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THE REFORM OF CUSTOMARY TENURE IN THE
ECONOMIC TRANSFORMATION OF TRADITIONAL AGRICULTURE

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Introduction

My recent consideration of the reform of the customary tenure system of Africa is part of a more comprehensive study of the contributions of economic analysis to the formulation of national agricultural development policies, currently entitled, "Transforming the Economic Order in Agricultural Development." I do not propose to say much about issues in this wider context, but a few remarks seem essential.

In this larger study I am simply trying to think my way through a complex set of issues, which to me are as yet unresolved. Since I am in the middle of this effort, my comments today are destined to end up in something of a vague zone which I have not yet thought through. I would note, however, that I am attempting to understand the processes of policy formulation. Since public or social policies are by their very nature intended to change things, and must therefore be evaluated on the basis of the changes they make, our thinking here cannot lead to very definite conclusions. It is much easier to study the "effects" of policies than to make warrantable judgments about the prospective content and design of such policies. But this is where we are at professionally in dealing with rural development policies for tropical Africa.

As I have observed and thought about agricultural development programs in the LDCs, and particularly in tropical Africa and Latin America, I concluded that more helpful insights were needed from economists and economic analysis. We need to formulate economic analysis in a way which recognizes that the structures of economic systems can be an economic problem--not just their operations. As one reflects on this point, I think one can see that the great creative moments in economic analysis have always come at times of crisis in national situations. Thus, the creative cutting edges of theoretical formulations in economics have come in the economically advanced countries, where the larger numbers of economists and other professionals have their careers--especially in the great universities. Inasmuch as it is only 200 years since the landmark formulation of Adam Smith's Wealth of Nations, not only have the creative frontiers of economic analysis since then been in Europe and America,

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but the types of problems now encountered in the so-called Third World were not of deep concern to the profession. In fact, until quite recently many of these folks lived in a colonial status; thus the types of problems now being confronted in national agricultural development programs have never been a central concern of most economists working at the puzzles and problems of their own countries. Economists have tried to surmount this set of problems by a faith that the technical analysis of economics has universal application. Although this is a valid assumption, within limits, it is not valid, in my judgment, for guidance in the formulation of agricultural development policies.

At any rate, I have come to the conclusion that agricultural development and particularly agricultural development policy should be better served by economic analysis than is now the case. As a part of this general effort, I am making a serious attempt to better understand the relevance of the writings of John R. Commons for the formulation of agricultural development policies.

It now seems to me that the relevance of conventional formulations of economics--referred to in academic circles as micro- and macroeconomics--are deficient as the basis for the formulation of agricultural development policies--and I would emphasize policy formulation--in the LDCs for a number of major reasons.

First, the great advances in economic analysis of the past 50 or 60 years have been achieved within a postulate that national systems of economy can be understood as mechanisms for the transformation of resources into commodities. This is in line with and descended from the achievement of Ricardo in formulating economic analysis on the basis of the Newtonian paradigm. Among the implications of this formulation is the assumption that the institutional structure --what Hicks called the social framework--can be taken as given. This in turn carries over to the view, so often expressed, of the government as an intruder, an interferer in the national system of economy--the common phrase is "government interference." Keynes, of course, broke through this barrier, by persuading the profession that fiscal and monetary policy could be used to achieve economic stabilization, an idea which was later extended to the possibilities of stimulating national economic development. This has had the consequence in the United States and, I think, Europe of overloading the tax system to care for the aged, the handicapped, and the unemployed--hence today's "supply-side" economics in the United States.

A second limitation imposed upon economic analysis is the assumption fastened upon the profession by John Locke and Adam Smith that the social order within which economic systems function is one of harmony, without fundamental conflicts of interest. Among the consequences of this is the inability to acknowledge, much less deal with, the problems of economic power and the nature of property relations.

A third limitation inherent in the formulation of conventional economics is that it has always been assumed by economists that everyone could be, and even would be, included in the modern sector of the economy--provided entrepreneurs had enough leeway. There has been much discussion over the past two centuries as to whether this could be achieved--the issue being originally

posed as to whether the introduction of labor-saving machinery would lead to unemployment. Although this issue is again becoming a "hot" one, with robotic production processes being installed, I am not interested in this issue at this point, but rather the corollary which must have seemed so obvious as to need no comment at the time of Adam Smith: namely, that if people were not drawn into the capitalist sector, to use Arthur Lewis' characterization, then they could continue to survive as before in the "subsistence" sector.

It is this habitual assumption of economists, I would now argue, that is getting us into much trouble all over the Third World. We would modernize agriculture according to the "best" thought in economics in ways which not only displace labor and make people redundant, but actually destroy the traditional society and system of economy, the great merit of which was originally, and to a great extent still is, that the system provided security of expectations regarding survival opportunities. This in my judgment is one of the major roots of the present crisis in African agricultural production.

Not only are the traditional subsistence-survival economies running down through population growth and the deterioration of soil and vegetation, national agricultural development programs are destroying the traditional survival opportunities in economies of agriculture without creating alternative employments. This is a very complex process, made worse by the rapid increases in population, the drought in grazing country, and the general deterioration of soil and vegetation through overuse.

Agricultural development programs devised by Marxians attribute all the distress resulting from the poverty which is spurred by the deterioration of the system of survival opportunities to the capitalistic record of colonialism, to exploitation by the advanced countries, and to the greed of multinational corporations. But agricultural development programs devised by Marxians are also destructive of the traditional survival economies of agriculture in ways quite similar to programs based upon the best ideas in the neoclassical formulation of agricultural economics. Essentially, in both views, the design of development programs is based upon the assumption and expectation that agriculture can be developed through increasing man's control over physical nature--through the application of science and technology, investment in physical capital, and in neoclassical economics by the achievement of a market orientation. There is no question that the latter approach can produce increased output, especially of export crops, as the recent history of Nicaragua attests. But this same process uprooted and dispossessed a vast number of people in Nicaragua, who tried to survive by drifting into the subsistence sector but were eventually led to revolution and to the current chaos.

Commons, by contrast, added the other essential half of the generation of development by his implicit emphasis upon the productivity of freedom, security of expectations, and willing participation. Economists do not really reject this view that development rests upon the wills, energies, and decisions of the people as well as upon increased control over physical nature. They have no way of incorporating these potentials into their theoretical formulations because of the adoption of the postulate of a mechanical Newtonian paradigm.

With this background comment, I shall now try to formulate a few propositions initially in relation to traditional agriculture, which bear on issues in the formulation of agricultural development policies in tropical Africa as I now see them.

Some Characterizations of Traditional Agriculture

1. The primary, the truly fundamental, or first task of national development policies is to establish an institutional order with sufficient strength to resolve conflicts and stand the stresses and strains of the exercise of economic power, in short, to create a national system of state and economy. Social order is the base upon which everything else is built. Ideally, this order should provide enough equality of opportunity to assure sufficient security of expectations for the people to enlist their willing participation in economic affairs.

2. Tropical Africa is the largest area in the world where the people now, after a century of colonialism, face the task of creating national economic and political orders. These must be built by transformation out of tribal societies and subsistence-survival economies, as modified by something like a century of colonial administration (with the task varying partly according to the former colonial policies, especially land and settlement policies).

There is no alternative to transformation, if economic development and agricultural growth are to be achieved. To do otherwise is to destroy the social fabric and even the people's integrity. Agricultural development can be achieved only by the efforts and wills of people in agriculture; this requires people of integrated character and personality.

3. The basic social and economic framework of these traditional societies has been the sets of working rules for the use, occupancy, and descent of land--this because the use of land has been their principal resource. Thus, if there is to be development by transformation, tenure policy, or better, land policy, must be at the center of it.

4. There are deep similarities over all of tropical Africa in the kind of traditional societies and economies the people devised; these similarities include arrangements for the use, occupancy, and descent of land among grazing peoples, and tenure arrangements among people who survive by cultivation--but with fundamental differences everywhere between the organization of grazing economies and the organization of the subsistence-survival economies of cultivating peoples.

5. The processes by which a people achieved social order were everywhere much the same. A people made a territory theirs by conquest and the subsequent defense against all others. Upon this elemental fact is based what we may call the sovereign interest in land. In tribal societies this interest was made effective and turned to the support of shared opportunities through the authoritative allocation by the heads of tribes or other landholding groups of the

privilege of using the land. These allocations were literally survival opportunities through the use and occupancy of land.

6. It is within this context--this social or sovereign order--that the basic differences between the tenure systems for grazing lands and cultivated or settled residence lands in Africa are to be understood.

For cultivable land, the authoritative allocation of land use opportunities is to individuals as heads of families. Historically, this was done by allotting to a young man (usually) at or about the time of marriage, a tract of raw land on the condition that he put the land to use according to community standards and keep it in such uses. For so long as this is achieved, the rights to the use and occupancy of land pass to his descendants. I would emphasize that, in my understanding of such arrangements, what the recipient of an allocation of land receives, initially by rationing or subsequently by inheritance, is only an opportunity to survive by his own efforts. This is the basis for individualized farming in Africa.

Thus the family holder of such an interest in land--of cultivable land, as well as homesites--has the exclusive right to the use of particular tracts of land, and such rights are created and assured by the duty of and the expectation that the local authority will support this claim to exclusive individual and family use. No such allocation of exclusive individual use rights to grazing land is possible, except for a few "big men."

7. For grazing land, that is, for land lacking sufficient water or fertility for cultivation, the authoritative heads of the group likewise allot opportunities to use the land, but these allotments go to groups. In principle, the grazing area may be rationed out to subordinate groups within the tribe, such as families. In practice, where herds and flocks must move with the season, as well as in response to the amount of rainfall, exclusive rights of use and occupancy become blurred and diffused in response to the needs of others to survive. Naturally when Europeans, having worked out their conception of rightful use and occupancy of land in a moist temperate climate, attempted to impose individualized conceptions of landownership upon grazing societies, great social disorganization followed.

8. Some implicit assumptions of the traditional African land and tenure practices should be noted. The use and occupancy of settled lands is very precious to Africans--and has long been so.

Out of their long past they have come to cherish a conception of land as a gift of God to the human family for its sustenance and survival. No one has ever stated the philosophy better, so far as I know, than the Nigerian chief quoted on the flyleaf of C.K. Meeks, Land Law and Custom in the Colonies: "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are still unborn."

Here one gets a sense of the deep attachment of Africans to their native lands. The spirits of their ancestors abide with them, an inheritable interest in such lands is a birthright. But as one tries to think about these matters

in terms of development policy, two points especially come to mind. One is that there is no provision in this conception of land for improvements in the quality of land through investment. Secondly, and closely related, there seems to be an implicit assumption in this traditional view of land that the descendants of the members of the landholding group would remain in the community. This premise has been invalidated by rapid urbanization. But traditionally a share in the village lands is viewed as a birthright by the descendants of the landholding family, regardless of where they live. In fact, this is the only social security system for the people of Africa except those few in "pensionable" jobs, and this right to return to the native community runs on for generations and is actually called upon by people in need. It is my understanding that the British made legal provision for the operation of a statute of limitation on such absentee claims in Kenya and even established a rule that the farms consolidated under the Swynnerton Plan could not be subdivided. But, as John Harbeson notes in his paper, the holdings are in fact divided among the heirs without changing the official public record. No one puts his brothers and sisters out to starve.

Toward Policies for Modernizing the Transformation of Agriculture

1. The fundamental problems in the formation of agricultural development policies relate to the way in which the powers of the state are used. If there is a state, which is functioning sufficiently well to be called a going concern, or even a social and economic order, then the heads of such states exercise considerable powers. We shall refer to these as the sovereign powers of the state. The exercise of such sovereign powers makes nation-states, excepting a few puny ones, the strongest of all social organizations. Also nation-states are given definite form, following Commons' ideas, in the same way as all other kinds of social organization: namely, through the establishment of working rules which are, or may be, sanctioned by whatever powers that the heads of the organization can command. In the heads of states there is vested a legal monopoly of violence.

In the formation of nation-states, in the African countries' experience, colonial administration was something of a half-way station; the tribes as social organizations were assimilated to the state. Ideally, the members of the tribe become citizens. The sovereign powers of tribes once exercised by chiefs were simply assumed by the heads of state, although the heads of the tribes may through forbearance or tolerance be allowed to exercise some powers.

2. It is within such a context of a social organization given stable order by the exercise of the sovereign powers of the state that national systems of economy are formed. Thus the fundamental function of the nation-state in the formation of the national system of economy might be called constitutional, in that the basic structure of the national economy consists of the working rules which those who exercise the powers of the state choose to sanction. All other powers of the state function within this context--for taxing, spending, regulation, and everything else.

Commons used to tell us that one of the truly important functions of an ideology in the formation of economic systems was in the provisions of the

working rules regarding whose will is to be made effective on what. It is upon this issue that the nature of the structure of the economy turns, for the structure of national economies is the working rules sanctioned by the sovereign powers of the state. In totalitarian systems of national economy--such as Marxian ideologists attempt to establish--the leading principle of the organizing working rules is to make the wills of those in command of the powers of the state operate from top to bottom. In such a system, if effective, there would be no open markets, no property relations, and no local discretion.

In the contrasting ideology which has served as the leading principle of organization in societies honoring freedom, as in the Anglo-American tradition, the working rules by which national economic systems are organized do not attempt to achieve economic performance by stipulating specific performances for individual participants; rather, what is specified is avoidances.

By this route there are created zones of discretion for individual actors, i.e., freedom and liberty. But this very discretion and freedom of choice also creates property rights and economic power, of which one correlative is that where there is development, there is also a cumulative inequality.

3. It is within such a context that the central policy issues in the transformation of customary tenure systems are to be understood. One of the points which took me back some years ago to a reexamination of Commons' ideas was the realization that the experience of England at the time of and subsequent to the Norman Conquest had many parallels with what I was seeing in the Middle East and Africa. And particularly, I began to wonder whether the common law method of rule-making might work in Africa, that is, achieving a common law out of the customary working rules of the people in the everyday affairs of life. I cannot delve very deeply into this point here, but I think it might be a key to the possible gradual transformation of traditional economies of agriculture, directed particularly to the customary working rules of land tenure for arable land.

It might be noted that nothing is more real, or important, to the villagers I know in the once-rain-forest area of Nigeria, than their rightful claims to the exclusive use of their land. "This is my land," or "This is the land of our family," they will say. As I have tried, now at some distance from these villagers, to understand the customary system of rules and practices regarding the use, occupancy, and descent of land, it seems to be that these people have what Commons called a common law form of property in land. These rights in principle are not salable, and pass from generation to generation by inheritance. They have usufructuary rights in land only.

I would like to see what kind of problems an African nation would encounter if it attempted an agricultural development policy which honored and attempted to build an agricultural modernization program upon the basis of recognizing that the cultivators already have common law property rights in their land. In fact, Nigeria, in the Land Use Decree of 1978, attempted something along this line. The whole effort was not built upon an attempt to honor what I here call common law property in land, though the Nigerians did appreciate the significance of what I call the sovereign interest in land. One of the assets for such an effort would be that the provisions for the exclusive use

of particular tracts of land would provide security of expectations regarding rewards for investment in improvements to land, particularly if provisions were made for a time limitation on birthright claims to the family lands.

4. As I tried to point out above in the interpretation of the principles of customary tenure in tropical Africa, particularly for cultivated or arable land, there are really two supplementary principles basic to the organization of the customary system of tenure of arable land. One I have referred to as the principle of sovereign interest and control asserted by right of conquest, which serves as the foundation for exercise of authority in the creation of the social and economic order. The other governs the rules for the use, occupancy, and inheritance of land--usufructuary rights. These latter rights are vested in the person who "mixes his labor with the soil" and "appropriates from the state of nature," to borrow John Locke's phrasing. These two sets of rules supplement each other and function together and, if successful, create a secure social order with rightful claims to the exclusive use of individual tracts of land.

Any government, in principle, which occupies an area by conquest, as did the colonial powers, may choose to usurp the sovereign powers over land vested in the tribes. This Britain chose to do in Africa only where they wished to establish European settlements or exploit minerals, for example. Thus, in Nigeria, lacking a comfortable temperate climate attractive to Europeans, the native tenure systems were left intact in rural areas, at least in principle. Thus marriage law, inheritance, and use and occupancy of land were left to native law and customs, that is, the disputes were settled in customary courts.

Come independence, however, the nation-state not only assumes the sovereign powers over land, eventually the state must face the question of policies regarding the rightful individual use and occupancy of particular tracts of cultivated land, this due to the pressure from citizens. It is at this point where both the operative ideology of the heads of state and the systematic understanding of the nature of rightful claims to land become critical.

If those who control the sovereign powers of the state, as Nyerere did in Tanzania after independence, choose to recognize only the sovereign interests in land and assume them, we not only have an attempted nationalization of land, but the way is opened for the functioning of an ideology which would make the will of the officials and bureaucrats effective in agriculture through a collectivization program. This approach, I suppose, is supported by those people, of whom there are many among expatriate intellectuals, who consider that the traditional tenure systems of Africa are communal. This I doubt--outside of grazing economies.

If, however, the individual usufructuary claims to land are recognized to be basic, as happened at least in the rules devised in the Anglo-American common law tradition, then those usufructuary claims can become the basis of a system of private ownership of land in which the sovereign claims to interests in land can become converted into measures for protecting the public interest in privately owned land--in the United States, taxation, eminent domain, and police powers.

It would be very interesting to see what a nation-state might achieve in the developmental transformation of agriculture if the validity of individual claims to particular tracts of land were honored, and a policy adopted of expanding claims of usufructuary ownership into wider forms of private property with some degree of market transferability (perhaps among relatives or neighbors as in Northern Europe), and especially one which recognized that the traditional rightful claims which one acquires as a birthright could be extinguished by some sort of financial payment by the resident heir to people who migrate to cities. For land to be genuine property it does not need to be salable; the basic right of property ownership of land is the right of exclusive use, not of sale.

Also, if the present usufructuary property rights held by the millions of families in tropical Africa were given a more definite and permanent form and recognized to belong to these people, these holdings of land could be combined into any of a very large number of general agricultural economic systems. If there could be part-time nonfarm employment, or even adequate transportation for labor mobility, the Africans could continue to live in their villages and undertake what we call part-time farming, as have the farm people in all the presently industrialized countries. Or they could and might continue to cultivate their present holdings of land--as individuals and join in some sort of cooperative-type system of farming for the land in the village reserves, where some remain.

Above all else, the energies and abilities of the rural people are the greatest resource for agricultural development in Africa. It would seem that what is needed are imaginative programs for the security, the expansion, and the improved accessibility of opportunities so that abilities and opportunities can be joined into careers.