

Spalding, Francis O., Earl L. Hoover and John C. Piper, "One Nation, One Judiciary: The Lower Courts of Zambia", ZAMBIA LAW JOURNAL, Vol. 2, Nos. 1 & 2. Lusaka, Zambia, School of Law, University of Zambia, Box 2379, 1970. xiv, 289 p. \$6.00

Upon a superficial glance, the lower courts of Zambia have in common only the fact that they are lower in the judicial hierarchy than the High Court. Consisting of three classes of subordinate courts (the magistracy) and two categories of local courts (urban and rural), they vary widely with respect to almost any significant judicial characteristic: jurisdiction - territorial, subject matter, and whether original or appellate, location, personnel, procedure, and even substantive law. Nevertheless, these courts are usefully studied together for several reasons. The sixty magistrates<sup>1</sup> and approximately 825 local court justices<sup>2</sup> rather outnumber the six High Court judges. It is the former who handle the vast mass of litigation: in 1969 the local courts heard 73,439 cases and the subordinate courts 53,758, while only 2,741 cases were filed in the High Court.<sup>3</sup> One explanation for this disproportion is the fact that the lower courts are geographically and economically far more accessible to the ordinary Zambian: magistrates are located in twenty-nine of Zambia's fifty-four districts, and everyone is near at least one of the four hundred and two local courts; lawyers are not necessary, and rarely appear, and court costs are low.<sup>4</sup> The High Court, by contrast, sits only in Lusaka and a few other cities, and must be approached through an advocate.

Yet despite the predominant role which such courts play in administering justice to the people, legal scholarship has largely ignored them. In the West this disregard has been justified by an ideology which asserts that the lower courts are pallid imitations subservient to their appellate superiors, within

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1. P. 127. (The book under review will be cited by page number only.)

2. P. 175.

3. P. 284.

4. P. 127, 168.

which alone significant judicial behavior occurs. Most African legal studies have unfortunately adopted this view, concentrating on the appellate decisions of the highest court of one or more countries. But the model of a lower court meticulously adhering to precedent in substantive law, and to administrative decree in procedure -- a gross distortion even in western legal systems -- simply cannot be maintained in Africa. For all these reasons, the authors are to be applauded for their decision to study the lower courts, and even more for their recognition that the institutional structure of those courts is at least as important in understanding their operations as are the substantive legal standards which purport to guide them.<sup>5</sup>

Among the possible approaches to the study of legal institutions, three seem relevant here: explication of the legal doctrines which state the norms of operation; description of the ways in which the institutions actually operate; and explanation of such operations as social phenomena. The authors -- a law teacher and two law students -- quite naturally begin with the first of these, and devote more than a third of the book to a history of the statutes relating to court structure and the ideologies which have guided the development of that structure. This is unquestionably a useful starting point: statutes do establish boundaries for action; ideology does influence legislative and administrative change. But the exegesis of doctrine should not become an end in itself, as happens in the last quarter of the book, which analyzes fine points in the jurisdiction of the lower courts. Spalding justifies this excursion as follows:

An answer to the question whether a court has judicial power is a necessary preliminary to the exercise of judicial power by that court -- at least where the question is raised....

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5. It is interesting to note that, on those rare occasions when legal studies take institutional structure into account, the institution studied is almost always a court. Legal scholars have largely ignored the structure of legislatures, administrative agencies (with the exception of the police and correctional institutions), and the larger society.

Moreover, unclear jurisdictional rules are both a trap for the unwary and a devastating technical tool in the hands of a skilled practitioner.<sup>6</sup>

But he then admits, with some embarrassment:

It is true in the Zambian legal system as elsewhere, of course, that jurisdictional rules or dicta in the cases are often overshadowed or obscured by the more compelling substantive issues within which they lie embedded....[T]he jurisdictional aspects do not always appear even in such indices as are available.<sup>7</sup>

[I]t is remarkable how infrequently questions of conflicts and choices of law have arisen in the cases. Even less frequently, perhaps, has there been any discussion of the question here -- the jurisdiction or power to apply a body of rules of law.<sup>8</sup>

If the issue of jurisdiction is rarely recognized and discussed, the concept would seem to be of singularly little use in understanding judicial behavior. Why, then, does Spalding spend his time analyzing it? Apparently because of the delight he takes in applying the skills of a highly competent American lawyer to virgin territory -- "a subject with complexities enough to suit the most fully developed legal system"<sup>9</sup> -- in an effort to construct a typically American legal product -- "an extensive, reasonably cohesive, reasonably harmonious body of case law of the jurisdiction of courts."<sup>10</sup>

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6. P. 219.

7. P. 221.

8. P. 229.

9. P. 2.

10. P. 220.

The distinguishing strength of this book, however, is that it goes well beyond the preoccupation with refinements of doctrine, on which legal scholarship has generally foundered. More than a third consists of an outstanding description of law in action -- the actual structures and operations of the lower courts. Here we are given exhaustive data, indispensable but nonetheless frequently overlooked, concerning: the number of courts, their location, and relative accessibility to clients and professionals; the physical setting of the courts; the characteristics of such personnel as judges, clerks, prosecutors and advocates, including their age, experience, training, language skills, and political ties; the career structure of those professionals -- salary, perquisites, opportunities for promotion, transfers; the nature of the business which the court conducts -- overall caseload and kinds of cases; the procedures followed, including interpretation, record keeping, participation of the judge in examination of witnesses, and of the clerk in decision; the length of time required to get a case heard and decided; and the mode of review or revision. Furthermore, this structural skeleton is fleshed out with a narrative account of a day in court in the style of Sybille Bedford<sup>11</sup> or George Feifer.<sup>12</sup>

My enthusiasm for this considerable accomplishment is tempered only by my disappointment that the authors have so unnecessarily limited their ambitions to pure description, and have declined to attempt the third approach -- the explanation of legal institutions as social phenomena. Indeed, they explicitly disclaim such a goal.

Although the most important part of our study was based upon field interviews, we did not use the full rigorous methodology of the modern social sciences. In part this reflected our own lack of expertise, but in larger part (for we could no doubt have found skilled methodologists to advise us) this is a result of the nature of our inquiry. We began without hypotheses to be tested, simply because our knowledge (which we think embraced substantially all published

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11. The Faces of Justice: a Traveller's Report (1961).

12. Justice in Moscow (1964).

learning in the field) was insufficient to enable us to generate meaningful hypotheses.<sup>13</sup>

The reason given for the failure to formulate hypotheses in advance is nugatory. For the authors' boast to have exhausted "substantially all published learning in the field"<sup>14</sup> reveals itself, upon scrutiny, to be grounded either in ignorance or in a philistine rejection of several significant sources of data and theory. First, the lower courts are studied in isolation from other social institutions, even those indigenous equivalents of official legal institutions which perform the same functions of formulating, changing, and applying behavioral norms. I find it incredible that the authors choose to pass over Max Gluckman's classic studies of Barotse legal institutions with a single cavalier footnote:

The work of Epstein's mentor, Max Gluckman, of course deserves mention....Gluckman, though remarkably sensitive to the legal viewpoint, is not a lawyer; nor were the Barotse courts, during the period of his study at least, really modern courts as that term is here used.<sup>15</sup>

Moreover, the wealth of anthropological literature produced by Gluckman, his students, and others at the Zambian Institute for Social Research (formerly the Rhodes-Livingston Institute) is largely ignored. Second, the authors specifically avoid comparison between legal developments in Zambia and those in other African countries, at least at this stage of their work.<sup>16</sup> Finally, they appear to be unacquainted with the growing body

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13. P. viii.

14. The book displays a disconcerting compulsiveness in several ways: collections of citations and authorities (p. 27, n. 180; p. 28, n. 181); an inordinate emphasis on comprehensiveness and orderliness (p. 29); and a pedantic concern for citation form (p. viii; p. 30, n. 185).

15. P. 31, n. 192.

16. P. 27-28. Data from other countries is used only as a source of ideology for judicial development, pp. 25-119.

of social science theory concerning legal institutions.

These oversights are unfortunate in the extreme. Students of the American legal system increasingly realize that it is impossible to understand that system without paying attention to unofficial or informal legal processes, as well as to the society in which they operate. This is true a fortiori in Zambia, where the governmental legal system is a callow newcomer among the numerous indigenous legal institutions which continue to serve the vast majority of the population. Similarities and differences between Zambia and other African nations fairly leap out at anyone familiar with the relevant literature, and such comparisons frequently serve to generate hypotheses. I was especially struck by the parallel between this study and the superb report by Arthur Phillips on the comparable courts in Kenya three decades earlier -- a report which is nowhere cited.<sup>17</sup> Furthermore, I have found the writings of sociologists and anthropologists an extremely fertile source of hypotheses about judicial behavior -- hypotheses which could well have been used to analyze the data contained in the present study in terms of such concepts as specialization, differentiation, and bureaucratization.<sup>18</sup>

But the authors' modest insistence that they "began without hypotheses" should not be taken at face value. Some notion of what is important must have instructed their decision to collect this data rather than other information. Indeed, it is not possible to engage in intellectual inquiry without hypotheses. It is possible, though ill-advised, to allow those hypotheses to remain implicit rather than stating them plainly. The implicit hypothesis underlying the present study can be seen in the following:

[Our research led us], perhaps most importantly, into the field, to observe and record some of what actually happens as the lower courts go about their business -- processes

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17. Report on Native Tribunals (1945).

18. I have developed these ideas in an unpublished paper, "Toward a Comparative Social Theory of the Dispute Process" (1972).

usually consistent with the law, but also in between the law, above and beyond the law and occasionally contrary to the law.<sup>19</sup>

The authors take the official legal standards as a model of what the lower courts ought to be doing, and then look at institutional variables to discern why judicial behavior deviates from those standards. I have elsewhere characterized this as the problem of the "gap" between law on the books and law in action, and have argued that dismay at the gap constitutes the single most pervasive approach in social studies of legal phenomena.<sup>20</sup> Among the many disadvantages of this approach is a disturbing constriction of vision: the researcher is directed toward departures from the legal standard, and thereby distracted from developing a more general theory which would explain the behavior of judicial institutions in terms of the structure of those institutions.

This formulation of the central problem of the study is in turn an outgrowth of the authors' primary interest in recommending policies rather than advancing our general understanding of judicial institutions. Such a concern is entirely natural in a team of lawyers, and is highly commendable when those lawyers are also expatriate scholars seeking to justify their research to their Zambian hosts. But it does create a serious dilemma: what right do American lawyers have to make recommendations for the development of African legal institutions? The authors are highly sensitive to this dilemma, but I do not find their solution very satisfactory. In part they fall prey to the technocratic delusion that it is possible to make policy recommendations without choosing between values. In the final proposal for their study the authors included among their purposes: "To report ... perceived strengths and weaknesses in the operation of these courts.... To analyse as thoroughly as possible and report any operational problems .... To offer any recommendations generated...."<sup>21</sup> But

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19. P. 2.

20. "Law Books and Books About Law," Yale Law Journal (forthcoming) [a review article on Max Rheinstein's Marriage Stability, Divorce and the Law].

21. P. 120.

strengths, weaknesses, problems, and recommendations can only have meaning with respect to values. In an effort to avoid imposing their own, the authors look for other sources of value. Some are claimed to have general acceptance, e.g.,

more or less universal principles of justice -- that is, the rule of law. The widespread veneration given the doctrine of separation of powers suggests that the human attributes which give rise to the problem -- which result, as it were, in poisoning the well of justice -- are of widespread occurrence.<sup>22</sup>

Where such vague slogans fail to offer adequate guidance, and they usually fail, Spalding engages in a lengthy analysis of the myriad recommendations for the reform of judicial systems in Africa in the hope of synthesizing a consensus of views. He succeeds, but only by denying representation to a variety of significant dissenters. His consensus consists of "colonial and independent government administrators, [legal] academicians, and [legal] conferences."<sup>23</sup> It excludes anthropologists, sociologists, and those dissident African politicians who do not manage to become administrators. Surely, if the latter were allowed a voice, Spalding could no longer write so confidently that "everyone talks about professionalization - and favorably."<sup>24</sup>

Where pan-African consensus cannot be achieved, or is embarrassingly mute, the authors try to discern and follow Zambian values. But the same problems persist: whose values to choose among the diversity of Zambian opinion, and what to do when those values cannot readily be identified or are overly broad. In the end they opt for a compromise, justifying it on the ground that it "might achieve the best of both worlds without straining any segment of a society in transition."<sup>25</sup> But even a compromise necessarily represents a choice between values, itself an expression of value.

22. P. 59.

23. P. 29.

24. P. 52.

25. P. 217.



Once we sweep aside this pretence of value-neutrality, it becomes clear that the values which the authors claim to find in other spokesmen are in fact their own. I believe it is important to state those values as clearly as possible, although I do not claim any standing by which to judge them.

(1) Reform of judicial institutions is important for national development.

[T]he magistracy has unquestionably made substantial contributions in this period to the overall long-term development of the Zambian legal system -- albeit that the precise nature and dimensions of the contribution are not now easily perceived.

The consequences of success in this respect may not seem large, given the benefit of hindsight; but the consequences of a failure, had it occurred, could have been devastating to much of the rest of the nation's effort toward self-development.<sup>26</sup>

This is an assertion of faith, which is necessary to justify undertaking the study in the first place.

(2) Judicial institutions ought to be unified.

[W]e convinced ourselves, as have many before us, what an important aspiration it is to Zambia's future development as one nation. In the end our main hope is that our work, embracing as it does the work of so many others, may be of help to those who continue to labour toward the goal -- "One Nation, One Judiciary".<sup>27</sup>

(3) There should be a separation of powers between judiciary and executive.<sup>28</sup>

26. P. 151 (I have reversed the order of these two sentences).

27. P. 3.

28. P. 155, 175, 214.

(4) The judiciary should be professionalized.

Zambia's history proves that it is possible to have a magistracy composed largely of laymen. But to do so in a modern, complex legal system is a kind of juridical tour de force .... Nothing can argue that that tour de force should be perpetuated one day longer than necessary. Always assuming that Zambian graduates will have a Zambian -- and not a British or American -- legal education, Zambian professionals will be far and away better equipped to handle the duties of the magistrate than will any layman.<sup>29</sup>

When the values are stated in this fashion, I think it can be seen that they express an idealization of the American judicial system.

This study of the lower courts of Zambia, then, though animated by the best intentions and executed with great energy and intelligence, is marred by two flaws common to contemporary legal scholarship. One is the belief that legal institutions can be understood in isolation from other social institutions, uninformed by the insights obtained from comparative data, and in ignorance of the burgeoning theories of social science. The other is the delusion that a scholar can avoid expressing his own values in designing the problems he studies, choosing the kind of explanation he seeks, and making recommendations. But despite these flaws, the report will be an invaluable source of data for the comparative social study of judicial institutions even if, because of them, it is not itself such a study.

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