THE CONCEPT OF LEGAL IMPOSITION

This chapter is an attempt to explain the historical processes by which English property law was and continues to be imposed upon indigenous society in Kenya, and to analyze the nature and impact of that law on the structure, content, and efficacy of indigenous social and political institutions. But before this is done, it might be useful to attempt a definition of the phenomenon of "legal imposition" and to explain why the imposition of law is such a rampant practice in the Third World, particularly in Africa. This is important because, in the context of post-colonial societies, the use of that phrase might imply concern merely with the normative and institutional legacies of colonialism. The phenomenon of imposition, in my view, is much wider. It encompasses any situation where fundamental change is contemplated in society through the medium of laws or legal institutions whose content is clearly contrary to the perceived and accepted normative order of those whose behavior it seeks to regulate or change. Imposition thus implies, first, an attempt to induce fundamental change; second, the application of norms that are external to society; and third, an absence of democratic consensus from that society. Although a situation of this kind often
involves the use of foreign models, this is not essential. The model can be internal. Thus critics of "villetization" in Tanzania might regard its legal framework as an imposition, even though the model is substantially drawn from the practice of ajamad in African society (Nyerere 1968:337).

An explanation of why legal imposition is a rampant practice in Africa and how it occurs must be both epistemological and ideological in nature. From an epistemological point of view the process of imposition may be seen as an essentially intellectual exercise. Twining has explained this in terms of the psychological urge to reproduce one's own kind (1966:115). This can be put in much simpler terms—namely, that in concrete lawmaking situations, draftsmen, legislators, and administrators always resort to models that have been transmitted to them through the educational process. This is exemplified by the fact that although there are some signs of increasing radical rhetoric within university and governmental institutions in Africa, the technical vocabulary and concepts used by African scholars to extract and communicate empirical data, and the actual content of legislation being churned out by many African legislatures remain largely conservative. Indeed, because the basic training of most teachers, students, and policymakers in Africa remains Anglo-American and European, western concepts, ideas, and models will, it appears, continue to dominate the legislative processes of African countries for a long time.

The process of legal imposition is also ideological in the sense that it is a function of the type of political economic system the state elites identify with. This explanation can be taken at two levels: the macro and the micro. At the macro-level continuous imposition of law can be seen as an expression of dependency relations between the Third World (the periphery) and industrialized nations (the metropolitan centers). In other words, the impetus for imposition of law can be seen at this level as being generated from without rather than arising from within. Elsewhere we have discussed some of the intellectual and political economic factors that make this sort of dependency possible (Okoth-Ogendo 1975:37). It is sufficient to say that this is the classic explanation for the persistence of neo-colonial institutions in most Third World countries.

At the micro-level the imposition of law in Africa can be seen as an overt act of commitment by policymakers to particular values. These values (or norms) require the development of an institutional framework within which they can be expressed. It becomes logical for policymakers to commit themselves to imposing this required framework either through direct transplants from societies with similar ideologies or, as is more usual in post-colonial states, by making incremental adjustments to the existing structures to bring them gradually into line with similar institutions in the ex-metropole. The result of such impositions—whether the change is radical or gradual—is to restructure the flow of natural resources in a manner that increases the inequality of the distribution of benefits in the society. In the process, the elite (who include these policymakers) adopt a system of values that justifies their favorable position. They are, understandably, committed to the survival of this system.

THE PROCESS OF LEGAL IMPOSITION IN KENYA

An historical account of the processes through which English property law was imposed on indigenous society in Kenya under colonialism and a brief description of contemporary practice clearly demonstrate the centrality of epistemological and ideological factors in those processes. The history may be described in three phases.

THE FIRST PHASE (1897-1915)

The early phase was an extremely intriguing one, if only because the first colonial policymakers and administrators did not start by imposing a new code of property law on nineteenth-century Kenyan society. Although the 1882 Indian Transfer of Property Act (TPA) had been extended to the new imperial possession in the late 1890s, and a set of Land Regulations (LR) had also been promulgated, these as yet had no relevance to Africans and were of only marginal practical significance to the small body of Asians and Europeans that owed allegiance to the British Crown. They were irrelevant to Africans for two main reasons. First, there was no basis in imperial law for the extension of these statutes to persons not yet considered British subjects. As early as 1833 the law officers of the British Crown had argued that "protectors," of which Kenya was then one, were nonetheless foreign countries and as such their residents could not be considered British subjects. Second, as a matter of practice colonial administrators (including the courts) refused to organize African property relations under a system that they regarded as too advanced for "savage" societies.

That these two statutes were only marginally useful to Asians and Europeans resulted from the fact that both fell short of institutionalizing the kind of property structure under which these communities understood and expected to organize production. The LR provided only for a system of occupation licenses, whereas the TPA was concerned largely with procedural aspects of transferring property rights and the substantive rights and obligations of transferors and transfers.  

4 Ajamad is a Swahili word which means "familyhood." The concept is used in Tanzania to refer to the principles governing collective living and management of resources by villages in the rural areas.


7 In an opinion to the Crown on the status of the Indian Islands.

8 Francis Hall, an early settler, denounced the Land Regulations as the most idiotic land law that ever was seen!
transferees. Thus the nature of tenure and in particular the precise quantum of rights an individual could acquire over land in Kenya during this phase remained rather uncertain. A great deal of that uncertainty had to do with a series of unresolved jurisprudential and policy issues concerning the effect of protectorate status on control and use of land, and the extent to which indigenous property institutions could be used as a basis for imperial exploitation in the same way as had been the case in the penetration of West Africa. These issues were, first, that as late as 1897 the imperial political view was still that declaration of protectorate status conferred no rights to deal with land; second, that indigenous social institutions were not considered sufficiently developed to enable European settlers to acquire permanent land rights by private arrangements with Africans; and third, that there was as yet no clear indication of the value of the new acquisition to the imperial economy. In other words, two preliminary tasks were considered necessary before London could permit institutional change during this phase, namely, a re-evaluation of imperial legal theory and a persuasive demonstration of the viability of the new possessions.

These were fulfilled in three main ways. First, the law officers of the Crown handed down an opinion in 1899 that imperial law recognized only “protecorates with a settled form of government,” which, they argued, Kenya did not have. Second, it was argued, with the support of available anthropological “data,” that it was fallacious to assume that Africans had any proprietary institutions, or such institutions as could form a basis for the production of those raw materials that the imperial economy needed. Third, and more decisively perhaps, it was strongly argued that not only did the colony possess limitless potential for the production of raw materials such as cotton, rubber, and sisal fiber, which the British textile industries badly needed (Wolf 1974), but the production of these raw materials was possible only under a system of tenure that would give to the producers maximum freedom of control.

The significance of the debates in this first phase is the fact that although the pressures for the imposition of English proprietary institutions of Kenyan society were clearly shaped by the type of production system the imperial government and the settlers wanted to promote, the actual manner in which solutions were arrived at was political and ideological in form. It is clear from various pronouncements that early colonial administrators were arguing for the only property system they understood, as were anthropologists, whose data and conclusions were the result of little more than attempts to examine African land relations from the conceptual categories of western property theory. Thus the stage was set for the imposition of alien laws and institutions that were to have fundamental consequences for land relations in African society (Obed 1970; Ogot-Ogendo 1975).

The first of these laws was the East African (Lands) Order-in-Council, which was promulgated in 1901 to give effect to the opinion of the law officers cited above by vesting all land in the protectorate in the commissioner, in trust for Her Majesty. The second was the Crown Lands Ordinance of 1902, promulgated by the commissioner under the 1901 Order-in-Council, under which he gave himself the power to make outright grants of land or leases for 99 years for the purposes of European settlement. What were the consequences of this act? It was to create a framework that made it possible for European settlers to make many important decisions about the destiny of the indigenous peoples within the colony. For example, the 1902 Ordinance enabled the resident commissioners (later governors) to convert the prevailing anthropological view that Africans did not own land into an important juridical tool, for they were now able to operate on the essentially feudal assumption that effective political control over people living in a defined territory per se implied ownership of the physical solum. It was simple, then, to consider the entire concept of the native title in favor of whomever it wished. This view was carried to extremes when in 1913 a third statute, a new Crown Lands Ordinance, declared inter alia that “Crown lands”

shall mean all public lands in the protectorate which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty’s protectorate . . . and shall include all lands occupied by the native tribes of the protectorate and all lands reserved for the use of the members of any native tribe [§5, 5a, and 56 of Ordinance No. 12/1913].

The 1915 Ordinance was a significant victory for protectorate administrators in several ways. First, the desire for a property system tailored to the free enterprise system of economy had been achieved. This was done by giving the commissioner the power to grant 99-year leases at nominal rents to European settlers. Second, the last impediment to freedom of settlement had been removed by converting Africans to what the courts described as “tenants at will” of the Crown. Third, the Ordinance gave the governor power to create reserves for the use and occupation of Africans: a mechanism that was seen not merely as an administrative necessity but also as a means of guaranteeing security for the settlers. An important effect of these statutes was that from the perspective of colonial legal theory indigenous proprietary systems were not only being phased out.

6 6 Contained in Foreign Office Memoranda No. 7586.
6 6 Anthropological fallacies on the nature of African land tenure institutions (or the “abundance” of them) abound in the literature. See, for example, the discussion in Ogot-Ogendo 1975.
6 6 This derives from the view in capitalist political economy that individual ownership per se will generate industry and enterprise.
6 6 S.R.O. 561 and Ordinance No. 2/1902, respectively.
6 6 On this assumption was used to partition Uganda see Prat and Loe 1990.
6 6 As the Colonial Office remained adamant on the question of freeholds, the protectorate authorities and the settlers settled on perpetual leases.
6 6 See, for example, Laidlaw and Munro v. Mungu and Indigenous Others, and the Attorney-General (1922-1923) Kenya Law Reports, 102.
but were also being replaced by a normative order that was both qualitatively and quantitatively alien to indigenous social organization. Because Africans could not acquire rights under this new order, the juridical status of their production systems within the colonial legal system was rendered uncertain and extremely anomalous.

THE SECOND PHASE (1915–1939)

That uncertainty and anomaly led to frustration and unrest in the African areas. As a result a new phase of legislative development occurred between 1915 and 1939, the primary objective of which was to impose an institutional framework that, it was hoped, would stabilize African property relations without conceding any of the gains that the settlers had already made. The main thrust of these developments was the elevation of the juridical status of areas settled by Africans, first by gazetting them in 1926 (Government Notice 354/1926), second by bringing them under a statutory system of administration in 1930, and third by taking them out of the juridical clutches of settlerism altogether in 1938.

The gazetting involved a declaration of some 24 “reserves” within which Africans could reside. These were drawn on ethnic lines and were located in areas that were either unsuitable for European settlement or had not yet been cultivated. The 1930 Ordinance advanced the juridical position of these reserves no further than laying down the terms upon which the Crown held “native lands.” Such land remained Crown land in law and was therefore subject to expropriation at any time. The Ordinance set up a board consisting almost entirely of colonial administrators and settlers to manage and control the reserves and in particular to advise the governor on the exercise of his power to lease land within the reserves to non-natives. In practice the board’s function went beyond this to include the maintenance of public order and the facilitation of recruitment and supervision of labor.

Developments up to 1930, however, did not really solve the problem of insecurity within the reserves. This led an important land commission, set up in 1930, to conclude that these reserves, together with any land to which Africans might be “entitled” should be excised from “Crown” lands altogether and be vested in a trust board to hold and administer them for the benefit of the people resident therein. Legislation along these lines was passed in 1938 and was subsequently guaranteed by a Kenya (Native Areas) Order-in-Council in 1939. The 1938 legislation provided that

9. THE IMPOSITION OF PROPERTY LAW IN KENYA

in respect of the occupation, use, control, inheritance, succession and disposal of any native land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing native customary law or any subsequent modifications thereof . . . (S.68).

Although this legislation was hailed as a milestone in the protection of African land rights, the structure it created was not only alien but also paternalistic, for it was still based on the principle that Africans were incapable of holding land directly. They could do so only through a trusteeship until such time as their concept of property had developed to something equivalent to ownership as understood in western property systems. Thus the radical (original) title to “native lands” could not be vested in the natives themselves.

The general structure of imposed law and legal institutions as of 1939 therefore consisted of the following elements: the territorial basis of land law was now firmly grounded in the theory that radical title to land was vested in the imperial sovereign through his representatives in the colony. This was the case not only with “Crown land,” but also with land reserved for occupation and use by indigenous (African) people. Within this juridical framework, immigrant communities, mainly Europeans and Indians, could acquire rights equivalent to English freeholds and leases, whereas Africans, inter se, continued to be governed by customary law. However, the 1938 legislation, which provided for the application of customary law, made it clear that no power of disposition could be exercised under that law (S.68).

THE THIRD PHASE (1939–1963)

It can be said that, from a structural point of view, the 1939 Order-in-Council completed the process of imposition of English property laws and institutions which had begun in 1897. Indeed, this structural arrangement remains to this day. Thus legislative developments after 1939 were simply responses to problems arising from the continuous but irregular and unsystematic interaction between the African and European sectors of the economy and political developments within the African areas. At the prompting of agronomists, administrators began to appreciate for the first time that the economic condition in the reserves was an important factor in the continued unrest in the African areas (Okoth-Ogendo 1976). For example, years of neglect by agricultural and social development officers assigned to these areas, coupled with a rapid reduction in the availability of cultivable land, had led to a stagnation in the development of the technology of land use. By the mid-1940s population pressure was already acute in several parts of the country, especially in central and western Kenya (Van Zwanenberg 1972).

Initial attempts to deal with this situation were largely administrative. At first it was thought that population growth was the problem and therefore a solution could be found in the reserves. When this failed, administrators thought that the problem was inferior land and inadequate technology and that therefore soil

12 Through the Native Lands Trust Ordinance No. 9/1930.
13 Through the Native Lands Trust Ordinance No. 28/1938.
14 Provision was made in S.3 of the Ordinance for an African member. There is no record that any was appointed.
reconditioning, strip-trellising, and destocking could improve things (Okoth-Ogendo 1976:152). Finally, however, agronomists came up with a diagnosis that had tremendous consequences for property relations and the organization of production within the reserves. They argued that the basic problem was neither overpopulation nor the need for improved technology but the system of African land tenure itself. Certain inherent characteristics of the indigenous land system, they claimed, were obstacles to agricultural development. These characteristics were, first, the communal nature of control—the cause of much uncertainty in decision making; second, the diffuseness of rights of use, which often led to incessant disputes; and third, the system’s inheritance rules, which often led to fragmentation of holdings and sub-economic land units within very short periods. If these could be removed, the argument continued, a green revolution would occur in the African areas. The solution they offered was that the African tenure system should be overhauled and replaced by a tenure system similar to that obtaining in the settlers’ areas. This was to be done through a three-tier process involving the adjudication of claims, the consolidation of fragmented holdings, and the registration of adjudicated claims in a state-maintained register.

Administrators feared that such a drastic program of tenure reform would generate political problems far in excess of the benefits that the agronomists predicted. This hesitancy gave way, however, to practical considerations when in 1952 African political unrest exploded into a full-scale revolt by the Mau Mau, precisely on the issue of land scarcity and economic stagnation in the African areas (Roweberg and Nottingham 1966). The Mau Mau revolt completely changed the raison d’etre of the reforms that agronomists had proposed. Land policy became essentially a political tool: a means of creating a contented peasantry that would be secure in the ownership of its land and willing to defend it against so-called “political mavericks hankering for the redistribution of land” (see discussion in Sorgenson 1967).” Swynnerton (1954), then Deputy Director of Agriculture, devised a plan in which his main argument was that redistribution of land was not a precondition of the green revolution in the African areas. What was needed, he argued, was to convert land in these areas into individually owned units under the freehold system and then intensify farming within them. The role of the state in this process would be similar to that in settlers areas, namely to provide the infrastructure, technical advice, and credit.

The ideological function of Swynnerton’s proposals was evident. In a historical context they were an example of political expedience and as such simply one more attempt to provide for the political and economic security of the settlers. In order to implement them, however, it was necessary, first, to adjust the existing structure of agricultural administration to the realities of the political situation and, second, to apprise African peasants of the peculiar attributes of individual tenure. The former task was carried out in 1953 through a comprehen-


18 The Working Party was asked to enquire into the possibility of a modified form of the freehold system could be devised specifically for the African areas.


20 Following the comprehensive changes in English real property law as a result of the Law of Property Act, 1925 (15 & 16 Geo.5:20).
munities, could now transfer their properties from the regime of the Indian Transfer of Property Act to the new Act.

Thus by 1963 the imposition of English property law had been successfully incorporated into the official normative structure. Although the domain of customary law had not been completely superseded, the policy now was progressively to phase out indigenous practices through the administration of the Registered Land Act. The intention was (and remains) to ensure that the Registered Land Act would eventually be the only substantive property law for all land in Kenya.

THE CONSEQUENCES OF LEGAL IMPOSITION

It is argued above that the imposition of English property law on indigenous society in Kenya during the colonial period was not a haphazard process. It had an epistemological basis in Western property jurisprudence and was clearly ideological in function. For the European settlers, an English model of property relations was fundamental to security and the viability of laissez-faire capitalism, a system of production relations that has been consolidated by the post-colonial state. The extension of this proprietary model to African land relations has assumed a much greater significance, for in this context imposition cannot be seen simply as an exercise in the transformation of the technical description of title or of the structure of agriculture for its own sake. It must be seen as part of an attempt to restructure society as a whole. Let us examine some aspects of the impact of these new institutions and norms on the indigenous social order.

THE INSTITUTIONAL CONSEQUENCES OF IMPOSITION

There is evidence from research into African land relations which indicates a direct correspondence between gradations of social status and access to land (Gluckman 1969). Therefore, in describing indigenous tenure systems, a distinction must be drawn between access to land, which was open to everybody on account of membership of a lineage or some wider segment of society, and control of land use, which was vested only in the political authority of that segment. But neither right of access nor the power of control was to be equated with the ownership of the physical solus under this arrangement. The right of access, on the one hand, remained a multiple phenomenon that varied in nature and content with the kind of land-use activity in which the individual or the community was involved. Control, on the other hand, was normally exercised by the common elder of the lineage or a representative chosen on the basis of genealogy. Such an elder allocated cultivation rights and controlled the type and extent of land use. Where land use required more expansive access rights—as, for example, in grazing—allocation and control would normally be exercised by a council of common elders—for instance, the Mbari elders among the Gikuyu, the Jotung Gsng' of the Luo, and the Kakeg elders of the Nandi. This hierarchy also operated as an appellate system for the processing of all disputes, whether these involved land or not.

The imposition of English property law and institutions had important consequences for the stability of the situation described above. The introduction of reserves administered by a board of trustees dominated by colonial officers, in particular, had the most drastic impact on African proprietary institutions and norms. In the first instance the boundaries of the reserves were such that they excluded not only non-African communities but other African communities as well. That is, after 1939 non-Africans were not permitted to obtain permanent land rights in any part of the reserves, and no African was permitted to reside in any reserve other than that to which his ethnic group was specifically assigned. Thus the idea of the territorial fixity of ethnic jurisdiction became an attribute of land tenure and land relations among African communities in Kenya. The main impact of these inflexible rules is that they disturbed the equilibrium between patterns of land use and availability of land by making it impossible to acquire permanent rights of access elsewhere. Read in the light of the fact that, despite a steady rise in population growth, the technology of production remained constant throughout the colonial period, this disequilibrium also explains why land deterioration was so endemic in the African areas, particularly in the late 1930s and throughout the 1940s. Indigenous production systems could no longer absorb the effects of changing man–land ratios, either through expansion of ethnic territory or through intensive agriculture.

In the second instance, the reserve system, compounded by population growth, exacerbated competition for scarce land resources within and among lineages, clans, and even families. This led to increased litigation, particularly in those areas where land shortages were most acute. This was the case, for example, in western and central Kenya. Indigenous tenure practices adapted to this situation, first, by evolving new techniques for the identification and adjudication of disputes with greater accuracy and without much damage to group solidarity, and, second, by adjusting the control structure of agricultural land use in such a way as to enable family heads rather than clan elders to exercise greater sovereignty over cultivated land. This, however, was done in such a manner as not to disrupt rights of public grazing across family, clan, and lineages of boundaries. Thus, although the actual amount of land reserved for public grazing continued to diminish as more and more of it was brought under cultivation, as soon as the harvest was gathered these areas reverted to public grazing until the next season.

In areas such as central Kenya and Kisi, where permanent cash crops had been established, however, there was little room for this kind of overlap. Not only was multiple land use even on a rotational basis difficult in these areas, but official government policy in regard to the development of these crops in the African areas was clearly against communal control. Consequently, the effect of bringing land under cultivation was to create a situation of family control very much analogous to individual ownership.

These developments weakened indigenous authority in several ways. First,
they undercut its structural base by eliminating the control functions of the elders in matters of land use. By the same token, the lineage system ceased to be of much relevance to land use even though the actual acquisition of access rights continued to be influenced by it. These changes paved the way for the emergence of exclusive land units based either on the family or on individual rights. This in turn contributed directly to land fragmentation and further litigation over ancestral lands. Second, the economic base of indigenous authority was undermined, allowing the introduction of new land-use patterns, the most significant of which was the development of permanent cash crops on exclusive holdings. Thus it was no longer possible within the context of indigenous institutions to regulate economic activity, even in the area of food production.21

Indeed, throughout the colony administrative officers reported a rapid breakdown of social institutions. The fear was that if allowed to spread unchecked this might be the source of political problems in the future. For example, the very highly developed Gikuyu system of landholding among the Gikuyu was said to be giving way to nucleated institutions of land control (Humphrey, Lambert, and Wynn Harris, 1945; Kenyatta 1953). Similar developments were reported among the Abaluhya peoples (Humphrey 1947). All these were areas where labor demands of the colonial economy had had their most destructive impact and where therefore the productive forces upon which these institutions were founded were most severely disrupted.

It seems reasonable to conclude, therefore, that although lineage and clan structures as such had not disappeared, nor their relevance to the definition and supervision of the fulfillment of purely sociocultural obligations been eliminated, the role of elders in land-use administration had been substantially weakened and in some cases superseded by more nucleated forms. The extent of institutional change varied from one part of the country to another. For example, disruption was least evident among the pastoral nomads of northern Kenya and greatest among the highland agriculturalists. The point to stress is that these changes so altered the stability of the indigenous social order that its institutions could no longer be used as a basis for the joint management of economic activity within the reserves.22

THE NORMATIVE CONSEQUENCES OF IMPOSITION

The imposition of English property law and institutions also weakened the stability of the indigenous society. In analyzing this effect, however, a distinction ought to be made between the general impact of colonialism on the indigenous normative order and the specific consequences of the imposition resulting from the tenure reform program already mentioned. Most of the normative consequences stemming from the former were essentially chain reactions from the institutional changes discussed in the previous section, whereas in the latter case the consequences were more specific. Indeed, the effects of tenure reform are likely to be felt for a long time to come.

The Normative Impact of Colonialism

As a system of production relations qualitatively different from indigenous forms, colonialism was, ipso facto, expected to alter the normative content of indigenous proprietary institutions. The main instruments of insurgency in this regard were the colonial courts and the "native" administration personnel. Even though throughout the colonial period the substantive law of the reserves remained whatever customary law was applicable to the area in which any land was situated, colonial courts were not slow to inject key notions of English property law into the former system. The courts were quite clear that the legal system gave them the freedom to temper customary law with English standards of justice. As one colonial judge in a suit involving the enforcement of an unsatisfied judgment in customary law said:

I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things as the institution of slavery [Kishu vs. Kiruna (1950) 1 Tanganyika Law Reports (Reprint) 463 per Wilson J].

In the area of property law this freedom was used extensively to mold the evolution of customary law toward a regime that would lead to the concentration of all attributes of ownership of land in the hands of fewer and fewer individuals. Thus the courts injected into customary law such radical concepts as prescription, limitation, and even the power of outright disposition.23 The first two of these concepts, which relate to the acquisition of rights over land by virtue of long and undisturbed possession, remain a storm center in African property jurisprudence even to this day (Katto 1965).

The role of administrators in the transformation of substantive law was especially evident after 1930, when the Native Tribunal Ordinance (No. 39 of 1930) formalized on a dualistic basis the form of justice that had existed in practice in the African areas since 1897. This arrangement enabled administrators to align the development of customary law not only with their own values but also with the political imperatives of the colonial state (Ghai and McCausland 1970).

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21 In an unpublished work done at the Institute of Development Studies, University of Sussex by Dr. A.O. Pala, it is reported that there were periodic shortages and severe famines in 1967-1968, 1915-1919, 1909, 1935, and 1942.
22 In a recent study of the sugar industry in Nyasaland we found that failure to take these changes into account has partly contributed to the disintegration of "block" sugar farms in the Chilawala area. These blocks were planned on the assumption that clan elders still had authority over land use. See Okoth-Ogendo 1977.

23 The Court of Review Reports are replete with decisions of this kind. The Court of Review (now the High Court) was the highest appellate court in matters of African law.
The method most often used was the issuance of "clarifications" and "directives" on matters of customary law to native tribunals, the notion being to ensure uniformity in the development of customary law. Later, the District Law Panels set up in 1948 were invested with the responsibility of "guiding the development of customary laws and making recommendations for changes therein." Commenting on the work of the panels in Central Province, Morris and Read have observed that they sometimes played a key role in transforming customary law in a fundamental manner, filling a vital gap in political machinery left by the removal of what traditional organs of legislative action had once existed [1972:203].

These subtle but deliberate changes were quite consistent with the so-called "civilizing" mission of colonialism. As a juridical fact, this mission was installed in the colonial legal process through the doctrine of repugnancy, which declared that indigenous law was applicable only so far as it was "not repugnant to justice and morality or inconsistent with any written law."

The Normative Impact of Tenure Reform

Thus, by the time comprehensive tenure reform began in earnest in the mid-1950s, a situation had been reached in the African areas in which not only were indigenous proprietary structures already weakened by the colonial system, but substantial infiltration of English property concepts had in fact occurred in the customary laws of many African communities. This was sometimes used by administrators to silence critics of tenure reform, the argument being that the reform was simply an attempt to implement what the Africans themselves had already come to accept. The actual position was, and still is, that the content of indigenous property law remained rather fluid and was beset by many internal conflicts. As land resources continued to decrease, traditional attachment to the land often grew stronger, even though in most cases the social process could not adequately handle disputes arising from competing claims. Tenure reform was, therefore, a very radical departure from indigenous property relations, despite the fundamental changes described above. In any case, after independence in 1963, reform of African tenure had become a government priority and therefore whether or not a particular society had adopted individual tenure was no longer a relevant consideration. Since I have examined elsewhere the contribution of tenure reform to agricultural production (Okoth-Ogendo 1978), I shall concentrate here on its impact on the social and political organization of the peasantry.

If we are to appreciate fully some of the social conflicts that have arisen as a result of tenure reform, it is necessary to state the judicial view about the legal effect of registration. There are two interpretations of the effect of registration.

9. The Imposition of Property Law in Kenya

The majority view is that registration under the Registered Land Act confers upon the registered proprietor all the attributes of ownership, free from all extraneous obligations not noted in the register. There is a long line of cases dating from 1964 in which the majority of members of the High Court have argued that registration extinguishes all customary claims other than those arising from succession and inheritance. These latter claims, as noted above, continue to be governed by rules of customary law. A minority of the members of the High Court Bench, however, now argue that there is nothing in the law to prevent registered proprietors from being held trustees of those who would be entitled to interests under customary law. Their view is that trusteeship of land "is inherent" in customary law—a duty that registration per se should not be allowed to extinguish. They also point out that unless the courts take this stance, many injustices are likely to be perpetrated through the medium of the law.

There is much to commend this minority view. A survey of peasant attitudes toward the land and their perception of what registration means indicates that the majority of the High Court Bench is clearly out of touch with the realities of the socioeconomic environment in which peasant communities operate. The majority of the peasants in Kenya have not fully accepted the final and divisive effects of registration. Apart from the fact that registration has expanded economic opportunities for some of them in certain parts of the country—for example, by making loans and better extension advice more accessible—most peasants still believe that the land is a collective or family asset and therefore to be used with due consideration for the needs of future generations. Therefore, subdivision according to customary rules of succession continues unchanged despite statutory restrictions on the maximum number of people who can legally own such land (Cap. 3000, SS. 101-104). Therefore, in practice, registration has simply increased the use of land without radically altering the heterogeneous character of tenure. In short, as far as most peasants are concerned, land rights remain indivisible rather than absolute values, and should be shared among all members of the family.

A study of family or lineage members occupying land registered in the names of other relatives is particularly illuminating. In a survey conducted in 1974-1975 in Kisiizi and South Nyanza districts over 95% of a sample of 100 nonregistered occupiers of land in each area justified their presence on the land by saying that registration could not, in their view, alter the fact that the land

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12 See, for example, Musangi Magathu v. Maina Magathu (1971), High Court Digest No. 16; Mushagwa Wamathu v.雪山 Musaga, High Court of Kenya at Nyari, Civil Case No. 56/1972; and Sunumuli Thita Michelle and Others v. Priscilla Wamathu and Amu, High Court of Kenya at Nairobi, Civil Case No. 1490/1975.
13 These investigations were carried out as part of a much wider study on the political economy of land law in Kenya. Results are reported in Okoth-Ogendo 1978.
belonged to the lineage or family of which they were members. They pointed out, for example, that since the registered proprietors themselves had received the land more often by inheritance or family partition than by sale or gift, such proprietors had no moral right to exclude other members of the family from it. When confronted with the majority view of the High Court stated above—namely, that under the new law, the registered proprietor could evict them with impunity—28% of the sample in Kisii and 87% in South Nyanza reported that such a course of action was incomprehensible. The rest of the sample responded as follows: 55% in Kisii and 5% in South Nyanza said they would demand their share; 13% in Kisii and 8% in South Nyanza said they would go to court or move; 2% in Kisii and no one in South Nyanza said they would purchase land elsewhere.

The differences in response between the Kisii and South Nyanza samples need some explanation. A probable explanation for the difference is that since the Kisii district has had a much longer experience of tenure reform (since about 1963), the possibility of eviction by registered proprietors was not as hypothetical to the Gusiis as it certainly was to the Luo, whose experience of effective tenure reform dated only from the 1970s. The second response among the Gusiis follows from the first. Indeed, demands of this kind, as I note below, have been one of the causes of homicides in Kenya. Of the rest, it is noteworthy that so few respondents said they would purchase land elsewhere—especially since the questionnaire permitted multiple responses. The explanation may well be that most peasants would not have enough money to buy land at current prices in Kenya.

The peasant view of registration has been accepted by Land Control Boards in most districts in Kenya. The theory of control of land transactions in the peasant sector, as stated earlier, was to prevent peasants from rendering themselves landless through injudicious exercise of their powers under the new tenure system. This remains the same, although since the enactment of a new Land Control Act in 1967 (No. 34 of 1967—now Cap. 302, *Laws of Kenya*), the rationale for control has become political and economic rather than social. Although usually very few peasants apply for consent to charge, sell, lease, or otherwise dispose of their land, almost without exception Land Control Boards in the rural areas regard farmer approval as a prerequisite for the granting of consent to transfer. There were numerous cases in which Land Control Boards in Kisii and South Nyanza would instruct applicants to bring their wives and brothers or, as happened in one case, their application would be refused because the father of the seller presented himself before the Board rejecting subdivision and sale of the land in question. Also it was learnt that though the father of the seller was not registered, he was staying on the same piece of land [Minutes of the Rongo Land Control Board 1974].

9. THE IMPOSITION OF PROPERTY LAW IN KENYA

The peasant's attachment to the land is rooted in something more rational than just the trappings of culture and tradition. As long as the land remains the basic source of livelihood for the peasantry, it will continue to be regarded as a family investment. Any attempt to change that conception in isolation from the total peasant political economy is bound to fail, and may also lead to a great deal of social disruption. For example, it is becoming increasingly evident that a large percentage of homicide cases in western Kenya, Embu and Meru districts, are often traceable to disputes over registered land. The explanation is simple. Indigenous social institutions can no longer contain such disputes, and the subordinate courts, because of the doctrine of precedent, invariably follow the majority High Court view given earlier.

Peasant attitudes, however, are likely to change. Indeed, the Gusiis data indicate that resistance to the normative framework of the Registered Land Act is unlikely to be permanent. In those areas where tenure reform has also led to substantial changes in the structure of land distribution, the disintegration of these attitudes is likely to be extremely rapid. A brief description of the impact of tenure reform on land distribution in the peasant sector will suffice to illustrate this point.

Until 1968, tenure reform statutes defined only two categories of rights, both premised on the assumption that the power of control in indigenous tenure was equivalent to ownership under English property law. These categories were cultivation and residential occupation rights. They did not apply in those parts of the country where no permanent settlements existed. Thus, in pastoral areas it was not uncommon before 1968 for a few enterprising individuals to lay claims to vast tracts of land on the pretext that their ancestors had once camped there, or that they had intended to live and farm there. A new statute in 1968 (No. 35 of 1968; now Cap. 284, *Laws of Kenya*) dealt with this particular problem by introducing a third category of general territorial rights held by identifiable "groups"—anything from a "tribe" to a nuclear family. Although group tenure was introduced primarily to avert the mass expropriation of land in pastoral areas noted above, the mechanism itself could be and has been used by small-scale agricultural communities as well.

The most significant effect of trying to slot land rights into these categories was that it altered the structure of access to land in the family economy by vesting ownership rights in adult male heads of households without at the same time giving adequate protection to the de facto or potential rights of women and children. It is striking in this respect that outside parts of Central Province and the matrilineal descent groups of the Coast Province, women accounted for less than 5% of the total registered proprietors, and children under 18 for even less.

10. To a recent survey a Parliamentary Select Committee reported that land in Kwaile, which was being sold at Kshs. 600 an acre during adjudication in 1972, was in 1978 being sold at a price in excess of Kshs. 50,000. Although these estimates refer to prime beach land, land prices in other parts of the country have seen astronomical. See Report of the Parliamentary Select Committee on the Issue of Land Ownership along the Tornicani Coastal Strip of Kenya, 1978.

11. Justice E. Cottan, presently a resident High Court judge in western Kenya, suggested in a personal communication to me that as many as 98% of all homicides he has encountered during the 2 years he has been there have their origins in land disputes.

Apart from a lack of clarity within the reform mechanism itself, the manner in which reform was conducted also had an important impact on the structure of land distribution in the rural sector. The process of consolidation, for example, did this by creating a clandestine land market in which parcels of fragmented land that could not be physically exchanged were simply sold to other people within the adjudication area. Because land prices were very low, many people had been able to expand their rural holdings. The data indicate, first, that most sellers tended to be poor; second, that the poor were willing to sell to raise money for social and civil obligations such as taxes, school fees, or subsistence; and third, that the buyers were almost invariably well-to-do neighbors who were able to command the necessary funds from government employment, business enterprises, or salaried relatives and friends (Okoth-Ogendo 1976). Since Land Control Boards had jurisdiction over registered areas only, this market remained unregulated and at times rather volatile.

Experience from Central Province suggests that, coupled with organic developments within the socioeconomic fabric of peasant organization, changes in the structure of land distribution might have several consequences. First, they might accelerate the numbers of the landless. In particular, the position of heirs would become extremely precarious if registered proprietors have a power of expropriation, since, contrary to the practice in English law, the rights of heirs under customary law do not accrue at death. They are transgenerational—that is, they extend beyond any single generation (cf. succession rights). Consequently, the former accrue by reason of physical existence per se. This situation has important implications for urbanization. Second, changes in land distribution might weaken the family as the basic unit of production. This follows from the view that an economy that depends so heavily on female labor cannot really afford to weaken the proprietary status of women over land. Customary property law, as noted, avoided this by separating access rights from control and subjecting control to the economic tasks required by reason of the former. The economic role of women in indigenous society, it must be emphasized, depended largely on the protection of their access rights to land.

Beyond these ramifications, it must be remembered that, in a land-based economy, the pattern of land distribution is always an important indicator of political power. In the context of the rural economy in Kenya, this relation is not obvious by any means. It is to be found in the fact that those who were accumulating land in the rural areas were predominantly state obliges. Many of them were "progressive" farmers, civil service personnel, and, to the extent that the benefits of the Africanization of business enterprises had trickled down to the rural areas, owners of shops, hotels, and catering establishments in rural centers. As an economic class this group had strong links with the political class in the urban centers in terms of patronage and influence. Consequently, there is a level at which they can be seen essentially as the rural end of petty capitalist production and political control that now characterizes Kenya’s political economy. In other words, the evolution of new patterns of land distribution also points to the narrowing of the basis of political control in the rural areas in favor of a rural landholding class corresponding somewhat to the oligarchy that now controls the formal sector of the economy. Thus the basis of accountability of power is also changing from indigenous to state norms and principles.

CONCLUSION

This chapter has attempted an assessment of the impact of the imposition of English property law on some of the sociopolitical processes of indigenous society in Kenya. It has been shown that the first reactions to this imposition generated disruptive conflict throughout the society. A model of normative and institutional organization that is alien to a particular community cannot be used as an effective tool for positive and comprehensive change in that community, even though elites may gain from it. A current study of the impact of tenure reform on public-resource allocation and decision making by farmers tends to confirm this. There are the usual problems of communication, internalization, and conflict management which make it impossible to predict the consequences of such imposition. Indeed, the lack of accurate information on the precise content of the new proprietary system greatly affected peasants’ reactions to it.

With very few exceptions, law-making and administrative elites in Africa are more convinced than perhaps colonialists ever were that alien models (mainly western in origin) can operate as a basis for the integration of national legal systems and the maintenance of stability in society. However, an important issue arises from this discussion of land reform in Kenya which scholars and legislators in Africa need to resolve if disruptive conflicts of the kind highlighted in this chapter are to be avoided or at least controlled. The issue is not simply that colonialism led to the imposition of alien laws and institutions upon the indigenous order and disrupted it. It is that throughout Africa, and indeed most of the Third World, there still exists a plurality of subsystems that represent not merely different historical processes but also fundamental conflicts over values. Whatever the ideological content or structural characteristics, legislators must face this reality in their attempts to impose a new national legal system.

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1 The original fieldwork was supported by a Foreign Area Fellowship, and subsequent research by the Yale Law School Program in Law and Modernization. A fuller statement of the theoretical structure of this analysis appears as: "Theories of litigation in society: Modern dispute institutions in 'tribal' society and 'tribal' dispute institutions in modern society as alternative legal forms," in B. Blankenbergh, E. Klaas, and H. Renleuthner, eds., *Alternative Rechtsformen und Alternativen zum Recht*, Jahrbuch für Rechtsanleger und Rechtstheorie, Band VI, Opladen: Westdeutscher Verlag, 1979.

10 WESTERN COURTS IN NON-WESTERN SETTINGS: PATTERNS OF COURT USE IN COLONIAL AND NEO-COLONIAL AFRICA

RICHARD L. ABEL

Within the sociology of law the genre known as impact studies, or studies of law in action, has been extremely popular. We have learned again and again that there are limits to effective legal action, that there is a gap between the law in the books and the law in action; we have been offered concepts of implementation, compliance, efficacy, and penetration. Gradually, as the theoretical underpinning of these studies has become more sophisticated, we have recognized that the "gap" is not one problem but many. Laws, whether judicial or statutory, no matter how clearly and carefully drafted, do not have an unambiguous purpose or meaning. Therefore, we cannot lay reality alongside the law and see whether or not the two match (to paraphrase a once-popular mode of judicial review) but instead must choose the relationships between law and society we wish to understand. We have also come to see those relationships as far more complex, involv...