Laying a Basis for Rights

An Inaugural Lecture
Delivered Before
the University of Nairobi
on 9th July 1992

by

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LL. B., LL.M, Ph. D

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Towards a Jurisprudence of Development

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J.B. Ojwang: A profile

Born on 10 February, 1950, J.B. Ojwang had his early education at Anjego Primary and Osogo Intermediate Schools (S. Nyanza), and later proceeded to Homa Bay School and Thika High School. In 1971 he entered into law studies, gaining the LL.B., Second Class (Upper Division) Honours in 1974 and the LL.M. in 1976—both in the University of Nairobi. He was appointed lecturer in August, 1976, and taught until September, 1978 when he proceeded to Downing College, University of Cambridge, to undertake doctoral research.

J.B. Ojwang's specialisation in Constitutional Law which had begun with his LL.M. research, was enhanced by his doctoral work which was on the topic, *Legislative Control of Executive Powers: A Comparative Study of the British and French-derived Constitutions of Kenya and the Ivory Coast*, which gave him clear view of the differing approaches to constitutional theory in the British and French experience. In the course of his studies he had the privilege of working at a number of research institutions in the U.K., France and Côte d'Ivoire.

By the time Ojwang obtained his Ph.D.(1981), he already had several articles in distinguished legal journals—a practice that continues to-date. His contributions, mainly in the area of Public Law, have appeared in journals such as: *International and Comparative Law Quarterly; Public Law; Verfassung und Recht in Übersee; Netherlands International Law Review; African Journal of International and Comparative Law; Journal of African Law; Revue de Droit International, de Sciences diplomatiques et politiques.* His full-length work, *Constitutional Development in Kenya* was published in 1990. He has co-authored or co-edited several other works, such as: *Innovation and Sovereignty* (1989); *The S.M. Otieno Case* (1989); *The Rational Path* (1990).

J.B. Ojwang has participated in academic conferences in Africa, Australia and Europe. He has served as an examiner for LL.M. and Ph.D. theses for the Universities of Lund (Sweden), Dar-es-Salaam and Zambia, apart from serving full terms as External Examiner for the Universities of Dar-es-Salaam, Malawi, Zambia and Swaziland.

J.B. Ojwang has served the University in several capacities, including as Chairman, Department of Private Law (1986–1989); Director of the Board

of Postgraduate Studies (1989–1992); Member of the Senate (1984–1992). This last January he retired from administrative responsibility, so as to devote himself fully to his calling as a teacher and researcher.

J.B. Ojwang is a Member of the Kenya National Academy of Sciences, a Commissioner of the Kenya Law Reform Commission, Dean of Scholars of the African Centre for Technology Studies (Nairobi), and an Advocate of the High Court of Kenya.

As a teacher since 1976, Ojwang has risen through the ranks to the positions of Senior Lecturer (1983), Associate Professor (1987),and Professor (1990). Earlier on he had served briefly as a visiting Associate Professor at the J. Reuben Clark Law School, Brigham Young University, Provo, Utah, U.S.A. (1982).

Introduction

LAWYERS, in most countries, enjoy a high profile, which partly arises from their routine presence at the scene of social tension or dispute; and there they are eloquent and audible in the assertion of the rights of the parties. The layman is apt to be bewildered not only by the deportment of the legal fraternity and their arcane expression, but above all by the mystique surrounding the 'rights' being affirmed. What is the plain essence of these rights? Whence do they emanate? Are these rights constant and immutable in their nature and composition? Or are they affected, in their content, by time or space? Are the rights affected by differences in legal systems, or in the specific laws of particular countries? Are they God-given and self-proving? Do rights incorporate future probabilities of nature? What are Africa's prospects for rights in the decades and generations ahead?

There are now many works of African legal scholarship, some by African and others by Africanist scholars,[1] and their contribution to a better understanding of the legal process as it operates in the governing social, economic and political context, cannot be doubted. But they take for granted an operational linkage with Euro-American legal tradition and juristic thinking, hardly at all subjecting this to the test of original analysis.[2] Such works, in the sphere of public law, have generally proceeded on the basis of established Western political and legal concepts;[3] and naturally they have subjected local social phenomena to normative yardsticks of a Euro-American provenance. In the area of private law, such works have merely juxtaposed the African experience in the relevant sub-disciplines (such as property law, family law, law of wrongs) to the standard organisational framework as originally set under Roman Law (from which much of the Euro-American private law is derived), and in the context of the economic orientations prevailing in the Western countries.[4] The works of international law have been concerned with describing the orthodox mechanisms of that body of law, as enacted primarily by the Euro-American nations, and to review the later developments that have taken place at the United Nations and its various organs.[5]

A scholar involved in the sphere of African legal developments ought to address certain basic questions: Is there a legal theory that would explain the particular characteristics of the law and the legal process in the form in which they operate in Africa? Do Africans, taken as a general category,

manifest any peculiar approach to legal thought? Or is Africa merely an appendage of the Euro-American world, in terms of perception on law and the legal process.

These issues are obviously too large to be covered fully in just one lecture. They must, for comprehensive treatment, be accorded the square attention of a plurality of scholars, from differing standpoints, over a prolonged duration.

My own studies, especially in the domain of public law,[6] have led me to the hypothesis that the dominant notions of legal rights and of justiciability, are rather skewed and mainly reflect the experience of the industrialised countries of the West; and all attempts to relate such notions to the Third World have been decidedly oblivious of the conditions of *the growth process of rights*.

This lecture seeks to contribute to the clarification of such issues. It attempts, first, to paint a plausible picture of the rights-creative process; secondly, to consider the African experience in rights-creation; and thirdly, to propose an approach to a 'jurisprudence of development', which views the formation of rights as dynamic and moulded by the fundamental economic and social conditions at play, and by the operative ethics of national policy choice.

Since the dominant scholarship on the subject of rights today is Western scholarship, it will be essential to set out in summary the nature of Western jurisprudence, and to consider the standing of 'rights' in that jurisprudence. This will provide the conceptual background to a focussed consideration of the place and nature of rights in the African context. For a better appreciation of the standing of rights in Western legal thought, it will be necessary to relate Western jurisprudence to the attendant historical, social, economic and political circumstances. In parallel, attention will be accorded similar issues in respect of African developments.

It should be mentioned at the outset that Western jurisprudence is largely based on *the past and the present*, and the Western notion of rights is founded upon *accrued* claims, expectations and deserts. It will be necessary to consider the strengths and weaknesses of such an orientation, especially in relation to *future* interests and claims, and *moral* expectations, which are increasingly being accorded prominence in municipal and international law—in particular in relation to the concept of *sustainable development*. If such future interests are so important, they may become the

common denominator in any assessment of the relative strengths of Western jurisprudence, on the one hand, and the African experience of law and legal process on the other.

The structure of this study thus rests on the following seven stages:

1. Introduction
2. The place of rights in Anglo-American jurisprudence
3. Anglo-American jurisprudence and its rights—in context
4. Rights in the African context
5. Present and future rights: the question of sustainable development
6. In quest of a jurisprudence of development
7. Conclusion

I. The place of rights in Anglo-American jurisprudence

Relying on a conceptual apparatus that is nurtured in the context of Western-type education, one may regard jurisprudence, in basic terms, as an aspect of the philosophical perception of law and legal phenomena. Such a view, however, provides a yardstick broad enough to be capable of universal application. For it suggests that any society with a distinctive social orientation, and with a particular kind of legal culture, will be capable of evolving and perfecting its own jurisprudence which reflects the prevailing economic, social and political substratum. The mere existence of such a recognisable basis to a society, however, need not lead inexorably and immediately to a particularly sophisticated philosophical perception of law and legal phenomena. There has, for instance, to be an established tradition of scholarship to explicate and consolidate such intellectual orientations. Thus, the jurisprudence of any society will be no better than primordial, or imperfectly developed, where illiteracy is the overwhelming reality; and it will be more advanced in the more literate and more scholastic society.

The broad sphere of philosophical reflection about law breaks down to identifiable components. One of these is jurisprudence proper—what Roger Cotterrell defines as 'the term most often used to refer to the whole range

of actual and possible inquiries concerned, in one way or another, with (the) broader significance of law'.[7] Now jurisprudence contains certain specific areas of juristic thought, notably 'legal philosophy', which in its turn incorporates 'legal theory'. Jurisprudence is concerned with law 'in its intrinsic philosophical or social interest and importance, which relates to but extends beyond its immediate instrumental value or professional relevance'.[8] Legal theory, in Cotterrell's definition, is the 'systematic theoretical analysis of the nature of law, laws or legal institutions in general.'[9] It is perhaps the most systematic and most abstract aspect of Western jurisprudence. Its primary concern, in both its normative and empirical aspects, is to make legal knowledge a *rational system*, with a recognised pattern of reasoning and with its own disciplinary autonomy and integrity.[10]

The essence of Western jurisprudence is to be found in lines of legal thought and juristic practice established by various schools of jurisprudence, over the last one-and-a-half centuries. The baseline in the juristic developments of that period was the common law, in the case of England, which was portrayed by prominent scholars, such as Sir Henry Maine (1822–1888), as the ideal law, insofar as it incorporated popular practices as they were interpreted and propounded by the judges in the course of litigation. Legislation was seen as undesirable, as it detracted from the communal basis of the law, and entailed political impositions and intrusions. The prevailing legal ideology led the scholars to glorify the common law and to treat the 'spirit of the people' as the fundamental reality in legal knowledge.[11]

However, much as the common law, thanks to the spontaneous character of litigation and the independence of the judiciary, was regarded as a basis of certainty and generality in legal matters, it was later seen to be inadequate to the increasingly complex task of conflict resolution. The rise of utilitarianism in Bentham's time (1748–1832), and especially its refinement in the sphere of jurisprudence by John Austin (1790–1859), posed a major challenge to the complacence of common law doctrine. The new ideology, marked by the quest for 'the greatest good of the greatest number' (the felicific calculus), inexorably led to the advocacy of conscious, top-down approaches to the law; in effect (unlike the common law), a sovereign-centred perspective of law. This was in the quest for a framework for effectiveness in policy making, and the recipe was thought to lie in centralism, sovereignty and the King's command. This was the background to Austin's

quest for a scientific approach to legal analysis.[12] He came up with what is often referred to as the command-based theory of law, which sought 'to map out a rational, scientific approach to legal understanding—a modern view of law which would replace archaic, confused, traditionbound common law thought but would be able to encompass both legislation and judge-made law.'[13]

Austin's theory may be regarded, in Anglo-American jurisprudence, as the first major intellectual enterprise in the explication of the scheme of Western law; many of its cardinal principles remain in place to this day, even if modified in certain respects. Most of the later Anglo-American legal scholars have had, overtly or covertly, to take Austin as their point of departure, and even their attacks on Austin's works merely register the fact that their theories are substantially reactive to, and nourished by the juristic achievements of Austin.

By divorcing the concerns of jurisprudence from empirical phenomena and bringing them squarely under 'ought' propositions, Austin fulfilled the essential conditions of *generality* and *certainty* that are so crucial to the working of the individualist society of *laissez faire*, where social conflicts are to be resolved by a disinterested judiciary on the basis of objective criteria.[14] Austin may be said to have been the first scholar to capture the very essence of the judicial practice, in juristic concepts that remain, to this day, the very foundation of Anglo-American jurisprudence. Up till then, the judge was the moulder, by the common law tradition, of the path of the legal process.[15] Austin considered that he was addressing himself to a 'mature' legal system that was not alien to certain organising concepts, such as *right, duty, power and property* .[16]

Later scholarship, especially that of Wesley N. Hohfeld (1879–1918), has shown the strength of Austin's theory by firmly delineating the place of *rights* in Western judicial practice. Hohfeld considered that there are two cardinal perspectives to juristic discourse as it applies in judicial practice: one's *self-regarding* acts or omissions, and one's *other-regarding* acts or omissions. That is, on the one hand, acts that one does or omits, and on the other hand, the interplay between other parties and such acts or omissions. *Right* is the most basic concept in understanding such a relationship. 'Right', as Hohfeld saw it, is the correlative of *duty*. Being the bearer of a right, implies that some other person bears a correlative duty, the performance of which will vindicate the right-entitlement. In relation to 'right'

other jural concepts also emerge: (a) *privilege*—where X is placed under no obligation to conduct himself in some particular manner to facilitate Y's vindication of a particular claim; (b) *no right*—because of X's privilege, Y has no right to a particular act or forbearance being given by X; (c) *power*—X has power when his voluntary act is destined to create new legal obligations affecting Y; (d) *liability*—in case (c), Y is under a liability to X, he must perform some legal act as a response to the exercise of power by X; (e) *immunity*—X has immunity if he has a special legal protection which removes him from the category of persons upon whom Y, by Y's own act, can place a legal burden; (f) *disability*—in case (e), Y is under a disability in relation to X, because Y's acts have no legal consequence on X.[17]

The above scenario depicts the abstractions of juristic science that were conceived by positivist scholars, to explain the nature of judicial reasoning.

The substantial body of legal doctrine that has emerged this century, has by no means sought to change the abstract character of Western jurisprudence; it has only attempted to perfect and to update the orthodox form.[18] Modern scholars have hardly at all departed from the basic principles of judicial reasoning which had evolved through practice and were later recast by positivists and other scholars. For example, Dworkin in his elaborate studies[19] has first and foremost been concerned with 'rights'. However, while he develops this area perhaps more than any other scholar, it remains true that the status of rights in Western judicial practice is still firmly founded on the jural correlatives and jural opposites formulated by Hohfeld, under the broad category of positivist analytical jurisprudence.

Other schools of thought, such as the natural law school, the sociological school, the realist school and the critical legal studies school have brought much intellectual richness to Western jurisprudence. But they have not substantially changed the basic principles that guide Western judicialism—principles which rest on a positivistic style of reasoning. The period starting in the early twentieth century saw, especially in the United States, a growing disenchantment with the existing normative legal theories. This was mainly because these theories corresponded to and described a legal process that attended escalating degrees of economic and social hardship.[20] The response of the legal philosophers was to craft the intellectual movement known as Legal Realism.[21] The essential object of this movement was to decentralise legal doctrine and to build a basis for juristic thought around a substantial plurality of institutional activities that were thought to

agents of beneficial economic and social developments set to crystallise new rights and expectations. The episode may have been an influence on such modern scholars as H.L.A. Hart, Lon Fuller[22] and Ronald Dworkin. The more orthodox realist scholarship, as developed mainly by Karl Llewellyn[23], has now all but given way to the critical legal studies movement, a movement whose enterprise is significantly different. This movement is largely American, and its main object seems to be to diffuse the long-held notion of a structured framework for juristic reasoning and judicial practice.[24]

'Rights', in Anglo-American law, have generally been viewed as if they were judicial principles and ideals autonomous enough, and sufficiently technical, to be vindicated in a more-or-less uniform manner, even with minimal reference to the dynamic societal factors. *It is apparently considered that the rights in question are all-available, and constant* ; the remaining task being merely to give them effect. This is plain from the contemporary literature. Thus, for example, Alan Gewirth writes:

> A right is *fulfilled* when the correlative duty is carried out, i.e. when the required action is performed or the prohibited action is not performed. A right is *infringed* when the correlative duty is not carried out, i.e. when the required action is not performed or the prohibited action is performed. A right is *violated* when it is unjustly infringed, i.e. when the required action is unjustifiably not performed or the prohibited action is unjustifiably performed. And a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, and the required action is justifiably not performed or the prohibited action is justifiably performed.[25]

'Rights' as thus defined, fall for enforcement not to widely accessible public agencies, but to *courts of law*; passive, technique-bound institutions which may be actuated only through expensive litigation, and when once in motion, operate in a solemn, orchestrated manner. The mode of operation of the courts is regarded as forming part of the cultural heritage of the West, a culture which lays a premium on the mechanistic play of institutions as the basis of objectivity and validity, and as the ideal method for asserting rights and claims. Thus Sir John Fletcher-Cooke says: '[W]e in Britain, like others in the West, are heirs to the Graeco-Roman civilisation. One of the ideas that we have inherited from the Greeks is the principle of the Greek dialectic; a belief that the best way to grope for the truth is by means of thesis and antithesis.'[26] And hence the court is a scene of cut-

and-thrust between counsel contending on behalf of their clients, with the judge standing as the arbiter. The winner takes all. Either there is a *right* or there is *none*.

Do the rights originate simply from litigation and the judicial process? The answer must be *no*. But it remains a hypothesis. Before discussing the legal phenomena in the African context, it should be remarked that it cannot but be a grossly incomplete picture of rights which fails to take account of their interplay with the process of historical evolution and especially with the main societal dynamics. For a better understanding of the place of rights in Anglo-American jurisprudence, we must now turn to the parallel developments on the social and economic front.

II. Anglo-American jurisprudence and its rights—in context

1. Intellectual and cultural heritage

The trappings of Western jurisprudence date back to the eve of the Middle Ages, in the time of St. Augustine of Hippo (354–430 AD). Augustine, who pioneered in drawing a clear distinction between the secular commonwealth (*civitas terrena*) and the divine commonwealth (*civitas dei*), had developed a scheme of legal metaphysics which concerned itself with the search for an ideal law of nature. This intellectual enterprise became the memorable origin of occidental legal culture. And this is the original basis of a general unity in the European legal tradition (which was referred to as the *ius commune*).[27] The traditions of juristic thought evolving in Rome were further perfected and elevated in intellectual status, during the classical high Middle Ages (c. 10th–13th century AD), particularly in the time of St. Thomas Aquinas (1225–1274 AD), who wrote highly influential works,[28] taking advantage of the earlier scholarship of the Greek scholar Aristotle (384–322 BC). The classical High Middle Ages saw a resurgence of legal thought, founded especially on the rediscovery of Emperor Justinian's (483–565 AD) comprehensive codes of laws (Pandects). These were the subject of a new cycle of scholarship directed by the Glossators, whose

doctrines of juridical science had spread to most parts of western and central Europe by the end of the medieval period (late 15th century AD). A commitment to notions of 'autonomy' in jurisprudence came with the full faith that scholars had in the Pandects and in their mode of interpretation; they were seen as representing 'timeless reason'.[29] Divorcing jurisprudence from empirical social and economic developments was partly dictated by the demands of those very developments. The high classical Middle Ages in Italy and southern France coincided with rapid economic and cultural advances; and it was generally thought that such advances were better protected by a dispute-processing procedure that was detached, and based on reasoned analysis and scientific legal doctrine. The realisation of such a legal culture was itself a major asset in the economic development of Europe. In the words of Franz Wieacker:

> By damming up the violent resolution of public conflicts . . . , and by eliminating the irrational elements from adjudication, these jurists created the most important preconditions for the future growth of commerce, production, material culture.[30]

This unwitting early age of 'positivism' was enriched and consolidated by transfusing doses of 'natural law', in the Modern Age, and later on, its character was significantly modified by modern practices, such as new approaches to legislative policy and new judicial attitudes to social scientific material;[31] but its basic skeleton remained and has continued to regulate virtually all the later approaches to legal thought.

The historical process bequeathed to Europe the culture of legalism, its essence being, as rendered by Edgar Bodenheimer, 'that positive legal norms (*which form the primary basis of judicial decisions*) possess a certain degree of independence from the surrounding social and economic conditions. Their autonomy (which . . . is partial only) furnishes some guarantee that lawsuits will be decided, not on the basis of irrational sentiments or purely subjective beliefs, but on the authority of sources that impart to the judicial process, some measure of objectivity, detachment, and predictability'.[32] Wieacker underlines legalism as the distinguishing mark of European civilisation: 'It is this legalism, if we see it correctly, which—apart from the scientific mastery of natural forces—most distinguishes European civilisation from that of other high cultures in which law emanates from an accepted social ethic as it did in Classical China, or from revealed religious texts as in Judaism and Islam'.[33] Now since legalism in this form has in

these days attracted misgivings,[34] it is important to note its justifications. These are advanced by Franz Wieacker in these terms:

> Beyond the "legitimisation by means of process", legalism has unburdened social conflicts from force, emotions, interests and prejudices which . . . has more frequently produced emancipatory rather than repressive results. As against public authorities, legalism *assures the individual of greater legal certainty*, and in criminal and civil procedure it has always signified freedom from the arbitrariness of irrational forms of proof and proceedings, and later, above all, greater strategic equality in litigation.[35]

He asserts that legalism, by its essential characteristic, 'has thereby converted historical rights and privileges into general freedoms of citizens and ultimately into human rights'.[36] The objectivity of this view is born by other jurists. From Australia, for instance, Mr. Justice F. C. Hutley states that the Western tradition of legalism provides the bulwark of liberty which 'survives . . . by reason not of sweeping, often meaningless declarations, but interstitially, in the cracks and holes of the coercive armoury of the state, such cracks and holes being discovered by lawyers and declared by an independent judiciary.'[37]

We thus see a distinct intellectual and cultural heritage which, as early as the onset of the Middle Ages, had started crystallising in the form of an autonomous legal system. Later developments in this system were to establish a 'positivistic' scheme of jurisprudence which became the source of such fundamental concepts as *rights*, *duties*, *privileges*, etc.

2. Economic and social developments and related phenomena

The evolution of Anglo-American jurisprudence has had an interesting interplay with the operative social and economic dynamics. As already remarked, a mix-up of legal issues with predominantly social and economic concerns had been avoided because the legal scientists saw those spheres as pernicious to juridical objectivity. Yet at the same time, as will unfold later, the most spectacular tool and yardstick of the law, namely the *concept of property*, had it origins in the rights and claims nurtured in the economic sector. Furthermore, the autonomy of jurisprudence itself became the veritable enabling condition for the stability of the liberal economy of the West, in which the rights of the individual, and his place in free enterprise, were

the hallmark.

The most remarkable social and economic phenomenon during the evolution of Euro-American jurisprudence was the Industrial Revolution. Its drastic significance emerges from David S. Landes' graphic depiction:

> The Industrial Revolution began in England in the eighteenth century, spread therefrom in unequal fashion to the countries of Continental Europe and a few areas overseas, and transformed in the span of scarcely two lifetimes the life of western man, the nature of his society, and his relationship to the peoples of the world.[38]

The Industrial Revolution replaced manual labour with powerful mechanical devices, brought steam power to replace human and animal strength, led to a decisive human control over the working of raw materials, and released an abundance of wealth that singularly enhanced the people's access to amenities of life. *Naturally, this changed the context, and elevated the levels of rights, duties, expectations and legal claims.* Parallel to the 'autonomous' jurisprudence of rights, a new basis of 'material rights' was created and consolidated. A new basis of political organisation also emerged, with categorised interests shaped by the formation of class-conscious groups around ownership of industrial enterprises, on the one hand, and the supply of labour for these, on the other. This scenario is aptly depicted by Landes:

> In sum, the Industrial Revolution created a society of greater richness and complexity. Instead of polarising it into bourgeois minority and an almost all-embracing proletariat, it produced a heterogeneous bourgeousie whose multitudinous shadings of income, origin, education, and way of life are overridden by a common resistance to inclusion in, or confusion with, the working classes, and by an unquenchable social ambition.[39]

This raises the question of new political and civil expectations, which would become the basis of rights-claims, to be vindicated within the legal process.

Such social and economic conditions dictated a basic principle, which coincided with the contemporary scheme of jurisprudence, namely, *rationality*. David S. Landes thus gives the operative meaning of the term:

> Rationality may be defined as the adaptation of means to ends. It is the

> antithesis of superstition and magic. For this history, the relevant ends are *the production and acquisition of material wealth.*[40]

The quest for wealth on the basis of rationality was paramount; and it found an enabling environment in a religious orientation which has been described as the 'Protestant ethic for the development of European capitalism'.[41]

In this economic philosophy, a premium was laid on the sanctity of obligations and the protective role of the law and the courts. Governments were seen as facilitators of industry, commerce and trade—by their policies and machinery of law. As Nathan Rosenberg and L.E. Birdzell observe in their remarkable work, *How the West Grew Rich,* [42]

> The monopoly of the social uses of violence, which is the most fundamental characteristic of the political sphere, implied the creation of a system of courts of law for the non-violent settlement of disputes in the economic sphere; it implied also the definition and protection of property rights, including limitations on political expropriation and taxation.[43]

The cardinal organising value flowing out of such a long tradition of individualism and of remarkable economic development on the basis of free enterprise, is that of *liberalism*; and we must thus look to liberalism as the most direct source and supporting philosophy for the cherished rights of the legal system. As already seen, a special relationship had existed between the operative legal doctrines and the spirit of free enterprise, which gave eminent justifications to the theory of the 'autonomy' of jurisprudence. But this legal culture was reaffirmed by the emerging value of liberalism which gave an ideological context and, itself, generated new rights that were thought to be appropriate for vindication under a legal doctrine imbued with autonomy. Such liberal values primarily entailed:

> (1) a valuing of free expression of individual personality; (2) a belief in men's ability to make that expression valuable to themselves and to society; (3) the upholding of those institutions and policies that protect and foster both free expression and confidence in that freedom.[44]

Liberalism centres on the rights and claims of the individual, *the self.* Community as such dissolves, as a possible bearer of rights; the individual takes the upper hand. The juridical core of this social philosophy inheres in

economic reality; it is the *right of property*. This right is the basis of all the legal rights and procedures that attach to the ideology of liberalism, that confer upon it the various classes of rights and liberties forming the cornerstone of the ideology as it is practised in the West.

The place of property in the rights of liberalism is frequently obscured by the many references made to certain civil liberties without examining their background. The Christian doctrine which evolved with Western jurisprudence, and with Europe's major economic gains of the 18th century and after, inculcated in adherents the lesson of the inviolability of property rights, which have been treated as a central aspect of natural rights. Pope Leo XIII, in the encyclical *Rerum Novarum* (1891), wrote:

> The fact that God has given the earth for the use and enjoyment of the whole human race can in no way be a bar to the owning of private property. For God has granted the earth to mankind in general, not in the sense that all without distinction can deal with it as they like, but rather that no part of it was assigned to anyone in particular, and that the limits of private possession have been left *to be fixed by one man's own industry* . . .[45]

The role of property in liberal rights is given concrete form through its selection as the standard measure for other rights.[46] Property rules are treated as the ideal yardsticks of certainty, accuracy and openness in the safeguarding of legal obligations. The link is thus stated by F. L. Neumann:

> A competitive society requires general laws as the highest form of purposive rationality, for such a society is composed of a large number of entrepreneurs of about equal economic power. Freedom of the commodity market, freedom of the labour market, free entrance into the entrepreneurial class, freedom of contract, and rationality of judicial responses in disputed issues—these are the essential characteristics of an economic system which requires and desires the production of profit, and ever renewed profit, in a continous, rational, capitalistic enterprise.[47]

The law has used property as the yardstick, firstly, because life rests upon the continuous consumption of certain things, but to have access to things for consumption, there must be rights of access;[48] and secondly because over the years sharp and sophisticated rules have evolved in the property sphere, and these have facilitated the tasks of the judicial process.[49] This point is clearly stated by Leslie A. Stein:

> Property is an essential foundation of all legal systems. The relationships between man and things, the rights in relation to property, vary in different systems and different juridical contexts, such as inheritance, possession, finding, tort. *It is these rights that are the traditional subject matter of litigation and are the defined and precise tools most easily used by the judiciary.* Consequently, in establishing an interest in *locus standi* issues, rights arising from property often serve as the measurement of such an interest.[50]

Property rights, thus, have formed the basic material out of which the main outlines of western jurisprudence have been moulded. These rights have guided the process of litigation and judicial reasoning, as well as the scheme of the legal doctrine that has evolved. It remains now to consider in more detail the nature of the specific rights that have evolved in Anglo-American jurisprudence.

3. Exemplification of rights in Anglo-American jurisprudence

'Traditional rights' is an apt depiction of the rights that lie at the centre of Western legal doctrine. These rights have been evolving for well over a millenium. They are based on a particular intellectual tradition and on certain property concepts. They flow from ideologies built upon the economic achievements of the Industrial Revolution of the 18th century. These rights are relatively settled in scope and are of a restrictive character. They function on established lines of judicial reasoning.[51] The concept of rights, in this traditional sense, is a gain to the individual which has the makings of a charity: it is 'moralistic, paternalistic, and supportive of the status quo.'[52]

This is contrasted with 'aggressive legal rights': 'Aggressive legal rights activities include a willingness to litigate and take on *law reform cases*, to take a client's perspective, and to *view clients as underdogs challenging society*. Aggressive legal rights activities encompass both test-case law reform litigation and service work.'[53] The scenario may be graphically illustrated as in Figure 1.

In the well settled society, with an abundance of wealth, equitably distributed, the mainstream will be all-dominant, and only a token amount of aggressive legal rights activities will be taking place. But in the impover-

ished society, or in a society where disparity of wealth is overwhelming, the mainstream rights will be relatively unsettled, as shown in Figure 2, and the challenge to them coming from the peripheries may be considerable.

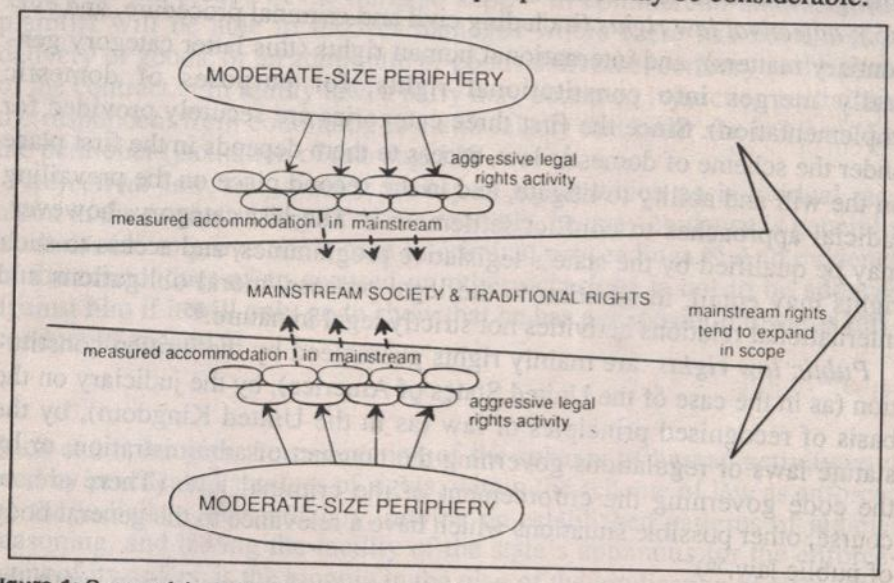

Figure 1: Successful aggressive legal rights activities produce an emission which trickles into the mainstream of traditional rights—thereby becoming permanently transformed.

Given the wealth and historical achievements of the Anglo-American societies, the mainstream rights tend to be dominant and the peripheral rights activities appear largely as the exception.

Within the foregoing framework, an attempt may be made to exemplify the common rights of Anglo-American jurisprudence.

* * *

Rights in Anglo-American jurisprudence are highly structured. They rest mainly upon the incidence of litigation, and on judicial practice—which is closely guided by established legal doctrine. Property rights have been regarded as the most basic rights, and it is from them that the many other rights have been culled or structured.

In their present range, a person's legal rights may be viewed in terms of the sphere of law to which they belong, the main such spheres being: *public*

law rights (including rights in constitutional, administrative and criminal law); *private law rights* (including property rights, rights in the law of wrongs, contracts and commercial obligations, family law, succession, etc.); *adjectival law rights* (including civil and criminal procedure, and evidentiary matters); and international human rights (this latter category generally merges into constitutional rights, for purposes of domestic implementation). Since the first three categories are securely provided for under the scheme of domestic law, access to them depends in the first place on the will and ability to litigate, and in the second place on the prevailing judicial approaches to conflict settlement.[54] The last category, however, may be qualified by the state's legislative programmes, and access to such rights may entail, in addition to the legal process, moral obligations and international relations activities not strictly legal in nature.[55]

Public law rights are mainly rights guaranteed by the written constitution (as in the case of the United States of America), by the judiciary on the basis of recognised principles of law (as in the United Kingdom), by the statute laws or regulations governing the conduct of administration, or by the code governing the enforcement of the criminal law. (There are, of course, other possible situations which have a relevance to the general body of public law.[56])

Thus, a statute standing in contradiction to the constitution, with the effect that a decision taken under the statute by a government minister injures an individual's rights, has been struck down.[57] A public authority's action, taken without reasonable notice, and prejudicing an individual's property rights, has been declared illegal and condemned in damages.[58] It has been held that any body of persons having a duty to determine the rights of subjects, and having a duty to act judicially, is liable to controlling judicial orders if it should exceed its authority.[59] A non-statutory domestic tribunal with control over an activity that gives a livelihood for its affiliates, must not unreasonably deprive them of their right to work.[60] It is an important principle of the common law, in criminal cases, that an accused person is not liable for any offence charged, unless the intent is proved to coincide with the impugned act (*actus non facit reum nisi mens sit rea*).[61]

Private law rights, which derive largely from the common law and partly from specific statutes, are well defined; all it takes to enforce them is some knowledge, legal advice and litigation in a proper case. An example in property law is that a purchaser (Y) who purchases land from another (X), knowing that a third person (Z) has an equitable interest upon that land, has

his proprietary interest restricted by that equitable right.[62] In the law of torts, he who brings a potentially dangerous thing upon his own land and keeps it there, is strictly liable to a neighbour who suffers injury as a consequence of the escape of the thing so kept.[63] In commercial contracts, the plaintiff will be able to recover damages where there has been a short delivery of goods, or an admixture of goods delivered, contrary to the terms of the contract.[64] In family law, a party may obtain an injunction restraining the respondent from continuing to claim falsely that he or she is married to the petitioner (jactitation of marriage).[65]

Adjectival law, too, gives a variety of rights which an individual may claim in the course of litigation. For example, hearsay evidence is generally inadmissible to prove one's case in criminal proceedings.[66] And evidence of the misconduct of an accused on other occasions is not to be adduced against him if it will only go to show that he has a disposition towards misconduct in general.[67]

* * *

Such examples give a cross-section of the spheres of human activity covered by practical guarantees of rights, within the scheme of law as enforced by the judiciary. The judiciary, relying on established patterns of judicial reasoning, and having the facility of the state's apparatus for the enforcement of its orders, is the kingpin in the plan of the vindication of rights,[68] in Western legal practice. Rights, in this sense, is a constitutional monopoly of the judiciary; and that which is not captured by the judicial machinery is not a *right* in the true sense, for no person will be under a binding correlative duty to render it.

It perhaps bears repeating that the very prospect of achieving the right—as it is explicated above—and having it vindicated, is closely linked to the society's intellectual and cultural evolution, and to the notable material gains that have, in the last more-than two centuries, been made on the social and economic front.

With this background, we shall now consider the African experience with rights.

III. Rights in the African context

1. Preliminary observations

Owing to the factor of colonisation, it is the Anglo-American legal doctrine that most of the African countries inherited, with the state machinery that passed on to them at independence. This fact at once raises pointed questions concerning the status of 'rights' in Africa. While the received doctrine was founded on Anglo-American positivist premises, there at the same time existed indigenous laws in the relevant countries—even if these were in most cases only part of an oral tradition which had not been developed into any brand of legal scholarship. Moreover, the unbroken background of intellectual tradition which had in the first place crystallised the Western legal doctrine, was no part of the African reality. Furthermore, the rich material condition which in Europe had helped to consolidate the legal rights were lacking in Africa. Further still, the society which was a central reference in the shaping of Anglo-American jurisprudence, had no real parallel in Africa. A more detailed description of these realities will shed some light on the status of rights, as understood in the Western sense, and with regard to Africa.

2. Regimes of customary law

Africa is a continent of many cultural groups, taking the shape of separate ethnicities. It is recorded that a country such as Kenya, for instance, was inhabited by as many as 64 tribes, about the end of the nineteenth century when colonisation began.[69] These tribes lived in simple conditions, depended basically on the endowment of nature, maintained themselves through largely self-sufficient subsistence economies, maintained political distinctness from other tribes, and practised cultures which basically reflected such economic and political conditions. These tribes were influenced by largely common circumstances, and so they evolved broadly similar legal practices.[70] It is true to say that in most cases, similar kinds of social activity have attracted similar laws to regulate them.

Now to concern oneself with rights, in the legal sense, and in relation to

African culture, is to address oneself to the character and object of the customary laws. Given the nature of the economy, and the attendant social activities, it is hardly surprising that the most basic laws related invariably to *property*, *wrongs*, *matrimony* and the *family*. 'The laws relating to these subjects reflected the social control systems, the beliefs and value systems, the cultural orientations of the society, etc.'[71]

The laws, in their essence, were driven in the first place by the goal of ensuring social control, and only in the second place by that of conferring rights upon *individuals*. The justification for this was in no way perverse; it rested on the communitarian nature of the society—a fact which flowed directly from the collectivist approach to survival, in the face of the difficult conditions of nature. Therefore, the law was designed to ensure unity and harmony. It was not the gladiatorial law of the kind associated with the individual-rights centred, Graeco-Roman inheritance.

In family law, for instance, the customary laws were concerned with such issues as personal capacity to marry; consent to marriage; marriage formalities; dowry; matrimonial rights and duties; matrimonial offences; divorce procedures; custody of children; etc.[72] In the law of succession, the concern was mainly with the rules of distribution of wealth. In property law the main concern was the right of access to and use of land. In the law of wrongs, the main concern was compensation for wrongful injury.

It should be noted that in most cases, legal claims were dealt with informally, by panels of elders whose main concern was to bring good sense and social accommodation, rather than to attain some abstract justice founded on recorded principles or doctrine of law.[73]

Suffice it to say that at the advent of colonialism, the African concept of rights was only mildly based on the *self*, the interests of the *community* as an organic entity being all-important; the machinery of justice was largely informal; the basis of 'judicial' solutions was derived from sheer *practice* and *oral tradition*—abstract legal doctrine being distinctly lacking. Africa's conception of rights was of the *Gemeinschaft* strain, rather than the *Gesellschaft*, or bureaucratic-administrative strain.[74]

* * *

What has been the fate of African customary law since the arrival of the centralised state, which came with the Anglo-American legal tradition?

I maintain my prior thinking on this question: 'The development from

the ethnic state, with the advent of colonialism, appears to be an irreversible change. The cake of custom has been crumbling and continues to crumble rapidly. . . . [C]ustom had previously been the basis of orderly life in society. When the cake of custom crumbles, a hiatus is exposed in the entire social order, which must, perforce, be filled by some agency of stability, of normative authority. This need is primarily met by the statute law—a regime of law founded upon Western law.'[75]

Here then is a *mélange* of the Euro-American legal doctrine and the practices of African customary law, seeking to govern social relations and to deal with the question of *rights*, for Africans. Do the rights remain the same as in the West, given especially the specific context in which the Western legal doctrine was conceived and nurtured?

The relatively amorphous rights of customary law were substantially changed by the received law. Claims relating to crime, tort and contract were removed from the traditional dispute-settlement agencies. A constitution and a set of state laws came, in the form of a structured hierarchy of laws[76], for the guidance of the process of dispute settlement; and these new laws took a place of priority over the customary laws and practices.[77] The effect was to import the Western phenomenon of *mainstream rights* and *peripheral rights activities*—and the rights of customary law clearly fell in the latter category. The machinery of customary rights, where it remained in place, had lost its legitimacy, in terms of the state legal system. The mode of rights-vindication in the central legal system was contrary to the traditional practices; it was based on Anglo-American doctrine. Thus most of the rights that would be vindicated by this legal system would be rights removed from the context of African autochthony.[78] It is clear that for any success to be attached to legal rights in this context it would have to emanate from fundamental *social changes*, which draw the African out of his traditional setting into a new way of life—a hybrid of African and Euro-American culture. This will have to be the direction of change *if Africans are to partake of legal rights in their new form*. But even if that were so, Africans would be subject to the severe cultural handicap that they have not as yet conceived any jurisprudential path that should give intellectual direction to the emerging scheme of rights. They would be compromised to the point of ascribing to the Euro-American legal doctrine a force of universality—as a pretext for not having constructed an autochthonous pattern of legal thought.

But the crucial test for the fortunes of the new generation of legal rights lies on the *economic, social and political front*. We saw that the Anglo-American legal culture, which is largely guided by mainstream legal doc-

trine, has important interplays with the material condition of the relevant societies. How far does a legal doctrine so conceived suit the practical needs of Africa, with its basic problem of abysmal poverty; with its large-scale shortages of food, shelter, clothing, education and health; with its unsatisfactory planning of resource use; with its poverty of basic administrative structure; with its uncontrolled pace of population growth; with its numerous political upheavals, cases of turmoil, war and destruction? To set up these damnations as a factor in Africa's material condition is no vain appeal, as it is a fully documented condition.[79]

Not only has Africa not evolved a line of juristic thought that captures the African vision of rights, its material condition is so gravely depressed that it hardly ever yields gains that would lend themselves to a fresh rights-protection scheme of legal thought. Indeed the deprivation caused by this condition may well have been instrumental in discouraging scholastic activity in the sphere of law and of doctrine formulation.

So, what is the current state of legal rights in Africa?

For an attempted answer I revert to the scenario of 'traditional rights' and 'aggressive rights activities'. The official framework of rights is the traditional one, which, therefore, is dependent upon an elitist judicial process, upon the conservative doctrine of Anglo-American law, and is necessarily restrictive. The rights that can be enforced through this machinery are the habitual ones of public law, private law and adjectival law. The social and economic handicaps set out above, rule out access to the judicial process for the overwhelming majority of the population; for them, the antiquated informal procedures of conciliation and mediation are the first recourse in situations of conflict. For the majority, the rights of the official legal system are unavailable. They are on the peripheries; and the best they can do is to apply pressure on the peripheries, hoping the dispute settlement mechanism gives them one or two access concessions. The privileged minority, of course, have a full access to the state's legal mechanism, being able to invoke this and to have their rights determined on the basis of Anglo-American legal doctrine.

Comparative inquiry shows that elsewhere, and particularly in the United States during years of economic depression and social hardship, aggressive legal rights organisations sprung up, with the object of uncovering the problems of the poor and the minorities, ventilating the sufferings and bringing the hardships before the formal state institutions—the courts and the legislature.[80] In the same way the socially and economically deprived people of Africa could look to such agencies coming up, and assuming such a public-spirited duty. But the hope could be misplaced, as such philan-

thropic agencies would be few and far-between, given the grim social, economic and political conditions which are virtually everywhere the rule.

In addition, aggressive rights movements may not achieve any positive result because of an important factor of political culture and structure. In the normal case of mainstream rights and peripheral pressures, such as obtains in the West, the competitive economy and politics and the public commitment to generality in law-making, make for a stable and secure mainstream *which readily absorbs any pressures for change coming from the peripheries*. In the developing countries, by contrast, *the mainstream rights are themselves skewed in their setting, and they are uncertain and insecure, because of imperfect competition in the economic and political organisations*; [81] on account of persistent threats to political stability; owing to ethnic and related schisms undermining the common national cause; due to unregulated personal factors in the general direction of economics, politics and administration. On account of such factors, the mainstream of rights tends to coincide with a concept aptly termed by Gunnar Myrdal, the *soft state*. [82] The 'soft state' means:

> . . . the general absence of discipline, particularly in the conduct of public affairs. Laws and regulations are often circumvented by officials and there is inconsistency in the application of policies and laws. Furthermore, government servants are often in secret collusion with politicians and other influential people whose real task is to supervise the execution of policies. Corruptive practices are commonplace in order to secure objectives other than those officially stated.[83]

Such a frame of government would not fail to taint all its three basic departments of power and the judiciary would be unable to perform its function as the pivot of an objective scheme of rights-determination. Being in such an insecure state, the mainstream rights, in their flow, could not easily accommodate pressures from aggressive rights activities coming from the peripheries, and consequently the total volume of rights capable of being realised at any time will be relatively low. The scenario may be illustrated as in Figure 2.

Moreover, it is to be noted that even if altruistic agencies of enhanced legal rights were to emerge, their mode of operation would necessarily be shaped by the restrictive machinery of the Western-style court system. The courts in this system are a passive institution, which will hardly ever give positive social and economic advantages capable of reproducing themselves and changing the lot of the poor. Their responses are no more than

anecdotal, rectifying *specific* legalistic 'wrongs'. Although such responses may truly bring up new rights, or laudably expand access to existing rights, the overall improvement they could make to the stability and legitimacy of the machinery of justice is no more than incremental. This is because the domestication of the court apparatus, among the people, must depend on a substantial enhancement of the social and economic condition of these people—a factor that would accord the judicial machinery a spontaneous appeal among the people.

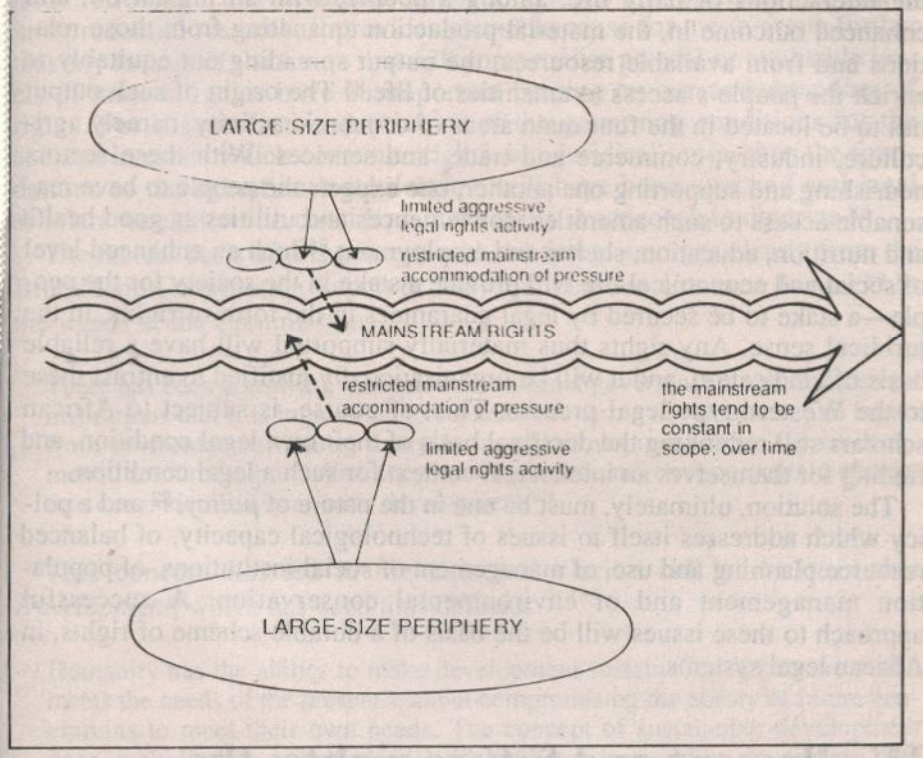

Figure 2 : A skewed pattern of mainstream rights, with limited response to progressive rights pressures from the large peripheries.

It follows, as a possible antidote to that sceptical note, that rights in a more durable sense should be viewed as an outflow from a material creative process which significantly alters and enhances the people's access to economic, social and political amenities. *The people need such material gains as a basis for the 'property' interest that will facilitate their participation in the judicial scheme of Anglo-American conception* .

The Gordian knot is to determine the content of 'development', and to prescribe its recipe. The literature on development is so voluminous as to be somewhat confusing.[84] But the term may be taken to suggest *change* in the interactions of daily life, among a people, with an impact on, and enhanced outcome in, the material production emanating from those relations and from available resources, the output spreading out equitably to enrich the people's access to amenities of life.[85] The origin of such output has to be located in the four main areas of economic activity, namely agriculture, industry, commerce and trade, and services. With these sectors nourishing and supporting one another, one expects the people to have reasonable access to such amenities, conveniences and utilities as good health and nutrition, education, shelter and employment.[86]Such an enhanced level of social and economical life will provide a stake in the society for the people—a stake to be secured by legal guarantees in the form of rights, in the juridical sense. Any rights thus materially supported will have a reliable basis of vindication, and it will be organisationally justified to entrust these to the Western-type legal process. This, of course, is subject to African scholars still rethinking the doctrinal basis of their own legal condition, and finding for themselves an intellectual context for such a legal condition.

The solution, ultimately, must be one in the nature of *policy,* [87] and a policy which addresses itself to issues of technological capacity, of balanced resource planning and use, of management of social institutions, of population management and of environmental conservation. A successful approach to these issues will be the basis of a durable scheme of rights, in African legal systems.

IV. Present and future rights: the question of sustainable development

To found a theory of rights upon material development, as I have done, is to bring to issue the relationship between the present and the future. The term 'right' bears a connotation of security, reliability and durability. If the

reality of a right is dependent upon the security of material conditions, then it is appropriate to inquire whether those conditions themselves are permanent. It is now well known that current human gains in agriculture, industry and other economic activities could cause irreparable damage to future interests, whether in our time or in the time of our descendants. The notion of durability of rights should, I think, suggest their availability not just to myself but also to my children and their descendants. That which claims to be a right, even if fully vindicable by legal process, is but an inchoate 'right', if it lacks temporal generality and will only cover me but not my issue. Although this argument ought to remain a hypothesis for future jurisprudential research, it provides plausible cause for me to argue further that any factors of the future that will compromise present or attainable levels of material gains have an important bearing on our understanding of rights. For if such factors deprive us of the governing conditions for the societal interests which constitute rights, in a juridical sense, then the foundations of the operative legal doctrine will have been wrecked and legal scholars would have to consider a more realistic approach to doctrine.[88]

The factual basis of this concern with the future emerges clearly from the Brundtland Commission Report of 1987, entitled *Our Common Future*.[89] In the words of the Commission:

> There has been a growing realisation in national governments and multilateral institutions that it is impossible to separate economic development and issues from environmental issues; many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development.[90]

This concern has led to the universal clarion call of *Sustainable Development*, which has been thus defined:

> Humanity has the ability to make development sustainable—to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development does imply limits—not absolute limits but limits imposed by the present state of technology and social organisation on environmental resources and by the ability of the biosphere to absorb the effect of the human activities.[91]

What are today regarded as 'rights', being given effect through the legal system, are in many cases unsustainable. As the Brundtland Report states, these efforts to maintain human progress,

> . . . draw too heavily, too quickly, on already overdrawn environmental resource accounts to be affordable far into the future without bankrupting these accounts. They may show profits on the balance sheets of our generation, but our children will inherit the losses. We borrow environmental capital from the future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, *but they can never collect on our debt to them.* We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.[92]

It bespeaks an incoherence in the legal doctrine, the fact that there may be material debts, which therefore must affect the reality of the recognised *legal rights*, but which in future cannot be demanded and recovered under the legal process. A debt, in Anglo-American jurisprudence, is a contractual right with a certainty of enforcement, provided the appropriate procedures are followed. So when we extrapolate the concept of debt to the larger material conditions, and the attendant juristic situations of the future, its recognised rights are rendered inoperative. Thus a material change in society and economy will have occurred which severely undermines the integrity of the present legal order.

The foregoing argument leads to a rights-scenario that may be graphically illustrated in Figure 3.

If this pattern gives a valid theory, then one must expect the long-term future to be a future of redoubled poverty, overcrowding, social strife and disruption of existing social and economic infrastructure. Such a situation would lead to a breakdown of the processes of law and justice, and consequently to large-scale popular grievances that could precipitate utter disorder. The overall effect would be to substantially lower the level of rights such as are enjoyed by the present generation—with all its current defects such as inequitable social and spatial apportionment.[93]

The rights of Anglo-American legal doctrine are based on the *past* and the *present*, and the crucial factor in those epochs is the *property interest*. This interest, in its very design, is a static factor insofar as it entrenches and sanctifies a certain condition of rights, and denies legality to new concerns which may appear contrary to the conventional wisdom—however valid or important they may be.[94] In my concern about this situation I have elsewhere noted:

As there is evidence to the effect that the sustainability of the earth's productive capacity is at stake, it is high time some current constitutional principles, especially those concerned with property rights, were reviewed and aligned with future needs.[95]

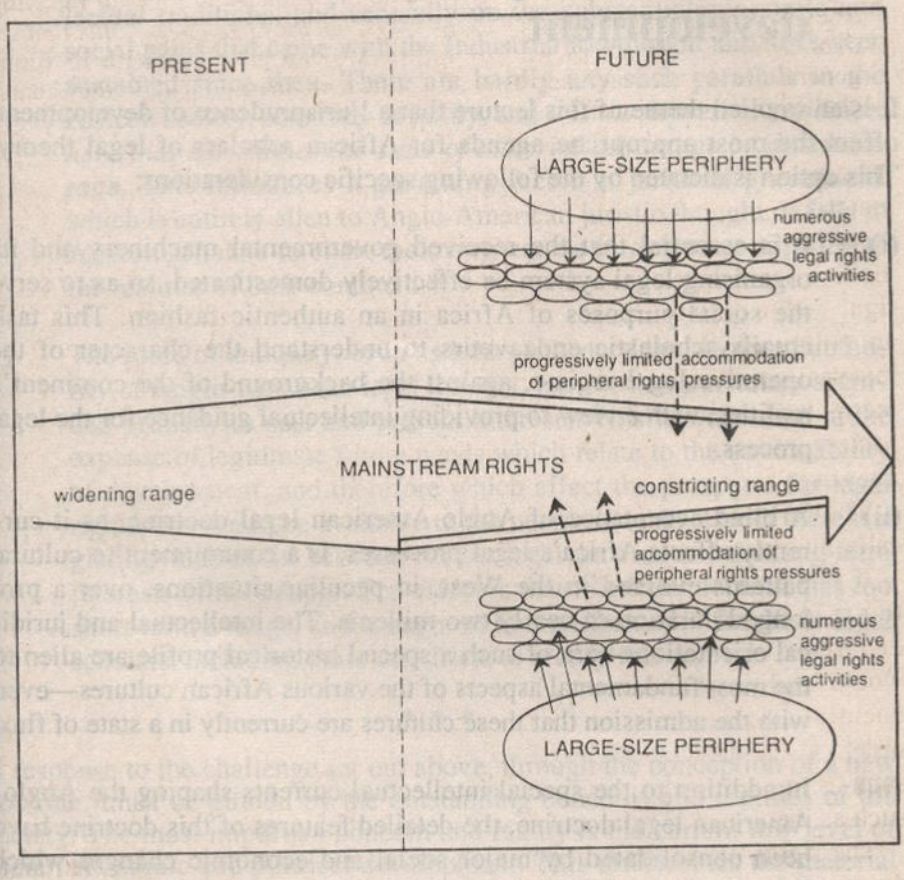

Figure 3: An undermined environment results in a constricting material base, which in its turn progressively narrows down the scope of the mainstream rights and makes them resistant to rights pressures from the peripheries.

Suffice it to say that Anglo-American jurisprudence, in the form in which it is at present guiding legal thought and process in Africa, is hardly

perfect, and its model of rights is inconsistent with the prevailing conditions and the temporal scope of Africa's survival.

V. In quest of a jurisprudence of development

It is an implied theme of this lecture that a 'jurisprudence of development' offers the most appropriate agenda for African scholars of legal theory. This option is dictated by the following specific considerations:

(i) It is essential that the received governmental machinery and its organising legal system be effectively domesticated, so as to serve the social purposes of Africa in an authentic fashion. This task entails scholastic endeavours to understand the character of the operative legal regime, against the background of the continent's realities, with a view to providing intellectual guidance for the legal process.

(ii) A blind acceptance of Anglo-American legal doctrine, as it currently affects Africa's legal processes, is a commitment to cultural patterns evolved in the West, in peculiar situations, over a prolonged duration of nearly two millenia. The intellectual and juridical orientations born of such a special historical profile are alien to the most fundamental aspects of the various African cultures—even with the admission that these cultures are currently in a state of flux.

(iii) In addition to the special intellectual currents shaping the Anglo-American legal doctrine, the detailed features of this doctrine have been consolidated by major social and economic changes which have been in progress, especially since the Industrial Revolution in the mid-1700s. This important factor has *not* influenced developments in the African societies, and thus a 'lack of fit' marks present attempts to apply Anglo-American legal doctrine without any significant qualification.

iv) Given the foregoing factors, *legal rights*, which have been the common denominator in the material as well as the concepts employed in Anglo-American legal thought, there, rest in a social framework radically different from that obtaining in Africa. Legal rights in Euro-American legal systems rest firstly on agelong intellectual traditions, and secondly on the substantial economic and social gains that came with the Industrial Revolution and have been sustained since then. There are hardly any such parallels in the African society, economy or polity, and *it is the depressed condition here that determines the state of material advantage or disadvantage*. This introduces a governing factor in juridical phenomena which is entirely alien to Anglo-American juristic thought. It falls to African scholars to chart their own course in a manner adjusted to the realities of their continent.[96]

(v) The force of antiquity, even as it has enhanced the doctrinal authority of Anglo-American legal thought, has by the same token accorded primacy to past and present interests. This has occurred at the expense of legitimate future needs which relate to the sustainability of development, and therefore which affect the prospects for legal rights that would be available to the people. In this respect there is a glaring 'lack of fit' between current legal doctrine and the long-term interests of the people. The effect is that this legal doctrine has too short-term a range, and it ought to be transformed.[97] It falls to legal scholars, including those of Africa, to rectify this defect.

* * *

A response to the challenge set out above, through the conception of a new doctrine, must be guided by the outstanding concerns and realities of the society. The most important concern and reality is the current low level of social, economic and political development. This undermines the material basis to support schemes for the enhancement of legal rights. A development-conscious approach to legal theory would seek to incorporate this material reality in the legal doctrine. It would also identify the place in legal thought, of the incremental rights-creation that takes place through pressures from the peripheries. The theory emerging would be more substantial in its conception than that associated with Anglo-American jurisprudence, which tends to be procedural and largely concerned with the

amelioration of specific conflict.[98] It would be more emphatically explanatory of social, economic and political phenomena—and thus of human nature—than the technique-dominated legal doctrine of Euro-American provenance.

Such an approach, no doubt, would share some features with Anglo-American legal doctrine, given the many commonalities in the machinery and concerns of governance—an obvious example being legal rights as a starting point in the construction of theory. But the dialectical relationship between such rights and other phenomena would have to be formulated so as to reflect the state of development obtaining, as well as the question of access to material supports.

Conclusion

I have endeavoured in this lecture to illuminate the subject of rights, and to clear some of the mystique surrounding the concept, as used by lawyers. In the process I have discussed the origins and the characteristics of rights in Anglo-American legal thought, indicated the place of such theory in African practice, explicated the problematic point about the domestication of legal rights, addressed the interplay between rights in the present and in the future, and attempted to state a case for a genuine search for an African juristic doctrine.

It is my hope that the scheme of this lecture, and its method and content have given some hints for scholars of legal theory.

Notes

1. E.g. B. O. Nwabueze, *Constitutionalism in the Emergent States* (London: C. Hurst & Co., 1973); B. O. Nwabueze, *Presidentialism in Commonwealth Africa* (London: C. Hurst & Co., 1974); B. O. Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (London: C. Hurst & Co., 1977); J. C. Gautron et M. Rougevin-Baville, *Droit Public du Sénégal*, 2é ed. (Paris: Editions A. Pedone, 1977); J. W. Salacuse, *An Introduction to Law in French Speaking Africa* (Charlottesville, Virginia: The Mitchie Co.) Vol. I (1969), Vol. II (1975); D. G. Lavroff, *Les Systémes Constitutionnels en Afrique Noire—Les Etats Francophones* (Paris: Editions A. Pedone, 1978); Y. P. Ghai and J. P. W. B. McAuslan, *Public Law and Political Change in Kenya* (Nairobi: Oxford University Press. , 1970).
2. There are exceptions, such as Robert B. Seidman, *The State, Law and Development* (London: Croom Helm, 1978).
3. cf. Nwabueze op. cit.
4. cf. Salacuse, op. cit. (n.1); A. Allott, *New Essays in African Law* (London: Butterworths, 1970).
5. See F. C. Okoye *International Law and the New African States* (London: Sweet & Maxwell, 1972); T. O. Elias, *Africa and the Development of International Law*, 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 1988); R. Yakemtchouk, *L'Afrique en Droit International* (Paris: Librairie générale de Droit et de jurisprudence, 1971).
6. See J.B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Nairobi: ACTS Press, 1990); J. B. Ojwang,'The Residue of Legislative Power in English and French-speaking Africa' (1980) 29 *International and Comparative Law Quarterly* 296–326; J. B. Ojwang,'The Nature and Scope of Executive Power in English and French-Speaking Africa: A Comparative Perspective' (1980) 13 *Verfassung und Recht in Übersee* 319–337; J.B. Ojwang,'Legislative Control of Executive Power in English and French-Speaking Africa: A Comparative Perspective' (1981) *Public Law* 511–544; J.B. Ojwang and J.A. Otieno-Odek,'The Judiciary in Sensitive Areas of Public Law: Emerging

Approaches to Human Rights Litigation in Kenya' (1988) 35 *Netherlands International Law Review* 29–52; J.B. Ojwang and P.N. Okowa,'The One-Party State and Due Process of Law: The Kenya Case in Comparative Context' (1989) 1 *African Journal of International Comparative Law* 177–205.

7. R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Butterworths, 1989), p. 2.
8. Ibid., p. 1.
9. Ibid., p. 3.
10. Ibid., p. 235.
11. R. Cotterrell, op. cit. (n.7), pp. 49-51.
12. John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1955).
13. Cotterrell, op. cit. (n. 7), p. 54.
14. R.H. Tawney, *The Acquisitive Society* (London: G. Bell & Sons Ltd., 1922), pp. 13–14. It should be noted that major developments of legal theory, along the same lines, were made by Hans Kelsen (1881–1973). See his *Pure Theory of Law* (Berkeley: University of California Press, 1967).
15. Thus Lord Scarman observes in *Gillick* v. *West Norfolk Wisbech Area Health Authority and Another* [1985] 3 All E.R. 402 (H.L.): '"It is a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law . . . . The mark of the great judge from Coke [1552–1634] through Mansfield [1705–1793] to our day has been the capacity and the will *to search out principle, to discard the detail appropriate (perhaps) to earlier times* . . . and to apply principle in such a way as to satisfy the needs of his own time' (emphasis added).
16. R.S. Bhalla, *Concepts of Jurisprudence* (Nairobi: Nairobi University Press., 1990), pp. 61-63.
17. Ibid., pp. 61-88.
18. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (Oxford: Oxford University Press , 1980); R. B. M. Cotterrell, *The Sociology of Law: An Introduction* (London:

Butterworth, 1984); R. M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

19. See n.18 (supra); R. M. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press 1985); R. M. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

20. It is a development that manifests the limits of the positivistic dislocation of legal theory from the empirical facts of life, and which will have to be kept in mind when we later on address the nature of jurisprudence in the African social, economic and political context.

21. J.N. Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986), pp. 94–96.

22. L.L. Fuller,'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958)71 *Harvard Law Review* 630–72; L.L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969).

23. K.N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); Cotterrell, op. cit. (n. 7), pp. 194–202.

24. R. Cotterrell, op. cit. (n. 7), pp. 210–213.

25. A. Gewirth,'Are there Any Absolute Rights?' in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), 91, at p. 92 (emphasis original). See also: F. Wieacker, 'Foundations of European Legal Culture' (1990) 38 *American Journal of Comparative Law*, 1–29; R.S. Summers, 'Theory, Formality and Practical Legal Criticism' (1990) 106 *Law Quarterly Review* 407–430; R. Cotterrell, 'The Sociological Concept of Law' (1983)10 *Journal of Law and Society*, 241–255; R. Cotterrell, 'The Law of Property and Legal Theory', in W. Twining (ed.), *Legal Theory and the Common Law* (Oxford: Basil Blackwell, 1986), pp. 81–98; T. Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987), pp. 241–243; L. Henkin, *The Rights of Man* (London: Stevens & Son, 1970).

26. Sir John Fletcher-Cooke,'Parliament, Executive and Civil Service', in Sir Alan Burns (ed.), *Parliament as an Export* (London: George Allen & Unwin Ltd, 1966), 142, at p. 144. See also R.H. Tawney, op. cit. (n. 14).

27. F. Wieacker, op. cit. (n. 25), p. 12. See generally, J.P. Dawson, *The Oracles of the Law* (Westport: Greenwood Press, Publishers, 1968).

28. E.g.,'Summa contra Gentiles' (1259–1264);'Summa Theologica' (1267–

1273).

29. Wieacker, op. cit.(n. 25), pp. 13–14nn.
30. Ibid., pp. 14–15.
31. Ibid., pp. 16–17.
32. Bodenheimer is the translator of Wieacker's article; see Ibid., p. 23n (emphasis added).
33. Ibid., p. 24.
34. Especially in Marxist jurisprudence: R. Cotterrell, op. cit. (n. 18) pp. 120–125; M. Cain and A. Hunt (eds.), *Marx and Engels on Law* (London: Academic Press, 1979); R. Miliband, *The State in Capitalist Society* (London: Quartet Books, 1973).
35. op. cit. (n. 25), p. 24 (emphasis added).
36. Ibid.
37. Mr. Justice F.C. Hutley,'The Legal Traditions of Australia as contrasted with those of the United States', (1981) 55 *Australian Law Journal* 63, at p. 66; see also T.G. Ison,'The Sovereignty of the Judiciary' (1985) 10 *Adelaide Law Review*, pp. 1–31. This line of thought has been pursued earlier in this century by some Western jurists who have maintained that: 'The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision—'libre recherche scientifique'—B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 16.
38. David S. Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (Cambridge: Cambridge University Press, 1969), p.1.
39. Ibid., p. 9.
40. Ibid., p. 21 (emphasis added). Such was also Max Weber's apprehension of the notion of rationalism {see M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (transl. Talcott Parsons) (London: Unwin University Books, 1930)}. Introducing this work, R.H. Tawney observes (p. 1e):'The word rationalism is used by Weber as a term of art, to describe an economic system based, not on custom or tradition, but on the deliberate and systematic

adjustment of economic means to the attainment of the objective of pecuniary profit.'

41. op. cit. (n. 38), p. 22.

42. N. Rosenberg and L. E. Birdzell, *How the West Grew Rich: The Economic Transformation of the Industrial World* (London: I.B. Tauris & Co. Ltd. Publishers, 1986).

43. Ibid., p. viii.

44. D.G. Smith,'Liberalism', *International Encyclopedia of the Social Sciences*, Vol. 9 (1968), p. 276.Also in point is Dworkin's view of liberalism, that 'its constitutive morality is a theory that requires official neutrality amongst theories of what is valuable in life', R. Dworkin, 'Liberalism', in S. Hampshire (ed.), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978), p. 142. See also: Roberto M. Unger, *Law in Modern Society : Toward a Criticism of Social Theory* (New York: The Free Press, 1976), p. 143.

45. Quoted in G. Dietze, *In Defense of Property* (Baltimore: The Johns Hopkins Press, 1971), p.70 (emphasis added). Dietze undertakes a detailed study of the interplay of property rights, and the rights today subsumed under the concept of civil liberties. In his study he underlines the primeval character of property and its role in the establishment of the original state of order and the conditions which led to the more typical rights and liberties associated with Western liberalism.

46. See R.H. Tawney, *Equality* (London: Allen & Unwin Ltd., 1964), pp. 85–109.

47. F.L. Neumann,'The Concept of Political Freedom' (1953) 53 *Columbia Law Review* 901, at p. 909 and see also H. Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660–1689* (Chicago: University of Chicago Press, 1977), pp. 37–39.

48. Y. Barzel, *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1989), p. 62.

49. See R.S. Bhalla,'The Concept of Thing Revisited', (1980) 22 *Journal of the Indian Law Institute* pp. 555–567.

50. L.A. Stein,'The Theoretical Bases of Locus Standi', in Leslie A. Stein (ed.), *Locus Standi* (Sydney: The Law Book Co. Ltd, 1979), p. 9 (emphasis added).

51. Joel F. Handler *et al.*, *Lawyers and the Pursuit of Legal Rights* (New York: Academic Press, 1978), p. 13.
52. Ibid.
53. Ibid., pp. 13–14 (emphasis added).
54. Such approaches could be expansive or restrictive, provided only that the basic guidelines are determined by settled legal doctrine: L.L. Jaffe, *English and American Judges as Law Makers* (Oxford: Clarendon Press, 1969). The general proposition, however, is to be qualified by the fact that in a number of Western countries new principles of government liability have emerged which tend to change the balance of constitutional responsibility, in rights-claims, between the courts and the legislature; see C. Harlow, *Compensation and Government Torts* (London: Sweet & Maxwell, 1982).
55. M.R. Fowler, *Thinking about Human Rights: Contending Approaches to Human Rights in U.S. Foreign Policy* (Lanham: University Press of America, 1987).
56. In this category would be rights linked to the implementation of tax law; see in the case of the U.K., *R* v. *I.R.C., ex parte Rossminster Ltd* [1980] A.C. 952; *Griffiths* v. *J.P. Harrison (Watford) Ltd.* [1963] A.C. 1.
57. U.S.A.: *Marbury* v. *Madison*, 1 Cranch 137 [1803].
58. U.K.: *Cooper* v. *Wandsworth Board of Works*, [1863] 14 C.B. (N.S.) 180.
59. U.K.: *R.* v. *Electricity Commissioners, ex parte London Electricity Joint Committee* [1924] 1 K.B. 171.
60. U.K.: *Nagle* v. *Feilden* [1966] 2 Q.B. 633.
61. U.K.: *Fowle* v. *Padget* (1798) 7 T.R. 509.
62. U.K.: *Inwards* v. *Baker* [1965] 2 Q.B. 29.
63. U.K.: *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.
64. U.K.: *Ebrahim Dawood Ltd.* v. *Heath (Est. 1927), Dalal (London) Ltd. (Third Party)* [1961] 2 Lloyd's Rep. 512.
65. U.K.: *Hawke* v. *Corri*, (1820), 2 Hag. Con. 280; 161 E.R. 743.
66. U.K.: Sir Rupert Cross, *Evidence*, 4th ed. (London: Butterworths, 1974), pp. 460–501.
67. Ibid., pp. 310–352.

68. M. Berlins and C. Dyer, *The Law Machine*, 3rd ed. (London: Penguin Books, 1989); S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974), pp. 5–6.

69. D.T. arap Moi, *Kenya African Nationalism* (London: Macmillan, 1986), pp. 3–5.

70. E. Cotran, *Restatement of African Customary Law—Kenya*, 1. *Marriage and Divorce*; 2. *Succession* (London: Sweet & Maxwell, 1968 & 1969); J.B. Ojwang, 'The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenyan Case' (1989) 4 *Law & Anthropology* 125–140; J.B. Ojwang, 'European Law in Africa: Wherefore?', in Stig Jorgensen, Juha Pöyhönen, Csaba Varga (eds.), *Tradition and Progress in Modern Legal Cultures* (Stuttgart: Steiner Verlag Wiesbaden G. m.b.H, 1985), pp. 141–147; S.C. Wanjala, 'The Relevance and Position of Customary Law in Kenya's Legal System', (1989) 4 *Law & Anthropology* 141–151.

71. Ojwang, 'The Meaning, Content and Significance of Tribal Law', op. cit. (n. 69), p. 127.

72. Ibid., pp. 127–129.

73. P.H. Gulliver, *Social Control in an African Society* (London: Routledge & Kegan Paul, 1963).

74. H. Randa, *Problems of Interaction between the Imposed English System of Law and the Luo Customary Law in Kenya* (University of Lund, Juris Dok. dissertation, 1987).

75. J.B. Ojwang, 'Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa', in P. Sack and E. Minchin (eds.), *Legal Pluralism* (Canberra: Australian National University, 1986), 99, at pp. 112–113.

76. Such constitutions and laws, in their essential design, were sharply antithetical to the traditional African society's scheme of social purpose, order and welfare. The Anglo-American constitutional models, Michael Foley tells us, are designed for elite functions, and are little in the nature of a translation of the broad social concern. He says these constitutions, through silence, gaps and abeyances, rely on uncertainty and obfuscation, as a means to avert the moral case for addressing the main practical social concerns: M. Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political*

Temperament in the Maintenance of Government (London: Routledge, 1989).

77. The Judicature Act, Cap. 8, Laws of Kenya.

78. Ojwang,'The Meaning, Content and Significance of Tribal Law', op. cit. (n. 69), pp. 131–133.

79. J.S. Wunsch and D. Olowu (eds.), *The Failure of the Centralised State: Institutions and Self-Governance in Africa* (Boulder: Westview Press, 1990); A. Sachs and G.H. Welch, *Liberating the Law: Creating Popular Justice in Mozambique* (London: Zed Books, 1990); Y. Ghai,'The Rule of Law in Africa: Reflections on the Limits of Constitutionalism', Working Paper, Programme of Human Rights Studies, Chr. Michelsen Institute, Bergen, 1990; Anon., 'Somalia: The Battle Rages On', in *The Weekly Review* (Nairobi), January 18, 1991, pp. 25–28; O. Njuguna,'Foreign Debts Strangle Africa's Advancement', in *The Kenya Times* (Nairobi), April 20, 1991, p.6; K. Kibwana, 'Development of Democratic Culture and Civil Society in Africa', in N.S. Rembe and E. Kalula, *Constitutional Government and Human Rights in Africa* (Maseru: Lesotho Law Journal, 1991), pp. 13–56; G. Muigai, 'Constitutional Government and Human Rights in Kenya', in Rembe and Kalula, *Ibid.*, pp. 107–135. Y. Ghai,'The Rule of Law, Legitimacy and Governance', (1986) 14 *International Journal of the Sociology of Law* 179–208; H.W.O. Okoth-Ogendo 'The Politics of Constitutional Change in Kenya, since Independence 1963–1969' (1972) 71 *African Affairs* 9–34; H.W.O. Okoth-Ogendo, 'Development and the Legal Process in Kenya: An Analysis of the Role of Law in Rural Development Administration', (1984) 12 *International Journal of the Sociology of Law*, 59–83; W.O. Oyugi 'Local Government in Kenya: A Case of Institutional Decline', in P. Mawhood (ed.), *Local Government in the Third World: The Experience of Tropical Africa* (London: John Wiley, 1983), pp. 107–140; Y.P. Ghai, 'Constitutions and the Political Order in East Africa', (1972) 21 *International and Comparative Law Quarterly* 403–434; C. Gertzel, *The Politics of Independent Kenya* (Nairobi: East African Publishing House , 1970); R. Martin, 'Legislatures and Economic Development in Commonwealth Africa', 1977 *Public Law* 48–83.

80. J.F. Handler *et al.*, op. cit. (n. 51), p. 14.

81. See Wunsch and Olowu, op. cit. (n. 79).

82. G. Myrdal,'The "Soft State" in Underdeveloped Countries', (1968) 15

University of California Los Angeles Law Review, 1118, at pp. 1120; R.B. Seidman, *The State, Law and Development* (London: Croom Helm, 1978), p. 18.

83. Goran Hyden,'Ethnicity and State Coherence in Africa', *Ethnic Studies Report*, Vol. 2, No. 1 (Jan. 1984), 1, at p. 4.

84. See: W.A. Beling and G.O. Tottem (eds.), *Developing Nations: Quest for a Model* (New York: Van Nosrand Reinhold, 1970); G. Myrdal, *Asian Drama: An Inquiry into the Poverty of Nations* (New York: Pantheon, 1968); D. Apter, *The Politics of Modernisation* (Chicago: University of Chicago Press, 1965); M. Kilson, 'African Political Change and the Modernisation Process', (1963) 1 *Journal of Modern African Studies* 425.

85. See generally, Seidman, op. cit. (n. 82).

86. C.O. Okidi, 'Management of Natural Resources and the Environment for Self-Reliance', (1984) 14 *Journal of Eastern African Research and Development* 92, at p. 93.

87. See Calestous Juma,'Sustainable Development and Economic Policy in Kenya', in A. Kiriro and C. Juma (eds.), *Gaining Ground: Institutional Innovation in Land-Use Management in Kenya*, Rev. ed, (Nairobi: Acts Press, 1991), pp.51–86.

88. See Raino Malnes and Arild Underdal, 'Duties and Deeds: "Sustainable Development" in Political Science', in *Forum for Utviklingsstudier*, 1990, No. 1, pp. 47–58; D. Sarokin and J. Schulkin, 'Environmentalism and the Right-to-Know: Expanding the Practice of Democracy' (1991) 4 *Ecological Economics*, 175-189.

89. The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

90. Ibid., p. 3; and see: C.O. Okidi, 'Reflections on the Teaching and Research on Environmental Law in African Universities', (1988) 18 *Journal of Eastern African Research and Development* , 128–144; B.D. Ogolla, 'Water Pollution Control in Africa: A Comparative Legal Survey', (1989) 33 *Journal of African Law*, 149–156.

91. Ibid., p. 8.

92. Ibid. (emphasis added); and see E. Brown Weiss, *In Fairness to Future Generations* (Tokyo and New York: U.N. University and Transnational

Publishers, 1989).

93. H.W.O. Okoth-Ogendo, 'Development and the Legal Process in Kenya', op. cit. (n. 79).

94. See Sarokin and Schulkin, op. cit. (n. 88); this article extols Western practices which appear to furnish environmental information to the public, on the score of achievement in democracy; but it remains true that the existing proprietary nature of legal rights, in such countries, stands as a major challenge to possible schemes of safeguard for future rights.

95. J.B. Ojwang, 'Sustainable Development and the Law: A Constitutional Perspective', African Centre for Technology Studies (Nairobi), Policy Outlook Paper, April, 1991, p. 18.

96. As such a task requires nativity in intellectual nurture, as well as abundant experiential attachment, it is unsuitable for foreign scholars.

97. The limits of traditional jurisprudence appear to be anchored at the cosmological level. They rest on inveterate property notions, some of which are derived from religious teachings. Thus Gen. 1: 26–27: 'Then God said, "And now we will make human beings . . . . They will have power over the fish, the birds, and all aminals, domestic and wild, large and small".' Some scholars have extolled the virtues of unlimited patrimony which (no doubt) incorporates ecological resources. W.Z. Hirsch, in his work *Law and Economics: An Introductory Analysis* (New York: Academic Press, 1979) writes (p.19); 'The presence of property rights furnishes incentives to use resources efficiently. Given a legal system that enforces property rights, *a holder can have confidence to obtain returns from the use of property*' (emphasis added). Hirsch's immediate concern with the environmental factor, in the economic calculation, is essentially as regards sensitive impairments that will vitiate the allocation of productive resources, with resultant economic loss. In this scenario, the concern for environmental conservation falls within the 'Pareto optimum' for economic gain.

98. R.B. Seidman, op. cit. (n. 82).

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