

This work is licensed under a
Creative Commons Attribution-NonCommercial-
NoDerivs 3.0 Licence.

To view a copy of the licence please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

IDS/DP 209

PROPERTY THEORY AND LAND-USE
ANALYSIS - AN ESSAY IN THE
POLITICAL ECONOMY OF IDEAS

by

H.W.O. Okoth-Ogendo

DISCUSSION PAPER NO. 209

INSTITUTE FOR DEVELOPMENT STUDIES

UNIVERSITY OF NAIROBI

P.O. Box 30197
Nairobi, Kenya

AUGUST, 1974

Any views expressed in this paper are those of the author. They should not be interpreted as reflecting the views of the Institute for Development Studies or of the University of Nairobi.

PROPERTY THEORY AND LAND-USE ANALYSIS - AN ESSAY
IN THE POLITICAL ECONOMY OF IDEAS

by

H.W.O. Okoth-Ogendo

ABSTRACT

This paper is concerned with one issue only. It argues that the development of adequate theory for social science research in Africa must be predicated on a proper appreciation of the social foundations of the conceptual and methodological tools we have inherited from Western or other bodies of social science. We need to do this in order to determine the suitability of these ideas to specific analytical tasks in our societies. The paper then proceeds to examine this argument in relation to law and land use analysis. The conclusion reached is that existing 'legal' and 'social' theories of law do not offer an adequate framework for the analysis of land relations in African societies. It therefore calls for more systematic investigation in this regard and, more particularly, the search for alternative forms of clarifying legal relations not only in the narrow sphere of land relations but more generally in society.

PROLEGOMENON

There is a great deal of debate in Africa today concerning the twin issues of the relevance of social science research to development planning and the manner in which the technical vocabulary, concepts and methods we use to extract and communicate our findings condition our perception of social facts, choice of policy and prescriptions for action. In this essay an attempt is made to confront these issues especially as they relate to law and land use analysis. Our underlying theme is that the development of adequate theory in this area as everywhere else must be based on a proper appreciation of the social foundations of the ideas we have inherited in sociolegal analysis, particularly those in the field of land use, which came to us through the colonial process. For it is only by doing this that we can determine whether or not these ideas can supply an adequate conceptual framework for the analysis of social behaviour in our societies.

On the Choice of Priorities

The substantive concern of early researchers on law in Africa with the existence or non-existence of certain institutional arrangements in traditional society is not at all accidental. There were good academic as well as pragmatic reasons for doing so. Colonialism had opened up tremendous opportunities to Western scholars for testing the validity of certain grand generalisations then current in their own particular disciplines. For British colonialism particularly, this kind of information was necessary for setting up an administrative regime in the colonies that would permit the maximum possible exploitation without fundamental alterations to the existing structural arrangements.¹

Thus early research was concerned mainly with the question of whether African (read 'primitive') societies had 'law'. (See 45, 15 and 34.) Later when this question had received some sort of answer, attention turned to more specific aspects of law. Scholars now wanted to know whether African societies had 'tenure', 'marriage' and analogous institutions; knew of 'ownership' in land; and distinguished between 'criminal' and 'civil' law.² All these issues were at that time the subject of much debate and confused thinking³ in the historical jurisprudence of

1. This it seems to me was the political economy of indirect rule. For another view of its operation in East Africa, see Morris and Read (40).

2. For a bibliography on the land tenure question, see Forde (18). For the 'civil' and 'criminal' law debate, see Rattray (46).

3. The confusion has been traced in Gluckman (22), to Maine (33) and Vinogradoff (59).

late nineteenth and early twentieth century Europe as well as being of crucial importance to colonial administrators.⁴ Indeed as colonialism became more and more established the system itself became a powerful influence on the determination of research priorities.⁵ As colonial policy changed, so did the focus of the literature. Thus in the British sphere the change from 'trusteeship' to what London called 'development' brought with it a great deal of changes in the literature.⁶ Two important areas which researchers turned to were administration and land tenure reform.⁷

As new debating points emerged in Anglo-American scholarship, research priorities also changed to reflect these developments. One such development was the revolt against formalistic jurisprudence which erupted at Harvard Law School in the 1890s and the rise of what is now known as legal (or American) realism. At the centre of this revolt was the assertion that legal phenomena were essentially the creation of judicial institutions and processes and not legislative or social institutions. (See 23 and 28.) In short the early realists argued that in attempting to capture salient elements about law we should focus our attention primarily on the courts and the law reports. Case-method or court-centred as opposed to rule-oriented analyses of law, however, did not become an important element in research in Africa until the publication of the Cheyenne Way⁸ in 1941 (32); by which time colonial administrators were also beginning to give serious attention to the problem

4. Most of these early ethnographers were in fact employed by colonial governments precisely for this purpose. Perhaps the greatest monument to this partnership was the founding of the Rhodes-Livingstone Institute towards the end of the 1930s, which for some thirty years operated as the colonial data bank for East and Central Africa. One of its typical field exercises was Allan, Gluckman and others (2).

5. Colonial policy itself was not always consistent and predictable. The effect of this on the literature can be seen in the different assessments that have been made of the theory of 'indirect rule', such as Ghai's and MacAuslan's (20) and Morris's and Read's (40).

6. As to what development meant, See Lord Listowel (31).

7. For the agrarian policy background, see Hellen (27); for general policy, see Lord Hailey (24).

8. For the methodological effects of this work, see Obed Hag Ali (41).

of courts and administration of 'justice' in the colonial context. (41 and 12) Thereafter the courts became the centre of attraction to legal anthropologists everywhere on the continent. (See for example 4, 21 and 16.)

More recently the decolonisation process has raised a fresh set of questions which foreign scholars have not found easy to answer within their own current conceptual frameworks. (26) Some of these include issues about the continuity of laws, internal conflicts, 'place' of customary law in national legal systems and legal 'development', etc. The initial reaction was ethnographical: a series of rescue operations were conducted in the 1950s and early 1960s to 'save' African law from the deluge of 'modern' law that was expected to come after independence.⁹ In the end, however, it was the historical jurisprudence of Europe and America that led the way as foreign scholars moved in to apply Weberian and Durkheimian generalisations to these fresh problems.¹⁰ Research after independence turned to issues of law and 'development' or 'modernisation' - issues that were also clearly linked to the needs of the new economic order. The entry of the multi-national corporation in the economic relationship between the metropolis and the ex-colonial 'periphery' required a particular kind of law and in sufficient quantities if these organisations were to be sure of their hold. The question of legal 'development' by which was meant some replication of western legal institutions, was therefore considered crucial.¹¹

On the Persistence of Ideas

It has been suggested so far that the choice of subject-matter of research can be explained as a function of intellectual and ideological dependency. The contention here is that the conceptual and methodological assumptions of the literature reflect a similar influence. There are two

9. This led to a series of conferences on the future of customary law, ultimately resulting in the restatement project of London University. For a summary of the arguments, see 41.

10. Thus law and development programmes have flourished in African law schools. For a summary of the core concept, see Trubek (56).

11. One attorney of a big New York multinational corporation specialising in service contracts argued at a speech to the Yale Association of International Law that one of the most critical problems of the third world is 'legal underdevelopment', by which he meant that third world bureaucrats cannot understand the intricacies of contractual obligation in the advanced nations. (personal communication from Speed Carrol, November 30, 1972)

points to make. The first point is that Anglo-American and lately Sino-Soviet ideas of law continue to dominate local research and policy-making in many African countries. This is manifested in several ways. The first is in terms of continuous importation of foreign laws and legal institutions into our legal systems especially in the more instrumental areas. Importation has even been extended in some cases to areas in which it has been shown to be almost wholly irrelevant to significant aspects of social life. This is particularly true of those countries in which foreign law is still seen by the law-making elite as a model for the future development of an integrated legal system. Without getting into matters of details it is our contention that for as long as we continue to import foreign law into our legal systems, for that long will it be considered necessary to resort to the framework of foreign jurisprudential concepts in the description and analysis of law in Africa.

The second manifestation is in the style of law teaching and the intellectual background of law teachers themselves. To many students of law, the statute books and law reports are still the most stable source of data available. Whereas this may in part reflect the influence which the organised bar still exerts over the teaching of law, it also reflects the fact that there is still some tension among law teachers themselves between those who believe that the proper function of law schools is the production of technocrats, i.e. those whose job it is to disentangle the syntactical webs of legislation and so keep the wheels of our legal systems moving, and those who favour broader orientation especially so as to incorporate the socio-economic and political relationships through which legal phenomena are manifest. In any event, the fact that most of our law teachers have been trained in Anglo-American jurisprudence has meant that there is a general disinclination from any kind of theoretical or empirical concern over non-doctrinal aspects of law teaching.¹²

Partly because of increasing dissatisfaction with Anglo-American jurisprudence, but also because of the emergence of a more ideologically committed social science approach, a different style of legal analysis has begun to take shape in Africa. This draws heavily from Marxist conceptions of law and legal relations generally. The central theme is that the content of law is little more than 'a

12. A summary of East African law writing quickly confirms this view. It was not until the emergence of the Eastern Africa Law Review in 1968 that the literature began to touch on socio-economic bases of law.

reflex of an economic substrate¹³ namely the production relations in society. This conception means that questions of origin, content and operation of law must in effect be answered in the same way, namely through an analysis of the class structure of society. (35 and 42) Neo-Marxist analyses of law in colonial and post-independence societies show quite clearly that some of our scholars have perhaps too readily accepted the validity of these generalisations. This has led to a situation in which some scholars now regard an analysis of the political economy of society as coincident with an analysis of law. In other words law expires as a conceptual category once its function is announced. (See for example 51.)

The second point concerns methodology, particularly the nature of the technical vocabulary and concepts that have been used by scholars to extract and communicate data about socio-legal relationships in Africa. It was accepted as a matter of course by early anthropologists that African systems could not be understood except through the conceptual glasses of Western jurisprudence. To young Gluckman, for example, African systems could only be understood by comparing them with the models erected by jurists in Europe and America. "The very refinement of English jurisprudence" Gluckman once wrote, "makes it a better instrument for analysis than are the languages of tribal law". (21) Although contemporary opinion on the utility of these concepts is not quite as chauvinistic, the same claim is now being made under the umbrella of cross-cultural analysis. Vansina has put the case as follows:

Whereas it is true that each society will have its own legal concepts, its own procedure, its own substantive law, all adapted to the particular society, it is important to recognise... that... law is a social science and that as in all social science there exists a body of general norms which should be discovered. (Vansina in 22)

Vansina and others who believe that a cross-cultural comparative method has been developed in Western social science are in effect saying much the same thing as their predecessors. Bohannan, for example, while castigating Gluckman for translating English 'folk' systems into 'analytical' systems, seems reluctant to part with key concepts in common law jurisprudence. Rather, he sees the possibility

13. The expression is Dias's. See 13.

of making the very terms that so distorted the existing literature perform a new and respectable function, i.e. the generation of 'general theories'. All we need do, says Bohannan, is to change the type of questions we ask. (4) The debate on methodology is still essentially confined to the ranks of those foreign scholars who have for some time been concerned with empirical investigation of legal phenomena in Africa, but there are signs that local scholarship may not move much further from this bias. (3)

THE UNDERDEVELOPMENT OF THEORY

The intellectual dependency outlined above has contributed to a situation of serious underdevelopment at the level of theory in this area of research. Legal theories tend simply to assume that a connection exists between law and land development; whereas social theories tend on the whole to overemphasise the purposive (i.e. instrumental) aspect of law and thereby to distort the total context in which legal phenomena operate.

Of Legal Theory

We start with some general points about legal positivism,¹⁴ this being the central theoretical reference for the study of law in East Africa. Very simply stated, the essence of positivism is that laws consist mainly of binding rules emanating from political authority, which are distinct from moral precepts and arranged in an internally logical and systematic manner within a given country. A look at legal research in East Africa shows that our scholars are still largely concerned with paraphrastic analysis of legislative rules, institutions and systems interspersed in appropriate places only by judicial pronouncements of our courts of record. As a theory, positivism is an invaluable technique of analysis especially on matters of identity and inter-relationships between legal rules. But we find it incapable of handling non-legal phenomena. There are a number of reasons for this, some of which have been mentioned before. One of these which Roscoe Pound pointed out long ago is that its fundamental concepts had reached a position of fixity long before the conditions with which law must deal today had come into existence. Pound added that

At this point when legal principles were taking a final shape, the growing point in human progress began to shift to the natural and physical sciences and their applications in engineering, in the arts, and in the scientific cultivation of the soil and development of its resources. (Pound in 50)

14. For a short summary of what legal positivism is, see Hart (26).
IDS/DP 209

- 7 -

This observation remains as true today as it was in 1907; only more so for us, since the socio-economic and political problems with which law has to deal in the third world have been compounded by factors of which the development of positivism did not take account, e.g. colonialism and cultural diversity.¹⁵ As such, it is impossible to explain through the framework of positivism such things as the dynamics of change within the law particularly the fact that certain types of legal institutions have the capacity to adapt to radical changes in society without any significant structural alterations within them.¹⁶

It was this fixity, among other things, that led to the rise of legal realism already mentioned. By directing its attention to the dispute process, realism constituted a significant departure from contemporary legal analysis. From a methodological point of view the dispute process proved much easier to conceptualise, hence controlled investigation became possible within the framework of legal theory. More substantively, attention shifted from an analysis of rules qua rules to institutions in which legal phenomena actively intervene. There was also the possibility that one could within this framework capture other social phenomena which interact with law in a wider social framework. Nonetheless, the realist movement did not in my view contribute much towards the development of a general theory of law and society. The early realists were largely engaged in ethnographic presentation of judicial and analogous behaviour. (See 16 and 32, for example.) More recent attempts to convert the techniques of realistic jurisprudence into a social theory of law have not been entirely successful. (For example, see 1.) Much as the resolution of disputes in society might form an important function of law, this certainly is not its central function. Indeed as Cardozo pointed out long ago, the dispute process cannot be taken as a vantage point from which to analyse the nature, function and limitations of law in society. (6) The focus is too narrow and as such excludes significant networks into which legal phenomena enter.

15. Pound's plea then was for a sociological jurisprudence which would place law in the political and socio-economic context in which it operates.

16. The classic analysis of this is Renner's (48). The Land Ordinance of Tanzania has also survived without changes in its substratum, although between 1923, the date of its promulgation, and the present there have been very fundamental changes in ideology in Tanzania.

Of Social Theory

It has been suggested that the dominant legal theories do not offer much assistance in the study of law in society. What we now suggest is that social theories of law have not made much headway either. By social theory of law we mean those approaches in which some social science theory is taken as a foundation for the study of law. This is usually accompanied by the application of the methodology of social science research to the study of law. Generally speaking, this has been the domain of social scientists rather than lawyers. A large number of these, however, tend to touch upon law only as part of the institutional rubric of socio-economic and political behaviour; hence the large literature on judicial processes, penal, family, land tenure and parliamentary institutions. This is an old slant in sociology. The sociological framework of law for Durkheim, for example, writes Smith, "consists in the institutional machinery through which its regulation is manifest". (in 50)

This institutional fixation has often meant that in social science literature legal phenomena generally appear at the tail end of the social process and to the extent that law is used or incorporated into the value system of society, this is usually seen as purely instrumental in character. The best example of this is Marxist and Neo-Marxist analyses of law. There are two reasons why I think that Karl Marx's writings contain the seeds of a 'social' theory of laws. Firstly, he put law in some sort of dynamic context, at any rate in terms of the analysis of pedigree and function. The function of law, Marx argued, was to further the interests of the dominant classes in society, i.e. those who control the means of production. It follows therefore that as the class interests of a group become more and more developed and consolidated, legal transformation will take place to further their achievement and protection. Secondly, this context was framed in terms of an explicit social theory, i.e. that being the creation and handmaiden of bourgeois class interests, the legal element in human relations is bound to disappear with the attainment of a socialist (classless) society. (19) This, we suggest, constitutes a highly instrumental and deterministic view of legal regulation.¹⁷

17. Marx's approach should perhaps be reread in light of Engel's reinterpretation of the relationship between the base and super-structure. Engel's letter to Sparkenburg in 1894 emphasises the fact that the economic position is not "the cause and alone active" while everything else remains passive. There is interaction "which ultimately always asserts itself". This opened up a whole new dimension to the analysis of law in society which neo-Marxists have not really taken up.

The effect is that many Marxist analyses seem to have fallen into what one Soviet legal scholar has described as the "morass of economic materialism". In such cases Vyshinski argued, 'We destroy the specific character of law as an aggregate of the rules of conduct, customs and the rules of community living established by the state and coercively protected by state authority'. (29) Although we do not share all of Vyshinski's notions of the nature of law, his observation is by and large a sound one. The result is that although the point at which traditional social science meets law is clear, this tends to be conceptualised in such a way as to be of little assistance in the elucidation of law.

Of Property Theory

The Idea of Ownership in Legal Theory: This general state of theoretical underdevelopment is most pronounced in the field of property theory.

Historically speaking, thinking about land in Anglo-American jurisprudence centres around an analysis of the evolution of the concept of ownership, "a problem still as vital", says Hargreaves, "as it has been at any time since the evolution of private property". (25, p. 43) The concept, however, derives ultimately from the dominium of Roman law, "a frank acceptance of the existence of absolute ownership ... over both chattels and land... Balbus could not say that he was the 'temporary' owner of a plot of land; he had either full dominium or no ownership at all." (25, p. 44) Land as the subject of ownership did not in this context mean the soil as such. The legal conception included all things that were attached to the land in such a manner as to be imbedded into it, and all things that were found under the soil. These were attributes which a tenant, whose rights were characterised as iura in re aliena,¹⁸ had no right to remove. Later in a feudal context this meaning of land also characterised the division of things which a villein could or could not remove from the soil.

The effect of feudalism on the Roman concept of ownership has been summarised as follows:

It ... separated the dominium directum (the dominion of the soil) which it placed mediately or immediately in the Crown from the dominium utile (the possessory title), the right to the use and profits in the soil designated by the term 'seisin' which is the highest a subject can acquire. (Black's Law Dictionary, Fourteenth Edition, 1968)

18. That is, rights in the land of another.

The relationship between the feudal lord and villein, however was characterised by the type of services which the latter gave in return for the protection he received from the former. Thus emerges the doctrine of tenure as an expression of the vertical structure of feudal authority. (See 37 and 10.) It may then be said that tenure referred to the manner in which land was held and being thus holden, tenure also referred to the ultimate form of political control over land so held.

The disappearance of feudalism left an interesting anachronism in property theory; the doctrine of tenure survived, even though as property historians point out, it had long ceased to have any practical significance. The more important concept after the feudal era was that of an estate in land, i.e. the extent in time of a person's interest in land. (See 38 and 52.) The survival of the doctrine of tenure, however, contributed to the emergence of the dogma that the Crown owned the land in the Roman sense while all that the tillers could have over the soil were certain rights constituting 'property' over it.¹⁹ Hence by the end of the nineteenth century property jurisprudence was, in effect, still founded on the view that the basis of political authority over other people was ownership of land. It followed that no individual, community or other group could own land in the continental European sense. The theory said that tillers of the soil were tenants and they held of the Crown certain rights constituting property over the land; but while that implied a tenure relationship, no tenure arrangement could now be said to be involved. To that extent, the theory was misleading; but it was an important aspect of common law thinking at the time colonialism began in the latter half of the nineteenth century.

The Idea of Ownership in a Colonial Context: The idea of ownership was an important tool in the colonial process. It dominated the entire span of colonial land policy in the settler colonies. The very first debates in the settlement of Kenya (then East African Protectorate) were concerned

19. This fiction lingers in English property theory despite the fact that the Administration of Estates Act of 1925 has now abolished escheat and replaced it with bona vacantia. Thus the right of the Crown in land can no longer be viewed as vested and continuing ownership subject to an encumbrance, "but as a contingent right of succession to an interest owner"; see Salmond on Jurisprudence (17) p. 413ff.

with issues of title to land. First it was the power of the Crown of England to alienate lands in a protectorate, then once that had been sorted out in English jurisprudence the issue turned to the question of settler ownership vis-avis native rights.²⁰ The latter question was resolved in a highly cavalier manner. It was said, for example, that African rights in land were in the nature of usufruct only - meaning in this context that the right or interest lasted only as long as the land was in use.²¹ Two conclusions generally followed from this: first that ownership, if it existed, lay elsewhere than in the users of the soil; and secondly that whatever was not being cultivated or occupied (i.e. by physical presence) was vacant land. It follows according to the English property notions we have discussed that vacant land was considered held by the territorial sovereign then in being, that is the colonial power, who was then free to grant it!²²

This was used extensively to justify the expropriation, of so-called waste and unoccupied lands, in areas where there was no "settled form of government and where land had not been expropriated either to the local sovereign or to individuals" (Law Officers of the Crown, 1899). The manipulation went even further. Thus when the British South African Company, acting on behalf of the Crown, raided Ndebele land in the late nineteenth century, the Judicial Committee of the Privy Council found as 'fact' that the Ndebele tillers had not in the land private rights worthy of protection even in the common law system.²³ For in that system usufruct was not a private right being a right 'not amounting to ownership'. In those parts of Africa in which social organisation had a strong military base, the literature spoke of very different juridical facts. It was said that communal or even chiefly tenures existed in these areas²⁴ - a finding that was extremely valuable. The conclusion of treaties with tribal chiefs was based on the assumption that the incidents of community ownership were vested in these function-

20. For the history, see Sorrensen (54) and R. mole (47).

21. See the opinions expressed in the Report of Stewart's Land Committee, 1905. This committee was chaired by Lord Delamere.

22. See the general tenor of the 1897 Land Regulations as applied to Kenya, British Parliamentary Papers, Vol. C-8683 December 1897. Also see Land Titles Ordinance of 1908, now Cap. 282, Laws of Kenya.

23. Re Southern Rhodesia (1919) Appeal Cases, p. 233.

24. That is in contradistinction to individual rights, c.f. Privy Council Judgement in Sakarivawo Oshodi v. Moraimo Dakola and others (1930) Appeal Cases, p. 667, in which chiefs were said to have reversionary rights in community land.

aries.²⁵

The point to be stressed here is that early administrators and ethnographers were trying to fit the facts of African land relations into the conceptual categories of Western property theory. Where no fit was found, it was generally assumed that these facts conferred no measure of security in and of themselves. In doing so, however, they introduced fundamental misconceptions and serious distortions into land-use analysis. In saying that African cultivators and occupiers had usufruct only, these writers were simply wrong in thinking that the pattern of land use was necessarily a function of tenure arrangement in the feudal sense. For usufruct in its original context and usage was a right of using and taking the fruits of property belonging to another salva rerum substantia, i.e. without the right of destroying or changing the character of the thing and lasting only as long as the character remains unchanged. Speaking of the Barotse, a chastened Gluckman aptly remarks, "... there is no one with a greater right to use the land than its present cultivator, and he has more than a right to take the fruits, he transmits his rights to his heirs." (22, p. 86) In saying that communities, families, tribes and other collectivities owned land, these writers were misled by the ideas of Sir Henry Maine and Paul Vinogradoff who spoke of communal ownership of land in early law. Hence they tended to question whether "a tribesman had any specific secure rights of ownership over particular parcels of land". (20) But in saying that chiefs owned land they were misled by a historical anachronism in English property theory into reading what I believe were purely jurisdictional facts as ownership characteristics.²⁶ For whereas under feudalism jurisdiction as a political fact was indeed founded on some form of dominium, it was one of the most significant effects of the disappearance of feudalism that jurisdiction ceased in fact to mean any form of ownership of the soil.²⁷

25. See the Maasai 'Treaties' of 1904 and 1911. For a discussion of some of these issues, see Seaton and Maliti (49).

26. Gluckman writes, "Since the people themselves in African states spoke of the chief as owner of tribal land they [English jurists] tended to think that his subjects had no firm and secure rights in it but cultivated it only by the chief's permission and to some extent at his capricious will ...". (20, p. 86) C.M.M. White has added that "the conception of tribal area and unit occupying territory" should not be taken to mean that any person who comes within that territory acquired land by allocation; see 59, pp. 124-130. See also Pashukanis (42), p. 49, and J.O. Ibik, writer of the Malawi section of the Restatement Project (London, 1971).

27. English property theorists would hotly dispute this view. For further clarification of the jurisdictional, as opposed to ownership, aspects of land, see Uchendu (57).

The Idea of Ownership and Land Use Analysis: The search for ownership and tenure institutions in African society was not simply part of the process of making colonialism work, it was also part of an attempt to sell a capitalist theory of law and land development. The theory was that the formal rules of tenure, to the extent that they define ownership characteristics, are in crucial ways related to positive decision-making in land planning and use. It was first argued that actual planning and implementation of land use matters were wholly issues of individual initiative. Property law assisted this initiative by conferring exclusive rights over particular parcels of land. Any form of external control, whichever way expressed, was therefore rejected, the argument being that these were unwarranted infractions upon vested rights. Rules of non-ownership character, to be legitimate and acceptable, had to be those and those only as lay within the bounds of private volition or privilege.

The English economist and moral philosopher Adam Smith stated the argument as follows:

A small proprietor... who knows every part of his little territory, who views it all with the affection which property especially small property naturally inspires and who upon that account takes pleasure not only in cultivating but in adorning it, is generally of all improvers, the most industrious, the most intelligent and the most successful. (53, emphasis added)

Even if we discount the peculiar problems posed by the agrarian conditions of eighteenth century Britain which formed the background to this and analogous views,²⁸ the underlying notion that private ownership of land is the key to positive decision-making in agrarian development survives to this day.²⁹ Its broader economic theory can be traced back to laissez faire individualism - the moving force in the rise of capitalism in the Western world.

The modern welfare modification to this argument has been stated by Denman as follows:

Property rights [in the narrow sense meaning private rights] or rights analogous to them are in the last analysis the only power by which man can execute positive plans for the use of land and natural resources. (11, emphasis added)

The variation here is that some form of public participation in planning and possibly minimal land use administration is recognised. Implementation

28. See also J.S. Mill's advocacy of family farming in 39.

29. See Doreen Warriner's comments in 60.

of plans is, however, left within the realm of private volition. In other words, the proper function of government according to the welfare approach is to provide an environment within which property power has the widest possible significance in terms of decision-making. The approach found strong advocates in colonial Africa. Thus in Kenya, the settler community often insisted on the provision of infrastructure, farm-planning facilities and extension services. They, however, pretty much controlled their own consumption and marketing.³⁰ The state was expected to reserve a power of intervention which occasionally could be used to secure proper development, but whether and when that power was to be used remained negotiable.³¹

In Marxist analyses, private property is generally conceived of as an institution with one specific function in society. Sweezy stated this as follows, 'property confers upon its owners freedom from labour and the disposal over the labour of others and this is the essence of all social domination whatever form it may assume.' (55, p. 243) He made it quite clear, however, that this did not apply to single-commodity-producing societies "where each producer owns and works his own means of production" since there would be no classes and hence no class domination. In other words, the relationship between property and land use was seen not in terms of psychosocial motivation as in capitalist property theory but in instrumental terms. The role of the state in this framework was similarly seen in historical terms. The state existed for the purpose of maintaining property relations. It did this through the application of force, reflected inter alia in public law.

Few attempts have been made to operationalise these different ways of looking at property relations, especially to set out in a systematic manner the linkages between proprietary phenomena and specific aspects of land-use behaviour. Professor Denman has now put up one such framework within the context of Anglo-American theory. First of all he argues that the locus of decision-making in land use will be found in what he calls the proprietary land unit.

Legal authority for taking decisions will lie in the property rights over land which in themselves will largely be fashioned by the local land law Because the subject-

30. See the view reported in Meek (36). For earlier feuds with the colonial administration, see Remole (47).

31. For example, although the colonial government interfered extensively with African land-use patterns then believed to be primitive and 'prejudicial to the welfare of the country', it hardly ever intervened in settler agriculture, although most of the large farms were grossly underdeveloped. See Remole (47), Wolff (62), p. 78, and van Zwanenberg (58), pp. 8-9.

matter, the physical solution and its fixed improvements are co-ordinate in geographical space, the property rights which will authorise positive land use can be related to a particular place on the map and extent of land surface. And these two elements, the run of property rights and the area of land to which they pertain together constitute the decision-making unit which is fundamental to all positive decisions about land use. (12, p. 18)

This unit, Denman emphasises is merely "a particular variety within the genre of decision-making entities or units that provides the structural framework of an economy". (12, p. 18) Denman's second argument is that agrarian law (as we have explained it) enters this unit initially as a device used under the law to abstract from and reduce the bundle of rights in the hands of a holder of a proprietary unit. (12, p. 30) In this Denman is drawing attention to an important point which will figure much later, i.e. that it is not enough to look at substantive property law even if your sole interest is to find out the quantum of rights a holder has. Thirdly, Denman has set out the variables that enter into the dynamics of this framework. These are basically socio-economic and include such things as capital goods (either singly or as an arrangement of related things designed to provide services essential to economic survival), consociate wealth (i.e. wealth external to the unit, which is held by the same person and can be assimilated to the unit), predisposing factors (i.e. set of givens such as restrictive shape and contiguity of units, etc.), motives and externalities associated with the socio-economic system.³² Agrarian law also reappears in the framework as a simple statement of inputs to be included in decision making but which do not necessarily determine or influence plans except in cases of "planning by prohibition". (12, p. 99 ff.)

Denman's framework contains some valuable insights for example that ownership rights create some kind of expectation in the minds of the holders with respect to the thing owned. But as a framework of analysis it is inadequate in many significant ways. We mention only five of these. First, the framework is built around an important concept which is not clearly defined. What is the nature of economic decision-making and what is the basis for suggesting that its structural frame is defined by legal

32. For a fuller treatment of the traditional economic argument about property rights and decision-making, see Demesetz (8) and (9); also Johnson (30).

phenomena? Second, Denman's analysis distorts the nature of proprietary phenomena in that it seems to assume that it is possible to determine the size of a bundle of rights held by land users in isolation from the total socio-economic context in which these rights have meaning. A proper appreciation of property systems the world over will show that the distinction between private and public domains of legal power is no longer tenable. Whatever power is expressed in the idea of ownership is progressively being diminished in significance by such external factors as the practical necessities of population growth and the crisis of food production that demand greater public participation in land use policy and activity. Delafons reports for example that although Americans continue to carry a very strong prejudice against external control over any aspect of the economy: "The massive intervention by the federal government in... agriculture and housing purchase finance shows that the system is less free and less enterprising than is usually represented". (7, p. 7) In a memorable passage he adds: "If the controls exercised by public authorities over land use in America seem excessively detailed and capricious, the controls happily adopted by private citizens are positively sadistic". (7, p. 85) Further, Denman's concept of property in land, tied as it is to the idea of exclusive rights, may not cater for systems of land use in which security is not based on title but rather on use and fulfilment of a specific set of community obligations. (22, p. 78 ff., and 5)

Third, the analysis tends to distort the nature of economic activity in the contemporary world. Any theory whose basic premise posits private rights in land ends up by equating economic activity with individual enterprise. Thus the inter-dependence of levels of economic decision-making, e.g. planning and administration, is completely lost sight of. For example, it would be misleading to analyse settler agriculture in Kenya as a function purely of private enterprise and motivation since it was through active state participation and systematic raids into the African ('subsistence') sector that it was possible to consolidate a viable industry. (58) In my view, the distinction between public and private domains of economic activity is also no longer tenable, certainly not in Africa and the plan-oriented economies of the socialist world.

Fourth, the analysis throws little light on the political process which forms the context of any land-use system. We are not here concerned with the question of jurisdiction so much as what once scholar has called

the ontological question,³³ i.e. the extent to which property relations in society are a function of political relations and vice versa and how this affects land use. It is not possible within Denman's theory to assess what influence ownership itself would have on the wider issue of resource allocation in society. Lastly, ownership-oriented analyses are misleading as a policy prescription. In formulating policies for land reform, colonial and post-independence policy-makers in Kenya, for example, thought that tenure reform would lead automatically to reform of land use. It is becoming increasingly evident that although tenure has some relevance, it is not the 'Ark of the Covenant in the temple of land use'!

Marxist theory, as I have said, is in essence a theory of political relations rather than that of law qua law. The operational dimensions of its approach to property as a legal concept have to be found within that wider framework. Much as this approach is valuable in illuminating certain aspects of land relations in colonial contexts, e.g. that between settlers and African labourers, its explanatory power would be considerably reduced when confronted with the facts of subsistence agriculture. It is not enough to say that property has no significance because no exchange relations can be established as an on-going process. That would be too narrow a view of legal phenomena. Indeed Marxist property theory, as Karl Renner suggested long ago, cannot adequately explain the transformation of property norms into public utilities which as we have indicated is an important element of legal relations (Renner 1949).

EVALUATION AND CONCLUSION

The situation described above draws attention to several important points. Two general conclusions about the sociology of ideas may be drawn from it. The first is that there is need to fashion our research subject-matter out of local concerns and priorities. We cannot build successfully on the literature we have inherited because much of it reflects utilities and opportunities not in tune with our own. Secondly, we should at least be aware that the key tools of analysis that we have inherited - both conceptual and methodological - conceal biases that are not only

33. I hijacked this expression from Dr. M. C. G. Mutiso of the Department of Government, University of Nairobi. To him, the expression refers to attitudes which people develop about land which express its intrinsic or mystical value to them, and the idea that many people define their personal identity to include ownership of land.

intellectual in nature but ideological in origin as well. The ideological biases in the existing body of ideas seem to me to include an assumption that the path of development for the third world will in some way duplicate that of present technologically advanced societies. This sort of historical determinism is not a recent phenomenon, but it came to assume a new significance in Africa as many colonial administrators and early researchers became increasingly convinced that the colonial process was an attempt, inter alia to hasten this inevitable progression.

More specifically, it is clear that land-use scholars have so far not succeeded in providing a meaningful framework within which to analyse the nature of legal phenomena both in the narrow sphere of land relations and more generally in society. Consequently, there is great need for systematic investigation of the role of law in our own societies. This is particularly crucial if we are to correctly evaluate more concrete problems, such as the utility of foreign legal transfers to specific socio-economic tasks.

The implications for theory and research are obvious: new and alternative forms of clarifying sociolegal relations must be proffered. This, however, is a task that goes beyond the scope of this paper.

BIBLIOGRAPHY

1. Abel, R.L. Toward a Comparative Social Theory of the Dispute Process. Working Paper No. 13. Yale Program in Law and Modernization, 1972.
2. Allan, W., Gluckman, M. and others. Land Holding and Land Usage among the Plateau Tonga. Paper No. 14. Rhodes Livingstone Institute, 1948.
3. Bentsi-Enchill, K. "Do African Systems of Land Tenure Require a Special Terminology?" Journal of African Law. 2 (114) 1965.
4. Bohannan, P. Justice and Judgement among the Tiv. London, Oxford University Press, 1957.
5. ———. "Land Tenure and Land-Tenure." In D. Diebuyck, editor. African Agrarian Systems. London, Oxford University Press, 1963.
6. Cardozo, B. The Nature of the Judicial Process. New Haven, Yale University Press, 1921.
7. Delafons, J. Land Use Controls in the U.S.A. Cambridge, M.I.T. Press, 1969.
8. Demesetz, H. "Some Economics of Property Rights." Journal of Land and Economics. October 1966.
9. ———. "Towards a Theory of Property Rights." American Economic Review. 57 1967.
10. Denman, D.R. The Origins of Ownership. London, Allen and Unwin, 1958.
11. ———. Land Use and the Constitution of Property. An Inaugural Lecture. Cambridge, Cambridge University Press, 1969.
12. Denman, D.R. and Prodano, S. Land Use - An Introduction to Proprietary Land Use Analysis. London, Allen and Unwin, 1972.
13. Dias, R.W.M. Jurisprudence. Third Edition. London, Butterworths, 1970.
14. Epstein, A.L. The Administration of Justice and the Urban African. London, H.M.S.O., 1953.
15. Evans-Pritchard, E.E. "The Nuer of the Anglo-Egyptian Sudan." In E.E. Evans-Pritchard and M. Fortes, editors. African Political Systems. London, Oxford University Press, 1940.
16. Fallers, L. Law Without Precedent. Chicago, University of Chicago Press, 1965.

17. Fitzgerald, P.J., editor. Salmond on Jurisprudence. Seventh Edition. London, Sweet and Maxwell, 1966.
18. Forde, Daryll. Ethnographic Survey of Africa. London, International African Institute, 1946-48.
19. Friedman, W. Legal Theory. Fifth Edition. London, Stevens and Sons, 1967.
20. Ghai, Y.P. and MacAuslan, J.P.W.B. Public Law and Political Change in Kenya. Nairobi, Oxford University Press, 1970.
21. Gluckman, M. The Judicial Process Among the Barotse of Northern Rhodesia. Manchester, Manchester University Press, 1955.
22. _____ . Ideas in Barotse Jurisprudence. Manchester, Manchester University Press, 1969.
23. Gray, J.C. The Nature and Sources of Law. Boston, Beacon, 1902.
24. Hailey, Lord. An African Survey. London, Oxford University Press, 1957.
25. Hargreaves, A.D. An Introduction to the Principles of Land Law. London, Sweet and Maxwell, 1944.
26. Hart, H.L.A. The Concept of Law. Oxford, Clarendon Press, 1962.
27. Hellen, J.A. "Colonial Administrative Policies and Agricultural Patterns in Tropical Africa." In M.F. Thomas and G.W. Whittington, editors. Environment and Land Use in Africa. London, Methuen, 1969.
28. Holmes, O.W. "The Path of the Law." In O.W. Holmes. Collected Papers. Cambridge, Harvard University Press, 1897.
29. Jaworskyi, M. Soviet Political Thought. Baltimore, Johns Hopkins University Press, 1967.
30. Johnson, Omotunde E.G. "Economic Analysis, the Legal Framework and Land Tenure Systems." Journal of Land and Economics. October 1973.
31. Listowel, Lord. "The Modern Conception of Government in British Africa." Journal of African Administration. 1 (99) 1949.
32. Llewellyn, K. and Hoebel, A. Cheyenne Way. Norman, Oklahoma, Oklahoma University Press, 1941.
33. Maine, Sir. H. Antient Law. London, Murray, 1861.

34. Malinowski, B. Crime and Custom in Savage Society. London, Kegan Paul, 1926.
35. Marx, Karl. Das Kapital. Volume 1. New York, International, 1967.
36. Meek, C.K. Land Law and Custom in the Colonies. London, Oxford University Press, 1949.
37. Megarry, R.E. Manual of the Law of Real Property. London, Stevens and Sons, 1969.
38. Megarry, R.E. and Wade, H.W.R. The Law of Real Property. Third Edition, London, Stevens and Sons, 1966.
39. Mill, J.S. Principles of Political Economy. London, Longman and Green, 1926.
40. Morris, H.F. and Read, James R. Indirect Rule and the Search for Justice. Oxford, Clarendon Press, 1972.
41. Obed Hag Ali. Anglo-American Studies of Tribal Law: Concepts and Methods. LL.M. thesis, Queen's College, Belfast, 1970.
42. Pashukanis, E.B. "Theory of Law and Marxism." In Babb, H.W. and Hazard, J. Soviet Legal Philosophy. Cambridge, Harvard University Press, 1951.
43. Phillips, A. Report on Native Tribunals. London, H.M.S.O., 1945.
44. Pratt, R. and Low, D.A. Uganda and British Overrule. London, Oxford University Press, 1960.
45. Radcliffe-Brown, A.R. The Institutions of Private Law and Their Social Functions. London, Cohen and West, 1952.
46. Rattray, P.S. Ashanti Law and Constitution. Oxford, Clarendon University Press, 1929.
47. Remole, R.A. White Settlers or the Foundations of Agricultural Settlement in Kenya. Ph.D. thesis, Harvard University, 1959.
48. Renner, K. The Institutions of Private Law and their Social Functions. London, Routledge and Kegan Paul, 1949.
49. Seaton, E.E. and Maliti, S.T. Tanzania Treaty Practice. Nairobi, Oxford University Press, 1973.
50. Simon, R.J., editor. The Sociology of Law. San Francisco, Chandler, 1968.
51. Shivji, I.G. "Insurance Law in East Africa." Eastern Africa Law Review. 3 1970.

52. Simpson, A.W.B. An Introduction to the History of Land Law. Oxford, Clarendon University Press, 1961.
53. Smith, Adam, The Wealth of Nations. London, Methuen, 1961.
54. Sorrensen, M.P.K. Land Policy, Legislation and Settlement in the East African Protectorate, 1895-1915. Ph.D. thesis, Oxford University, 1962.
55. Sweezy, P.M. The Theory of Capitalist Development. New York, Monthly Review, 1942.
56. Trubek, D.M. "Towards a Social Theory of Law." Yale Law Journal 82 (1) 1972.
57. Uchendu, V.C. The Conflict Between National Land Policies and Local Sovereignty Over Land in Tropical Africa. Paper presented to the Leiden Conference on Land Use in Africa, 1972.
58. Van Zwanenberg, Roger. The Agricultural History of Kenya. Nairobi, East African Publishing House, 1972.
59. Vinogradoff, P. Outlines of Historical Jurisprudence. London, Oxford University Press, 1920.
60. Warriner, Doreen. Land Reform in Principle and Practice. Oxford, Clarendon University Press, 1969.
61. White, C.M.M. "Terminological Confusion in African Land Tenure." Journal of African Administration 10 1958, pp. 124-30.
62. Wolff, R.D. Economic Aspects of British Colonialism in Kenya, 1895-1930. Ph.D. thesis, Yale University, 1969.