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PROPERTY THEORY AND LAND USE ANALYSIS-
(AN APPROACH TO THE STUDY OF THE FUNCTION
AND LIMITATIONS OF LAW IN PEASANT LAND
USE IN KENYA)

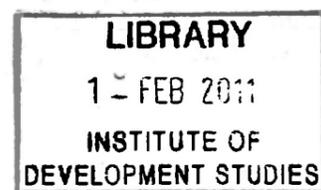
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PROPERTY THEORY AND LAND USE ANALYSIS-
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ABSTRACT

This paper is concerned with three issues. First it argues that there is need for systematic and empirical investigation of the function and limitations of law in socio-economic and political development in Kenya. This, it is suggested is crucial for policy since law has always been and continues to be viewed as an important if not the principal instrument for the effectuation of public policy. Secondly it argues that existing 'legal' and 'social' theories of law do not offer an adequate framework for such analysis. Thirdly it outlines a framework for the analysis of the role of law in peasant land use. This is based on an expanded notion of property theory set within a context of theories of economic decision-making.



" We cannot learn law by learning law. If it is to be anything more than just a technique it is to be so much more than itself; a part of history and sociology a part of ethics and a philosophy of life".

- Lord Radcliffe. The Law and its Compass 1961.

1: Prolegomenon

The function of law in socio-economic and political development and its limitations in that regard are not easy to state. The question is, however, sufficiently important to merit some attention by those interested in the development process. No such investigation has, as far as we are aware been undertaken in this country- at least not in a systematic and empirical manner. We at present know virtually nothing about the extent to which legal phenomena are relevant to behaviour; how they are incorporated into the value systems of Kenya's diverse societies and more particularly how individuals and groups use or respond to them in the course of socio-economic and political activity.¹ This almost total lack of interest in socio-legal issues is all the more surprising for a country in which law has always been and continues to be viewed as an important (if not the principal) instrument for the effectuation of public policy.²

The starting point in analysis is to examine the priorities, and the ideational and methodological assumptions of the existing literature to determine whether we can distill from it an adequate conceptual framework for the analysis of law in society. What we have done throughout is to give this preliminary question a proper historical perspective.

1: a. On the Choice of Priorities

That the substantive concern of early researchers on law in Africa was essentially 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 for Western scholars to test the validity of certain grand generalisations then current in their own particular disciplines. Besides, for British colonialism particularly, this kind of information was necessary for the purposes of setting up an administrative regime in the colonies that would permit the maximum possible exploitation without fundamental alterations to the existing structural arrangements.³

Thus early research was concerned mainly with the question whether African (read 'primitive') societies had 'law' (Radcliffe-Brown, 1952, Evans - Pritchard 1940, Cf Malinowski 1926). 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.⁴ All these issues were at that time the subject of much debate and confused thinking⁵ in the historical jurisprudence of late 19th century, early 20th century Europe as well as being of crucial importance to colonial administrators.⁶ Indeed as colonialism became more and more established the system itself became a powerful influence on the determination of research priorities.⁷ 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.⁸ Two important areas that researchers turned to was administration and land tenure reform.⁹

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 (Gray , 1902, Holmes 1899, 1920). In short the early realists argued that in attempting to capture salient elements about law we should focus our attention primarily to 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 Way¹⁰ in 1941; by which time colonial administrators were also beginning to give serious attention to the problem of courts and administration of 'justice' in the colonial context (Phillips 1945; Epstein 1953). Thereafter the courts became the centre of attraction to legal anthropologists everywhere in the continent.¹¹

More recently the decolonisation process has raised a fresh set of questions which foreign scholars have not found easy answer within their own current conceptual frameworks (Hart 1962). IDS/WP/164

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 sixties to 'save' African law from the deluge of 'modern' law that was expected to come after independence.¹² 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.¹³ 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.¹⁴

1:1. 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 ideational and methodological assumptions of the literature reflect a similar influence. There are two 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 they have 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 itself 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 is 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.¹⁵

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 reflex of an economic substrate'¹⁶ 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 (Karl Marx 1867, E.B. Pashukanis 1924) 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 his 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.¹⁷

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 analyses than are the languages of tribal law" (Gluckman 1955).

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 to Gluckman 1969).

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 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 (Bohannan 1963). 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 its bias.¹⁶

1: D: Evaluation

The situation described above draws attention to three important points. The first is the need to fashion our subject matter of research out of local concerns and priorities. We cannot build successfully on the literature we have inherited precisely because it reflects different utilities and opportunities. Secondly, we should at least be aware that the key tools of analysis that we have inherited also reflect biases that are not only conceptual in nature but ideological in origin as well.¹⁹ The ideological biases in the existing literature 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 assumed a new significance in Africa as many colonial administrators and early researchers were convinced that the colonial process was an attempt, inter alia, to hasten this inevitable 'progression'.²⁰ Thirdly, 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 the utility of foreign legal transfers to specific socio-economic tasks.

Let me emphasise that I am NOT advocating parochialism but simply contextualism in theory and analysis. After all the purpose of theory should be to place the environment in a mode that is meaningful to the mind of the man who interacts with it.²¹ Hence the range and context of data, the technical vocabulary, concepts and methods we use should reflect the cultural contexts of the societies we study. We now proceed to analyse in greater detail the relevance of these points in relation to a specific proposal.

2: Project Description

2:a: The Research Objective

The ultimate objective of this study is to illuminate the question of how law relates to the distribution and use of social economic and political resources in Kenya. For purposes of economy and control, however, we intend to focus our attention on the function and limitations of law in agricultural, particularly peasant + land use. The choice is not hard to justify. Nowhere is the confrontation between law and behaviour more likely to be felt in this country than in the administration of this sector of the economy. Agricultural organisation in Kenya is literally inundated with legal rules, institutions, and officials whose functions and powers are defined extremely widely within the law.²² Many of these rules and institutions and the policy framework within which they operate are essentially foreign and colonial in origin; but a large part still derive from indigenous forms of economic organisation whether or not these are part of the positive ++ law. The result might well be the most complex and internally inconsistent regime of economic law in Africa. The other reason is the centrality of land in the economy and power politics of this country throughout colonialism to the era of constitutional independence.²³ On the economic side it is enough to mention that projected trends for the current Plan Period 1974 -78 indicate that agriculture will for a long time continue to support at least 90% of the country's 12 million-odd people, provide employment for at least 85% of the total labour market, and account for some 14% of the overall G.D.P. of the country. On the power side, recent analyses of land reform confirm a broader generalisation that is that 'throughout the underdeveloped world political power structures are land based and family focused'²⁴ (Harbeson 1973, Wasserman 1973. Both of these reasons also mean that agriculture must for a long time remain high in our priorities for development & research in Kenya. Finally the availability of fairly substantial primary and secondary data on

+ : This word has no political connotations in this context, it is used to identify small-scale producers in the 'trustlands'

++ : 'Positive' here means statutory.

nearly all aspects of the agricultural economy will be of invaluable assistance in the formulation of our research issues and analysis of the overall data.

2: 2; The Research Problem

The focus on the agricultural economy means that the sets (or classes) of legal phenomena and aspects of agricultural land use with which we have to deal can be more narrowly defined and this enables us to identify and conceptualise the immediate problem of research more precisely. There are two overlapping sets of legal phenomena to look at namely those which confer rights of property over or access to the land itself, whether these flow from a 'tenure' arrangement or simply by right of first settlement (herein property law); and those whereby the agricultural economy is administered whether or not this is done by conferring powers upon private individuals or public authorities (herein agrarian law). The specific elements of property law to be examined are the system of allocation of land that is to say the manner in which rights to acquire and dispose of land are defined and how they function; and the political aspect, that is the relationship between authority and physical domain particularly as it manifests itself at the inter-personal level.

Agrarian law is essentially concerned with the administration of land use in its various aspects. By 'administration' we include all those regulatory processes and directives which are designed to influence in one way or another the direction in which development of land by holders of property rights will be permitted.²⁵ These are defined through general and specific rules which embody standards for farm - level action (individual and collective) as well as defining the frontiers of administrative power and functions in the agricultural economy. The point at which agrarian and property law overlap will vary from one community to another, for example it will be greater in communities in which authority operates by way of jurisdiction over the person rather than the land itself; than those that are not.

Aspects of agricultural land use that we are interested in are production and marketing set within the context of change. By change we mean qualitative effects of decisions (planned or unplanned) over time; decisions made by those involved in the business of using land and its produce. Production as a process must be viewed essentially

in socio-economic terms i.e. as an optimum combination of land, labour capital and information inputs. Information is not always seen as a separate input but we are convinced that the situation of knowledge of the land use agent is a critical factor. As a specific activity we shall focus on certain key products that represent the lowest denominator of proprietary land use as well as public regulation and direction. Most of our marketing institutions contemplate external markets. But with increasing urbanisation and small scale commercial farming, the domestic market is becoming increasingly important. Our interest is in behaviour of the market in relation to the products chosen according to the scheme above.

The immediate problem of research that emerges from this is to define and explain the manner in which the legal phenomena given above connect with or influence decision-making in agricultural production and marketing. This can be split into four subsidiary problems. Given the fact that a large section of the phenomena we shall handle is 'foreign' and colonial in origin the first is to investigate the foundations of these laws so as to determine their socio-economic character. What we want to find out is whether colonial themes and attitudes have persisted into post-independence law-making and land administration. The second concerns the manner in which legal phenomena are communicated: What law is communicated and to whom? How is it communicated and with what effect? Communication affects the situation of knowledge of land use agents and as such is an important element in determining the impact of law on behaviour. The third concerns the functions and limitations of law in agricultural land use; What happens to socio-economic organisation when it comes into contact with legal phenomena? What happens to legal phenomena itself? What aspects of law penetrate and influence behaviour and which ones do not and why? These will be important issues particularly with recent changes concerning the structure of access to land. The final subsidiary problem will be to determine what implications this holds for development planning. 'Development' is a troublesome concept but we are content to agree with political economists that its minimum core consists in sustained, growth and equity in the distribution of the fruits of that growth (Uphoff and Ilchman 1973). Growth must be seen as an economic as well as social question.

We must be concerned with the growth of social institutions and systems as much as with economic ones (F.W. Riggs 1962, E.W. Weidner 1970). Equity is essentially a matter of ideological orientation hence in examining the implications of legal regulation on development, an identification of the ideological context in which this occurs is indispensable. What next follows is an attempt to devise a framework which would spell out the necessary and sufficient structural and normative conditions for interaction along these lines.

3: The Framework of Analysis

3:a; The Underdevelopment of Theory

As a starting point we want to argue that existing 'legal' and 'social' theories²⁶ of law cannot be looked to to furnish us with this kind of framework. Underlying the problems of intellectual dependency discussed at the beginning of the paper is a state of serious underdevelopment at the level of theory in this area of research. Legal theories tend simply to assume that a connection exists whereas social theories tend on the whole to overemphasise the purposive (or instrumental) aspect of law and thereby to distort the total context in which legal phenomena operate.

3:a: i : Of Legal Theory

We start with some general points about legal positivism²⁷ this being the central analytical 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 to-day 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 R. James Simon 1968).

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.²⁸ 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.²⁹

It was this fixity, among other things that led to the rise of legal realism already mentioned. By directing its attention at 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.³⁰ More recent attempts to convert the techniques of realistic jurisprudence into a social theory of law have not been entirely successful.³¹ 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 (Cardozo 1921). The focus is too narrow and as such

excludes significant networks into which legal phenomena enter.

3: a: ii: 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 R. James Simon op. cit.).

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 we 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

⁺⁺⁺ : This traditional distinction is no longer tenable, hence we have kept it here for clarity only.

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 (Friedman on Pashukanis, 5th Ed). This we suggest, constitutes a highly instrumental and deterministic view of legal regulation.² The effect is that many Marxist analysis seem to me 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" (Jaworski 1961)

Although we do not share all of Vyshinski's notions of the nature of law, his observation is by and large a sound one.

I believe there are two problems here. One is entirely cognitive i.e. that of designing a framework that would capture what is especially 'legal' and keep it separate from the traditional frontiers of 'social' phenomena. There is an implicit reluctance on the part of social scientists to borrow some of the cognitive tools of legal philosophy for social scientific investigation. The other problem would be that for many social scientists in Africa much of the positive law appear at least ex facie to be irrelevant to social life of the indigenous population. There is thus no particular urge to investigate the functional dynamics of law in society. 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.

3: a:iii: Of property theory

3: a:iii: aa: The idea of ownership in legal theory

By way of substantiation we shall look in some detail at an aspect of these theoretical systems that is most germane to the study of land use namely 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."

(Hargreaves 1944, 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" (op. cit. 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 aliena³³, 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 1968).

⁺⁺⁺ : When a bundle of rights over an object vest in a legal person (individual, collectivity or corporation) we say that the object is the property of that person.

The relationship between the feudal lord and villeins, however, were 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.³⁴ 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.³⁵ 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.³⁶ Hence by the end of the 19th^c 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 19th^c.

3:a:iii:bb: 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 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-a-vis 'native' rights.³⁷ 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.³⁸ 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. physical presence) was 'vacant' land. It follows according to 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!³⁹

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 late 19th^c, 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.⁴⁰ 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' 'tribal' or even 'chiefly' tenures existed in these areas⁴¹ - 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 functionaries.⁴²

The short point to be stressed here is that what early administrators and ethnographers were doing was 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 those 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 chastened⁴³ 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".
(Gluckman 1969, 36)

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' (Gluckman op. cit). 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.⁴⁴ 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 feudalism that jurisdiction ceased in fact to mean any form of ownership of the soil.⁴⁵

3:a:iii:cc: 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" (Adam Smith 1937 edition emphasis added). Even if we discount the peculiar problems posed by the agrarian conditions of 18th^c Britain which formed the background to this and analogous views,⁴⁶ the underlying notion that private ownership of land is the key to positive decision-making in agrarian development survives to this day.⁴⁷ Its broader economic theory can be traced back to laissez faire individualism - the moving force in the rise of capitalism in the western hemisphere.

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"

(Denman 1969, parenthesis and emphasis added). The variation here is that some form of public participation in planning and possibly minimal land use administration is recognised. Implementation 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.⁴⁸ 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.⁴⁹

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"

(Sweezy 1942). 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 those 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" Denman explains. "Because the subject-matter, the physical solum 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." (Denman and Prodano 1972 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' (Denman and Prodano loc. cit.). 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 holder of a proprietary unit (ibid 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 includes 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 as and can be assimilated to the unit), predisposing factors (i.e. a set of givens such as restrictive covenants shape and contiguity of units etc etc), motive and externalities associated with the socio economic system.⁵⁰ 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' (ibid p. 99 ff.).

and the regulation of safety conditions in mining operations. The precise quantum, of any one range will be a function of the inter-relationship between these factors.

The implications of functional relativity to land use analysis is this: that what can or cannot be done in land use is potentially very fluid. The latter powers given in the example above may cut down the activities which the land use agent as the holder say of grazing rights would expect to execute over the land e.g. if the grazing of goats were to be prohibited in this area. On the other hand it may expand the range of activities e.g. when public officers introduce a resistant crop variety in an area where none could survive before.

3: b: ii: dd: Empirical dimensions

The empirical questions that are necessary to complete this dynamic can be organised around the following issues:

1. A determination of the socio-economic character of given relevant factors. This involves an analysis of the historical origins of those factors.
2. A situation of communication of those factors to the primary actors within the unit. 'Communication' is understood merely in terms of the level of awareness that actors have of those factors.
3. What their effectiveness and relative weight is to other relevant factors within the unit. This includes the question of their persistence (or tenacity) over time and transformation if at all in the process of systematic decision-making.
4. The implications of the first three to social organisation generally. This needless to say would be largely inferential.

3: c: Evaluation and Conclusion

Let me summarise the implications of the approach suggested here as follows:

- i) I think it directs our attention to what I believe to be the progression of all property systems: that is that private ownership as a source of legal power is decreasing. This does not mean that public ownership is increasing; what is increasing is public administration (Renner 1949 op.cit.).

- ii) Economic activity must therefore be viewed as a compound of both central and decentralised planning. An adequate theory must seek to grapple with this inter-relationship.
- iii) Land use as a social process is at the tail end of many activities which may not immediately be related to land but which can be decisive. Whereas good theory must not seek to gather every possible influence it must capture those factors that are necessary and sufficient to explain the problems it is intended for.
- iv) Finally a note on policy. If the 'problems' of specific aspects of land use e.g. agriculture can be identified as problems of decision-making then the task of law is to help articulate the criteria for choice.

3: d: Research Hypotheses

In order to determine whether any of these relationships have occurred with respect to legal phenomena, we shall seek to verify the following sets of hypotheses:-

I: On the structural frame of decision-making

1. Despite changes in the system of landholding or the formal character of agrarian administration decision-making units in production will be structured primarily by access to the use of land and the 'task' environment in which these units operate; and only secondarily by 'title' to the land or the legal instruments that define the extent of decision-making power.
2. Decision-making units in produce marketing however, will be structured almost wholly by the legal framework of marketing arrangements; and only to a small extent by the household economy or the peculiar characteristics of the 'marketing' environment.

II: On the dynamics of decision-making

3. Where as is often the case decision-making units tend towards the maintenance of continuity of result, decisional factors will reflect a large amount of the policy framework and attitudes of past decision-making.
4. Consequently where there is no change either in the structural frame of, or the policy framework in which decisional factors operate they will continue to influence decisions in the light of these legacies.
5. Where the changes envisaged in hypothesis 4 occur, existing factors will assume functions which are radically different from those in relation to which they have developed while new factors will tend to reflect those changes both in content and function.
6. Decisional factors such as are described in Hypotheses 3-5 are of relevance only if they are communicated to actors in decisional situations. The extent to which any single decision is shaped by a particular factor is generally directly related to level of knowledge of an actor in respect of that factor.
7. The manner in which these factors are communicated and their goal orientation will be decisive in shaping the amount of knowledge an actor has, and his perception of those factors.
8. The framework of communication described in hypothesis 7 and the relationships that exist between actors in a single decision-making unit inter se and those in complementary units will determine the degree to which actors identify with or actively appeal to the content and purpose of any factor in a given decision-making situation.

9. If the relationships envisaged in hypothesis 8 are one a) of sympathetic contact this will increase positive identification with or appeals to the factors involved. b) of hostility or no contact at all identification will generally be negative and appeals to those factors virtually non-existent.
10. The total impact of a decision based on any factor, however, will depend primarily upon the extent to which such a decision facilitates or constrains existing patterns of socio-economic life and only secondarily upon the degree of political (ideological or simply administrative) commitment of actors to that factor.
11. Thus we expect that aspects of social life of a mainly instrumental character e.g. commercial action will be significantly influenced by new factors while those defining status relations will not be much changed.

Comments

Hypotheses 1-2 imply that legal phenomena will be relevant but this will vary in degree. The first hypothesis takes as its base the 'ecological' view of action (see F.W. Riggs op. cit fn. 56 below) and suggests that decision-makers do not look first to the law to determine the limits of their power but rather to what is or is not capable of implementation in the circumstances. The limitation to this perception is clarity and limited discretion in decision-making power. This is what the second hypothesis expresses.

Hypotheses 3-5 concern the socio-economic character and adaptability of norms. Their significance may be for example that legal institutions whose quantitative scope (i.e. number of persons or things affected by them) has been extended will tend to be perceived of and to influence decisions in much the same way as in their original context. Hypotheses 4 and 5 envisage two ways of changing the function of law, one is by changing its structural framework and the other by changing the ideological context in which it operates.

Hypotheses ~~6-7~~ concern the communication of norms. The one seeks to measure awareness of certain normative prescriptions and the other what it is that people are aware of and what aspects of it. The implication for peasant land use is likely to be that since legal communication (at least of statutory norms) is dominated by state agents, the manner of communication will tend to emphasise propaganda and sanctions rather than participation and diffusion. Hence many land use agents in decision-making situations will in general fail to distinguish legal from non-legal (e.g. political) information both at production and marketing.

Hypotheses 8-11 concern the relationship between law and socio-economic behaviour. No. 8 implies that actors will use law not because of its intrinsic merits but because it fits into a scheme of informal relationships. No. 9 implies that there identification is not always positive (i.e. compliance) it can also be negative (i.e. violation). Nos. 10-11 assess impact in terms of instrumentalism rather than commitment. Hence it implies that aggressive administration does not always produce results.

3.e: Research location and methodology.

There are two types of data that is necessary for this study. The first is archival and the second field. Archival data which has and already been collected was drawn from materials available at the Sterling Memorial Library at Yale, the Land Tenure Centre in Wisconsin, Rhodes House in Oxford, the Public Records Office and British Museum in London, and the Kenya National Archives in Nairobi. The purpose of this data is to explain the historical foundations and socio-economic character of the legal phenomena to be handled. This is in the process of being done. The materials will also be useful in filling in the current socio-economic and political context of peasant land use in Kenya.

The field data is being drawn from two adjacent divisions of South Nyanza and Kisii Districts. These are Central and Bosongo (Kuja) Divisions respectively. I have selected them for similarities in land use structure and farming types, geo-physical and ecological characteristics; and contrasts in culture, historical contact with land reform and agrarian administration processes, and population pressure on the land. The data will come from four registration sections (two from each district), that reflect those considerations. Three (the two in South Nyanza and one in Kisii) of these areas have already been covered.

The methodology of research has been essentially socio-anthropological. Specific techniques used have fallen roughly into the following categories.

- a) General surveys particularly to gather the nature of proprietary land rights (or access to use), the pattern of distribution of holdings and the extent of multi-ownership or user of land. This has been (or will be) adjusted where necessary by direct observation and perusal of available field records such as land registry files.
- b) Unstructured interviews. A large part of my interviews are intended to test perception and objective behaviour. As a search process was involved many were free interviews. Two sets of questionnaires (- Appendices) were used; one for land use agents and the other for state agents.
- c) Qualitative observation This involved attendance at such occasions at local markets, land control board and sub-district Agricultural Committee meetings and public barazas.

3: f: Summary of expected data

The available data has not been analysed yet but we expect to draw the following information from it:

a) Data on law and legal institutions

The extent of rights, obligations and discretions concerning the following:

- the land market i.e. powers and procedures concerning the acquisition and disposal of land: herein of Land Control Boards.
- the production process i.e. powers and procedures concerning the communication and implementation of standards about production both generally and in relation to specific crops
- the produce market i.e. powers and procedures concerning the structure and organisation of the produce market. I am here concerned mainly with the Maize and Produce Board, and Coffee Organisations (i.e. the Board and Co-operatives)
- the credit market i.e. the powers and procedures concerning the acquisition and repayment of loans. The concern here is mainly with the Agricultural Finance Corporation and Guaranteed Minimum Returns as provided in the Agriculture Act.

b) Proprietary Land Use Data

This data will be summarised largely from the questionnaire in Appendix 1 herein. The data will be arranged as follows:

i) Land registration and transactions

- Volume of registered land i.e. an inventory showing details of ownership manner of acquisition size of and number of parcels registered and number people actually using the land whether registered or not
- Transactions i.e. volume and distribution of sales and purchases supplemented with qualitative notes from proceedings of Central and Bosongo Land Control Control Boards for 1968-1973

ii) Agrarian finance and extension

- Distribution of loans i.e. from the AFC and other sources administered by it. This is shown against ownership of land, type of farming activity and situation of knowledge of the farmer.
- Extension - here I have relied essentially on available data. My interest here is to understand the relationship between loan administration and communication of legal and other skills to the farmer.

c) Data on land use administration

This has NOT been completed. It will involve an inventory of district-level litigation on land and produce; perception and decision-making processes of district-level administrators, parastatals, technical officers, and of national level bureaucrats particularly of Central Agricultural Institutions.

FOOTNOTES

1. The only comprehensive study that gives a glimpse of some of these issues is Ghai and McAuslan, Public Law and Political Change in Kenya (OUP, Nairobi 1970). See also G. Gertzel, The politics of Independent Kenya (EAPH; Nairobi, 1970) and H.W.O. Okoth-Ogendo, "The Politics of Constitutional Change in Kenya Since Independence 1963-1969", African Affairs (1972) vol.71, 9.
2. Instrumentalism has been most pronounced in the sphere of constitutional politics but it permeates the whole bureaucratic system of the state, see, Ghai and MacAuslan op.cit.
3. 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, Indirect Rule and the Search for Justice (OUP, Clarendon, 1972).
4. For a bibliography on the land tenure question see Daryll Forde's Ethnographic Survey of Africa (London I.A.I. 1946-68). For 'Civil' and 'criminal' Law debate see Rattray, Ashanti Law and Constitution (OUP Clarendon, 1929).
5. The confusion has been traced in Gluckman's Ideas in Barotse Jurisprudence (Manchester 1969) p.75 to Maine's Ancient Law (Murray, London, 1861) and Vinogradoff's Outlines of Historical Jurisprudence (OUP, London 1920).
6. Most of these early ethnographers were in fact employed by colonial governments precisely for this purpose. Perhaps the greatest moment 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 W. Allan, Gluckman and Ors' study of Land Holding and Land Usage among the Plateau Tonga (1945).
7. 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' of: Ghai and MacAuslan/Morris and Read op.cit.
8. As to what 'development' meant see Lord Listowel's article on 'The Modern Conception of Government in British Africa' Journal of African Administration (1949) Vol.1, 99.
9. For the agrarian policy background see J.A. Hellen's "Colonial administrative policies and agricultural patterns in tropical Africa" in T. Thomas and Whittington (eds) Environment and Land Use in Africa, (Methuen, London 1969), for general policy see Lord Hailey's An African Survey (OUP, London 1957).
10. K. Llewellyn and A. Hoebel (Oklahoma, Norman 1941). For the methodological effects of this work see Obed Hag Ali's Anglo-American Studies of Tribal Law: Concepts and Methods (Unpublished LL.M. Thesis, Queen's College, Belfast 1970).

11. See for example Bohannan's Justice and Judgement Among the Tiv (OUP, London, 1957), Gluckman, The Judicial Process Among the Bantse of Northern Rhodesia (Manchester 1955), and Fallers, Law Without Precedent (Chicago, 1965).
12. This led to a series of conferences on the 'future' of customary Law ultimately resulting into the restatement project of London University. For a summary of the arguments see Obed Hag Ali op.cit.
13. Thus law and 'development' programmes have flourished in African law schools. For a summary of the 'core' conception see D.M. Trubek's "Towards a Social Theory of Law" Yale Law Journal (1972) Vol.82, 1.
14. 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 - Speed Carroll, Nov. 30th 1972.
15. A summary of East African law writing quickly confirms this view. ~~It is not until the emergence of the Eastern Africa Law Review in 1968 that the literature began to touch on socio-economic bases of law.~~
16. The expression is Dias' see his Jurisprudence (Butterworths, London 3rd ed. 1970) at p.452.
17. See for example I.G. Shivji's 'Insurance Law in East Africa' Eastern Africa Law Review (1970) Vol.3.
18. E.G. K. Bentsi-Enchill's "Do African Systems of Land Tenure require a special terminology?" Journal of African Law (1965) vol.9, 114.
19. These biases are more pervasive. They seem to stem from three sources:
 - i) the conceptual background and training of the scholars - including the political economic context in which they have grown and to which they ascribe
 - ii) the prevailing intellectual concerns of scholars within the context in (ii) at the time they are writing. This helps to explain, for example 'cross-cultural comparative dimension in recent social science research in Africa.
 - iii) and perhaps to a lesser degree now than it was in the colonial era, the policy concerns of the administrative elite in the area of research.
20. See Lugard's Dual Mandate in British Tropical Africa (London 1926) and the introduction to Rattray's analysis of Ashanti law op.cit.
21. Pospisil has argued that this is not necessarily important. The actors themselves may not be aware of the universe the researcher is describing. See his Anthropology of Law (Harper, New York 1971).

22. The powers are generally of three types:
- i) General and supervisory which are basically political in function. Such powers are exercised by Provincial Administrators
 - ii) Advisory, which are basically techno-managerial in function. Such are exercised by land development authorities e.g. Agricultural Committees
 - iii) Executive which are basically commercial and regulatory in function. Such are exercised by Commodity Boards and credit institutions e.g. AFC or Maize and Produce Board.
23. See Rosberg and Nottigham, The Myth of Mau Mau (Prager, New York 1966), and M.P.K. Sorrensen, Land Reform in Kikuyu Country (OUP, Nairobi 1967).
24. P.M. Raup's 'Some interrelationships between public administration and agricultural development' in Uphoff and Ilchman (eds), The Political Economy of Development (California, 1973) p.439:ff.
25. For a more sophisticated concept of development administration see F.W. Riggs, Administration in Developing Countries (Houghton Mifflin, Boston 1964), and the collection by Hayden, Jackson and Okumu (eds) Development Administration: The Kenya Experience, (OUP, Nairobi 1970)
26. 'Legal' theories here means merely lawyers views of their discipline whereas 'social' theories would cover the field of sociology of law and other political economic analyses of legal phenomena.
27. For a short summary of what legal positivism is, see Hart, The Concept of Law (OUP Clarendon 1962) at p.253
28. Pound's plea then was for a 'sociological' jurisprudence which would place law in the political and socio-economic context in which it operates.
29. The classic analysis of this is Renner's The Institutions of Private Law and their Social Functions (Routledge and Kegan Paul, London 1949). The Land Ordinance of Tanzania has also survived without changes in its substratum although between 1923, the date of its promulgation and now there have been very fundamental changes in ideology in Tanzania.
30. See Fallers, op.cit. and Lewellyn and Hoebel op.cit. for example.
31. For example, R.L. Abel's "Toward A Comparative Social Theory of the Dispute Process", Working Paper No.13, Yale Programme in Law and Modernization 1972.
32. Marx's approach should perhaps be re-read in the light of Engel's re-interpretation of the relationship between the base and superstructure. Engel's letter to Sparkenburg in 1894 emphasises the fact that the Economic position is not 'the cause and alone active' while everything else remain 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.
33. i.e. rights in the land of another.
34. See Megarry's Manual of the Law of Real Property (Stevens and Sons, London 1969), also D.R. Denman The Origins of Ownership (Allen and Unwin London 1958).

35. Meggery and Wade: The Law of Real Property (3rd ed. 1966) and A.W.B. Simpson: An introduction to the History of Land Law. (OUP, Clarendon 1961).
36. This fiction lingers in English property theory despite the fact that the Administration of Estates Act 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 intestate owner," see Salmond on Jurisprudence (7th ed. by Fitzgerald, 1966) at p. 413 ff.
37. For the history see M.P.K. Sorensen: Land Policy, Legislation and Settlement in the East African Protectorate 1895-1915 (D. Phil. Thesis, Oxford 1962) also R.A. Remole: White Settlers or the foundations of Agricultural Settlement in Kenya (Ph.D. Thesis, Harvard, 1959).
38. See the opinions expressed in the Report of Stewarts' Land Committee 1905. This committee was chaired by Lord Delamare.
39. See the general tenor of the 1897 Land Regulations as applied to Kenya, British Parliamentary Papers Vol.C-8683 Dec. 1897. Also Land Titles Ordinance 1908, now Cap.282 Laws of Kenya.
40. Re Southern Rhodesia (1919) Appeal Cases at p.233.
41. That is in contradistinction to 'individual' rights. cf: Privy Council Judgement in Sakariyawo Osbodi V. Moraimo Dakola and Ors (1930) Appeal Cases at p.667 in which chiefs were said to have 'reversionary' rights in community land.
- 42.3 See the Maasai 'Treaties' of 1904 and 1911. For a discussion of some of these issues see Seaton and Maliti, Tanzania Treaty Practice (OUP Nairobi, 1973).
44. Glushman 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" op.cit. p.86. C.M.M White has added that 'the conception of tribal area and unit occupying territory' (Emphasis mine should not be taken to mean that any person who comes within that territory acquired land by allocation see "Terminological Confusion in African Land Tenure" Journal of African Administration (1958) Vol.10,124-130. See also R. Pratt and D.A. Low: Uganda and British Overrule (OUP, London 1960), 49; and J.O. Ibik, writer of the Malawi section of the Restatement Project (London 1971),
45. English property theorists would hotly dispute this view. For further clarification of the 'jurisdictional' as opposed to 'ownership' aspects of land see V.C. Uchendu, 'The Conflict between National land policies and local sovereignty over land in Tropical Africa', Leiden Conference on Land Use in Africa, 1972.
46. The Wealth of Nations (1937 ed.), 392. See also J.S. Mill's advocacy of family farming in his Principles of Political Economy (Longman and Green, London 1926).
47. See Doreen Warriner's comments in Land reform in Principle and Practice (OUP, Clarendon, 1969).

48. See the view reported in B.K. Meek, Land Law and Custom in the Colonies (OUP, London 1949), 84. For Earlier feuds with the Colonial administration see Remole's thesis op.cit. Chapter III-V.

49. 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 op.cit. also R.D. Wolff Economic Aspects of British Colonialism in Kenya 1895-1930 (Ph.D. Yale 1969), 78; and Roger van Zwanenberg's The Agricultural History of Kenya (EAPH, Nairobi 1972), 8,9.

50. For a fuller treatment of the traditional economic argument about property rights and decision-making see H. Demsetz 'Towards a theory of property rights' American Economic Review (1967) Vol.57, also his 'Some economics of property rights' Journal of Land and Economics (1968) Oct. Also Omotupade E.G. Johnson, 'Economic Analysis, the legal framework and land tenure systems', Journal of Land and Economics (1973) Oct.

51. Glukman op.cit., 78 ff., Bohannan, 'Land', 'Tenure' and Land-tenure' in D. Diebnyck (ed) African Agrarian systems (OUP, London 1963).

52. Roger van Zwanenberg's Agricultural History of Kenya, (EAPH) Nairobi 1972.

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

54. For an overview of decision-making theories and the controversy that surrounds them see the collections by C.J. Friedrich (ed) Rational Decision (Atherton N.Y. 1964), F.G. Castles et al (eds) Decisions, Organisations and Society (Open University, 1971). Also H.A. Simon's 'Theories of Decision-making in Economics and behavioural science' American Economic Review, (1959) Vol. 49, 3, 253-83; and R.C. Snyder (ed) Foreign Policy Decision-making (Princeton, 1964).

55. For a discussion of rationality in relation to law see Dietz 'The limited rationality of law in Friedrich op.cit., 67.

56. F.W. Riggs suggested as early as 1961 that a purely 'bureaucratic' analysis of administration in developing countries will not do. The 'professional' bureaucrat whose decisions are shaped entirely by institutional facts does not exist. See his Ecology of Public Administration (New Delhi, 1961).

57. For explanation of an authorisation as opposed to a permission see Hans Kelsen, The Pure Theory of Law (California 1964).

58. For considerably/sophisticated development of these indices see Firey: Man, Mind and Land (1961) and the introduction to Part I of Uphoff and Ilchman op.cit. The first book deals with problems of constructing an optimum theory of resource management, and the second with those of reconstructing a theory of choice based on the ancient discipline 'political economy'.

59. For an analysis of these notions see R.M. Dworkin in Summers Essays in Legal Philosophy (California 1968) p. 25ff.

60. For a classic analysis of relativity of property rights see V. Kruse: The Right to Property (OUP, London 1939). It should be added that property rights may also have physical relativity. This means that there are societies in which legal phenomena do not correspond to any fixed place on a cadastral map. Bohannan's analysis of Tiv Land use op. cit. seems to apply to nomadic people and possibly shifting cultivators as well, i.e. it is possible to conceive of a right (meaning some form of access) to live off the land without attaching it to a particular parcel of land.

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