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Citation: 25 Wis. Int'l L.J. 261 2007-2008



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Fri Sep 5 01:16:58 2014

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CHANGING AMBITIONS FOR LAW IN EAST AFRICA

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This short essay is a reflection on my forty years of interest in the countries of Tanzania, Kenya, and Uganda, which collectively I call East Africa. My interest began in 1967 when I became a young lecturer at the Faculty of Law, University of Dar es Salaam, in Tanzania. I remained on that faculty for two years, at a time when it was the only law school in East Africa and drew students from all three countries. I returned to East Africa in the 1975-76 academic year to teach at the Faculty of Law, University of Nairobi. In 1999 I taught for two months at the Faculty of Law, Makerere University, in Kampala, Uganda. Throughout this period and since, I have maintained many friendships with people from those countries and a keen interest in developments there.

The focus of these reflections is on the social role of law in East Africa since I first arrived there in 1967. My own ideas for what law might accomplish have changed dramatically over the past forty years. The pattern has been one of ever reducing-ambitions for law. For a lawyer and law professor, it has been humbling.

When I went to Tanzania in 1967, after only two years of teaching law in the United States, I was recruited by a foundation, known as SAILOR, devoted exclusively to the development of legal education and research in Anglophonic, sub-Saharan Africa. The organization's biggest activity was recruiting American law professors to teach in the emerging law schools of Anglophonic Africa. There were no law schools in Anglophonic sub-Saharan African countries prior to their independence. As countries achieved independence, law schools were quickly founded, but it was necessary to staff them largely with expatriates. This was particularly true of the University of Dar es Salaam, which drew staff from all parts of the world. During the two years that I was there, the faculty of law had teaching staff from the

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United States, Canada, Britain, Ghana, Guyana, Malawi, Australia, Hungary, and from each of the three East African countries. The rest of the campus was similarly diverse. It was a remarkable international experience for a young couple who had never previously left the United States.

My ambitions for law were very high when my wife and I first went to Africa. Economic development was certainly the policy goal with which I identified most closely. It was also articulated as a high-priority policy objective by the political leaders of these newly independent countries. Law's role in economic development in East Africa was not, as it became later in many parts of the world,¹ to establish the legal infrastructure for a domestic private economy. That infrastructure was established during colonial times by the British and was allowed to remain in place at independence. The goals for law that others and I advocated were more in the public field, focusing particularly on establishing procedures for making government decisions that took account of all the appropriate interests. Administrative law, broadly conceived, was an important focus.

My colleagues and I were also committed to a vision of law as a vehicle for achieving socially determined goals rather than as the expression of timeless values, stemming from Roman law or elsewhere. We wanted to focus on how the rules were impacting practices on the ground—the law in action. Finally, we had great confidence that lawyers were essential to the process of building an effective government in a newly independent country. We saw lawyers as skilled at problem solving. Indeed, one of the primary objectives of SAILOR was to send American-trained legal academics to staff the new law schools because it felt that American-style legal education was better suited to training students in problem solving due to its emphasis on the case method and Socratic classroom dialogues.

I still believe that there was much that was correct in this vision, yet it was lacking in important ways. Less than thirty years of age when most of my North American colleagues and I arrived in East Africa, we imagined that we could use our brainpower to figure out what needed to

¹ See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in DAVID M. TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 1, 5-6 (2006) (discussing the "Second Moment" in law and development theory. In East Africa there was a period when state enterprises were privatized, especially in Tanzania, but not a great need to reform commercial law in order to facilitate this development. In this respect East Africa's experience differed from the countries of Eastern Europe and much of Asia.

be done. Certainly there were many things we didn't understand, and we knew that. We wanted to conduct field studies to learn about the context in which law would operate so we could devise more effective legal strategies. But we were less attuned to the need to listen to the African citizens of these countries than we should have been. We did not adequately appreciate the importance of some of the goals that were cherished by the citizens of these newly independent countries. Certainly economic development was articulated by their political leaders as an important goal, but they did not necessarily mean the same things by that phrase as we did. More importantly, there were other goals as well.

Political independence, something Americans always take for granted, had been recently fought for and was highly valued in these countries, and it was not taken as a certainty by its citizenry. There was great concern about possible subversion of the newly independent political institutions, and the presence of white supremacist regimes throughout southern Africa, as well as America's collaboration in the overthrow of Prime Minister Lumumba in the Congo, only served to reinforce those fears. The East Africans were concerned not just with formal political independence, which they had. It was also important to them that East African citizens, and particularly black East African citizens, came to occupy the important positions in their society—in the private and public sectors as well as the universities. To them, this latter goal was simply a continuation of the fight against colonialism.

This last point was driven home to me by an incident during my second year at the University of Dar es Salaam. As I mentioned, the majority of the faculty was expatriate. A group of us, along with some East African colleagues to be sure, embarked on a curriculum reform project. It was ambitious, a dramatic rewriting of the curriculum. We wanted to substitute a curriculum that we understood to be relevant to East Africa's current legal needs for a curriculum that was very doctrinally focused and drawn mostly from the standard English law school curriculum of the 1950s. Our new curriculum was adopted by the faculty despite some evident unease on the part of a few of our East African colleagues. It included new courses like law and agriculture, natural resources law, and law and the military, courses that we thought addressed real problems facing the East African countries more than did traditional courses, like "Bills and Notes." Before the new curriculum could be implemented, however, the students mounted large and successful demonstrations against the new curriculum. They saw the

curriculum as imposed by outsiders, as in some sense it was. They also had another concern. After graduation, these students would be competing for top law jobs with other East African citizens, and some expatriates, who had received law degrees from English law schools. They were concerned that our new “relevant” curriculum would be perceived by some employers to be less rigorous and foundational than a standard English curriculum and hence would put the Dar es Salaam graduates at a competitive disadvantage. Upon reflection I now think that the students were right about this latter concern, even as I continue to think that the new curriculum that we had devised more directly addressed the legal problems then facing East Africa.

Incidents like this soon convinced me and other like-minded Western expatriates that we had been too presumptuous, even arrogant, in our ideas about what role law might or should play in these newly independent countries. It was obvious that economic development, as we defined it, was not the only or even the most prominent goal of the East Africans, and it was also evident that we were not very good at figuring out the most effective ways to use law to achieve whatever goals were established.² I was soon to leave East Africa for a number of years though I maintained my interest and kept myself informed.

When I returned in 1975-76, the role for law that I identified with was quite different. It was protection of what we now call “human rights.” For reasons more complex and nuanced than I wish to explore in this essay, the political structures of these countries quickly gravitated towards undemocratic one-party states. In 1971 General Amin led a coup in Uganda and established a military regime which disrespected human rights in ways that are well known. In Kenya, and to a lesser but still significant extent Tanzania as well, incarceration without charge or trial of political dissidents was becoming more common. Informal sanctions against dissidents, such as job dismissal, were also common. This led to an objective for law, advanced by most of my best East African lawyer friends and one with which I identified, to protect human rights: to provide, through law, a space for political opposition to what were increasingly looking and acting like dictatorial regimes.

Perhaps it should not have been surprising that the governments of Kenya and Tanzania were acting in a way that we Americans

² This view was most prominently and elegantly expressed by my colleagues David Trubek and Marc Galanter in a well-known law review article. David Trubek & Marc Galanter, *Scholars in Self Estrangement: Some Reflections On the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

considered contrary to the rule of law. Colonial legal regimes were not protective of human rights, especially for “natives,” as black Africans were called in colonial times. Preventive detention was widely practiced, there was no right of habeas corpus, and the judiciary was not independent of the executive. The newly independent governments of East Africa in some ways simply continued the legal traditions that had been bequeathed.³ So the efforts to establish legal protections for human rights were very much a legal reform movement. It was also one that expressed faith in the ability of law to achieve important social objectives, albeit very different objectives from the economic development objectives which I originally had emphasized.

To a significant extent, over the years from 1975 to 1995, this movement achieved considerable success. Individual rights were identified in legal documents as entitled to legal protection, greater formal independence of the courts from the executive was established,⁴ and there came to be widespread respect for procedural due process, at least for those who could afford a lawyer. There was a companion movement to establish a multi-party political structure that was also largely successful. To be sure, the success of these movements was not just a product of respect for the law. The Western press and Western-oriented non-governmental organizations like Human Rights Watch and the Lawyers Committee for Human Rights Under Law took an interest in East Africa, and their interest insured that the governments of East Africa could no longer disrespect the rights of prominent dissidents operating in their metropolitan centers without incurring international disapproval. Perhaps law needed this kind of outside support if it was to importantly influence the course of events, but law nevertheless was playing a significant and, I thought, helpful role in the evolutions of these countries.⁵

When I arrived back in East Africa in 1999, after an absence of nearly twenty-three years, I already knew that official corruption was

³ I do not mean to make this suggestion with respect to the excesses of the Amin regime in Uganda, nor of the successor Ugandan regime (known as Obote II).

⁴ See JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* (2001), for an account of the effort to establish an independent judiciary in Tanzania.

⁵ Useful in this respect was the emergence of an independent bar in all three countries, and especially in Nairobi (Kenya), with lawyers willing to challenge the government in the courts. Many of these lawyers had once been my students, which made me very proud. See The Law Society of Kenya, <http://www.lsk.or.ke> (last visited Aug. 8, 2007), Uganda Law Society, <http://www.uls.or.ug> (last visited Aug. 8, 2007), & Tanganyika Law Society, <http://www.jurisint.org/en/asc/26.html> (last visited Aug. 8, 2007).

widely perceived as an enormous problem, one that so distorted government decision-making that it did not matter much what were the official policy goals. I had maintained contact with many educated East African friends who reported these concerns, and I read the newspapers. What I was unprepared for was the extent to which these concerns were held by people on the streets, ordinary East African citizens. But the political process was not operating to allow these citizens a practical choice between elected officials who would crack down on corruption and those who had demonstrated only a penchant to participate in the spoils.⁶

All this was vividly illustrated to me when my very good friend and distinguished constitutional law scholar, Professor Y.P. Ghai, himself a native-born Kenyan, was appointed chair of a commission to draft a new constitution for Kenya in 2001. Professor Ghai was internationally known as a scholar, but he had not lived or worked in Kenya itself for thirty years and was not well known to the general public. But he moved to Kenya and quickly demonstrated both a commitment to fair process and a willingness to stand up to persons known not to be committed to limiting corruption, including the sitting president, Daniel Arap Moi. Professor Ghai soon became an immensely popular person in Kenya, immediately recognized when he stepped out on the street, and urged by ordinary citizens to include all kinds of provisions in the new constitution, many of them motivated by a desire to combat corruption.⁷ Professor Ghai led his commission to endorse a new constitution that weakened the power of the executive in Kenya and introduced many new checks and balances, all in an effort to introduce transparency and accountability to government decision-making. But the incumbent government refused to put this constitution to the referendum vote required for adoption. Instead they put up to a referendum an amended version, stripped of most of the key provisions of the proposed constitution. Professor Ghai opposed this amended constitution, which was rejected by the populace in the referendum, largely because it was

⁶ The majority of Americans who widely favor stringent campaign finance reform might recognize the phenomenon. Which candidates promising clean campaigns and campaign financing do you believe?

⁷ I personally observed Professor Ghai as he talked with a Kenyan citizen who wanted him to mandate a new system for distributing Nairobi taxi licenses in the constitution. The individual was motivated by his personal experience with corruption. Ghai recognized, of course, that a constitution should not mandate such detailed administrative processes, but the incident was nonetheless telling about the ordinary person's lack of trust of the usual political processes.

widely and correctly perceived as not a bona fide attempt to combat corruption.

While I applaud the effort at constitutional reform in Kenya, and other efforts to corral corruption in the other countries of East Africa, I am now keenly aware of the limits of law in this effort. In thinking about Professor Ghai's draft constitution, which I dearly wanted to be adopted, I strongly favored the checks and balances it sought to create. But I also realized that the persons who were to run the new institutions designed to deter corruption, such as a special corruption prosecutor or the courts that would hear cases, had to be appointed by somebody. Law itself could not guarantee that the persons appointed would do a good job. The most it could do was to insure that these people had the legal tools to do a good job. In short, law alone cannot guarantee responsible governance. There must a political will and the ability to express that will in an effective way.

Today, my interest in East Africa remains as great as ever. Each of these countries has achieved a considerable amount since independence, particularly in the development of political institutions with some stability. My hope that law can play a constructive role in the future of these countries also remains. I have much keener appreciation, however, of the limits of law and the need for law to work with other institutions and/or forces in these countries if it is to play a helpful role in future development.

