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Land Law in Ghana: Contradiction between Anglo-American and Customary Conceptions of Tenure and Practices

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LAND LAW IN GHANA: CONTRADICTION BETWEEN ANGLO-AMERICAN AND CUSTOMARY CONCEPTIONS OF TENURE AND PRACTICES

by

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INTRODUCTION

The production of the material means of sustenance is the basis of social life. Social production defines every historically determined stage in a society's socioeconomic development. It determines the form, essence, and content of its economic structure. The law is a creature of that economic system. It is a legal expression of its property relations. It functions as a purposive ordering of the affairs of that society. As a creature of the economic structure, it stands in a secondary relationship to the former. Yet the two are harmoniously interconnected, interrelated, and interdependent. They influence, affect, overlap, and dovetail into each other. The latter relationship is necessary for an orderly socioeconomic progress. Where, at any given time, conflicts arise between the two so that the law ceases to reflect the economic structure, the former becomes an impediment—a clog on further development. At that stage, new laws are required in place of those that have become outmoded in order to give fillip to further economic and social progress.

It would appear, however, that the English common law was engrafted onto Ghanaian communal societies without taking into account the differences between the early nineteenth-century capitalist economic structures and the egalitarian communal institutions of Ghana. Both systems of law reflect distinctively different economic structures. That oversight, *inter alia*, laid the foundations for the conflicts between the customary law and practice and the Anglo-American common law, its notions and conceptions of tenure. The conflict that developed has become one of the most formidable obstacles to socioeconomic development in Ghana since colonial times.

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By the last decade of the nineteenth century, commercial agriculture based on permanent cultivation of the soil had been established in Ghana. Mining and timber industries had equally been developed to appreciable levels within the last two decades of the nineteenth century. Those events created favorable conditions for capitalist development, for which the private ownership of the means of production is a prerequisite. However, at that time, the basic means of production in Ghana was the land, generally held in common and not privately owned. The traditional communal schemes of tenure were based on, what for want of a better term, we would describe as subsistence agriculture. That system remained in the countryside. At the commercial and urban centers of the country, a distinctively different system of production, the capitalist sector, was established.

The capitalist sector, which became dominant, produced in its own image a privileged class of private property owners consisting of European, national, and rural capitalists. Attempts by this class to acquire and own lands privately gave rise to doctrinal, conceptual, theoretical, and practical problems. The most important of these were the twin problems of uncertainty of titles and costly litigation. Land transactions were beset with conflicts between the customary practices, norms, usages, and jural postulates governing the indigenous land law, on the one hand, and the Anglo-American conceptions of tenure and its common law notions, on the other.

Today, over 60 percent of the working population in Ghana is still to be found in the agricultural sector. The pace of depeasantization and productivity at the agricultural sector is very slow. Economic underdevelopment in Ghana has often been linked with the problems of insecurity of title. For over a century, solution to these thorny problems has been sought in the establishment of a scheme of land registration. Such measures have been resorted to without regard to the qualitative differences between the two economic structures. Yet those differences are often reflected at the level of the superstructure. Uncertainty of title and costly litigation are in themselves the product of the contradictions between the traditional egalitarian, communal system and the exploitative, capitalist sector of the economy. Yet it seems this fact has often been overlooked.

It is one of the key objectives of this work to shed light on the linkages between the exploitative capitalist sector and the traditional communal system. In the process, we hope to show that service by the traditional system of the capitalist sector of the economy lies at the root of economic underdevelopment in Ghana. If we achieve our objectives, then we should be able to demonstrate that legislative measures aimed at establishing a machinery for land registration can neither solve the problems of underdevelopment nor effectively eliminate the manifestations of conflict in the shape of litigation and economic underdevelopment. Instead, it would in its effect consolidate the usurpation and privatization of communal lands to be concentrated in the hands of a minority of the rich, speed up the pace of landlessness and social stratification, and lead to political instability. We seek to demonstrate that the present privatization policies, planned within the framework of the International Monetary Fund's (IMF) and the World Bank's globalization schemes, would aggravate these problems and sharpen the contradictions.

For a proper appreciation of the difficulties, it is necessary to undertake a brief discussion, from historical perspective, of the form, essence, and content of the Anglo-American land law and its common law doctrines, notions, and theoretical conceptions of tenure which were

engrafted onto the Ghanaian traditional societies. We believe that by this approach the incompatibility of the two systems will become self-evident.

THE “RECEIVED” ENGLISH LAW: THE DOCTRINES OF ESTATES AND TENURES

The evolution of the common law of England occurred during the transition from medieval to modern times. Its development was guided and shaped by the emergence of the capitalist economic structures that gradually replaced the feudal ones. The common law conceptions of tenure were rooted in the twin, artificial doctrines of tenures and estates, fed by a web of tissues woven around a mystical conception of ownership. These doctrines constitute the pivot around which English land law revolves. That is why the understanding of how the law works both in theory and in practice requires a critical study, examination, and understanding of its historical antecedents.

The Modern English law, which was imposed on the predominantly subsistence societies of Ghana, evolved from a socioeconomic formation known to human history as feudalism.² The basic characteristic feature of this historically constituted economic system in England was the use of landownership by the crown as the basis for organizing political, social, and economic life. Land in feudal society was the most important economic resource. It was the basic means of production. Hence its ownership and control carried with it the exercise of economic and political power over men. Thus the feudal oligarchy, which claimed ownership over the bulk of the lands, regulated socially people’s relations to the land as the basic means of production.

Feudal organization of production, distribution, and exchange therefore involved relations of dependence, subordination, and domination. It was a relationship described by Cheshire as “the negation of independence.” “It implies,” he writes, “subordination, it means that one man is deliberately made inferior to another.”³ It was that feudal system, which developed in the continent of Europe in the Middle Ages, that William the Conqueror adopted for the administration of the realm in England after his conquest of 1066.⁴

William the Conqueror took the view that since English landowners had denied his right to the crown and he had to assert that right by force of arms, their landed possessions became absolutely vested in him and he could deal with them in any manner he pleased.⁵ Having declared allodial ownership over the lands, William the Conqueror rewarded his Norman followers and those Anglo-Saxon barons who submitted to his authority by granting them vast areas of land. However, these land recipients did not thereby become owners of the lands over

² Even before the formal “reception” of English law and the ideas associated with it, a legal system supporting economic structures was already established at the urban and commercial centers of colonial possessions.

³ *Cheshire’s Modern Law of Real Property*, 12th ed., ed. E.H. Burn, London, 1976, 10.

⁴ *Ibid.*, 13

⁵ By 1086, such tenants in chief numbered 1,500. See Megarry and H.N.R. Wade, *The Law of Real Property*, 4th ed., London, 1975, 14.

which they had control. They held the land from William the Conqueror as the overlord upon condition that they not only remain loyal to him but also render continuing services to him. The relationship that was established in this way is succinctly described by Bentsi-Enhill:

They as tenants in-chief of the crown in turn made lesser grants out of their holdings to various individuals under similar arrangements whereby various continuing services were to be rendered in return for the grant. Thus was a pyramid established of land grants being progressively made downwards and reciprocal services of various kinds flowing up from tenants in actual occupation of land (tenants in demesne), through intermediate tenants (or mesne lords) to the tenants-in-chief who were thereby able to render the requisite services to their lord the king.⁶

The services for which grantees were permitted use of the land became known as tenures and were classified according to the nature of the feudal incidents or services. Those who held the land under military tenure had to render military service—that was the means by which armed forces were raised for the king and the nobility. The majority of the population, however, held the land under socage tenure—that implied the supply of agricultural services. The tenant by frankalmoign had to render religious services, that is, to pray for the welfare of the giver of the land, the king.

Closely associated with the doctrine of tenures is that of estates. As noted earlier, William the Conqueror did not grant land to his vassals as absolute owners. The vassals held the land in return for rendering specific services. From this developed the doctrine that land could not be an object of ownership by the subject. A distinction was thus drawn between ownership and possession, so that, although the subject would not own the land, if he were vested with possession, he would be entitled to exercise proprietary rights with respect to the land. The exercise of such proprietary rights derives from ownership not of the concrete, physical, material object—the land itself—but of an abstract⁷ entity referred to as an estate, which is interposed between the person seised and the land. The estate represents the extent of the individual's right to seisin.⁸ In it, the tenant holds a right of exclusive user over a time of uncertain duration. When the land was exploited by the serfs, on the other hand, the ruling feudal oligarchy appropriated the lion's share of the produce, despite the fact that the oligarchs themselves had not directly participated in the process of production. They were, therefore, more or less mere parasites on the society.

In a slave society, the slave is regarded as the property of the slave-master. On that account, the latter is entitled, under the laws of that society, to appropriate all the wealth created by the slave when using the master's tools. In English feudal society, the serf was no longer a slave, that is, the personal property of the landlord; yet he was tied to the land of a

⁶ Kwamena Bentsi-Enhill, *Ghana Land Law*, London, 1964, 223.

⁷ The artificial distinction drawn between ownership and possession in the common law has its foundations in the feudal relations of production and finds its legal and doctrinal expression in these concepts. The dichotomy established between corporeal and incorporeal hereditaments can also be seen to derive its source from the feudal ideas.

⁸ Thus Pollock and Maitland consider the most salient traits of English land law to be the projection of proprietary rights in land upon a plain of time. The category of quantity, of duration, is applied to them. See F. Pollock and F.W. Maitland, *History of English Law*, Cambridge, 1968, 2nd ed. reissued, vol. 2, at 10.

particular lord in a particular manor. When the manor was transferred or changed hands, the serf had to remain on the land and render services to the new landlord. As pointed out by Walter Rodney, “just as the child of a slave was a slave, so the children of serfs were also serfs.”⁹ Thus Marx saw the dominion of land as “an alien power over men” inherent in feudal landed property. The serf, he wrote, was an adjunct of the land. He was an appendage to it.¹⁰

However, feudal society, like all human societies, was subject to the objective laws of social development. One of these laws is that the level of the development of productive forces must correspond with production relations. Where the latter has become inconsistent with the former, it becomes a clog or a fetter on further development. In such a case the contradiction has to be resolved by creating new production relations to replace the outdated ones to conform to the contemporary levels of productive forces. When this occurs, a new economic structure will emerge, usually generating its own superstructure, an aspect of which will be its laws. This was exactly what happened when the feudal organization of production, exchange, and distribution was gradually replaced by the nascent laissez-faire capitalist system. It was within the context of such development that the freehold estate evolved. For a proper appreciation of the issues involved, we need to discuss the evolution of the freehold estate within the framework of the doctrine of estates.

EVOLUTION OF THE FREEHOLD ESTATE

The evolution of the freehold estate was influenced by several factors, including the Renaissance, which started during the fourteenth and the fifteenth centuries. The new learning questioned the religious dogma of the Middle Ages with its conception of a heavenly hierarchy that reflected the feudal order. In that ideology was disguised the exploitation of the serf by the lords as a natural subordination of the former to his superiors under the rule of God.¹¹ Similarly, the new learning encouraged the development of science and scientific inquiry. All these undermined age-old beliefs with the result that great progress was made in astronomy. The discovery of the compass was particularly important in aiding voyages of discovery.

During the feudal era, the feudal lord did not try to exact the utmost advantage from his land. Instead, he consumed what he could and calmly left the worry of producing to the serfs and tenants.¹² As feudal services became definite and certain, provided the serf satisfied his lord, any excess product belonged to him. That attitude left some measure of incentive for excess production. Excess production resulted in exchange of goods and services and, therefore, further division of labor. All these developments led to a series of inventions during the Middle Ages.

⁹ W. Rodney, *How Europe Underdeveloped Africa*, London, 1972, 13.

¹⁰ Marx and Engels, *Pre-Capitalist Socioeconomic Formations*, Progress Publishers, Moscow, 1979, 31.

¹¹ See Maurice Conforth, *Dialectical Materialism: An Introduction*, vol. 3, *Theory of Knowledge*, London, 1977, 89.

¹² See Marx and Engels, *op. cit.*, 31.

There were introduced new applications of water power, the modern type of plow, new methods of navigation, the spinning wheel, new mining methods, cast iron, and so forth.¹³ Most of these developments took place within the guilds. Thus capitalism was already developing within the bowels of the guilds; the process was given added impetus by the ideas generated by the Renaissance. All of these developments implied an increased division of labor, which carried in its train the development of new forms of property and economic activity that were not directly connected with physical exploitation of the land. Skills unrelated to agricultural services were being developed and perfected. Those processes were accelerated by voyages that led to the discovery of the Americas in the last decades of the fifteenth century. That incident opened the way for the development of merchant capital which would be invested in manufacturing industries, one of the most important of which was the woolen industry.¹⁴

The development of various skills meant that people no longer depended on physical exploitation of the land in order to subsist. The development of new forms of property, moreover, provided the material conditions for the exchange of goods and services. That phenomenon entailed the development of monetary-commodity relations, which began to undermine feudal economic structures. As money became a medium of exchange, the serf who had acquired it could commute his feudal services to monetary payments. This could serve as a complete discharge of his feudal obligations and set him free to pursue his own goals.¹⁵ Pollock and Maitland describe the process as follows:

We may see the process of commutation in all its various stages, from the stage in which the lord is beginning to take a penny or a halfpenny instead of each "work" that in that particular year he does not happen to want, through the stage in which he habitually takes

¹³ See Maurice Conforth, *Dialectical Materialism*, vol. 2, London, 1976, 57.

¹⁴ The growth of the woolen industry was one of the key factors in the qualitative transformation of English feudal society. Its growth was considerably aided by the great increases in trade between England and the Continent as a result of English occupation of Normandy and Aquitaine and enhanced by the growth of the woolen trade with Flanders. See Cheshire, *op. cit.*, 26. It should also be pointed out that the expansion of the woolen trade gave impetus to the Enclosure Movement under which many arable lands were enclosed for raising sheep and cattle. This led to the forced eviction of many "liberated" serfs, causing both pauperism and unemployment and their incidental social problems. That phenomenon helped to provide and create a reserve labor force—"a reserved army," as Marx would call them—for the emergent capitalists. Marx discusses in detail how, as a prelude to the revolution that laid the foundations for the capitalist mode of production in the last third of the 15th and the first decade of the 16th century, a "mass of free proletarians was hurled on the labor-market by the breaking-up of the bands of feudal retainers, who, as Sir James Steuart well says, 'everywhere uselessly filled house and castle.'" The rapid rise of Flemish wool manufacturers, and the corresponding rise in the price of wool in England, writes Marx, gave direct impulse to those evictions. See Marx, *Capital*, vol. 1, 671–675. In his *History of Henry VIII*, Bacon writes: "Inclosures at all time (1489) began to be more frequent, whereby arable land (which could be manned without people and families) was turned into pasture which was easily rid by a few herdsmen; and tenancies of years, lives, and at will (whereupon much of the yeomanry lived) was turned into demesnes. This bred a decay of people, and (by consequence) a decay of towns, churches, titles, and the like.... In remedying of this inconvenience the king's wisdom was admirable, and the parliament's at that time...they took a course to take away depopulating inclosures, and depopulating pasturage" (referred to by Marx, *loc. cit.*, 673).

¹⁵ For a more detail discussion of the transition from labor services to monetary payments, see Cheshire, *op. cit.*, 21–27.

*each year the same sum in respect of the same number of works but has expressly reserved to himself the power of exacting the works in kind, to the ultimate stage in which there is a distinct understanding that the tenant is to pay rent instead of doing work.*¹⁶

As this practice became widespread, that semblance of an intimate connection which existed between the feudal lord and the serf had to be severed. This occurred simultaneously with the introduction of material wealth—money as the most essential connection between the feudal lord and the occupant of the land. Under such circumstances the landlord need not have any personal relations with his tenant nor even necessarily know him. Provided the landlord received the agreed sum in lieu of the feudal incidents or services, he was forced to remain satisfied with his lot.

It was under these circumstances, where feudal services were commuted into monetary payments, that conditions became favorable for the evolution of the freehold estate. It was not only the new forms of property and skills which were being developed that became subjects of exchange. *Landed property also became a marketable commodity.* During that period, productive forces had been developed to a level that feudal relations of production could no longer support. Therefore, the feudal organization of production, exchange, and distribution and the institutions that supported it were to be discarded. In their place, new production relations were being adopted to suit the character of the new forces of production.

The rules that emerged as a legal expression of the new property relations had to conform to the nascent capitalist economic structures. The evolution of the freehold estate during the transitional period in the fourteenth and the fifteenth centuries should therefore be understood in terms of the transformation of the feudal legal and economic system. During the feudal era, the serf was bound to the lord and his manor by ties of respect, allegiance, and duty. The lord's relation to the serf was directly political, and had a human, intimate side to it. This intimacy had disguised the fact that the feudal lord appropriated the produce of the serf's labor.¹⁷ That fact was also overshadowed by the abstract, feudal conceptions of ownership, rights, duties, and obligations, all of which were ideological illusions at the level of the superstructure, of the feudal economic structures.

Although feudal production relations were changing in response to new economic circumstances, the abstract feudal conceptions and theories concerning ownership, estates, and tenures persisted. If the subject did not own but held an estate in the land, those estates or intangible interests ought to be classified into various categories so as to fit into the commodity exchange economy. Land is immovable. But it is possible for several people to exploit the same parcel of land in various ways for various purposes. A person may have the right to fell the timber. Another may have the right to cultivate the land for food crops, while yet another might have a right of future use. These rights could be exercised in respect of the positively identified piece or parcel of land. In order to transform the land into a marketable commodity, which must move and exchange hands, corresponding intangible rights must be created as being estates of freehold existing as categories apart, independent of the immovable property—

¹⁶ F. Pollock and F.W. Maitland, *History of English Law*, Cambridge, 1968, 2nd ed. reissued, vol. 1, 336.

¹⁷ See Marx and Engels, *op. cit.*, 31.

the concrete, objective, physical entity to which they relate. In order to become a commodity, therefore, the estate was to be classified into periods of indefinite duration.

The basis of such classification was the theory of allodial ownership by the crown. Upon the basis of such a theory, estates were classified corresponding to the hierarchical feudal order that was being replaced by the capitalist system. The freehold estate thus fully evolved, with the fee simple emerging as the highest estate that can be held by an individual under English law. Out of the fee simple, lesser successive estates of fee tail and life estates could be carved. Initially, only estates of freehold were recognized at common law as landed interests. The only lawful right to possession of land was tenancy-at-will under which the tenant, having no estate at all, could be ejected at any time. Leases or term of years later grew outside the system of estates. They were regarded as personal contracts binding on the parties to it only. However, in response to the development of the money-commodity relations and the transformation of landed property into a marketable commodity, that is, capital, such transactions became recognized at the end of the fifteenth¹⁸ century as estate contracts.

It must be pointed out, as Marx rightly demonstrates, that such development of the law was necessary in order that landed property, the root of private property, be brought in line with the general movement of private property. The changes that occurred during the course of the evolution of tenure were necessary to bring the law into line with the transformation of landed estates into commodities, *the rule of proprietor to appear as the undisguised rule of private property, of capital, freed from all political tincture.*¹⁹ This was the form, essence, and content of the English land law that was formally imposed on the subsistence, communal societies of Ghana at the last three decades of the nineteenth century.²⁰ In order to lay a firm foundation for understanding the conflict between the common law and the customary schemes of tenure, it will be appropriate to consider the related issue of contract theory and doctrine, which became the foundation for the movement of goods and services.

CONTRACT DOCTRINE AND THEORY

Like the doctrine of estates and tenures, contract law was conceived in the womb of feudalism. It was born during the transition from the medieval into the modern times. It was the process described by Maitland,²¹ the great English legal historian, as the movement from status to contract. It was nurtured to maturity during the early stages of capitalist development. That is why the theoretical, doctrinal, and philosophical foundations of contract law are rooted in the early eighteenth- and nineteenth-century laissez-faire, individualist ideology—and no one

¹⁸ A tenant for years was originally regarded as possessed, not seised, and thus had no estate. Therefore, if he was dispossessed, he could bring a personal action only for the recovery of damages. However, the transformation of landed rights into commodities, choses in action, rendered such a rule outmoded and leasehold interests were brought under the scheme of estates. For further discussion of the issue, see Cheshire, *op. cit.*, 38–40.

¹⁹ See K. Marx, *op. cit.*, 32.

²⁰ See Ordinance No. 4 of 1876, by which the common law, the doctrines of equity, and the statutes of general application, which were in force in England on 6th July 1874, were made applicable in the colony.

²¹ In *op. cit.*, 232.

should be surprised, write Borrie and Diamond, that nineteenth-century advocates of laissez faire individualist principles took to it with natural enthusiasm.²² Central to contract doctrine is the maxim, *caveat emptor*.

The maxim means the buyer must take care. It applies to the purchaser of specific goods or things. It equally applies whenever the buyer voluntarily chooses what he buys. Whenever by usage or otherwise, it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller—*caveat emptor, qui ignorare non debuit quod jus alienum emit*—a purchaser must be on his guard, for he has no right to remain ignorant of the fact that what he is buying belongs to someone other than the vendor. A buyer who fails to investigate the vendor's title does so at his own risk.²³ This view, as Borrie and Diamond²⁴ have pointed out, was eminently suited to the prevailing eighteenth-century ideas. This never meant that a buyer never had a remedy if he was a victim of unprincipled salesmanship. Yet it was not enough to prove that the seller boasted that the goods were sound or genuine. The buyer had to take the risk that the goods were faulty or worthless unless the seller had broken a positive promise—a warranty—or was guilty of fraud.

Fraud, however, is not easy to prove, since the burden of proving that the seller actually knew that what he said was false is a heavy one. So where the buyer purchased a shiny, glittering ornament, believing that it was gold when it was not, unless he could prove a vitiating factor, such as mistake, fraud, or innocent misrepresentation, he would not have a remedy. These are entrenched principles, doctrines, and theories that persist and linger on today. The maxim *caveat emptor* applies to land transactions in the same way as it does in respect of the sale of goods. However, contracts for the disposition of interests in land, referred to as estate contracts, are usually beset with conceptual problems—problems that can really become acute in a predominantly illiterate, communal society like Ghana, where they became applicable. Before subjecting to study and analysis the conflicts between the customary and the common law, we must examine next the essence and content of the indigenous law itself.

TRADITIONAL SCHEMES OF INTEREST IN LAND

Contacts between different societies often have the effect of changing their respective rates of development. Where the productive forces of one society are far more developed than those of the other with which contacts have been established, the tendency will be for the rate of development in the more technologically advanced society to accelerate at the expense of the less developed one if the bases on which they carry on the exchange are unequal. That was what happened to most African societies when voyages of discovery led to contacts with Europeans in the last two decades of the fifteenth century and later to colonization. European history is replete with the accounts of the nature of development in Europe before the

²² G. Borrie and A.L. Diamond, *The Consumer, Society and the Law*, 2nd ed., London, 1968, 16.

²³ See Jowitt's *Dictionary of English Law*, 300.

²⁴ *Op. cit.*

expansion abroad. However, very little information concerning the social and economic organization of black African societies before their contacts with Europeans is available.

Nevertheless, from the scanty accessible information, it is generally recognized that at that time most African societies had not developed to the level of the feudal stage of the European type. Yet Western European societies had, by the fifteenth century, reached a stage of primitive capitalist accumulation. In Africa south of the Sahara, where Ghanaian societies are to be found, we find that the quality of the Ife arts and the Benin bronzes dates from the fourteenth and the fifteenth centuries.²⁵ In the Western Sudan, the three great empires, Ghana, Mali, and Songhai, dating from the tenth to the fifteenth century, attained high levels of commercial, educational, and cultural advancement. Before the Portuguese arrived in the Gold Coast, indigenous mining technology had developed to appreciable levels. Gold was mined and refined into fine qualities. Division of labor in the precious metal industry was underscored by the development of the jewelry industry in which blacksmiths played a prominent role in the manufacture of gold ornaments. Thus when the Portuguese arrived in the Gold Coast in 1471, they met the chief of Cape Coast wearing a golden necklace.²⁶ The high level of skills developed in the mining industry was underlined by the large volume of supplies. For example, in 1554, Captain Thomas Winham, the first English man to visit the Gold Coast, returned to England with 150 lbs. of gold dust.²⁷ The evidence suggests the existence of a highly developed, complex economic structure necessary to support the superstructural arrangements in West African societies.²⁸

However, neither a slave mode of production as a dominant economic system on the scale witnessed in ancient Greece or Rome nor the feudal relations of production of the European type in the Middle Ages has been proved to exist in West Africa before the contacts with Europeans. That is why Walter Rodney made a bold and brilliant attempt to reconstruct the nature of development in Africa before its contacts with Europeans.²⁹ From the sketchy accounts given by social anthropologists, historians, and early travelers, prominent among whom were men like Ibn Batuta, the great Islamic scholar who visited the western Sudan in the

²⁵ Hand and stone axes had been found dispersed in a wide belt in Nigeria at Iwo-Ileru in Ondo state, Joss Plateau in the North, Igbo-Ukwu in the East, and elsewhere in West Africa. The ages of these tools have been determined by radio carbons as dating, in some cases, as early as 9,250 B.C. Nok and Igbo-Ukwu cultures are much older than Ife and the Benin cultures. See Professor F. Agbodeka, "The Roots of our Present Economic Woes," 22nd Inaugural Lecture, April 1986, University of Benin, Nigeria.

²⁶ See J.M. Sarbah, *Fanti National Constitution*, London, 1906, 54. The Portuguese named the colony *oro de la mina* on account of what they had seen and from which the colony derived its name—the Gold Coast.

²⁷ See Governor Clifford's Memorandum on the *Land Question*, 26 December 1917. This could be seen as the beginning of more than four centuries of trade in gold and other products between the United Kingdom and the Gold Coast.

²⁸ For some accounts of trade and commerce in the Western Sudan during the period, see E.W. Boville, *The Golden Trade of the Moors*, Oxford, 1958.

²⁹ See his book, *How Europe Underdeveloped Africa*, London, 1972, ch. 2. For some theories on African economic structures, see Yuri Popov, *Political Economy and African Problems*, Moscow, 1982; A.Y. Elyanov, *Economic Growth and the Market in the Developing Countries*, Part One, Moscow, 1982; Christos Theodoropoulos, "Law and Materialism," 1980 *Zambia Law Journal*, vol. 12, 53; Issa G. Shivji, *Class Struggle in Tanzania*, Dar Es Salaam, 1975; Ansa Asamoah, *Classes and Tribalism in Ghana*, Accra, 1984. Kwame Nkrumah, *The Class Struggle in Africa*.

thirteenth century, and Leo Africanus, Rodney came to the conclusion that in Africa, before the fifteenth century, the predominant principle of social relations was that of the family and kinship associated with communalism, that every member of an African society had his position defined in terms of blood relations. Some societies attached greater importance to matrilineal ties and others to patrilineal ones.³⁰

Rodney identifies these social relations to be crucial in the daily existence of a number of African societies, “because,” as he writes, “*the land [the major means of production] was owned by groups such as the family or clan—the head of which was responsible for the land on behalf of all kin, including fore-parents and those yet unborn.*”³¹ The social organization of labor in African societies at that stage of development thus centered around kinship. This can be contrasted, as Rodney rightly points out, with the capitalist organization of labor, where money buys labor, and with feudalism, where the serf provides labor in order to have access to a portion of the land belonging to the landlord.³²

Despite centuries of indirect and formal imposition of the Anglo-American common law on African societies, land tenure in such communities does remain predominantly traditional, exhibiting communal features. Many pre-colonial and the present-day land tenure systems are thus imbedded in tenurial arrangements under which social, economic, and political organization of society is intertwined with land tenure. Such characteristic features are so common that Gluckman, who describes the hierarchical system of customary land administration for the Lozi of Zambia in terms of primary, secondary, and tertiary estates of administration, concludes that such a hierarchical order is the general pattern in African land tenure.³³ However, this is to go far too far—not every African society was central nor was its organization hierarchical, but the picture is valid for many of the central states of West, East and Central Africa.

Similar distinguishing features of land administration based on a hierarchy of “chiefly jurisdiction,” carrying with it the responsibility for land allocation, distribution, and administration, are identified by Ian Hamnet in his work on the Sotho.³⁴ We can also note the comments of Allott on the pyramidal structures of political organization and land tenure in Ashanti. He writes:

The Ashanti system for the control and enjoyment of interests in land was fundamental to the whole structure of government, so much so that, if one removed the land rights of the chiefs, the basis on which they held their office and exercised their jurisdiction over their

³⁰ Ibid., 43–44; he identifies the Bemba of Zambia and the Ashanti of Ghana as examples of societies placing greater emphasis on matrilineal ties.

³¹ Ibid., 43.

³² Ibid., 44.

³³ See M. Gluckman, *Ideas and Procedures in African Customary Law*, London, 1969, 253, 257.

³⁴ Ian Hamnet, *Chieftainship and Legitimacy*, London, 1975, 63.

*subjects would be destroyed. This net work of land rights supporting the political structure extended upwards and downwards.*³⁵

If we turn to Nigeria, we find that the accounts given of centrally organized societies like the Yoruba and Benin present a similar picture. Hence, although one may not agree entirely with Gluckman that in African traditional systems of tenure, the control, management, and administration of lands are universally based on hierarchically organized structures, such characteristic features are common and identifiable at a general level of investigation in many property systems of black Africa.

However, in societies that lack unifying structures or central authorities, land rights are normally enjoyed through voluntary occupation and exploitation of land without the necessity of a formal grant or allocation based on a hierarchy of political administration or chiefly authority.³⁶ In some other societies, there may be chiefs exercising jurisdictional rights over land within their areas of authority. But such chiefs may not have rights of administrative control over lands at all.³⁷

Despite such minor differences, it is possible to identify, at a general level of investigation, a universal norm that underlies and determines the property rights, the beneficial enjoyment of rights in land, and the nature of such rights or interests under black African traditional schemes of interest in land. Such a universal norm or principle is exemplified by the right of the individual member of a social group, such as the polity, the clan, the tribe, or the family, to beneficially enjoy property as a member of the group or community. A general principle can therefore be deduced from the various studies of the land tenure systems to be that the beneficial enjoyment of rights in land is community based and devoid of status.

This is demonstrably so whether or not the land administration system and land rights are based on hierarchical structures or simply based on group membership. This conclusion seems to be inescapable because claims of inherent rights to benefit from the land are ultimately dependent on membership in one of the social groups mentioned. We have been unable to find any traditional land scheme of tenure in black Africa where the beneficial enjoyment of rights in land is dependent on contract in the sense that one has to acquire the land by sale or by any means other than membership of the land-holding community. It is of paramount importance to stress the fact that the unity of interest of individual members of a social group, such as the polity, the clan, the village, the compound, or the family, is consummated in the communal ownership of the land in which that unity finds legal expression.

³⁵ A.N. Allott, *The Ashanti Law of Property*, Stuttgart, 1968, 140–41; see a similar discussion about Akure, a centrally organized Yoruba society, by P.A. Oluyede, in his *Nigerian Law of Conveyancing*, Ibadan, 1978, 2–5. See also P.C. Lloyd, *Yoruba Land Law*, London, 1962, 1–60.

³⁶ See the discussion of this point by C.M.N. White, in *Readings in African Law*, vol. 1, 225, ed. E. Cotran. White discusses the land tenure system of the Tonga and some societies in Northern Rhodesia. See also an account by P.H. Gulliver of the land tenure system of the Arushia, in Tanzania, based on the family system, in *The Family Estate in Africa*, London, 1964, 197–229, ed. R.F. Gray and P.H. Gulliver.

³⁷ The Northern Ewe of Ghana and the Ibo societies of Nigeria, discussed by A.P.K. Kludze and S.N. Obi, respectively, afford good examples. See, respectively, *Ewe Law of Property*, London, 1973, 141–43, and *The Ibo Law of Property*, London, 1963, 3–35.

That unity of interest anchored on the communal ownership of the land carries with it the important implication that the socioeconomic and political organization of society revolves around such communal ownership. Collective ownership of the land is thus the fundamental basis of social organization. If the land, the basic means of production, is held in common by members of the group, then this makes cooperative effort in the exploitation of resources one of the most important factors in the social organization of labor. Using commonly owned land to produce the material means of sustenance through joint effort provides a sound basis for the equitable sharing of resources in the community.

The history of dialectical evolution of human societies shows that communal ownership of the means of production provides a shield against the exploitation of one man by the other. The egalitarian character of pre-colonial Ghanaian societies can therefore be scientifically explained in terms of communal ownership of the land. Subsistence agriculture, organized on the basis of group ownership of the land, therefore constitutes the dominant economic structure of traditional Ghanaian societies. Members of the community become conscious of such structures, out of which ideas in abstract form are developed giving legal expression to its property relations.

Religion plays an important role in matters relating to land tenure and administration in Ghana. In most communities, the land was regarded as a community asset and resource, an ancestral heritage, to which no one individual should be permitted to lay exclusive claim. It was believed, for this reason, that the ancestors would not permit any absolute alienation of the property. To do so would deprive the future generations yet to be born thereof. It was thought that would have the effect of severing the link between the dead and the living and the future generations yet to be born. Hence any disposition which would have the effect of irrevocably divesting the community of all interest in the land must be seen to be absolutely in the interest of the community at large. Compliance with these rules expressing such egalitarian ideas underlying the distribution of community resources was partly enforced by the fear of the ancestors' wrath which might be visited on "offenders."³⁸

The concretion of these religious ideas in the jural postulates of the traditional systems is a reflection at the level of the superstructure of the communal subsistence mode of production. Such ideas represent legal and sentimental expressions of communal property relations. The unity of interest of individual members of a community in which the allodial title was vested was consummated in the communal ownership of the land in which that unity found legal and sentimental expression. That system came into conflict with the developing dominant capitalist sector based on the private ownership of land, exploitation of wage labor, and capitalist laissez-faire ideas of maximization of profit and competition. The ideas behind the latter system mirrored capitalist property relations which came into conflict with the egalitarian traditional ones. Thus ensued an ideological struggle reflecting the ideas of the two deferring systems of

³⁸ For some discussion of the religious aspect of land tenure in Ghana, see K.A. Busia, *The Position of the Chief in the Modern Political System of Ashanti*, London, 1951, 40–42; S.N. Obi, *Ibo Law of Property*, London, 1963, 25; A.N. Allott, *The Ashanti Law of Property*, Stuttgart, 1966, 139–43; A.P.K. Kludze, *Ewe Law of Property*, London, 1973, 105–07; S.K.B. Asante, *Property Law and Social Goals in Ghana 1844–1966*, Accra, 1975, ch. 1.

production in which the dominant capitalist ideas held sway over the traditional ones.³⁹ The most significant areas in which these conflicts become manifest can be found in the transfers of interests in land. These we must subject to critical examination.

PRACTICAL MANIFESTATIONS OF THE CONFLICT

Prior to colonial rule, the territories now comprising the state of Ghana were occupied by various independent polities. Their boundaries were not clearly defined, but each territory had a well-organized government. Members of each community resided in well-established towns and villages constituting the fixed bases from which they were engaged in the exploitation of the land and its resources. People of each community or tribe were united by certain patriarchal and matrilineal traditions owing allegiance to its own individual, tribal government. Each polity, whether it was a Dagomba, Krobo, an Akan, or an Ewe, had its own internal arrangements and rules for the control, management, and administration of lands included in the areas it regarded as falling within the territorial confines of its polity.

Like the Lozi system described by Gluckman,⁴⁰ political and social organization of society, which Allott illustrates for the Ashanti of Ghana, revolves around a hierarchical arrangement of political authority, with the political head of government at the upper limits of the hierarchy.⁴¹ The responsibility for the control and administration of lands devolved on the same persons exercising political and other powers associated with government. This description would also be valid for most other Akan communities, including some Ga-Mashie areas where the concept of stool lands⁴² was highly developed, although there could be slight variations in the customary law in certain cases.

But in most non-Akan patrilineal communities, such as the Northern Ewe described by Kludze in his pioneering work on Ewe property law, the political heads or chiefs of the Ewe chiefdoms did not usually perform land-control functions in their capacity as chiefs.⁴³ Land administration was carried on by family heads and their principal members. If we now turn to the generally acephalous patrilineal communities of the Upper East, Upper West, and Northern Region of Ghana, which Pogucki studied and discussed in his work, it is noted that in such

³⁹ This was the sort of problem described by McPhee in abstract terms as “the clash of an advanced civilization on comparatively unsophisticated peoples who, as in India, were in danger of losing their lands on the introduction of a commercial and monetary economy by the maneuvers of concessionaires and money lenders, and accordingly needed protection as much against their own simplicity as against the cunning of others” (Alan McPhee, *The Economic Revolution in West Africa*, London, 1926, 140).

⁴⁰ *Op. cit.*, 253–57.

⁴¹ *Op. cit.*

⁴² In its physical sense, the stool is the wooden stool that the political ruler or a chiefdom notionally occupies. In those societies where it exists, it is believed to embody the spirits of the ancestors and the souls of the body politic subject to the jurisdictional authority of the person occupying it. The stool is not only a symbol of unity of the subjects owing allegiance to it, but also a legal personification of the office which the traditional ruler occupies. The stool may thus be likened to the modern state concept or what the crown represents in English jurisprudence or political theory. The paramount title in lands within the territorial borders of those native states in which this concept was developed is held to be vested in the stool and not in an individual.

⁴³ *Op. cit.*, 108–12.

societies, the functions of land administration were performed by religious leaders known as Tindanas, who might not necessarily be political functionaries.⁴⁴

In spite of such disparities as might have existed in the internal arrangements for land administration and control in each individual polity in the country, three factors were common to all the systems. They were:

- (a) an inherent right in the individual member of a land-holding group to benefit from the land regarded as a common asset and resource;
- (b) the recognition of certain members of the community as having the power of control over how rights to benefit may be exercised; and
- (c) the lack of individual ownership of the soil itself, the paramount title of which was accepted by the communities as vested in the groups, such as the stool, the clan, or the family, all of which are corporate juristic entities.

The land tenure systems operated on the basis of these common factors—factors that could be employed to harmonize the systems within the framework of a national land policy and to develop a common law. However, this was not done.

The right to benefit is dependent on membership of individual polities, tribes, or family and not on Ghanaian citizenship. Therefore, in terms of beneficial enjoyment of rights in land, each land-holding group regarded people from other communities as strangers and thus not entitled to benefit from the land, unless the permission of those with power of control over the communal lands was first obtained on terms prescribed by the customary law of the group concerned.

During colonial rule, all these petty independent polities were absorbed and amalgamated into the country under the British colonial administration. By an Imperial Charter, a legislative council was established in 1874.⁴⁵ This was followed by the enactment of the Supreme Court Ordinance that made the common law, the doctrines of equity, and the statutes of general application, which were in force in England at the date on which the local legislature was established, operative and applicable within the jurisdiction of the courts.⁴⁶ Subsequently, a public lands ordinance was passed under which lands could be acquired compulsorily in the service of the colony.⁴⁷ None of these statutes affected significantly the land rights of the natives or the land administration systems.

In terms of beneficial enjoyment of rights and land control functions, the petty states were treated by the colonial administration as if they still retained their independence and sovereign rights. No attempt was made to harmonize the common features of the land tenure systems. Boundaries between adjoining polities and communities remained undefined, unidentified, and undemarcated. This created an additional recipe for conflicts and disputes. The situation was

⁴⁴ See R.J.H. Pogucki, *Gold Coast Land Tenure*, Accra, 1955, vol. 1, 6–8.

⁴⁵ Charter of 24th July 1874.

⁴⁶ Ordinance No. 4 of 1876, § 14. See § 10 of the ordinance permitting the application of the customary law to *causes and matters relating to the tenure and transfer of real and personal property* provided such law or custom was not repugnant to natural justice, equity, and good conscience.

⁴⁷ Ordinance No. 8 of 1876.

aggravated by the customary rules governing the alienation of communal lands. The basic principle governing the alienation of communal lands is that for an alienation to a nonmember of the group to be valid, the head of the group must act in concert with the consent and concurrence of the accredited members of the group. For family lands, the family head is required to act with the consent and concurrence of the principal members of the family. For stool lands, the occupant of the stool or the chief must act with the consent and concurrence of the stool elders. Those responsible for this administrative function are therefore referred to as the management committees.⁴⁸

Some of the major difficulties faced by strangers are the identification of members of the management committees and the uncertainty in the operation of the rules on alienation.

When the customary law provides that the head of the group should act with the consent and concurrence of the accredited members, does this mean that he should be joined in every transaction by: (a) all the other members, (b) a majority of them, or (c) a minority of them? If the head of the group does not participate in the transaction, can all other members or a majority of them take a legally binding decision? On those occasions where the head is acting with all the other members, is it a unanimous or a majority decision that will bind the group?

These are some of the pertinent questions relating to the disposition of stool or family lands for which the customary land law does not provide a clear and ready answer. The problem is compounded by the fact that the customary law did not know writing and therefore was not recorded. The British judges who sat on cases involving land transactions never knew the law. All these difficulties, together with the problems concerning the misuse of common law terminology to describe customary interest in land, produced a situation in which the foundations were laid for the clash between the traditional law reflecting the communal structures and the English common law mirroring eighteenth- and nineteenth-century capitalist economic institutions at the level of the superstructure. But how do these conflicts manifest themselves both in theory and in practice? This is what we must examine next.

CONVEYANCING PROBLEMS

Before the advent of writing in Ghanaian communities, all forms of transaction were conducted by oral agreements. For record purposes, ceremonies of various kinds were devised within each community to make the compact memorable. These compact-concluding ceremonies varied from one community to the other. Yet they had certain common features. For instance, the transaction had to be made binding or sealed by a ceremony accompanied with publicity in which some valuable property or objects, such as drinks or a sheep, was presented to the vendor by the vendee.

Allott's picturesque account of the ceremony associated with land sales under Akan customary law vividly illustrates the point. He writes:

Some of the Akan customary laws provide for the sale of land as cutting guaha. Agreement to purchase has been reached, the land has been inspected, the price fixed, the boundaries

⁴⁸ Bentsi-Enchill coined the phrase; see his *Ghana Land Law, op. cit.*, 49.

cut and marked with special trees (themselves as evidence of the extent of land conveyed), the parties return from the forest within doors. The guaha ceremony then takes place before many witnesses for both sides. Vendor and purchaser each provides a representative usually a young boy to cut guaha. The vendor provides a piece of fibre on which are threaded six cowry shells. The two persons cutting guaha then squat down; each passes his left hand under his right leg and grasps one end of the string of cowries, holding the three cowries nearest to him. The respective parties keep the cowries used in the ceremony forever, in order that in case of dispute between them or others over the sale, the cowries may be produced as evidence. In fact the production of the cowries is an essential piece of evidence as to the sale. After the ceremony the purchaser offers drink and sheep to the vendor (the stamping or the aseda).⁴⁹

As the learned author rightly points out, the effect of this ceremony is to make the transaction complete and irrevocable. It also provides tangible evidence of the witnesses present at the ceremony. In order to prove the sale, therefore, evidence as may be taken from the ceremony can be made available.

However, the defects in the compact-concluding function of the guaha-cutting ceremony and the evidentiary value of preserving physical objects used or presented are obvious. Take the case of the two types of witnesses identified by Allott as an example, partial and impartial. The latter merely testifies to the fact that the transaction actually took place. The former are themselves interested parties in the subject matter of the transaction. Their interest is bound by their presence and the acceptance of the *aseda*, which signifies their consent to the transaction when this is required.⁵⁰ This may be likened to the signature.

But the acceptance of the drink and objects has not that kind of permanent proof like the signature and a seal on a written document. The partial witnesses can destroy the objects in their possession if they are minded to do so. They can alter boundary marks, uproot bottles buried in the ground, and tell deliberate lies to disprove their consent. Impartial and partial witnesses may die and their oral evidence be obliterated forever. They may tell deliberate lies to falsify the evidence. Human memory grows dim and may not always be reliable. Some of the parties concerned may lose the physical objects by mistake or the objects may be destroyed by fire or through some other means.

With such defects in the traditional method of land transactions, the Ghanaian business community quickly recognized the advantages of the written word when it arrived and welcomed it wholeheartedly. Its permanent nature as well as its peculiar characteristic of assembling all the relevant facts in a conveniently portable piece of document proved attractive to prospective acquirers of interests in land. The modern tendency is thus for every prospective purchaser to prefer to secure some record of the transaction in a written form. However, resort to the increasing use of documents as a means of transferring interests in land is not without serious problems. The first difficulty is that the society is predominantly illiterate. The second is the use of conveyancing forms employed by lawyers to transfer customary interests through the use of language fitted into the straitjackets of Anglo-American tenurial terminology. These

⁴⁹ See *Readings in African Law*, vol. 1, 85, ed. E. Cotran and N.N. Ruben. See also A.N. Allott, *Essays in African Law*, London, 1960, 243.

⁵⁰ Allott, *Essays in African Law*, *op. cit.*, 244.

constitute formidable jurisprudential, social, and practical problems with which land transactions are beset.

It should be pointed out that the parties involved in the customary land transaction are often closely and directly associated with the process and are fully aware and clear in their own minds about what they are doing. They have no doubt about the nature of interest being transferred and each party's obligation under the contract. The problem begins when, after the compact-concluding ceremony of cutting guaha, the parties approach a legal practitioner requiring him to reduce the oral transaction into a formal, legally enforceable document on their behalf. The pertinent questions raised by such recourse to document are as follows.

- (a) Does the ensuing document serve only as a memorandum of what has been agreed upon by the parties?
- (b) Do the parties, who may be illiterates themselves and on whose behalf the memorandum is prepared, understand the content, nature, and quality of the document?
- (c) Does the use of English tenurial terminology to describe the interest which the document purports to convey, actually convey such interest, although the interest held by the transferor falls short of that which the document describes?

The principal difficulty about providing a reasonable answer for these questions is that it is not always easy to determine whether or not, when the parties request that the agreement be reduced into writing, they intend the ensuing document to be a memorandum whose purpose is to record, into a permanent form, matters which might otherwise be in dispute. Matters such as the description of the land conveyed, the nature of the transaction, whether it be an outright sale, a pledge, a mortgage, a lease, a tenancy agreement, and the like, may be disputed. As Allott points out, although on the face of it a document made by an African may appear to be an instrument, it may be nothing more than a memorandum, and there is the danger that a memorandum may be held to operate as an instrument.⁵¹

Under these conditions, when European firms began to acquire mining and timber concessions in the last two decades of the nineteenth century, it became apparent that the use of terms which the illiterate chiefs could not understand began to cause confusion. The truth of the matter was that the few literate merchants, lawyers, and local elite had embraced English ideas of tenure as well as conveyancing forms and became intermediaries between the European concessionaires and the local land administrators. Trained in English property law and conveyancing forms, their attitude was to employ those terms in drawing up and preparing deeds of conveyance. English law and conveyancing forms introduced ideas of individual

⁵¹ Ibid. In many court cases in Ghana such as *Total Oil Products Ltd . v Oben and Manu* [1962] 1 G.L.R. 228, *Addai v Bonsu II* [1961] G.L.R. 272, etc., the courts had to deal with and resolve issues concerning the interpretation to be placed on instruments which purported to convey the *fee simple* and phrases such as *whereas the vendor is seized in fee simple free from all encumbrances*. In those cases the lawyers had argued their appeals principally on the grounds that the use of those terms should be understood in terms of what they connote in English land law. In Ghana, however, the courts have consistently held that the fee simple did not exist under customary law. Our experience in legal practice in Ghana shows that in the majority of cases, the parties to land transactions agree on terms before approaching a solicitor. Many disputes which end up in the courtroom arise from the misunderstanding by the parties of the nature and quality of the document prepared for them.

ownership as a necessary step leading to the alienation and commercialization of communal lands. It was, however, soon to be realized that failure to dichotomize between traditional schemes of interest in land and English notions of tenure was a serious error.⁵² The problems that arose were succinctly described in 1893 as follows:

*The would be concessionaire, who is usually a native with a certain amount of education goes to the chief of the locality where mahogany or gold is to be found, in exchange for a few pounds induces him to affix his mark to a formidable-looking document which conveys to the concessionaire complete rights over a stretch of country, varying in extent from a few hundred yards square...to 30–40 miles in dimensions.*⁵³

The problems of improvident alienation of communal lands became serious enough to warrant a committee of inquiry in 1912. In the course of its inquiries, the committee sought to ascertain the character and extent of land alienations under the concession ordinance. On the basis of the information obtained from instruments affecting lands supplied to it, the total area of lands alienated within the relevant period was found to be 36,000 square miles. Yet the estimated area of the colony at that time was 24,335 square miles. That meant the purportedly alienated area exceeded the actual estimated area by 12,136 square miles.⁵⁴ The chaotic situation leading to the extensive, vague, and imprecise nature of rights acquired through the use of English conveyancing forms is illustrated by the case of Captain J.A. Duncan. In a lease for a term of 100 years, he purported to have acquired rights to:

*“all the lands of the lessors and all the adjacent and intermediate villages and rivers...and the adjacent streams and mountains together with the right of the lessors in all rivers and water courses in the said lands with all metal ores and minerals, precious stones, rocks or other mineral substances or material within or over and under the said land with full power, to license and authority to sink, make and use any shaft...and other mining works now existing or hereinafter to be constructed...”*⁵⁵

The effect on the land rights of the indigenous people of the introduction of English contract law and the unquestioning reception of Anglo-American tenurial notions, ideas, and concepts with the increasing use of their forms and techniques of conveyancing in land transactions under the traditional schema is amply demonstrated by a Tarkwa case. The chief, Kofi Chay, granted a large tract of his stool land to Essamang Mining Co., Ltd., in 1888. Apparently believing genuinely that his subjects still had the right to do so, he permitted them to continue mining in the area granted away. The company sued for trespass and damages in the sum of 3,000 pounds sterling. The governor of the colony had to intervene on the grounds that the terms on which the company had obtained the grant were so one-sided and so

⁵² See Brandford Griffith Jnr. to Sir William B. Griffith, 29 August 1894, Enclosure No 2, CO879/46, 21.

⁵³ See Charles Unbenze Illegbune, “British Concession Policy and Legislation in Southern Ghana,” Unpublished Ph.D. thesis, London, 1974, 34.

⁵⁴ The committee was a West African Land Committee set up to investigate land tenure systems of British West Africa. It sat from 1912 until 1914 and prepared a draft report in 1916, but for an unexplained reason it was never published. However, it has often been authoritatively referred to by the courts and text writers.

⁵⁵ See Hodgson to Chamberlain, Enclosure, 16 May 1896, CO 96/273. Author’s emphasis.

unreasonable that legal action was entirely unjustifiable.⁵⁶ If the action were allowed to be contested in the regular courts, it would certainly have succeeded.

Such occasional official interventions did not have the effect of preventing or reversing the trend toward the usurpation of the indigenous people's rights to work and mine precious metals and exploit the land and its resources in the exercise of their inherent communal rights. Lacking the capital and contemporary European technical know-how, the local middle class and elite were incapable of competing with their "foreign friends" and joined the race for concession acquisition and speculation. This they did in order to avoid being reduced to and falling into the rank of a growing army of a proletarian class.⁵⁷ As David Kimble has pointed out, enterprising groups of natives and individuals continued in the fields of speculation and concession acquisition to such an extent that their speculative activities became a "source of annoyance to the tidy mind of officialdom during the 1890s."⁵⁸

Indeed, most of the transactions might be perceived by the indigenous people as unjust. However, there is a direct link between the caveat emptor maxim under which parties are supposed to look up for themselves and the doctrine of consideration. Under the common law, consideration need not be adequate. Hence, if from the outward manifestations of the parties' intent an agreement could be seen to have been reached, the parties are held to be bound no matter how inadequate the consideration might seem to be in the eyes of the outside observer. A classic operation of this rule was exemplified in the negotiation of the Adansi and Bekwai concessions in 1895 which became known as the Ashanti Goldfields Corporation. The corporation, which has been listed on the New York Stock Exchange, some few years ago acquired its 100 square mile property for a consideration of 12 pounds sterling and a bottle of rum. It should be noted that in most of the transactions, the grantor-chiefs were mere administrators and not owners with exclusive, plenary dispositive rights. Yet they purported to exercise such rights.

DISGUISED EXPLOITATION OF THE COUNTRYSIDE

These few examples selected from a large number of land transactions in which the use of English terms resulted in privatization and usurpation of communal lands over the years provide indications as to the nature and the character of the linkages between the communal agricultural sector and the capitalist enclaves established at the urban and commercial centers of the colony. The foundation of such linkages is the money-commodity relations. Those connections provided the machinery for the systematic exploitation by the minority of privileged native middle class and European merchants of the majority in the hinterland. A critical examination of the cases discussed above would disclose that such naked fact of exploitation has been disguised by the metaphysical abstraction of such concrete reality under feudal tenurial ideas which continue to linger on. The overshadowing effect of such

⁵⁶ Ibid., loc. cit.

⁵⁷ Dr. J.B. Africanus Horton, for example, obtained 23 separate concessions between 1878 and 1880, totaling over 200 square miles. See Sir H.B. Griffith to Lord Knutsford, received 24 July 1889, CO 879/416.

⁵⁸ David Kimble, *Political History of Ghana, 1850-1928*, Oxford, 1963, 21.

abstractions at the level of the superstructure is often reinforced by contract doctrine and theory.

As has been explained earlier, there is a mistaken assumption underlying the *pristine laissez-faire ideas* on which contract principles, rules, and doctrine are premised that the parties to the contract stand on the same bargaining positions, that they are equal. That is, of course, not true. They may be held to be equal before the law. Experience shows, however, that differences in the economic circumstances of the parties usually put them at varying bargaining positions. Knowledge, expertise, and other factors can, and do, often affect the bargaining positions of the parties. Yet by taking the position that consideration need not be adequate because it is the outward manifestation of the parties' intent and not what is actually in their minds that contract law is concerned with, the truth is hidden behind the conceptual screen of metaphysical abstraction of the reality. The ideas, rules, and legal principles governing these relationships are mere reflections at the level of the superstructure of the exploitative, capitalist economic institutions via which communal resources and the people are daily exploited.

It should be noted that in most of the transactions, the grantor-chiefs were referred to as *owners*. This is certainly a travesty of the true position. The chiefs are mere administrators and not owners vested with exclusive dispositive rights. It is the *stool*, the symbolic representative of the social group or the community, in which ownership is vested. This means that, in principle, the operative effect of the *nemo dat quod non habet* rule would have been sufficient for declaring all such transactions invalid. It is obvious that the chiefs, acting alone, had no legal capacity under the customary law to deal with the properties concerned. The position was made worse by the fact that the literate, native middle class and elite, who could have accorded some measure of protection to the chiefs, reduced themselves to a position where they could not do so. The lawyers were particularly guilty in that respect. As intermediaries and speculators in concessions, their interests became linked with those of their "foreign friends."⁵⁹ They were unable to appreciate the threat posed to the indigenous mining industry by the unquestioning reception and use of Anglo-American notions of tenure and the increasing use of their techniques and conveyancing forms to sign away the land rights of their own communities.

MISPLACED REMEDIES

The direct result of the concession boom was the privatization and usurpation of the communal lands. These were the lands over which the indigenous people had for centuries exercised their

⁵⁹ We thus find that apart from the infamous Ashanti Goldfields transaction, Prince Albert Owusu Ansa was able to acquire vast areas of land for speculative purposes. In June 1894, for example, he purported to have acquired from Chief Quacoe Attah 200 square miles of land for a term of 99 years for 100 pounds sterling. Two years later, in October 1896, he disposed of his interest to William Frederick Reagan of London, for 800 pounds sterling. See Sheehy, 26 October 1896, to the colonial office, CO96/269. Similarly, Dr. J.B. Africanus Horton obtained 23 different concessions between 1878 and 1880 totaling over 200 square miles. In May 1882, he floated a company, the Wassaw and Ahanta Gold Mining Syndicate, Ltd., to which he sold his assets. He had an initial capital of 10,000 pounds sterling divided into 200 shares of 50 pounds each. See Sir H.B. Griffith to Lord Knutsford, received 24 July 1889, CO879/46.

mineral exploitative rights without hindrance. They suddenly became landless. That created conditions which became potentially dangerous to the peace. When the real social and economic implications of granting away all the known mining areas over which the local inhabitants were accustomed to mine became known, there were serious reactions from the communities. The peaceful atmosphere under which the acquired mines could be profitably exploited was threatened. The colonial administration whose responsibility it was to protect the economic interests of those investing in the mining industry saw a solution in statutory and legal remedies. Yet the problem was itself rooted in the clash between the nascent capitalist sector of the economy and the traditional communal institutions. The measure was doomed to failure.

In response to the situation, the Colonial Secretary Chamberlain proposed the establishment of a concession court under a concession ordinance. Through such a court the government would exercise supervisory control over land transactions between European firms and chiefs. The ordinance was thus introduced in 1900.⁶⁰ It was an attempt to confirm the rights of the chiefs and elders to exercise their traditional land-control functions properly and to ensure that, in the course of transactions with strangers, advantage was not taken of their ignorance to defraud them. The Colonial Secretary was, however, careful to caution that the measure should not prevent “any native owner” from being “left free, as now, to *make his own bargain if he wishes to sell to an European...*”⁶¹ The policy foundations of the concession ordinance were therefore to: “Watch the land operations of the natives and to insist upon the observance of certain regulations with respect to them as may appear to be called for in the interest of Natives on the one hand and capitalists on the other.”

The main functions of the court, among other things, were to declare concessions valid if they satisfied certain prescribed conditions. They should not be declared valid unless:

- (a) the court was satisfied that the proper persons were parties thereof and it may be *reasonably assumed* that they understood the nature and terms thereof;
- (b) it was not obtained by fraud or other improper means;
- (c) it was made with adequate or valuable consideration; and
- (d) the court was satisfied that the customary rights of the natives were reasonably protected in respect of *shifting cultivation, hunting, and snaring game, etc.*⁶²

Significantly, indigenous mining rights were not included for protection by the concession court. It is also interesting to note that concessions acquired before 10 October 1895 were excluded from the ambit of the concession court, allowing the horse to escape before the stable door was shut. By that time, most of the known rich mining areas had already been granted away. Hence, such infamous acquisitions as the Ashanti Goldfields, covering 100 square miles

⁶⁰ See Ordinance No. 14 of 1900 (cap 87).

⁶¹ See his memorandum to the ordinance, 2 December 1899, CO879/57, No. 578. Our emphasis.

⁶² See § 11 as amended by § 20 of 1901, § 16 of 1912, and § 2, § 3, and § 22 of 1918. Our emphasis.

and for a paltry sum of 12 pounds sterling and a bottle of rum, were deliberately protected.⁶³ Sections 20 and 47 of the ordinance sought to place restrictions on the size of concessions that could be acquired by one person or a corporation. However, the provisions were so blatantly and so frequently breached that it might be concluded that they were rendered ineffective against the evils at which they were directed

In the *Gazette*, one often found notices of certificates of validity granted by concession courts in respect of concessions in clear violations of § 20 of the ordinance restricting the area of concessions to 5 square miles, not to mention the paltry sums for which they were acquired.⁶⁴ The position of the indigenous miners became aggravated by the introduction of another statute, the Gold Mining Products Protection Ordinance, which sought to protect the concessionaire's right to gold mining products.⁶⁵ No person shall without the consent of the governor in writing deal in or purchase gold mining products. The business of goldsmiths was not to be carried on unless a license had been obtained.⁶⁶ The administrative procedures required for obtaining such licenses proved difficult for the illiterate community. That was how the law shut them off. The rights of the people to mine gold and other precious minerals were thus usurped through the legal remedies purportedly designed to protect them. The indigenous jewelry and ornament industry, which had developed as an offshoot of mining, had been completely destroyed by those legislative measures. Having been reduced to laborers in this way, those who could not be employed by the concession owners went underground and began illegal mining, which became known as "galamsay" until the present day.

The consequences for the indigenous mining industry of the introduction of laws that did not mirror social practice stands out clearly from the discussion above. It demonstrates how the local industry was undermined completely. The development of the mining industry on capitalist lines since colonial times can be seen as the extension to the country of commercial and industrial activities to which the industrial revolution had given impetus in the seventeenth and eighteenth centuries in Great Britain. The success achieved by the capitalists in Ghana, then, depended on the availability of capital, the technical know-how, cheap labor, and the stronger bargaining position in which the concessionaires stood vis-à-vis the illiterate chiefs. The level of success achieved did not depend on the introduction of the "received" law per se. That law had already evolved and developed from socioeconomic practice in England. It had proved successful in promoting that type of development there—hence its introduction to advance the same type of economic activity in the colony.

However, such laws were in conflict with practice in the social system of production within the customary schema. That contradiction therefore became a clog—an impediment to further development—and, in consequence, completely killed the indigenous industry and its supporting skills. The "received" tenurial arrangements and their supporting conveyancing forms and contract doctrine could not promote development in systems that were egalitarian

⁶³ Mr. Cade, who acquired the concession, carried the document to England and made a paper profit of 2 million pounds sterling when he used it to float a share in London. That was just a year after the acquisition, even before any mining activity had taken place.

⁶⁴ See Morel to Colonial Office, 21 June 1910, CO879/109, No. 77.

⁶⁵ Ordinance No. 3 of 1905, as amended by No. 15 of 1915.

⁶⁶ See § 3 (1).

with community-based rights of enjoying things in common. The laissez-faire ideology was alien to them. Yet, when it came to dealing with problems relating to insecurity of title and costly litigation, solution was once again sought in statutory measures and not in finding a way to resolve the conflict. Instead, socioeconomic underdevelopment of the colony was blamed largely on this malady. After flag independence, the neocolonial governments have continued such policies designed to consolidate the privatization and usurpation of communal lands.

Within the framework of that policy, several statutes have been enacted, beginning from 1960, to supplement the Land Registration Ordinance of 1883 and the Registration Ordinance of 1895.⁶⁷ It is not surprising that title insecurity and costly litigation, themselves products of the contradictions, have remained the most thorny problems of land tenure in Ghana today.⁶⁸ This is in spite of the establishment of a land-title registration system on the lines of what has become known as the Torrens system. The privatization policies that these enactments seek to promote are presently being intensified on the promptings of the world capitalist institutions such as the IMF and the World Bank. The ultimate effect will be the integration of the Ghanaian economy into the world capitalist system. This is the phenomenon currently referred to as globalization.

⁶⁷ See, respectively, Ordinance No. 3 of 1883 and No. 1 of 1895, the latter of which was in force until the enactment of the post-independence ones, i.e., the Land Development (Protection of Purchasers) Act, 1960 (Act 2), the Farm Lands (Protection) Act, 1962 (Act 107), the Land Registry Act, 1962 (Act 122), and the Land Title Registration Law, 1986 (PNDCL 152).

⁶⁸ For the literature on litigation and insecurity of title in Ghana, see the following: C.R. Havers, KC, *Report of a Commission of Inquiry into Expenses by Litigants in the Courts of the Gold Coast and the Indebtedness Caused Thereby*, 1945. The Report shows that the series of disputes between the chiefs of Hieman and Mokwa, which began in 1872 over the right to ferry over the river Pra and a piece of land, was never settled until 1931. It was discovered that the chief of Hieman and his people spent over 20,000 pounds sterling, having paid 12,000 pounds to one legal practitioner and 8,000 to another. Despite the purported settlement by Sir John Yates in 1931, at the time of the Havers Report, the dispute raged on. The Report also indicates that the disputes between the various stools to whom Ahafo lands, a total of 720 square miles, were presented by the Asntehene, Nana Opokuware after the Abimburo war were never settled until 1939. The case of *Nana Sir Ofori Atta v. Nana Kwaku Amon* (1931) W.A.C.A. 15, provides what may be regarded as the most frivolous and longest legal dispute in the history of land litigation in Ghana. According to the Havers Report, Ofori Atta, representing the Akim Abuakwa stool, spent over 100,000 pounds apart from other expenses, which were not on record. Peter Greenhalgh commenting of this case writes: "It was the development of the Akwatia Diamond Concessions and the Royalties paid that enabled litigation to be pursued with such vigor as far as the House of Lords, and involved the employment of the best lawyers in the country, who were the main beneficiaries of the estimated 200,000 [pounds] spent on the case." See P. Greenhalgh, "European and African Enterprise in the Ghanaian Diamond Mining Industry," paper presented at African History Seminar, University of London, 1972/73 (SOAS). For further comments on this case and other information on land litigation in Ghana, see Robin Luckham, "Imperialism, Law and Structural Dependence: The Ghana Legal Profession," 1983 *J.L.P.* 200; see his tables, at 220–21, showing land litigation as the main source of legal practitioners' income in Ghana. For further information, see the Belfield Report of 1912, cmd 6278; Professor Sheppard's Session Paper No. 1 of 1931, "Economics of Peasant Agriculture in the Gold Coast"; R.H. Rowe, "Cadastral Surveys Framework of Gold Coast Colony and Registration of Title to Land," Memorandum of 15 December 1922; Report of a Committee on Agricultural Indebtedness, 1957.

CONCLUSIONS

The current trends toward privatization of communal lands do also include other economic ventures, which had hitherto been the preserves of governments in Ghana, in particular, those institutions providing services of a social nature such as education and health. What will the social, political, and economic implications of this be for a developing country like Ghana? It is of paramount importance, in order to appreciate the answers to that question, to bear in mind continually the pivot around which capitalist organization of production, exchange, and distribution revolves. Private ownership of the means of production, maximization of profit, and competition—together they constitute the center of gravity of capitalist production. The latter element, competition, is the most relevant to our circumstances. Competition implies survival of the fittest. Those who are unable to survive will have to perish.

Yet, in this millennium and beyond, the capitalist race can only be won by those acquiring and having access to science and technology. The application of science and technology as tools for transforming nature into the forms in which we require them is crucial to survival in the competition. The truth of the matter, however, is that Ghana, like most third world countries, is a technologically backward country. Sixty percent of its work force is still in the agricultural sector engaged in peasant farming. What position will she occupy in the global capitalist economic order? It is self-evident that, lacking the tools of the game, she will stand in a very poor bargaining position vis-à-vis the more technologically advanced partners. She will therefore be compelled to enter into relations of domination, exploitation, dependence, and subordination with the latter. No doubt, the most technologically advanced countries will, under these circumstances, develop at her expense and widen the already existing, too wide a gap between her and the advanced countries.

The theoretical, philosophical, and the doctrinal underpinnings of the present trends toward privatization of lands is the eighteenth and nineteenth centuries' laissez-faire ideology by which property rights are considered to be sacrosanct. Such ideas are, however, changing and are being questioned in the light of changed circumstances.⁶⁹ For centuries, African societies have never been allowed to develop and evolve naturally in obedience to the operation of the objective laws of social development. There is no doubt that the introduction or the imposition on African traditional societies of alien economic, social, and political structures and the ideas supporting them at the level of the superstructure can largely be blamed for its underdevelopment. The danger of aggravating the problems of

⁶⁹ See, for instance, the recent brilliant exposition and critique of property rights and philosophy of land by Harvey M. Jacobs, in his "Fighting Over Land: America's Legacy...America's Future?" 1999 *Journal of American Planning Association*, vol. 65, 141–49. The central theme in the learned author's critique is that views about property rights must change correspondingly with changing technological advances and socioeconomic values. Recent works by the veteran Peter Dorner advance similar views. Of particular interest and relevance is the recent excellent paper in which he made an overview assessment and critique of the trend toward globalization within the context of modern technological advances and modern-era constraints on the initiative for land reform. His discussion of the role of the World Bank, the IMF, and other relevant international financial institutions is instructive and rewarding. See United Nations Research Institute for Social Development, *Grassroots Initiatives for Land Reform*, Discussion Paper No. 100, June 1999.

underdevelopment in Ghana appears to be present in the extreme pressures being exerted on its government by the agents of global capitalism.

Under such pressures, privatization policies which seek to integrate the relatively primitive national economy into the global capitalist system are being pursued with vigor. With promises of IMF and World Bank loans and foreign private investment, the slogan is: “private enterprise is the engine of growth.” We disagree with the uncritical reception and implementation of such policies. So long as access to land, the ultimate form of economic and social security, remains critical for the majority of the working population in Ghana, the end results will be to increase poverty levels, social stratification, and, in consequence, instability. That is why those in the field are beginning to question the theoretical and practical foundations of such policies.

This is why OXFAM GB, which has been in the field researching on land rights issues in Africa, has, for instance, been expressing grave concerns about such policies currently in vogue. In a recent summary of their latest research findings, it was observed:

...access to land, which remains for many people in Africa the ultimate form of social security, is being severely threatened. The threat comes from a combination of local and international factors, which include excessive liberalisation, the search for foreign investment, and often blind faith in market solutions. It particularly affects land held by groups of people under some form of customary tenure, in which access is dependent on acknowledged membership of a group. This remains important throughout the continent, despite various attempts to extinguish it.⁷⁰

We submit that the implementation of these privatization policies by legal means per se will fail to achieve the desired results. The functioning of society is regulated by social norms, rules, and laws. Such laws largely reflect social practice. Social practice is founded on producing the material means of sustenance. Hence, the economic structure that emerges at any historically determined stage of society’s development would produce laws in its own image. That is why the laws and the economic structure are interconnected, interrelated, and interdependent. They affect, overlap, influence, and dovetail into themselves. But, as legal expressions of property relations, the law stands in a secondary relationship to socioeconomic activity.

This view is consistent with knowledge or cognitive activity which is based on reflecting concrete objects, processes, and phenomena in the consciousness of human beings. The acquisition of knowledge involves the conscious reproduction of the objects under observation, their properties, connections, and relations in their ideal form into the consciousness in the form of ideas. *A fortiori*, consciousness is secondary in relation to matter. *Ex hypothesi*, the economic structure is the creature of the law. If we are right in this view, then the law as a reflection of social practice and property relations can play only a promotional role. It cannot by itself bring about any qualitative transformation of society. It can give impetus to socioeconomic activity by liberating and removing all legal obstacles to social and economic progress. At that level of society’s development where it ceases to mirror social practice and

⁷⁰See Oxfam Policy, Land Rights in Africa, Introduction, Key Principles, January 2000, <http://www.oxfam.org.uk/landrights/intro.htm>.

thus becomes a clog or a fetter on further development, new laws become necessary to repeal those which have become outmoded.

The new law reflecting current economic trends and structures will promote and give impetus and fillip to socioeconomic progress, *ceteris paribus*. In this sense, the law must follow social practice as does equity, the law. We therefore conclude that Ghana's underdevelopment problems will continue to deepen so long as the contradictions between the capitalist sector of the economy established at the city and urban centers and the traditional sector persisting in the rural areas remain unresolved. The conflicts which the two disparate economic structures reflect at the level of the superstructure in terms of legal principles, social norms, and jural postulates can neither promote the socioeconomic policy goals of the capitalist sector nor advance those of the traditional one. As and when the Ghanaian economy becomes fully integrated into the global capitalist economy (which now seems inevitable) those contradictions will become acute and aggravate the situation. The only palliative for Ghana and other African countries in similar positions could, perhaps, be economic and political unity of the continent. In that position, they may be able to strengthen their bargaining positions as one large economy and market with resources.