Withering Institutionalised Power: Critical Views on the Control of Inheritance in Kenya[1]

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Introduction

Legal reforms usually appear to be a positive element on the development agenda. They appear positive because they can be associated with values like social order, peace and stability. And certainly they are on the agenda nowadays – perhaps more than ever since the period of ferment in the early 1960s when the colonial powers made their last efforts to save their position. This time, legal reform has entered the agenda through the code words of good governance and human rights. But exactly how the legal reforms are to be implemented is a much more difficult question and here we find very different opinions.

Currently some people argue that what is now required is more law and order. This means more unified statutory laws, professional lawyers and prisons. Others argue that legal development needs to adapt to local needs and develop step by step, relying on customary laws and legal machinery specific to the location. Yet others say that nothing good will happen until the causes of oppression and exploitation are uprooted.

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[1] I use the term 'institutionalised' to refer to both legal and extra-legal institutions which prescribe social norms with sanctions.

These positions represent a whole range of old debates which have raged in the anthropological and legal literature for a long time. The discussions are still valid and the answers far from self-evident. Perhaps it is fruitful to leave the discussion about values ("what should be done") and instead look at the historical evidence ("what has happened"). This shift in perspective gives one an important hint: while studying African legal systems it is necessary to avoid evolutionary generalisations. Legal systems can change in various ways as the social forces behind them adopt new stances on legal control. Within a particular country, different sections of legislation can develop contradictory positions.

I have been studying inheritance and its control in Western Kenya and have found some historical and ethnographic evidence which I look at from the perspective of the marginalised people. Broadly speaking, my argument is that legal development under legal pluralism creates constellations whereby Statutory Law functions as a hindrance preventing other institutions from gaining respectability. When the apparatus of statutory law remains inaccessible to poor rural people and auxiliary institutions are toothless, disputes remain to be settled within families. In this situation, the governing system is not any kind of Customary Law, but the position of power of well-established men.

Apart from the substantive issue, the paper includes a methodological discussion where new approaches of legal anthropology are presented. I hold the firm opinion that legal anthropology is not an antiquated branch of anthropology. Instead, it can incorporate new theoretical insights into its methodology.

My study is based on fieldwork conducted a few years ago in the Bungoma district of Western Kenya. In addition to the fieldwork I did extensive reading on legal matters, land tenure and household structures in Kenya (cf. Seppälä 1994). During this time I had the pleasure of cooperating with Smokin Wanjala from the University of Nairobi, Department of Law. He conducted a small study on inheritance cases in the Bungoma magisterial district.
The text is divided into five sections. First I discuss legal studies and their object from an anthropological perspective. Then I

discuss the history of the legal control of inheritance in Kenya. The third section concerns the local institutions and quasi-legal control of inheritance. The fourth section supplies three different perspectives on the analysis of inheritance cases. Finally, I draw the discussion together and ask, what can anthropologists offer to the analysis of legal change.

On Legal Studies from Anthropological Perspective

Legal issues have been a central theme in the anthropological study of Africa. Legal issues have generated a set of specific topics, approaches and concepts (e.g. Allott 1960; Kuper and Kuper 1965; Gluckman 1969). Some very interesting work is done when the researchers escape from the self-constructed borders of the legal anthropology. In the following I discuss legal anthropology and the new challenges facing it.

John Comaroff and Simon Roberts (1981:5–21) have distinguished between two paradigms or schools of legal anthropology: the rule-centered and the processual paradigms. The rule-centered paradigm stresses the analogy between Western jurisprudence and customs. It starts from the existence of legal institutions and laws in pre-state societies. By contrast, the processual paradigm casts doubt on whether any foundation for legal anthropology exists. It roots customs within the ritual and everyday practices of dispute setttlement. (Cf. Moore, 1978 for a similar analysis.)

This juxtapositioning of two paradigms has been and still is interesting and relevant. However, strange positions have arisen whenever the object of study has been defined as an unaltered local custom. Both orientations, in their classical form, have tended to undermine the historical processes of state penetration and economic upheaveals which shape the power structure and the hierarchy of the judicial forums. In other words, they have failed to place the field of legal regulation in a societal context. Political economists, by contrast, have deepened the analysis in this direction (Hay and Wright, 1982:xi).

What does the perspective of the political economist offer legal studies? Firstly, it is more detached and does not take for

granted what the voiced arguments say in the dispute. Rather, it interprets the economic interests behind the positions of the disputants and makes claims over and above the spoken motivations and arguments. Secondly, political economists observe the existence of the parallel legal and extra-legal avenues and regard them as competitive mechanisms of dispute settlement which condition each other. The third and crucial contribution is that the resulting situation is not necessarily a standard level of law and order. Instead, the result may be many laws and very little order. Or few laws and a lot of order. The relation of the judicial machinery to the legitimate social order is far from self-evident.

Martin Chanock's book, *Law, Custom and Social Order; the Colonial Experience in Malawi and Zambia* (1985), has brought a balanced perspective of political economy to legal studies in Africa. This perspective provides a sharp critique of any idealist construction of colonial and post-colonial law. In other fields of anthropology, the tradition of political economy has been dealt some heavy blows during the last decade. Some of the materialist analysis has proved to oversimplify reality. Political economy has been challenged by the praxis school of social studies, which emphasises the situated actor, located in unique contexts and networks which surround a case with several layers of referential meaning. Yet another challenge has been posed by the discourse theories which unravel the anatomy of ideas and show cultural twists in what we would take as self-evident and unchallenged facts. This view has been further developed in postmodern analysis which dissolved the bond between rational argumentation and social representations. I shall present these three perspectives as complementary approaches to the legal study of legal phenomena.
Before presenting the case-study I provide some background on the development of legal control over inheritance in Kenya.

The History of Inheritance Laws in Kenya[2]

There is no evidence of written legal norms among much of the African population in the pre-colonial era. The separation of legal institutions from ritual and political authorities is a creation of the colonial administration. How the separation was

[2] For a more detailed account of colonial and post-colonial legislation on inheritance see Seppälä (1991).

done reveals much that contributes to an understanding of the history of law. From the beginning, the colonial administration in Kenya started with the orientation of "law and order", which meant that selected social institutions were prohibited and replaced by state institutions. The legal and administrative state institutions provided rules in criminal cases; but in the field of civil law, Custom — if it was not strictly against any other laws — was preserved. Matters of inheritance and marriage, and land and cattle transactions related to the former, were classified within the category of civil cases.

The colonial power enforced different laws of succession for Africans, Moslems, Hindus and Europeans at an early stage of colonization. These laws were only very slightly modified during the colonial period. (Kuria, 1979:34–40; ROK, 1978:7–13)

The laws of succession enforced on Africans were the customary laws of each tribal unit.[3] These laws were hardly known by provincial administrators; and in the 'reserves', not much attention was paid to any personal laws of the Africans. At first, judiciary powers were vested in appointed chiefs, but later on, the administration was increasingly separated from the judicial system. The actual working of the system varied from district to district. (Cotran, 1983.)

Independence did not immediately lead to any fundamental legal change. Historically, a slow shifting of the discursive context of inheritance laws can be noticed: colonists were not particularly interested in civil inheritance laws until land registration was started in the 1950s and they faced the problem of the <u>fragmentation</u> of neat consolidated parcels of land through division because of inheritance. This problem has never been resolved, but since independence it has given way to a new issue, the rights of widows and daughters to a share of the property. The <u>women's issue</u> was discussed in connection with proposals for the legislation of marriage laws in the 1960s and 1970s. The reform of marriage law has not been carried through

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[3] I find it necessary to restrict the meaning of customary law to statutory jurisprudence where custom is taken to be the explicit starting-point of a state legal organ, or where a local organ is recognized by the state machinery (with the possibility of appeal to state legal organs, or merely by the granting of authority).

due to a lack of consensus.[4] Instead, the rights of women have been widely taken into account in the reform of the law governing inheritance. This reform was carried out parallel with attempts to marriage laws, but more successfully - the Law of Succession Act (L.S.A.) which slipped through Parliament in 1972 was enforced in 1981.

The recommendations of the Commission, which wrote a draft law, were approved almost intact. These recommendations were based on much more sophisticated aims than those related to the fragmentation of land through inheritance, discussed in conncetion with the creation of land registration a decade earlier. The pronounced aims were to minimize litigation, encourage national unity, prevent the uneconomic subdivision of land holdings, and achieve fairness within the immediate family of a deceased person. (ROK, 1968; cf. Kuria, 1978 and Coldham, 1984)

Competition between different legal corpuses brought to a head the question of whether a national culture has developed in Kenya which overrides the ethnic and religious cultures. The striving towards modernisation has been partly induced by the wide application of English jurisprudence, which is also the mother of the Common Law orientation. H.W.O. Okoth-Ogendo (1989, 135) has argued for the generation of a national Common Law (i.e. without any reference to common law as applicable in England) through the cases in the courts. The official line taken by the Appeal Court in the famous case of Otieno (see below) was diametrically opposed — and the work of the courts is the final test of this question. It should be mentioned that personal Statutory Laws are repeatedly discussed in Parliament and are voted down by the conservative male majority.
The court case concerning the burial of S.M. Otieno, himself an esteemed lawyer, was a case in point (cf. Ojwang and Mugambi, 1989; Seppälä, 1991b; Cowen and Ojwang, 1992). The question of the right of burial was disputed. The decision of the Court of Appeal was to follow the Luo customary law. More than that, the case confirmed the opinion that the ethnic customary laws

[4] There was even a step backwards in personal laws when the Affiliation Act was repealed in 1969 and affiliation cases were allowed to float according to customary law. S. N. Waruhiu (a former lecturer in the University of Nairobi) has argued for the revival of the Act (The Weekly Review, Jan. 4, 1991:18-21).

are still a strong part of the legal system and that there is only a limited application for Common Law similar to the old English jurisprudence. African cultural traits, it was decided, cannot be forced under the moral sentiments of the unitary law. In the judgement, it was pronounced that

> ... generally speaking the personal laws of Kenyans are their customary laws in the first instance. Common law is not the primary source, but it may be resorted to if the primary source fails. (Cotran, 1987:340.)

Thus the official view seems to be that the L.S.A. has a very limited scope of application and concerns only movable property. Land distribution should take place according to customary law. Since there is a written document ("The Restatements of Customary Law" by Eugene Cotran [1969]) on customary law, it is easy to rely on it in court, even when it is based on material collected from elders 35 years ago and processed by an Englishman.

Institutional Power Positions and the Control of Inheritance

The formal legal insitutions

In this section I analyse the practices of inheritance among the Babukusu as a specific case of the coexistence of different legal arenas and legal corpuses. The Babukusu are a sub-group of the Luhya, inhabiting predominantly the Bungoma District in Western Province. During the pre-colonial period, they had large herds of cattle and semi-permanent agriculture, but later on a combination of agriculture and wage-labour has become a predominant mode of making a livelihood. The inheritance system of the Babukusu has the ideology of patrilineal descent as its foundation. The question is how effective and systematic the ideology is in praxis. The first part of this section dwells upon the procedures of succession and inheritance. The second part deals with the substantive rules.

Categorically speaking, the Law of Succession Act has not had any effect on the distribution of wealth in the community. The Law, which is radical in its effect, has not been applied. The

division of land after a man's death is not brought to the land registry. Widows do not have any legal backing for their usufructuary rights over the holding.

The challenge to the supremacy of courts as a social arena for the settlement of personal affairs is obvious. In Kenya, the official channel for registering death, by suing the deceased in court and establishing procedures for land partition, is very complicated. Many people have a suspicious and frightened attitude towards the court system, which is expensive, slow and full of foreign technicalities. It is no wonder that only a small portion of inheritance cases ever reaches the courts in Bungoma (Wanjala, 1990).[5]

The President stated in the early 1980s that land issues should be more swiftly handled. Consequently, legislation on "elders' panels", working under the divisional officer, was hastily drawn up. This piece of legislation was heavily criticized by the lawyers. It gave powers to untrained persons and contradicted other pieces of legislation. I did not come across cases which had been taken to the divisional officer from the village studied. An early study from another district showed that the divisional officer/elders' panel was resorted to in "law and order" type of cases, i.e. the punishment of an individual whose stand is politically or economically suspect.

Although the court system and the divisional officer are avoided whenever possible, the case-study has shown that there is parallel and serial use of judicial institutions. Given the mistrust of the public towards the court system, it is easy to understand the relative acceptance of the process of dispute settlement through meetings organized by the local administration. Local administrators have retained their judicial functions despite the development of the court system. Currently the village head may solve simple cases, but the sub-chief's meeting wields more authority. Meetings under the village head are rare and concern specific cases, whereas the sub-chief heads a meeting — attended by all the village heads in his area — on a regular weekly basis. The chief also solves cases, but is

[5] Cf. van Donge (1993) on the long and unpredictable way that a land case takes in a Tanzanian court. Walekwa (1991) gives an account of the administrative problems of rural jurisprudence in Kenya. Unfortunately this kind of analysis of the judiciary-customer interface are very rare.

perceived (at least in the research area) as an authoritarian figure with powers similar to those of the courts. After independence the main political party, KANU, has also created a grassroots organisation which works as a mediator with judicial functions. Although the party workers, village headman and sub-chief have contact with the police force, they use the police only as a threat of sanctions in a case where the conciliatory style proves inadequate. The common element in the local arbitration bodies is that they use the vernacular, and the procedures are conducted in a manner that shows respect for the disputants. The decision made reflects the current cultural idea of good behaviour within the limits of the situation.

Family affairs

Nevertheless, many inheritance cases do not reach even these formal local arbitration bodies. Given that death and succession are not deviant and condemned acts, this is understandable. How families and kin groups settle their succession themselves is a matter of Custom. The procedural norms are linked with a chain of post-mortem ceremonies which span years. These norms have two main effects. They create a liminal phase during which the administration of the holding is given to a nominated "administrator". In addition, the customs emphasize the role of the effective agnatic section of the clan — the generation of the elders — as an authority above the heirs themselves.

The procedural norms of Custom contain an inherent ambiguity, which arises from the dialectics between rules and procedures. The procedures come into effect after the holder of the property has died. However, it is a common practice to distribute a large section of wealth before the holder dies. These allocations, although they are not governed by ritual confirmation, tend to appear over the years as de facto inalienable and permanent rights. This is one source of conflict between the older generation (clan) and the younger generation (heirs). Although the older generation can present the "right" procedures to settle all matters during funerals, post-mortem ceremonies and special meetings, the younger generation increasingly deny the authority of "clan" elders to intervene in what they perceive as private "family" matters.

The conflict has a long history in the erosion of the elders' power due to the extensive labour migration of young men over the last seven decades. In the present social setting, one is astonished by the lack of ideological forums within a kin group with discursive practices tailored to make judgements and apply sanctions. The very existence of parallel arbitration bodies has ripped the means of authority from the elders. As youngsters point out, the clubs which the elders carry (a traditional symbol of power) are hollow — they contain beer tubes. Elders' power when it is divested of its political and economic functions has, paradoxically, one stronghold upheld by statutory law, namely registered land. It is no wonder that old men tend to keep the bulk of land under their direct control. In the study area, every second man with at least one married son had allocated practically no land to any of his sons or their wives. Although a few cases can be explained by the relatively recent marriage of the eldest son, a number of other cases revealed the importance of direct land rights for the authority of the fathers.

I have used a lot of ink to describe how the collapsing local and legal power structures are the source of deadlock in many conflicts on inheritance. This should not lead to the idea of a harmonious golden past where customary law reigned. During the past, open hostilities and more concealed fights have had equal effects on marginalising some individuals.

Three Approaches to Studying the Institutionalised Control of Inheritance

In the following, I apply three different approaches to inheritance cases. These are political economy, theory of practice and discourse theory. The three approaches are complementary ways of constructing the object and analysing a multi-faceted issue which is too demanding for a single, overuling perspective.

The approach of political economy: looking for the hard core of inheritance disputes

The perspective of political economy can approach inheritance through the concept of the relations of production. In the process of inheritance, the access to the means of production are renegotiated and consequently the relations of production are

reshaped. Claude Meillasoux is one of the French anthropologists who has discussed the relations between juniors and seniors as a relation of production in the so called 'domestic mode of production'. This mode has been historically articulated with the capitalist mode of production and the articulation has created constellations where the power position of seniors is challenged by the power position of the capitalists. Thus the process of inheritance is conditioned by capitalist property rights: the open labour market and the land market. They lead to situations whereby inheritable property becomes a commodity with exchange value. The domestic mode of production loses its independence.

A further complication for materialist analysis is that each inheritance case takes as long as a generation. Social conditions have changed dramatically during the period each generation has existed in this century. Thus each generation has been socialised into a process of 'extended exchange'[6] that was no longer valid when it reached the time of retreat. The ascending generation has challenged its claims of authority and its idea of accumulation. Among the Babukusu the idea of accumulation has changed during this century from a large number of followers, to a large herd of cattle, to a large land holding, and then towards urban employment. In this situation, the basis of authority has shifted rapidly and the elders have been forced into defensive positions.

One conclusion drawn from this discussion is that the conflict between elders and juniors (along and across the sexes) is very important, but the balance of power can hardly be construed through universal categories. In some cases, a junior may be an employer of and own the land of his senior, while in another case, a mutual sharing arrangement works well. Differences in the individual cases hinders the development of a generation-based 'class' consciousness.

Does political economy provide a comprehensive social frame for analysing inheritance cases? A conventional historical materialist view would emphasize the historical process of

[6] Extended exchange can be viewed as an ideology according to which we shall exploit our juniors in the same way as we are exploited by our seniors now.

privatisation and commoditisation. Privatisation is really taking place but it has its definite limits, simply because it tends to become dysfunctional: the volatile African economic institutional setting does not support extreme individualisation. The reason is that the individualised actor could not manage the risks of economic transactions. Instead, the local economy requires cooperation and trust between actors. Commoditisation is also taking place but in an uneven pace. Commoditisation is most noticeable with regards to 'new property' (Chanock, 1991:81–87) which may follow different routes of distribution which challenge the position of the conventional heirs. The crux of the change is that economic interaction is increasingly organised through negotiated networks which do not necessarily follow kinship routes. The implication for the perspective of political economy is that more attention needs to be devoted to the sphere of circulation.

The perspective of political economy has its parallels at a societal level. From the perspective of political economy, the legal system is a means to control property rights. I do not dwell on a class analysis of legal control in Kenya. It may be enough to point out that the high level usurpation of state power for private ends includes land matters. The class issue is also complicated by the ethnic issue. In several corners of the country, the state has provoked rather than calmed down the social conflicts. Various kinds of security forces have been used to influence the results of local conflicts. Unfortunately, the Bungoma district was recently one of the battle grounds where established land rights were trampled down by inter-ethnic violence. The ethnic warfare resulted a splitting of one district into two, and the displacement of many people because their plots were on the wrong side of the border.

The theory of practice: the scope of interpretation in inheritance cases

The theory of practice[7] emphasises the situational factors which turn an inheritance case into a social drama, often with an unpredictable end. In this analysis, the substantive rules of succession and inheritance are contingent on the sense that the circumstantial factors have a paramount effect on the outcome.

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[7] The conceptual approach used here is derived mostly from Pierre Bourdieu (1977).

This view directly challenges the rule-centered perspective. It is misleading to define the Babukusu as a patrilineal people, who divide the property equally between sons. It is a fatal error to take a few principles of lineage organisation as the base from which all the practices of inheritance can be deduced. Though the lineage ideology favours patrilineal inheritance, the actual understanding of the application of the rule is complicated by numerous contextual parameters.

The matters which are important are the wealth, residential pattern, religious affiliation, nature of marriage and age order of various people, earlier conflicts and their settlement, future fertility of women and the educational achievement of children. An inheritance case is crucially dependant on factors like proximity in the residential arrangements, the age difference between the senior and junior generation, the age differences between the likely heirs, the closeness within the lineage and so forth. Thus the social distinctions (junior/senior, male/female, dead/alive) do not have a definite impact, but function only through a situational constellation of relative impacts. The theory of practice places emphasis on situational factors like the proper rhythm, sequence and timing of important acts, the relative social positions, implicit local knowledge of the social expectations and permissible deviations from them. In other words, the case is dependent on the 'habitus' of the persons involved. Here, small nuances may appear as immensely important factors. For example, a woman may be evaluated as a widow if she has managed to have a child and receive presents from relatives. But if the woman does not have an accepted child, or if the gifts have not been properly exchanged, she may still be thought of as a mere girlfriend and not be entitled to an inheritance.

There are two major variations in the inheritance of land which deviate from the principle of equality between sons. The first concerns the effect of a large age difference between sons. The Babukusu acknowledge the special position of the eldest son, which takes the form of a mediating generational status. An eldest son, after he has married, may secure a relatively independent position in relation to his father, while he may develop a rather fatherly relation with his younger brothers. After the death of the father, he might — at least a few decades ago — take over his young step-mother. However, this

special position amounts to a "positional succession" only in very rare cases. More often, it is an interpretation of the generative schemes of posterior/anterior and old/young which leads to a slight tendency towards primogeniture. In practice, this means that older married men with minor brothers tend to value social age (in terms of the life-cycle) above generational age. They claim a large section of a holding, based on their age and growing family. Later, when the minor brothers reach maturity, they base their claim on their generational age — and the conflict is apparent. Here, Custom — as a rule — has nothing to offer the brothers but ambiguity.

The second common source of conflict is constituted by the rights of marginalised women and their sons. Marginalisation is conflated here with a lack of attachment to any agnatic core of men. Categorically, the Babukusu are ashamed when a grown-up daughter dwells in her natal home. Her place is to be married. However, the institution of bridewealth has been eroded to the extent that the payment of full bridewealth, giving money and organizing a ceremony are the privilege of the top elite. In the case of divorce, the sons of a woman who was not paid for are not always claimed by the husband's clan. Thus, safeguards related to the woman's rights to the land of her husband are minimal. When the woman is divorced, her brothers — who did not benefit in the first place — are reluctant to give her support.

It is possible to regard the women who have a child out of wedlock, who are divorced or widowed early, and who dwell in the compound of their fathers where they are merely tolerated by their brothers, as protected — despite complaints — by the father, while being afraid for their own and their children's future.[8] Here, one corner of the foundation of Custom has collapsed and consequently the whole structure is shaking. Here agnatic succession, if narrowly interpreted as the Customary Law of Inheritance, would become the language of the legitimation of the patriarchal ideology and a tool for the harsh treatment of women.

From the perspective of the theory of practice, an inheritance case is a social game and, by comparison, legal procedures mean

[8] Nevertheless, the age, wealth and stature of woman can intervene and thus no inevitable relationship should be drawn (Potash 1986).

just putting a simplifying limit to its complexity. From the perspective of the theory of practice, the statutory law is an irritating straitjacket, while the use of the customary law in a judicial body looms dangerously close to being an ideological relic, legitimizing selected past practices. On the other hand, there is good reason to simplify the legal system. Faced with contradictory claims of litigants, the legal system is bound to avoid a large part of the circumstancial factors.

Discourse analysis: the sphere of legitimate arguments in a local land tenure discourse

Discourse theories provide yet another angle on inheritance issues.[9] Instead of speaking of rights of inheritance, it is possible to identify a local discourse on inheritance. This discourse is conducted through separate but structurally connected speech events and the narrative develops from one funeral to another, from a village meeting to a beer place meeting, from a courtroom to a clan meeting. In this local discourse, the central axes of inheritance are constructed. In some cultures these are access to the land and the labour of dependants, in others, the honorary titles and names that tie a person to his ancestors. The central concepts define what are valid arguments and what are peripheral or immoral arguments.

Discourse analysis has a lot to offer to legal anthropology. An inheritance case can be seen as a discussion where both words and acts are valid statements. Through this method, a scattered process becomes coherent and the whole case appears more like a long discourse with its own rules. Nevertheless, the problem with discourse theory is that it can easily lead to broad generalisations of cultural unity. It is evident that a discourse also has discontinuities and that there are different 'discourse registers' with their own rules: separate rules for women and men, the rules for loaded public settings and the rules for everyday encounters. These different 'voices' are also structured hierarchically. The polysemic quality of discourse may easily remain unnoticed when the truths of the most visible speech

[9] I do not refer directly to one single theory. Instead I use semantic anthropology and socio-linquistics with some Foucaultian emphasis. I have especially been drawn by the language register studies.

events are taken for granted.[10] In the following, I build up an analysis of inheritance which regards it as a discourse.

Land is the major thing of value transferred through inheritance. Instead of speaking about a land tenure system (as a fixed, uncontested hierarchy of rights), I would like to speak of a local land tenure discourse. The distinction is important. It shows that the relationship between a person and a piece of land is not definite but depends on the discursive context. This is exemplified by Kopytoff in relation to commoditisation when he argues that:

> Out of the total range of things available in a society, only some are considered appropriate for making as commodities. Moreover, the same thing may be treated as a commodity at one time and not at another. And finally, the same thing may, at the same time, be seen as a commodity by one person and as something else by another. (Kopytoff, 1986:64, referred by Chanock, 1991:66)

Land certainly receives different valuations according to the context.[11] When land is inherited, the discourse can attain fantastic dimensions, ranging (in Mainean terms) along the whole spectrum from 'gift' to 'commodity'. Here I simplify and present two major contexts for land tenure discourse. I call these the 'squabble' and 'succession' registers. These discursive registers can be characterised as follows overleaf:

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[10] The legal pluralism argument can be couched in terms of discourse register analysis.
[11] For a detailed anthropological analysis of man-land relationships, see Moore (1986).

The squabble register	*The succession register*
* disputes on the use of land: production and exchange during a single year or an agricultural cycle	* disputes on the control over land: resource tenure with implications during a developmental cycle
* economic rationality	* social rationality
* decision-making as managerial decisions	* decision-making geared towards the social integrity and stability
* labour arrangements geared to practical aims	* labour arrangements as commitment to the unit
* concrete budgeting, including off-farm income	* amount of land
* varying domestic group attachment	* decisions which define domestic group composition

The crux of these options is that, depending on the context, a person selects a discursive register. In an ordinary situation outside ritual getherings, it is normal to follow the squabble register but is is also possible to try to frame the issue in terms of the long-term succession register. These options become very clear when one discusses women's land rights with Bukusu men. Any Bukusu man can privately admit that women play an important role in cultivation, food processing and crop trading. Women can enjoy substantial independence in arranging their time to do these tasks. Still, the same man might say, when several men or women enter the discussion or when the question is slighly modified, that a woman is merely "the handle of a hoe" fetched from her father's place and placed under the control of her husband. The shift in the focus can take place in a matter of seconds and the speaker does not see any contradiction.

This semantic analysis of the inheritance might show which discourse register is used in which situations. The semantic conventions are not limited by constraints of logic. When language is used as a means of persuasion, it is important to see that the statements need not be rational and coherent to have a persuasive power. Instead, the effect is derived partly from contextual factors and non-verbal communication. It follows that the relation between justice and the judicial process is not self-evident.

The succession register is more often used in public arenas where checks against the abuse of power are more likely to occur than in private arenas. In this respect, the institutionalised control of power is likely to provide minimal safety for the marginal household members. The problem is caused by the speech situations where the short-term perspective of squabble register tends to predominate nowadays.

The narrative of inheritance is always a long story with many loose ends, anecdotal figures and unsettled positions. Discourse analysis aims to show the major lines in this narrative. What are the legitimate arguments in this discourse and which arguments fall beyond the public discourse? I think that, generally speaking, people living in the Kenyan countryside have strong ideas concerning the conduct permissible in family matters. The living conditions of the majority of people make it, unfortunately, very difficult to follow the good way of life. In this situation, the realm of legitimate arguments in public meetings has been divorced from the essential arguments: the issues of poverty, changing marriage practices and the critique of domestic power relations. These are still not within the scope of valid arguments.

The way of talking at public events is reserved and elaborate. Hectic expressions are seen as a sign of weakness. The tradition of trying to find peace is admirable but often it becomes an end in itself: eloquent decisions are made, but they cannot be enforced as there are no mechanisms to do it.

I have tried to emphasise one issue: inheritance is not discussed merely in the ritual/official contexts. It is also discussed, in one way or another, in daily life. The daily encounters provide a different forum for presenting claims and forwarding arguments.

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The courts have generated a language of their own. This is totally obscure to a layperson and cannot be defended in any way. Any future reform should start from the aim of making a law understandable and accessible.

Conclusions

I have presented three analyses of the inheritance patterns and their institutional control. The approach of political economy offers a benchmark for the analysis of the material interests that exist between the various parties. This analysis becomes much more vivid when the theory of practice is used as an auxiliary tool. The theory of practice has the capacity of incorporating contingent contextual elements which have a definite role to play. Yet the analysis tends to be limited to a positional analysis emanating from social rivalries which are allegedly settled in a rational manner. The input of discourse analysis is a word of critique. Discourse analysis can show the limits of the valid arguments and prevailing perceptions. It can show how an ideological argument can provide its own justification that is divorced from rational judgement. Once we have reached this point, a critical political economist may ask whether the ideology is not actually a reflection of certain class configurations. A praxis theorist may ask, after hearing discourse analysis, whether the analysis of valid statements should be supplemented with the analysis non-verbal practices and practical knowledge. I find discourse analysis to be the most interesting approach but I admit that it needs to be conditioned. I also find it helpful to keep the different analyses so distinct that the corrective measures will be fully explicated and firmly grounded in theory.

My analysis shows that the plurality of the legal arenas is there to stay. Legal reform needs to be based on the premise that this plurality has advanced because it has been functional in reducing the workload of the courts. The problem is that 'shopping' for justice and the extreme abuse of legal systems create distrust of the whole institutionalised setting. To my mind, currently existing practices of inheritance are not derived from either Common Law or Statutory Law. The whole institutional arena of dispute settlement seems rather toothless.

I base my value-loaded judgement on past happenings. My claims are that

a) legal control of inheritance often functions only as a spectator in a process where economic interests on property take a prominent position,

b) the legal machinery controlling inheritance is marginalised as a whole because it is unreliable and represents alien state structures,

c) harsh treatment of some vulnerable groups goes unchecked, as they do not have legal protection, and thus

d) legal reforms should concentrate on reachability (procedures, settling and enforcement) of the legal system instead of just trying to write still better laws.

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References

Allott, A.N., 1960. *The Future of Law in Africa.* Butterworth, London.

Bourdieu, Pierre, 1977. *Outline of the Theory of Practice.* Cambridge University Press, Cambridge.

Chanock, Martin, 1985. *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia.* Cambridge University Press.

Chanock, Martin, 1991. A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa. In *Journal of African History*, vol. 32, pp. 65–88.

Coldham, Simon, 1984. The Kenya Law of Succession Act, 1972. In *East African Law Journal*. Vol. 10/1, pp. 93–105.

Comaroff, John and Roberts, Simon, 1981. *Rules and Process – the Cultural Logic of Dispute in an African Context.* The University of Chicago Press.

Cotran, Eugene, 1969. *Restatement of African Law, Vol. 2; Kenya: The Law of Succession.* Sweet & Maxwell.

Cotran, Eugene, 1983. The Development and Reform of the Law in Kenya. In *Journal of African Law,* Vol. 27/1, pp. 42-61.

Cotran, Eugene, 1987. *Casebook on Kenya Customary Law.* Nairobi University Press.

Cowen, D.W. and E.S. Odhiambo, 1992. *Burying SM; The Politics of Knowledge and the Sociology of Power in Africa.* James Currey, London.

Donge, Jan van, 1993. The Arbitrary State in the Uluguru Mountains. Legal Arenas and Land Disputes in Tanzania. In *the Journal of Modern African Studies,* vol. 31 no. 3, pp. 431–448.

Gluckman, Max (ed.), 1969. *Ideas and Procedures in African Customary Law.* Oxford University Press.

Hay, Margaret Jean and Wright, Marcia (eds.), 1982. *African Women & the Law: Historical Perspectives.* Boston University Papers on Africa, VII.

Kuria, G. Kamau, 1978. The Law of Inheritance and the Child in Kenya. In Gutto, S.B.O. (ed.), *Children and the Law in Kenya.* University of Nairobi, Institute of Development Studies Occasional Paper 35, pp. 34–51.

Kuper, Hilda and Kuper, Leo (eds.), 1965. *African Law, Adaptation and Development.* Berkeley, University of California Press.

Moore, Sally Falk, 1978. *Law as Process; an Anthropological Approach.* Routledge & Kegan Paul.

Moore, Sally Falk, 1986. *Social Facts and Fabrications. "Customary" Law on Kilimanjaro, 1880–1980.* Cambridge University Press.

Ojwang, J.B. and Mugambi, J.N.K. (eds.), 1989. *The S.M. Otieno Case; Death and Burial in Modern Kenya.* Nairobi University Press.

Okoth-Ogendo, H. W. O., 1989. Customary Law in the Kenyan Legal System - an Old Debate Revived. In Ojwang and Mugambi (eds.), pp. 135–148.

Potash, Betty (ed.), 1986. *Widows in African Societies; Choices and Constraints.* Stanford University Press.- 1986. Widows in Africa: an Introduction. In Potash, Betty (ed.), pp. 1–43.

ROK = The Republic of Kenya, 1968. *Report of the Commission on the Law of Succession.* The Government Printer, Nairobi.

Seppälä, Pekka, 1991a. *The History and Future of the Customary law in Kenya.* University of Helsinki, Institute of Developing Studies Occasional Paper 13. Helsinki.

Seppälä, Pekka, 1991b. Oikeus vai kohtuus [Legality versus Justice]. In *Suomen Antropologi* vol. 16, no.4, pp. 27–35.

Seppälä, Pekka, 1994. *The Changing Generations; The Devolution of Land among the Babukusu in Western Kenya.* The Transcriptions of the Finnish Anthropological Society 35. Gummerus.

Wanjala, S.C., 1990. *An Analysis of the Land Inheritance Cases in the Magistrates' Courts in Bungoma.* Unpublished mimeo.

Walekwa, R, W, 1991. Obstacles to the Administration of Justice in Rural Areas. In Kivutha Kibwana (ed.) *Land the Administration of Justice in Kenya.* International Commission of Jurists, Kenya Section, Nairobi, pp. 144–152.