BOOKS

Sawyerr, G.F.A. & Hiller, J.A.,[1] THE DOCTRINE OF PRECEDENT IN THE COURT OF APPEAL FOR EAST AFRICA. Dar es Salaam, Tanzania Publishing House, 1971. viii, 96 p. $4.00

In a foreword to this book the Hon. P.T. Georges, then Chief Justice of Tanzania, describes its thrust as follows:

> There is a call to have frank recognition of the need for judges to change judge-made law when the conditions under

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[1] Both authors have had considerable experience in East Africa. Sawyerr, who has now returned to Ghana as a Lecturer in Law, University of Ghana, was a lecturer at the Faculty of Law, University College, Dar es Salaam, for a number of years, as well as Director of the Legal Research Centre there. Hiller was a Visiting Professor of Law at University College, Dar es Salaam in 1966-68.

I must confess to being disappointed to find the book unleavened by the quick and dry wit which I know can emanate from either of these authors, and that so little of their personalities shinesthrough. The subject is not immune to the effective use of humourous, but nevertheless scholarly writing. See e.g. Seidman, "The Style of Appellate Opinions in East Africa: A Comment," 3 E.A.L. Rev. 189 (1970), where among other things, Seidman repeats Karl Llewellyn's remark that a judge who denies that he makes policy resembles a Victorian virgin tubbing under her nightgown. My disappointment is tempered, however, by a recognition that poking fun at those one seeks to persuade is commonly suicidal. This is perhaps particularly true where one or both authors are, in East Africa, expatriates. (I once said to Sawyerr in Dar es Salaam, "You know, Aki, you're an expatriate too." His reply: "Oh no, an expatriate is someone who can't get home without swimming.")

* This review will also appear in the Eastern Africa Law Review.

which it was declared have themselves changed; to do boldly what has hitherto been attempted by stealth; to demonstrate that law can only grow and thrive when it is deeply rooted in the local situation. Side by side with this must go a conscious recognition of the part which considerations of policy play in the development of case law[2].

These themes are in sharp contrast to traditional English doctrines of strict precedent still largely prevailing not only

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[2]The Chief Justice's own attitude toward rigidity in law may be illustrated by a remark he once made, which I hope he will not mind my repeating. Shortly after I arrived to teach at the Faculty of Law in Dar es Salaam in 1965, a colleague introduced me to the Chief Justice. The three of us fell to discussing the difficulties involved in a project upon which my colleague was working, developing a Swahili legal dictionary. Inevitably this involved translation of countless English legal concepts into Swahili. The particular phrase then giving the lexicographers difficulty was "beyond a reasonable doubt." They were toying with "kabisa, kabisa" -- "very, very" -- as its starting point, which seemed not at all bad to my ears. But my colleague was unhappy because, "It is not very scientific," which response led me to ask the Chief Justice if he too believed the law to be a science. He replied: "Law is making things work." It is interesting to contrast this answer with the definition of law later given by the then President of the Court of Appeal for East Africa: "For present purposes . . . I would define the law as that body of rules governing the rights and duties of persons within an internationally recognised geographical area having an organization of its own, such, for example, as the State of Uganda, which is enforced by the courts of that area." Newbold, "The Value of Precedents Arising from Cases Decided in East Africa as compared with those Decided in England," 2 E.A.L. Rev. 1 (1969). For a less anecdotal and more extensive exposition of Chief Justice Georges' views see his chapter, "The Court and the Tanzania One Party State," in Sawyerr (ed.), East African Law and Social Change (1967).

in East African[3] and other common law African nations,[4] but also in varying degrees in such diverse common law countries as India, Canada and Australia, and sporadically, in the United States. Their dominance in East Africa is not merely a residue of cultural habits lingering from the colonial era, the English doctrines are incorporated as positive local law by reception statutes enacted by East African legislatures.[5]

Before turning to the issues raised by this provocative book, a brief summary is in order. Chapter 1 introduces the common law doctrine of precedent as developed in England. Detailed consideration of the manner in which the doctrine has been and is being applied in East Africa appears in Chapters 2-4. Chapter 5 analyzes the authors' concepts of the role of

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[3]Readers familiar with the landmark case of Dodhia v. National & Grindlays Bank Ltd., [1970] E.A. 195 (C.A) may wonder why this statement is not in the past tense. In that case the Court of Appeal unanimously adopted several of the points made by the authors. (A draft of the book had been submitted to both the court and counsel, and the case was decided too late for Sawyerr and Hiller to integrate its wisdom into their work). In writing this review I am to some extent, however, ignoring Dodhia's potentially radical effect in the belief that old habits do not change overnight, even under command of higher courts. It remains to be seen how long it will take for the spirit of Dodhia, as distinct from the letter, to overcome years of contrary thinking at bench (including the Court of Appeal itself) and bar. Two recent decisions showing very mild cautious recognition of that spirit without citing the case itself are Obongo v. Municipal Council of Kisumu, [1971] E.A. 91 (C.A.) and Dodd v. Nandha, [1971] E.A. 58 (U.).

[4]But cf. Veitch, "Some Examples of Judicial Law Making in African Legal Systems", 34 Mod. L. Rev. 42 (1971).

[5]See Chapter 3 for an extensive discussion of reception statutes; for a very simple introduction to the subject see Macneil, "Research in East African Law", 3 E.A.L.J. 47, 48-50 (1967). Such incorporation normally is subject by the terms of the statutes to limitations such as "so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

precedent in East Africa. Finally, Chapter 6 urges a series of precepts upon East African courts; (1) No court in East Africa should consider itself bound to follow any decision of a foreign court; (2) The continued importation or copying of foreign law and statutes should not detract from the implementation of (1); (3) The Court of Appeal for East Africa should feel, and declare itself to be, free to overrule or depart from any previous decision of its own or of any other court, including the Privy Council, where it considers it appropriate to do so; (4) In deciding upon the need to overrule a previous decision the Court should bear in mind the need for certainty in the law and the element of reliance; (5) Though not absolutely binding on the Court itself, decisions of the Court of Appeal bind lower courts and therefore substantivally settle the law.[6] To these I think it fair to add the following which, although not appearing among the enumerated precepts in Chapter 6, clearly emerge from the book as "action" proposals: (6) When judges make law they should acknowledge the fact, and should think about and explain the policy reasons for the law they are making (something close to what Llewellyn called the Grand Style of judicial work and thought[7]); (7) East African judges should broaden the factual bases upon which they make law, not only by encouraging counsel to emphasize policy considerations in presentation of cases, but also by such techniques as making use of social scientists and their work, legal research centres, and the like.

The policy goals underlying these proposals appear to be twofold. One is the East Africanization of the law as rapidly as possible. The other is of more general nature, namely, to increase the effectiveness of the judiciary in fostering

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[6]Several aspects of these precepts have been adopted by the Court of Appeal, see n. 3. supra.

[7]The Common Law Tradition -- Deciding Appeals 36 et seq. (1960).

> It is a way of on-going renovation, but touch with the past is too close, the mood is too craft-conscious, the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform. Ibid

national policy and development goals.[8] These goals are unexceptional to anyone who supports wholeheartedly the national aspirations of independent East African countries.[9] But, would acceptance of the proposals by East African judges in fact lead substantially in the direction of effectuating the policies? And would implementation of the proposals have collateral negative effects? These are, it seems to me, the key questions.

East Africanization of the law. A mere reading of some of the precepts makes it clear enough that their adoption would lead to a more East African corpus juris than now obtains. Moreover, as the authors point out, the idea that no court in East Africa should consider itself bound by any decision of a

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8"... for as long as the strict common law of precedent persists for so long will the courts remain at best questionable agents of development." p. 2. For proposals to use codification as a technique to achieve goals similar to these described in the text see Eorsi,"Some Problems of Making the Law," 3 E.A.L.J. 272 (1967).

From this summary it will be seen that this book is by no means novel; its originality lies in the detailed consideration in an East African context of jurisprudential views which have been the subject of extensive debate in the common law arena for generations, and in its vigorous call for judicial response to its proposals. For another recent and interesting example of that debate, see Weiler,"Legal Values and Judicial Decision-Making,"48 Can. Bar.Rev. 1 (1970).

9Moreover, these policies do not necessarily reflect the individualistic overtones of such essentially western policy statements relating to law as the Delhi Declaration on the Rule of Law. See International Comm'n of Jurists, The Rule of Law in a Free Society: A Report of the International Congress of Jurists 3 (1959); quoted in Seidman,"Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa," 1966 Wis. L. Rev. 999. These overtones may be viewed by many as in partial conflict both with African cultural patterns and with the pressing needs of developing countries.

foreign court has already made considerable headway,[10] and this development will doubtless add impetus to the move towards increased emphasis on East African cases as sources of law. But what of the more controversial ideas concerning more liberal overruling of previous decisions, the utilization of the Grand Style approach to judicial work, and the broadening of the factual bases upon which courts make law? Undoubtedly these too would contribute greatly to the East Africanization of the law. An approach to law-making focusing forthrightly on policies to be achieved will, when utilized by East African judges, inevitably add more East African content to the law than will rigid, logic-chopping reliance upon English precedent, or even upon East African precedent based in turn heavily on English precedent. So, too, the broadening of factual bases for decision will increase the East African content of the law; the additional facts will almost always be East African in origin and content. Thus, in summary it can be said that the authors' proposals would clearly be a step in the right direction of achieving one almost universally accepted social desideratum, the East Africanization of the law in East Africa.

Effectiveness of the judiciary in fostering national policy and development goals. One of the hazards of a system of strict stare decisis is that judges may actually believe it and think they do not make law.[11] They then are likely further to conclude that their decision-making bears no relationship to public policymaking beyond merely helping to keep order while others make policy. The upshot may very well be judicial policymaking running counter to goals established by the more frankly political organs of society such as the legislature

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[10] In addition to the cases analyzed extensively in the book see Newbold, op.cit., supra, n. 2, and Dodhia, supra, n. 3.

[11] When Hiller once heard a member of the High Court of Tanzania state that "Judges do not make law; we merely apply the law," he says that he felt much as if he had suddenly been confronted by a live brontosaurus. "Teaching Jurisprudence in East Africa," 10 Assoc. of Am. L. Schools Foreign Exch. Bull. #2, p. 3, 5 (1969). Sir Charles Newbold's refreshingly frank views on this score stand in stark contrast to such nonsense. Newbold, "The Role of a Judge as a Policy Maker," 2 E.A.L. Rev. 127 (1969), and his judgment in Dodhia, supra, n.3.

and the executive, and the dominant political party or parties.[12] Most of the proposals of the authors look in the direction of a greater recognition by judges (and lawyers) of the policymaking role of judges thereby reducing the likelihood of such unconscious (and perhaps occasionally conscious) thwarting of national policies. To the extent that the proposals do no more than call for judges "to do boldly what has hitherto been attempted by stealth" few would probably care to quarrel openly with the authors.[13] But the proposals taken collectively with the overall spirit of the book, undoubtedly go beyond merely calling for openness. They call for greater policymaking on the part of the judges than has heretofore been the practice in East African courts. And the question is whether this would be a good move.

There is a notion extant that a judge's decisions on public policy can "only be determined by the political philosophy of the particular judge."[14] Why this is so is not explained. The fact is that every complex society must entrust countless of its public servants in the executive and administrative branches of government with broad discretion in the implementation of public policy. This discretion is not expected to be exercised in accordance with the private "political philosophy of the particular" civil servant, but in accordance with the

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[12] For an account of judges thwarting legislative and administrative policy in the colonial era in the guise of "finding law" see Seidman, "The Reception of English Law in Colonial Africa Revisited," 2 E.A.L. Rev. 47 (1969); cf. Scotton, "Judicial Independence and Political Expression in East Africa -- Two Colonial Legacies," 6 E.A.L.J. 1 (1970).

[13] An argument may be made that to preserve the independence of the judiciary it is necessary to clothe their real activities in fictions, just as we clothe their bodies in robes and wigs to make them more godlike and less human. Thus, as in the case of the Delphic Oracle, ordinary men are not deprived of the security of thinking that judges discover and reveal the wishes of the gods rather than merely do the work of man and his society. But the price of such fictions may be very high in the thwarting of the basic purposes of a judicial system.

[14] Newbold, op. cit., supra, n.11, at 129.

public "political philosophies" of the legislature and the upper levels of the executive branch of government, and, in the case of a one-party state, the party. Why should anything less be expected from judges? Judges who now accept without blanching their lot in life applying legislation and precedents with which they may not always be in sympathy are not inherently incapable of exercising discretion in accordance with broad principles with which they also may not be entirely in sympathy. Moreover, there are many important checks other than rigid doctrines of precedent built into the judicial system, checks which restrain judges from wandering down trails of their own rather than those of superior policymakers. Professor Llewellyn, speaking of American courts, listed no fewer than thirteen factors other than "legal doctrine" as "major steadying factors in our appellate courts."[15] Among these are the presence of law-conditioned officials, group decisions, a known bench, the limiting and sharpening of issues in advance of decision,[16] and, (in my view probably most important) the discipline imposed by requiring written judgments explaining decisions. Although Llewellyn was talking more of predictability than of the dangers of judicial usurpation of power those same factors (which in major measure are present in East Africa) also tend to keep the exercise of judicial discretion focused on public rather than on personal judicial philosophy.

Akin but not identical to the notion that judicial policymaking can only reflect the personal political views of the judge is the belief that judicial policymaking necessarily precludes the degree of predictability of decision that society requires of a legal system. It is, of course, very much a

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[15]Llewellyn, op. cit., supra, n. 7 at p. 19 et. seq.

[16]This process is likely to be the most significant factor where superior policy has been most sharply expressed, e.g. in legislation and presidential decree.

matter of degree since, as both Newbold[17] and the authors point out,[18] proponents of rigid stare decisis attribute a great deal more predictability to legal systems purporting to follow rigid precedent than those systems deserve. Thus, the present starting point is by no means an almost entirely predictable system, and the question is whether greater acceptance of the role of judges as policymakers would lead to significantly less predictability than is provided by the present imperfect system. As the discussion earlier concerning judicial usurpation of power suggests, I would answer this question in the negative. What Llewellyn called reckonability will continue to exist in adequate measure even though the courts accept wholeheartedly an obligation to engage in judicial policymaking as the occasion demands.[19]

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[17]Sir Charles Newbold in Dodhia, supra, n. 3, at 199:

> ...too strict an adherence to the principle of stare decisis would, in fact, defeat its object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was no longer the law.

[18]See pp. 2-7 and authorities cited.

[19]In both of his articles cited earlier, supra, nn. 2 and 11, Sir Charles Newbold raises the spectre of the Supreme Court of the United States, and the alleged volatility and instability of its judgments. Without accepting the accuracy of his analysis of that court, it should nevertheless be pointed out that the analogy is not apt insofar as East African courts are concerned, because no East African court has been or is likely to be given the extremely broad political roles of the United States Supreme Court. Far better analogies would be to the highest state courts or to the intermediate federal courts whose roles are far closer to those of the Court of Appeal for East Africa. A recent survey of three such courts, the New York Court of Appeals, and the Federal Courts of Appeals for the Second and District of Columbia Circuits reveals an entirely different picture from that painted by Sir Charles. Daynard, "The Use of Social Policy in Judicial Decision-Making," 56 Cornell L. Rev. 919 (1971). It is very much a picture of legal stability, and this in spite of apparently very different attitudes towards stare decisis on those benches from those

The "major steadying factors" to which Llewellyn refers will continue to be present, including inevitably a proper respect for prior legal doctrines.

Discussions of differing legal doctrines tend to become shrill, all-or-nothing, arguments. It is fortunate indeed, therefore, that the tone of debate concerning precedent in East Africa was set initially by talks and resulting articles, and finally a judgment, of Sir Charles Newbold, former President of the Court of Appeal,[20] recognizing that neither rigid adherence to precedent nor excessive judicial innovation is a satisfactory judicial technique. Sawyerr and Hiller, too, although clearly advocating greater flexibility, have kept the debate within limited, and therefore useful, bounds, particularly by their forthright recognition of the need for innovative judges to keep in mind the need for certainty in the law and the element of reliance. In one sense then the debate centers on the point of balance within a relatively narrow range of the use of precedent on the one hand and the use of more flexible techniques on the other. And the range of difference in outcome of actual cases by wholehearted judicial acceptance of one view rather than the other would probably be very narrow indeed. If this is so, wherein lies the difference between the authors and adherents to modified traditional views such as Sir Charles Newbold? I would say that it lies in the spirit of the judicial system and those who work in it, particularly judges and lawyers. As Sawyerr and Hiller put it (in the context of the issues arising from East African courts dealing with English cases):

> The argument is rather for a change in emphasis, for a more positive attitude of bench and bar towards the development of the law. This calls for a more explicit consideration of policy and a more deliberate effort to situate the individual decision as well as the principles of law within the local context.[21]

It is this approach, rather than changes in the outcome of particular cases, which is needed to shift the East African

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[20]Newbold, op. cit., nn. 2, and 11, supra, and Dodhia, supra, n. 3.

[21]pp. 36-37.

courts into the role of affirmatively reinforcing national policy goals as established by the more frankly political organs of society. This is particularly the case with these rapidly changing societies since reliance on precedent inevitably reinforces the status quo, from which East African countries are seeking in many ways to escape.[22]

It is clear enough that my sympathies lie with the cautious judicial activism of Sawyerr and Hiller rather than with the judicial caution of Newbold. I do, however, have two basic reservations, the first and more important of which I shall simply put in the form of a question: Given the inevitable difficulties respecting social and political stability in countries emerging from colonial and undeveloped status, how much does an active judicial policymaking role jeopardize the

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22 ... the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. Dodhia, supra, n. 3, at 199.
Moreover, it is important to recognize that it is not just change from some real established law that is required in developing countries. There is also a need to develop law in countless areas where in a very real sense there is now none, even though in reception-statute-theory English law applies ex cathedra from Westminster. It is almost as silly to think that that external law is fully operative in the hearts and minds of East Africans as it would be to maintain that East Africa has the full benefit of the British health system because occasionally an East African is flown to London for special treatment. In very real ways law theoretically applicable in East Africa which is not truly East African is not law at all, it is simply nonexistent. Since neither legislation nor administrative law can ever fill these voids without judicial help, the question becomes not whether East African courts change existing law, but whether they fill the voids with East African law rather than with English law.

independence of the judiciary and performance of its other roles?[23]

The second reservation concerns economy. I have little doubt that the approach advocated by the authors is more expensive in time and effort of judges and lawyers than the traditional "we just discover the law" approach. This is particularly the case where extensive efforts are made to ascertain the underlying social facts by use of social science research, legal research centres and the like. One hesitates ever to recommend avoidance of expensive social institutions to African countries because such recommendations inevitably sould like "second-best is good enough for Africans." Nevertheless, determining what is the most socially productive allocation of scarce economic resources is one of the most difficult questions facing any developing country, and it must be continually answered. If the Grand Style costs more, and I believe it does, should those costs be incurred in preference to spending the money on medical clinics, or roads, or other aspects of the legal system itself, e.g. prison reform, improving public administration, etc.? In one sense such questions are technical questions calling for decisions by professional experts, but in a larger sense they are not for the Sawyerrs, Hillers or Macneils, or even the Newbolds or Georges to answer, but constitute political questions calling for answers from the people of East Africa and their leaders. This book along with the published views of Sir Charles Newbold and others supply at least a partial basis for East African leaders to make such decisions. Among the leaders who must decide are the growing number of judges of East African origin.

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[23] Too little judicial activism also endangers the position of the judicial system. As Chief Justice Georges put it in the foreword to the book:

> If they [lawyers and judges] stand still while the rest of the society moves, the unhappy result may well be that they will have failed to incorporate into the new pattern of progress the idea that the rule of law has a necessary place in any community where the equality of all men and their human dignity are greatly valued.