

## BOOK REVIEW

Eugene Cotran, *Casebook on Kenya Customary Law*.

Abingdon, Oxon: Professional Books Limited/Nairobi University Press. 1987.

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This addition to the literature on the law of Kenya will prove indispensable to serious students.

Ever since the East African Order in Council 1897 established the colonial judicial system for Kenya the superior courts have been required to 'be guided' by African customary law whenever certain conditions are present. Since the early 1960s there have been increasing numbers of cases subject to this provision. To furnish courts with information on customary law the School of Oriental and African Studies at the University of London instituted the Restatement of African Law Project. Dr. Cotran conducted the research for and wrote the two volumes on Kenya customary laws (Cotran 1968, 1969). While that work was in progress the Kenya government established two Commissions, with Cotran as secretary, to make recommendations as to the possible reform, unification and comprehensive codification of the laws of Marriage and Divorce, and Succession. They reported in 1968. The Draft Marriage Bill of the first was rejected by Parliament, but the second resulted in the Law of Succession Act, which has been in force since 1981 and has replaced much of the customary law. The courts have begun to build a body of case-law on customary law, relying on evidence of customary law, and making frequent use of the Restatement volumes. To this activity also Cotran made a contribution, in the role of Cotran J., between 1977 and 1982. That is the context of his collection of cases.

He states: "In this Casebook my principal aim is to illustrate the use made by the Kenya Courts of the Restatements and supplement them by decided cases." Thus his selection of cases is designed in part to include decisions in which the courts have treated the Restatements as reliable expositions of the customary laws (and a very few in which they have not), and in part to provide authoritative answers to issues of customary law not answered by the

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Restatements. He states secondly, that "it has been said that the customary law is what the Courts hold that it is and not what a Law Panel consisting of Chiefs and Elders [such as the Restatements relied upon] may opine that it is at a given time"; and, somewhat vaguely, that he hopes the collection "will deal with this problem". Finally, he says that he aims to show the practicality of presenting the customary law classified primarily according to legal issues, not by ethnic group as in the Restatements. His grounds are that development has been towards uniformity, and that it would be "unwise" to emphasise ethnic diversity.

The collection is divided into chapters on such topics as "Essentials of Marriage", "Effect of Death on Marriage" (which however concerns only the death of the husband), and "Dispositive and Testate Succession". Each chapter begins with a brief introduction in which Cotran states the significance of the selected cases and refers to the recommendations of the Commissions and the subsequent legislative reform if any. The cases include decisions of all the courts, from District Magistrates' courts to the highest courts of review and appeal.

The grounds of selection are not in all instances easy to appreciate. There appear to be 93 cases in all (excluding Case 76A, the significance of which is stated at p. 256, but which I have been unable to find). 16 had already been published in law reports to which serious users of this book are likely to have access. Most of the cases in Chapters 7 to 9, on the law of succession, deal with substantive law which has been rendered largely obsolete by the Law of Succession Act. They could remain relevant to current techniques of establishing customary law, but Cotran does not claim this in many instances. His introductory comments do not discuss the problems of interpretation of the new law to which some of them could be relevant. For example, he does not mention the question who is a 'father' or a 'child' of the deceased under the Law of Succession Act, although the answer could often be determined by customary law. (S. 3 (5) of the Act, reproduced at p. 202, and dealing with one portion of this question, seems to leave room for considerable argument.) Again, he does not indicate to what extent or under what conditions written customary-law wills remain valid (p. 274), just as he does not indicate the effect on customary-law wills of the African Wills Act, now obsolete but in force at the time of most of the selected cases.

The book has been attractively produced, employing the latest technology. Laudably it includes the decision of the Court of Appeal in the famous *Otieno v Ougo and Sirango*, decided in 1987 after the book had gone to press. Unfortunately other parts of the book show signs of over-hasty last-minute amendment, and inadequate review in the later stages to eliminate unnecessary verbatim repetitions, errors, omissions, inconsistencies and typographical errors.

However, my principal reaction to the book is puzzlement at another gap. Cotran evinces no interest in, nor even conscious awareness of the fundamental nature of the process in which he has been a participant, and about which he clearly knows much. This process is the creation by the judges in state courts, with the assistance of advocates and text writers, and subject to the requirements of the legislature, of a body of state law commonly called 'customary law' but better qualified as 'lawyers' customary law'.

The process occurs whenever a court is required to be guided by customary law in deciding an issue. The statutory injunction entails a principle that the court should give effect to the existing principles of the social order. The court accordingly takes account of any available information on the social order. That information may be provided by witnesses, a Restatement, or various other sources. The court also has regard to other relevant principles such as those requiring the exclusion of rules repugnant to justice and morality. It follows any statutory rule which in the circumstances overrides partially or completely the requirement to be guided by customary law, such as the statutory invalidation of customary marriages which conflict with statutory monogamous marriages. It then attempts to render the decision which best gives the appropriate weight to all the applicable principles. This decision is 'the law' for the case. Generalised, it provides a rule of 'customary law'.

This is not the way in which the process has been traditionally depicted by lawyers. According to them, the courts merely seek to ascertain the rules which are already observed in society, and apply them to the issues before the court. That account was once part of the judicial ideology. It is impossible to sustain it today in the light of the evidence of the cases, including those in this book. In the Introduction Antony Allott impliedly rejects it when he refers to the role of the courts in developing and transforming the customary law. It seems clear that rules governing social conduct which occurs outside and independently of the state courts cannot also be rules directing the state courts on how to decide cases. Yet Cotran's statement of his purposes; the tenor of his commentaries; and his own judgments declaring the rules of customary law as if they existed, immanent in society for the observer to find, or for his panels of chiefs and elders to declare: these all suggest that he believes it.

If Cotran had a more realistic theory of customary law, he could have better defended the Restatements against criticism. It has been frequently pointed out that the methods of investigation and analysis were anthropologically unsound, and "almost bound to produce systems of 'ideal' rules and principles", forced into the inappropriate conceptual frame of the Western lawyer, and bearing only a distant relationship to social behaviour (Holleman 1973: 601-2; see also:

BOOK REVIEW: COTRAN, *KENYAN CUSTOMARY LAW*  
Gordon R. Woodman

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Twining 1963; Abel 1969: 247-256; Roberts 1970; Moore 1979: 250). But as Allott (1969) explained, and as indeed all the commentators accepted, the object of the project was not to write anthropologically sophisticated texts, but to assist in the 'processing' of social norms for their use in state institutions. Cotran has never, as far as I am aware, attempted to explain and justify his methods in response to the anthropological criticisms, and he certainly does not do so in this book. I suggest that he might well have based his defence on the ground that, in extracting from the panels statements of relatively simple rules suitable for application in the state courts, even where such rules did not operate in reality, the Restatement project discharged part of the judicial burden. It procured the consensual formulation and publication of rules for judicial application which in the circumstances were on the whole unlikely to be unduly disruptive of the social order. While the Restatements contain passages which are less than highly illuminating, with their statements about what 'may' occur in various circumstances, and their omission to address all the principal issues, they do provide numbers of rules of 'customary law', laid out neatly, ready to be incorporated in judicial decisions.

The omission of this dimension is not only puzzling, but also regrettable. Since Cotran sees no fundamental problem in the process of formulating lawyers' customary law, he devotes little attention to it. Such discussion as the book contains is based on the old, erroneous ideology. He includes two cases of overt relevance to the issue, but seems to discount their value. The first (Case No. 69) he summarises simplistically by saying that it "is also very important in laying down the test of how customary law is to be proved in the Kenya courts" (p. 230). (More exactly it contains a vigorous dispute over the different modes of proving the social facts relevant to the determination of the content of lawyers' customary law.) Then he continues: "The case was decided before the Restatements were published and is of somewhat academic importance now because the Restatements are frequently used in proof by he who wishes to rely on them [sic]" (*id.*). This does not, on my view, succeed in proving that the Restatements make the present volume redundant *ab initio*, but it seems to be trying. The other case (No. 70) shows the court rejecting a rule which might have been created on the basis of the Restatements. Cotran's comment is that it shows "how the Restatements can readily be departed from" (*id.*), although the Restatement did not at this point state a rule for application in the courts which the court could "depart from" in the sense of formulating a contradictory rule.

No other cases are apparently selected to demonstrate any aspects of this judicial process, and certainly none to reveal the various principles in different fields of law to which the courts give weight in conducting the process. Neither are these matters drawn attention to in the commentary. The second stated aim of the book (above) does not seem to mean that such matters would be "dealt with",

although I have difficulty in understanding what it does mean. The result is a presentation of the judicial function in customary-law cases as either mechanical or unpredictably idiosyncratic, and in any case socially unaware.

Those who contribute to the process of the creation of customary law have an onerous and responsible task. If it is to be well done, the social and political implications need to be recognised, and the issues as to method need to be discussed openly. This book does not greatly help. It does provide information on the process, but largely by accident, and the truly fascinating and important information on judicial creativity has to be dug out by the reader. Some can be dug out, and for this reason it is worth repeating that the book is a worthwhile accession to the Kenya legal library. But it could have been so much more useful.

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