"The Doctrine of Judicial Precedent As a source of Law: with Special Reference to Kenya."

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A C K N O W L E D G E M E N T S

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C O N T E N T S:

TABLE OF CASES

S T A T U T E S

Appellate Jurisdiction Act No. 15 of 1977.

Contract Act Chapter 23 of the Laws of Kenya.

Constitution of Kenya, No. 5 of 1969.

East African Order Council 1897

East African Protectorate Order in Council 1902.

Evidence Act Chapter 80 Laws of Kenya.

Judicature Act 1967.

Kadhis Courts Act 1967.

Matrimonial Causes Act Chapter 152 Laws of Kenya.

Native Tribunals Ordinance 1930.

ABBREVIATIONS

AC	-	Appeal Cases
ALL E.R.	-	All England Reports
C.B.R.	-	Canadian Bar Review
E.A.	-	East Africa (Law Reports)
E.A.C.A.	-	East African Court of Appeal
E.A.L.R.	-	East African Law Review
J.A.L.	-	Journal of African Law
KB	-	Kings Bench
L.Q.R.	-	Law Quartery Review
L.R.	-	Law Reports
P.C.	-	Privy Council
Q.B.	-	Queens Bench
V	-	Versus

INTRODUCTION

This dissertation deals with the doctrine of precedent as a source of law in Kenya. It is one of the three principal sources, the other two being customary and legislation. The doctrine developed in Kenya from England. It came to Kenya with the English law which was to be applied by the English courts so established in Kenya.[1] The question I attempt to answer in this dissertation is whether the doctrine of precedent is a source of law which is relevant to the present Kenyan social and economic needs. As to the question whether it is a source of law, there is no doubt about it being, since the courts are interpreting statutes and applying customary law thereby laying down some principles which have to be adapted in later litigation where the facts of the problem in issue are similar. The question repeated is whether the interpretations so given and the application of customary law so made is in keeping with the obtaining social economic needs and if not, what can be done to bring them into line?

The issue is twofold. In the colonial era the colonizers had a civilising mission[2] which gave them an incentive of attracting the Africans (then called and refered to as natives) from their customs and being subjected to English law. In the same era, the social economic and political conditions were entirely different from those professed after indepedence and the question that arises from this stand is whether the decisions given then are still good to abide by now. The second issue concerns the indepedence era. Changes were made in the other organs of government, that is, the legislature and the executive but non as regards Africanisation of the judiciary and particularly so to its higher ranks. The judiciary still stand as a colonial institution and the question is whether the principles of law it pronounces are to be looked upon as those of an indepedent people or of a colonised people. Did it mean that after indepedence the foreign judges

who had all along tainted our law with a foreign element were to stop doing so even though they were the same persons, and were making reference to their own past decisions?

The doctrine of precedent or stare decisis, which literally means to stand by things decided are in themselves in favour with our sought of legal system. They establish uniformity, consistency and certainity in law It would make the preparation for a case or even advising a client very diffucult if the judges could change their interpratations or application of the law in each case of similar nature. There would arise continual uncertainity. There should however be a common consciousness in the courts to change or modify any precedent which has served its purpose and has been surpased by events. Once a precedent is outdated, then it should be abrogated unequivocally.

Certainity, consistency or uniformity of law can never be justified to perpetuate injustice. The precedents therefore that were given before indepedence and after are not to be justified by the consistency, certainty or uniformity which they give the law to import English principles of law into present Kenya and I contend that they are not relevant. They should all be reviewed in the light of the obtaining local conditions and by local personnel who have grown and identify with the Kenyan masses.

This dissertation is split up into three chapters. Chapter one deals with the evolution of the doctrine under English law, then under Kenyan law and then a brief definition. In discussing the evolution of the doctrine especially under English law I have tied it up with law reporting since the system of judicial precedent is very much depedent upon the existence of law reports and the law reporting has to be consistent and accurate As is shown the doctrine took a proper hold in the eighteenth and nineteen centuries through the decisions of judges who avoided inconsistency by following the decisions of their predecessors. It acheived great rigidity and

eventual relaxation in the twentieth century.[3] I also show how the doctrine found its way into Kenya, what factors favoured its development and the respect attached to it in present day Kenya. Finally I have attempted to show what the doctrine of precedent means.

In chapter two I have shown the efficacy of the doctrine as a source of law in Kenya both in the colonial and indepedent era. The question posed is whether the precedents followed are relevant and if not are the decisions so reached part of a Kenyan common law? I have tried to show how irrelevant they are and how the courts in applying foreign statutes or decisions have failed to subject them to the "local circumstances rule"[4] which has existed both before and after indepedence. The courts have used the doctrine of precedent to import English law even fifteen years after indepedence. It is a continuation from the colonial era. Customary law has been suppressed from the colonial time and this still happens today. How is a Kenyan common law ever to be achieved through the doctrine of precedent if the local customs and other local factors are not to be taken account of? It will never be achieved. There must be changes effected if it is to be achieved.

Chapter three deals with changes that must be effected if Kenya is to attain her own common law. The reforms proposed are not without precedent and I have shown other countries that have effected them and have consequently achieved their own common law and jurisprudence, some of them within only fifteen years.[5]

Indepedence to a nation means indepedence to all its organs that function to make life worth living. I have concluded by saying that the proposed reforms in chapter three are overdue. The judiciary has to be freed from the colonial legacy.

CHAPTER 1

EVOLUTION OF THE DOCTRINE OF JUDICIAL PRECEDENT BOTH UNDER ENGLIGH AND KENYAN LAW AND A DEFINITION OF PRECEDENT.

1:1 DEVELOPMENT OF PRECEDENT UNDER ENGLISH LAW

The history of the doctrine of judicial precedent is intimately bound up with the history of law reporting and is for convenience divided into four periods 1290 - 1535 the Year Book period 1535 - 1765 the period of Plowder and Coke, 1765 - 1865 the period of the authorised reports and fourthly 1865 to the present which is the modern period.

Whenever judicial decisions are systematically reported their authority increases since when there is only one memory to be relied upon then there will be no uniformity in law and every case will be decided as if it was a case of first instance. Before the Year Books came into being which represent the crude beginnings of law reporting all there was were some rolls which had been used by the judges which contained a series of notes and cases. In the early Year Book period, it has been said the cases were not treated as authority. This is a based on the evidence that the mode of reporting of the subject matter, the absence of a decision in many cases the observations of judges and counsel and the discretionary power of the justices shows that nothing of the past was considered binding or even worth coming to court.

The Year Books are not reports in the modern sense but mere collections of private notes of cases made in court by pleaders and apprentices for their own instruction. The writing up of notes from memory permitted of a liberal extension, ommission or change in the arguments as used in court and they were likely to be simplified and

facts may have been invented.[2] The same cases for example were reported quite differently in different manuscripts and some versions give contradictory conclusions. In the case of Surbiton - v - Pickle[3] the first two versions show the court was opposed to allowing a certain voucher whilst the third indicates that the voucher was allowed. Some other cases are confirmed to selected arguments and pleas while others are concerned with different arguments. Names of the parties were witheld and the lack of care in assigning cases to any particular year shows that the compiler of the notes only thought of himself and his friends who well knew the parties names and the contemporary judges.[4] The subject matter of the Year Books give an account of points and facts raised or suggested in argument whether relevant to the point or not. The concern was more with the pleading, the debates leading to the issue and not so much with the decision on the issue. This is indication of the fact that the decision was not important and the importance of the report was to give pleaders ready made arguments. The lawyer of Edward II's day studied the reports in order that he might be prepared to make the right - book moves - but he did not think that the court would be bound to decide a given case in a given way because he had a similar decided case in his book.[5]

Judgments were absent in many cases as there was a tedancy to evade a definite rulling on a point of law and the pleaders were often requested to ease the court and avoid to bring difficult questions. Little was said in form of a rulling of a case hence lack of a decision to be applied in a future similar case. The observations of justices and counsel also show us that little was known of precedent. Counsel were advised not to mind their precedents or not to trouble the court with

what may have been said or done in previous cases. Judges were heard to say that no precedent is of such a force as what is right which indicates that precedent was not as authoritative as it is today and if it existed, it was a weak case. In the later years of the Year Book period, there was a slight change in the attitude of the courts towards precedent for more manuscripts were available for reference.[6] In the Year Book period cases were cited as indicating the custom of the court but were not binding and were to be verified since the manuscript reports differed. The common law judges were often guided by considerations of good conscience and equity and as they were in close personal contact with the King, until the fourteenth century, by virtue of his prelogative they wielded wide discretionary powers. As such they could easily act on their whim and not on what their brothers had done earlier. Where cases were cited it normally took the form of an appeal to memory. Judges and counsel gave their recollections of what had happened in cases in which they themselves had taken part or which they had heard when such case resembled the one before the court and it was presumed that all present would remember them. The judges when they remembered cited some of their decisions so as to keep the law consistent but when their memories failed them, they could at times rely on the counsel or reject all but the present facts. Recollections varied and differed and with lapse of time the precise determination was forgotten or perverted and there was no way of verifying the precedents. Coke is quoted as observing that the Year Book period counsel did not cite specific cases but simply appealed in general terms to principles known to be established.[7] They could be ignored however, sometimes in the Year Books there were several versions of a case only

one of which contains an account of a precedent cited to the court and it is manifested that the majority of the reporters were not concerned about the cited cases.

During the Year Book period therefore one can see that there was no use of the doctrine of precedent but only a tendancy towards it. It was not organised as well as it is today and it may not have played a great role in the determination of issues but all the same there was in the back of it all a call for the uniformity of decisions and hence to decide similar cases similary where it was right to do so.

The Year Books came to an end in 1535. Between 1535 and 1565 when there appeared the first regular series of authorised reports there were tendancies towards precedent. Up to the end of the seventeenth century however most of the reports intended for the private instruction of the reporters amongst whom Plowder and Dyer were. They had taken up law reporting at the close of the Year Books. In some reports there is an indication that the manuscripts had been lent to friends and that by divers means they got into the hands of the printers who intended to make a profit by printing them. This led to in accuracy in reports. Plowden is quoted as saying that the justices encouraged him to make his book public[8] a fact which shows the profession was in need of reports and can therefore be argued the precedent was gaining good ground despite the uncertainity of a source of a reported case which would be accurate. There are distinctions between reports of this time and the Year Book period since printing had been invented. The system of written pleadings had also been introduced which made it earsier for the reporters to gather their material and also to have it printed. The leading features of this period which led to the growth of modern law reporting system and the modern view of the value of decided cases

are summed[9] up as; the change from oral to written pleadings tended to make for a clearer definition of the point at issue and attention was directed to the decision on the point and not to the arguments leading up to the formulation of the issue. Thus reportable cases were those which turned on a point of law and not on a point of fact. This brought about more accurate law reports which would be relied on in future.; This change necessarily led to the growth of the modern view as to the authority of decided cases and is in its turn led to the growth of the practice of constantly citing cases in court which had been decided earlier and had a bearing on the case at hand. Coke noticed this change and observed that during the Year Book period counsel did not cite specific cases but simply appealed to principles known to be establised in general terms, but in his day they cited particular cases which shows that decided cases had been given a better stand than they previously had. The doctrine of precedent was taking shape.

Plowden does not speak of his decided cases being binding but he claims they have the sanction of judgement so they can be relied upon and they excel any former book of reports in point of credit, assurance and authority. They do not consist of sudden sayings of judges and counsel but turn on points of law tried on demurrer upon which judgement had been given after great and mature deliberation. It shows that there was a practice of citing cases since he considers himself a source of decided cases but as to their binding nature he says nothing. There are instances however given where precedent or previously decided cases were held to be the law as such. An illustration is given where sixteen decided cases were cited by counsel to prove what the law was. They were written and delivered to the judge. He perused all the books where the cited cases were alleged to be, read them and said that no man learned in law could show any book

adjudged contrary to the books he cited and as here there were many books one way and not the other he advised the judgements before given to be followed.[10] This was a clear indication of movement towards precedent.

By the beginning of the seventeenth century it is quite clear that the decisions of decided cases were authoritative. The treatises of Coke and his reports had much to do with this development. Coke took it upon himself to unearth the ancient authorities deducing rules of positive law from the scattered and often inconsistent dicta and decisions gathered from Year Books and wherever possible reconciling conflicting decisions. This was a way of showing that old decisions and principles could be adopted to team up with requirements of his day.[11] By collecting and classifying precedents of past generations, by tracing their development, he furnished counsel of succeeding generations with a wealth of cases which they were only too glad to employ. It is from this collections that citation of cases in court was facilitated and the practice became more common. His main aim was to give direction in like cases that might help to ensure that the justices with one mouth in all mens cases might pronounce one and the same sentence. It is him more than any other who gave root to the doctrine of precedent for from his works came to be the greatest number of cases cited as of that time and it became a custom. To Coke law was the logical development of old authorities and all that has been perfected and refined by the wisest men proved and approved by experience as good and profitable and should not be altered without great danger and hazard.

With the exception of Coke the reports down to the time of Burrow, by what has been referred to as a singular conspiracy of silence nothing is said about the authority of judicial decisions. It is however contended that judicial decisions were cited much as they are today. They were treated as authority but there was no strict hierarchy. There were many other

reporters like Siderfins whose reports cover 1657 to 1670, Chief Justice Vaugham, Showers Reports 1694 to 1699 and many others but as regards the doctrine of precedent it was as enunciated by Coke. Thus did things stand when the first authorised reports came into being in 1765.

The authorised reports brought a still higher demand for citing cases in court but the doctrine of precedent was not still established. The cases were cited in some instances not to show their binding or legal force but mainly as a custom the court followed. In a way they were brought up to show procedural other than substantive law. The cases as such cited however were more apt to be relied upon since they no longer were private notes. A reporter was attached to each court and such would have enough time to take notes and fill his report with less invented material. By the middle of the eighteenth century the modern form of law reporting began Burrows reporting ending at around this time constituted a new departure in law reporting and represented a more modern form. It had a headnote and a clear division between the facts of the case, the arguments of counsel and the judgement of the court with at least a correct outline of the reasons upon which it was based.[12] Deductions were thus established from reported cases which became part of the law and not mere custom. It was however left to the nineteenth century judges finally to establish that they were bound by the ratio decidendi of any case decided by a court that was above them.[13] By the Judicature Acts 1873 and 1875, the court system was completely reorganised. They established the supreme court of Judicature which consisted of the Court of Appeal and the High Court of Justice. The high Court of Justice was established to include the jurisdiction of the former common law courts and the court of chancery. In addition to the fusion of the courts the law which they administered was also merged. No longer would seperate courts administer common law and Equity but instead all Divisions of the High Court would apply rules

of law and equity in cases which came before them. In case of any conflict between the rules of law and equity, equity was to prevail.

Good law reporting and the streamlining of the courts strengthened the use of the doctrine of precedent.

The present system of judicial precedent reached its final stages of erection in the nineteenth century[14] when the necessary changes for the establishment of the rigid and sysmetrical theory as it exists today.[15] The exclusion of the lay Lords from the House of Lords judicial functions together with the addition of professional lords of appeal left the house better and stronger than it was before. The organisation of one court of appeal instead of many had a similar result in the middle rank hierarchy while the unification of the high court cleared away any possibilities of choice which existed as long as there were uncordinated courts of Kings Bench, Common pleas, exchequer and many others. From then on if the court gave a decision on a point of custom it lost its flexibility and was fixed by the rule of precedent at the point where the court touched it.[16]

Each of the superior courts of common law was by the practice of the law bound to follow a decision of its own or of either of the others on a point of law and a decision of its own on a point of practice. It was not bound to follow the decisions of another cordinate court on a point of practice. The House of Lords the highest court was absolutely bound by its own prior decisions and nothing but an Act of Parliament would remove them [17] and the court of Appeal[18] too. It is at this point that the doctrine of precedent took its rigid form in England.

Up to 1966 the state of precedent was that every court was bound to follow any case decided by a court above it on the hierarchy and the appellate courts were also bound by their prior decisions. However in

1966 the House of Lords released a practice statement which set free the House of Lords from its previous decision.

> " Their Lordships nevertheless recognise that too rigid adherence may lead to injustice in a particular case.... and while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so."[19]

The doctrine as such was relaxed but not for the lower courts. This chang is only available for the House of Lords and not the other courts on its hierarchy. This policy statement has been criticised[20] and there have been some important observations in the House of Lords and Court of Appeal concerning its obligation to follow its past decisions but nothing has yet deprived it of its power to ignore a decision of its own when it feels right to do so.

1:2. DEVELOPMENT OF THE DOCTRINE UNDER KENYAN LAW

In Kenya the doctrine of precedent or stare decisis is part of our common law heritage. The introduction of English law to Kenya was by an order in Council [21] which received the substance of the common law, the doctrines of equity and statutes of general application of England as on twelfth of August 1897. This law was supposed to be exercised by the British courts established in Kenya according to the procedure and practice observed by courts of justice in England. The reception clause as such did not only import substantive law but also adjectival law. The colonial judges proceeded on the understanding that they were just as bound as their brothers at home by the doctrine of precedent and this gave the doctrine root in Kenya. The judges in the High Court and also Court of Appeal were white people and it was only natural that England should offer the guidance. It was the mother country and as the judges looked upon her for leadership and inspiration

even if they had not been required to follow English decisions and procedure so rigidly otherwise than local circumstances required, they were strongly influenced by the English practice and decisions with which they were most at home.[22] The result of this was that the doctrine of precedent as evolved under common law and received in East Africa as part of the practice of the English Courts attached what is now generally considered exergerated importance to previous decisions such that precedent has become an important source of law.

The Privy Council was the final court of appeal for Kenya upto 1965 which sat in London which made the status and authority of extraneous decisions of great importance in Kenya. This made Kenyan Courts be tied up with the relationship between English law and the law in East Africa.[23] The court as such sitting back at home was not without influence of practice for the courts that were applying the doctrine of judicial precedent. This is another factor which gave root to the doctrine in East Africa. If the Privy Council was to give a decision then it became binding on Kenyan Courts since they did not follow its decision then the Privy Council would overrule it. The hierarchy of Courts as such called for adherence to the doctrine for any smooth running of the application of justice. This did not only bind the court from which the appeal came in the colony as a rule of practice but also their courts whose appeals went to the Privy Council. In theory however each country had to have its own decisions indepent of the others. The Privy Council itself was not bound by its previous decisions[24] which was a way of giving it discretion to give different decisions on similar appeals from different colonies.

The development of the doctrine in Kenya within the framework of colonial law evolved around the existing organisation of courts with the Privy Council being at the apex. The Order of Council 1897 which received

the English law also established a High Court in Kenya whose appeals law to the Privy Council. It was repeated in 1902[25] but the 1902 Order of in Council amongst giving rise to other courts[26] retained the High Court. The courts born of the 1902 Order in council were to be surbodinate to the High Court where their appeals would lie. Hence when the Privy Council gave an anti-African decision on a particular point and the High Court adapted it then the surbodinate courts had no choice but take it as law. As adapted in Kenya however it was only Privy Council decisions that were to bind Kenyan Courts. In reality however the decisions of English courts that were not hierarchichaly or structurally connected with the judicial systems of Kenya were binding on this court either by cooptation by the Privy Council or by being used as persuasive guides and eventually being authoritative.

The position in East Africa as regards the binding force of precedent or decisions given before the reception date[27] by any superior court in England was clearly stated in the case of Kiriri Cotton Mills Co. Ltd.v . Dewan[28] by Occonor, P. who said

> ". and in my opinion established decisions on the common law or doctrines of equity of the superior courts of England given the date or reception ..into the relevant colony.. are binding on this court as well as on the supreme court or High Court.."

which shows that the English decisions were taken as law. Despite the binding force of precedent the Court of Appeal was ready to deviate from its previous decisions if following them would lead to denial of liberty[29] or justice otherwise in principle the court was bound to follow its previous decisions. Unlike the House of Lords however after 1898[30], the courts in Kenya would thus overrule their previous[31] erroneous decisions especially so in criminal cases.

It was bound by any Privy Council decision. However since a case could be reversed if it did not take a Privy Council ruling in its decision. There was a preference for English authorities although some of them may have been ignored. In Githae s/o Githigi - v - R.[32] a House of Lords decision on the question of accomplice evidence[33] was considered binding on the court of appeal and a number of its previous decisions to the contrary overuled. As late as 1964 after indepedence an East African Court of Appeal decision ignoring an inconsistent decision of the England Court of Appeal on a statute pari materia would be set aside as having been given per incuriam. There is authority[34] for this which shows that the E.A.C.A. was not steady with its previous decisions but overthrew them when it found suitable English decisions.

In 1965 the political and administrative authority of the Privy Council came to an end and hence no longer binding on other East African Court of Appeal (discussed in chapter II). East Africa had got its Court of Appeal which assumed the role of the Privy Council. If it was however faced with an English decision it felt was wrong it was not ready to overrule it and think straight through it but instead it tried to distinguish it. This is mainly due to the fact that the judges remain mainly expartriate and as they do not wish to interfere with the local policy they seek justification for their decisions elsewhere. In 1967, Sir Charles Newbold, as to the binding force of English decisions said interalia that,

> ".. it is clear that this court is not bound by any English decisions whether given before or after indepedence.." 35

and only a year later in 1968 the court declared its position on how far it was bound by its previous decisions. The court asserted for itself the power it had formerly to depart from its previous decisions and also the measure of discretion formerly enjoyed by the Privy Council;[36] which eased

any rigidy in the application of precedent these gave the court a chance to change the law to suit the present social economic set up. These discretion however is limited. To the lower courts it does not extend. They have to abide with a decision of the court of appeal or it will reverse their decisions.

The structure of judicial administration and matters pertaining to judicial authority are a fudamental aspect of the process of government. Indepedent Kenya has always had constitutional provisions for the High Court structure, the appellate system, tenure of Judges and other aspects of the judicature.[37] In 1977 therefore when the East African Community broke up, it went away with the East African Court of Appeal. Therefore by an Act of parliament which came in operation in October 28th 1977[39] a Kenya Court of Appeal was formed. The court had its first judges to be sworn in as those who were members of the defunct Court of Appeal. They included its former president and vice president. The judges are expected to do what they used to do in the defunct court and honouring their decisions and looking to Britain for guidance then I hardly believe this will change the doctrine of precedent in any way.

In summary, the doctrine of precedent grew from the long court workings in England where uniformity of customs and law was the aim. The doctrine found itself in Kenya with the coming of colonialism and it did not only take root but also brought some English cases totally irrelevant for our needs. The doctrine had found a right atmosphere to grow in since the judges applying it were from its mother country and substantially so to this day. For its suitability and convenience as a source of law its shortcomings and efficacy in Kenya we shall consider in chapter II.

1:3 DEFINITION

I will allude on some definitions given by jurists on the doctrine

of precedent and stare decisis. Amongst them I will quote a few definitions so as to give a general idea of what precedent is thought to be. It has been defined as "authoritative or examples to be followed by courts of justice";[39] a form of custom of the courts varying in different legal systems[40] a judicial decision to which authority has been attached,[41] protions setting forth the rules of law applied by the courts the application of which was required for the defermination of the issues presented, are to be considered as decision and as primary authority in later cases in the same jurisdiction[42] and it has also been said that, in the large precedent consists of an official doing over again under similar circumstances substantially what has been done before by him or his predecessors.[43] From the above few definitions it is apparent that a precedent is a judicial decision, that is in an issue that has been dealt with by the courts following the facts given and in the decision appears a settlement which becomes a rule of law. This rule of law is based on facts stated is what is known as the ratio decidendi and it has a binding force on subsequent cases which may bear similar facts. The ratio decidendi is distinguished from the obiter dicta which is a conclusion reached upon hypothetical facts brought up by the court and has no binding authority.

The decision once given binds on lower courts of the same jurisdiction and the court that pronounced it unless it was given in error[44] and later the court realises its fault.

Precedent as such is doing what has been done before. When it is a rule then it becomes law when a court in the highest stage of a hierarchy pronounces it and people can go by it in their daily affairs.

During the colonial period the Privy Council was the highest court of appeal and it bound the courts were under it. There was the Supreme Court under the Court of Appeal under which there was the surbodinate courts of first, second and third class. There were also the African Courts which

CHAPTER II

OPERATION OF THE DOCTRINE OF PRECEDENT IN KENYA

2:1 INTENDED OPERATIVE FRAMEWORK

Until 1930 the Native Tribunals were integrated with the main judicial system of the colony to the extent that there was a normal avenue of appeal leading to the Supreme Court from the magesterial courts. Advocates were not allowed both at the magistrate courts and the Supreme Court. From 1930[1] the Native Tribunal system was removed almost entirely from the control of the Supreme Court as appellate jurisdiction was practically confined to administrative officers. A parallel system was created from the integrated one. There was from then on a two court tire system, one applying English Law the other Customary law and it is the former which indeed adhered to the doctrine of precedent.[2] They concern these paper for it is through them that the doctrine has come to be recognised as a source of law.

The personnel of this court system was predominantly foreign. They were trained in England and were to administer justice in a foreign land which had a different people and philosophy from that appertaining in England. English law was imported directly as by the 1897 Order in Council[3] or indirectly by giving effect to some Indian Statutes[4] being made applicable here which was English law first taken to India and then brought to Kenya from India.

The law so imported was supposed to apply under some qualifications, that is common law equity and statutes of general application were to apply only in so far as the circumstances of the colony or Kenya protectorate and its inhabitants permitted and subject to such qualifications as those circumstances may render necessary.[5] There

is the inference therefore that they were to be applied only where there was a gap of which I do not know any custom with a gap. The imported law had been developed under different social econimic and cultural conditions from those obtaining in Kenya and it was common-sense therefore that they needed modification if they were to serve any worthwhile purpose to the people of Kenya generally and not the Whites only. The concept of a good life differs from one society to another depending on the geographical, historical, cultural and social patterns obtaining in each of them. These factors help shape a society's law. It is therefore necessary to modify any law which seeks a new home so as to make it meaningful within that peoples good life concept.

It can be argued however that the intended operative field for the imported law was that of the settlers who had been brought up under it but then the reality was that it was imposed on all persons. Customary law was suppressed and as such all criminal law was taken over by the Indian Penal Code and English law generally applied. The African Courts therefore were left only to administer civil customary law.

2:II OPERATIVE REALITIES. COLONIAL ERA.

The doctrine of precedent has been a source of voluminous law in Kenya. In the colonial era most of the law was pronounced by White judges who felt themselves as bound as their confreres in England by the doctrine of precedent.[6] They were therefore going to apply the law they knew and were not going to alter its standards. The case of R. V. Amkeyo[7] may serve to illustrate what I mean by

saying that the colonial judges were not going to change the standards of English Law as they knew them. In the Amkeyo case above, the English principle of the case Hyde V Hyde[8], where marriage was defined as a voluntary union of one man one woman for life in exclusion of all others was applied to an African marriage. Since the concept of marriage was different in the customary sense where it was polygamous and dowry an essential of a valid marriage, it was described as a wife purchase. It was no marriage and no privilege enjoyed by a married couple would be granted. This is an instance where English Law was applied without regard to the local circumstances and other qualifications that were to be used in finding out what law to apply here.

The courts regarded themselves as indeed they were bound by the decisions of the Privy Council. This meant that the courts could not as such reach a decision which it thought could not stand in the face of the Privy Council and at this point were left to decide cases wholly on English principles of law which later to be followed by the subordinate courts which in turn bound the native courts that took their appeals there.[9] The Privy Council on the other hand was an entirely foreign court and the judges who sat in it knew little if anything of the colonies to which they acted as appeal judges. They looked for the law there where they sat other than consider the prevailing circumstances of the place from where the appeal came. When their decisions came here however, they became law. The Privy Council too tried to unify the common law doctrines as well as equity in the colonies since from the colonial office it was important politically and convenient as the judges in the colonies and protectorates could

be transfered to any country regardless of whether it was a colony or a protectorate. He had to be acquainted with some legal principles hence the importance of making the law substantially similar. It is this factor amongst others which brought about the exaggerated importance to previous decisions considering how precedent was evolved under English Law and imported here.[10] The Privy Council was not bound by its own previous decisions[11] which was aimed at giving it a wide discretion for it dealt with many countries. As pointed earlier it had power to decide two similar cases differently if they came from different countries.

Principles of law were all the Colonial Courts were interested in and Privy Council decisions were followed by Kenyan as well as other countries High Courts and subordinate courts and also the appeal courts even if the decision had come from a different country. In a certain case[12] the Privy Council warned that its judgements in a series of cases from India on points of Mohammedan law were not confined to that law as applied in India and here failed to see the circumstances appertaining in India or any other country as such were not relevant to Kenya or present here. This was to be the law however and it can be assumed that this principle therefore applied to all other courts with lesser jurisdiction than had the appellate court.

The appellate courts themselves considered and conducted themselves as bound by their own previous decisions like the English courts.[13] There is evidence to this effect as per the case of Robin V R.[14] where the East African Court of Appeal its own prior decision in R V Amkeyo[15] (above) about fifteen years later despite the fact that it was not law suitable to local circumstances but the court did nothing to eliminate

it and bring up a law which suited the local circumstances.

Customary law would have been applied and consequently the courts would have made up a Kenyan common law which would well serve our needs other than a law far fetched and irrelevant to our needs. On matters of customary law magistrates courts or even the Supreme Court ought to have followed an established decision of even the lowest native court if it was the only one available on the point. In theory this was the case in so far as the custom so established should not be repugnant to natural justice and morality or any written law.[16] This was a certificate for damnation of customary law. The so called 'repugnancy clause' helped much in the whittling down of customary law. The reason was that the standards applied to decide the repugnancy of a custom were the English ones which were known by the judges sitting in the courts of authority. They could not view it like they were supposed to, that is in view and in conformity with the local circumstances obtaining and most customs were passed as repugnant and English law applied. Standards of justice and morality in Kenya were so different from those of England and missing this point simply meant following Privy Council or other English decisions which they knew and were familiar with. It became our law as a result. The tension here was between traditional African values and western values. The White man allegedly came to civilise the natives and one of his tools of civilisation was law. Modernisation or civilisation is equated with adopting western values. This adoption is based on the erroneous view that the white man is superior to the black man. The tension is thereby created by the different concepts of a good life.[17] As regarded inconsistency of custom/any law with written law, the coloni-

zers had an easy way of doing away with customary law. One of its main features is that it was not written law hence if they sought written law then customary law would be simply considered inconsistent with written law and pushed off. A new law as such was imported to which there was no relevance with our law. In practice the higher courts were not attracted to the idea of being bound by the lower native courts and where itwas so done then it was an exceptional case.[18] Theoretically it seems the judge-made law that would result from cases decided if local circumstances were taken into account would lay a foundation to a Kenyan common law. It is in this due process that the customs that are not in line with the changed times and peoples expectations would gradually be eliminated leaving a law that people would understand and a law that can easily be used and made use of. There is no evidence to the effect that customary law is static and can not change with the times and therefore it was up to the colonial judges as it is to the present ones to change it other than doing away with it. The native courts that applied customary law were to appeal to administrative officers and this leaves a lot to be desired as regards the law that would result and stand as precedent in customary law.

The administrative officers were bound to look at the law and apply it in such a way as was convinient to the areas they administered other than meting out justice to the contestants but only for administrative convinience. Such a law made of administrative convinience was to be unjust and most likely distorted since despite the fact that they would be expected to have known the customs of the people of whom they were administrators but it is a fact they did not. They did not understand their way of life and therefore any issue that came up was to be decided on the face of the prevailing political circumstances. They would be expected to bring in principles of justice as they understood them and hence a conflict of interests since the people who knew it were denied a final say on issues that were brought before them. The elders ought to have had the upper hand and the administrators only ought to have

helped implement their decisions-that is those of the elders.

The substance of common law, the doctrines of equity and the statutes of general application which were to be applicable to Kenya were those that had been establised before twelfth of August 1897. However it has been held here and in reality was the practice that this was not strictly adhered to and post 1897 common law rules and equity doctrines were applied. The reception date was only considered as a dividing line between binding and merely persuasive English decisions. However it is submitted that this was not the courts practice. When confronted with a post reception English decision the court denied that it was bound by it. An analysis of the cases however shows that such statements did not reflect what the court actualy did either because it nevertheless applied the cited English case[19] or it went to a great deal of trouble to distinguish or explain it as was in Jivraj - v - Devraj[20] or because the case was for some other reason inapplicable as was in the case of Hari Singh - v - General Workshop.[21] On the other hand one can see that the persuasiveness of post reception decisions has been more than just persuasive and the courts, that would have questioned the validity of some of the foreign decisions like the court of Appeal for East Africa in such instances has without much debate on their persuasive value followed or taken guidance from the decisions of English courts in post reception cases with conclusive persuation. Chacha Wamburu - v - R[22] is a good illustration in the colonial days when the court said that

> "if the House of Lords has said something to the contrary on which we express no opinion, its pronouncement as to the true nature of the law of England cannot bind us in the face of the authority of the Privy Council."

This ought to have been the true situation since any other court in England would only be assumed to bind the courts in Kenya for it's decisions given before August twelfth 1897 but not later. The true position can be seen from cases like Bhimji -v- Hercules Insurance Co.Ltd.[23], Zarina Shariff -v- Sethna[24] and others where post reception decisions were followed. This shows us that

the reception date does not seem to have made any difference to the court in its selection of cases to apply which in effect made the situation here seem that Kenya was developing on the same lines with the English community as regarded the development of case law in England and Kenya. Was this necessary for our needs of law adaptable to our needs or what purpose was it meant to serve? In Elgood -v- R[25] the court of Appeal followed an English decision of 1961[26] which had set out clearly the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for purposes of the appeal. This is clear indication of the unimportance of the reception date and the binding nature of English cases. Even if the 1961 case was not binding on the court of Appeal, it was followed and despite the fact that the conclusion was good it is questionable as to whether the court of Appeal could not itself have reached a similar decision which would have been based on the principles of natural justice other than seek British decisions to justify or offer authority for its decision. One would therefore be justified in concluding that there has been confusion surrounding the question of status of decisions of the English courts here which results in the importation of English law under the principle of judicial precedent. We have as yet to find a case in which a decision of the House of Lords of any date has been rejected as wrong in so far as it covers the points in issue.[27]

English decisions have also been imported under the guise of interpratation of statutes in pari materia. It is to be remembered that most of the legislation in force during the colonial era was derived from English legislation directly or indirectly.[28] It was the law known by the English administrators and was also the easiest they could turn to so as to supplement the received doctrines of common law and equity. It is a shame to note that even after indepedence our statute law has tended to remain close

to English models. The result_ of this as it was and still is that English decisions interpreting the statutes were to be imported here for purposes of interpretation. This amongst other things missed the point that the social economic cultural and other factors that led to the enactment of such a statute in Britain may never have existed or will exist in Kenya and this makes the interpretation be necessarily aimed at the circumstances obtaining here other that import foreign interpretations. There was little sense if any in importing the decided cases to interpret the Kenyan ones. Such decisions only ought to have to come in if they were going to comply with and be applicable only as far as the circumstances and people of Kenya permit and subject to such qualifications as local circumstances render neccessary just as the doctrines of common law and equity were supposed to operate. The inhabitants of Kenya however had no control in the whole system and as such courts were left to make law which was not relevant save for the mϕnority settlers. The view that English decisions were binding on the courts of Kenya and elsewhere in the interpretation of statutes of like enactments is based on the privy council decision in Trimble -v- Hill[29] where it was ruled that where a colonial legislature has passed a like enactment to animperial statute and the latter had been authoritatively construed by the court of Appeal in England or the House of Lords, then the colonial courts were bound to govern themselves by that construction.

The Privy Council in a later case[30] approved this principle but probably had seen the injustices it would cause to adhere to it strictly and it therefore put a caveat to the effect that the English decisions may not be followed where there are local conditions which make their application inappropriate. The courts however would more often than not find nothing that would make such decisions inapplicable. The court of Appeal for East Africa then came up with another justification for the following of the English construction of statutes in pari materia which is indicative of

of the seeking of guidance in English courts. In Rashid Moledina -v- Hoima Ginnries[31] the court said that despite the fact that the court was not bound by English decisions when interpreting statutes clearly derived from the English legislation respect should be shown to English decisions on the act and particularly, so those given before the enactment of the statutes here since,

> "In the absence of any indication to the contrary, it is reasonable to suppose that the legislature enacted the Kenyan statute with knowledge of those decisions"

which is infact legislating by the court for the legislature. If it meant that the decisions to be held effective and respect be shown to them, they should have said so expressly that is the legislature other than leave the courts to imply it. The courts were simply trying to escape their obligations in interpreting statutes and avoiding English constructions which may be inappropriate and in the process not looking at the relevance of the constructions they take. They seemed to revolve on the technicalities of law as divorced from the circumstances surrounding the cause of the issue they have to deal with. The result is that they make bad law. Bad law in that it is too foreign for our needs in Kenya since the local circumstances are nto looked into. Some constructions have been thought to be capable of reaching such strange results or artificial ones[32] but the court has felt bound by an English decision interpreting a similar section of an act and has subsequently adapted what to it seems to be a strange or artificial justice this being made the law inspite of the caveat given in the case of Nadarajan Chettiar -v- Mahatmee[33] which had been given a year before the case of Monmohadas -v- Kalyan[34] which as such would be said to have been given per incuriam but strangely enough it was still law seventeen or so years later and was applied to a case with immunity. This is an issue of ignorance of law and also shows how easily guidance was sought from England and was taken inspite of strange or artificial results. This is a way of the courts saying that

they were bound and not merely persuaded by English constructions. I would prefer a situation where the courts interpret the statute first without any external reliance and then compare their results with the foreign construction and only follow the foreign or be guided by it if there was a strong case advocating for this. This would only occur where the two constructions would be at variance but I am sure the judges would not be nor are they so daft that they can not tell what is just in a given context and community but were only lazy so that they sought to get made material. The only other reason not so far mentioned would be that they were not sure of themselves so other than be original they prefered to justify their constructions with those that were already made and hind themselves bthind the cover of such authority when they deed some injustice.

Denning, L.J., had seen the purpose of trying to apply the foreign law in a synthe sised form to suit local conditions. In the case of Nyali Limited -v- Attorney General[35] the English court of Appeal decided that the technical common law rule that the grant by the crown of a franchise of pontage (a right to build a bridge) had to be by matter of record (given in accordance with certain formalities) could be dispensed within Kenya. All Denning was saying is that the conditions in England calling for the application of the rule were non-existent in Kenya and therefore there ought to be no insistence on the application of the rule as it was in England. This was a court of Appeal decision a court that did not fall within the hierarchy of our courts. It is surprising that Denning had a mind to see what the judges sitting in Kenya could not see. He applied for the understanding of local circumstances so as to make the application of the foreign law meaningful here in Kenya. On the application of common law doctrines he had this amongst other things to say,

> "This wise provision should I think be liberally construed. It is a recognition that the common law cannot be applied in a foreign country without considerable qualification. Just as with the English Oak so with the English common law. You can not transplant it to the African continent and expect it to

> retain the tough character which it has in England. It will flourish but it needs careful tending . So with the common law.....it has also many refinemants, subleties and technicalities which are not suited to the folk. These off shoots must be cut away" 36 quite right!

He went ahead to say that people in far off lands must have a law which will understand and respect and common law was not going to be suitable unless it was considerably qualified in its application. Judges according to Lord Denning were entrusted with the task of making the said qualifications with their wisdon but it is sad to say that they either did not possess the wisdom called for or they ignored to do what was their duty. Whichever of the possibilities it is a fact that common law was applied in most cases with the off shoots uncut. What was said of the application of common law and equity doctrines was not only common sense but also just since when English law was introduced into certain territories like Kenya, the courts were expressly empowered in unmistakable terms to modify the rules so as to fit them into the local conditions. Lord Denning was therefore only commending the provision[37] since it was as sensible and just as would be needed even today.

It is highly desireable that courts decisions should always result in justice and also reflect our concepts of a good life. They have a duty imposed upon them which is not a general duty of administering justice but rather to administer the rules of law that they are directed to apply by the relevant statutory enactments. In the absence of a statutory power to do so, it is not legitimate for them to disregard that duty when they consider that the results of adhering to it would not be satisfactory. A worse situation is where there is a statutory provision that they should administer justice not by strict adherence to the law given but by their wisdom of justice when applying the given law.

There are other instances in which English law was held inapplicable and customary law or other locally defined law was applied. In Shallo -v-

Maryam[38a] the equitable doctrine of advancement was held inapplicable as the Muslims had the benami institution which was applicable to the case in issue. In such other instances certain pre-reception statutes were held inapplicable since the circumstances of the protectorate coupled with the fact that advocates of the courts of the protectorate stand in a different footing from the solicitors of the supreme court of England do not permit of its application and this was stated in Bux -v- Dalal.[38b] The solicitors Act of 1843 was therefore not applicable in Kenya. In Bennet -v- Garvie[38c] in an action for specific performance for a contract of sale of land, it was contended for the defedant that there was never a contract since the statute of Frauds was a statute of general application and being a pre-reception date statute was applicable in Kenya. It made any contract void if it was not in writing and the contract in issue was an oral one. It was however held that what may be suitable for a highly civilized country like England may be unsuitable for a less civilized society such as Kenya where only a small fraction of the community can read and write and there would be grave objections to holding that an act of this nature is suitable to some of the inhabitants and not all, for that would lead to uncertain enforcement of law. Local circumstances as such were considered and the statute held inapplicable. In another case, Mawji And Another -v- Queen[38d] the case on appeal concerned a conviction on a charge of conspiracy between a couple married and Muslim law. The characteristic of the marriage was potentially polygamons and therefore the marriage was denied the privilege, enjoyed by sponses, of the English criminal rule which says that a husband and wife cannot be guilty of conspiracy since they are one. It was held that the criteria of the applicability of the rule in Tanganyika was the law obtaining there. If a marriage was regarded valid by the law of Tanganyika then the rule would apply to such a marriage. It was a valid marriage. The rule applied. The appeal was allowed. In Re Tanganyika National Newspaper

Limited[38e] a trust was held valid as charitable for the advancement of education. The issue was whether a paper published in Kiswahili could be held a valid charitable trust. The judge however said that within the conditions and circumstances obtaining in Tanganyika a paper whose function was to disseminate fairly and importially news and other matters of public interest with fair comment on them was a valid charitable trust. The people of Tanganyika were ignorant of other languages same kiswahili with an exception of a few who knew other languages and therefore a swahili paper to inform them of what was going on in their own country was charitable. It was held as being substantially for the purpose of advaning education.

There are a few other instances where local circumstances were taken into account when English law was sought to be applied[38f] but then this spirit was not kept up. In those instances where common law or equitty were held to be applicable as the basic law in the absence of a permissible reference to any other body of norms, the courts did not concern themselves with the question whether it should be modified in some way as to meet the special demands of the Africans[39] and this rigid application of common law made it very inconvinient for the people who were the litigants. It raised fear for those who were befallen by the same circumstances.

It is a fact that the colonialists had changed the conditions under which the customs had been developed. There was purpose therefore to modify even the customs which were not static to develop a Kenyan common law based on the adapted customs. This would be a law suitable to the Africans in their newly acquired social economic and political factors. Reluctance to do this is attributed to the colonialists who simply did not want customary law applied and either dismissed it as mediaval as was the case in Re Kibiego[40] or where they applied it, they viewed it

as a drawback to their mission of civilising the native and therefore had nothing to do with it. It would have made sense if the objectives behind a certain custom were considered and any repugnant parts of it severed other than either just refuse to apply it or where they applied it they did not consider what changes it may have undergone.

The explanation which one can give for the failure of the courts to exercise the discretion given to them to adapt the received judgemade law include the facts that all the colonial judges were non Africans trained in Britain hence more versed with English other than customary law nor the customary way of life. They were usually moved from one territory to the other and familiarity with English law applied uniformly in the colonies and protectorates was a basic component of their competence to serve. The deeply ingrained tradition of the English legal profession including their judiciary assigned to judges the duty of stating and applying the law not creating it. Conscious shaping of the law by reference to policy considerations grounded on social and economic factors was viewed as a legislative and not a fudicial function. The judges who came to the colonies or protectorates had not practised or had failed to attract clients[41] if they had practised hence they found it too novel a task to be accomplished and hence the failure of exercise of wisdom. Morris refers to them as unpurified judges[42] and he is right. The imperial ideology as well as the burocratic urge for uniform administration tended to discourage the development of variations on the common law theme from colony to colony.[43] The urge to umpire by the Privy Council where it was said that ,

> "it is of utmost impotance that in all parts of the empire where English law prevails, the interpretation of the law should be as nearly as possible the same" 44

It is from the above justifiable to conclude of the colonial era by saying that the judge made law in this period under the doctrine of judicial precedent was aimed at meeting other needs other than those of the

Kenyans. It has correctly been said that justice during the period of indirect rule (the colonial period) eluded those administrators judge or inhabitants who sought it.[45] The law was inappropriate hence lack of justice.

2:III POST COLONIAL ERA

General changes took place after indepedence which effected the application of the doctrine of precedent Appeals to the Judicial Committee of the Privy Council were abolished by the Constitution of Kenya (Amendment) Bill 1965[46] and the Court of Appeal for Eastern Africa later the East African Court of Appeal. This meant that a local court was to apply the law as the highest court of appeal and being less divorced from us was expected to create law in its administration of justice, that was relevant and in line without social and economic conditions. It also ought to have realised that Kenya was no longer a colony hence not to depend too heavily on foreign law. By the Magistrates Court Act 1967[47] the African Courts and other courts to which appeal lay from African courts were abolished there being formed a one-tier hierarchy consisting of District Magistrate's Courts, The Resident Magistrates Courts and the High Court. In addition the old surbodinate courts known as Muslim Surbodinate Courts that is Courts of Kadhis, Mudirs and Liwalis were abolished to be replaced by six Kadhis courts.[48] Under this system all courts were given jurisdiction over all persons irrespective of race and there is no restriction to representation by advocates in any court. The parallel or dual system was substituted with a fully integrated system.

In the District Magistrate's courts were lay magistrates who were mostly promoted court clerks hence not well versed with the law. The Resident Magistrate's Courts were predominantly filled with Asians, Africans and Europeans most of whom had received their legal education

in Britain. For the High Court , the colonial judges continued and any replacement was not aimed at Africanisation of the Bench since more Europeans were put in . For the Africans it was alleged they had not got the required qualifications and as is natural would have been expected to take over when they had acquired the qualifications. This has not come into being although it is over fifteen years ago. The judges in the High court are all expatriates with an exception of four.[49] In the higher hierarchy therefore the colonial type of mantality as regards the doctrine of precedent should not be expected to have changed much.

Given the immediacy of the colonial past and also the set up after indepedence, it comes as no surprise that English ideas and values prevail in law as in other spheres of modern life in Kenya as well as in the whole of East Africa. There is a continuing influence of English cases in the decisions of Kenyan courts and with the dominance of English people in the higher appellate courts explains this attitude. The lower courts have to abide with the thinking of those above them which is foreign for their decisions not to be overruled. They simply have to comply.

The Judicature Act 1967[50] provides for the mode of exercise of jurisdiction, section 3 which provides amongst other things what the High court and all surbodinate courts shall conform with. It lays down the law for them generally. It provides for the application of common law, doctrines of equity and statutes of general application, just as it was in the colonial days, with the limitation clause that they shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. customary law under section 3(2) of the same Act is provided as a guide in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and not repugnant to justice and morality or inionsistent with any written law and the section also excluded technicalities of procedure but since those

manning the courts are accustomed to the technicalities of procedure then this exclusion serves no purpose.

The stage thus set, the position of the East African court of Appeal was stated in the case of G.M. Dodhia -v- National And Glindlays Bank Limited [51] as regards foreign decisions and also its own application of the doctrine of stare decisis. For foreign decisions that is those of the Privy Council. It said that being the final court of appeal for Kenya, Uganda and Tanzania it was not bound by previous decisions of the Privy Council of whatever date. As regards its own decisions, it was said by the courts president sir C. Newbold that,

> "while it would normally regard a previous decision of its own as binding should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so." (at page 199).

Newbold, P. refused to specify the precise circumstances in which the court would depart from its previous decisions. The freedom of the final court however was not to be enjoyed by the courts lower down the hierarchy. They are bound by the court of Appeal and by their own decisions. The positio as such was that the Court of Appeal for it was the highest court would depart from its earlier decisions and be binding on the lower courts. This was a very theoretical position since in the same case, for purposes of certainit and consistency in law, a Privy Council decision[52] which according to the court was wrong in that the majority of the judges of the Privy Council were unaware of the conditions and needs of the people of Kenya, and as this was a minor matter of the construction of a section, they followed it. This only indicates that they set a precedent which was bad law and anti-the-spirit of the Judicature Act which provides for application of law which takes into account our needs. This shows that the court is not ready to depart from wrong decisions despite its alleging to be doing that and the strict adherence to precedent it in practice shows.

In the Dodhia case (supra) it was also said that the decision should

not be taken as a guide to the results which should normally follow the failure to comply with the imperative provisions of a section which is indicative of the fact that the court itself was too well aware that it was pronouncing bad law the question arising from this is, what is the relevance of the case as regards future problems with the similar facts? The answer would follow that it is useless and should a new case arise, it will need be considered as one of first instance calling naturally for importation of foreign irrelevant case law.

The same court has also emphatically refused to review its own decisions.It stated this fact in the case of Lakhamshi -v- Raja[53] which is proof of its adamancy to the holding onto of a decision which may have been wrongly given or even ran out of its purpose as law. These only creates confusion in the state of the law and defeats the very purpose for which precedent is greately upheld. There are changes which are brought about by the course of development taken by the indepedent coutries and this calls for the courts to follow suit so as to give the appropriate law for a certain stage of development. This calls for the court of appeal to be ready to review or even declare as bad law any case law it feels is outdated or it had wrongly decided. It must take into account that it is now the final court of Appeal for indepedent states which are developing and the law should also aid in its development policies hence the need for its relevance. If the court cannot think through its previous decisions or those of the Privy Council or any other English decisions then it tries to go round it. It has stated that it will not review its own decisions Raja (supra) hence what it will try to do will be to distinguish any decisions from the case before them which does not help but only inreases the confusion there is. There is indeed so much reliance on English decisions which are claimed to be non binding but only taken to make a start a discussion since they are only persuasive but the real thing is that they

spread the influence and are tempting to use. An instance is given[54] where out of a list of fifty five cases listed as having been judicially considered in part III of the (1968) East African Reports, two were Privy Council decisions, thirty seven were decisions of the English court and sixteen, less than half were decisions of the East African courts. When it is considered that most of the cited East African cases in turn relied heavily on English cases, the predominance of English cases in 1968 becomes overwhelming. This is not the spirit the court should have especially so when it is considered that it has been in existence for about eighty years. It has not been able to lay down its own common law and no wonder the Judicature Act imports the English law so imported in 1897. The common law and doctrines of equity and also statutes of general application imported them ought to have been synthesised so that by indepedence time or a few years after the society in which we live should have had its own law.

For failure of the court of Appeal to review its own decisions, it is so shameful in view of the fact that in the colonial days it had advanced this view.[55] There is the more need for it to review its previous decisions in view of its being the highest court of justice and also due to the fact that there are unprecedented changes taking place everyday. The court should not be conservative in its behavious towards the community needs but should be revolutionary to remove anything it feels is hindering its developing of a common law relevant to our social needs.

The court of Appeal adapted the expcetion rules to the stare decisis doctrine in the colonial days.[56] The exceptions were that where the court was faced with two conflicting decisions of its own. It is not bound to follow either, it may depart from its previous decision if it is found in another case to have been given per incuriam and thirdly there is the constructive overulling, that is, the court would not follow an earlier decision which though not overruled can not in its opinion stand with that

of the Privy Council. This one is irrelevant now since the court is not bound by the Privy Council anymore. Using the first two methods however the court can get rid of any undersirable decisions. If a decision had not taken into account the local circumstances then as it is so required and it missed it, the court can confatably declare it as given per incuriam and ignore it with impunity. Where however the court has used the per incuriam rule, it has been to supplement customary law with English law. An illustration is that of Wambwa -v- Okumu [57] where the court of Appeal held that the applicable customary rule which gave the right of custody of an illegitimate child to the putative father did not adequately take into account the welfare of the child, and consequently that the rule of customary law conflicted with and was superseded by section 17 of the Kenya Guadianship of Infants Act. Therefore Karuru -v- Njeri[58] was suspected of being per incuriam and was therefore not followed. A history of the Act[59] so applied to supercede customary law shows that it was not meant for that purpose but only to benefit the whites to whom customary law was not applicable in which case the Wambwa case was the wrong one and the Karuru one, right. This being the practice therefore it only shows that the court substitutes the wanted law for foreign law and can be argued that as the Magistrates courts Act[60] provides for custody to be settled under customay law, then the Guardianship of infant Act is not any more law than the magistrates courts Act and therefore one ought to look back to customary law. Wambwa is a bad decision although it represents our law today. It is the poor spirit of precedent in our courts being facilitated by a foreign people in who have responsibilities in our highest court of appeal and our High Court. The personnel being the same one would not expect any changes in the law so created by judicial pronouncement. As by December 31st 1975, out of seventeen high court judges the chief justice inclussive, only four of them were Africans and no matter how well they may try to Africanize the law, theirs

would be under a quarter or so of the whole judge made law hence negligible and hard for any person to claim that the trend is one of making a Kenyan common law with local circumstances taken into account. Failure of indication of direction towards an Africanized judicial system leads the advocates to arm themselves with persuasive English decisions which in return play a great roll on the final touch of the cases under consideration. Citing of this case later as an African authority does not help since it is itself so much tainted with a foreign element. This is not the way it ought to be.

By the Appellate Jurisdiction Act No. 15 of 1977 Kenya formed her own court of appeal following the breakdown of the East African Community. Looking however at the membership of that court which is the chief Justice at least two substantive judges of Appeal and the pluisne judges, that is, all the ordinary judges of the High court. There is therefore no attempt that was made to Africanize the personnel which would be a first step to Africanize the case law and especially so to suit our local needs since the membership of that court just like the High Court is substantially expatriate Morever the number proposed is too large and according to a certain observer the membership should be small in size so as to help the evolution of a strong appellate tradition based on close understanding.[61] The hierarchy of courts is now from the District courts to the Resident magistrate's courts from where appeals lie with the High court and eventually the Kenya court of Appeal. For Muslims appeals lie from the Kadhis courts to the High court and subsequently to the court of Appeal.

There are volumes and volumes of decided cases which is indicative of the fact that the courts have been able to cover substantial branches of law making way for any other issues that may come for consideration. However the law therein pronounced, both before and after indepedence has not been one dealing with our local needs when the hue and cry is one for our development. As has been shown it has been influenced by another peoples law who are

not in any way connected to our needs and who have their law pronounced by their courts for very different reasons and under different circumstances from those obtaining here. The reasons are numerous[62] and have been the same since the colonial era. The conditions that existed under the colonial rule were drastically changed on our obtaining of indepedence status. The judiciary however seems to have had little change, change only being as regarded the hierarchy of our courts which can not in any way help to bring in our law a relevant stand as regards our present social economic set up. The courts ought to have reviewed all the case law laid down in the colonial days and discarded any that would not be calling for the present time. It is a fact that if the law does not develop at the pace of the social and economic developments then it will fall out and be of no useful purpose since it would hinder other than aid develpment. On the other hand if it develops faster in comparison with the local social and economic developments, it will be too hard to reach for and will once again serve no purpose. It has therefore to take the same pace with the other branches of development aids. Faster developments and uncalled for law however, brought in by way of the doctrine of precedent seems one pace and trend of the courts. In the case of K -v- K[63] a post indepedence decision whose order was dated December 9th 1966 had a decision to the effect that the jurisdiction of the High court under section 3 of the Matrimonial Case Act[64] must be exercised in accordance with the law applied from time to time in the High court of Justice in England and I have my doubts as to whether this was the aim of the legislature.[65] This was direct importation of English law by the courts and if be the case then there comes up the question as to whether the High court of justice in England still binds our courts and if so why the legislature did not say these directly. It can be observed here how important judicial decisions are since when the legislature lays down the applicable law then it is up to the courts to interpret it. If they chose to make it

stand out as irrelevant to our social and economic needs at the stage the country is, like has been done to date it will take much time before the legislature reviews the law again. The courts should be willing to clear up any law that is not serving the expected purpose and do away with it. The courts are empowered to do this by being given a discretion they can exercise but it seems the discretion is exercised to the convinience of the minority at the expense of the majority. The judges seems to favour a certain group of people the class from which they come.

There is purpose for a change which is long overdue. In the concluding chapter[66] I will look at possible reforms which can bring about the necessary changes.

CHAPTER III

PROPOSED REFORMS AND CONCLUSION

There is need for reform in the judiciary if there is ever going to develop a Kenyan common law. Since Kenya's colonisation and subsequent independence there have been some factors which have hindered the development of such a common law which can identify with the social, economic needs of the people of Kenya. In this chapter, I intend to raise some propositions which if effected could probably lead to the judicary making up case law in form of decisions which would satisfy the needs of the people it will serve.

It is imperative if there is going to be any change in the case law area to change the personnel of the courts. Most judges in Kenya, like it was in the colonial period are expatriates who do not identify with our local needs. However good the law laid down for interpretation may be, it cannot answer our needs if it is interpreted by persons who do not understand what the needs of the Kenyan people are. In the colonial era, one would say that the expatriates were needed to man the courts which were a new creation and the Kenyan knew nothing about. In the later years of colonialism some Kenyans qualified for those posts but were not given a chance to take seats on the bench. Now that Kenya is indepedent, need the expatriates be retained? My answer to this question is no. They need all go and it is a surprise that even after sixteen years of indepedence expatriates are still a majority in the High Court and also the Court of Appeal.[1] Their leaving would mean a total revolution on the bench and if replaced by persons who have been familiar since childhood with the social enviroment, then and only then can a Kenyan common law begin to develop.

The Kenyan courts will never be free from the English decisions in so far as the expatriate judges stay. The courts in reality need be completely free from all foreign authorities which would leave them to formu-

late their own authorities in terms of case law. This case law would eventually develop into a Kenyan common law. The binding force of English decisions will still be felt since the people on the bench have been trained in England or India and what they can easily turn to, to solve problems is English law. There are some Africans who know nothing about the local needs and this makes Africanisation in itself inadequate. Foreign decisions are taken in as guiding or persuasive guides but are in reality followed. In the case of Dodhia - v - National And Glindlays Bank[2] for example the defunct E.A.C.A. stated that it was not bound by any English decisions as the Privy Council was not the superior appellate court. The court in the same case however decided to follow an earlier decision of the Privy Council even though it considered it wrongly decided[3] which poses the question whether all the pronouncement's on the non-binding character of foreign decisions was merely dicta. There was no change in personnel and it is evident that foreign decisions will continue to bind Kenyan courts as far as the personnel deciding what decisions are to be followed favour them. If the courts have to be free from foreign decisions then the foreign judges have to go. The development of an indepedent Kenyan common law is in capable of growth or even proper formulation until the highest Kenyan court ceases to follow automatically and without critical examination as to the relevance to our social and economic needs of the alien tribunals decisions. In other words until the court of Appeal considers English courts decisions irrelevant and uncalled for, unless modified to suit local conditions then there will not be a start of the growth of a Kenyan common law. It has been shown above why the decisions of English courts are followed automatically and also the remedy for this.

The has been a contention that there is an East African common law which is to be found in the voluminous law reports dating back from 1897

to the present day.[4] My contention however is that there is neither a Kenyan nor an East African common law. What has been referred to as an East African common law to me is merely a collection of decisions which have been pronounced in East Africa by foreign judges which do not reflect our moral, social or economic standards. It is a foreign common law wrapped up in the guise of an East African common law. It is not a welcome piece of news to learn that Kenya which has been an indepedent state for about sixteen years has yet to get off the ground in search for her common law.

The legislature is also to blame for failure of the judiciary to formulate a Kenyan common law. In 1967, the Kenyan parliament enacted the Judicature Act whose section 3(1)[5], like the 1897 order in council, imports the doctrines of common law, equity and the statutes of general application. The result of this is that it poses a colonial continuation of the application of English case law and statutes that were in force in England on August 12, 1897. This is an act of colonial mentality brought forth to the indepedence era by an indepedent perliament. The case law obtaining in England at the above given date is to be classified as Kenyan with its application subject to some qualifications given in the proviso to section 3(1) of the Judicature Act. When it is applied by the expartiate judges from whose motherland it derives, then it is hardly changed to suit the local conditions and if the resulting decisions are to be referred to as a Kenyan common law then this is a misnomer. The Judicature Act section 3(1) ought to be repealed. It serves no worth while purpose in indepedent Kenya. The tendancy of the courts towards foreign statutes enacted wholesale or in provisions is to assume that they import decisions interpreting them in this way more case law is borrowed which does not answer Kenyan needs but only hinders the development of the said Kenyan common law. In the interpretation of foreign statutes the courts should look to the

legislative policy behind the enactment of the statute and attempt its implementation in local conditions uniterfered with by decisions relating to foreign conditions. This failing, as it has, the legislature should then try and be more original in its enactments so that the courts have nowhere else to look for justification of their decisions save the local policy. It has been recommended that courts read into the receiving statutes[6] a proviso similar to that included in the general reception clause, empowering the courts to modify the received law to suit local conditions[7]. This would in effect bring the courts to adapt an attitude whereby they would allow the originality of the lawyers in court. Lawyers would on their turn probe the social economic needs obtaining in the country which would be their authorit to certain constructions other than the courts demand English or other forei decisions as authority for such construction as is the practice. The local needs should be given some preference since it is only through their incorp ration that we can achieve a Kenyan common law. The use of foreign decisions as persuasive or guiding lights should be put off. It has to be done away with.

The newly formed Kenya court of Appeal should take upon itself the duty of reviewing the presently so called East African Common law. There may be a few decisions that are patriotic which would be let stand but for the unpatriotic ones, it should scrap them all and have a new start. The defunct East African Court of Appeal had emphatically said that it would never revie its own decisions[8] but as it is now dead, it is the duty of the Kenyan appea court to do a review and not to adapt as stupid an attitude as the defunct court had. It is exclussively a Kenyan court and the best service it could render the country is to be a parent of a Kenyan common law.

A decision that is plainly inadequate for the present conditions only plays a role of impeding the proper development of the common law. It is an

amomally and should be discarded[9]. The Kenya court of Appeal should therefore never feel shy in its overruling of a case that has been outdated by events. Most colonial decisions should be looked at with sceptism since the social economic conditions obtaining then have been revolutionzed and changes brought about. Kenya is now a sovereign state for example and should have little to do with her colonial achievements since they may fall short of the expectations of the Kenyan society today. Most of the decisions especially those of the East African Court of Appeal were given for the three East African states which persue different political ideologies. The three are developing countries but they differ in their means of development and hence their laws should be different since they are aimed at different social circumstances and there is need therefore for the court of appeal to be clear about thinking through some of the decisions now in the East African law reports other than their being applied with the courts eyes shut. The Kenya court of appeal ought to start on a clean slate for the formulation of a Kenyan common law. If the appeal court sets out on a particular direction then the courts below it will follow and will, they themselves not follow blindly the standing decisions if they are not relevant to the social economic local conditions. The doctrine of precedent is acclaimed for making the law certain but I contend that recognition of a power in the highest court of appeal to overrule its earlier decisions or even those of its predecesor increases rather than decreases certainity and predictability in the law[10]. The reason why it increases the predictability and certainity in law is that it establishes unequivocally what path or trend it is taking and hence the lawyers and others concerned with the prediction of law will be given a guide line to follow. This makes it possible since when there is a standing irrelevant decision or the like, then nobody would predict whether the court will ignore it or follow it hence a split. If the court has shown what way it is going on the other

hand, then a lawyer would always be sure that a certain irrelevant decision is not going to be let stand. Being irrelevant in this context means not being in line with the obtaining economic social and political conditions.

What causes uncertainity in law is the employ of the methods of distinguishing or explaining cases which merely lets there be decisions which are not good law but are on the other hand not expressly overruled. This is why there is the more reason for the Kenyan court of appeal to be strict and clear cut with its handling of cases. There need not be any accumalation of dead-wood in terms of case law which serves no purpose. Where a case decision which is not in line with the local considerations but has been relied on for a long time, the court should not hesitate in overruling it. It is clearly bad law and it has to go. Here the court would apply the anology of the legislature which repeals any statute at its leisure but then its repeal does not affect those whose interests were guarded by the statute. The court therefore should overrule a poor decision and give a warning that in furture no one will be allowed to rely on such a case. The defunct court of appeal had expressed such a move in the case of Chogley - v - Bains [11] where the judge said that,

> "we do not however regard the present practice as either correct nor satisfactory and we give clear warning that in future applications of this nature....12

This would indicate that a particular practice or decision of the court is no longer entertainable hence a change. It reduces the number of cases which would be used a authorities other than cause confusion by trying to explain or distinguish them. If there has to be a meaningful review or examination of prior decisions, then no foreign or local decision ought to be binding on the appeal court for if there are any there will be a tendancy to distinguish them which brings about obscurity of law and also the process tends to militate against sensible decisions.[13] It ought if need be, be

exercised sparingly otherwise never.

For most of the colonial era, judges held office at the pleasure of her majesty. This meant that they had to tow the line of the queens government in the colonies when their tenure of office was secured further, they were appointed by the governor which still meant that they had to be loyal to him and the judiciary was not indepedent. The decisions of such instances are to be found favouring the government policy. After indepedence, the judges appointment is by the president and the tenure of judges is secured under the constitution which provides for their removal only on grounds of misbehaviour or incompetence, that is, inability to perform the expected duties. The security of tenure is safeguarded but it is obvious that the judges so chosen or appointed will be tempted to favour the government which gave them the positions they hold. The result is that such judges are not without external influence in their daily work which not only results into injustice but also to poor interpretation of the law to suit their own convinience. It will be justice according to the wishes of the government. The magistrates are appointed by the Punlic Service Commission and may be said to be less attached to the government but then they are not final courts in themselves. The High Court and appeal court can overrule their decisions and in the final analysis it is to be seen that it is the will of the higher courts that will stand and also that of the executive. Chief Justice Marshall had this to say of a judge.

> "A judge should be rendered perfectly and completely independent with nothing to influence him but God and his conscience. The greatest scourge an angry heaven can inflict on an ungrateful and sinning people was an ignorant corrupt or depedent judiciary". 15

It is my contention that our judiciary is depedent on the executive and therefore will pay homage to the executive other than to the people for it will interpret the law according to the executive expediency. Where there

is a conflict of a conscience and justice what such a judiciary is apt to do is to ignore both policy and local conditions and seek justification for its decisions elsewhere which will result in the creation of a poor law and they will in future apply the same law under the doctrine of precedent as if it was part of the common law. Most of the law formulated under such circumstances does not result in a countries common law but merely remains foreign law imposed on a people for whom it serves no purpose. The remedy for this is that the government should not have a hand in the appointment of judges. Parliament ourght to be given this function and as members of parliament are assumed to be the peoples representatives then they will do this noble task. The judges will on the other hand be indepedent and the judiciary can stand against the executive when it wants to interfere with its functions. An alternative means is to allow a method of promotion based on competitive examination among members of the surbodinate judiciary which might help to avoid the possibilities of political influence, especially so if the executive is not the promoting body, on the appointment of the judges. It is punishment to have a depedent judiciary as justice Marshall says above and I can not contemplate a reason why the Kenyan community should suffer. One has to question as to whether the injustice or antiquity of the law in East Africa particularly Kenya is not the result of a defective machinery of justice. The is need for a re-examination of the machinery of justice. The role of the machinery of justice as well as its prejudice, bias and idiosyncrasies and similar factors need a re-examination a re-appraisal or condemnation as things stand today. The judges and others who are empowered to give decisions should be re-examined as of necessity in the hight of the changed political social and economic ideals of the Kenyan society today.

"In sum there must be a rethinking and re-evaluation of

what means are available in the course of administering justice" 16

Several former colonial countries have made an attempt to form their own common law. Examples are the Sudan, Tanzania, Nigeria and Ghana to name but a few which changed and africanzed their judiciary soon after indepedence. Sudan for example in the first few years of attainment of indepedence the language of litigation was changed to Arabic. Today few judges write their judgments in English.[17] In Kenya, the parliament uses Kiswahili as a medium of expression and like the Sudan I see no reason why the courts in Kenya should not dominantly change over to Kiswahili since the present language of media English, simply seems to mystify things especially so to the illiterate masses.

Although the judges in the Sudan have largely followed in the footsteps of their predecessors on the bench, they have gradually developed a more liberal attitude and given thereselves the right to consult systems other than English law. Through the adaptation of rules of English law or the application of local circumstances and practices the courts have laid down the foundations of a Sudanese common law.[18] Political upheavals in that country may explain why they have not got very far but at least they have made a start.

Ghana has africanized her judiciary and even gone further by trying to codify her law other than have general reception[19] clauses such as Kenyas Judicature Act[20] S 3(1). If all the law is certain, then all there need be is a people who know well of the local circumstances and the needs of the people and a Kenyan common law would take of the ground. This is worth learning from Ghana if we are to develop our own common law.

India a former British colony just like Kenya is even a better example. The first step it took after indepedence was to cut off the Privy Council from its hierarchy of courts. Soon after indepedence the number of English

judges, personnel in the judiciary and the Bar almost disappeared.[21] It is true that the change over only substituted for the English element an Indian element which was both among the judges and the advocates deeply imbibed with English principles and English practice. Even so this change had its effects. It is true that English decisions are less often cited in the superior courts in India than before indepedence.[22] This arises in a great measure by reason of the supreme court, the highest court in the land having evolved during a period of over fifteen years its own jurisprudence[23] so that the High Courts as well as the supreme court are on many an occasion able to deal with the questions which arise before them by the application of principles laid down in the large body of decisions of the supreme court itself. Decisions of English courts are still frequently examined by the superior Indian courts and applied except where the circumstances and conditions in India make it inequitable to apply them. India a former colony is a classical example of a country which has within a scope of fifteen years evolved her own jurisprudence.

It is therefore evident that the reforms I am trying to put forth are not new in any way. Other countries have tried them and they have worked and even where they have not been fully successful, it is not due to their in applicability but due to factors like depedncy of the judiciary on the executive and a countries political instability playing a role of impeding their evolution. The overthrow of the government makes the atmosphere non-conducive to the proper functioning of the courts and this is a common factor that has hindered development of a common law in the African states which have moved a step forward tpwards the formulation of their own jurisprudence. Kenya has much to learn from other countries which have been successful and as there has been political stability there is no reason why Kenya should not have been able to formulate her own common law.

CONCLUSION

After indepedence Kenya acquired differnt political policies, social and economic factors were changed and therefore a new set up was needy if she had to develop on a more indepedent sphere. The executive was reformed reform being mainly in the direction of Africanisation of the personnel in the Civil service. For the legislature, the people of Kenya elected their own representative to the National Assembly so as to have their needs met by an people they knew well. Although the persons so elected may not have changed the law to suit the local conditions and break away with the English legislature and courts an attempt had been made and changes were thus expected.

For the judiciary however the personnel was not substantially shaken and thus the colonial legacy was passed on to the new Kenyan nation. This is not in keeping with a countries indepedent status since it meant that although political indepedence had been achieved, in the field of law, we were still colonized. It is not at all fair that even after almost two decades of political indepedence, Kenya should still have much to do as regards her courts with the colonisers courts. Both our bar and bench are still predominantly dominated by foreigners which leaves one wondering whether our judiciary has achieved any indepedent status. If not, why? Kenyas non-aligned policy should also be adapted by the bench and bar so that she does not rely on only one country as a source of her guiding principles in the interpretation of her laws but should be free to seek guidance from any other country in so far as the sought guidance is in keeping with our local needs. There is no point really why a country should claim to be indepedent and yet some of her organs of government be still controlled by people who are still the same as those the indepedence struggle was aimed at. If Kenya did not have the required manpower to man her judiciary then it would be understandable since little could be done to change it. My contention however is that since indepedence, Kenya has acquired

enough personnel educated at either of the three universities in East Africa who can now take over from the foreigners still running the Kenyan judiciary.

Perfection is achieved through experience. It would therefore be reasonable if the local personnel was fitted into the bench so that they can gain the required experience otherwise it will be futile to wait for a time when Kenya will have experienced personnel to fit into her bench. Where else they may be expected to gain the requisite experience is a question that those concerned ought to furnish an answer.

There seems to be fear amongst the less educated people as regards the courts. This was brought up from the colonial times since the courts were looked upon as instruments of oppression. One of the tools of exploitation used by the colonialist was law. If after indepedence the courts still continued to be manned by the same people, this does not erase the feeling of fear from the people and as such the courts are left to serve only a small section of the community who understand it. The larger section still view the courts as a foreign element which does not answer their needs. What therefore is the need for the courts? Are they not supposed to be instruments of giving justice and arbitration to all the Kenyans? I contend that they have failed since all there is in them answers very little of the people's needs. Unification of customery[24] law was in a sense a way of destroying it and further total extinction was made on criminal customary law since no one can be tried for an offence which is not written law[25] whereas it is a fact that one characteristic of customary law that it is unwritten. It is with the customarylaw that the elder generation and those who are in the rural areas at ease with and therefore if it has to be done away with, the new law should be applied by people they will be at ease with. Without these the courts are likely to fail in their expected roles.

My objection is not with the application of the doctrine of precedent. What I am trying to say is that if it is rigidly applied it will only result

in injustices. Kenyans indepedence period has not seen much change in the judiciary hence if any good use of the doctrine is to be made, then it need be flexible. There ought to be changes effected through the use of the stare decisis doctrine since there are changes in all spheres of development taking place. If a case is adhered to for too long as a good authority then it results into injustice other than justice. It is common sense that once an authority has outlived its usefulness, it ceases to be any real protection to the public and it becomes a trap since people take a different direction towards development but the law will pull them back. If there has to be development it need be in all organs of government. Any one of them left behind will impede development or fall into oblivion. If there is need for Africanisation it should be effected in all fields but not in some and others be left out. This will only result into inconsistency and conflict in what may be refered to as development.

I have proposed some reforms and even gone further to show where they have been implemented with success. Kenya's common law need have its roots in Kenya's own jurisprudence and I submit that any reforms in the judiciary are overdue.

FOOTNOTES. INTRODUCTION

1. East African Order in Council 1897.

2. The Dual Mandate in Tropical Africa
Frank & Cass Limited 1965 P 614
By Lugard, F.J.D.B.

3. R. CROSS Precedent in English Law 3rd
Edition (1977) page 109-110.

4. East African Order in Council 1897.
Section 3(1)(C) of the Judicature Act 1967.

5. India is a good example. See generally M.C. stelvad's - The role of
English Law in India.

FOOTNOTES. - CHAPTER 1

1. Dr. T. Ellis Lewis 46 L Q R 207.

2. YB 3 Edward.

3. See n. 1(supra) at p 217.

4. Bollands Manual of Year Book Studies P 43.

5. See 1(Supra) at page 219.

6. Pollock - First Book of Jurisprudence.
6th Edition page 326.

7. Ibid.

8. Lewis T.E. 48 L.Q.R. 231.

9. Holdsworth. H.E.L. vol. 5 371-372.

10. Lewis (Supra) quoting (1553) 1 Plowd. 89-91.

11. Holdsworth (Supra) at page 490.

12. Potter H. Outlines of English Legal History p 27.

13. Ibid p 29.

14. Goodhard. Caselaw. 50 L.Q.R. 196.
Holdsworth. H.E.L. vol. 12 page 146.

15. Plucknett, T. A concise History of the Common Law 5th Ed. P 350.

16. Lord Chorley. Conflict of Law and Commerce. 48 L.Q.R. 63.

17. London Tramways Co. -v- London County Council (1898) A.C. 75.

18. Young -v- Bristol Aeroplane Co. (1944) K.B. 719 where Lord Greene M.R. said that "on a clear examination of the whole matter we have come to the conclusion that this court is bound to follow previous decisions of its own...."

19. For full statement see R. Cross. Precedent in English Law. 3rd ed. 1977 page 109-110.

20. Professor Dworkin. Taking Rights seriously. (Geral Duckworth 1977).

21. Article 15(2) of the East African Protectorate Order in Council 1902.

22. Sawyerr. G.F.A. The Doctrine of Precedent in the court of Appeal for East Africa.

23. Allot, A.N. Judicial Precedent in Africa Revisited. (1968) J A L 3.

24. Tooth - v - Power (1891) A.C 284 (P C.)

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5. E.A.O.C. 1902.

6. 12th August 1897.

7. (1958) E.A. 239 at 246.

8. Joseph Kabui - v - R (1954) 21 E.A.C.A. 260

9. See n. 17(Supra)

0. The Court of Appeal for East Africa acted on the assumption that it was bound by its previous decisions. Dosai -v- R (1946) EACA 77.

1. (1956) 23 E A C A 440.

2. Davies -v- D.P.P. (1954) 1 All E R. 507

3. Bhatt -v- Luxmichand (1964) E A 414

4. Rashid Moledina -v- Hoima Ginneries.
(1967) E.A. 645.

5. Ibid 656

6. Dodhia -v- National and Glindlays Bank Ltd. (1970) E.A. 195.

7. Ojwang J.B. The proposed court of Appeal for Kenya: Antecedent Constitutional Basic and Implications. (Unpublished).

8. The Appellate Jurisdiction Act. No. 15 of 1977.

9. Wharton Law Lexicon 14th Ed. page 788.

0. B.A. Mortley. Jurisprudence. page 65.

1. Keeton, G.W. The Elementary Principles of Jurisprudence at p. 96.

2. S.M. LLwellyn. Bramble Bush (1951) page 64.

3. P. Morgan. The study of Law.

4. Joseph Kabui -v- R. (1954) 21 E.A.CA. 260.
Young -v- Bristol Aeroplane Co. (1944)2 All E R 293. C A.

5. A.N. Allot. Judicial and Legal systems in Africa (1962) pages 89-97 and also 215.

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25. E.A.O.C. 1902.

26. 12th August 1897.

27. (1958) E.A. 239 at 246.

28. Joseph Kabui - v - R (1954) 21 E.A.C.A. 260

29. See n. 17(Supra)

30. The Court of Appeal for East Africa acted on the assumption that it was bound by its previous decisions. Dosai -v- R (1946) EACA 77.

31. (1956) 23 E A C A 440.

32. Davies -v- D.P.P. (1954) 1 All E R. 507

33. Bhatt -v- Luxmichand (1964) E A 414

34. Rashid Moledina -v- Hoima Ginneries. (1967) E.A. 645.

35. Ibid 656

36. Dodhia -v- National and Glindlays Bank Ltd. (1970) E.A. 195.

37. Ojwang J.B. The proposed court of Appeal for Kenya: Antecedent Constitutional Basic and Implications. (Unpublished).

38. The Appellate Jurisdiction Act. No. 15 of 1977.

39. Wharton Law Lexicon 14th Ed. page 788.

40. B.A. Mortley. Jurisprudence. page 65.

41. Keeton, G.W. The Elementary Principles of Jurisprudence at p. 96.

42. S.M. LLwellyn. Bramble Bush (1951) page 64.

43. P. Morgan. The study of Law.

44. Joseph Kabui -v- R. (1954) 21 E.A.CA. 260.
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45. A.N. Allot. Judicial and Legal systems in Africa (1962) pages 89-97 and also 215.

FOOTNOTES (CHAPTER II)

1. Native Tribunals Ordinance 1930.
2. For a historical treatment of the African Courts in Kenya see PHILIPS: Report on Native Tribunals (1945); CARSON: further Notes on the African Courts in Kenya 10 Journal of African Administration 34 (1958); "The Court of Review, the Appeal System African Courts" (1966) East African Law Journal 151.
3. 1897 East African Order in Council Article 11.
4. Examples are the Indian Evidence Act and also the Penal Code.
5. N.3 Supra
6. Allot, Judicial Precedent in Africa Revisited 12 Journal of African Law 3.
7. (1914) 7 KLR 14.
8. L.R. 1 P&D 130.
9. Elias T.O. British Colonial Law Chapter 2.
0. Sawyer and Hiller - The Doctrine of Precedent in the court of Appeal for East Africa. Page 1.
1. Tooth -v- Power (1891) AC 284 (Priry Council).
2. Faturma Binti M. Bin Salim Bakhshaven -v- M. Bin Bakhshaven (1952) AC 1 (P.C.).
3. Court of Appeal in England. See the case of young -v- British Aeroplane Co. (1944) KB 718 (C.A.).
. Robin v. Rex (1929) 3 Ny. L. R. 34.
. N.7 Supra.

CHAPTERY 2

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18. Kajibi - v - Kabibi (1944) 11 EACA 34.

19. (1956) 23 E.A.C.A. 80 ILAHI -v- PATEL.

20. (1968) E.A 263.

21. (1951) 18 E.A.C.A. 4

22. (1953) 20 E.A.C.A. 339.

23. (1963) E.A. 114.

24. (1963) E.A. 239

25. (1968) E.A. 274.

26. R. -v- PARKS (1961) 3 All E.R. 633.

27. See n. 10 (supra) at page 20.

28. See n. 4 (supra)

29. Trimble -v- Hill (1879) 5 App. Cas. 432.

30. Nadarajan chettiar -v- Mahatmee. (1950) A.C. 481 at page 492.

31. (1967) E.A. 645.

32. Monmohandas Darachand -v- Kalyan (1950) E.A.C.A. 63.

33. See n. 30 (supra)

34. See n. 32 (supra) also Birsing -v- Khetia (1967) E.A. 741 a decision of the Tanzanian High Court.

35. (1956) I.Q.B.I.

36. Ibid See at page 16.

37. Article 15 of the East African Order in Council 1902.

38a. Shallo -v- Maryam (1967) E.A. 409.

38b. Bux v Dalal (1912) 4 E.A.L.R. 99

38c. (1917) 7 E.A.L.R. 48

38d. (1957) 1 All. E.R. 385.

38e. (1959) E.A. 1057.

38f. Nagji -v- Abdulla (1938) 6 U.L.R. 43 and Khoja Shia Ithnasheri

38f. Jamal -v- Godinho (1938) 6 U.L.R. 47 are good examples of situations where statutes of general application were not followed due to the local circumstances. in Uganda.

39. Harvey W.B. Introduction to Regal Systems in East Africa at page 553.

40. (1972) E.A. 179.

41. Morris and Read. Indirect Rule and search for Justice. (1972) Chap. 9.

42. Ibid at page 311.

43. Seidman. The Receiption of English Law in colonial Africa (1969) 2 E.A.LR. 47.

44. See n. 29(supra) at P 345.

45. See n. 41(supra) at P 330.

46. Section 15. See Kenya Gazette Supplement 9th February 1965 at P 19.

47. No. 17 of 1967.

48. Kadhis courts Act. No. 14 of 1967.

49. As per December 31st 1974.

50. No. 16 of 1967.

51. (1970) E.A. 195.

52. Dharamshi Vallabhji -v- National and Glindlays Bank. (1964) E.A. 442.

53. (1966) E.A. 313.

54. See n. 10 (supra) at page 86.

55. Lenson Abindwile -v- R. (1955) 22 E.A.CA. 448

56. Kiriri Cotton Company -v- Dewan. (1958) E.A. 239.
The exceptions therein adopted were expounded in the case of Young -v- Bristol Aeroplane Co. (1944) 2 All E.R. 293 by the court of Appeal

57. (1970) E.A. 578

58. (1968) E.A. 361.

59. See the Report of the Committee on Young Persons and children. Recommedation 70. Government Printer 1953.

60. The East African Law Reports 1975 at page V.

61. Ojwang, J.B. - The proposed court of Appeal For Kenya: Antecedent, Constitutional basis and Implication. (Unpublished)

62. See generally chapter three, (infra).

FOOTNOTES CHAPTER III

1. The appellate Jurisdiction Act. No. 15 of 1977.
2. (1970) E.A. 195
3. Harvey. W.B. Introduction to Legal Systems in East Africa at page 667.
4. Tudor Jackson. Introduction to the law of Kenya page 15.
5. No. 16 of 1967.
6. See for example S 2 of the contract Act. 1961.
7. Sawyerr and Hitler: The Doctrine of Precedent in court of Appeal for East Africa P 69.
8. Lakhamshi v Raja (1966) E.A. 313.
9. British Railway Board v. Herrington (1972) 1 All E.R. 749 at page 786.
10. In theory the defunct court of Appleal for East Africa was of the same view but in practice, the contrary.
11. (1955) 22 E.A.C.A. 62
12. Ibid at page 64
13. (1958)36 Canadian Bar Review 175 at page 199.
14. Constitution of Kenya S62(3) Act No. 5 of 1969.
15. The Journal of the American Judicature Society. May 1978 vol. 61 page 479.
16. Sawyer G.F.A. ed. East African Law and social change. at page 296.
17. Common Law in the Sudan. See generally for the position of the judiciary today and the changes therein by Mustafa Z.
18. Ibid.
19. Gower. L.C.B. Indepedent Africa.
20. See n. 5 (Supra)
21. Setalvad, M.C. The Role of English Law in India at page 58.
22. Ibid at page 61.
23. Ibid.
24. Twinning, W.L. The place of customary law in the National Legal Systems of East Africa. (Chicago, 1964)
25. Constitution of Kenya No. 5 of 1969 Section 77(8).

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