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NOTES AND NEWS

The Law of Buganda: Some Recent Publications

The Buganda Government and the Judicial Adviser, Buganda, Mr. E. S. Haydon, have recently been responsible for the publication of some useful material for the study of the law applying in Buganda. First we have comprehensive texts of all the Protectorate legislation applying under section 12 of the Buganda Courts Ordinance, together with the texts of that Ordinance and the African Authority Ordinance;[1] then we have the texts of the native laws of Buganda, i.e. those enactments of the Buganda Government which are now in force;[2] and lastly we have a digest of decisions on customary law made by the Principal Court of Buganda during the year 1956.[3] Other territories have, it is true, collected in one volume the statutory law which native courts are entitled to enforce; and a start is being made elsewhere on the publication of decisions on customary law; but what distinguishes the Buganda publications is first, that they are bilingual, and secondly, that they are rather more comprehensive and voluminous than similar compilations elsewhere. In particular, one welcomes the *Customary Law Reports*, 1956; it may be that the African courts in other territories are not so developed as those of Buganda, but such a series might well be copied with advantage. If one has any word of criticism, it is that a certain amount of space is wasted in the *Customary Law Reports* by the mode of citation of the case-headings and the presentation of the cases generally; more serious is that space which could have been devoted to an exposition of the reasons for the decisions and an explanation of the background to them is sometimes taken up with a recital of the facts, which do not always contribute to an understanding of the *ratio decidendi*.

The most interesting feature of these publications, as already noted, is that they are bilingual in character. A version in English is printed on the left-hand side of the page, and a version in Luganda on the right-hand side. The preparation of the translations must have been an arduous business; but they will be valuable for extra-legal reasons as well, as source-material for the study of "legal" Luganda by linguists.

[1] *Translations. Volume I. Ordinances.*

[2] *The Native Laws of Buganda in force on the 1st day of January*, 1957.

[3] E. S. Haydon and I. S. Mayanja, *Customary Law Reports*, 1956.

Report of Working Party on African Land Tenure in Kenya

Colony and Protectorate of Kenya: *Report of working party on African land tenure*, 1957-1958. 1958. Government Printer, Nairobi: Shs. 5.

A working party was set up by the Kenya Government on 11th March, 1957, to examine and make recommendations as to the measures necessary to introduce a system of land tenure capable of application to all areas of the Native Lands. The working party consisted of Mr. F. D. Homan, African Land Tenure Officer, who acted as Chairman; Mr. S. R. Simpson, C.B.E., Land Tenure Specialist at the Colonial Office; Mr. A. M. F. Webb, Legal Draftsman; and Mr. J. E. Jardin, African Land Titles Officer. Mr. I. C. Duthie, Barrister-at-Law, was also later co-opted onto the Working Party. The background to the Working Party's establishment is admirably presented in the Historical Summary, Chapter II of the Report. Kikuyu land tenure has for long been the core of the problem, on which a Committee reported in 1929 (the Maxwell Report). The East African Royal Commission, appointed in 1953, made a special study of the problems of African land tenure in the three territories. The Arusha Conference on African Land Tenure, held in 1956, carried the matter somewhat further with a discussion of practical proposals for implementing the general drift of the Royal Commission's Report. What was the trend of development can be clearly seen from paragraph 19 of the Arusha Conference's Report:—

> " It will be clear from what we have said in the preceding section that we consider that Governments would be well advised to encourage the emergence of individual tenure in areas where conditions are ripe for it."

The Emergency following on the Mau Mau uprising had led to very disturbed conditions in the Central Province, especially in the Kikuyu areas. The process of compulsory " villagization " (a not very elegant word) had already fundamentally altered the residence-pattern of the Kikuyu, who had up till then lived in scattered settlements and not in compact villages. Social upheaval had also been rife, and the opportunity (a possibly unique one) presented itself for a fundamental revolution in the pattern of Kikuyu land tenure and rural life generally. Even in advance of legislative change empowering such action, a certain amount of voluntary consolidation of the previously scattered holdings of Kikuyu farmers had been going on; and what is proposed now in this Report is a legal framework which will govern such changes in African land tenure and provide the machinery by which these changes may be brought about.

The terms of reference of the Working Party were:—

> " (1) Having regard to the emergence of individual tenure in certain areas of the Native Lands of Kenya and to the growing demand for the consolidation of fragmented holdings, enclosure and the issue of title to individual landowners, to examine and make recommendations as to the measures necessary to introduce a system of land tenure capable of application to all areas of the Native Lands, with particular reference to—

(a) the status of land in respect of which title is issued;
(b) the nature and form of title to be granted, the incidents of tenure and any restrictions on land transactions;
(c) the substantive legislation required to provide for determination of rights, consolidation; . . . issue and registration of title, conveyancing (etc.);
(d) the control and registration of land transactions (including devolution);
(e) the special position of landowners under a disability (e.g. women, minors, lunatics);
(f) the organization necessary at headquarters and in the field for issue and registration of titles and for the registration of subsequent land transactions; and
(g) the financial implications involved in carrying out these measures."

The Working Party were also asked to take into consideration Chapter 23 of the Royal Commission's Report, and the Report of the Arusha Conference on African Land Tenure in East and Central Africa.

In their Report the Working Party give their approval to the already existing method by which consolidation, demarcation and settlement of rights in land have been carried out in the Central Province by committees of indigenous elders in each area. These elders of each clan and sub-clan are or were the traditional guardians of the land and had under customary law powers (albeit somewhat limited) to control the occupation of land and re-allocate it from time to time. The Working Party say that they thought this system could not be improved

> " and the same process was capable of application in any part of the Native Lands, whether or not consolidation was a necessary preliminary to registration."

This reliance on traditional authorities is interesting, since they will doubtless know more than any other body about the history of land and present rights in it, and their decisions are likely to carry the full support of the people in the area. This aspect of the Working Party's proposals can be warmly commended.

New legislation of a comprehensive character was required if the proposals about individual tenure put forward by the Working Party were to be carried out. Under the Native Lands Trust Ordinance, section 64(1)(e), the Government lacked the power to recognize or create rights unknown to the law and custom of the tribe concerned by means of rules made under the Ordinance. The other relevant legislation is the Kenya (Native Areas) Order in Council, 1939, which defines the Native Lands, vests them in the Native Lands Trust Board, and provides that they shall be administered in accordance with the Ordinance. The Working Party recommended that the Order in Council should be amended so as to divest the Trust Board of land actually registered in individual ownership under the proposed Bill and to vest it in the registered owner; and to provide for the reversion of such registered individual land to the Trust Board if the holder dies leaving no one entitled to succeed. The Order in Council has in fact already been amended

by an Order in Council of 1958.[1] The Working Party propose that it should remain a function of the Trust Board under section 7 of the Order in Council to exercise general supervision of registered individual land in the Native Lands.

As to the general form of titles to be granted to Africans under the proposals, the Working Party were satisfied that

> " the rights enjoyed by individual Africans in many cases had now evolved to something like full ownership and should be registered as such."

The idea of vesting title by grant from either the Crown or the Trust Board was rejected; instead the local Committees will list the persons whose rights they consider " should be recognized as ownership and that subsequent legislation should convert that recognition into a freehold title which would vest in those persons an estate in fee simple." This is undoubtedly a great change in form, if not in fact; customary law will cease to apply to such registered individual titles, and transactions in such registered land will be governed by detailed provisions in the Registration Bill. Any suits affecting such registered land will be dealt with, not by the African courts as heretofore, but by the Supreme Court or a subordinate court constituted by a Resident Magistrate.

In justifying this proposal, the Working Party observe (p. 25) that the concept of individual ownership " is itself incompatible with native law and custom "; since they also state that " the concept of individual ownership has already emerged to a large extent ", e.g. in Kikuyuland, this statement is difficult to justify, unless one interprets it to mean that individual ownership so-called is foreign to ancient or traditional customary law. It can be strongly argued, however, that customary law is in a constant state of flux and evolution in Africa; and that such ideas or institutions are by no means foreign to modern customary law in several areas. In other words, it is misleading to present the choice as one between ancient customary law (which no longer applies) and the full English system of land tenure. Instead, then, of having a discontinuity between the previous system of land law and the future one, as here proposed, a more gradual evolution might be possible or desirable—if not in Kikuyuland, then at least in other parts of East and Central Africa, where these proposals will be studied with the greatest interest.

Another general point that may be noted here is in regard to the terminology used by the Working Party. Expressions such as " full ownership " have already been criticised in this Journal in other connexions. Statements such as that " since an African did not own any land he could not leave it to anyone on his death " are also unfortunate, as a better terminological system is one where persons are not described as " owning land ", but as " owning interests in land " (and this system is that followed by the English land law). If one translated the above statement into " an African did not own any interest in land " it would obviously be an incorrect description of the present position under customary law. If an African owns an

[1] The Kenya (Native Areas) (Amendment) Order in Council, 1958, S.I. 1958, No. 1049.

interest in land (whether that interest equals " full ownership " or not), he may or may not—depending on the modern customary law—be able to pass it on to a successor when he dies. In some areas an individual's interests are transmitted on death; in other areas they are not, and lapse. The mode of expression and reasoning of the Working Party are to this extent somewhat suspect.

To carry their Proposals into effect, the Working Party add to their Report the text of The Native Lands Registration Bill, 1958, which they have drafted.The types of interest registrable under the Bill will be: (i) a freehold title, which will vest in the registered proprietor an estate in fee simple (here was a golden opportunity for the Working Party to get away from antique English legal terminology, and substitute an expression such as "absolute interest" for " estate in fee simple "); (ii) a leasehold title; (iii) a charge; (iv) an easement or a profit. Among interests which need not be registered are: (i) rights of way, etc.; (ii) rights to minerals; (iii) customary tenancies and rights of occupation subsisting at the time of first registration. Such subsisting customary tenancies shall be " overriding interests " under clause 40 (f) of the Bill, to which effect will be given though not registered. (Has a " not " been omitted in clause 40 (e) of the Bill, which provides that the following shall not require registration—" leases for terms longer than one year "?) " The proprietor of land " may charge it by section 56; such proprietor presumably means the registered proprietor of the freehold; can the registered proprietor of a leasehold charge his title? (Again, difficulties about terminology are illustrated here.)

Provision for the prescriptive acquisition of registered land by adverse possession is made under the Bill (clauses 83 to 85). The Indian Limitation Act, 1877, applies to the Colony;

> " the provisions of which . . . seemed to us difficult to ascertain and we have therefore set out the principles briefly in the Registration Bill."

The provisions in the Bill appear to be based on the similar provisions in the Sudan. The position regarding limitation of actions in Kenya, already sufficiently complicated through the application of the Indian Act with parts of the English law existing concurrently in the background, may thus become still more obscure in regard to registered land under the new Bill.

Two special aspects of registration are (i) succession to registered interests; (ii) co-ownership of registered interests. As to (i), the Working Party examined this thorny question in a separate Chapter (VIII). The members rejected the idea either of including provisions about wills in the Registration Bill, or of modifying the customary law so as to prevent fragmentation, etc. They recommend that until legislation governing the question of testamentary capacity of Africans and intestate succession generally is enacted, the transmission of land on the death of a registered proprietor should follow native customary law. (The Law Reform Committee is reported to be studying a proposal to introduce a code to cover testamentary capacity and intestate succession; this is very important news.)

On co-ownership there is also a separate chapter—Chapter X; the recommendation is a compromise; tenancy in common will not be forbidden, but not more than five persons will be registered as the owners of any parcel of land. There appears to be nothing in the proposals to prevent one or more owners holding as trustees for an indefinite body of persons.

There may well be good economic and social reasons why fragmentation of holdings and the reduction of holdings below an economic size by subdivision should be prevented. There is also the problem of transfer between the races. The Working Party therefore propose machinery, enacted in a Land Control (Native Lands) Bill, by which all transactions in land in any area to which the Bill is applied must be submitted for the consent of a Divisional Land Control Board (usually one such Board to be provided for each administrative division of a District). Provincial Boards (to hear appeals, give general consents, etc.) will also be established. Sales of land between the races will be prohibited. (Limited companies may be registered as proprietors; dealings in the shares of such companies will be similarly subject to control. One question worth further examination is whether the existing law relating to the definition of " African " is sufficiently wide to include a company some or all of whose members are Africans: cf. the Uganda provision in the Interpretation and General Clauses Ordinance, cap. 1, section 3.)

The report contains a wealth of sound and reasoned discussion on various points, a detailed exposition of the features of the proposed legislation, and a multitude of interesting and valuable facts, forms, and so on; to all this justice cannot be done in a brief notice. There can be no doubt but that this is a historic document, which not only establishes a new pattern for the evolution of African land tenure in Kenya, but will doubtless be followed (in its form and completeness, if not in the details of the substantive proposals it makes), as a model for such things, in other territories—not only in East Africa. The Working Party are to be congratulated on their report. There is only one reservation, but this is a major one, that must be made: there is little or no mention in the report of the sociological aspects of the proposed reforms, no attempt to investigate and predict what will be the result of such sweeping changes in the most fundamental part of African life on the social organization generally, on individual farmers, on the position of women, etc., etc. This might be said to have been within the terms of reference of the East African Royal Commission, but this aspect of their duties the Royal Commission conspicuously failed to discharge. It is somewhat alarming to find that the human aspects of changes in land tenure can be glossed over in this way, however much attention may have been paid to the technical (legal, administrative, agricultural) side of the proposals.