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### Book Review. The Doctrine of Precedent in the Court of Appeal for East Africa by G.F.A. Sawyerr and J.A. Hiller

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## BOOK REVIEW

### THE DOCTRINE OF PRECEDENT IN THE COURT OF APPEAL FOR EAST AFRICA. By G. F. A. Sawyerr and J. A. Hiller

Tanzania Publishing House Limited, Dar es Salaam, 1971, 96 pp.

Three events of the past decade have invited a careful re-examination of the operation of the doctrine of *stare decisis* in the courts of East Africa: the achievement of independence by the former British dependencies, the subsequent abolition by each of appeals to the Privy Council, and the decision of the British House of Lords in 1966 to announce its freedom from the extremely stringent adherence to precedent to which its former theoretical position committed it. Not surprisingly, the Court of Appeal for East Africa has recently addressed itself at length and on similar occasions to the claims for adherence to precedent which it will honour as the ultimate appellate court for the three sovereign countries.

The brief study by Sawyerr and Hiller, both former members of the Faculty of Law in Dar es Salaam is timely. Following an introductory discussion of the common law doctrine of precedent, the authors consider the historical status in East Africa of decisions of the Privy Council and of the courts of England and then, in a separate chapter, examine the general rule enunciated by the Court of Appeal with respect to its own former decisions, as well as the usual exceptions to that rule. The two final chapters are devoted to a more jurisprudential analysis of the actual treatment of earlier decisions within the scope of freedom provided by traditional theory and to an extended statement of the authors' own views on the appropriate role of the doctrine of precedent in the legal orders of East Africa.

The decision of the Court of Appeal in *Dodhia v. National & Grindlays Bank Ltd.*, [1970] E.A. 195, leaves a substantial part of the present work with only historical interest. In that case the Court made clear that it is not bound by the decisions of any foreign tribunal and that while it will normally regard its own prior decisions as binding it will feel free to depart from them in both civil and criminal cases "when it appears right to do so". In other words, the Court asserts for itself the same measure of freedom within the precedential system of East Africa as is now engaged by the House of Lords in the English Legal System.

The decision in the *Dodhia* case was announced after the draft of this study had been completed. It is of interest, however, that the authors point out in a footnote that their draft was read and commented upon by all members of the Court before the *Dodhia* appeal was heard, that counsel in the case also received copies of the draft for use in the preparation of his arguments, and that a number of the views urged in the study were adopted by the Court in the *Dodhia* decision. Certainly the authors make clear their own objection both to the extreme reverence shown by the East African courts towards all English decisions and to any version of the doctrine of precedent which denies to the higher courts freedom to reform the law, in the light of either perception of prior error or changed circumstances, other than through the introduction of artificial distinctions.

The principal virtue of the book survives the Courts' adoption of its main theoretical premises. For in fact the authors are relatively little concerned with announced theory; in the tradition of the American realists they are interested in what the Court of Appeal in fact has done. Thus, they largely discount the refinement emphasized by earlier studies which depended on distinctions between the decisions of the Privy Council and those of other English Courts or on whether the earlier decision was before or after the relevant reception date in East Africa. Their analysis leads inevitably to the view stated candidly in 1968 by Sir Charles Newbold, then President of the Court of Appeal: "There was a tendency, very understandable in the political circumstances then existing, to regard almost any British decision of a superior court as virtually binding." If the realist methodology of the authors is pursued, it may well appear that the victory for flexibility and judicial creativity, formally announced in *Dodhia*, is unlikely to precipitate any great judicial activism in reshaping the law. Perhaps it is captious to observe that even in the *Dodhia* case itself, after rigorously asserting the nonbinding quality of the earlier decision of the Privy Council, the Court nevertheless decided to follow it, despite a clearly stated conviction that it was wrongly decided. Subsequent decisions of the Court do not reveal any significantly reduced frequency in the citation of English decisions or any markedly greater disposition to re-examine traditional doctrine for appropriateness to the circumstances and aspirations of the East African countries. Definitive judgments on the extent to which the Court of Appeal will utilize its new freedom would, however, be premature. Its judicial labours over the coming years will provide the necessary material for further illuminating studies.

In a work of obvious merit it is regrettable to note defects that detract from the readability and possibly the impact of the book. Its organization products unnecessary redundancies and prolixity and a more frequent use of conventional punctuation would have eliminated for the reader a series of awkward and puzzled pauses. More substantively, the prominence of the authors' own views will reduce the appearance if not the actuality of their scholarship. The book projects more the image of a reformer's zeal than scholarly objectivity. This vice, if such it is, appears relatively forgivable, however, to one who shares the authors' general perspective.

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