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AUTOCHTHONY: THE DEVELOPMENT OF LAW IN UGANDA*

FRANCIS M. SSEKANDI**

* This is the text of an address delivered at the Law Development Centre in Kampala, Uganda in July 1979, barely three months after the Ugandan Liberation Forces, composed of exiles and led by the Tanzania Defence Forces, booted Idi Amin out of Uganda. An interim government led by Yusufu Lule had assumed office and there was a lively debate in the air on the future of the Ugandan Constitution.

Historically, Uganda was ruled by the British as a Protectorate, from 1890 with a measure of internal autonomy for the inhabitants, through a series of "treaties" with the kings of the territories from which Uganda was carved. Thus, on attainment of independence in 1962, the country emerged as a federation of its constituent parts. The Constitution negotiated with Britain preserved the "autonomous" status of the Kingdom Governments of Ankole, Toro, Bunyoro, Buganda and to some extent Bosoga, all of which account for almost two-thirds of the country. In fact, for a brief period (1963-1966) the Kabaka (king) of Buganda also acted as President of the whole country. The Prime Minister, Milton Obote, had a skirmish with the Kabaka in 1966, resulting in the latter going into exile in Britain where he later died.

In 1966 Obote abrogated the 1962 Independence Constitution, abolished the kingdoms and in 1967 enacted a "Republican" constitution, with himself as President. In 1971 Obote was overthrown by Amin who continued to enforce the 1967 Constitution by special decree, with certain amendments to eliminate the requirement of presidential or parliamentary elections. On liberation in 1979, there were those who contended that Uganda's true constitution was the 1962 document. These discussions, however, became moot when in 1980 Obote returned to power. He is still the President. See May, *Uganda's Opposition Party Grows in a Window of Tolerance*, N.Y. Times, Oct. 14, 1984, § 4, at E5, col. 1; CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. Apr. 1983).

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INTRODUCTION

The topic for this discussion may sound baffling. The Oxford dictionary defines autochthon as one of the "earliest known dwellers in [a] country . . . [an] aborigin[e]," listing "autochthonous" as an adjective.¹ In parentheses, the same dictionary provides the Greek derivative of autochthon as meaning "sprung from the land itself." The expression is popularly used by jurists with regard to constitutional developments in the Commonwealth. We probably owe this to Wheare, who developed the theory of autochthonous constitutions.²

In the area of constitutional development, there are divergent views regarding the meaning of autochthony, particularly whether the steps taken by those countries which attempted to break with the mother country did indeed achieve the desired end of getting a constitution that was based firmly on the will of the people and not on the will of the colonial power. Anyone wishing to pursue this area of argument can find adequate food for thought in available legal literature.³

It is not only in the context of constitutional legal theory, however, that the term autochthony has importance. Today, the efforts of judges, rather than legislators, to make the law truly indigenous will be discussed.

The meaning herein for the term autochthony is "homegrown." In this respect, it is curious to note that Morris and Read thought that the 1962 Constitution of Uganda,⁴ though promulgated in Westminster, was autochthonous on the ground that it flowered by a gradual process over a long period. The discussion today will centre on the extent to which case law in this country and not the Constitution can be described as homegrown.

1. THE OXFORD ENGLISH DICTIONARY 573 (1970).

2. K.C. WHEARE, CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH (1960). Wheare's prediction that "[m]embers of the Commonwealth will, as a rule, take steps quite soon after they achieve their independence, through a constitution made in Britain, to embody that constitution and proclaim that independence in a document which they claim owes its validity and authority to no outside country or institution but to themselves alone," *id.* at 113, became almost a prophecy as one after another of the newly independent Commonwealth countries (e.g., India, Ghana, Uganda, Kenya, Tanzania and Zambia) declared themselves Republics. The disclaimer of the prophecy, asserting that the histories of the Republic of Ireland, India and Pakistan are exceptions, appears rather hollow today. See generally K. ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW (1966).

3. See generally K.C. WHEARE, *supra* note 2; K. ROBERTS-WRAY, *supra* note 2; F. BENNION, THE CONSTITUTIONAL LAW OF GHANA (1962); A.F. MORRIS & J.S. READ, UGANDA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS (1966) (volume 13 in a series on the British Commonwealth).

4. UGANDA CONST. of 1962.

SOURCES OF LAW

It is no accident that the 1967 Judicature Act⁵ lists among the laws to be administered by the courts the common law and doctrines of equity, expressions used in the colonial Order-in-Council of 1902. A fact of history is that Uganda was under colonial rule from 1900 and, until 1962, the courts administered laws deriving their authority from the colonial power. Upon attainment of independence, the 1962 Constitution was promulgated as a schedule to an Act of Parliament of the United Kingdom.⁶ One theory of autochthony would interpret such a constitution as foreign. Another view, advanced by Morris and Read, is that the 1962 Constitution was in fact autochthonous because its provisions preserved the African institutions, such as the Kingdom governments, which the British had found in place and used for internal administration purposes.

It is doubtful whether a sudden breach with a former legal authority, as advocated by some scholars, is necessary for a constitution to satisfy the criteria for autochthony. Those who argue for a sudden break ignore the need for gradual development which has made the common law a hardy plant in its native soil. One might even attribute the frequent revolutions that have swept through former British territories to jurists who poisoned politicians with the proposition that unless republican constitutions written in the country of origin were promulgated, the independence obtained from the colonial power would be a sham.

It is the failure to appreciate the need for balancing various pressure groups in the country and to reconcile them with modern democratic needs that brought about the 1971 coup d'état in Uganda.⁷ One wonders whether it is not the same ghost that haunts us even today. As I write, there appears to be a movement to rule this country without a constitution. Such a prospect raises mammoth legal implications, especially to purists who believe that the constitution is the *grundnorm* whence all laws flow. A legal vacuum might be worse than the worst days this country has ever known.

The other source of law in Uganda, in addition to imported law, is customary law. Unfortunately, the Judicature Act on its face appears only to deal with customary law in negative terms. Section 8(1) provides:

Nothing in this Act shall deprive the High Court of the right to observe or endorse the observance of, or shall deprive any per-

5. Judicature Act, 1967.

6. Uganda Independence Act, 1962, ch. 57, sched. 1.

7. See N.Y. Times, Jan. 27, 1971, at A3, col. 1.

son of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.⁸

The framers of the statute were probably right to treat customary law in this manner. Its efficacy does not depend on any statutory provision. Customary law is indigenous to our soil and flourishes and will continue to flourish whether or not attempts are made to kill it, as was notoriously the view of some jurists at the time of independence. Attempts have been made to incorporate it in statutes, e.g., adultery and elopement, which were codified in the Penal Code, and rules of succession in the Succession Act. The cases that go to court under the statutes, however, are but a drop in the ocean compared to the many others that are decided in the courts on the basis of the evidence of existing custom or solved under the mango tree, outside the judicial system, by elders administering customary law.

UNIFICATION OF COURTS AND ITS EFFECTS ON THE LAW⁹

It is commonly known that when Europeans came to Uganda they found well developed political and administrative organizations. One

8. Judicature Act, 1967, § 8.

9. A brief discussion of Uganda's judiciary follows. Under British rule there was a dual system of courts. The "Native Courts" were supposed to reflect the court system employed by the kings prior to British rule. These courts were presided over by chiefs and appeals went from the lowest chief to the highest (the King). They administered customary law and only had jurisdiction over Africans. Serious crimes (e.g., murder) and disputes involving non-Africans were left to the Magistrates' courts, presided over largely by British administrative officers, and the High Court, manned by British judges (lawyers that had made a successful legal practice elsewhere in the colonies or otherwise proved themselves as magistrates).

Upon independence the judicial system was integrated and made separate from the executive branch. Today there are:

(a) The Magistrates' Court Grades II and III, which exercise jurisdiction in minor civil and criminal cases with unlimited jurisdiction in customary law disputes. They are manned by respectable elders who have experience in other jobs, as chiefs or teachers, and have successfully completed a law course at the Law Development Centre.

(b) The Magistrates' Court Grade I and Chief Magistrate's Court are manned by trained lawyers. The Chief Magistrate serves as the judicial administrative officer of a District. He also hears appeals from the Magistrates' Court Grades II and III. Appeals from the Grade I Magistrate and the Chief Magistrate (both in exercise of original and appellate jurisdiction) go to the High Court.

(c) The High Court is a court of record (equivalent to the New York Supreme Court). It is manned by judges appointed from the Bar or the Lower Bench. It exercises unlimited jurisdiction in both civil and criminal cases.

such organization was the machinery for administration of justice. The chiefs and traditional elders held courts and dispensed justice to the people with provision for appeals to the highest ruler. The treaties concluded for the protection of Uganda by the British in 1890, 1891 and 1900 did not disturb this part of internal administration. In 1911 the traditional courts were given legislative stature, and these courts continued to enjoy a measure of independence from the High Court until 1964 when they were integrated in a unified courts system.

The unification of courts did not mean unification of laws. The imported law, in the form of statutes, common law and equity, is administered side by side with customary law. There is no guide as to which law prevails over the other except in two instances: where a statute is applicable it is supreme and where common law conflicts with equity the latter prevails. What if customary law applies to a given fact situation on which there is also abundant authority at common law? This question has been left to the courts to answer. Today specific instances will be explored to demonstrate how courts have dealt with the problem.

CONSTRUCTING A PATH IN A THORNY BUSH

It is notoriously true that with expatriates in every tier of courts except the lowest cadre of courts in this country, the law applied was invariably the imported one. Attempts by litigants to plead the aid of customary law met with frequent resistance. Perhaps this contributes to the dearth of reported cases on customary law in East Africa as opposed to West Africa. It is not until recently that we have started to read judgments making attempts, albeit negligible, to expound principles that our forefathers carried in their breasts and applied, without reference to books, to particular disputes.

I hope that the work begun will not be a seed on the rock but rather a bean in the fertile soil for which Uganda is world famous. Recent judicial decisions that grapple with the problem of building truly indigenous principles of law reflecting the beliefs and practices of the people are still very few, but effort has not been lacking. It will be clear

(d) The Court of Appeals (equivalent to the New York Court of Appeals) is the highest court in the land and exercises jurisdiction in (i) appeals from the High Court (in exercise of original and appellate jurisdiction); and (ii) constitutional questions—cases in which the interpretation of the Constitution is an issue (the Court exercises original jurisdiction in such cases directly or on referral from the High Court). See D. BROWN & P. ALLEN, *AN INTRODUCTION TO THE LAW OF UGANDA* (1968); E. HEYDON, *LAW AND JUSTICE IN UGANDA* (1960).

at the end of this talk, however, that the path through which the few have trodden has not been a bed of roses.

CRIMINAL LAW

The criminal law is primarily statutory, as opposed to the civil law, and in this area the courts are constrained from aligning judicial principles with the thinking of the people. The colonial power as well as successor governments administered a code of penal laws alien to the indigenous people, and the courts were happy to enforce them lock, stock and barrel. One area which has proved difficult, largely because of the way the code was worded, is provocation. Provocation is defined in section 188 of the Penal Code as follows:

any wrongful act or insult of such nature as to be likely—
 (a) When done or offered to an ordinary person; or (b) . . . to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.¹⁰

There was no secret concerning the colonial judges' view of provocation. They interpreted the section to mean an act which would deprive a man on the Clapham omnibus of his self-control. No thought was given to the reaction of the man on a village path or in Kisenyi with little or no possessions except a chicken or a goat. Consequently, two areas with regard to provocation proved difficult: witchcraft and thief beating. Would a man brought up as a Christian lose his self-control if threatened by witchcraft? Would a man in the English suburbs lose his self-control to the extent of taking another's life if his chicken were stolen? The answer to these questions was invariably no; the full rigours of the law were brought to bear on the "native." By the thousands, sons of our soil were hanged to stamp out the un-Christian practices. Unfortunately, only a few still manage to escape the noose.

A. Witchcraft

The best known case on witchcraft is *Eria Galikuwa v. Rex*.¹¹ In that case, when the threat of witchcraft was set up by the appellant as a defence, the Court responded:

In these territories self-defence as an answer or partial answer [provocation] to a homicide is governed by the principles of the English common law . . . so that it is difficult to see how

10. Penal Code Act, 1960, ch. 106, § 188.

11. (1951) 18 E.A.C.A. 175 (East African Court of Appeals Reports).

an act of witchcraft unaccompanied by some physical attack could be brought within the principles of the English common law.¹²

The courts persisted in rejecting the obvious fear which local people entertain of any person practising witchcraft, a fear which invariably leads to injury, sometimes fatal, in a desperate attempt to save one's life. The adamant refusal by the courts to appreciate what the local populace considers self-evident led the Tanzanian Judge Kwikima to observe: "Until all and sundry are rid of the age-old belief in magic our people will be condemned to death for holding such belief."¹³ Despite his castigation of the colonial attitude towards African beliefs, Judge Kwikima felt unable to depart from the established authority and convicted the accused of murder.

In *Uganda v. Gabriel Ojoba*,¹⁴ we had occasion to observe as follows:

It is not for me to pass judgment on the correctness of earlier decisions especially when they are decisions of the highest Appellate court in the land. But, I think, there was by far too much emphasis on eradicating the belief in witchcraft by the "Natives." The purpose of the Criminal law is to punish an individual for his wrongdoing and not to sacrifice a few in the hope of converting their community from beliefs, however primitive, which they hold so deeply. Criminal responsibility has always been individual.¹⁵

The accused persons in *Ojoba* were allowed the partial defence of murder by reason of belief in witchcraft and convicted of the lesser offence of manslaughter. In order to do this, the Court avoided interfering with established authority that the mere belief in witchcraft cannot amount to provocation. Had it been possible at that time, the best course would have been to overrule that line of cases which obviously is bad law. Instead, we found it more appropriate to devise another technique to treat the situation—lack of necessary intent. The law on malice aforethought was altered in 1970 so that the intention to kill is the primary *mens rea* to murder. Using that facility we held:

If a proper view of the law is taken as it stands today and as explained in the cases I have referred to, then there is no doubt

12. *Id.* at 179.

13. *Republic v. Juma*, (1974) E.A. 336, 338 (East African Law Reports).

14. High Court Crim. Session Case No. 260, slip op. (1975).

15. *Id.*

that before a person is convicted of murder, his actual state of knowledge and intent, which in all other cases determines his criminal liability must be established.¹⁶

It was our view then, and still is now, that a man who kills a suspected witch does so under a state of fear and confusion, to save his life or that of his close relatives. At that moment in time, he cannot be said to have intended to kill. The act of killing cannot, of course, be excused on that ground alone, but his belief in the actual state of circumstances at the time and his state of mind must be taken into account. The lack of necessary intent to commit murder reduces the offence to manslaughter.

There are, however, occasions when a belief in witchcraft is so intense as to induce in the believer an insane delusion. In a forward looking decision, Judge Lyon accepted the defence of insanity on that ground, as an escape from the harshness of the *Galikuwa* case, in *Rex v. Magata s/o Kachehakana*.¹⁷ *Kachehakana* was rarely followed, but it was revived recently in *Okello s/o Kamuleti*.¹⁸ In that case the appellant killed the deceased because he suspected her of bewitching him over a period of time. He showed signs of mental illness after committing the offence and there was evidence of an insane delusion amounting to insanity. We observed:

His [appellant's] explanation that he had killed a wizard who was bewitching him and his child, a fact which on the evidence could not have been true, was an indication that he was labouring under an insane delusion that both of them were being bewitched. His mind must have been so affected by that delusion that he was incapable of understanding what he had done.¹⁹

B. Thief Beating

In a country like Uganda where property is difficult to acquire, with no system of property insurance for the rural people or old age pensions for the peasants, particular importance is attached to the little one owns. It is not uncommon for suspected thieves to be vengefully killed by mobs, even after arrest. The situation is aggravated by a poor, if not nonexistent, policing system in the villages. Cases of theft are rarely investigated, and even when a thief is caught in the criminal act and arrested, the sophisticated rules of evidence often defeat a convic-

16. *Id.*

17. (1957) E.A. 330.

18. Uganda Court of Appeals Crim. App. No. 2, slip op. (1978).

19. *Id.*

tion. It is in fact not unusual for a chief in the area to arrest a suspected thief and hand him over to the police, only to find him back in the village the following day. The police may not bring charges without water-tight evidence, or sometimes the suspect merely bribes his way out. These factors anger the local people and vigilante groups are formed for self-protection. No wonder that when an alarm is raised and a thief arrested, justice is meted out on the spot, often resulting in death. Surely, the killing is unlawful, but does it amount to murder? Our law has no ready answer but from the time the colonial power established its laws here, those arrested for thief beating have faced the gallows. *Dafasi Magayi v. Uganda*²⁰ is just one of a line of cases where the courts have taken the attitude that the offence is murder. In that case, the trial judge, having reviewed the relevant authorities, stated: "It seems clear to me that whether the deceased was rightly suspected or not of being a thief, any person who was identified as having taken part in that beating must be guilty of murder."²¹

Due to differing judicial views on the matter the law has been amended. Section 186 of the Penal Code²² re-defined malice aforethought. In *Uganda v. Owortho*²³ we observed:

Section 186 was amended in 1970 by Act 29/70 so as to eliminate causing bodily harm as part of the definition for malice-aforethought. Magayi's case was decided before the amendment to that section and it is my view that that case is no longer authority for the general view that where a group of people jointly beat a suspected thief using blunt weapons, as a result of which the suspected thief dies of multiple wounds, they are guilty of murder.²⁴

The accused persons in *Owortho* were convicted of manslaughter. The view expressed therein is gradually gaining ground. One day it may prevail, but in any event each case must invariably be decided on its particular facts.

EVIDENCE

The rules of evidence were imported in this country via the Indian subcontinent. As a result, the principles contained in our Code do not always coincide with the common law, although it is to that body of

20. (1965) E.A. 667.

21. *Id.* at 670.

22. Penal Code Act, 1960, § 186.

23. Crim. Session Case No. 261, slip op. (1975).

24. *Id.*

law that the courts frequently turn for guidance. The temperament of Ugandans is different, however, and problems have cropped up with regard to the sanctity of the oath and the ability to compel witnesses to testify. Today only the ability to compel spouse witnesses to testify will be discussed.

Section 119(1) of the Evidence Act, before it was amended in 1971, stated: "Where a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last-named person shall be a competent and compellable witness on behalf either of the prosecution or the defence."²⁵ Although the section is clear in that it refers to polygamous marriages, the courts extended it to cover all non-Christian marriages on the ground that all such marriages are potentially polygamous. The effect of this interpretation was to exclude almost all African marriages from the privilege of non-compellability of the spouse witness whether or not the particular person had one wife. In the famous case of *R. v. Amkeyo*²⁶ the presiding judge observed:

Women so obtained [under customary law] by a native man are commonly spoken of, for want of a more precise term, as "wives" and as "married women," but having regard to the vital difference in the relationship between the parties to a union by native custom from that of the parties to a legal marriage, I do not think it can be said that the native custom approximates in any way to the legal idea of marriage.²⁷

More from embarrassment than articulated legal principle, an amendment to the section was introduced in 1971 due to judicial concern with the discrimination between customary and Christian marriages, especially after Uganda achieved independence. The result of the amendment was that practically all women of marriageable age could claim the privilege. In most cases the women would claim to be married under custom to a man with whom they had a child. Because customary law was given little credence during those years, it was assumed that any legal principle that did not fit in with the imported law qualified under customary law.

This is the state of affairs from which we must build a set of principles to redeem customary law from oblivion. It has been associated with paganism, primitiveness, reactionaryism, and the like, so it is

25. Evidence Act, THE LAWS OF THE UGANDA PROTECTORATE ch. 9, § 119 (1951) (vol. F).

26. (1917) 7 E.A.P.L.R. 14 (East African Protectorate Law Reports).

27. *Id.*

practically impossible to convince foreigners that there is anything in our customs that can survive the repugnancy clause in the Judicature Act. But, we know that a customary marriage is as stable and sacred as a Christian one. A proper marriage is contracted with the consent of the parents, and certain formalities are entered into before contracting a marriage and, when difficulties arise, before dissolving it. Unless those formalities are fulfilled, no marriage contract exists. For this reason we took pains to define the amendment provisions to avoid abuses which would only produce injustice by allowing criminals to escape the law by sheltering them under the privilege. Faced with a situation where the privilege was claimed by a woman who eloped with the accused, the Court, in *Uganda v. Kato*,²⁸ reviewed the purpose of the privilege of non-compellability and explained the true nature of a customary marriage. In conclusion we observed:

The Act refers to a marriage recognised under customary law and I think this excludes customs or usages that have not matured into Rules. In order for a union to be regarded as a marriage under the Act, the parties must have satisfied all the formal and essential requirements prescribed for the validity of a marriage under customary law. In other words the parties must have gone through the ceremony of marriage required under their community and the marriage ought not to be void or voidable. It does not matter, in my view, whether that marriage has been registered or not under the Customary Marriages Decree 16/73.²⁹

The last sentence was deliberately included to avoid the development of technical rules requiring production of certificates. Customary law is by its nature unwritten, and a distinction must be drawn between rules reduced to statutory enactments and unwritten rules. Marriages registered under the Decree would obviously be statutory as opposed to customary.

CIVIL CUSTOMARY LAW

A. *Limitation of Actions*

One other means devised to entrench the imported law, in addition to the repugnancy clause, was to forego providing a remedy through the courts on the ground that the cause of action is time-barred. In the majority of civil customary law cases the litigants do not

28. Crim. Session Case No. 298, slip op. (1975).

29. *Id.*

articulate their claims in the pigeon-holes known to the common law (i.e., property or marriage law). If a party is aggrieved he will go to court for a remedy and time is of no consequence. Litigation is often a last resort after the traditional means of reconciliation have failed. As a result, courts have always been faced with what, under the imported law, are stale claims. The statute of limitation was specifically excluded from application to customary law, which was administered almost entirely by native courts. With integration, however, native courts were abolished. The magistrates' courts that replaced them did not enjoy the same exclusive jurisdiction.

In *Olowo v. Akenya*³⁰ Judge Nyamuchoncho stated:

The Limitation Act did not apply to customary claims instituted in so called African courts. It would be unfair to apply the law of limitation to stale [customary] claims simply because of integration of courts This would result in grave injustice to the respondent and his sons who had occupied the land for such a long time.³¹

We think that this is the proper view. The Limitation Act has no application to customary civil suits, and the decision in *Kintu v. Kamira*³² can be distinguished on the ground that the plaintiff in that case based his claim on the grant of a temporary occupation license by the Governor in 1940 and not through customary law. A recent decision, *Bulasiyo Muwereza v. Christopher Mbusya*,³³ reflects the current position and is in line with the decision in *Olowo*. We held:

The Limitation Act does not apply to customary land tenure and customary law does not recognize prescription as a root of title. Disputes arising from customary land tenure are instituted in the Magistrates courts of Grade II and III which are the successors to the African courts. The Limitation Act by S.32 was specifically excluded from applying to any proceedings in an African court. This provision has not been repealed.³⁴

B. Substantive Law

The Court has also addressed the substantive civil customary law area, trying to articulate what have hitherto been unwritten customary

30. Civ. App. No. 108, slip op. (1970).

31. *Id.*

32. Civ. Suit No. 26, slip op. (1978).

33. Civ. App. No. 118, slip op. (1975).

34. *Id.*

law principles. In *Lulenti Buluma v. Mbirika*,³⁵ the Court discussed at length the different modes of acquiring land; in *Nsereko v. Gitta*³⁶ the tort of seduction was clearly spelled out; and in *Nassanga v. Wangonga*³⁷ the entitlement of dowry payment among the Bahima (pastoral) people of Ankole and internal conflict of laws were treated. There are three other cases of interest. The first is a novel one that relates to mortgages on customary tenure, the second relates to emper-eka (bailment) among the Bahima people of Ankole and the third relates to family property.

C. Mortgages

In *Mutambulire v. Kimera*³⁸ the plaintiff borrowed some 2,000 Ugandan shillings (equivalent to U.S. \$200) from a wealthy neighbour and entered into an agreement to repay the loan with interest in a year's time. The sum mentioned in the agreement was 3,800 Ugandan shillings (equivalent to U.S. \$380). The agreement stated that in default of payment, the plaintiff's kibanja (land) and house would be treated as sold to the defendant for the amount therein stated. The plaintiff defaulted and the defendant took possession of the kibanja. The trial magistrate had to determine whether land held under customary tenure could be mortgaged and whether customary law provided remedies to a mortgagor. He applied the imported law. Since the formalities for executing a mortgage had not been fulfilled, the judge held that the transaction was an outright sale. The difficulty is that the imported law deals with registered land, but the kibanja was not registered. On appeal, we considered the question and held:

There are no provisions for a tenant to enter into agreements whereby the "Kibanja" is used as security for a loan. But, the Kibanja's owner, for all purposes, enjoys security of tenure, and his title is as good as that of an owner of land under customary tenure. He can sell his "Kibanja," pledge it or even mortgage it at will.³⁹

In a sense, the case recognises the creation of a mortgage under customary law and eliminates the introduction of the statutory limitations and restrictions on the recovery of land so secured. We held that the mortgagor can redeem his security by payment of the loan and

35. Crim. App. No. 80, slip op. (1971).

36. Civ. App. No. 63, slip op. (1973).

37. Civ. App. No. 13, slip op. (1977).

38. Civ. App. No. 37, slip op. (1972).

39. *Id.*

before foreclosure the mortgagee must obtain a court order. Both these rules are for the protection of the secured property from unscrupulous money lenders who might exploit the ignorance of the kibanja owner, the mortgagor, who all along understands the whole transaction as a debt with the property merely acting as security.

D. *Empereka*

Among the pastoral people, the Bahima of Ankole, cattle takes the place of land. Therefore, rules for dealing with cattle have been formulated over the years. The Bahima know them well but, as the rules remain unwritten, complications arise in litigation. The Court restated these rules in *Mugoha v. Rukoza*.⁴⁰ In that case, the appellant had entrusted to the respondent thirty-five head of cattle in 1963. He demanded return of the cattle and in 1965 instituted an action in default. The appellant recovered fifty-seven head of cattle which included the progeny, but there was a dispute as to the inclusion of two head of cattle that were born between the court order and execution of the order. Furthermore, the respondent claimed the traditional cow as compensation for looking after the cattle. The case was confused in the lower courts, so on appeal we took the occasion to articulate the principles governing the customary law rule on *empereka*, holding:

The customary law of Ankole regarding "empereka" is that the person entrusted with the cattle is under a duty to account to the owner for all the cattle and their progeny. The owner does not in any way surrender his right of title in the cattle and this right extends to the progeny. The person entrusted with the cattle assumes possession, such as using the milk and the milk products, but he cannot do anything with the cattle that would be inconsistent with the rights of the owner. When the owner demands the cattle back, he is entitled to the original cattle entrusted together with their progeny. The person entrusted with the cattle is entitled to receive consideration for his labour and reimbursements for any expenses incurred.⁴¹

E. *Family Property*

We all know the problems that face our families when husband and wife married under customary law decide to live apart. Very often the family breaks up after several years of marriage, with many children being affected by the separation. In traditional societies there are

40. Civ. App. No. 61, slip op. (1972).

41. *Id.*

usually no problems, for example, when the wife leaves her husband—she returns to her parents who, in turn, give back the man's dowry. With the problems of development and urban life cutting across the traditional way of living, however, the old rules no longer safeguard the interests of the woman and her children. It is not uncommon to find both spouses working and contributing equally to the property they acquire. It would be unfair to maintain a vacuum in such a situation. The statutes cannot be prayed in aid as they only apply to registered marriages. We considered this question in *Nakiyingi v. Merekicadeki*,⁴² holding:

This court is enjoined to apply customary law. But, it is also a court of equity. In the present case it is the plaintiff who decided to terminate the marriage. He cannot in my view merely chase the defendant out of a home to which she has substantially contributed to build and maintain for a period of 12 years.⁴³

CONCLUSIONS

In an editorial published in the *Law Focus*⁴⁴ we surveyed the future of the common law in Africa. That editorial was written at the height of a serious crisis caused by the prevailing lack of confidence in the judicial system constantly voiced by the military leadership of the day. We hoped to reinstate confidence in the Ugandan legal system, which was being branded "imperialistic" and "un-African." There were complaints that the courts were incapable of marching with the revolution which was progressing at "supersonic speed." Worse still, all lawyers were castigated as confusing agents. Despite the judges' efforts, military tribunals were set up to take over a wide sector of the courts' work. These tribunals worked very much like Kangaroo Courts, meting out punishments ranging from death to lengthy periods of imprisonment with no remedy for appeal to the established courts. After a time, the officers of these courts got tired. They began to seek legal assistance, and lawyers were allowed to defend litigants. The work was too much, however, and thousands of people's cases remained on remand for even longer periods than those awaiting trial in the courts.

42. Civ. App. No. 8, slip op. (1977).

43. *Id.*

44. *Law Focus*, vol. 2, No. 2. The *Law Focus* is a publication of the Law Development Centre. It is published quarterly and contains articles on current legal developments; it particularly reviews recent judicial decisions and makes proposals for law reform. It is essentially intended to meet the needs of practicing lawyers but also attempts to reach public officials and legislative policymakers. The author started it when he was Director of the Law Development Centre (1971-74).

In the editorial under reference, we were concerned with establishing that the common law is now part of our law and cannot be dismissed as an imposition by the colonial power. We defended the system of law we inherited, concluding: "The general belief, therefore, that the rule of law is incompatible with a revolution has no basis in past history. In fact[,] past experience seems to show that for a revolution to succeed a stable legal order is necessary."⁴⁵

Today, the problem of marrying the two parallel streams of law has been discussed. The problem of constructing principles that will reflect the mores and ethos of the Ugandan people is a continuing one. It cannot be done by the stroke of a pen. It must be gradual and, perhaps, the courts rather than the legislature are best suited in the circumstances to carry out this process. We have gone through some of the most difficult years of our national history. The courts and the lawyers of this country deserve to be congratulated for having withstood the test of the eight years of military rule and for having preserved the legal system without succumbing to tremendous pressures to adulterate it.

Contrary to exile megalomania, the judges maintain that a good job was done to preserve the system of law, dispensing justice to the people in the best way possible. The atrocities that were committed by the military regime were done outside the courts and it cannot be said that we condoned this because we did not. Representations were constantly made against these atrocities, mostly in private, culminating in the murder of the first Ugandan Chief Justice, Benedicto Kiwanuka, which is clear testimony that no stone was left unturned by any of us to protest the gross violations of human rights in this country during that period. The duty we all now shoulder is to reconstruct and mend what went wrong and to revive the confidence of our people in the system of law so that never again should we experience the rape of our nation. Those who have committed crimes must be brought before the established courts and the rule of law must be restored. It is our belief that in the great task of reform that faces us today, the best hope is in encouraging our people to assume the responsibility of dispensing justice rather than trust that outsiders will do a better job for us. The work already begun should be built on and not destroyed in the zeal of rehabilitation.

45. *Id.*