

B O O K S

Mustafa, Zaki, THE COMMON LAW IN THE SUDAN--An Account of the Justice, Equity and Good Conscience Provision. Oxford, Clarendon Press 1971. XV, 272 p., including Tables of Cases and Bibliography. \$11.25

This book by Professor Zaki Mustafa is based on his Ph.D. thesis for the University of London. As such it is correctly described by the author as a product resulting from the searching of archives "for long forgotten or badly classified documents and reading hundreds of unreported cases." This effort alone reserves to this book space in the libraries of those who study the causes which led to the reception of the English common law in Africa, and of the variance of such common law principles at the hand of those who took the wider view by attempting to form formulate suitable rules for the administration of justice in what, to the administrators, were foreign places.

The author's summation of the development of the concept of "Justice, Equity and Good Conscience" in India, shows the conscious evaluation of English rules by judges in India as well as the slavish copying of English common law rules by judges who ignored the need to formulate tests to determine the applicability of such rules to a different social, economic and cultural environment.

A short historic outline of the development of law in the Sudan to the date of the condominium and the resultant introduction of martial law and of the concept of "Justice, Equity and Good Conscience", leaves the reader with a feeling that something more should have been done to analyze the motives which led to the adoption of an Indian Penal Law as a model, rather than of an Egyptian or Islamic Code. The author poses the question why the courts did not follow through to embody more of the Islamic law and local customs when English translations of the former were available to them and when the application of such laws or customs would have resulted in judgments more consonant with "Justice Equity and Good Conscience" when approached from the standards of the local populace. There seems to have been more questioning of the applicability of English statute law, however, an area where Owen's J. famous dictum "we are guided but not governed by English common and statute law" seems to have more accurately

reflected the court's approach to novel situations. Although the question is posed, there is no answer beyond a painstaking and thorough analysis of numerous cases in which the issue of what is "Justice, Equity and Good Conscience" confronted the court. It is this conscious search for solutions, as traced by the author, which makes this book a useful tool, for he makes known numerous cases which had not been reported before and only some of which are now available in the volumes of the Sudan Law Reports, 1900-1940 [see 63 Law Library Journal 306 (1970)] and of the Sudan-Law Journal and Reports 1956-1966 [see 6 Int'l and Comp. L.Q. 685 (1957)].

That the Indian Penal Code was known to the civilian civil servants administering justice in the wake of British Army officers, who knew their Queens Rules and Regulations, can not be doubted. That the Islamic Code, even if available in English, was unfamiliar and the Egyptian law had an unpopular connotation is also clear. Thus is it not possible to agree that in this area, as well as in the adoption of the common law to civil cases, we have what I termed "the factor of unexpressed consciousness of legal training and affinity"? [see 6 Int'l and Comp. L.Q. 401 (1957)], a conclusion the quotations from the cases discussed by Professor Mustafa amply supports. The training and outlook on life of such administrators of justice forced them to look to the English common law to fill the interstices of "Justice, Equity and Good Conscience"; to seek the rules of law and to apply the techniques of analysis and interpretation with which to solve the issues before them. Only when the unsuitability of an English rule to a different social, economic and cultural milieu was forcefully brought home to such administrators of justice, were they forced to re-evaluate their predilection for English law and forced to question whether they really were administering "Justice, Equity and Good Conscience."

In his analysis of cases decided after Sudanese independence Professor Mustafa shows a continuance of the approach introduced by the British judges. Is this really so surprising? What Professor Mustafa does not make clear is that Sudanization of the courts was not complete; that the composition of the courts involved eminent jurists such as Soni, J. who came from India as well as the Cottrans who had their training in England and had practiced [at least the elder Cottran] in what was then Palestine; and above all that, apart from a small group of lawyers trained in Egypt or at the Khartoum branch of Cairo University, the

majority of Sudanese judges had received their training from English lawyers and had attended English universities. A further shackle to the continuance of the trend to look to the English common law, albeit now more to Sudanese cases than to those decided by English judges in London, is an acceptance of the doctrine of stare decisis beyond the point of seeking some certainty in the law. It is hoped that the loosening of this shackle which has been achieved in the United States, where many Sudanese judges have received post-graduate training, will help to broaden the approach of the Sudanese courts.

Professor Mustafa concludes his book by recording a movement which threatens the steady assimilation of the law to the needs of a mixed Moslem and non-Moslem population, i.e. the infusion of religious politics into the development of the law. The existence of forces battling for control over the future development of Sudanese common law, leaves many of us, who know this part of the world with its multitudinous diversities, holding our breath and hoping that nothing will hinder a development of the law which will reflect the social, economic and cultural basis of the country. Such development does not involve the destruction of a system which has adapted to the political changes that have occurred and has become truly "a Sudanese common law" and yet still has within itself the ability for change and can adapt itself to the need of an emerging society.

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\* We are most fortunate that Professor Egon Guttman was able to review THE RECEPTION OF THE COMMON LAW IN THE SUDAN for the AFRICAN LAW STUDIES. Professor Guttman taught in the Sudan at Khartoum University from 1952-1958; during that time Professor Zaki Mustafa was a student of his. Among Professor Guttman's publications relating to the Sudan are Reception of the Common Law in the Sudan, 6 Int'l and Comp. L.Q. 401 (1957); Law Reporting in the Sudan, 6 Int'l and Comp. L.Q. 685 (1957); A Survey of the Sudan Legal System, (1957) Sudan L.J. and Rep. 7; Land Tenure Among the Azande People of Equatorial Province of the Sudan, 37 Sudan Notes and Records 48 (1956); The Sudan Law Reports 1900-1940, 63 Journal of American Law Libraries 306 (1970).