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# ANALYZING PROPERTY IN DIFFERENT SOCIETIES\*

Jacques Vanderlinden<sup>†</sup>

## INTRODUCTION

The distinction between persons and things is, for sure, one which needs to be revisited; the diversity and quality of the contributions to this workshop are ample evidence of it. Furthermore, most of them, inspired by the reflections of their authors and the eight questions so adequately proposed by the initiators of this joint venture, are, quite naturally centered on law systems which are familiar to teachers and students in European and North American law schools. The ambit and purpose of this paper is however quite different, as they leave the familiar shores of the Roman-inspired legal traditions (I am exclusively referring here to the distinction between persons and things) for those of the continent celebrated by Joseph Conrad in *Heart of Darkness*.<sup>1</sup>

The reference to Conrad's work is particularly appropriate as the following considerations deal with pre-colonial African laws, as applied in societies which are indeed quite different from that in which Gaius<sup>2</sup> established the *summa divisio*, which still rules a good part of the formal apparent structure of many civil codes throughout the world. But let us be quite clear: there is no such thing as pre-colonial "African law." The laws of Africa, even if one limits oneself to so-called "black" Africa—the one spreading from the southern limit of the Sahara Desert to the Cape of Good Hope—reveal

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\* This written version differs substantially from my oral contribution to the workshop; this is due to the fact—for which I apologize to the reader—that I am unable to write a text before I speak on a specific topic. In a sense, to be true to the title of the workshops, this is a "revisited" version of what I said.

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1. JOSEPH CONRAD, *HEART OF DARKNESS*, available at <http://etext.virginia.edu/toc/modeng/public/ConDark.html> (last visited November 6, 2008).

2. Who taught law, by the way, in Africa, where the classical structure of the *digesta* was less evident than in Rome.

huge differences between the laws of people practicing agriculture, commerce, fishing, gathering, hunting, and pasturing (if one looks only at their mode of economic production) or having adopted various types of socio-political systems (from the extended family to one form or another of pre-state political regime) as their mode of government. Such diversity precludes any serious generalization, even on a regional or sub-regional basis. It is often said that most lawyers (or legal anthropologists) who present the legal system of an African ethnic group necessarily limit themselves to one group (or possibly two) in the course of their academic career. There must accordingly be no surprise if I shall essentially limit myself to one African society, that of the Zande of North-Eastern Congo, even if what I say or write could possibly apply to the members of the same group who live in the the neighbouring Central African Republic or the Sudan; this is a classical example of the splitting of African pre-colonial societies as a result of colonialism. What is essential is that I do not pretend that my case study is valid for the whole of the continent.

Nearly fifty years ago, when I arrived in the Zande country, I had just completed my first year of teaching as a part-time “assistant” (tutor) in the Faculty of Law at Brussels Free University from which I had graduated in 1956 before serving for eighteen months as a candidate reserve officer in the Belgian Air Force ground units that specialized in the defense of airfields against possible paratroopers from Eastern Europe! The people of whom I was instructed to study the system of land tenure were as unknown to me as the heart of Africa was to Joseph Conrad seventy years before, when he landed on the shores of the Congo river. The only advantage I had on the famous novelist was that there was some literature about Zande land tenure. But I was clearly paid to go beyond it, as it appeared unsatisfactory both quantitatively and qualitatively. I accordingly spent six months in the field talking through an interpreter with many Zande chiefs or simple peasants about what their legal connection to land could be.

When doing this, I clearly was a foreigner approaching an African society from the outside-in on the basis of what he had learned, some years before, in a classical positivist law school about “things” or rather, more generally, about property (*les biens*) in the Belgian (which is the French) Civil Code. At that stage of my career, no need to say I had few (if any) qualms about what “law”

was. I also knew that African laws were essentially “customary,” as they were, *mutatis mutandis*, in the Northern part of France in the Middle Ages, before the writing down of the customs as of the 15<sup>th</sup> century onwards; this topic was precisely the one I was currently discussing with my students during my tutorials.<sup>3</sup> Beyond that sketchy and inappropriate background, I had read some contemporary classics on structuralism by Claude Lévi-Strauss and bought a copy of the *Notes and Queries in Anthropology* published by the Royal Anthropological Institute in London.<sup>4</sup> All this does not plead very much in favour of those who were sending me in the context of an interdisciplinary mission entrusted with the task of advising the Belgian government about the economic and social development of the Zande country.

In so far as I am concerned it nevertheless was a shattering experience on two counts: at first, it deeply transformed me from a legal point of view; second, it made me aware of the importance of linguistics in the study of laws. Both had to deal with what I had decided, many years before, my professional life would be: that of a teacher. Until then, the law was to me an abstraction with a universal value of which I had tried to master the intricacies in order to pass examinations and get a piece of paper which would open doors to a comfortable future. I had been exposed to some limited aspects of its relativity through an introductory three credits course devoted to the common law, but that was all. Furthermore that course was taught in French with an occasional mention of English terminology whenever it was indispensable to distinguish concepts. But that was all. No fundamentals as to what a legal system or the limits of translation were ever challenged. My first contact with a single African legal system on a very narrow point—the law of immovable property—irremediably changed all that.

#### I. IS THERE A NAME FOR PROPERTY?

My contribution to a better knowledge of the Zande world was to present a clear view of the local land tenure system. These last three

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3. See Jacques Vanderlinden, *The Recording of Customary Law in France during the XVth and XVIth Centuries and the Recording of African Customary Law*, JOURNAL OF AFRICAN LAW 165-175 (1959).

4. NOTES AND QUERIES ON ANTHROPOLOGY (Royal Anthropological Institute of Great Britain and Ireland, 6th ed. 1951).

words obviously sound more anthropological than legal, the latter adjective referring normally to something quite familiar to lawyers in systems where the law has a well-defined meaning. As the Zande apparently had no distinct word in their vocabulary to identify law, there was no use to ask them what their law about immovable property was.

Yet they had courts and, interestingly enough, I met a case where a distinction was made between two ways of solving conflicts between individuals. The problem involved a husband and his wife. She was the plaintiff and she was denied any remedy. The problem she brought in front of the court was not considered because, the judges said, it was not one of those within their jurisdiction.<sup>5</sup> It rather fell within the jurisdiction of the parents of both parties who had to sort it out between themselves. Would that provide us with a distinction between what is legal and what is anthropological? Or would it be only be an aspect of the legal pluralism existing within Zande society? According to a positivist lawyer's view, perhaps, but certainly not for the Zande people involved. In fact, the American or European lawyer is irresistibly tempted to project onto African society his own conception of law. By doing so, he looks at local society from the outside-in and the validity of such approach is quite debatable.

Whatever the result of a possible debate may be, I chose to adopt that approach and to have a good look at local cases as reported in the native courts archives. I perused 2,000 of them in the course on long evenings next to an oil-lamp roaring beside me, found out that some 500 had to deal with private law and, finally, that there was not a single case dealing with land tenure (not to speak of anything like immovable property). At that stage, I could either give up and go back to Europe or decide to take the anthropological path and inquire through field work and interviews with inhabitants of the Zande country. I chose the second possibility. Thus while carrying on with the analysis of my 2,000 cases which allowed me to publish my book, the *Coutumier, jurisprudence et doctrine du droit zande*,<sup>6</sup> I turned myself into a legal anthropologist during daytime, visiting

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5. A lawyer trained in Roman law—but many others too—would immediately think of the maxim *de minimis non curat prator*. But beware of such too easy comparison!

6. JACQUES VANDERLINDEN, *COUTUMIER, JURISPRUDENCE ET DOCTRINE DU DROIT ZANDE* 350 (Editions de l'Institut de Sociologie 1969).

farmers day after day, walking with them through their fields, sitting in their habitat and trying to find what their answer was when questioned on the basis of the *Notes and Queries in Anthropology*, and also of some supplementary questions of my own.

Some conclusions resulted from that fieldwork. Here they are:

1. Each Zande socio-political unit—let us give it the name the Belgian colonial authorities gave it, that is, chiefdom—occupied a specific area of land. This area had a specific name in paZande (the language of the Zande): *sende*. Anyone could settle on a *sende*, provided he got the authorization to do so from the local authority—let us again give him the name the Belgian colonial authorities gave it, that is, chief. Normally, no chief would ever refuse a candidate, as the more people that lived within his jurisdiction the more powerful he was and was considered a “big” chief. Once he had admitted someone on the *sende*, the chief would help him to find a suitable place where he could settle down and establish his *kporo*; there was no question of the chief imposing a place on his new subject.

2. Land in the Zande country was plentiful, of an average-poor quality, agricultural techniques were rudimentary, and manuring practically non-existent as cattle could not resist the tse-tse fly. Everyone could find a plot on which to establish his *kporo*. This was the place where he would build his house, open up a garden of various plants, organize his kitchen area, rest during daytime between his activities, meet with his family and visitors, etc. Not too far from the *kporo*, he would clear, within the limits of his physical strength, the *öti* or cleared land on which he would start further work in order to open a *bino* on which he would grow the main crop providing him with the basis of his subsistence and that of his family. The products of that subsistence agricultural economy were supplemented by the produce of the family garden and hunting (often practised with some neighbours in order to facilitate it). Part of these products went to the chief who would redistribute it on specific occasions, such as holding a court to solve litigation between his subjects. Finally, as this subsistence economy may be considered to be a fairly rudimentary one, land had to be left resting regularly between crops and, accordingly, the *bino* regularly lied fallow for some time.

3. Such a factual description leads to one conclusion: as everyone lives in that way, including the chief, who has his own

*kporo* as a center of his personal life, land, as far as one could judge, never was an object of any special interest, and accordingly an object for any litigation, being altogether admitted that there could always be exceptions justifying the rule, but also that I did not meet any sample of it, either during my fieldwork or in the existing literature. A second conclusion is that the social intercourse between persons about land appears, until now, practically (but for the necessity for anyone wishing to settle on the *sende* to be authorized to do so by the chief) void of any element a lawyer would call property law, or an anthropologist, land tenure. In order to bring legal notions into the picture, one needs to look at what are the powers (or privileges) related to the different categories of land and exercised by the people described in the previous paragraphs. Hence, the interviews brought me into the system as perceived by those living in it and not anymore by the outsider.

4. In that perspective, let's consider first the *sende*. Its limits are determined by the chief and the chief alone. He is also the only one able to decide that the *sende* will be abandoned by the group (thereby relinquishing all powers on it) if there is a need for the group to migrate. As long as the group is established on the *sende*, the chief has, besides his exclusive power to admit newcomers on it (see par. 1), full control over its parts where his subjects have not established their *kporo*, *öti* or *bino*. But they, in turn, have on that part of the *sende* the complete power to freely circulate on it, to modify the place of their *kporo*, their *öti* or their *bino*, to collect the wood they need to build their houses or to make fire, to hunt; in short, take advantage of the *sende* as they please for their own use and that of their family as long as it does not infringe on another person's situation. In a sense, the parties involved try constantly to achieve equilibrium between whatever the chief wishes to do with some parts of the *sende* and the limits of whatever his subjects want to use it for. This is the reflection of a wish for consensus between rulers and the people they rule. Being a "good" chief requires the preservation of such reciprocal harmonious behaviour. The powers of the chief *vis-à-vis* the *sende* is expressed in a word, *ira*, which qualifies the chief. And the same word applies to his powers over the people living on the *sende*. He is accordingly *ira sende* and *ira Azande*.

5. If the chief has theoretically extensive powers on the *sende*, the same is true of the individual established on it for any part he

considers to be his. He alone begins with the determination of the limits of his *kporo*, his *öti* or his *bino*, decides who is allowed to circulate on them, what he is going to build or plant on his *öti*, and ultimately, possibly, will make up his mind to abandon them and let them turn back to the *sende* from which they had been taken through his actions. Powers as to land in the Zande country are indeed acquired by the individual through the incorporation of his work on a part of the *sende*. The latter could be considered, when looked at from the outside, as “virgin” land; that is, land which has not yet been transformed by man’s actions; the three elements (*kporo*, *bino* and *öti*)<sup>7</sup> we have been referring to could be called “transformed” land, and, apparently, in order to qualify collectively these various species of transformation of the *sende*, there is no generic word in the local language which could be opposed to the latter. Furthermore—and this is where the real rub appears, as in Hamlet’s perception of sleep—we quickly realize that the individual is also called *ira kporo*, *ira bino* or *ira öti*, the same word used for the chief *vis-à-vis* the *sende* and the Zande. But this is a problem for part two of this paper. Finally, the fruits which any Zande may hope to extract from the land through the incorporation of his work on it will definitely be his, to share with a possible family.

6. Looking at what has just been described in the anthropologist’s way with a lawyer’s eye, one immediately enters slippery ground. One indeed quickly tends to recognize, even if a more detailed approach could lead to distinctions, two of the classical components of the classical Roman concept of ownership: the usage (*usus*) and the fruits (*fructus*), being absolutely clear that the Zande language has no special general term regrouping the components of the two notions. So far, so good. But then immediately arises one of the most debatable, if not challengeable, assumptions about pre-colonial African land tenure: the absence in African systems of land tenure of an individual power of disposing of land, the latter being necessarily common to the group and not within reach of the individual. Let us try to have a look at the various aspects of what the Roman concept of *abusus* may encompass, and distinguish between different ways of disposing from one’s land.

*Abusus* involves three coupled distinctions:

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7. These three are but examples of a wide variety of specific lands coming out of the *sende* through work.



- a) Alienation *inter vivos* or *mortis causa*;
- b) Gratuitous alienation or alienation against compensation;
- c) Alienation for the benefit of a member of the social group or for a stranger.

7. Let's consider the three above-mentioned distinctions:

a) Alienation *inter vivos* is the only one which can be contemplated as, in the case where a head of family dies, his death is generally attributed to bad fortune, the latter being necessarily associated to the place where he lived. There is thus no question that someone would stay (this is the case for whoever we would be tempted to consider as his heirs) or come and settle down in such place as he would be likely to be the victim of the same malediction. This, of course, is the matter as seen by the Zande, and it would be preposterous to try and invoke the absence of a "rational" link between the fact of the death and that of the place where the *kporo* is established. *Exit* alienation *mortis causa*. When talking to Zande peasants of the idea of disposing of their land *inter vivos*, it simply does not seem to ever have come to their mind. Why? This question brings us to the two ways through which alienation can take place.

b) Gratuitous alienation or alienation against compensation? Alienation of land against compensation is unimaginable, as who would have a piece of cultivated land available to dispose of when it constitutes the very basis of its subsistence and that of his family? And who would be in a position to dispose of extra land in a system where basic conditions—as described previously—for an extra investment are not met? There simply is no market for land in the Zande country. As for gratuitous alienation, it is even less likely—and for the same reasons—than onerous alienation. And there is no reason to necessarily include a power of *abusus* other than the one—which we have already met—of disposing of the land by abandoning it and letting the *kporo*, the *bino* or the *ötis* return to the *sende* from which they originated as distinctive sorts of land through the incorporation of man's labour. But is any man roaming through the Zande country free to settle down and transform the *sende* into a *kporo*, *bino* or *öti*? This last question opens up a last problem.

c) Alienation for the benefit of a member of the social group or for a stranger? The matter of alienation of land is already settled through the previous paragraphs; it only exists when the *ira* of a *kporo*, a *bino* or an *öti* decides to abandon a piece of land and lets it return to the *sende*. Could then any Zande (or non member of that ethnic

group) incorporate his work into the *sende*? By doing so, would he become an *ira* of whatever piece of it he has so transformed? This is a last point which is fundamental in trying to understand African land tenure. And the answer of the Zande system on that point is without ambiguity: as the careful reader has certainly already noticed, when going through paragraph 1, only members of the social group, i.e. persons allowed to do so by the chief who accepts them as members of the group—and consequently divest them of their quality of stranger—are legally able to incorporate their work into the *sende* and become (as the chief is in relation to the *sende* and the Zande) an *ira* of their *kporo*, *bino* or *öti*. The affiliation to the group living on a specific *sende* is, in the Zande case, purely “political,” if one adopts a foreign classification which distinguishes between, for example, cultural, economic, political, or social affiliations; such a classification, there is no need to say, does not exist in the Zande way of thinking about such affiliation. In other African societies, the required affiliation will be, quite often, of a so-called “social” nature when the link results from consanguinity, even if one considers the quite extensive one uniting members of the same clan; in such case, the possibility of acquiring rights to land is limited to members of the clan, which includes even those who, being originally strangers, enter it by a ceremony of adoption. From this importance of a necessary existing link between people holding rights to land results the idea that African land tenure is “collective” or, better, “communal.”

8. On the basis of what has been shown in the Zande example—of which I am willing to admit that it could be atypical, but not that it does not lead to a reassessment of our thinking about African land tenure—the outside non-African observer is often led to a double conclusion. When he adds the fact that there rarely is a factual interest in disposing of the land, even for the benefit of a member of the group, his inescapable twofold conclusion is a) that there is nothing like ownership in Africa because of the lack of *abusus*, and b) African land tenure is necessarily communal (collective has been abandoned because of the confusion arising easily with the collective conception of land tenure existing in socialist legal systems).

9. My personal point of view—which, I insist, is highly debatable—is that as long as *abusus* exists and people can individually divest themselves of their powers in connection to land under some form—in the Zande case by abandoning the land on

which they have all the powers recognized to an *ira*—there is no justification not to speak of an ownership of land in the Roman way, provided—but this is never challenged—*usus* and *fructus* also exist. No one has ever said that alienation **must** be either *inter vivos* or *mortis causa* or gratuitous or onerous, in fact for the benefit of a third party, which is not the case when a Zande abandons the land in which he undoubtedly has well defined interests.

10. As for the communal character, no one seems to have ever expressed the opinion that individual ownership disappeared when the transfer of ownership to strangers was either curtailed or excluded. The example—for many years—of Finland and Switzerland are very clear on that point. During a long period of my life, I spent my summer vacations in a sauna on a peninsula at the end of an island fifty or so miles from Helsinki. I owned the cabin in which we found shelter during these memorable weeks, but, as a Belgian citizen, I could not constitutionally own the land around it. Would I or anyone, including local lawyers, have said that the friend—a Finn of course—who owned it, was not the owner of that land or that the cluster of rights and duties he had in relation to it were not ownership in the full sense of the word? Certainly not from the Finnish point of view. And when, in winter, I once contemplated—but, unfortunately never got the means to do so—buying a small chalet in the Swiss Alps and was told that, as a foreigner, I could not own that piece of immovable property, could I conclude that the Swiss owner of the chalet was not an owner according to the relevant provisions of the Swiss Civil Code? Of course not. Like his Finn counterpart (but in a more specific way as such limitation in Switzerland was essentially local and not general as in Finland), he was an owner. Perhaps a slightly different one than his counterpart in Belgium or Louisiana, but still an owner. This being admitted, would one dare to say that the Zande *ira* is an “owner”?

## II. IS TRANSLATION POSSIBLE?

The last word of the previous section brings me to my second section. But before considering some problems involved in the linguistic transfer of African legal concepts in Western European languages and the amount of doubts and dissatisfaction the exercise leaves in the mind, there seems to be one point on which most people interested in the matter seem to agree. What is more, it is

directly relevant to the thread which unites the contributions to this workshop, even if it is quite different from the ones usually considered. It is, of course, a creation of American or European minds observing African reality and creating abstract categories which do not necessarily exist in African minds or languages. It is the concept of the person-thing entity or unit.

Many anthropologists observing African land tenure have come to the conclusion that land tenure does not deal so much with relations between persons about land, but concerns rather the analysis of the single entity that man has with earth or—why not?—the latter has with the former. The one does not exist without the other and, in that respect, one might say that African legal geography (etymologically writing about the earth) is necessarily physio-human geography and not purely physical geography. Or, as some are inclined to say, “man does not own the land, the latter owns him.”<sup>8</sup>

If we now look at the components of that entity or unit, the person is not considered as an abstraction but as a diversity of human beings occupying in society a specific position because of their age, their sex or their cultural, economic, political or social function. The same is true—as it was underscored in the previous paragraphs—for what we call “land,” which is never considered in such abstract way, but always linked to a specific function.<sup>9</sup> Thus a correct analysis of land tenure necessarily goes through a previous careful analysis of both components of it. And ends up with a presentation of a cluster of person-thing unit which is not necessarily systematically organized in societies where the need for abstract systematization is not as felt as in ours. Quite obviously, my own analysis of Zande land tenure was, from that point of view, totally unsatisfactory.

The immediate temptation, as the student of African law I was nearly fifty years ago in the Zande country and the teacher I also was (by the way, both I still believe I am) as soon as I came back from Africa to my class in Brussels, was to communicate. Studying in order to teach was already the fundamental activity of my craft. I had not too many problems with the factual realities represented by

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8. Quoted, without reference, in Daniel Biebuyck, *Introduction, in* AFRICAN AGRARIAN SYSTEMS 2 (Daniel Biebuyck ed., International African Institute 1963).

9. One of the most interesting analysis from that point of view is that of G. WAGNER, *THE BANTU OF NORTH KAVIRONDO* (Oxford University Press for the International African Institute 1956) where he distinguishes 24 sorts of land with reference to its use, 5 with reference to the rights of control upon them and 7 with reference to its quality in Logoli vocabulary, but no term for “land” in the abstract.

the paZande words *öti*, *kporo*, *bino* or *sende*. I rather easily decided that the first one would be “cleared land,” i.e., the part of land of which all obstacles had been removed in order to possibly sow and cultivate some vegetation on it; the second one, “habitat,” i.e. the part of land upon which a house and his separated and aerated kitchen would be built, plus whatever land was freed and prepared for circulation around the house and the kitchen to receive guests, or for any other use; the third one, “field” as it had to be sown and tended on the *bino* in order to produce some crop; and, last but not least, *sende*. With the latter, things appeared more difficult indeed. I did not favour territory, as the latter has, in French legal language, a specific technical meaning “linked with public law” (a non-existent notion in Zande thought), which, if used to sum up the Zande reality, was conducive to serious potential confusions.

In that respect, it was true that “*territoire*” had a less specific and technical meaning in French when speaking of the territory of animals. But, for obscure reasons, that reference when speaking of people discouraged me from using the word. Re-reading my text of 1960 (the year of its publication), it appears that I did not venture in a translation and satisfied myself with a description of approximately twenty lines of what the *sende* was. Would I dare to propose today the “physical support of social life,” which is far from short and elegant? And also quite abstract, when compared to the formulation of Wagner, “bush land that has never been cultivated”<sup>10</sup> for *ovulimu* in the Logoli language, which seems to be the nearest to the Zande *sende*.

But this was not the end of my qualms. The real test came with the three letters of *ira*, either when we apply it to the individual or when it concerns the chief. In fact, at a first stage, the problem was not so much with the *ira kporo*, *bino* or *öti*. In accordance with the conclusions I came to in paragraph 10 above, “owner” could seem provisionally acceptable to me, provided one admitted (this still does not fully satisfy me, as we shall see later) that ownership never is as absolute as one likes it to be and that the Finns or the Swiss may—with some approximation—be called owners as much as the Belgians or the Louisianians. We would then have no problem in calling the Zande commoner an owner, something of which Allott would totally disapprove when he writes that “the words ‘own’ and ‘ownership’ are . . . misleading, for the description of African property

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10. *Id.* at 76.

systems.”<sup>11</sup> And he is indeed quite right. But then—in order to carry his logic on a wider geographical space—I would consider that ownership is as much misleading when comparing Finnish or Swiss law with either English or French law, as both of the latter have no restriction whatsoever linked to the nationality of the buyer of a piece of land in England or France. Good enough. But, then, how do I translate *ira* when referring to the individual? May I beg the reader to be patient and keep the question unanswered for a while?

Turning now to the chief, the matter seems—*prima facie*—simpler than in the previous case. Certainly he is not, in any sense, the owner of either the *sende* or the Zande as the local language indicates. This was clear to my mind. But then, which French word to use? I finally decided in favour of “master” (*maître*).

Such choice was motivated by a fundamental wish, i.e. to find a single word in French (as in paZande where one finds *ira*) which could apply to both the chief and his subject. If I had accepted not to take that wish of linguistic homogeneity into consideration, the problem would have been easily solved, by using “lord” for the chief and “owner” for the commoner. But I had the feeling that by doing so I was introducing in my description the distinction between public and private law, so familiar to me through my legal education, but totally absent from the Zande mind. The thing would perhaps have been easier if I had been trained in the common law where that fundamental distinction has long been absent from the doctrinal sphere. But I was communicating with continental lawyers educated differently and for which the split between public and private was fundamental in the legal discourse. “*Maître*” had the advantage that it was still used (yet only once) in the French or Belgian Civil Code when speaking of the liability of masters for the wrongful acts of their servants (art. 1384, al. 5) and (this time, twice) when referring to property which is vacant or “without master” (art. 539 and 713). *Maître* could thus apply to both persons and things, as did *ira* when concerning either the *sende*—a thing—or the Zande—a person. This for the public law side. As for the private law one, didn’t popular wisdom say that “*charbonnier est maître chez soi*” (literally “a coalman is the master in his own house,” or, in accordance with the English idiom “a man’s house is his castle”)?

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11. A.N. Allott, *Language and Property: A Universal Vocabulary for the Analysis and Description of Proprietary Relationships*, 11 AFRICAN LANGUAGE STUDIES 12, 20 (1970).

Fifty years later, I admit that all this seems (or should I write is?) amateurish. Had I been better informed of the existing anthropological literature about what I had to study, I would also have realized that in many African societies—as in the case of the Zande with *ira*—a single word is used to characterize the most extensive powers of a person on land.<sup>12</sup> But, the reader knows, from the introduction to this paper, in which circumstances and with which kind of training (or should I write non-training?) I marched into the heart of darkness; my total ignorance of methodology, substance and form insofar as what I had to study is obvious. What is perhaps funnier is that the publication of the results of my research led to an invitation to the Second International African Seminar organized by the International African Institute in Kinshasa (then Léopoldville), where I spoke about the problems resulting from the introduction of new ways of using land among the Zande and that two years later, on the basis of these two papers, I was asked to open and occupy the chair of African customary law at the Lovanium University also in Kinshasa. From then on, an incredible number of persons strongly believed (and still do) that I was a legal anthropologist. How strange!

All along that long road into the kingdom of academe which is still mine nearly half a century later, I have met many brethren—sometimes close friends—who were treading along the same path. But, be it K. Bentsi-Enchill in 1965,<sup>13</sup> A. Allott in 1970,<sup>14</sup> H.W.O. Okoth-Ogendo in 1974,<sup>15</sup>

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12. Daniel Biebuyck, *supra* note 8, at 3-5. He provides examples borrowed from the Barotse in Zambia, the Lo Wiili, the Nsaw in Cameroon, and the Nyanga in the Congo. Be it the word *mung'a*, *so*, *KEr*, or *mine*—and one cannot but be struck by the likeness with the *ira* of the Zande—one single word indicates the most extensive powers a person with a specific status may have on a specific sort of land.

13. K. Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?*, in *AFRICAN LAW AND LEGAL THEORY* 265-290 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

14. Allott, *supra* note 11.

15. H.W.O. Okoth-Ogendo, *Property Theory and Land Use Analysis*, in *AFRICAN LAW AND LEGAL THEORY* 291-305 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

G. McCormack in 1983<sup>16</sup> and T.W. Bennett in 1985<sup>17</sup>—only to mention a few—none of them were of much help insofar as I was and still am concerned about the extraordinary (from an American or European point of view) concept of a man-earth or person-thing entity. But the most influential and seminal for me was P. Bohannan, whom I met at length in the International African Institute Seminar on land tenure that I was invited to in Kinshasa, as I mentioned earlier in this paper. In his presentation, Bohannan wrote:

It is . . . probable that no single topic concerning Africa has produced so large a poor literature . . . The ignorance derives less from want of ‘facts’ than what we do not know what to do with these ‘facts’ or how to interpret them.<sup>18</sup>

His words were echoed after a week of discussions at the International African Institute Seminar when its organizer, Daniel Biebuyck wrote, under the title *Problems of Analysis and Terminology*:

The comparative study of the innumerable works devoted to these problems [those of land tenure] reveals, as it was underscored in the Seminar, the big disparity of approaches and the inadequacy of the corresponding terminology, the existence of a serie of untrue statements and the absence of a true theory in that field.<sup>19</sup>

Twenty-five years later, Bennett considered—a judgment to which I still subscribe today—that it was “disheartening to find that little progress seems to have been made”<sup>20</sup> on that topic.

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16. G. McCormack, *Problems in the Description of African Systems of Landholding*, in AFRICAN LAW AND LEGAL THEORY 321-334 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

17. T.W. Bennett, *Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory*, in AFRICAN LAW AND LEGAL THEORY 335-349 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

18. P. Bohannan, ‘Land’, ‘Tenure’ and Land-Tenure, in AFRICAN AGRARIAN SYSTEMS 101 (Daniel Biebuyck ed., International African Institute 1963).

19. Author’s translation from the French. Daniel Biebuyck, *Problems of Analysis and Terminology*, in AFRICAN AGRARIAN SYSTEMS 1-19, n. 2 (Daniel Biebuyck ed., International African Institute 1963).

20. Bennett, *supra* note 17, at 335.



CONCLUSION  
(IF I AM STILL ABLE TO ESCAPE SELF-DERISION)

In the course of the fifty years which followed my escapade in the Zande country, the deeper and wider I went into comparing laws, the more I was inclined to realize how true Karl Llewellyn was when he wrote:

Legal usage of technical words has sinned, and does still, in two respects; it is involved in ambiguity of two kinds: multiple senses of the same term, and terms too broad to be precise in application to the details of single disputes. First, it does not use terms in single senses, but uses the same term in several senses; and in several senses, indiscriminately, without awareness. This invites confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable. No logician worth his salt would stand for it; no scientist would stand for it.<sup>21</sup>

I do not claim, in any way, to be considered as a logician or a scientist, but being forced into communication by my craft, I cannot but be struck by the fundamental truth emanating from these words first uttered when I had still two years to go before being conceived.

In this instance, when the Zande speak of *ira* or we speak of ownership, we all use abstract terms reflecting concepts built in our minds, and probably more clearly formulated in the Zande country where people live the law as a constant communal process than in our countries where they are the product of self-proclaimed sophisticated minds arguing, as in Byzantium, about the sex of angels in a language that even ordinary lawyers are at pains to understand. Lawyers and perhaps more evidently legal scholars—a group to which I belong so that everything I write about it can obviously refer to me—have not yet had the capacity or the courage to develop a language which would at least try to be understandable by all lawyers of good will. Also, no one has decided to take the time and courage needed for a possible systematic and rigorous application of the fundamental concepts defined by W.N. Hohfeld to African land tenure, in spite of the eloquent plea made in favour of it

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21. K.N. LLEWELLYN, *THE BRAMBLE BUSH* 84 (Oceana 1978).

by E.A. Hoebel in his *Law of Primitive Man*,<sup>22</sup> which he concludes by another quotation of his accomplice in the study of the Cheyenne, Karl Llewellyn: “And thinking thus, in nicer terms, with nicer tools of thought, you pull the issue in clarity . . . unambiguously, because your terms are not ambiguous.”<sup>23</sup> But these voices of scholars of first magnitude in legal anthropology were *clamantes in deserto*. Everything went on as if there was a definite advantage to keep the law ambiguous and the comparison between laws foggy.

And yet on the rich material we currently have, from the factual point of view through more numerous and elaborate legal anthropological fieldwork, through fundamental theoretical legal research and also, in some instances, through a combination of both, it should have been possible to go beyond—and even, if one looks at my limited and shaky contribution on Zande law, far beyond—what has been common knowledge among africanists for more than a quarter of a century.

I have had some occasions to plead in favour of such joint efforts involving scholars in the field of law and linguistics. To no avail, the most reluctant being the lawyers. For sure, their theoretical contribution seems more advanced than the development of research in African concepts about what “order” may mean in society. Social anthropology has made tremendous progresses in the analysis of African ways of thinking; but they seem to have focused on the background, both factual and intellectual, which subsumes what we could possibly call “order” or “law.” The task is complicated by the fact that many among us—including myself—have serious doubts as to the existence in pre-colonial African minds of a distinct mental category isolating what we consider as “legal” from the rest of the seamless web which holds those societies together. But, at least, the challenge ought to be met. And do not ask me why I did not take it up. The accused can’t be forced into admitting his own guilt.

Being currently, in the twilight of my life, I am still in the Heart of Darkness about what I consider to be a possible science of laws at large.<sup>24</sup>

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22. E.A. HOEBEL, *LAW OF PRIMITIVE MAN* 46-53 (Harvard University Press 1954).

23. LLEWELLYN, *supra* note 21, at 88.

24. I come back to this issue of a general formulation of legal concepts in *Les nouvelles ambitions de la science du juriste: Une langue générale de spécialisation en droit est-elle une utopie ?*, forthcoming, in a volume edited by R. Sacco, to be published by the Accademia nazionale dei Lincei in Rome.