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# LAW AND THE PUBLIC INTEREST

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## Preface

This volume contains the proceedings of the first of a series of seminars initiated in 1985 by the Faculty of Law. The series focussed on some of the main areas of teaching, research and dissemination of legal thought. The initiative for the series sprung from the ingenuity of some scholars, particularly Dr. C. O. Okidi, Chairman of the Faculty's Research, Library and Legal Publications Committee.

In Africa, the law, especially enacted law, has been seen as the main instrument for implementing economic and political policy and for resolving stresses arising from policy decisions. This approach to societal problems prevailed even in colonial times, when the legal process was used to facilitate political and economic management programs. Partial responsibility for the chronic underdevelopment of much of Africa before independence lies with this use of the law.

That such a role for the legal process still remains was considered intriguing enough to justify new, development-based studies in the Faculty of Law. Law has a role in stabilizing social institutions, and changes wrought by development initiatives need to be founded on institutional stability. Thus, how law responds to development is an important subject.

Of the several seminar proposals prepared by the Faculty, the first to attract the interest of donors and participants was the one on "Law and the Public Interest." The purpose of the seminar was to consider, through specific examples, the role of law in promoting and safeguarding the public interest. *Public interest* here refers to a whole set of developmental matters set to benefit people socially, economically, culturally and in other related senses.

Development in Africa is primarily state-directed. The private sector, even when ostensibly dominant, is regulated by the state through legislated codes or administrative practices. In many third world countries, the state, through its ability to command bureaucratic, financial and technological resources, becomes the main agent in mobilizing development. Public interest then includes those expectations which the citizens entertain in

exercising their civil status. The state generally intervenes in the interest of its citizens through the device of law. Thus, clear perspectives need to be developed on the interplay between the law and the public interest in the process of national development.

This concern is shown in the character, form and order of these proceedings. We hope that this volume will be useful to scholars and policy makers, as well as providing a basis for more specialized discussions on important topics such as population and resource management, the character of the law and its effectiveness in relation to policy, and resource rent and taxation.

Funding for the seminar came from the International Development Research Centre (IDRC), the National Council for Science and Technology (NCST) and the University of Nairobi. We are greatly indebted to these donors for supporting the seminar and for permitting the use of the remainder of the funds to produce this volume.

We also appreciate the role played by the participating scholars, from as far afield as Botswana, Côte d'Ivoire, Egypt, Indonesia and the United Kingdom. This kind of participation brought forth the experience of many societies, in both the industrialized and the non-industrialized world.

We acknowledge the co-operation of members of the Faculty of Law who performed a number of essential tasks during the seminar, including serving as chairmen of sessions, rapporteurs and discussants. We thank Mr. A. G. Ringera, who served as chairman of the Kisumu Seminar Committee.

Finally, we are indebted to the Institute for Development Studies for agreeing to have this work published in its Occasional Paper Series. Apart from the IDS personnel, in particular Dr. I. Riak, the Seminar Co-ordinator, we have also greatly benefited from the assistance of Alison Field-Juma of Initiatives Ltd. for editing and production, and of Dr. Calestous Juma of the African Centre for Technology Studies. Special thanks are due to Dr. John Oucho, of the Population Studies and Research Institute, who helped edit the two papers on population.

J. B. Ojwang  
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## LAW AND THE PUBLIC INTEREST

### Some Introductory Remarks

J. B. OJWANG

This volume covers a wide range of subjects—agrarian reform, commerce and industry, petroleum exploration, environmental management, public health, and population. It has, however, but one theme: law and its application in matters of public interest. This volume does not pretend to be the most internally coherent, focussed on a limited number of issues. Rather, it brings together the contributions of different authors, and can claim a fair degree of uniformity at the level of its main theme.

The studies contained in this volume examine the relationship of law to the problems of development and the special conditions under which law operates in developing countries.

#### The General Problem of Development

The seminar began with the common understanding that "the public interest" refers to "a whole set of development matters set to inure to the benefit of the people as a whole, in social, economic, cultural and other related senses." Ultimately, the guardian of such interests is the state and its public agencies. The state designs and implements relevant policy and law validates it. Not only ought the "right" policy choices be made; suitable laws must be formulated and effectively applied. The management of policy and its legal validation should thus be priority areas in order to achieve social, economic and other changes.

In practically all African countries, agriculture takes priority as an economic activity. It is fitting that this volume begins with agrarian reform, discussing its relation to development and laying bare the relevant law.

Besides agriculture, economic development must incorporate commerce and industry. The interplay between these sectors can expand peoples' economic fulfilment, create conditions for self-reliance, and enhance the productivity of each sector. The laws for implementing appropriate policy in these spheres need to be fully understood.

Africa's development rests upon its natural resources—even those still unknown. Lack of technology still largely leaves the exploitation of such resources to foreign entrepreneurs and capital. Under these conditions, Africa can secure its resources only through policy and law. Hence, it is important to show the role of law in relation to natural resource utilization.

Although development is often described in quantitative economic terms, the status of health, the condition of the environment, and the mode of population management are very relevant. The three last chapters illustrate how the legal process relates to these qualitative aspects.

#### Special Problems of the Law in Development

Although law validates official policies, it too has inherent problems, especially in Africa. For example, the law in most African countries lacks a social equilibrium insofar as it has a foreign orientation resulting from colonialism. Prior to colonialism, law was traditional and ethnically-based. Although this ethnic law remains in force to some extent, its authority and future prospects are much compromised. This situation can be described as follows:

Western law, with the entrenchment of the modern state, became the instrument for modelling a uniform legal system which grows by legislation and judicial interpretation, invalidating and supplanting traditional law. As a result, the various indigenous legal systems have progressively declined, as application of Western law has extended to cover all spheres of life. Although traditional law (for reasons of inertia, and owing to the fact that there will be many marginal areas not directly affected by the impact of the State and its attending institutions) is certain to remain, in certain respects, operative for many more years, it is no less evident that the application of Western law must move towards universality in the years to come.<sup>1</sup>

This instability in the law is deepened further by the context of change, which, in Africa, is remarkably rapid. Of this reality, President Kaunda of Zambia writes:

We live in a changing world, and one in which the pace of change is becoming even greater. Neither the character nor the needs of any given society can remain static, and if the law is to fulfil its proper function it must keep pace with the changes. This is not to say that the law must be a straw in the wind; if law is to be an effective instrument of social order it must be a stabilizing influence, but it must be flexible and it must be progressive else it will hinder society in its progress and development . . .<sup>2</sup>

The law is therefore handicapped, both by its internal shortcomings and by the pressures of social change. This complicates the task of designing suitable laws and applying them correctly, and in translating developmental policy in the interest of the public. Law and the public interest is thus a problem with no ready answer. This volume illustrates specific difficulties and points to possible solutions.

The different studies in this volume provide a comparative framework and emphasize the common human character of public interest issues. For example, a country's approach to population or natural resource management is basically an approach to the problem of human survival; which appears to be the ultimate objective of the public domain in all countries.

Prof. Okoth-Ogendo isolates some of the main imped-