

Reform of Private Law in East Africa

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In this article we propose to discuss the adequacy of current East African institutions concerned with promoting reform or change in the private law and to examine problems arising from proposals to improve the present situation. By private law we mean generally the rules governing the formal settlement (usually judicial) of disputes between private juridical entities (persons, corporations etc.). Thus, private law includes law of contracts, torts, succession, property, corporation, and so forth. For purposes of this paper we distinguish private law from public law, which consists of the rules for the formal settlement of disputes involving government acting in a traditional governmental capacity (criminal law, administrative law, etc.).

Broadly speaking, there are two sources of private law in East Africa. The vast majority of disputes between individuals are governed by customary law, in which classification we include Islamic law. Although customary law is characterized by the lack of written substantive rules governing disputes settlement, we make the assumption that rules nevertheless exist in the form of more or less consciously applied principles that at least guide dispute settlement.¹ Formal disputes not governed by customary law, including most major commercial transactions, are governed by applied Indian codes or by the English common law as modified by the East African and a few English statutes. The English common law is made applicable in each East African jurisdiction by a statute which "received" the English common law, as modified by statutes of general application in effect in England as of a particular date, 12 August, 1897, in Kenya; 22 July, 1920 in Tanganyika; 7 July, 1897 Zanzibar; and 11 August, 1902 in Uganda. In many instances, of course, the received non-customary law has been replaced or modified by local statutes. In most instances, however, these local statutes resemble very closely either an English statute or a statute which was

originally drafted by the British for use in some other colony and which usually resembles the existing English law at the time of the original drafting.

There are several directions in which the existing rules of private law need revision. Much of the non-customary law is based on English law of about 50 years ago. Many of the changes made in English law in recent years, particularly those made by statute, have not been absorbed or received. Because in some ways the socio-economic conditions of East Africa resemble the conditions in England in 1920 more closely than the conditions in England today, there may be some instances in which it is appropriate to base some of the non-customary law on old-fashioned English law. In many respects, however, the recent changes in English law reflect either changing notions of justice, which notions are largely shared in East Africa, or a change in socio-economic conditions which has occurred in both England and East Africa. In these instances, East Africa would be better off if it modernized its current law either by adopting the recent changes in English law or by making some other change.

In addition to modernization, non-customary law needs to be localized and adapted to current governmental objectives. This need derives partly from the increasing number of Africans whose activities are being governed by non-customary law, with the consequent need to change the rules governing their private relations so that they are more consistent with their expectations. There may also be a political need to change the completely British basis for non-custom-

1. Such an assumption is also made in the Kenya Restatement of Customary Law and the Tanganyika unification of customary law projects, as well as in most writing on customary law. E.g., Gluckman, *The Ideas in Barotse Jurisprudence*, Yale University Press, 1965.
2. See Zamengof, "Combining Guidance by State Plan and Economic Independence in Contractual Relations", 2 *Soviet Law and Gov't.*, No. 1, p.27, 1963.

ary law, in the sense that the population demands abolition of remainders of the foreign and "imperialist" past. The most important need for change in the non-customary law, however, is that it has important and often undesirable effects on the successful implementation of government policy and activity. There has till now been only an inadequate appreciation of this, and few commissions and working groups on economic and social developments contain legal experts.

A few examples will illustrate the importance of private law for development. East African governments are increasingly participating directly in commercial, agricultural and industrial enterprises as a means of achieving developmental objectives. While legislation may provide for the establishment and internal organization of public corporations (which we would call public law), the relationships of these organizations to other enterprises, which may determine their success in achieving governmental objectives, is likely to be governed by private law, e.g., contract. As has long been recognized in socialist countries, there may be a need to apply different legal rules to contracts between two private entities and to contracts in which one or both of the parties are state-owned enterprises². Secondly, the laws regulating extension of credit, such as the Hire Purchase Acts of Tanzania and Kenya,³ can have an important impact on the amount of credit available. The amount of available credit can affect the level of demand for goods and services frequently bought on credit, and this demand level will have an important impact on decisions to invest in productive activity in East Africa. A third example is patent law, which at present is primarily based on English law throughout East Africa. There has been a good deal of discussion in recent years about whether patent laws based on the western European pattern adequately serve the developing countries' needs for economic development.⁴ Finally some mention should be made of the law regulating trusts. At the time the leadership qualifications prescribed in the Arusha Declaration were implemented in Tanzania, leaders frequently resorted to the trust device as a means of disposing of their investment property. Some doubts were raised about whether rules regulating the rights of the grantor over the corpus of the trust were adequate in view of the uses to which the trust device was being put.

The rules of customary law also have an important and often undesirable impact on the achievement of developmental objectives. The success of a scheme for land consolidation depends in large part on the rules for the succession of property; if the rules require its wide distribution among descendants the aims of consolidation will be frustrated within one or two generations. The law of contract determines in an important way the pattern of business activity; it has been argued that one of the reasons for the comparative lack of success of the African trades, especially in rural or small urban areas, is the failure of the customary law to provide an efficient system of remedies for breach of contract.⁵ Another example can be taken from family law; the size and form of dowry can have a profound effect on incentive and savings, and on the nature of the productive activity, of the group concerned.

These specific difficulties with customary law are merely symptomatic of a more general dilemma regarding the future of customary law. The rules of customary law grew out of, and are designed to operate in, a subsistence economy. As development occurs, there obviously will be some radical changes made. It is possible that customary law will simply disappear as more and more people move into the cash economy and thereby, according to the prevailing rules for choice of law, subject their activities to regulation by non-customary law. More likely, however, attempts will be made to change the substantive rules of customary law so that they will be more appropriate to the changing socio-economic conditions. These changes may ultimately take the form of integration of customary and non-customary rules to create a common body of law appropriate to East Africa and applicable to all persons. Before integration occurs, if it does, there will apparently be attempts at unification of the various strands of customary law. The motivation for unification is largely political in that it is widely believed that unified private law can contribute to a greater sense of nationhood. Unification may be desirable for the additional reason that a common customary law may encourage greater interaction between tribes which in turn may contribute to quicker socio-economic development. The Tanganyika Declaration of Customary Law Project and the Kenya Commissions on marriage and divorce and succession are contemporary

examples of attempts to change the customary law in the direction of unification.⁶

In this paper we intend to discuss which institutions would be most likely to promote and effectuate the legal reform we think is necessary. Aside from the few examples we have given in support of our belief that reform is necessary, we do not intend to discuss what substantive changes should be made in the private law. In discussing what institutions can best promote law reform, however, it is necessary for us to consider some of the factors that must be taken into account in formulating law reform in specific areas. As our colleague, L. L. Kato, has pointed out elsewhere,⁷ in most areas of law reform it is necessary to make inquiries in the field to determine what results law reform should yield. For example, in considering how to reform the customary laws of succession to prevent the constant reduction of the size of land holdings in areas of land shortage, it is necessary first to determine what sizes of landholdings are considered desirable and how those sizes compare to existing land holdings, and probably it is necessary to consider what alternative means are available to support persons who might be deprived of all land under the reformed law. An institution for promoting law reform, therefore, should have the facilities to acquire this type of information.

It is also important in considering law reform to recognize that most disputes between individuals are settled informally by private agreement or other traditional dispute settling methods (i.e. arbitration before clan elders). There is very little information available on the interaction of formal methods of dispute settlement with the informal; nor do we know what role the formal rules of private law play in informal settlement. It may be that the informal merely supplements the formal methods and that there is no essential clash between the principles applied in the two methods of dispute settlement. On the other hand, it is possible that there is such a clash and the systems are seen as competitive. If so then the ability to affect development goals by changing the rules of private law will be diminished since the change will possibly not be reflected in the more numerous informal dispute settlements. An institution promoting law reform should be aware of this possibility and seek ways to minimize its harmful effects; it should explore for means to manipulate the results reached in

informal dispute settlement by changing the rules for formal dispute settlement.

Historically, the most important institution for the reform of private law has been the courts, or the counterpart customary law institutions for settling disputes. Until recently English private law was mostly court made, with individual adjudications being made into rules of law by the doctrine of *stare decisis*. The legislature has always enacted statutes affecting private law, of course, but in the past these statutes have tended to deal only with narrow issues and have often been regarded as filling gaps in the judge-made law. The broad principles of English private law have been judicially created. The institutions for establishing substantive rules of customary law have probably on the whole played similar roles, though in the absence of competent studies in this area, it is not possible to be more specific.

There are advantages in having the courts be the principal formulator of private law. Each case decided by a higher court potentially presents an opportunity to change the law, and therefore in some sense forces a decision about whether a change should be made. Inertia in the face of an unwise rule of law may be much easier to endure in a legislative body which does not so frequently face a specific decision whether to change a particular rule. Each case also comes equipped with a set of facts and over a

3. Tanzania Acts, No. 22 of 1966; Kenya Acts, No. 42 of 1968.
4. E.g. Grundmann, "What Kind of Patent Law does Tanzania Need?" unpublished paper prepared for the Economic Research Bureau, University College, Dar es Salaam, ERB. Paper 68.15.
5. Ghai, "Customary Contracts and Transactions in Kenya" in *African Customary Law and Procedures*, Eds. Gluckman and Allott, O.U.P. (forthcoming).
6. The Kenya Government set up two commissions in 1967, one on succession (Gazette Notice No. 1095) and the other on marriage and divorce (Gazette Notice 2261 of 1967). The terms of reference included the making of recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, the Indian Applied Acts and the relevant Acts of Parliament including those governing Muslim and Hindu communities, and to prepare a draft of it. The commission recently filed their reports with the Kenyan government. *East African Standard*, 4th September, 1968.
7. Kato, "Methodology of Law Reform", in Sawyerr, ed., *East African Law and Social Change*, 279.

series of cases these sets of facts may enable the courts to acquire some understanding of the socio-economic effects of a particular rule. More importantly, perhaps, it has been argued that being forced constantly to adjudicate particular disputes gives courts a certain "situation sense" which enables them to determine better than other possible law-making institutions how to apply broad principles of justice to particular fact situations.⁸ This latter advantage is particularly crucial if one assumes that rules of private law have little effect on informal dispute settlement, and for that reason on conduct, and are principally important only in the formal settlement of disputes.

Despite the many advantages in law-making possessed by courts, it is doubtful that the courts can meet the need in East Africa for change in the private law. The changes needed are extensive and they must take place in a relatively short period of time. Courts can change the law mostly only by case by case adjudication. To change general principles in that fashion often takes many years. Moreover, the precise nature of many of the changes needed, particularly in the customary law, will not be determinable simply by examination of adjudicated cases. Many other sources of information, such as the effects of formal rules on the informal dispute settling systems, will be required which are not readily available to courts. Most important, however, although the reasons for the change are far from clear, in recent decades English and East African courts administering the non-customary law have become much more reluctant to change the existing law by judicial decision than they formerly were. This conservatism is particularly pervasive in the appellate courts of East Africa. The courts almost never change a rule inherited from England on the ground that it is a silly rule or not appropriate to East Africa, and frequently they are even reluctant to accept the few judicial changes in the law made by the English courts. In the past several institutional factors reinforced this tendency. The court of final resort used to be the Privy Council, a court consisting almost entirely of English judges who heard cases from throughout the commonwealth and who had little knowledge of the special conditions prevailing in the individual countries or colonies. The local courts were also largely staffed by English judges. These local judges were usually "profession-

al" colonial judges who during their careers frequently shifted from one colony to another. As a result they tended to view the English common law as one unified whole and to give little emphasis to the need to adjust the common law to the needs of the people to whom it is applied.⁹ Since independence the East African countries have dispensed with the final appeal to the Privy Council, and in recent years there have been some admirable efforts to appoint local judges who are either indigenous to East Africa or familiar with its social and economic conditions, and who therefore may be more inclined to adapt the English law to those conditions. Accordingly it can be hoped that in the future East African courts will take a more enlightened approach to the doctrine of precedent and accord more recognition to their role in reforming the private law. Nevertheless, it would be most unwise to rely on the courts as the sole institution for reform of non-customary private law.

The East African appellate courts have not been nearly so conservative in changing the customary law, but in this area the principal difficulty has been their lack of familiarity with either the existing law or the socio-economic conditions in which it operates. The judges mostly lack formal training in customary law, and too few cases involving private customary law reach the appellate courts to enable the judges to learn much on the job. The fact that few customary law cases reach the appellate courts means that the lower courts have greater freedom to change the law on their own, and it is probable, although not yet verified, that the newly created courts concerned with customary law have exercised this freedom to a considerable degree. But in the absence of clear and reasoned criteria, the changes tend to be made on an ad hoc basis and without any clear picture of the direction in which customary law should be changed.¹⁰ Since the reporting of customary law decisions has been very inadequate and many of the judges have no access to whatever is available, it has not been easy judicially to establish general principles.

Together with the decline in law-making importance of the courts, and perhaps a cause thereof, has been an increase in legislative activity in private law areas. In England and America the increased legislative protrusion originally took the form of more and more statutes designed to remedy

specific defects in the judge-made law. In recent years, however, there have been a number of "codifications" of broad areas of private law.¹¹ The reasons for the more frequent introduction of these common law codes vary. Frequently the codes represent a recognition of the inability of courts to keep up with the needs of law reform in a quickly changing technological society. With the volume of litigation, and therefore the number of precedents, ever increasing, administration of a case law system becomes more difficult, in the sense of simply discovering and absorbing all the applicable precedent. A code attempts to collect most of the applicable rules in one place. In America codification has often reflected a desire to unify the law in a country which for most private law purposes consists of 51 separate jurisdictions.

East Africa also has a considerable, and even older, tradition of legislative intrusion in non-customary private law areas in the form of codes. The tradition emanates from the British practice of introducing much of the non-customary law into the colonies in the form of codes which were intended to be largely declarative of the English common law as it then existed. In East Africa most of the codes enacted by the British were originally drafted for use in India. The reasons the British used codes so extensively to introduce non-customary law into the colonies are not altogether clear. It is often assumed that one of the purposes of the codes was to modify the English common law to meet the peculiar needs of the colonies. Doubt is cast on the accuracy of this rationale by the close similarity of the codes to the English law and by the fact that the British considered it appropriate to transfer the Indian codes to East Africa without making significant changes. Moreover, in applying the codes there has been a tendency on the part of appellate courts to interpret the provisions which on their face appear to make innovations as intending simply to codify the English Law.¹² We suspect that a more important reason for the use of code in the colonies was to facilitate law administration. Many of the officials charged with administration of the law at the trial levels were not legally trained, and in any event it was not always practical to provide them with a complete set of English case reports. It was much easier to provide these officials with a statute which they could read and apply according to the

apparent meaning of the provisions.

Since independence the East African countries have retained the essence of most of the non-customary codes. In many instances, however, the respective legislatures have reconsidered the codes. In the course of reconsideration the names of the codes have been changed to substitute the name of the country for the name of the colonial code. Thus, in Tanganyika the Indian Contract Act has been replaced by the Tanganyika Contract Ordinance.¹³ Very few substantive changes have been made in the codes, however, and those changes which have been made do not usually reflect any extensive consideration of what changes are needed to make the codes more appropriate to conditions in East Africa.¹⁴ In a conversation, an official in the Tanzania Attorney General's office suggested that the usual

8. See Llewellyn, *The Common Law Tradition—Deciding Appeals*, 121-57, 1960.
9. Cf. Twining, "Legal Education Within East Africa", in *East African Law Today*, pp.118-19.
10. In the appellate courts customary law has often been changed or disregarded on the grounds of the repugnancy clauses, which provided in colonial times for the application of customary law only if it was not "repugnant to natural justice, equity or good conscience". See Seidman "Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa", 1966 *Wis. L. Rev.* 999.
11. E.g. UNIFORM COMMERCIAL CODE: The Uniform Commercial Code is a draft statute designed to provide most, although not all of the law governing commercial transactions. It was prepared both to modernize the commercial law in the United States and to unify the commercial law among the 51 different private law jurisdictions in that country. The Code has already been enacted in almost all of those jurisdictions.
12. For example, section 56 of the Tanganyika Contract Ordinance (Tanganyika Rev. Laws, Cap. 433) appears to limit the contract doctrine of frustration to situations in which performance of the contract is impossible. In practice, however, the courts have ignored the literal meaning of the section and applied the frustration doctrine in a manner more consistent with the English common law. See *Victoria Industries Ltd. v. Ramanbhai & Brothers Ltd.*, 1961 E.A. 11.
13. In a memorandum in support of the Tanganyika Law of Contract Bill, the Attorney General gave as the principal reason for the legislation the fact that it was becoming difficult to obtain copies of the Indian Contract Act. Extracts from this memorandum are reprinted in Macneil, *Contracts: Instruments for Social Cooperation: East Africa* 732, 1968.
14. Other examples of recent legislation essentially reenacting a colonial Code (usually an Indian Code applied to East Africa) are: The Evidence Act, Kenya, Acts of 1963, No. 46; the Copyright Act, Laws of Uganda, C.81; Civil Procedure Code, Tanzania Acts of 1966, No. 9.

method for determining what changes should be made in the course of a "reenactment" of the code was to assemble three or four lawyers from the Attorney General's chambers for a general discussion based not on any particular research but almost solely on their general knowledge of the "law". Given this failure to inquire into the actual effects in society of the various provisions of the Indian codes, it is not surprising that few changes were made when they were reenacted.

Aside from reconsideration of the codes, the extent of legislative intrusion in both customary and non-customary private law has been mixed. There has been extensive activity in the areas of land and labour law. In Kenya and Tanganyika there has also been legislation concerning the organization of cooperatives. The reasons for legislative activity in these areas are fairly obvious. Agricultural development is at the centre of the development plans of East African governments and it is widely assumed that revision of existing land tenure systems is a prerequisite to such development. The nature of the law governing employer-employee relations may also be important to development, and in any event both employers and employees form important political pressure groups who can usually get their views heard. This latter explanation also accounts for another instance of significant private law reform in East Africa, the modernisation of Hindu law in Kenya.¹⁵ There are many other areas of private law in which reform is needed, however, even if not as urgently or as evidently as in the land law area, and in which the interested parties do not possess so much political power. Yet, with the significant exception of the Tanganyika unification of customary law project, about which more will be said later, there has been little legislative activity in these other areas. What legislation there is consists mostly of minor changes, often in some existing statute governing private law, although there has been an occasional significant statute, such as the Tanganyika Hire-Purchase Act of 1966.¹⁶

The reason for the scarcity of legislation in other private law areas is not difficult to discern. Parliaments generally lack any expertise on matters of private law and they are much too preoccupied with other matters. As a practical matter, the legislature for purposes of private law reform is the Attorney General's chambers; rarely is initiative

taken elsewhere and any legislation suggested by the Attorney General will almost certainly be adopted. Yet the Attorney Generals' offices in East Africa are woefully understaffed. Moreover, those lawyers that do exist tend not to appreciate the potential effect of private law rules on the social and economic structure of society. Perhaps as a legacy from colonialism, they tend to view the criminal law as the only effective tool of social engineering. In common with most lawyers, and even most legal academics, they fail to appreciate the need for empirical legal research before wise and extensive private law reform can be attempted. Finally, the governments have established no means of regularly surveying the private law to determine in what areas there may be a need for reform. These conclusions about the limited attention given to legislative reform in most areas of private law were borne out in the aforementioned conversation with an official in the chambers of the Attorney General of Tanzania. He suggested there are only two ways in which suggestions on legislative reform of private law were received. Occasionally a Ministry will suggest a change in an area with which it is concerned, although outside the area of land and labour these suggestions are rare and usually involve only minor changes. And the Attorney General's office reviews the appellate court decisions, which sometimes suggest a need for reform through the absurdity of their results.

It would seem, therefore, that neither the courts nor the legislatures as presently organized can be relied on to effect the private law reform that we consider necessary. What institutions exist or can be created to promote the necessary reform? It has been suggested recently that the ultimate solution for the problem of private law reform in East Africa is to replace the basic common law structure of the private law with a code structure similar to that in use in the civil law countries of continental Europe.¹⁷ Civil law is characterised by extensive, broadly drafted codes which cover all aspects of private law and which constitute the exclusive source of private law in the country concerned. Cases are important as interpretation of the provisions of the codes but they do not constitute an independent source of law as they do in common and customary law systems. The cases carry some weight as precedent but usually not as much as cases in the common law system,

even those common law cases interpreting statutes. In each case in a civil law country the central problem is to apply the code correctly to the facts before the court. The civil law codes differ from the codes presently in force in East Africa in that they are comprehensive, whereas most of the East African codes can be supplemented by case law that is not directly inconsistent with a code provision; and in that they tend to be drafted in terms of broad principles, whereas the East African codes contain mostly specific provisions and more or less presume the broad principles established by pre-existing case law.

There is much to be said in favour of a civil code approach to private law reform in East Africa. Certainly codification would be the quickest way to unify customary law, and, if it is desired, to integrate the rules of customary and non-customary law. It has been suggested that England and the United States have been able to survive so long without a civil code structure for private law only because of their remarkable history of political stability and the consequent lack of any requirement for a sudden break from the law of past.¹⁸ Even so, as those societies become more and more complex there is a noticeable trend towards codification. Although the idea for civil codes dates back to Roman times, France first achieved its national civil codes only after the Revolution and the accession of Bonaparte, and Germany did not have a national code until its unification. In the socialist countries of Eastern Europe codes have been the principal means of transforming the private law of those countries to conform to the new socio-economic conditions existing after the revolutions. The political situation in East Africa after *uhuru* probably resembles more closely the situation in these countries which have undergone fundamental political transformations than it does anything in the history of England and the United States. Codes can also make law administration easier, as decision-makers would in many instances find it necessary to refer only to the Code rather than to a large number of case reports, which in any event will probably be unavailable.

Although codes have much to recommend them, there are a number of possible difficulties which, although they are not easy to evaluate at the present time, suggest that an immediate and complete transformation to a code system is neither desirable nor

possible. The drafting of a Code which will make substantial modifications of the existing private law is a complex task, which should only be attempted after thorough empirical research into the needs of private law in East Africa. Such studies do not exist now and the manpower available for conducting them is admittedly limited. Codification attempted without such studies would probably lead either to more codes in the order of the present codes (that is, attempts at codifying the English common law of several decades ago) or wholesale copying of the codes of some country, for example the Soviet Union.

Either result would be unfortunate. The former would tend to discourage existing attempts to make the private law more consistent with current needs, without providing any acceptable alternatives. Courts would be precluded from changing the law on a case to case basis and legislatures would be discouraged from making changes for fear of tampering with the Code's symmetry. The latter would suffer from similar difficulties and in addition would make such a drastic change in the formal law that the seemingly inevitable result would be almost exclusive resort to informal processes for the settlement of private law disputes.

Moreover, the lawyers in East Africa, who must administer the private law, are all trained in the common law and are not presently well equipped to deal with a code system. Common law lawyers are trained to regard statutes suspiciously; the canons of interpretation say that they must be narrowly construed, particularly if they are in derogation of the existing case law. Code interpretation requires different techniques. There is no body of exclusively judge-made law on which to fall back, so the code provisions must provide a result to every dispute. Accordingly, the provisions must be interpreted broadly with the end in view of enforcing the general purposes of the code even if there is no specific provision in point.

The difficulties we foresee in switching to a code system are illustrated by Tanzania's experience with the unification of customary law project. The customary law declarations

15. Hindu Marriage and Divorce Act, Kenya Acts, No. 157 of 1962; Hindu Succession Act, Kenya Acts, No. 158 of 1962.
16. See note 3 *supra* and accompanying text.
17. Eorsi, "Some Problems in Making the Law", 3 *E.A.L.J.* 272, 1967.
18. See generally Von Mehren, *The Civil Law System*, pp.3-13, 1967.

that have resulted from that project take the form of codes. They differ in some important respects from civil codes. They are not comprehensive, in the sense that traditional customary law will continue to be applied with regard to matters on which a code is silent. Many of their provisions are very specific, sometimes specifying the precise amount of damages which must be paid in the event of a certain occurrence. Both these differences from the civil code model raise problems: the former because it invites narrow interpretation of the declarations to allow a greater role for the pre-existing law, which the declaration was intended to change; the latter because it ensures that the declarations will become out of date very shortly, for example as notions of value change. Although it was not intended that the customary law declarations take the form of civil codes, these difficulties are some of the ones likely to be encountered by draftsmen trained in the common law and their presence in the declarations may indicate that similar difficulties would arise in the drafting of civil-type codes. Moreover, the declarations are often marred by poor draftsmanship, a product in part of the haste with which they were drafted and the lack of skilled draftsmen in East Africa. Perhaps most importantly, however, it has been suggested that the declarations have not in fact been applied consistently in the courts charged with enforcement of customary law and that, to the extent they have been enforced, they have caused extensive resort to informal dispute settling mechanisms because of dissatisfaction with the substantive provisions of the declarations.¹⁹ These suggestions have not yet been verified by empirical research. Nevertheless, they do point to difficulties that could accompany a change to a code system. Hopefully, Tanzania's experience with the customary law declarations will be thoroughly investigated before extensive new efforts at codification are attempted.

Ethiopia, although obviously differing from East Africa in many respects, also offers an object lesson in the difficulties likely to be encountered if immediate transformation to a code system is attempted. Shortly after World War II the government of Ethiopia decided to replace much of the then existing customary law, of which there were several varieties, with codes which would unify and modernize the law throughout the country. Because there were few, if

any, lawyers in Ethiopia itself, European lawyers were commissioned to draft the codes. Although some of these draftsmen made admirable efforts to learn about the pre-existing law and the socio-economic conditions in Ethiopia,²⁰ in very many instances concepts have been drafted into the codes which are quite unfamiliar to the people of Ethiopia and for which deviation from accepted norms there appears to be little justification in terms of the social and political goals of the Ethiopian people. As one might expect in such circumstances, serious difficulties have been encountered in putting the code into practice, even at the level of getting judges to apply it correctly, and there still remain vast discrepancies between the law in the books and the law in fact.

The difficulties we foresee in changing to a code system do not mean that codes should be abandoned as a means of effecting private law reform. The fact remains that codes are probably the only effective way of transforming East African private law quickly to meet the needs of social and economic development. But any effort to change to codes must be a cautious one. We would suggest that the first step should be an empirical study of the Tanzania customary law declarations to determine what the difficulties are in their application. Similar studies could be done on the effects of the two current commissions in Kenya on marriage and succession, if their recommendations are enacted.²¹ Thereafter an attempt might be made to draft a code in an area in which customary law plays little role, perhaps some aspect of commercial law. After evaluation of these experiences and of the problems that have arisen or are likely to arise, it should be possible to evaluate more thoroughly the usefulness of codes in East Africa. If it is decided to pursue a course of codification, we hope that the draftsmen of East Africa's first codes will not intend their products to be considered "perfect" codes designed to last many years. No body of law, no matter how "perfect" when drafted, should be considered sufficient for a large number of years, for as socio-economic conditions change the law designed to regulate and accommodate those conditions needs to be changed. This is especially true in East Africa where codification must proceed on a trial and error basis for some time. Each draft should therefore be reviewed after a few years to see how it is

working. In fact, it may be desirable to establish a body with power to review continuously the operation of the codes and to make or recommend changes as defects are discovered.²²

The model we propose for the introduction of a code structure into East Africa is somewhat at variance with a model for achieving the same end recommended by Professor Gyula Eorsi.²³ Rather than beginning with codes which are more or less comprehensive within the areas they cover, he suggests the enactment in a variety of different areas of the law of a number of very general, civil code like statutes enunciating general principles. These statutes would co-exist for sometime with the present case law and the network of specific, common law like statutes, except of course insofar as the existing law is inconsistent with the newly enacted general principles. Professor Eorsi is concerned with providing the law-apppliers, principally the judges, with experience in the civil law task of reasoning from broad statutes, which, as we indicated, differs from the common law approach to statutory interpretation. We prefer our model because it not only provides such training but also provides equally important training in the drafting of a code designed to meet the needs of East Africa. Of course, it would be possible to combine the two models by enacting "test" codes in a few areas and a number of broad principles to supplement the existing law in other areas.

Although we believe that enactment of codes is probably the quickest and most effective way to achieve the needed private law reform in East Africa, it can be seen that even this way will take some time. Meanwhile, much improvement can be accomplished through stop-gap statutory reform of the type usually made in common law countries. As explained earlier, the principal reason such stop-gap reform is not occurring in East Africa today is that for various reasons the organs of government charged with proposing statutory reforms do not devote the necessary effort to identifying areas for reform. What is needed is some institution which can challenge the many forces favouring inertia. Britain, which historically has also suffered from inertia in the face of a need for private law reform, has recently developed an institution, seemingly patterned after a similar American institution, designed to fight the forces favouring inertia. It is called the "Law

Commission" and consists of five Commissioners, all lawyers, appointed by the Lord Chancellor. The Commissioners are provided with funds to hire research staff. The functions of the Law Commission are described in the establishing statute.²⁴

It shall be the duty of each of the Commissioners to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law. . .

Although the Law Commission has not been in existence for long, there are already indications that it will be quite successful in promoting private law reform. A similar institution in America, the New York Law Review Commission, has been in existence for 30 years and has the remarkable record of having had three of every four of its proposals for reform enacted into law.²⁵ The reasons for the success of these institutions is not difficult to discern. Their official, yet disinterested and somewhat academic, status makes it difficult for the political institutions to ignore their recommendations. Yet they are charged only with the duty of suggesting reforms of the private law, and thus they are protected from distraction by other governmental concerns which usually appear more pressing.²⁶

In our view East Africa would be well advised to create institutions similar to Britain's Law Commission. Because of the scarcity of trained manpower, it may not be desirable to establish commissions consist-

19. Tanner, "The Codification of Customary Law in Tanzania", 2 *E.A.L.J.* 105 (1966).

20. See generally David, "A Civil Code for Ethiopia: Considerations for the Codification of the Civil Law in African Countries", 37 *Tulane L. Rev.* 187 (1963).

21. See note 6 *supra*.

22. In recognition of the fact that no code can be considered adequate for all time to come, the socialist countries of Eastern Europe have developed institutions for the regular review and revision of their codes. For a description of these institutions, see Eorsi, *supra* note 17.

23. Eorsi, *supra* note 17.

24. Law Commissions Act of 1965, c.22, s.3.

25. MacDonald, "The New York Law Revision Commission", 28, *M.L.R.* 1 (1965).

26. See generally Stone and Pette, "Revision of Private Law," 54 *Harv. L. Rev.* 221 (1940).

ing of full time commissioners with paid staff. Various substitute institutions can nonetheless be established. Law faculties seem an especially good source for suggestions of private law reform. Teachers of private subjects are bound to uncover numerous areas in which some type of statutory reform is obviously desirable, if only in the form of enacting a statute recently passed in Britain or some other common law country.²⁷ Law teachers also have the advantage, at least usually, of being disinterested; their judgments, although not always accurate, cannot be rejected as motivated by selfish considerations. Lacking today, however, are institutional devices for conveying these discoveries to appropriate government officials. Some attempt has been made to create such an institutional device in Tanzania recently, with the establishment of a Law Reform Committee consisting of some members of the Law Faculty at University College, Dar es Salaam, the High Court of Tanzania and the Tanzania Attorney General's chambers. Although the Committee has not yet begun functioning well, it is hoped its performance will improve in the future. In Uganda there is a Reform Committee on which there is representation from the Judiciary, the Bar and the Government. It makes recommendations to the Attorney-General and its proposals have led to some reform legislation, particularly in the area of family law. Another individual in a good position to promote law reform is the Counsel to the East African Community. Article 29 of the Treaty of Cooperation charges him with the duty of promoting the "harmonization" of the commercial laws of the three countries. It is not clear what "harmonization" means but certainly the Counsel could interpret his duties to include promotion of reform of the commercial law. The Law Societies are a final potential source of suggestions of private reform. In the course of their practices private advocates encounter many problem

areas needing statutory reform. Suggestions coming from advocates may suffer somewhat in that they will not always appear to be devoid of selfish motivation. For this reason, it may be better to include representatives of the Law Societies on the aforementioned Law Reform Committees and let advocates channel their suggestions for reform through their representatives on the Committees.

The draftsmen of the proposed civil codes, as well as institutions for promoting stop-gap statutory reform, will need some means for conducting empirical legal research to determine what changes in the private law will be most effective in achieving the given social and political goals. Unfortunately the techniques for conducting such research are not well developed anywhere in the world and especially in East Africa. Recently, however, University College, Dar es Salaam, has produced proposals to establish an East Africa Law Institute charged with the duty of performing legal research requested by government and semi-governmental bodies. Hopefully, the Law Institute will develop the capacity for extensive empirical research and will then make those talents available to promoters of private law reform.*

27. For example, the Ghana Contract Act rather simply and admirably dispenses with the English law regarding the right of third party beneficiaries to contracts. Ghana Contracts Act, 1960, sections 5 and 6. The English law on this subject is recognized to be archaic and inappropriate to conditions in Africa. See Whitford, "Third Party Rights in Insurance Contracts", *E.A.L.J.* 338 (1967).

* It should be noted that there is no particular reason why an East African Law Commission would have to restrict itself to questions of private law reform. The Penal Codes of East Africa, for example, are in need of considerable improvement. In this article, however, we have chosen to justify the need for a Commission in terms of the inadequacy or other institutions which might initiate reform of private law. We have not examined the adequacy of institutions that might initiate reform of public law.