by clearing new lands to which no claim had been laid. With regard to pastures, there were communal pastures to which, in theory, everyone had a right of access; and there were pastures controlled by chiefs where rights of usufruct were permitted on tribute payment and which chiefs could allocate for cultivation. Lineage heads still had power
to allocate uncultivated lands (hill chiefs controlled only the admission of "stranger" farmers). The Belgian administration, however, altered this and ordered the surrender of uncultivated lands to the hill chiefs who were then authorized to reallocate uncultivated lands and to demarcate the boundaries of the land of each member of the lineage kin group (Reintsma 1981). Landless persons, thus, had to become clients of hill chiefs. The other aspect of tribute and labor will be dealt with later. It was not until the 1960s, after repeated comments at the Trusteeship Council of the U.N. that a Special Provisional Council, comprising both Batutsi and Bahutu members, recommended that private rights in pasture land be converted to collective rights, and that customary law prevail with regard to land, subject to the acceptance of Batutsi "acquired gains" (lands already leased out by Batutsi). Division of land between patron and client, so as to provide where possible a minimum of two to three hectares each, was also decreed in the Gisenyi division. Indemnities payable by a tenant were also fixed in terms of a certain number of years.
APPENDIX B: POST-INDEPENDENCE LAND POLICIES AND LEGISLATION

1. In Kenya, the "clear preference for private capitalism" (Okoth-Odengo 1976:180) had its roots in legislation before independence. The legislation grew out of two major policy changes. The first, expressed in the Swynnerton Plan in 1954 saw the development of individual tenure as a logical and necessary step for economic growth to take place. It was realized that in the process of individualization some would fall by the wayside, that some would be left without land. This was, however, seen as inevitable, a price that had to be paid; and the failures would encompass only the inefficient farmer. The second, was the encouragement towards individual tenure provided by the report of the East African Royal Commission, 1953-55. The Commission's support of individual tenure took into account the problems that could arise -- landlessness, the rise of indebtedness -- but nevertheless favored the transition.

2. In Kenya, legislation then became an instrument of policy designed to effect a transition to individual tenure. This was expressed in the Native Land Tenure Rules, 1956, which provided for adjudication, consolidation and redistribution of holdings in one process. The processes were, however, to be applied to selected districts. A year later, to prevent any social disruption, the Suspension of Suits Act was passed effectively staying any suits relating to land and preventing further litigation, in areas to which the Native Land Tenure Rules applied. The Working party on African Tenure expressed the view that sporadic
application of registration was undesirable and recommended that registration applied systematically, district by district. This recommendation was adopted in the subsequent Kenya Native Land Registration Ordinance, 1959. The Ordinance made no provision for recognition of group ownership "because it was considered that this would militate against the intended individualization" (Simpson 1976:200). Provision was also made for the processes of adjudication, consolidation and registration to be carried out by committees and with administrative personnel. The effect of registration was to grant the person whose land had been registered a title 'in fee simple'. Further, the Ordinance also made the first registration conclusive evidence of title to the land, thereby effectively preventing any challenge, even if the registration had been obtained by fraud.

3. At the same time it was felt that dealings in land should be carefully supervised. For this purpose the Land Control (Native Lands) Ordinance, 1959 (closely modelled on the earlier 1944 Ordinance) was enacted. This Ordinance provided that any land dealing required the consent of a Land Control Board comprised of two officials, two persons appointed by the District Council, and between six to fifteen persons appointed (initially) by the Provincial Commissioner. It was believed that the last-mentioned group would comprise the traditional elders who could bridge the transition from customary to individual tenure.

4. Both Ordinances were subsequently amended. In 1963, the parts relating to registration contained in the 1959 Registration Ordinance were repealed and replaced by the Registered Land Act. The Control Ordinance was also repealed in the same year and replaced by transitional provisions. This situation continued till 1967 when a new Land
Adjudication Act was passed which provided for both adjudication and consolidation. In 1968 the last Act was renamed the Land Consolidation Act since a separate statute, the Land Adjudication Act was passed in the same year, and the provisions relating to adjudication contained in the 1967 Act were repealed. In that year, the Registered Land Act was also amended and references to group land registration were added. Further, the Land (Group Representatives) Act 1968 was also passed which allows for the representatives of a group to be appointed as a condition precedent to the registration of title of the lands used by those groups for purposes such as ranching. A group was defined as "a tribe, clan, section, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group".

5. It is worthwhile, at this stage, to pause and consider the effects of the foregoing legislation. Under the Registered Land Act, registration of a person as "the proprietor of land" vests "absolute ownership". Second, where there is multiple ownership, the land can be registered in the names of not more than five persons (subject to other limits the Minister may prescribe). These two aspects take land ownership completely out of customary tenures. However, the Registered Land Act did not entirely exclude customary succession to land. It expressly provides that nothing in the Act affects "the law of testate or intestate succession" (section 107) and that section 120 of the Act applies when a "proprietor dies intestate and is subject of African customary law relating to succession on death". In the circumstances last mentioned, an administrative officer certifies that the land was subject to customary
law. The certificate is then forwarded to the Registrar, and, after an enquiry by a court to determine the heirs and their respective shares, the land is registered in the names of the proprietors subject to the rule that the property cannot be registered in the names of more than five persons. The Registrar, however, can only proceed with final registration if the requirements of the Estate Duty law have been complied with. The Land Adjudication Act which was passed to apply to areas where land consolidation was not appropriate, provides for the appointment by the Adjudication Officer (in consultation with the District Commissioner) of a Land Committee of not less than six persons resident within the District from whom he may select five to form the Land Committee. This Committee advises the officer on any dispute cannot resolve, "having due regard to any customary law which may be applicable". Where the Committee is unable to determine a dispute, or if the Adjudication Officer or a party is dissatisfied with the Committee's ruling, the matter is referred to an Arbitration Board. The decision of the Board is then entered on the Register by the Adjudication Officer. Appeals by aggrieved parties from a decision of the Adjudication Officer (initially, or as a result of an entry pursuant to the Arbitration Board's decision) must now be made to the Minister whose decision is final. Until 1981 disputes concerning customary land were heard by the District Magistrate and in courts variously named as native courts, African courts, etc.; those concerning registered land by the Resident Magistrate or, where the value of the land was more than £25,000 (a rare occasion), by the High Court. In that year the Magistrates' Jurisdiction (Amendment) Act was passed which excluded jurisdiction of Magistrates in four types of cases relating to land
involving (i) the beneficial ownership of land; (ii) the division of, or the determination of boundaries to, land including land held in common; (iii) a claim to occupy or work land; and (iv) trespass to land. In these cases, the dispute would be referred "to a panel of elders to be resolved". The panel comprises a chairman (the district officer) and either two or four elders agreed upon by the parties. The 'elders' are defined as "persons in the community or communities to which the parties by whom the issue is raised belong who are recognized by custom in the community or communities as being, by virtue of age, experience or otherwise, competent to resolve issues . . . and where there are no elders, or where the parties cannot agree upon the choice of elders . . . such persons as the District Commissioner shall appoint" (section 9). In effect most civil disputes are taken out of the scrutiny of courts except for obvious errors on the face of the proceeding. Once a decision has been arrived at by the panel and is entered as a decree by the court no appeals lie except where the decree is "in excess of, or not in accordance with, the decision of the panel of elders". Apart from the uninterrupted flow of legislation both before and after independence, there is an obvious movement back to Land Committees and panels of elders and an implicit re-affirmation of customary modes of settlement. Passage of the Land (Group Representatives) Act was undoubtedly facilitated by the prospect of a World Bank credit for livestock development for it was "unlikely that IDA would have lent without some version of tenure, except to Government (the ultimate owner) for use as grants to pastoral areas . . .". 1/

6. In 1965, the Lawrance Mission was favorably impressed with the working of the registration Ordinance and Act.\footnote{Simpson right points out that the Lawrance Mission was in Kenya "not to investigate the economic and social consequences of land policy as such, but merely the operation of the system provided for the administration of that policy. Of the efficacy of the system the Mission had no doubt, and it was well qualified to judge" (1976:453).} In ten years, between 1956-1965, more than 1.6 million acres in over 247,000 parcels were brought on the Register. Fleming, who was appointed Land Tenure Advisor in 1967, noted that "increasing demands for land and rising land values had made the public in the areas affected by these conditions even more appreciative of the value of registered title. In 1973 the number of titles on the Register had increased to 630,000 in twenty-two registries" (Simpson 1976:453). There were, it is true, problems particularly at Fort Hall (now Murang'ara). But, by and large, the applications for registration were increasing. Another problem was the failure to proceed with equal enthusiasm converting old titles, granted under the Registration of Titles Ordinance, 1919, to titles under the 1963 Act. The pace of conversion of these older titles was, and still is, slow, although this is a matter of urgency only where former European farms are subdivided and resettled.

7. Land legislation in Kenya has been dealt with above at some length largely because much of the post-independence legislation passed in former British colonies is similar and would not, therefore, need extended reference. There is, in fact, notable tendency not only to copy constitutions (Lloyd once described them as 'carbon copy constitutions'), but also legislation. The Kenya legislations was influenced by the Sudan.
and Lagos legislation. Kenya, influenced legislation in Malawi. Zambia borrowed large sections of the Leader Act from Tanzania. Simpson was an advisor to the governments of Kenya, Nigeria, and Malawi.

8. In Malawi, Dr. Banda introduced four Bills in Parliament in 1967 which he claimed "when passed as Acts of Parliament, enforced and carried out, will revolutionize our agriculture and transform our country from a poor one into a rich one" (Simpson 1976:457). The philosophy underlying those Bills was that customary tenure where land is held in common was inherently wasteful, uneconomical, discouraged lending by financial institutions and placed responsibility on no one — 'everybody's baby is nobody's baby at all'. The four Bills were the Customary Land (Development) Bill, the Registered Land Bill (based on the Kenya model), the Local Land Boards Bill to control land dealing, and the Land Amendment Bill (to enable customary land to become private land and to vest these lands in the Head of State). The four Bills were enacted in 1967.

9. The Land Development Act is a later version of the Kenya Ordinance of 1959, and the subsequent Land Adjudication Act of 1968. It differs from the Kenya Act in that it enables a family to be recorded as the owner of land under the name of the "family head". It provides also for the redistribution of land in a declared area. The Act defined all waste land, burial grounds, sacred grounds, and the like as "unallocated garden land" which would continue to be governed by customary rules even though registered. The Act also provides for the appointment of Committees to advise the Allocation Officer. Unlike Kenya, however, the appointment of these Committees is only discretionary, not mandatory. The Act was meant primarily to serve as a 'feed in' to the Registered Land Act. The
scope of the Registered Land Act was narrow. It applied only to land held
under customary tenure although it was intended to apply as well to other
lands. Arrangements for bringing all lands which had previously been
registered were only made in 1971 with the enactment of the Adjudication of
Title Act. The Local Land Boards Act prevents any person from selling,
leasing, exchanging, partitioning, or dealing with land (including
acquiring land) without the permission of the Local Board. Under this Act
the Board is also empowered to partition family land and replace the
registered representative of a family. Appeals from decisions of the Board
lie to the Minister. Appeals under the Adjudication Act lie to the High
Court.

10. Simpson notes that registration and adjudication have proceeded
very slowly. This is apparently borne out by the Bank's experience in
three phases of the Lilongwe project. In Phase I of the project (Cr.
113-MAI), only 13,600 acres had been registered to family heads during 1972
although a much larger area had been demarcated. There were fears at that
time that unless registration proceeded more rapidly further subdivision
might take place. In Phase II (Cr. 244-MAI), the survey target of 375,000
acres was exceeded (by 965 acres) but only 96,493 acres had been registered
although farm allocations of 261,800 acres had been made. In Phase III,
(Cr. 550-MAI) the area demarcated fell short of the target (78,200 ha v.
81,000 ha), but the area registered exceeded the target (132,900 ha v.
109,400 ha). The Government noted that "many problems were encountered in
the land allocation processes particularly disputes over who was the family
head". Another cause for delays was the slow pace at which documents were
issued by the Registrar. Lilongwe was the only area in Malawi where the Land Development, Registered Land and Local Land Boards Acts had been applied for the benefit of smallholders. In Phase IV (Cr. 857-MAI) where further development of the Lilongwe area was part of a National Rural Development Programs, the land registration component was dropped, an indication that Government was reconsidering the registration program.

11. Land tenure systems in the Sudan can be divided into several types: First, areas of Government land over which no individual has any legal rights. Second, land minimally owned by Government but over which tribal, village and individuals exercise control (largely in the south, southeast and west). Finally, individually owned lands which are registered, and are in the north and riverine areas (Bolton, 1948).

12. In the north, Islamic law generally governs ownership and use. But, although the law provides for shares for daughters, in practice females usually give up their land rights in favor of their brothers or sons (Murdock 1979). Among patrilineal herders in the north the Islamic shari'a also applies. In the south, with numerous tribal groups, the system of land ownership and use is mainly patrilineal. Most of these groups are without chiefs or centralized authority.

13. In Sudan the Unregistered Land Act, 1970, vested all waste, forest and unregistered land in the State and these lands "shall be deemed to be registered as such". The statute has resulted in bringing adjudication of title to land under the Title to Land Ordinance, 1899, and the Land Settlement and Registration Ordinance, 1925, to a standstill in new areas. Another statute, however, has had an even greater impact: the People's Local Government Act, 1971. Prior to this Act, the allocation
of lands (particularly grazing lands since arable lands were privately owned or already occupied) was left to the omda (a sub-district chief) under Native Administration. This was abolished when the 1971 Act was passed, and replaced by local or provincial councils which comprise elected or appointed officials. The only person retained under the new system is the sheik, who is a mere trustee of village lands and has to apply to the council on matters relating to land. The new Act set up no system for the allocation and control of grazing lands. As a result any person may freely graze these lands (see Hammer 1982). The 1971 Act has often been ignored in practice, but the resulting impact has increased insecurity.

14. In Uganda, the first constitution in 1962, implicitly revoked the 1902 Order in Council requiring the courts to be guided by customary law. The administrative control of land had already been decentralized and delegated to District Boards under the Public Lands Act. "This Act retained the same arrangements regarding customary use as existed prior to independence under the Crown Lands Ordinance, i.e. public land continues to be held under customary tenure in rural areas throughout Uganda without lease or licence". 1/ The second 'Republican' Constitution of 1967 terminated the special relationship between the State and Buganda and the other kingdoms. Further it vested both corporation 'official estates' and ownership and control of public land in the Uganda Land Commission. Third, it vested mineral rights in mailo lands in government. Finally, the Public Lands Act 1969 converted all mailo lands to freehold.

15. At independence, there were three main types of tenure in Botswana: tribal land (comprising about 71 percent of the total area); State land, comprising about 23 percent of the land formerly known as Crown Land and covering mainly national parks, game reserves and leasehold ranches; and freehold land, amounting to about 6 percent of the total area. In pursuance of a policy of encouraging individual tenure, the Land Control Act, 1975, provided for the advertisement of the sale of these freehold lands, the authorisation by the Minister of these purchases, and a much higher rate of transfer duty for non-citizen purchasers. In 1971, the Tribal Land Act was passed. The power to allocate land was transferred from customary authorities (chiefs, ward headmen) to Land Boards, as trustees for the tribe. The Land Boards were given power to create leases of tribal lands (on their own initiative from month-to-month, and with Ministerial consent for a longer period) in consultation with District Councils on matters of policy. These powers relate to agricultural, residential and grazing lands. The Boards also have the power to cancel allocations on a number of grounds including failure to observe restrictions specified. It is not clear, however, whether the prior permission of the Board is needed to approve of a sale of residential sites and, if so, whether the Board would not approve sales between members and non-members of a tribe (Bruce 1981). It is clear, however, that transfers of residential holdings have been taking place from about 1943. It also appears that there is no case of revocation by the Board of the right to use residential lands.

16. The Tribal Land Act did not involve a change in the customary
system of tenure. The more important impact was on the transfer of power from customary authorities to administrative personnel — even though chiefs were often chairmen of local Boards and called in as advisors. The recognized right to use land and free access to grazing lands were left untouched. The grazing lands, vital to Botswana's most important livestock sector, became the subject of debate and legislation. The declaration of Tribal Land Policy in 1975 was the ultimate step in a debate that had continued for some time. In the early 1970s it was believed that unless something was done to arrest range degradation, the national livestock herd's existence would be undermined. These fears were confirmed by a consultant study in 1972 which suggested both means to develop commercial ranching and special provisions for the development of smallholder herds. Some of these recommendations were incorporated in the Tribal Grazing Land Policy, 1975.

17. The basis of the Policy was expressed in the President's speech: "... Unless livestock numbers are somehow tied to specific grazing areas no one has an incentive to control grazing" (Lawry 1983, Machacha 1984). Individual tenure, then, together with credit (on soft terms) and management training would provide the incentive for more rational management of herds and reduction in herd sizes. Grazing areas were to be divided into three zones: first, a commercial ranching area (where customary rights would be extinguished and leases created in favor of groups or individuals); second, communal grazing areas (near villages and in mixed farming areas continuing under customary use and with little more than a hope that herd sizes would be reduced as a result of a transfer
to the commercial areas); finally, reserved areas, for future needs — the preservation of wildlife, mining and cultivation. There are several aspects of the Policy worth noting: first, there was no provision that when an option to join a commercial scheme was exercised, the person was prohibited from grazing any of his livestock on communal grazing areas. Second, requirements of fencing were never prescribed. Third, land boards were given no powers under the leases to take action against defaulters. Fourth, the assumption at the planning stage "that there were vast areas of open, unused land in Botswana was proved wrong at the implementation stage. The zoning surveys done in 1975/76 showed that the sandveld areas ... which were to be turned into ranches, already had existing water sources and substantial livestock and human populations. As a result a substantial number of ranches were dezoneded" (Machacha 1984:77). In fact, those who already owned boreholes and cattle posts were given de jure rights to the land forcing small farmers (who were purchasing water from these owners) to go back to the communal areas. Other dwellers in more remote areas who did not herd livestock were moved off their lands to make room for the ranches. Some of these problems have now been addressed by a government directive in 1983 which has provided more concrete guidelines to land boards.

18. The constitution of the Republic of Malagasay affirms the right of private ownership. An amendment, however, passed in 1962 gives the State the right to acquire possession of "unexploited" or "derelict" property. An Ordinance was passed in 1962, and procedures set out in 1964,
for the application of the power to acquire unexploited property. Although the term 'unexploited' is rather vaguely defined (land should be normally cultivated or reafforested or prepared for new planting, or prepared as a tourist resort): anyone with more than five hectares of land, however acquired, who has failed over a period of five years from the date of commencement of the Ordinance to work his land loses ownership of the lands to the State which becomes the full owner. This decision is made after an on-the-spot enquiry by a commission. Once a decision is made that the land is not being exploited, the property is transferred to the private domain of the State and no compensation is payable to the former owner. As part of the land reform program, the State is also entitled to declare rural development zones which are managed by special organizations. — Aires de mise en valeur rurale (AMVR). In many aspects AMVR resemble the Belgian paysannat schemes. Clearly defined zones in rural areas are specified; enquiries into land holding rights conducted; the land is appropriated in the public interest; holdings are consolidated and thereafter, plots are allocated. Farmers have to cultivate lands in accordance with a prescribed cropping pattern. The allottees who get first preference are persons resident in the zone. Each allottee signs a contract giving him a provisional title for a period of ten years. Compliance with all the conditions for that period then entitles the allottee to ownership. Failure entails the loss of the plot and allotment to another individual. Allottees cannot sub-divide their holdings, nor can they create mortgages on the property without prior authorization. On the allottee's death, the heirs must nominate a representative who will undertake to abide by the obligations.
19. A feature of Malagasay tenure, which continues despite its illegality, is the system of metayage (rental arrangements). There are diverse forms of metayage — use of the land of kin, sharing the costs and benefits of rice production (some owners pay for seeds and other inputs, others rent out tractors and ploughs, other landlords pay nothing and still obtain a share), cash rentals. The system which is widespread, is not necessarily exploitative (as in the case of the use of land by kin when sub-division is not permitted in AMVR).

20. In 1962, the constitution of independent Rwanda confirmed the land tenure regulations which had been introduced by the Belgian administration. At this point in time, there were three types of tenure: first, the original inhabitants were confirmed in the possession of lands which they occupied; second, State lands, divided into the public domain (public buildings, roads, rivers, borders) and the private domain — land registered in the name of the State, unregistered lands (including those rented for less than nine years), mines, and vacant land; and, third, lands owned by non-natives. The third category required registration. It also mainly covers land in urban areas and lands leased to missionary organizations. Owners of registered lands were entitled to deal with them, subject to the power of the State to acquire them in the case of 'imminent danger'. All sales and gifts of land required the prior approval of the Governor of Rwanda-Urundi (later amended to the Minister of Agriculture). Though the tenurial system was apparently simple, there was a great deal of confusion for several reasons. First, the supersession of customary law had not been uniform. Second, as might be expected, customary tenures
varied enormously between, and within, regions. Third, much of the written legislation was expressly 'provisional'. "For example, a 1961 edict suspended but did not abolish certain privileges of chiefs such as the right to graze their cattle on a client's fallow land, or the right to appropriate some land from each client once in the latter's lifetime. Similarly, a 1960 decree only suspended private rights over pasture land" (Reintsma 1981:16) 1/

21. The 1976 land law should have addressed these problems, but did not. The main features of this law were that, first, all lands not appropriated under written law belong to the State. Second, all other lands (whether held or used under customary or other law) cannot be sold except with the express permission of the Minister and after the Communal Council has been consulted and expressed an opinion. Among the considerations for the grant of such permission are that the seller would have at least two hectares of land remaining after the sale and the buyer has less than two hectares. Contravention of these rules renders the parties liable to fine and the loss of customary rights or rights of occupation of land.

22. The Land Tenure Ordinance, 1962, applicable to northern Nigeria reaffirmed earlier legislative recognition that all the lands were 'native' lands, subject, now, to Ministerial control. The Minister's consent was a condition precedent to alienation to non-natives. In 1964, the Registered

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1/ I have relied on Reintsma (1981) for a substantial part of this discussion on post-independence tenures in Rwanda.
Land Act (Lagos) was passed. It was intended that this Act would amend and replace the Registration of Titles Ordinance, 1935, which applied to Lagos and the Western Region, although the Ordinance was never implemented in the Western Region. It had been four years since the Report of the Working Party, on which the Bill ought to have been based. However, between the receipt of the Working Party's report and the Bill introduced into the legislature so many amendments (often contradictory with other provisions) had been introduced that it was decided that it would be preferable to submit an entirely new draft. This was done in 1965 and enacted in that year. Political upheavals, however, and instability prevented the legislation from ever being implemented. The Act, derived in part from the Kenya Native Land Rules Ordinance, 1959, would have allowed for the registration of family ownership of land except that where a family comprised more than 20 persons the property would have been registered in the name of the family and its representative. This representative could have dealt with the property, and in the case of fraudulent dealings, the other family members could file an action in damages (not for the recovery of the property). The Act became moot with the passage of the Land Use Decree in 1978.

23. The Land Use Decree is a revolutionary document, given previous history and "attempts to solve all the land tenure problems by fiat" (Fabiyi 1979:549) — one might add, executive fiat. The Decree transfers title to all lands in Nigeria (urban and rural) to the Federal government, although the provincial governors are trustees for each state. Lands in urban areas are under the control of the State Governor; rural lands are controlled by the local government. In rural areas, occupation is
recognized, although the occupant has in law only the right to use the land which can be inherited. In the urban areas a distinction is drawn between developed and undeveloped land. The former type continues in the occupation of the user. With regard to the latter, a land ceiling is prescribed: one plot or portion of land not exceeding half an acre. The excess holding above that limit is forfeit to the State. Curiously enough, no limits are set for new allocations of urban land by government. The Decree also leans in favor of 'commercial' agricultural producers in that the farmer can acquire a maximum of 500ha for agriculture and 5,000ha for grazing. Provision is also made for acquisition of land for public purposes. In the event of acquisition, the government is expected to offer land in addition to compensation to the person whose land has been acquired.

24. Fabiyi (1979) notes some of the problems with the Decree. First, the Decree does not specify the distinction between urban and rural land (and it must be recognized that these distinction are quite blurred, especially around close-settled areas). Second, since registration of ownership was most common in urban areas and their peripheries, enquiry into occupation and use is likely to be a long-drawn process with little satisfaction for the parties involved. Third, the Decree is vague about assessing valuation on acquisition -- what, for instance, is an 'unexhausted improvement'? Fourth, the demands of the Decree (the enquiry into a distribution of certificates of occupation) impose intolerable burdens on an administration already overburdened and understaffed. It therefore provides a fertile ground for assaults on administrative integrity.
25. In 1963, a land law was passed for the Cameroon (Eastern Region) to counter the law of 1959. Under the law of 1959, customary use and tenures were recognized. In practice this meant that nearly 99 percent of the lands would have come within the category of customarily used lands. Under the 1963 law there are four types of tenures recognized: First, lands used by groups or persons by custom. This includes not only lands actually used, but also land allowed to remain fallow, pasture land and other land necessary for an expanding population. Second, State public and private lands (a distinction similar to that in Rwanda, but including local government corporations). Third, privately owned lands. Finally, the National Collective patrimony. This last category includes part of the category under the first type — land customarily used by communities but said to belong to the State, and subject to the needs of, and control by the State. The law provides for the delimitation of community lands and the determination of individual rights.

26. Both community and private lands can be registered — in urban areas customary rights have to be recognized within five years of the date from the passing of the legislation. Where title to customary lands is issued, there can be no sale of these lands for a period of five years thereafter. Rights of expropriation (or 'incorporation') by the State are only confined to customary lands. If these are expropriated, no compensation is payable in respect of buildings and other fixtures and facilities, not land. Alternative lands may be offered. \(^1\) The law also

\(^1\) To anticipate, this introduces the notion of land having no value which is also to be found in the legislation of Zambia, Tanzania, Botswana, and Swaziland.
provides that disposal of private lands may be subject to later restrictions "in order to fight speculation and protect individual interests" (section 24). Although the law provided for the determination of both community and private lands this was not given effect to in the law relating to the Adjudication of Customary Rights passed in 1964. The 1964 law only emphasized individual rights, except where two or more persons are "designated by name". This law provides for commissions of enquiry to conduct on-the-spot investigations and adjudication. The commission is independently appointed and the administrative head of the district is not a member. In a recent note, Falloux (1984) remarks that there has been a surge of applications for registration and a backlog of 150,000 applicants. Most of these applications have been made by urban dwellers, which could be the result of the provision in the 1963 law requiring a determination of rights within five years. Finally, plantation farms are not subject to land reforms. They are, in fact, protected by the State for economic reasons. 1/

27. Ghana re-affirmed customary rights as well as the power of the State to acquire lands. In 1961 the Ghana Chieftancy Act recognized the power of the chiefs both to declare what the customary law is, and to recommend changes in the customary law. These recommendations or declarations are mandatory when the Minister requires them. All are subject to review by the Minister who, if in agreement with the opinions,

1/ To anticipate again: Exemption from land ceiling laws, or land development restrictions by plantation farms is fairly endemic — Ivory Coast, Niger, Senegal, Nigeria, Ghana and Mali are a few examples.
embodies them in legislation. In 1962 the Ghana Farm Lands Protection Act was passed which secures *de facto* occupation of land. Valid title to the land is conferred, notwithstanding defects, if the lands have been acquired, under customary or any other law, in good faith and have been farmed for at least eight years after acquisition. The Act applies only to lands acquired in this manner after 1940. Those who had an interest in the land and were affected or injured by the transfer are entitled to monetary damages alone. In the same year the State Lands Act was passed giving the State power to acquire lands for a public purpose. The compensation provisions on acquisition are a bit vague. It would be calculated on the market value of the land, or replacement value, or "the cost of disturbance or any other damage thereby". Alternative lands may also be offered.

28. Form the earliest days of independence in the *Ivory Coast* both immigration and individual rights were encouraged. The only insecurity for the individual is to be found in a law passed in 1957 before independence and continued thereafter. This law gives the State the right to expropriate land where the concessionaire grantee has failed to develop the land for a period of five years. Compensation is calculated on the basis of the price paid compounded by a price index factor together with the value of any improvements. This law was later extended to give the State power to acquire lands for a public purpose, particularly the development of commercial agriculture, which is excluded from the purview of land laws.

29. In *Niger* legislation was passed in 1961 for the adjudication of customary rights where recognition was sought for the right of an individual to dispose of the land. The rights were to be recognized if an
individual had exploited the lands for ten consecutive years without interruption. In the same year regulations were also passed forbidding the development of agriculture beyond 15°N of the Equator. These were revised in 1964 and the prohibition pushed further north. In 1962, the customary privileges of 'chiefdom lands' (lands attaching to the office of chief which were cultivated by 'tenants') were abolished and the lands became the property of the cultivator. In the following months rules were passed with regard to the exploitation of these lands. Lands were demarcated and cultivators indentified. Holders were required to fence their lands and had no power of alienation whatsoever (including leases). But the lands were heritable.\(^1\) State power to acquire lands, particularly for the Office du Niger, are well settled.

30. Land law in Sierra Leone remains much as it was before independence. The only legislation relating to land introduced after independence was the Town and Country Planning Act, 1976, which was opposed by most of the paramount chiefs. This legislation transfers the administration of four major provincial town (Kenema, Makeni, Bo and Kono) from the paramount chiefs to two bodies — the town council and the town management committee. Thus in the western part of Sierra Leone (Freetown and its urban periphery) land is registered in the registry of deeds. In the other areas the control of land is legally vested in the paramount chiefs. Customary law prevails over a major part of the country.

\(^1\) See also Senegal, and Nyarabunja tenures in Tanzania (below).
31. The goals of tenurial change in Sierra Leone were expressed in the National Development Plan, 1974/75-1978/79 as follows:

The replacement of communal tenure by individual tenure may be an essential prerequisite if the standard of living of the community is to be improved. Certain forms of tenure may not provide security of tenure.

(quoted in Johnny 1980:10)

Though these goals expressed national philosophy there are increasing doubts about the need for change to individual tenure (see Njala 1980).

32. In Mali the basic land law is that passed by the French administration in 1937. There "are four different types of land presumed to exist and legally recognized: traditional farm and pasture lands, on which the customary law of the area is recognized; vacant land, which belongs to the State and can be appropriated for development projects; concessions rurales, farm or truck gardening lands usually in peri-urban areas; registered, homestead (mise en valeur), eventually provided with saleable title, if all conditions are met; and concessions urbaines, similarly able to be titled if developed" (USAID/RBDO 1982:114-5).

33. Mauritania passed the Land Ownership Law, 1960. The legislation nationalized all land which was "not used". It was vague, did not recognize customary diversity of tenures, and ignored a basic Islamic precept that ownership is based on work, ('vivification' of land) and history of ownership. Under Islamic law, the land belonged to any person who 'vivified' it — for instance, grew crops on land. It is not necessary
for continuous cultivation to continue thereafter to divest ownership.

Further, a neat point of law is whether the land, or any parcel of land, can in fact be owned ("malk") under Islamic law since the entire territory was the gift of the Caliph Omar and tribute lands (kharadj) cannot become the subject of ownership by individuals. It always remains tribute land, with tribute payments by those who use the land. Further the diverse customary tenures among the Soninke, Toucoulers, Maures and Wolof, with their hierarchical ordering of tenurial rights were also ignored. The Land Ownership law also abolished the payment of tithes (assakal) by tenants. The problems created in enforcing the law gave rise to the National Commission of Land Tenure which was faced with the problem of reconciling difference and recommending law that would be nationally applicable. On July 5, 1980, Mauritania abolished slavery -- for a second time! In 1983, another law was passed which radically altered the provisions of the earlier law. The new law affirms the principles of Islamic shari'a. The primary effect of this legislation is the recognition of individual tenure.

34. There is little internal impetus for the development of land legislation in Lesotho because the economy is bolstered by off-farm labor in South Africa. The Powers of land allocation are vested in the 1,086 chiefs tracing their lineage to Moshoeshoe I.\(^1\) Despite this, after independence, a town planner was employed to examine land tenure systems and make recommendations for any changes thought necessary. The recommendations were not accepted. Instead, two laws were passed in 1967 which did little to change the situation. They were the Land (Procedure) Act and the Deeds, Registry Act.

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\(^1\) This discussion relies on Mosaase (1984).
35. In 1973 two laws were passed in an attempt to control land allocation and improve land administration: the Land Act and the Administration of Lands Act. The latter Act was never implemented because of opposition. They introduced a concept, however, which still prevails: all land is vested in the nation, with the King as trustee. Land used by the administration and its agencies is deemed to be set aside for public purpose. In 1979 a new consolidating and amending Land Act was passed.

36. Under the 1979 Act, land allocation has been delegated to land committees in the rural areas. These committees comprise partly elected and partly nominated officials with the chiefs as chairmen ex-officio. The committees are guided by Ministerial directions. Ministerial consent is also required for land allocations for commercial or industrial purposes. The Act provides for three types of rights over land. First, a lease for a period from 30 to 90 years. Leases can be applied in respect of urban land, and progressive farmers can also obtain leases for farm lands if they desire to undertake modern farming. Lease rights can be transferred and "for urban dwellers it guarantees reasonable access to financing through mortgaging, while in the agricultural sector it allows for enclosures and ease of utilising credit facilities" (Mosaase 1984:92). The second type of right is an allocation, a right to use agricultural land which is now made heritable, the objective being "to encourage permanent improvements to land through assurance to the allottee that land will pass to the heirs" (ibid.). The third type is the licence, a non-negotiable three month right to use agricultural land falling within urban areas. "The idea is to facilitate urban expansion without the requirements of compensation on
acquisition" (ibid.). In order to deal with uncontrolled urban development, and the accompanying growth of squatter settlements, the Act also provides that Government can declare any area as a 'selected development area' for development, or reconstruction, or for commercial and industrial development. On such a declaration all titles in the area are extinguished and the former holders are entitled to either a new plot in the development area or compensation. A similar declaration can also be made in respect of agricultural areas for the purpose of land consolidation, or for development projects (such as irrigation projects). The Land Act came into force in July 1980. Until November 1984 only six applications for leases had been filed. Attempts to apply the Act have been confined to the lowland urban areas. In the rural areas and the highlands, the authority of the chiefs continues, diminished only by the fact that there are hardly any arable lands in their power to allocate.

When Zambia attained independence in 1964, there were three categories of land: Reserves and Trust land, State (formerly Crown) land, and private estates held by individuals. To maintain the status quo, the Zambia (State Lands and Reserves) Order, 1964, vested both Reserves and former Crown lands in the President. At the same time an agreement was entered into between the succeeding Zambian government and the Litunga recognizing the special status of Barotseland and the rights of the Litunga and Council. The Order of 1964 did not repeal previous orders relating to reserves (a source of confusion now) and left intact the Reserve and Trust Land (Adjudication of Titles) Act, 1962. Almost immediately after independence questions were raised about the future of the country's land—its major resource—and the tenure system. As a result, a Land
Commission was appointed in 1965 to examine all aspects of land law. The Commission submitted its report to the Cabinet Land Policy Committee in mid-August 1967. The Commission had been assisted in its work by provincial working committees which had been asked to gather local views. The general view of the committees (subject to one province's caution that nothing should be done to endanger the rights of people under customary law) was that land under customary law should be made more available for development. In effect, a trend towards individualization of tenure was favored. This was the Commission's main recommendation as well. And they appended . . . a draft Bill on Property and Conveyancing which R.W. James has called 'a renumbered version of the 1925 English Law of Property Act, which its emphasis on protecting plenary powers of the fee simple owner'. This might well be the reason why Government received the Commission's Report with mixed feelings" (Mvunga 1982:78). Government shelved further action.

38. Three years later, however, Government relied on one of the Commission's recommendations to pass the Western Province (Land and Miscellaneous Provisions) Act to vest Barotseland (the Western Province) and all interests in the land in the President as reserve land under the Zambia (State Lands and Reserves) Order. Thereby, the special status enjoyed by Barotseland was extinguished and the lands were placed in the same category as other reserves. The passage of the Act was facilitated by a constitutional amendment.

39. In 1974 another controversial 'code' was given statutory force: the Leadership Code. The Code was based on a similar code which Tanzania had passed in 1967. Briefly, it limited the amount of land with a 'leader'
could hold while in office. The Code required the leader to dispose of any excess property to a person other than his spouse or child. A leader, however, was not bound to sell any property if he elected not to receive a salary. Curiously enough the Code excepted holdings under customary law from the purview of the rule. It is worth noting that, apart from other apparent problems with the Code, passage of the Code was difficult, with leaders actively taking an interest in introducing amendments — since it cut so close to the bone (Seidman 1975).

40. The Code did provide some indication of the President's views regarding land. Those views became more apparent with the passage of the Land (Conversion of Titles) Act, 1975. This Act marked a complete departure from colonial and post-independence history. All land in Zambia was vested in the President as trustee for the people. Further,

Notwithstanding anything contained in any other law or in any deed ... instrument or document, ... no person shall subdivide, sell, transfer, assign, sublet, mortgage, charge or in any other manner whatsoever encumber, or part with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President (s13(1)).

In granting consent, the President is entitled to attach any other terms that he may think fit. Neither the grant or consent, or its withholding is subject to legal scrutiny. The President can also fix the maximum amounts which can be received in any land transaction. Land is without value and, therefore, any price fixed relates only to the "unexhausted improvement" (which the later Nigerian Decree echoed). This rule applies as well to
acquisition proceedings. The provision was not translated into an effective transfer of these lands to local authorities with regard to vacant and undeveloped urban land. With reference to these lands, the result is merely a no-sale situation. One of the unresolved questions is also whether the President's consent is necessary with regard to land falling within customary tenures — for the words used in the Act are "land of any tenure" — and sales of these lands could take place. The impact of the Act on mortgages should also be noted: the mortgage amount can only attach to the 'unexhausted improvements' and not the land. The value of the mortgage is thereby diminished. Accompanying the Act (which bears many similarities with Tanzanian legislation of 1963) was an announcement of land reform measures as part of the entire program. Real estate agencies (the 'speculators') were closed down; blocks of flats were to be taken over by local authorities, and in future, no individuals would be allowed to build housing for rent. The Act, finally, converted all freehold title, or land held in fee simple, and all leases for more than 100 years into leases of 100 years — all became statutory leaseholders from July 1975.

41. At present, agricultural lands "scheduled" under the Agricultural Lands Act, 1960, require a chain of permissions to be obtained before any leases can be created: approval of the Agricultural Lands Board, followed by approval by the Commissioner of Lands, valuation by the Ministry of Local Government and Housing (since the Ministry of Lands does not have a valuation department), and then compliance with the Lands and Deeds Registry Act. Every lease above a year has to be registered. And more
complex formalities have to be complied with under that Act before a final Certificate of Title can be issued (see Bruce and Dorner 1982). Now, although the Lands and Deeds Registry Act has not been extended to interests in land under customary law, it is arguable that since the Act of 1975 vests all lands in the President the former distinctions between 'reserves', 'trust land', State land, and private lands have disappeared and that, the Lands and Deeds Registry Act will also apply to dealings in customary lands. At any rate there is no argument that the 1975 Act diminished the title of those who held freehold land, or fee simple title. The philosophy behind the legislation was expressed in a speech in 1968 by the President:

Land, obviously, must remain the property of the State today. This in no way departs from heritage. Land was never bought. It came to belong to individuals through usage and the passing of time. Even then the chief and the elders had overall control although ... this was done on behalf of all the people. 

(quoted in Mvunga 1982:86)

This was not accurate history, but it remains the accepted philosophy in Zambia.

42. Zimbabwe was the last African nation to attain independence after a long and bloody struggle. Before independence there were several attempts to alter land legislation and provide for greater African participation. The Land Apportionment Act, 1930 (which was amended sixty times between 1930-1978) was amended in 1977 to allow Africans to purchase lands in the commercial areas for the first time. Though the Land Husbandry
Act was abandoned by 1970, its objectives were reflected in the subsequent Integrated Rural Development Areas (IRDAs). A Tribal Land Development Corporation (TILCOR) was created resembling the previous Tribal Trust Land authority, though the residents had tenancies, not use merely at the pleasure of the chiefs in law. In 1979, the Tribal Trust Land Act vested all tribal lands in the President. The Act, one of many inherited at independence, "while allowing the possibility of considerable local discretion by traditional chiefs or local councils in the management of the land, also gives the minister strong powers to intervene in such matters on behalf of the President . . ." (Harbeson 1981:41). The Rural Land Act, 1979, provided the legal basis for settlement schemes which leaves virtually "all control over the settlement land in the hands of the government" (ibid., 14).

43. Harbeson (1981:15-6) sums up the situation with regard to the tenurial system at independence as follows: First, a reduction in available land and holding sizes as a result of population pressures. Second, a decline in the power of the chiefs as a result of the reduction in land available for allocation, participation in the activities of previous regimes, and substitution by political parties and elected officials at the local level in the management of rural land. Third, "a growing dichotomy between 'de jure' land 'rights' in customary sense which are vested in males and 'de facto' responsibility for land management which is increasingly vested in females as their spouses seek work elsewhere." Fourth, the growing negotiability of land. Fifth, "diminished collective
management of common resources in some areas of high land pressure where availability of land for communal grazing has vanished". Sixth, a corollary of the first point, a significant number of people without access to land in the tribal trust areas. Seventh, growing inequality in landholdings. Finally, the importance of commercial farms in agricultural production as opposed to family-held farms.

44. Most of Harbeson's conclusions are supported by other evidence. At independence lands in Zimbabwe fell into three categories: the private title area (PTA) which covered about 16.5 million ha, the communal land area (the former tribal trust area) covering about 16 million ha, and the resettlement area (RA). An estimated 660,000 families live on communal lands. The Commission of Enquiry reported in 1982 that over two-thirds of these lands were already under pressure and that 24 percent were under "excessive or intolerable pressure" (Heilbron 1983: Annex I, n.30).

45. In 1982 Zimbabwe passed the Communal Land Act. The Act changes the system of land allocation in communal lands. Briefly, no person can occupy or use land except where a previous right existed, or in terms of the right issued under the new law, or where the person is a spouse, dependent relative, guest, or employee of a right or permit holder. Persons in occupation at the time when the legislation was passed are confirmed in their occupation. District Councils have been constituted (including among their membership chiefs or headmen) with powers to grant consent to applicants who want to occupy communal lands. District Councils are required to take into account customary land tenure law in their areas when granting consent to an applicant. They also have the
powers to regulate future occupancy and to prohibit further occupation and use (including pasture of animals) if the area becomes overcrowded. All new permit holders must use their land in accordance with the rules and restrictions prescribed by the Council. The Council is subject to ministerial control and to such model by-laws as the minister may frame. Unfortunately, there does not appear to be any provision under which a Council can take action against a defaulting resident.

46. Lands held under private title are governed by the Roman-Dutch law of the Cape Colony in 1891 as modified. This law provides full title to the holder — the right to use, and the right to abuse land. Registration amounts to registration of title, not merely the deed. But there is no obligation under the law as it presently stands to compel an owner to use land productively. Land can be acquired by Government on payment of compensation, except where the sole ground is underutilization.

47. Under the transitional national development plan, Zimbabwe hopes to settle 162,000 families on some 9 million ha. No uniform system of tenure has been adopted for these areas. Three models are presently being experimented with: the first, provides for intensive "village settlement of families with individual arable (land) and communal grazing"; the second, "for communal and/or cooperative living with co-operative farming"; and, the third, modifies the first type by the addition of a centrally controlled service area to provide "essential specialist services to the settlers . . ." (Chitsike 1984:109).

48. While other nations have been ambivalent about whether or not to encourage the development of individual tenure, Swaziland is clear about
the return to customary tenure in rural areas. The nation's land policy includes, first, "to return private title deed land in the rural areas to customary tenure, to be administered by the custom system of allocation through community chiefs". Second, to "give security of tenure to long-established squatter settlements on private sector farms" (Flatt 1984:82). No laws have, however, been passed. In practice, however, there has been little return to customary tenure except that private farms purchased by Government have been turned over to projects, parastatal companies and experimental farms. The government is also "reluctant to use the powers contained in the Acquisition of Land Act, 1961. The Act is misunderstood and mistrusted by the administration — perhaps because it is regarded as a legacy from the colonial administration, not geared to indigenous cultural attitudes" (ibid., 81). The only legislation passed recently is the Land (Control of Speculation) Act, 1971 which covers only dealings in land by aliens whereas it is "citizens who are now the major participants in land transactions". The only other piece of legislation which might be said to control development in the rural areas is the Town Planning Act, 1961, which regulates building development in controlled areas. One of the controlled areas extends 400 years on either side of the main road linking the Kingdom its borders with Mbabane and Manzini, the main urban centres. Thus the law prevailing in Swaziland is customary law, and pre-independence colonial law with most land in urban areas and to remaining 'European'-owned farms comprising an area greater than all urban areas registered under individual tenure or held by the Crown.
Tanzania was the first nation in East Africa to opt for a socialist approach to land. Unlike Senghor in Senegal, Nyerere looked to no precedent in Marx or Lenin. His opposition to individual tenure was already quite clear in the 1950s. In 1958, the Government of Tanganyika followed the recommendations of the East Africa Royal Commission in proposing passage of a statute permitting freehold "in appropriate areas". The recommendations were never implemented because of the opposition of the Tanganyika African National Union (TANU). Nyerere, the leader of the Union, wrote, "I am opposed to the proposed Government solution . . . If we allow land to be sold like a robe, within a short period there would only be a few Africans possessing land in Tanganyika and all the others would be tenants" (quoted in Pitblado 1981:100). The legislation passed subsequently reflected this view although it only whittled away at the concept of individual ownership and tenure gradually.

Nyerere was particularly against landlords and the first legislation passed was the Rent Restriction Act, 1962, which created a tribunal with powers to fix standard rents in urban areas. This was to counter the exorbitant rents some landlords were charging. The more important, and wider, legislation, however, came the following year with the passage of the Freehold Titles (Conversion and Government Leases) Act and the Rights of Occupancy (Development Conditions) Act. The Freehold Titles Act converted all estates in fee simple into government lease-hold estates for a term of 99 years. Development conditions were also to be applied. For the purpose of development holdings were divided into urban holdings in planning areas, urban holdings in other areas, large rural
holdings (that is, above 48ha), and small rural holdings. The development conditions applicable to the first three types of holdings were contained in the Land Regulations, 1948, as amended in 1958. Development conditions only attached to small rural holdings when the Commissioner of Lands considered them ripe for development. The Rights of Occupancy Act applied the development conditions contained in the Land Regulations Act to rights of occupancy granted before 1948. Appeals lay to Lands Tribunals whose decisions were final. Further, in the latter Act the Minister was entitled to exclude some holdings from the purview of the Act if he was "satisfied" that the holding should not or could not be developed. Also, where an occupant felt that the conditions were too onerous he could accept compensation for the value of the "unexhausted improvements" and surrender the property to the Commissioner of Lands who alone had the power to make the valuation and from whose decision no appeal lay.

51. "The newly independent government adopted the World Bank report of 1961 ... (and) in the implementation of that report the government created co-operative farming villages in which peasants were to work on the basis of human equality. The Rural Settlement Commission Act, 1965 and the Land Tenure (Village Settlement) Act, 1965 ... were enacted to provide the legal basis of settlements" (Mkatte 1984:97) The village settlement schemes were not successful and the program was abandoned two years later.

52. From 1965 another species of legislation dealt with the problem of eliminating landlords. In 1965, the Nyarabunja Tenure (Enfranchisement) Act was passed which gave tenants on Nyarabunja lands permanent occupancy rights and abolished rental payments to landlords. The following year the
Rural Farmland (Acquisition and Regrant) Act was passed. And, in 1968, the Urban Leasehold (Acquisition and Regrant) Act was enacted. While the Rural Act aimed to give rural land to the occupier, the Urban Act had a similar goal for the urban occupant. The Rural Act did not appear to cover all rural farmland occupants. Therefore, to deal with the possible lacuna, the Customary Leaseholds (Enfranchisement) Act was passed in 1968. Both the Nyarabunja Act and the Customary Leaseholds Act provided for appeals to the district court from the decision of a Tribunal. This right of appeal to the courts was abolished in 1969 when the Customary Leaseholds (Enfranchisement) (Amendment) Act was passed. The appeal thereafter lay to the Minister. This was in line with the provisions of the Rural Act and the Urban Act where the powers of acquisition and regrant were vested in the Minister. The last Act also established a customary land tribunal to adjudicate disputes between customary landlords and tenants. The general trend was to gradually withdraw the right of courts to adjudicate land disputes or to look into administrative actions.

53. The attempt to foster agricultural growth and equity through legislation continued with the passage of the Government Leaseholds (Conversion to Rights of Occupancy) Act, 1969. Under this Act all leaseholds were converted to rights of occupancy, "for a term equal to the unexpired term of the government lease for which the land was held immediately before April 1, 1970 ...". The Freehold Titles (Conversion and Government Leases) Act, 1963, was repealed. Further, all these occupancies were made subject to the development conditions contained in the Land Ordinance, 1948. These development conditions were strengthened
by the enactment of the Land Laws (Miscellaneous Amendments) Act, 1970, the
Land Ordinance (Amendment) Act, 1974, and the Land (Rent and Service

54. The legal basis of Ujamaa Vijijini, announced in 1966, had
already been laid in earlier legislation, particularly in the Rural
Settlement and Land Tenure (Village Settlement) Acts of 1965. The problem,
however, was not with the tenure of new villages created under the
villagisation program, but of existing settlements. The amendment, in 1965,
of the Public Land (Preserved Areas) Ordinance, 1954, partially resolved
the problem by extinguishing customary rights in the settlement area. With
regard to ujamaa villages, however, no decision was taken with regard to
the tenure of the village, or of the residents. The original intention was
to create some form of individual tenure where the cultivator would be
granted an interest in either a homestead plot, or an agricultural plot, or
both. The problem was not resolved for some years. In the meanwhile,
there was a gradual trend away from ujamaa villages and towards
villagization. The problem regarding the tenure was finally resolved with
the enactment of the Villages and Ujamaa Villages (Registration,
Designation and Administration) Act, 1975. This statute granted rights of
occupancy to villages. Further, the village became a body corporate with
the council as its representative. The village council was granted power
of "purchasing, holding alienating, managing and disposing of any property
whatsoever, whether moveable or immovable, and whether by way of investment
or otherwise . . ." In law the rights may seem tenuous considering that
the village only has a right of occupancy; in practice, however, it does
permit the village council to deal with land within the framework of local power politics. As of 1984, more than 8,000 villages had been incorporated and more than 95 percent of the country's population reside in them.

55. In furtherance of the policy of nationalisation, the Specified Coffee Estates (Acquisition and Regrant) Act was passed in 1973, and the Specified Sisal Estates (Acquisition and Regrant) Act in 1974. Both Acts vest the estates in the treasury registrar with the ultimate intention of transferring them to 'specified organizations'. Initially, management of the sisal estates was taken over by the Tanzania Sisal Corporation which had been established under the Sisal Corporation Act, 1967. No divesting and transfer from the registrar of coffee estates has as yet be accomplished.

56. The development of land tenure legislation in Tanzania until 1982 can be briefly summed up: First, all rights to land are only rights of occupancy. Second, the courts have little or no powers to intervene in administrative decisions. Third, a customary land tribunal adjudicates disputes between landlord and tenant in the village. This would involve merely the determination of compensation since the tenant has been statutorily confirmed in occupation.

57. In 1982, the Government appointed a "Task Force on National Agricultural Policy" to examine methods of strengthening the rural sector. In a frank appraisal the Task Force "questioned the validity of collective village farms, concluding that 'in general, individually owned farms perform better than collective village farms'. It called for private land ownership in the rural areas to replace the existing pattern of lands
theoretically held by the villages but in practice held on conditional, discretionary terms" (Harbeson 1984:7). The Task Force recommended streamlining the procedure for allocation of lands, waiving charges for surveying and mapping in order to clarify the land tenure situation as soon as possible, and for the issuance of title deeds with a minimum duration of at least 33 years. The Task Force report was followed by the government's policy paper: "1983 Agricultural Policy of Tanzania". The paper seeks to re-interpret the Arusha Declaration. Without surrendering the basic goals of the Declaration, including the goal that all land must be publicly held, the paper "implicitly recognizes that tenure insecurity at the household level has be detrimental" (ibid., 9). Under the new policy, individual users would be granted leases from 33-99 years; villages would be granted 999-year leases, with an option to sub-let up to 99 years. Allocation procedures are to be streamlined to avoid the confusion that existing allocation procedures sometimes cause. It is still too early to determine the impact of the new policy on land tenure in Tanzania.

58. Senegal was the first nation in West Africa to nationalize land tenure. The Law of National Domain, 1964, introduced both tenure and administrative reform. From June 17, 1964, all land not part of the public domain, and not registered in the name of the owner, or where the owner's name had not been entered at the conservation des hypothèques (entry in the books of the conservateur des hypothèques was the first registration system used in AOF) constitutes the national domain. Occupants, however, of the

1/ This para relies entirely on Harbeson (1984).
national domain were given six months to request registration of their property if this property was a completed building. The ownership of land connected with the building could also be registered together with the building provided the area of land was not more than four times the area of the building (see Executive Decree in July 1964). All those whose deeds had been entered with the conservateur were given two years to request re-registration. The law confirmed the right of occupancy of those who resided in the nation and cultivated lands.

59. After a period of six months all unregistered lands could only be deeded in the name of the State. These lands, amounting to nearly 7.5 million ha (out of 8 million ha) were then divided into four zones: urban areas, reserves (national forests and parks), rural farmlands and pastures (zone des terroirs), and pioneer zones. The payment of rents, tithes, and labor services in the rural areas was abolished for those who had cultivated land for two successive years — based on land to the tiller program. Pioneer zones were any areas within the national domain which were declared as such and which the State could then cede to any organization willing to develop it. "On this basis, first the Delta, and later the entire Senegalese portion of the Senegal River Basin was allocated to SAED (Société d'amanagement et d'exploitation des terres du Delta) for development. This made SAED the arbiter of land distribution so far as the national legal structure was concerned" (USAID/RBDO 1982:115).

60. The administrative reforms included the reconstitution of local communities into rural communities with rural councils as their representatives. Membership of these councils include elected
representatives, representatives of each village and rural cooperatives, and nominated officials but not village chiefs. Not more than one member of a family can be chosen, nor can a salaried or urban employee. The rural council is empowered to control land use, allocation, and re-allocation (on the extinction of a lineage) but not rights relating to the exploitation of mines and quarries, hunting and fishing rights, and the commercial exploitation of trees. Further, the rural council has no powers over lands declared to be part of a pioneer zone.

61. During the six months after enactment, nearly 10,000 requests for registration were presented. This is a high figure considering that the total number of registered plots in the entire nation before that was 20,000. Most of these applications were made in respect of urban land since rural dwellers were unaware of the need to register and were not notified that they should present their claims (USAID/RBDO 1982, Verhelst 1968).

62. Congo was the second West African nation to nationalize all land in the 1970s. But there is little information about the legislation or its impact.

63. Haile Selassie I was deposed on September 12, 1974. A few months later, in April 1975, the new revolutionary government issued Proclamation 31 — to provide for the "Public Ownership of Rural Lands" — and Ethiopia chose the socialist path to development. The Proclamation dealt both with substantive issues of tenure and also set up an administrative organization.
64. Under the Proclamation 'all rural lands shall be the collective property of the Ethiopian people'. All forms of tenure inconsistent with the Proclamation were abolished and replace by 'possessory rights'. Land must be personally cultivated and all transfers (except through inheritance) were prohibited. Holding limits (up to ten acres) were imposed. The law also provided that compensation could only be received for movable properties and permanent works on the land, but not for the land itself or forest and tree crops on such land. The law relating to land ceilings only applied in the southern provinces; in the north the peasants were given 'possessory rights over the land that they till'. The law also abolished all dues and other obligations payable to local officials. This included rental payments and other debts owned by tenants to their landlords. In addition, tenants were also permitted to retain the tools and oxen which the landlord may have given them and were only required to compensate the landlord for these within three years. But the landlord was entitled to take back these tools and oxen if he both did not have any tools and oxen and personally used them thereafter.

65. The law provides for the formation of a hierarchy of peasant associations. The lowest level is the chika sum, the basic geographical unit. Peasant associations must be formed for every area with 800 or more hectares. But the law was vague on the manner of selection of representatives to this association, the functions of the leaders, and the terms under which members and leaders could function. The lowest level of association would send representatives to the next higher level, the woreda (sub-district). The woreda would sent representatives to the awraja level.
association (district). The woreda associations could change lower association boundaries, distribute land, and establish a judicial tribunal. Awraja associations coordinate the work of woreda associations. The hierarchy then ends at this district level.

66. The jurisdiction of courts to try land cases was taken away and transferred (without specific instructions) to courts to be established by the local, woreda and awraja associations. The Proclamation, however, "does not specify whether control over rural land is to be exercised directly by the Ethiopian people or by the government. But Article 17(1) grants the government power to use 'peasant association land' for public purposes" (Cohen and Koehn 1978: 41 n.8). This removes a perennial forum for the development of status — since land litigation was frequent and a well-recognized method of establishing status.

67. Despite its generalities and the failure, often, to provide specific measures of enforcement, the thrust of the Proclamation was clearly aimed at remedying some of the ills that beset agriculture in Ethiopia: onerous tenancy patterns, the widespread phenomenon of absentee landlordism, and in the South, the large estates.
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