CHAPTER 2

Dominium

Property rights, more specifically titles to land or land ownership, were an essential constituent of the European acquisition and partition of Africa in the late nineteenth century. Often they had a prominent place in the cession and protectorate treaties concluded between European States and African rulers, and transferring sovereign rights over territory impacted on existing property rights to the land. Before discussing the appearance of property rights in these treaties, the concept of land ownership – *dominium* – will be addressed, both from a European and from an African perspective. Section 1 describes the theoretical framework and the premises that support the evaluation of the meaning of property rights to land. Next, property rights to land will be discussed more extensively from the European perspective and the African conception of property rights in the age of New Imperialism (§2). The chapter concludes with a summary of the main argument (§3).

1 Property Rights: Theoretical Premises

Proprietary rights come in a variety of types and forms, and those most relevant to this book will be discussed here. Today, the right to property has lost its absolute character. Property is a complex, organizing concept, and it is found in most legal systems.[1] Although the concept of property varies in content and form from one system to the other, depending on the given social, cultural, political and economic context, some of its features are universal. Trespassory rules and the ownership spectrum are considered fundamental in all world societies. Property is both a social[2] and a legal institution. Here, however, the emphasis, however, will be on property as a legal institution and its position in the vertical relationship between sovereigns and their subjects. While in

1 A right to property indicates a legal relationship and not a thing: 'It is to be observed that in common speech in the phrase the object of a man's property, the words the object of are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words a man's property perform the office of the whole.' J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by E. Harrison (Oxford: Blackwell, 1948), 337 (Chapter XVI, Section 26).

2 J.W. Singer and J.M. Beermann, 'The Social Origins of Property,' *Canadian Journal of Law and Jurisprudence*, 6 (1993), 218.

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the civil law tradition ownership as the most comprehensive property right is based on the Roman law notion of *dominium*, the parallel between *dominium* in Roman law and ownership in modern law must be put into perspective, because property is determined by the temporal and spatial context in which it functions.

Property does not coincide with and is therefore not equal to, nor the same as, ownership.[3] Property is a broad concept, of which ownership is a subcategory. Property comprises a wide range of forms of ownership and possession, also referred to as titles, irrespective of whether these titles are absolute or relative. The right of ownership is the most comprehensive right a person can have in an object and it only stops where the rights of another person begin: 'ownership rights can be limited only to prevent harm to other people.'[4] Consequently, ownership cannot be considered to be equal to possession. These notions and their differences already existed in Roman law in the Late Republic (264–227 BC).[5] The Roman lawyer Ulpian would later observe that ownership had nothing in common with possession.[6] Possession is the factual or physical holding of an object complemented by the *bona fides* belief of the possessor that he is the owner.[7] Ownership, in contrast, comprises the all-comprehensive power and right over a thing. Although the possessor holds an object materially and mentally,[8] it is the owner who has the most extensive rights. Put differently, possession is a material institution, ownership an immaterial institution. Ownership concerns the question whether the relation between the individual and the object has been constituted in such a way that the law confers rights

3 See J.W. Singer, *Entitlement. The Paradox of Property* (New Haven, London: Yale University Press, 2000), 6–9. Singer argues that property law establishes the minimum conditions for social interaction between individuals: '[P]roperty law both responds to and shapes social relations by norms and rules that take into account the systemic effects of alternative entitlement structures. Paradoxically, property is both an individual entitlement and a social system.' *Ibid*., 14.

4 *Ibid*., 30.

5 See A. Watson, *The Law of Property in the Later Roman Republic* (Oxford: Clarendon Press, 1968).

6 D.41.2.12.1 (Ulpian): '*nihil commune habet proprietas cum possessione*.' See also R.A. Epstein, 'Possession as the Root of Title,' *Georgia Law Review*, 13 (1978–1979), 1221–1243.

7 Possession served as an alternative praetorian protection for those who were not able to prove ownership.

8 In contrast to the holder, who only holds and object materially. See A. Borkowski and P. du Plessis, *Textbook on Roman Law* (Oxford University Press, 2005), 164; B. Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1975), 105ff; and T.G. Watkin, *An Historical Introduction to Modern Civil Law* (Aldershot: Ashgate, 1999), 229ff.