SOME EXAMPLES OF JUDICIAL LAW MAKING IN AFRICAN LEGAL SYSTEMS

Introduction

The sterility of the argument of judge-made law versus legislation was long ago exposed by Sir C. K. Allen in his *Law in the Making*.[1] In the same vein, the view that judges do make the law has gained acceptance among the majority of both judges and writers. Professor Friedman has recently written, "The Blackstonian doctrine of the 'declaratory' function of the Courts, has long been little more than a ghost."[2] However, the extent of this judicial law making, as seen in recent English case law, has provoked some excellent opinions in article form.[3] As yet, however, nothing has been said on this subject with respect to the English-speaking African legal systems.

It is clear that the role of the judge in a developing legal system may differ from that of his counterpart in a developed system. In a recent House of Lords judgment, Lord Reid, when speaking of the historical role of the English judges, said:

> "Courts have often introduced new rules when, in their view, they were required by public policy. In former times, when Parliament seldom amended the common law, that could hardly have been avoided. There are recent examples although, for the reasons I gave in *Shaw* v. *D.P.P.*,[4] I think that this power ought now to be sparingly used."[5]

The first part of Lord Reid's dicta can readily be applied to the English-speaking African legal systems. The volume of legislation

1 7th ed. (1964) at p. 309.

2 "Limits of Judicial Law-making and Prospective Overruling" (1966) 29 M.L.R. 593. For another opinion, see Sir Kenneth Roberts-Wray [1960] J.A.L. 66: "I am old fashioned enough to find attraction in the contrary view, the doctrine on which I was nurtured as a law student; that the law is locked up in the breasts of the Judges who interpret or propound it but do not make it: that the expression 'judge-made' law is strictly a misnomer; and that a new principle which emerges from a judgment leaves the law unchanged but the lawyer enlightened."

3 Friedman, *loc. cit.*, *supra*. Stevens, "Role of a Final Appeal Court in a Democracy" (1965) 28 M.L.R. 509; Blom-Cooper and Drewry, "Reflections on the Social Utility of Final Appellate Courts" (1969) 32 M.L.R. 262. The cases discussed are: *Shaw* v. *D.P.P.* [1962] A.C. 220; *Hedley, Byrne* v. *Heller* [1963] 2 All E.R. 575; and *Rookes* v. *Barnard* [1964] 1 All E.R. 367.

4 [1962] A.C. 220.

5 *Suisse Atlantique* v. *N.V. Rotterdamische* [1966] 2 All E.R. 61. Both Professor Stevens and Sir C. K. Allen have mentioned Lord Reid's Scottishness in his approach but only the latter writer hinted at but did not explain that heritage in terms of the *nobile officium* of the Court of Session. These powers, extant in limited form, were in former times the mode of judicial legislation in

passed in these systems following independence has been very great, but it is true to say that despite the flood most of the old law is still in force.[6] That is to say, the new law has been administrative and adjectival rather than substantive in nature, albeit that law reform is a live issue. It is equally true to say that the laws of the bound volumes often bear little relation to the day-to-day problems coming before the courts. This situation has therefore demanded that the judges give broad decisions to effect "Africanisation" or "modernisation" of the received law both written and unwritten.

At present English law remains the general law; but customary law and Moslem law still govern the lives of the vast majorities of the peoples living outside of the urban areas in the African systems.[7] And while customs have had to give way to the power of the alien law, the policy of the governments now appears to be unification of the two kinds of laws by legislation. This legislation must also take into account the political aims of the governments committed to socialism.

Criminal law has already been codified: in some countries the customary criminal law has been eliminated entirely [8]; in others it has been grafted on to the English derived law [9]; and in still others it has formed the basis, to the considerable exclusion of the received law.[10]

Likewise in contract and tort law, where there were not strongly competing customary principles, legislation has been enacted which has drawn on both English and American sources.[11]

Attempts have been made to unify the law applying to land and always there has been the ultimate promise of nationalisation.[12]

But the areas of matrimonial and succession law have proved more difficult to rationalise: as Mr. Park has said, "These are subjects which it is impossible for legislation to move very far in advance of opinion and practice among the public. Any attempt now to abolish that law in its application to them would be a potentially dangerous exercise in futility."[13]

The stubborn resistance of the customary personal law to "modernising" is to be seen in both the legislative failures as well as in the successes. Notable failures have included the Limitation of

6 J. W. Salacluse, "Brightening the Revolution," *Africa Report*, March 1968.

7 For example there are some 700 courts administering customary law in the Northern States of Nigeria to a population of some 30-odd million.

8 Tanzania (mainland) and Malawi.

9 *e.g.* Uganda.

10 As in the Northern States of Nigeria.

11 The Contract Act of Tanganyika and the Sale of Goods Act of Ghana provide good examples.

12 "Therefore no citizen should entertain the idea that the Government of Uganda cannot, whenever it is desirable in the interests of the people nationalise mailo and freehold land at any time for the benefit of the people." Para. 39, "The Common Man's Charter," by President A. Milton Obote, December 19, 1969.

13 *The Sources of Nigerian Law* (1963), p. 142.

Dowry Law [14] and the Abolition of the Osu System Law,[15] both of the former Eastern Region of Nigeria. In practice the amount of dowry has increased and discrimination against persons belonging to the Osu castes has not abated. Both laws remain law only on the statute book. The tenacity of the customary law is also to be seen in the omissions of the legislatures; all have wished to bring in legislation more in keeping with their own social and economic conditions; all have hoped to write laws which would engender the new social values necessary not only for nation-building but also for pursuing a socialist path.[16] But the unwillingness of the customary law to yield is witnessed by the many reports, recommendations and submissions of learned commissions which have never been translated into law acceptable to the mass of the people.[17]

Two examples illustrating the power of the practices of the people and the corresponding difficulties of a government attempting to construct a law accommodating both their progressive aims and the ideas of the people, can be taken from Uganda.

The preamble to the Uganda Succession (Amendment) Bill of 1967 declared:

> " . . . the property of the majority of the people in Uganda who die without making a will is subject to the customary laws and that much too often the wives and children of persons who die intestate are put in a desperate financial position because the property which should be theirs is taken by persons claiming heirship under customary laws. This Bill in seeking to amend the Succession Act, goes much further than the Statutory Instrument 181 of 1966, and abolishes the distinction between those persons subject to customary law and others who are not. Under the law as amended by this Bill the property of a person who dies without having made a will will be distributed among the relatives according to clearly defined rules. If a person does not like the rules, he may make a will distributing his property in the manner he wishes this to be done and provided the will is properly made under the provisions of the Succession Act, his wishes will be carried out regardless of any conflicting customary law." [18]

This proposed amendment did not attract popular support and thus has not reached the statute book. This was the fate also of a projected measure of reform of the matrimonial law. In 1965 there was set up in Uganda a Commission on Marriage, Divorce and the

[14] No. 23 of 1956, Laws of Eastern Nigeria.
[15] No. 13 of 1956, Laws of Eastern Nigeria.
[16] " Some of these interests and jural postulates as could be found in traditional land tenure, or in succession and inheritance under customary law which still obtains in some Ghanaian local communities, are both opposed and inimical to radical national and economic developments." Dr. Ogwurike (1967) 4 U.G.L.J. 122.
[17] See Professor A. A. Schiller, " The Draft Legislation and Customary Law " [1969] E.A.L.J. 88.
[18] Under the hand of G. L. Binaisa, Q.C., Att.-Gen. April 28, 1967. Compare the opposite result in Nigeria in *Yinusa* v. *Adesubokan* discussed *infra*.

Status of Women under the chairmanship of Mr. W. W. Kalema, M.P. It was charged to consider the relevant laws of Uganda " bearing in mind the need to ensure that those laws and customs while preserving the existing traditions and practices as far as possible should be consistent with justice and morality and appropriate to the position of Uganda as an independent nation. . . ." [19]

In the report the members commented both on existing practices and the existing law. They pointed out that " most are unaware or ignore the fact that a Marriage Act (English style) marriage makes the husband incapable of contracting a valid marriage under ' native law and custom ' while the first marriage subsists." [20] Also the members questioned the apparent discrimination between the wife of a polygamous marriage and the wife of a monogamous marriage contained in the Uganda Evidence Act.[21]

The Commission principally recommended that no person should be allowed to register more than one wife, which they justified in the words:

> " Though basically a polygamous society, there is a substantial number of people who are monogamously married. The various customs always give special place to the first wife, that is, she is the wife. Human nature being what it is, Muslim adherents are not capable of loving equally two or four wives. One marriage only is demanded by the need for higher standards of living, education and for spiritual advancement." [22]

The Commission's report has not been acted upon and it seems unlikely that it will form the basis of new legislation. As with the Succession (Amendment) Bill, the report was not favourably received throughout the country, the people being unconvinced of the possibilities of material or spiritual advancement.

While the government legal officers have been largely unsuccessful in their efforts to draft legislation modernising the matrimonial law and the law of succession, they have had greater success, at least

[19] Compare the Introduction to the Kenya Reports of the Commissions on Marriage, Divorce and Succession: " We agreed that the new law should generally be compatible with the African way of life, and should not be based on any foreign model. On the other hand, the law should recognise that the traditional African way of life is rapidly changing and should therefore cater for differing conditions both in the rural and urban areas. We thought that the law should recognise that Kenya is a country of many races, tribes, communities and religions, that the laws and customs of these different people are deep-rooted and that any changes we suggest should offend as little as possible their respective beliefs. On the other hand, we thought that the new law should encourage national unity and the building of Kenya as one nation irrespective of race or creed." The reports are discussed at length in a Symposium in [1969] E.A.L.J., Vol. V, Nos. 1 and 2, pp. 5–145.
[20] Para. 29; and compare *Namatovu* v. *Kironde Bakery Ltd.*, *infra*.
[21] At para. 193 of the Report. S. 119 of the Uganda Evidence Act (cap. 43) reads: " where a person charged with an offence is married to another by a marriage other than a monogamous marriage such a last-named person shall be a competent and compellable witness on behalf either of the prosecution or the defence."
[22] At paras. 212 and 213 and comment; to be compared with the quote at p. 90 of Professor Schiller's article, *loc. cit.* note 17.

in the drafting, with legislation whose declared aim has been to teach new social values, and in the instance below, to engender a greater appreciation of the value of human life.

In the debates of the Uganda National House of Assembly on the Penal Code (Amendment) Bill of 1968 arguments of this kind were put forward. By the provisions of the Bill section 278 of the Penal Code was redrafted so as to make the death penalty mandatory for armed robbery with violence. In justifying the imposition of the death penalty, the promoter of the Bill said:

> "I venture to submit that there will be a time when the generation that will come after us will say that this punishment is no longer wanted. I am saying . . . , that values have got to grow: that is what I mean by community growth. . . . Our task is made difficult by the fact that we are nation builders at the foundation level." [23]

So far there have been mentioned legislative failures such as the Limitation of Dowry Law and the Abolition of the Osu System Law where the laws were enacted but never made effective; also given were examples of legislative omissions in matrimonial and succession law such as the Succession (Amendment) Bill and the Report of the Kalema Commission which were never enacted; and then were noted legislative successes such as the Penal (Amendment) Bill which was enacted and has since been made effective.

Still to be examined is the approach of readjusting the received law by the insertion of clauses accommodating customary law and practices. This technique was adopted by some of the former Regions of Nigeria. For example, in the fatal accidents law of the former Northern Region provision is made for polygamous marriages and for customary modes of distribution of the award.[24]

In section 2 "immediate family" (those having a legitimate claim) is defined as: "(a) wife or wives, and (b) in relation to a deceased person who was subject to the systems of native law and custom known as Moslem, the persons who are entitled to share in the award of diya prescribed by Moslem Law for involuntary homicide."

Section 4 recognises the legal status of customary representatives:

> "Every such action shall be for the benefit of the members of the immediate family of the person whose death shall have been so caused and shall be brought,
>
> (a) by and in the name of the executor or administrator of the deceased person; or
>
> (b) in the case of a deceased person who was subject to any system of native law and custom immediately before his death, at the option of his immediate family by and in the name of such person or persons as the court may be satisfied is or are entitled or empowered to represent the deceased person or his estate according to such native law and custom."

[23] Vol. 83, *Parliamentary Debates*, Second Session 1967–68, cols. 3257 and 3339, *per* Doctor Zake, Minister of Health and Agriculture, Att.-Gen. Likewise the preface to the Civil Code of Ethiopia (1960): "The Civil Code has been promulgated by Us at a time when the progress achieved by Ethiopia requires the modernisation of the legal framework of Our Empire's social structure so as to keep pace with the changing circumstances of the world today. The aim of Our Code was, rather than to sanctify existing practices, to offer a unified legal model for the society to come."

[24] N.R. No. 16 of 1956: and compare that of the Eastern Region, E.R. No. 16 of 1956; that of the Western Region (cap. 122) of 1959; and that of the

Whatever the legislative experience, be it enforced inactivity, or gentle adjustment, or failure, or even success, there has been a considerable burden placed on the shoulders of the judges.

They have had to contend with the gaps left where no new law has been forthcoming and thus with the divergence between the ideas and practices of the people and the ideology of the unreformed alien law. Here the judges have resorted, though not often, to interpreting the English derived law "as local circumstances render necessary." The broadness of some of these decisions, the grant or withdrawal of rights of whole classes in society, are clear examples of judicial law-making.

Where the chosen mode of legislative change has been revision of the received law by the grafting on of customary derived clauses, still the judiciary have had to take the initiative since this technique has left untouched much of the pre-independence law including pre-1900 English statutes of general application such as the Wills Act of 1837.

Where the reforms have been ineffective the Bench have been called upon merely to accept that fact. But where the new legislation has been both enacted and made effective the judges have had to apply the law in the knowledge of the fact that there is a considerable distance between the opinions and habits of the people and the values and aims embodied in that new law. They have found it necessary to interpret that new law, through divining the real intention of the legislature, in order to apply it in a manner approaching "natural justice, equity and good conscience."

THE CASES

The unreported case of *Namatovu* v. *Kironde Bakery Ltd.*[25] provides a clear example of the technique of interpreting the untouched received law "as local circumstances render necessary." [26] The initiative of Sheridan J., as he then was, appears to run contrary to the intention of the legislature with respect to the status of customary or polygamous wives. In Uganda the legislature, and often the

[25] High Court of Uganda, Civil Case 132/1961 (December 1961).

[26] Most of the English derived enactments were accompanied by a proviso of this kind but they were rarely invoked despite the dicta of Denning L.J., as he then was, in *Nyali Ltd.* v. *Att.-Gen. of Kenya* [1957] A.C. 253.

courts in East Africa as a whole, have refused to recognise these wives as equal in status to Church or " ring " wives. This is to be seen in the provisions of the Evidence Act and in the cases of *R.* v. *Amkeyo* and *Abdulrahman* v. *R.*[27]

The facts of *Namatovu* were as follows: in an action arising from a fatal accident, brought under the Law Reform (Miscellaneous Provisions) Act 1953, it was shown that the deceased had left six sons, five daughters, three widows, a mother and two sisters as dependants. The point of law rested in the status of the three widows; one was married to the deceased in Church, that is, a " ring " wife, and therefore, under the law of Uganda, was the legal wife, while the other two were married to the deceased by custom.

Counsel for the defendant company did not question the joining of the two customary widows as claimants; however, Sheridan chose to expand on the point. He said:

> " It might have been argued that as this is a purely statutory remedy, only the legal wife could be considered, but as against that it would be illogical to include the illegitimate children and to exclude their mothers; if necessary there could be invoked the proviso to section 15 (2) of the Uganda Order in Council 1902 which enforces the application of statutes—the Law Reform (Miscellaneous Provisions) Act 1953 Part 2 reproduces the Fatal Accidents Act 1846—to take into account ' so far as the circumstances of the Protectorate and its inhabitants, and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary."

Here the court was extending the benefit of the received statute to a whole new class of persons, the class of polygamous and customary wives.[28] On the facts of the case the two claimants were not wives by any construction of the laws of Uganda because of the lawfulness preserved for the first " ring " wife although their ilk are accepted as wives by great numbers of the people. This fact was later underlined by the empirical research of the Kalema Commission on Marriage, Divorce and the Status of Women mentioned earlier.

In the former region of Northern Nigeria a provision similar to that of Uganda's order in council has been interpreted by the High Court of the Northern States so as to remove from a class of persons a once accepted right to dispose of their estate unfettered by will. Section 34 (1) of the High Court Law reads:

> " The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice, equity and good conscience, not incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of such native law and custom." [29]

[27] Evidence Act (Cap. 43) 119 (1) at note 21, *supra*. [1914] E.A.L.R. 14 and [1963] E.A. 188 respectively. For comment, see J. S. Read, *Journal of the Denning Society*, December 1966, vol. 1. And J. M. N. Kakooza [1968] E.A.L.J. IV, p. 1.

[28] It is interesting that one of the clear limitations on the exercise of the *nobile officium* of the Court of Session in Scotland in modern times is to the effect that if a statute gives rights to a class, that class cannot be extended by the exercise of that power.

In the case of *Yinusa* v. *Adesubokan* [30] the facts were as follows: The testator, a Moslem, made a will in terms of the Wills Act of 1837 under which he gave the plaintiff son £5 and to his other two sons equal shares in his property and the residue of his estate. The plaintiff son complained that the testator being a Moslem could not make a will in terms of the Wills Act since the manner of distribution was contrary to Moslem law; in short, the plaintiff was deprived by the English-style will of his right under the customary law (*i.e.*, a share equal to that of each of his brothers).[31]

Bello J. held that a Moslem of the Northern Six States of Nigeria is entitled to make a will under the Wills Act 1837 but that he has no right to deprive, by that will, any of his heirs who are entitled to share under Moslem law of any of their respective shares granted to them by Moslem law.[32]

The effect of this ruling is that Moslems of the Northern Six States, some 20-odd million, may only dispose of the " free third " of their estate, as determined by Moslem law, by the provisions of an English-style will. In the course of his judgment the learned judge observed that the mode of distribution laid down by the Moslem law, equal shares for male heirs and equal half shares for female heirs, " is far from being repugnant to natural justice, equity and good conscience. On the contrary, it is well founded on these three pillars of justice and fair play." [33]

He went on to say further that there was no incompatibility between the freedom of testation of the Wills Act 1837 and the restricted modes of the Moslem law.[34]

> " It seems to me that though there appears to be an incompatibility between the (Wills) Act and the Moslem law when viewed through the spectacles of English domestic law in that

[29] N.R. No. 8 of 1955, now applicable to the Six Northern States.

[30] Z/23/67, heard at Zaria before Mr. Justice Bello, judgment given October 30, 1968; as yet unreported.

[31] In *Rufai* v. *Igbirra Native Authority* (1957) N.R.N.L.R. 178, in the converse situation, the High Court of the Northern Region held that a custom which deprived a party of a common law legal right was not, for that reason, contrary to natural justice.

[32] In Southern Nigeria the courts had arrived at the opposite conclusion in *Apatira* v. *Akanke* (1944) 17 N.L.R. 149.

[33] Compare *Danmole* v. *Dawodu* [1962] 1 W.L.R. 1053 where the Judicial Committee of the Privy Council cautioned a Nigerian judge on the efficacy of overruling a surviving custom of distribution of an estate in favour of " modern ideas."

[34] The Wills Act 1837 was clearly a statute of general application " for the time being in force." See *Braithwaite* v. *Folarin* (1938) 4 W.A.C.A. 76 and *Lawal* v. *Younan* (1961) 1 All N.L.R. 245 in which Brett F.J. said: " . . . the Courts have in fact been enforcing them [English Acts including the Wills Act], even though subject to reservations, and that is as strong an indication as there could be that local circumstances do permit their application."

an Englishman has unlimited capacity to dispose of his properties by will in the manner he likes, closer examination of section 34 (1) would show that the incompatibility is only apparent under our domestic law."

It is true that when the received law in force in the Northern States of Nigeria is viewed in the light of existing social conditions it does require re-interpretation in the light of those conditions. Certainly the Northern Region Government did not revise its laws in force as the Western Region had done in 1959,[35] and in the absence of such a move by the legislature then the burden must fall on the Bench.

Both *Namatovu* and *Yinusa* illustrate the attempts by the judges to bring the unreformed alien law into line with the realities, on the one hand of a polygamous society, and on the other of a Moslem or customary society. These initiatives are to be seen against a background of either legislative inactivity or legislative failure to draft a law acceptable to the mass of the people.

Where the legislatures have acted there is still a noticeable gap between the new law and the practices of the people. Many governments have felt that legislation must be brought in to teach the people new social values and to prepare them for the new society. The members of the Kalema Commission made a plea for monogamy on the grounds that its adoption in law would lead to the benefits of better living standards and increase educational opportunities for children. Also a law outlining a mandatory death penalty for armed robbery with violence was supported by the Government spokesman as being a law which would encourage new values in society.

The judges here are forced to attempt to bridge the gap between the habits of the people and the aims of the government, and also to apply the law in accord with current ideas about crime and punishment.

A leading case here is that of *Opoya* v. *Uganda*.[36] The Uganda Penal Code Act (of 1950) stated in terms of section 273 (1), " any person who commits the felony of robbery is liable to imprisonment for fourteen years." Section 273 (2) stated, " If the offender is armed with any dangerous weapon or instrument . . . , he is liable to imprisonment for life, with or without corporal punishment."

Over the years it was felt in Uganda that the number of " Western-style " hold-ups was dramatically increasing and the legislature was of the opinion that really deterrent sentences ought to be provided. This feeling was embodied in the Penal (Amendment) Act 1966 in which section 273 was restated:

> 273 (1) " Any person who (a) commits the felony of highway robbery on any public highway, shall be liable on conviction to imprisonment for a term not exceeding fourteen years and not being less than ten years."
>
> 273 (2) " . . . Where the offender (a) is armed with any dangerous or offensive weapon or instrument, (b) is in the company with one or more persons, (c) wounds, beats, strikes any person, at, immediately before or immediately after the time of the robbery, shall be liable on conviction to suffer death."

[35] The Law of England (Application) Law (cap. 60) 1959. In the Northern States common employment remains a defence for employers sued vicariously by a [illegible] the tort of a fellow worker.

[36] [1967] E.A. 752.

This redrawn section 273 (2) fell to be construed in the instant case. The question was straightforward: was there a mandatory or a discretionary death sentence? In answering this question the court distinguished the earlier case of *Kichanjele s/o Ndamungu* v. *R.*[37] in which it had been held that the words " shall be liable to " in the Kenya Penal Code was mandatory, on the ground that the point had not been fully argued there. De Lestang V.-P. went on to say that " shall be liable to " in its ordinary meaning is clearly different from " shall be sentenced to death," and thus the death sentence was a maximum sentence leaving the judges with a discretion. He did say, however,

> " If the Legislature intended the penalty in section 273 (2) to be mandatory it has, in our view, signally failed to use the appropriate language to achieve its object. Moreover, section 273 (2) has been subject to repeated criticisms by the judges of the High Court and justifiably so we think. It is not happily worded and is likely to raise other problems in the future. We can only express the hope that the law on such a serious offence will not be allowed to remain for long in such a state of uncertainty." [38]

The legislature was not slow to declare its intention: by the Penal Code (Amendment) Act 1968, section 273 was redrawn yet again, the most important phrase being in section 273 (2): " where an offender uses a deadly weapon or causes death or grievous harm to another, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death." [39]

It is clear of course that if there is a discretion, then the judges will not readily impose the death penalty. On the other hand, if there is no discretion then the burden lies on the legislature to define exactly which sort of offender they wish to suffer that penalty and to expressly exclude the purely technical offender from the list.

[37] (1941) 8 E.A.C.A. 64.

[38] At p. 75.

[39] Act 12 of 1968 (effective July 26, 1968). Two cases have so far been decided under the amendment and the penalty enforced, the first being *Uganda* v. *George Kigoye and Two Others*, C.S.C. 415 of 1969 which will be fully reported in *East African Reports*. Nevertheless the D.P.P.'s Office appears to be using its discretion in order to bring cases before the Chief Magistrate's Court where the maximum penalty prescribed by s. 273 (1) is 10 years' imprisonment; *e.g. Ochan* v. *Uganda*, Criminal Appeal No. 824 of 1968 (January 13, 1969). A similar amendment to Kenya's Penal Code has been vigorously debated in the National Assembly in May 1970.

There are differing views as to the efficacy of the death penalty as a deterrent in Africa; many are convinced that the experiences of Europe and North America have little relevance to the differing conditions prevailing in the developing systems. The Ugandan legislators have stated theirs with no uncertainty.[40]

The debates in the House suggested that the law was passed with the aim of teaching new social values; until the total reception of those values the Bench must exercise considerable initiatives to apply the law within the ideas of equity and natural justice.

The second case to be considered here is that of *Alai* v. *Uganda*.[41] The problem was one of interpretation of the law partially reformed so as to bring it into line with the customs of the people. That is, the Uganda Penal Code has been reformed in part by the insertion of offences known to customary law; thus the offences of adultery and elopement have been grafted on to the original Code.[42]

As mentioned earlier the legislature of Uganda and the courts of East Africa had adopted a discriminatory attitude towards the wives of polygamous marriages as opposed to wives of monogamous marriages. In the principal case the court was concerned with the interpretation of section 150A of the Penal Code which states: " Any man who has sexual intercourse with any married woman not being his wife commits adultery and is liable to imprisonment. . . ." [43] Counsel for the appellant argued that since section 4 of the Code defines wife as " wife of a monogamous marriage " then the marriage of any believer in the Moslem faith could not be a " monogamous marriage " because the man remains potentially able to marry up to four wives. Had this submission been accepted then the appellant could not have committed an offence known to the Penal Code because the Moslem complainant and the woman accused were not husband and wife within the definition of the law.

The respondent's counsel replied that there were at least three forms of marriage recognised in Uganda [44] and the question to be

[40] The general public have also expressed themselves: in an editorial in the *Uganda Argus* of November 5, 1969, under the heading " Brutality before Justice " the following information was given: " While the wave of robberies with violence in Uganda is on the increase sections of the public have resorted to brutal methods of eliminating anybody found stealing anything. . . . The method of rounding up suspected thieves and killing them en masse before they were taken to the police, which started in the rural areas, appears to have been adopted in areas around Kampala. At Nakulabye trading centre on the Kampala-Hoima road, seven people have either been beaten or slashed to death within a week. It appears that the residents of Nakulabye have changed their attitudes towards thieves or alleged thieves. While formerly the crowd dispersed in flight when an assaulted victim pretended to be dead, it is now no longer so. The crowd goes on beating the victim until they are sure that he is completely dead."

[41] [1967] E.A. 596.

[42] See ss. 150A and 121A respectively.

[43] Penal Code Act (cap. 106).

[44] Counsel referred to the Marriage Act (cap. 211) s. 37: " . . . nothing in this Act shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner applied to any marriage so

determined was not the definition of " wife " but the definition of " marriage."

Sir Udo Udoma, formerly Chief Justice of Uganda, after the manner of Lord Denning M.R., said in his judgment:

> " In my opinion the views expressed by the learned chief magistrate [*sic*], are not only unsound in law, they are both extraordinary and dangerous, having regard to the situation and social structure of Uganda and the different and complex forms of marriages recognised by the law of Uganda. In my opinion, it is primarily the duty of the court to interpret an Act of Parliament in such a manner so as not to defeat the intention of the Parliament and the purpose for which it was enacted. It would be absurd to presume that, when section 150A was enacted by Parliament, the provisions there were intended only to apply to a husband and wife of a monogamous marriage, having regard to the fact that to the knowledge of the members of the Parliament, there are several other forms of marriage in Uganda. This knowledge must be presumed. In any case, were it the intention of the Parliament to limit the offences to monogamous form of marriage it should have said so. The intention can only be gathered from the Act itself."

The Chief Justice determined that " any married woman " in the words of section 150A must mean any woman who is married to any man irrespective of the form of the marriage and that the definition in section 4 was therefore irrelevant. The learned Chief Justice gave this broad judgment albeit that section 4 contains a rider, " In this Code, unless the context otherwise requires. . . ." [45] By overlooking this rider Sir Udo appears to have concentrated more on the fact of the marked unwillingness of the Uganda legislature to translate its knowledge of the forms of marriage in Uganda onto the statute book. The marriage laws, fatal accidents provisions, the Workmen's Compensation Act and the Evidence Act have remained unchanged despite reforms in neighbouring Kenya and Tanzania.[46]

The Chief Justice was willing to look at the social conditions in order to give section 150A " force and life " by his divining of the intentions of the honourable members.

SUMMARY

The cases discussed above illustrate the determination of the judges to reform the received law and bring it into line with social conditions where the legislators have not intervened. They also show that even where the law makers have acted it may be just as necessary for the judges to take the initiative where the new law is no

[45] This rider was also overlooked by the writer but was brought to his notice by the learned editors of this journal.

[46] For example, the Kenya Evidence Act, s. 127 (4) 1 of 1963 and the Tanzania Evidence Act (1967) s. 3.

more in line with the practices of the mass of the people nor in accord with accepted ideas about the administration of justice.[47]

But of course such initiatives are not without their dangers in Africa, as one Chief Justice has pointed out:

> ". . . a judge should recognise that his discretion must affect that society, so that such discretion as he has should be exercised toward helping rather than hindering the solutions of social problems. To fail to recognise this can only lead to unhappy conflict, between the judiciary and the executive which too often leads to a defeat of the judiciary and a lowering of its prestige." [48]

E. VEITCH.*

[47] See the protest resignation of the Malawian Bench in November 1969, in response to the passing of a Bill described in *The Times* as follows: "The Bill giving the local courts in Malawi the right to try more serious criminal and civil cases and to impose the death penalty was passed by Parliament. Regarded as a triumph for traditional African concepts of justice which accept circumstantial evidence as sufficient proof of guilt." (November 19, 1969).

[48] Mr. Justice Georges, C.J. Tanzania in "The Court and the Tanzania One Party State" in *East African Law and Social Change* (1967), editor G. A. Sawyer. And compare Claire Palley, "Rethinking the Judicial Role" [1969] 1 *Zambia Law Journal* 1.

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STATUTES

THE MERCHANT SHIPPING ACT 1970 *

THE Merchant Shipping Act has dragged the employment conditions of merchant seamen and fishermen kicking and screaming into the nineteenth century. The Act, essentially an enabling measure, ranges over a number of issues but is basically concerned with terms and conditions of employment and replaces, *inter alia*, Part II of the 1894 Act.

The world of seamen has remained largely a closed book to labour lawyers and a cursory glance at this enactment explains why. One is immediately thrown back into an ethos predating the Employers and Workmen Act 1875 when the otherwise quaint phrase "master and servant" assumes a health and vigour unknown to the current generation of law students. Perhaps a little social perspective is called for in underlining this phenomenon. Speaking of the revolution in labour law worked by the 1875 Act the then Home Secretary remarked: "For the future, contracts of hiring and service shall be as free and independent both for master and servant as any other contracts between other persons." [1] Nearly twenty years later the Merchant Shipping Act 1894, consolidating in substance measures dating back to 1850, preached imprisonment and forfeiture of wages for desertion, imprisonment for disobeying lawful commands and further criminal penalties for inducing a breach of contract of employment (or "articles" in the language of the sea). These shackles remain intact until the appointed day for the operation of the 1970 Act. It is a long-suffering and unindulgent work-force which has remained placid before such restrictions. This is not the place to speculate on the reasons for passivity in the face of legislative and industrial hostility but it is alien territory which the lawyer enters when embarking on an investigation into the labour conditions of the shipping industry.

The Act is not without merit, especially in the matter of what look to be stricter safety measures (though given the essentially regulatory nature of the statute it would be premature to form conclusions) and the removal of the iniquitous discharge report system. Even so the striking feature remains the retention of disciplinary provisions which no shore-worker would tolerate for a moment—of which more later.

* No part of the Act is yet in force. Many sections simply confer a power to make regulations after consultations with both sides of the industry, and it is not intended to make the Act effective until a considerable body of regulations has been agreed upon. Consultations are taking place at present, but it may be some time before they are completed.

[1] Quoted Howell, *A Handy Book of the Labour Laws*, (1895).