

Vorträge, Reden und Berichte aus dem Europa-Institut / Nr. 83

herausgegeben

von Professor Dr. Dr. Georg RESS
und Professor Dr. Michael R. WILL

Professor B. A. RWEZAURA
Ph. D. (Warwick), LL.M. (Harward)
Faculty of Law
University of Dar es Salaam

STATE LAW AND CUSTOMARY LAW
– Reflections on their Relationship in Contemporary Tanzania –

Vortrag vor dem Europa-Institut der Universität des Saarlandes

Saarbrücken, 3. Juni 1987

1. INTRODUCTION

The recent Tanzania Court of Appeal decision in *Maagwi Kimito v. Gibeno Werema* (C.A. Civ.App. No. 20/84) has brought back to the stage with a particular sharpness the issue of the relationship between customary law and state law in contemporary Tanzania. The relevant part of the decision which this paper is concerned with states that "the customary laws of this country now have the same status in our courts as any other law, subject only to the Constitution and to any statutory law that may provide to the contrary."

The above cited case involved the question of whether courts are obliged to apply a customary rule which requires a sole heir to pay all the debts of the deceased irrespective of the time such debts became due and of the amount of assets actually inherited. In this case the relevant debt was in form of 36 head of bridewealth cattle which a widow who was a sole heir to her deceased husband was ordered by a local Primary Court to refund to the claimant. The applicable customary law was that of the Kuria people and the basis of the claim was that the sole heir was liable to discharge her late husband's debts.

The widow appealed to the District Court where the decree of the Primary Court was upheld. On second appeal to the High Court it was held that her liability as a sole heir to pay her late husband's debts under Kuria customary law should be interpreted to exclude future debts based on unknown events such as divorce. The claimant then successfully appealed to the Court of Appeal where the decision and order of the District Court were restored. The Court of Appeal held that under Kuria customary law, the heir is liable to pay all the past and future debts of the deceased notwithstanding the amount of assets inherited by such heir. Referring to an earlier High Court decision where a similar customary rule was disappplied on the ground that it was repugnant to natural justice,¹ the Court of Appeal noted that at the time of that decision (i.e. in 1963) the High Court had power to disregard any customary rule which it considered to be repugnant to natural justice or morality but such power had now

¹ See *Abdalla Kombe v. Said Leverl* (1962) D.A.L.C. Vol. IX p. 11.

been removed (as from 1964) by the Judicature and Application of Laws Ordinance (Cap. 453).

At first glance this decision appears to be uncontroversial as it seems merely to require the High Court and subordinate courts to observe and apply the statutory scheme which regulates the formal relationship between customary law and state law. However, having regard to the fact that some of our customary laws are unwritten and that those which are written are every passing day becoming more obsolete and are for the most part developed through innovative application by the High Court, one will certainly be anxious to reflect upon the possible implications of this decision for the development of customary law.

2. THE CONTEXT OF CUSTOMARY LAW

Tanzania, like many other African states, is a plural society. It has within its borders many ethnic and religious groups governed by differing customs and traditions. This pluralistic character of the country appears clearly in the content of the legal system which recognises as well as protects these various group identities.

But Tanzania is also a young nation and many of its peoples, while retaining their ethnic identities, also see themselves as Tanzanians. Furthermore, economic and social changes which are closely associated with colonial capitalism continue to transform many communities throughout the country. The Tanzanian leadership recognises this fact of change and while it remains committed to the protection of its people's cultural and religious freedom,² it also seeks to move the country towards the road of national integration and economic development as a modern nation state and a respectable member of the world community. There is therefore a conflict between the desire to protect the multiple identities of the people and the need to accommodate the effects of socio-economic change and to build a modern nation.

² See Articles 19 and 20 of the Constitution of the United Republic of Tanzania (1977).

This contradictory relationship between the two objectives appears also at the level of the legal system and constitutes an important and enduring element of the relationship between state law and customary law. This relationship can be examined at two levels. The first relates to the statutory provisions on choice of law and jurisdiction of courts and the second refers to the interaction between the two legal systems in court practice and the extent to which they are capable of influencing one another.

Yet the content of customary rules is disputable and appears to differ with the context in which it is asserted. In interpersonal disputes located outside state courts, the content of a rule is negotiable and is worked out on case by case basis through a process of bargaining and dispute settlement. This has been one of the major elements of customary law and has been widely recorded by ethnologists (White 1965: 86 ff.).

However, where a rule of customary law is proved in evidence in a state court or written down in form of a statute, its content assumes a different character. It becomes rigid and precise and takes on the quality of statutory provisions as a form of state law (Tanner 1966: 105 ff.; Twining 1964; Woodman 1983, 1985).

Economic and social changes have added to the uncertainty of customary law by creating conditions conducive to the challenge of certain customary rules by some individuals. As a response to this challenge, litigants have tended to assert the content of customary rules in a more rigid form usually as a defensive posture (Chanock 1987; Eekelaar 1987; Woodman 1987). Litigants also have come to realise that, if stated in a form considered acceptable to the state court, a customary rule has a higher chance of acceptability. But equally, this strategic behaviour of certain litigants has given rise to the assertion of "traditional rights" in non-traditional contexts (Rwezaura 1983, 1985).

The High Court of Tanzania has, since independence, been assisting in the development of customary law through cases. This function of the High Court has been of a two-fold character. On the one hand it tries to resolve competing interpretations of customary law between litigants and to make sense of some of the more crude versions of the written customary law. On the other hand, it has to see that its decisions are in accord with the general goals of the legal system (Cf. Sawyerr 1977).

This balancing function of the superior court, in a fast developing society such as Tanzania, has tempted many judges to disregard certain customary rules which appear to be obsolete and no longer reflecting the social conditions of the community. But in so doing they have had to ignore the statutory scheme which requires courts to apply customary law where it is applicable and not in conflict with any written law. It is in this context that the Court of Appeal decision in *Maagwi Kimito* becomes significant and is therefore considered to be of general importance to the legal system.

3. STATUTORY PROVISIONS GOVERNING THE APPLICATION OF CUSTOMARY LAW

The formal relationship between customary law and statutory law is set out in section 9 of the Judicature and Application of Laws Ordinance, hereinafter called JALO (Cap. 453), and section 3(1) of the Interpretation and General Clauses Act (No. 30/72). Section 9(1) of JALO provides that customary law shall be applicable in certain specified cases. These include a) civil cases arising between members of a 'customary law community'; b) cases relating to the personal status of a member of a customary law community or to his/her succession; and c) cases where, because of the connection of a relevant issue with a customary right or obligation, the court considers it appropriate to treat the defendant as a member of a relevant customary law community.

The test for membership in such a community is based on the way of life and this has meant in practice that a Tanzanian of African descent is considered *prima facie* to belong to a specific customary law community until the contrary is proved. It is permissible for a person to cease to be a member of one community "by reason of his adoption of the way of life of some other community" (s. 9(2)(b) JALO). However, mere absence from one's community shall not be treated as evidence of opting out of a given customary law community unless other evidence points to that fact.

As membership of a customary law community is not defined in racial terms as in colonial times, any person resident in Tanzania can become a member of a customary law community either generally or for specific

purposes. But as noted above, in the latter case, there may be no presumption as such and a "way of life" test may have to be passed by a litigant seeking to have customary law applied to him/her.

Notwithstanding the foregoing, the application of customary law is excluded where it appears to the court that from the nature of the particular act or transaction or manner of life or business, such matter is to be regulated otherwise than by customary law.

Customary law is defined by section 3(1) of the Interpretation of Laws and General Clauses Act (No. 30/72) as:

"any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African community and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under s. 9 A of the JALO, 1961 and references to 'native law' or to 'native law and custom' shall be similarly construed.

Tanzania's statutory definition of customary law was first enacted in section 2(1) Interpretation and General Clauses Ordinance (Cap. 1), it was later amended by the Magistrates' Courts Act (No. 55/63, s. 9 A) and subsequently re-enacted in section 3(1) of the Interpretation of Laws and General Clauses Act. There are two constituent elements which are specific to Tanzania's type of customary law and feature in its definition.

The first element is expressed by the words "rules .. established by usage in any Tanganyika African community and accepted by such community in general as having the force of law". This element represents a source of customary law derived from the people's social interactions and, so far as can be ascertained, it represents people's initiative as makers of their own law. The importance of this element is that where the unified version of customary law is either silent or vague, courts are entitled to apply this element of customary law.³

The second element represents the results of the codification of customary law project completed in 1963. The object of the exercise had been to record, unify and modify the major customary laws of the patrilineal Bantu peoples of mainland Tanzania. This project resulted in the publication in

³ See *Mwambopo Mwaizenda v. Lazzaro Mwakanjuki* 1976 LRT n. 60.

1963 of the Declarations of Customary Law governing the law of persons, inheritance, wills and guardianship of children.⁴

The test for applicability of customary law is found in the proviso to s. 9(3) of the JALO which states that "the court *shall not apply any rules or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disappplied or superseded by any Ordinance or Act of Tanzania...*". Therefore, where any rule of customary law conflicts with any written law, the latter shall prevail.

The test for applicability of customary law which is outlined above differs from the one applied during the entire colonial period. As noted already in the introduction, the law previously required the High Court *to be guided by native law so far as such law was applicable and was "not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance"* (Art. 24 Tanganyika Order in Council 1920). This clause came to be known in academic legal literature as "the repugnancy clause" (Read 1972: 167) and is the authority or power which the Court of Appeal in *Maagwi Kimito* declared to have been taken away from the hands of the judges by the JALO.

Although most of the civil cases in which customary law was applicable were litigated in the local courts, a separate judicial system having primary jurisdiction to apply customary law to Africans only, yet in a sufficient number of occasions, particularly in criminal appeals or in non-customary civil litigation between Africans, the High Court had an opportunity to test customary law against the repugnancy clause. In a number of cases the colonial High Court refused to apply certain customary rules or practices on the ground that they were repugnant to justice and morality, as understood in European sense (Sawyer 1973). This rather arrogant and patronising attitude of the colonial judiciary has been rightly criticised by many academic lawyers. It is hardly surprising that the dissatisfaction with the manner some colonial judges treated customary law provided an incentive for the new leadership to exclude the repugnancy clause from the JALO and to make speedy efforts for the recording of customary law.

⁴ See Local Customary Law (Declaration) Order G.N. 279/63; Local Customary Law (Declaration) (No. 4) Order G.N. 436/63.

Whereas the recording of customary law carried with it a nationalist flavour seeking to restore to customary law its proper place in the legal system of an independent state, the demands of national integration, social justice and development required not only the unification of these customary laws but also their modification.

Unfortunately however, the removal of the repugnancy clause from the statute book was not followed by an active and regular process of modernising customary law and of keeping it up to date with the changing times. Moreover, there was at the time little knowledge about the nature of customary law and the special problems of its application in a modern legal system. These problems came to be faced by the High Court at a time when there were no clear statutory powers to disregard a rule of customary law on the ground that it was obsolete or inequitable. I give below some examples of how courts coped with these problems.

4. CUSTOMARY LAW: A "REINLESS HORSE"?

"Speaking for myself", noted the late Mwakasendo Ag.J. (as he then was), "customary rules are like a reinless wild horse which only the expert horseman can mount and control; but left to the uninitiated it can do deadly harm". The late Justice of Appeal saw it as the historical duty of superior courts "to assist the growth and promotion of equitable customary rules", noting that "courts would be failing totally in [this] duty if [they] were to abide without reflection or common sense by the unchanging ... traditions of the past ...". These views were given in a case involving a claim for refund of bridewealth following the dissolution of a long-lasting marriage.⁵

In another case a compensation claim for maintaining the appellant's seventeen year old daughter was allowed by the High Court. The claimant demanded a sum of TShs. 10,800 based on a figure of TShs 600/- per

⁵ *Mbaruku v. Chimonyogoro* (1971) H.C.D. 406.

year.⁶ The girl's father refused to pay, insisting that the respondent was, according to Sambia customary law, entitled only to one cow called mtonge. This, he said, was the customary gift for a person who looks after one's child. After considering all the relevant evidence, Chief Justice Georges noted that the court did not seek to interfere with the customs of any particular ethnic group in Tanzania but it wanted to "ensure that any customary practice [did] not operate unfairly against any party". The Chief Justice noted that the Sambia customary law which recognises one cow as being sufficient compensation for bringing up a child "might have been a very good custom within the tribe when it came into operation, but ... that must have been a very long time ago ...". Georges C.J. stressed that in contemporary Tanzania "no parent could bring up a child to the age of seventeen, and also make provisions for the child's education, on the sum of TShs. 150.⁷ What must therefore be done", he advised, "is to face the facts as they are rather than take shelter under an old customary practice."

Another judge, referring to the Chagga customary law which excludes an only daughter from inheriting her father's estate, Saidi J. explained that the rule was intended to keep clan land within the control of the clan by removing the possibility of such property falling into the hands of a non-clan member such as the husband of a female heir. He thought that the rule was good in traditional times when individuals had no opportunity to acquire personal property outside the clan. But if applied in modern circumstances the rule would create a loophole for underserving clansmen to enrich themselves. Such people, he noted,

"would anxiously await the death of their prosperous clansman who happened to have no male issue and, as death occurs, they immediately grab the estate and mercilessly mess up things in the dead man's household, putting the widow and daughters into terrible confusion, fear and misery."

⁶ Exchange rate for Tanzania Shilling is now (June 1987):
TShs 33 : 1 DM.

⁷ The sum of TShs. 150 was the official price of one cow set by Rule 11 A of the Local Customary Law Declaration, G.N. 279/63, which is in theory applicable even today when the price of one cow is about TShs. 3,000.

Another reason why Saidi J. felt bound to disregard this particular rule of customary law was due to its discriminatory effect. He noted that "in Tanzania as in all other places in Africa ... the idea of equality between men and women had gained much strength", and added that distinctions between men and women in various spheres of African traditional life were based on considerations "which have practically no relevance to the modern ways of life".⁸

The late Judge Maganga also thought that the Kuria customary rule which holds a father liable for the torts of his adult son "is repugnant to reason and natural justice". He therefore refused to apply it.⁹

Yet another judge, while considering a customary rule of the Kwavi people which entitles a widow to a token compensation if expelled from her deceased husband's estate by the heir, Mwakibete Ag.J. (as he then was) stated that

"an able person who is enjoined by customary law to maintain his step-mother cannot be encouraged to flout his obligation by his invidious acts unrestrained, for otherwise the particular customary law which is supposed to be inviolable to the members of the tribe will, naturally, become both unreasonable and meaningless. [In such cases the High Court] would step in to modify customary law".¹⁰

The foregoing extracts represent a few of the more outspoken opinions of judges regarding the applicability of customary law. They show the extent to which parties manipulate rules, use tradition and kinship relations to gain certain advantages or to escape from certain obligations. This strategic behaviour of parties, to which reference has already been made in this paper, is closely related to the rapid change in social and property relations. This change challenges the basis of maintaining rules which are no longer part of the daily experience of the people. It also forces judges to play the mediatory role between various litigants who present to courts competing versions of "customary law".

⁸ *Ndewawiosia d/o Ndeamtzo v. Imanuel s/o Malasi* (1968) H.C.D. 127, also cited at pp. 204-209 in James & Fimbo 1973.

⁹ *Mariba Wanyangi v. Romara Romara* 1977 LRT n. 7.

¹⁰ See *Sembetwa Ndyatuya v. Maria Kisukari*, Dar es Salaam High Court (PC) Civ.App. No. 51/73.

Yet despite the overwhelming justification to ignore certain customs which are unjust or obsolete, the statutory provisions require courts to apply customary law where it is applicable and is not inconsistent with written law. They are not to reject a customary rule merely because it is repugnant to "justice or morality". It is this legal position which the court of Appeal in *Maagwi Kimito* has reiterated by reminding all the Courts including the High Court to observe.

Looking at this entire development in the law from a distance makes one curious as to why the High Court has consistently ignored the statutory provisions in favour of a more realistic approach to the problem of applying customary law. There are three possible explanations.

The first is that some High Court judges seem to be unaware that the repugnancy clause has been removed from the statute and therefore feel that they still have such powers. This view is supported by their occasional use of the repugnancy formula in certain cases.¹¹ Unfortunately, in many of these cases where customary rules have been clearly established and openly rejected by the court, there has not been much discussion on the statutory provisions and their relevance to the decisions to apply or to reject customary law.¹²

The second explanation is that the High Court has considerable discretion to determine the applicable rule of customary law where the lower court's records show any dispute or uncertainty as to the existence of any customary law. Section 37(3)(d) of the Magistrates' Courts Act states that

"where there is any dispute or uncertainty as to any customary law, whether by reason of anything contained in the record of the proceedings in or before any lower court which has exercised jurisdiction in the case, the grounds of appeal, or otherwise, shall not be required to accept as conclusive or binding any evidence contained in the record but shall -

(i) in any case of dispute, determine the customary law applicable, and give judgement thereon, in accordance with what it conceives to be the best and most credible opinion or statement of such law, being an opinion or statement which is

¹¹ See for example *Mtatiro Mwita v. Mwita Marianya* (1968) H.C.D. 82 and other cases cited in this paper.

¹² Cf. *All Zanda v. Mohamed Ndago* 1973 LRT II. 16.

consistent with the provisions of such customary law as are undisputed; and

(ii) in any case of uncertainty, determine the appeal, and give judgement thereon, in such a manner as accords as near as may be to the provisions of such customary law as are established and certain."

These provisions give the appellate court sufficient discretion to modernise customary law. They have power to decide the mode of establishing customary law. They have authority to take more evidence on any rule of customary law but are not bound to accept such evidence as conclusive. They can otherwise take judicial notice of a rule or follow previously decided cases.

Eugene Cotran had expressed the view that the codification of customary law and its coming into force in 1963 would render the above mentioned provisions inapplicable, "since the codified version of the customary law [would] apply" (1965: 113). However, this prediction has not come true because the provisions giving the aforesaid discretion to the appellate courts were not repealed and to date the practice of the courts shows that the Declaration is considered to be one among a number of sources of customary law.¹³

This power of the High Court has been used in certain circumstances to enable the court to select the more acceptable version of customary law proposed by either side.¹⁴ It is possible therefore that the High Court considered itself empowered to reject certain customary rules even though no discussion appears in the judgement to suggest this alternative approach.

The third explanation is that until 1979 when the Court of Appeal was formed the High Court was in effect the highest national court.¹⁵ This strong position gave the High Court a sense of freedom to develop customary rules and the power to give a final opinion on certain issues

¹³ See for example *Gati Marwa v. Kisiri Kubyo* 1977 LRT n. 13 and *Mwambope Mwaitenda v. Lazaro Mwakanjuki* 1976 LRT n. 60.

¹⁴ See obiter in *Mtatiro Mwita v. Mwita Marianya* (1968) H.C.D. 82.

¹⁵ See Sawyerr & Hiller (1971).

affecting the legal system. This also explains why it took over a decade before it was pointed out that the provisions of the JALO were not being strictly observed. But now the High Court has to look up for guidance from the Court of Appeal of Tanzania and the decision in *Maagwi Kimito* appears to provide such guidance.

It is beyond debate to state that the High Court is bound to follow the decisions of the Court of Appeal even if following them will not likely lead to the best results. However, in the next part it is argued that the High Court has sufficient power to influence the development of customary law without having to disregard the provisions of the JALO.

5. SOME POSSIBLE APPROACHES TO JUDICIAL CONTROL OF CUSTOMARY LAW

In the preceding section I noted how the High Court has approached the complex issue of the relationship between state law and customary law. It is clear from this discussion that the particular circumstances of Tanzania, i.e. its economic, social and legal contexts, have compelled the High Court to take a more active role in modifying customary law. To a large extent this role of the High Court has been rendered unavoidable by the legislature's failure to bring up to date or abolish certain customary practices. One would have expected that the passing of the Law of Marriage Act in 1971 would have been followed soon enough by a comprehensive law governing the status of the child as well as a uniform law of succession.

However, in view of the fact that justice has to be administered and must not wait for the slow hand of the legislature, and in view of the realisation that the provisions of the JALO are not as permissive as originally thought, some other approaches to judicial control of customary law have to be considered.

The first is that from the date of the Court of Appeal's decision High Court judges will have to be more careful about the applicability of customary law. They will have to state the exact legal position as to whether or not customary law applies in a given case and further whether or not a particular customary rule has been established or not. If such

rule has been clearly established and is applicable to the case, they will have to apply it subject of course to its consistency with any written law.¹⁶ In such cases if a judge thinks that a particular customary rule is out of date or oppressive, he/she will have to make this point clear in the judgement in the hope that it will be picked up by the legislature.

The second approach is that, because parties are likely to be offering different interpretations of customary rules and the High Court has wide discretion, as an appellate court, to determine the manner of ascertainment of customary law, it is probable that judges will continue to control the applicability of customary law and to modify its content. At this juncture it should be noted that judges will have to handle with care most of the High Court decisions handed down from 1963 to the present in as much as these decisions purport to disregard the provisions of section 9 of JALO governing the applicability of customary law.

The third approach which could prove to be as effective is the constitutionality test. With effect from 1st March 1988 when the Tanzanian Constitutional provisions governing basic human rights, freedoms and duties come into force, it will be possible for the High Court to test certain provisions of statutory and customary law against the Constitution. Space does not permit me to discuss in detail the human rights provisions of our Constitution but one can say that these new powers of the High Court, if used effectively, provide enough scope for judicial control of customary law. It is also anticipated by section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 (No. 16/84) that with effect from March 1988 courts will construe existing law, including customary law, "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Constitution".

¹⁶ Some room for flexibility still exists here and the courts can test the consistency of customary law with the proviso to s. 9(3) of JALO which permits courts not to apply a rule of customary law if such rule is impliedly abolished by any written law.

6. CONCLUSION

This paper has discussed the legal problems of applying customary law in a changing society. It has argued that this problem has been made more difficult by the failure of the legislature to keep abreast with changing social and economic conditions as well as the absence of clear statutory provisions empowering courts to modify customary law. If this paper has appeared to make a case for judicial control of customary law it is because at present there is no other realistic way the judges can be expected to do justice without having these powers.

It should not be supposed, however, that this is the best state of affairs. Certainly there are dangers of leaving the function of modifying customary law to the superior courts. The legislature is best suited to perform this function and one can only hope that this happens sooner than later.

• Acknowledgement

I would like to acknowledge the help of Dr. U. Wanitzek who kindly read through the draft of this paper and made many helpful suggestions and of Miss A. Diwisch who typed the script with admirable speed and accuracy.

BIBLIOGRAPHY

Chanock, M. 1985

Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia, Cambridge University Press, Cambridge.

_____ 1987

Neither Customary nor Law: A Case of Mistaken Identity. Paper Presented at the Regional Conference on Social Change and Legal Reform in East, Central and Southern Africa. University of Zimbabwe.

Cotran, E. 1965

Integration of Courts and Application of Customary Law in Tanganyika, *East African Law Journal*, Vol. 1, p. 108-123.

Eekelaar, J. 1987

New Law for Old - an African Dilemma. Paper Presented at the Regional Conference on Social Change and Legal Reform in East, Central and Southern Africa. University of Zimbabwe.

James, R.W. and Fimbo, G.M. 1973

Customary Land Law of Tanzania: A Source Book. East African Literature Bureau, Dar es Salaam.

Read, J.S. 1964

When is a Wife not a Wife? *Journal of the Denning Law Society*, Vol. 2, p. 47-75.

_____ and Morris, H.F. 1972

Indirect Rule and the Search for Justice. Clarendon Press, Oxford.

Rwezaura, B.A. 1983

Traditionalism and Law Reform in Africa. *Vorträge, Reden und Berichte aus dem Europa-Institut Nr. 17*. Universität des Saarlandes. Saarbrücken.

_____ 1985

Traditional Family Law and Change in Tanzania. A Study of the Kuria Social System, Nomos, Baden-Baden.

_____ 1987

Integration of Marriage Laws in Africa with Special Reference to Tanzania. Paper Presented at the Regional Conference on Social Change and Legal Reform in East, Central and Southern Africa. University of Zimbabwe.

Sawyer, G.F.A. and Hiller, J.A. 1971

The Doctrine of Precedent in the Court of Appeal for East Africa. Tanzania Publishing House, Dar es Salaam.

Sawyer, A. 1973

Customary Law in the High Court of Tanzania, *Eastern Africa Law Review*, Vol. 6, pp. 265-284.

_____ 1977

Judicial Manipulation of Customary Family Law in Tanzania, in: S.A. Roberts (ed.), *Law and the Family in Africa*, Mouton, The Hague.

Tanner, R.E.S. 1966

The Codification of Customary Law in Tanzania, *East African Law Journal*, Vol. 2, pp. 105-116.

Twining, W. 1963

The Restatement of African Customary Law: A Comment, *Journal of Modern African Studies*, Vol. 1, No. 2, pp. 221-228.

_____ 1964

The Place of Customary Law in the National Legal Systems of East Africa. Chicago University Press, Chicago.

White, C.M.N. 1965

African Customary Law. The Problem of Concept and Definition, *Journal of African Law*, Vol. 9, pp. 86-89.

Williams, D. 1986

The Recognition of 'Native Custom' in Tanganyika and New Zealand - Legal Pluralism or Monocultural Imposition?, in : P. Sack/E. Minchin (eds.), *Legal Pluralism. Proceedings of the Canberra Law Workshop VII*, Canberra, pp. 139-154.

Woodman, G. 1985

Customary Law, State Courts and the Notion of Institutionalisation of Norms in Ghana and Nigeria, in: A.N. Allott/G. Woodman (eds.), *People's Law and State Law. The Bellagio Papers*, Foris Publications Dordrecht, pp. 143-163.

_____ 1987

Unification or Continuing Pluralism in Family Law. Past Experience, Present Realities, and Future Possibilities in Anglophone Africa. Paper Presented at the Regional Conference on Social Change and Legal Reform in East, Central and Southern Africa. University of Zimbabwe.

Court in Kenya Allows Tribe, Not Widow, to Bury Lawyer

By SHEILA RULE

Special to The New York Times

NAIROBI, Kenya, May 15 — A Nairobi court ruled today that the body of one of Kenya's leading trial lawyers could be buried in his ancestral homeland, ending a legal battle that underscored the powerful force of tribalism in Africa and its intricate system of rights and beliefs.

The Court of Appeal ruled that the body of the lawyer, S. M. Otieno, which has remained in Nairobi's mortuary for more than 140 days during the legal dispute, could be given to his fellow Luo tribesmen for a traditional burial in his homeland near Lake Victoria in western Kenya. Members of the lawyer's Luo clan had argued that without a proper tribal burial, the ghost of Mr. Otieno would haunt and torment his survivors.

Mr. Otieno's widow, Virginia Wambui Otieno, a member of the rival Kikuyu tribe, had insisted in court that her husband led a modern way of life, disdained tribalism and divorced himself from Luo customs. She fought to have a non-tribal burial for him at his farm near the Ngong Hills on the outskirts of Nairobi.

The ruling, by three judges in the Court of Appeal, represented to some Kenyans a victory for African customary law over Western modernity. The judges said it was impossible for an African to disassociate himself from his tribe and its customs, particularly if he was a member of a tribe such as the Luo, who trace descent and kinship through the father rather than the mother.

As a result, the judges said, Mr. Otieno was bound by his tribe's customs, and his clan had the right to arrange his burial.

The court's 26-page decision suggested, however, that Parliament consider legislation that takes into account the burial wishes of the deceased and their widows. The judges said tribal elders owed it to "themselves and their communities to insure that customary laws keep abreast of positive modern trends."

The lawyer representing the Luo clan in the case, Richard Otieno Kwach, said: "This is a very fantastic ruling by the court. This goes a long way to confirm the fact that a woman

cannot be the head of an African family. Customary law must prevail. I always knew from the start that common law was irrelevant in this case."

Mrs. Otieno's intertribal marriage to her husband in 1963 was one of the first between Kikuyu and Luo in Kenya and at the time was viewed as shameful. She had portrayed the court battle, which touched on the role of women in modern Africa, as a test case for women's rights in Kenya.

After the judgment, which ended one of Kenya's longest court cases involving a dispute over burial, Mrs. Otieno told reporters that she would take the case to the International Court of Justice in The Hague.

Attention Focused on Trial

"There is discrimination in Kenya, contrary to the United Nations convention for the elimination of discrimination against women, which Kenya ratified in 1984," said Mrs. Otieno, a pioneering feminist who was treasurer of an international women's conference held here in 1985 by the United Nations.

The trial, which began in January, gripped the attention of a nation whose political leaders publicly deplore tribal divisions, but exploit them to seek or maintain power. Banner headlines in the three English-language daily newspapers accompanied full transcripts of the court proceedings. Two of the papers published rare special editions after the ruling today.

Hundreds of Luo tribesmen from Mr. Otieno's clan crowded around the courthouse in downtown Nairobi and danced and sang after the court's ruling.