This symposium grew out of a seminar on problems of East African Law given at the University of Pennsylvania Law School in the spring of 1971. It is natural that American law teachers and students should sometimes demand a justification for including in J.D. curricula courses which focus on law in Africa; it is as natural that they should not be entirely satisfied with the answer: "Because it is there." During the past ten years a number of such courses have nonetheless been offered in American law schools. The remarkable variety in their style, subject matter, and geographical coverage is as much a testimony to the adventurous spirit of American academic lawyers as to a lack of consensus about the educational objectives which might be achieved by such courses.

Despite this variety, those involved have been confronted, to a greater or lesser extent, by a few common problems. Some are quite mundane, such as the difficulty of building up library facilities, dealing with the variety of motives and interests of students attracted to the study of such a seemingly esoteric field, and compressing a course within the limited amount of time that even the most liberal law schools are normally prepared to allocate to foreign or comparative law. Other problems are more fundamental. First, those of us who subscribe to the proposition that for most purposes law is best studied in its historical, social, and economic context share with other students of comparative law the problem that "the context" is not on our doorstep and that much relevant information may not be accessible. Similarly, if one is concerned with the realities of the law in action, it helps to be where the action is. Whereas traditional comparative lawyers have largely restricted themselves to comparing and contrasting legal doctrines, many of those writing or teaching about law in various parts of Africa have attempted to confront the problem directly. Whether they have always been successful in solving it and whether they have been making a virtue out of necessity are beside the point. The fact remains that the nature of the subject virtually compels the student to learn something of the geographical context, to be sensitive to the relationship between law and social and economic change, and to ask fundamental questions about the cultural, ideological, and philosophical assumptions.

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underlying his own legal systems and law-ways. A major difficulty in teaching about African law in an American law school arises because it cannot be taken for granted that American law students will be familiar with the relevant "context," with the result that a substantial amount of time may have to be devoted to preliminary sketching of the background; the course may deteriorate, as one American law teacher has put it, into little more than "baby anthropology, baby economics, baby geography, and baby political science." Because of the necessarily slow takeoff, American law school courses oriented towards Africa may not be suited to half-measures: either a substantial amount of time should be allotted to them or they should not be offered at all. If the latter alternative were universally chosen, this would be unfortunate, for there are issues and phenomena in contemporary Africa which are of general interest and significance.

A second major problem in the past has been the state of the literature, which is still rather uneven both in quality and coverage. Only very recently has a substantial body of scholarly legal writing in the area begun to grow; the improvement of local archives, the development of efficient systems of law reporting, and, above all, the emergence of a significant number of African legal scholars are largely achievements of the past decade. A primary aim of this symposium is to draw attention to a number of recent books dealing with law in one region of Africa, each of which deserves to be judged by the highest standards of international scholarship. The five works selected for review are not unique, but they illustrate vividly the wide range of important issues that are alive in East Africa today: How far can the national legal systems sustain their "African" character and yet be responsive to the demands of national unity and economic development? To what extent is unification of personal law possible and desirable in plural societies? Do law and lawyers have anything positive to contribute to nation-building? What is the relationship between law and anthropology? What can the ideas of theorists as diverse as Hart, Lasswell, Levi, Llewellyn, Maine, and Weber contribute to our understanding of African phenomena and vice versa? What are constitutions for and how can they be encouraged to take root? Are Bills of Rights ever dysfunctional? And, for those with a taste for the exotic, can songs ever be validly treated as a "source" of law; if so, in what sense? These are just a few of the questions raised in the works under review. They suggest that one good reason for continued American interest, apart from the general value of any comparative study, is that in Africa today many fundamental questions about the nature of law and its relation to society in all its aspects are posed in a peculiarly striking way because they are, or have in the recent past, been live issues requiring resolution as a matter of practical necessity.

It is important to remember that the primary audience for literature on African law should be people in and of Africa; and the main criterion
for evaluating such works should be the extent to which they cast light
on the nature of African legal systems and thereby contribute directly
or indirectly to the solution of African problems. It is to be counted
as a bonus that the study of law in Africa may also help non-Africans
better to understand their own situation and the nature of legal
phenomena in general. Because this symposium is directed mainly to
an American audience, attention has been focused on the potential
interest of East African legal institutions to people in the United States.
It is hoped that some of the reviewers' remarks will be of wider interest.
Of course, the views expressed are those of the individual contributors.
Each work was selected because it was thought to be of more than usual
significance, and, if some of the comments are critical, this is only be-
cause it is felt that rigorous, but constructive, criticism may assist the
development of this rapidly progressing field.

READINGS IN AFRICAN LAW. Edited by NEVILLE RUBIN &

William L. Twining †

In these substantial volumes two legal scholars of the School of
Oriental and African Studies in London have skillfully assembled a wide-
ranging selection of extracts from the scattered literature on customary
law in Africa. They have brought together a wealth of material, much
of which has been relatively inaccessible, and they have largely suc-
cceeded in their stated aim of providing "a comprehensive introduction
to the subject as a whole." The writings of leading anthropologists
such as Bohannan, Fortes, Gluckman, and Schapera are well repre-
sented, as are the works of the pioneers among lawyers such as Allott,
Danquah, and Elias. The editors have been modest in selecting rather
little of their own work for inclusion, but their substantial introduction
contains an excellent discussion of the different perspectives of lawyers
and anthropologists in this area. Their editorial notes are unobtrusive
and useful.

Provided that the reader bears in mind its modest objectives,
Readings in African Law can be safely recommended as a useful intro-
duction to the English language literature on African customary law.
Some important limitations need to be noted, however: first, this is not
an introduction to contemporary law in Africa, but an anthology of
secondary literature on customary law. A majority of the extracts date

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1 1 READINGS IN AFRICAN LAW xiii (N. Rubin & E. Cotran eds. 1970).
from the pre-independence era, and some were published before 1930. It is notorious that the convention of "the anthropological present" can give a misleading impression of timelessness. Reading through these volumes one gets no clear sense of historical perspective. The ambiguity is compounded for the unwary reader when extracts of widely varying dates about tribes in different parts of Africa are placed side by side. Thus, one may ask, can an account of adoption among the Kikuyu (Kenya) in the late nineteen-fifties be safely compared with accounts of adoption among the Xhosa (South Africa) in the forties and the Tswana (Bechuanaland, now Botswana) in the thirties? Given the state of the literature and the nature of the enterprise, such juxtapositions are difficult to avoid. But the reader must be on his guard.

A second limitation arises from the choice of "African law" (more precisely "African customary law") as an organizing concept. For many purposes this seductive category is at once too narrow and too wide. It is too narrow because in contemporary Africa it becomes increasingly artificial and misleading to treat customary law as a discrete phenomenon which persists in some sort of vacuum. While the editors are well aware of the problem, and few of their authors can be accused of making crude errors on this count, the general impression left by the collection is redolent of the literature of classical anthropology, which tended to treat tribes as isolated units. One result is that there is little mention of the ideologies and policies of African nationalist leaders, or of problems of economic development and political integration; nor is there any systematic discussion of the relationship between customary law and social change. Even the more familiar topic of the relationship between customary modes of dispute settlement and Western-style courts gets scant attention. Furthermore, the category of "African Law" is far too wide to be any longer satisfactory as a mode of designating a field of expertise. Like other pretentious and ambiguous labels such as "Comparative Law" or "Law and Development," it too often encourages scholars and students to bite off more than they can chew. In fact works labeled "African Law" rarely deal with the whole continent. The present work is almost entirely devoted to anglophonic Africa and contains little or no material on approximately half the countries in that large and varied continent. While it was undoubtedly useful at the pioneering stage for writers like Allott and Elias to outline the general picture in broad terms, and while there is still value in searching for uniform patterns, a healthy trend in the direction of regional, sometimes national, specialization has emerged in recent years. It is difficult enough for the neophyte to acquire sufficient background to get a feel for the legal problems of one or two African countries; tempting him to think of Africa as a single place may lead him into the most elementary errors.

These limitations make this work unsuitable for use as a course-book on its own. The one thing that can be said in favor of its price
is that it makes it rather unlikely that anyone will be tempted to recommend it as a course-book. For other purposes Readings in African Law will for a long time to come be useful as a rich compendium of general and illustrative material on customary law.


Larry I. Palmer †

One might question the value of a well-written, yet relatively short, scholarly work that proceeds for 100 pages before the author is able to state explicitly that he is ready to "turn to the main business of this study . . . ." But given the controversial nature of the literature on African customary legal systems, a scholar undertakes an enormous intellectual task if he hopes to make a major contribution to the field of comparative legal studies. Lloyd Fallers, an anthropologist, has made such a contribution by using the analyses of several Anglo-American jurists in his study of the legal reasoning of litigants and judges of the colonial courts of Busoga. Fallers' work is an important contribution for legal scholars interested in interdisciplinary studies. His book is an example of the type of integration of law and a social science that we have come to expect in modern scholarship. His use of legal theories and methodologies in his analysis of the social science data is both highly sophisticated and critical. In developing his major thesis that the Soga legal system operates as a system of social control, "without overt communication about the application of legal concepts—without precedent or legislation," Fallers demonstrates both the applicability and the inapplicability of analyses from our legal system, with its strong notion of precedent.

A lawyer would be naive to rely upon the notion that he has been trained to "get to the essence" of materials and on that rationale skip

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1 L. FALLOWS, LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COLONIAL COURTS OF BUSOGA 100 (1969).

2 See March, Sociological Jurisprudence Revisited, A Review (More or Less) of Max Gluckman, 8 STAN. L. REV. 499 (1956), and Gluckman's reply, id. 767. The author acquaints the reader with this controversy between the leading writers in the field early in his work. L. FALLERS, supra note 1, at 9-14.

3 E.g., H. L. HART, THE CONCEPT OF LAW (1961); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).

4 Busoga is part of what is now Uganda.

5 L. FALLERS, supra note 1, at 312 (emphasis in original).

6 See sources cited note 3 supra.
lightly through the first 100 pages. A thorough comprehension of these three chapters is essential to an understanding of the results of the cases and Fallers' analysis of them. His discussion of the relationship of the Busoga legal system to the stresses in that society during the period of colonization is excellent. In particular his demonstration that the function of the colonial courts under British rule is, in many respects, consistent with the Soga's previous system of political authority may help lawyers to understand the relationship of law and legal institutions to the transformation of societies. Fallers demonstrates that Soga litigants and judges use legal reasoning in the sense that they employ "categorizing concepts" in determining legal controversies. Deciding that a certain course of conduct fits within a recognized concept of legal wrong among the Soga is a means of distinguishing legal standards from merely moral ones. Before the common-law trained lawyer is able to comprehend the application of Soga legal reasoning to the cases involving marital rights and land rights, he must understand that law is a "cultural system"—a system of ideas—intimately linked to the Soga social system.

In an examination of the material on marital and land rights in the next four chapters, Fallers' application of Soga legal reasoning results, at times, in a superb synthesis of the "case law" on a particular subject. The parameters of the concept of "sufficient reason" for harboring a man's wife, for example, are developed from cases in a fashion that demonstrates the law's function in Soga society. Although husbands have been occasionally unsuccessful in actions against their in-laws because there was "sufficient reason" for the wife to be in her parents' household, Fallers' synthesis of all the cases illustrates that the legal concept of harboring without reason is used to place the burden of keeping a marriage together on the wife and her parents. Despite the stress of new ideas about the role of Soga women—primarily a form of cultural change—legal concepts in the marital area are relatively stable. In a case where newer ideas about the status of women are in conflict with traditional notions, judges are likely to be more explicit in their legal reasoning and their disagreement about the result, because how a particular judge will apply legal concepts to the facts of the case depends upon his view of the status of women.

7 L. Fallers, supra note 1, at 1-72.
8 The author draws heavily upon his own work on political authority among the Soga. L. Fallers, Bantu Bureaucracy: A Study of Conflict and Change in the Political Institutions of an East African People (1965).
9 L. Fallers, supra note 1, at 20. The term is borrowed from E. Levi, supra note 3.
10 Cf. L. Fallers, supra note 1, at 85.
11 Id. 14.
12 In addition to the case materials selected, the author interviewed judges whom he had met. Id. 2.
13 Id. 156-68.
14 Id. 323.
area of land law, Fallers' organization of the cases indicates that Soga litigants' search for new legal concepts that protect the newer uses of land, such as leasing, is a reflection of the increasing commercialization of land. Prior to the colonial period, the chief's authority over his constituents was undifferentiated from his authority to allocate land. Fallers argues that the Soga legal system needs new concepts to protect newer land uses because differentiation of political authority and power to allocate land represents a great social change for the Soga.

The final chapter is a comparative discussion of the distinctive features of Soga legal reasoning. Compared to the Anglo-American legal system, the Soga legal system is less explicit in its communication of legal concepts, but more popular in the sense that legal concepts are known by a large number of the populace. Not unsurprisingly the Soga legal machinery is readily accessible to the litigants. Because the Soga judges and bench enjoy a high degree of respect and authority, which correlates with the degree of legalism of the court's adjudication, law performs a different function in Soga society than it performs in other African legal systems—the Lozi, the Arusha, or the Tiv. Fallers concludes with a short discussion of the implications of his work for the attempts of leaders of independent Uganda to adapt the customary legal system to contemporary needs. He shows the inappropriateness, in light of Soga legal concepts of wrongs in the marital area, of national legislation to be applied in local courts, making adultery an offense. He suggests that the official government policy of leaving the customary system alone would perhaps be a more effective means of adaptation of customary law than codification (the means used by neighboring Tanzania and Kenya) if the customary courts were equipped with a reporting system that would tend to encourage more explicit communication of legal concepts.

Throughout the book, use of the present tense means the period 1950-1952, when the research was conducted. Fallers, however, makes the reader fully aware of the relevance of this circumstance in that there are inherent methodological problems in the use of twenty-year-old research data. He attempts to overcome as many of these problems as possible through explicit discussion and the use of appendices, one

15 Id. 224.
16 Id. 329-31.
19 See P. Bohannan, Justice and Judgment Among the Tiv (1957).
20 The author's statements about post-independence politics in Uganda, L. Fallers, supra note 1, at 332-35, are already out of date since Major General Idi Amin led a successful coup d'etat of the Obote government. N.Y. Times, Jan. 26, 1971, at 1, col. 7. This is perhaps a demonstration of the inadvisability of such statements since his comments are relevant regardless of who heads the Uganda Government.
21 L. Fallers, supra note 1, at 334.
22 Id.
on Soga kinship and the other on the case records and the methods of
selection. Despite these problems, his work should be carefully studied
by American lawyers. Legal scholars in interdisciplinary areas must
begin, in their use of social science data and techniques, to match the
sophistication demonstrated by Fallers, a social scientist, in his use of
legal materials. Because Fallers' study offers a thesis to explain the
relationship of the change of legal concepts and social transformation,
American lawyers can use his work as a basis for formulating hy-
potheses about the relationship of legal and social change in our own
society.

PUBLIC LAW AND POLITICAL CHANGE IN KENYA. By
YASH P. GHAI & J. PATRICK W. B. MCAUSLAN. Nairobi:

Stanley A. Koppelman†

Public Law and Political Change in Kenya1 addresses itself to
questions, now being asked in Kenya, that are asked of all young nations.
How successful has Kenya been in solving the many problems it faced
at the time of independence? Is the Kenya Government a stable institu-
tion capable of achieving orderly transfers of power, or is it merely held
together by one charismatic leader and thus in danger of crumbling after
his death? Although the questions are common, the authors' approach
is unique; they develop a theory based on the concepts of constitutional-
ism and legitimacy of governmental institutions that is useful in pur-
suing the answers to these questions.

Public Law does not focus on these questions until near its con-
clusion. Indeed, it may appear to the reader that the authors' novel
approach was merely an afterthought. The book primarily traces the
development of the legal framework of Kenya, in sometimes minute
detail, from its colonial period, through its transition to independence,
and up to the 1969 elections. As an historical study Public Law far
surpasses other works on East Africa both in breadth of coverage and
depth of analysis. The sections on agrarian administration and the
administrative process are especially well done. Though these virtues
are worth presenting, this Review will focus instead on the theory ex-
pounded at the conclusion of the book, because this theory is the book's
most controversial aspect and should most intrigue the student of
African law.

To gauge the likelihood of future political stability in Kenya,
Messrs. Ghai and McAuslan turn to the Weberian concept of legitimacy.

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1 Y. GHAI & J. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA
Thus, of preeminent concern to the authors are the questions whether the institutions and procedures of government are regarded with trust and confidence by the people of Kenya, and what role the public law plays in developing the legitimacy of these institutions and procedures.\(^2\)

With respect to the first question, the authors state that one task of new governments is to transfer charismatic legitimacy into institutional legitimacy.\(^3\) Charismatic legitimacy is the right to rule derived from a particular deed, such as engineering the quest for independence, or from the personality of the leader; the governmental system is accepted not for what it is, but because it is run by the charismatic leader. Institutional legitimacy, on the other hand, is based upon the acceptance of the system itself; the rulers have title to rule because they have achieved power through the designated system. The latter form of legitimacy, the authors assert, is the more difficult to create yet much more necessary to establishment of a lasting constitutional form of government.\(^4\)

Ghai and McAuslan believe that the Kenya Government has not been as successful as it might have been in maintaining the people's trust and confidence,\(^5\) and that this has weakened Kenya's chances of achieving institutional legitimacy. Specifically, in terms of one institution of government, the election process, which may play a vital role in transforming charismatic into institutional legitimacy,\(^6\) the authors accuse the government of speaking as though a multiparty system existed while initiating constitutional amendments to insure that no party presents a serious challenge to KANU,\(^7\) the country's dominant party.\(^8\) With respect to this and other governmental institutions, the Kenyans' view of the constitution as a ruler's weapon to be used against political challengers—and therefore to be altered when convenient—presents a serious challenge to attempts at legitimation.

Nevertheless, there has been some movement towards institutional legitimacy, and, as Ghai and McAuslan point out, the Kenya Government has achieved many of its prerequisites. At the time of independence the road to legitimacy had numerous obstacles. Under colonialism, there was a lack of respect for the process of law. The Constitution, which was drafted prior to independence, was touted as an immutable document. Unfortunately, compromises intended to appease all minority groups, and an underlying distrust of power by these groups, resulted in establishment of a weak form of government—one not conducive to achieving a sense of nationhood and rapid economic development. Even if the Government was carried away in its removal of constraints on the executive, these actions must be placed in the

\(^2\) Id. 505.
\(^3\) Id. 519.
\(^4\) Id.
\(^5\) Id. 506.
\(^6\) Id. 519.
\(^7\) Kenya African National Union.
\(^8\) Y. GHAI & J. McAUSLAN, supra note 1, at 512-13.
context of events, a context suggesting that some change was inevitable. Thus, while the Government may have sometimes lost sight of the need to preserve public confidence, it may not have been acting in bad faith as Ghai and McAuslan would have us believe.

With respect to the second question, the role of public law in developing the legitimacy of the institutions and procedures of government, the authors conclude that the "credibility gap" existing in Kenya severely diminishes the country's chances of achieving institutional legitimacy. Although the disparity between the rhetoric of the Kenya Government and its practices is one factor bearing on institutional legitimacy, there are other equally important factors. The orderly transference of power and the need for assuring that the President will not arbitrarily exercise his power are extremely important considerations.

Ghai and McAuslan have contributed a valuable, thought-provoking analysis. If the Kenya Government has been acting in bad faith, the authors' pessimism concerning institutional legitimacy is justified. But the facts as presented in the book suggest that the Government has been merely careless. If so, a more extensive explanation of other factors is necessary before one may hazard a guess about the future of constitutionalism in Kenya.


James D. Keeney

In 1967, the President of the Republic of Kenya appointed a commission on the Law of Succession, and another on the Law of Marriage and Divorce. Each commission was directed "to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code . . . applicable to all persons in Kenya . . .". The issues facing these commissions should interest Americans since they reveal basic tensions similar to those inherent in our own multicultural and dynamic federal system.

Kenya is a nation with extraordinary cultural and legal diversity. In addition to numerous African tribes of several distinct racial and linguistic families, the country's population includes large numbers of Europeans, Asians, and Arabs. During the British colonial period, one

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1 See REPORT OF THE COMMISSION ON THE LAW OF SUCCESSION (1968) (unpaginated Letter of Transmittal) [hereinafter cited as REPORT].

2 The 1962 census enumerated about 34,000 Arabs, 56,000 Europeans, and 176,000 Asians, in addition to scores of Bantu, Hamitic, Nilo-Hamitic, and Nilotic African tribes. The total population was about 8.6 million. STATISTICAL OFFICE OF THE UNITED NATIONS, DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS DEMOGRAPHIC YEARBOOK 1963, at 304-05, U.N. Doc. ST/STAT (1964).
code of succession was made applicable to Europeans and another to Asians. The African majority was left free to make wills and inherit property according to the "customary law" of the various tribes. If, however, an African or an Asian happened to be a Muslim, his estate might instead be divided in a Muslim court, according to rules of inheritance inscribed in the Quran.

In recognition of this diversity, the Government's directive to the Commission on the Law of Succession was very carefully balanced. The Commission was to produce a "comprehensive . . . code . . . applicable to all persons in Kenya," but the code was to be uniform only "so far as may be practical." Thus the Commission was given the task of deciding the extent to which a true unification of this area of personal law should be attempted.

The Commission seems to have interpreted its mandate so as to preclude consideration of an irreverent but critical threshold question: why is a uniform inheritance law needed or even desirable in such a diverse society? Is it not likely that an attempt to legislate change in this area will create animosity rather than unity? The Report alleges the opposite conclusion but does not articulate the Commission's reasoning. We are given little more than a bare recommendation that a uniform law of testamentary disposition and intestacy should be applied throughout most areas of the country. Of course, it is possible to speculate about why uniform inheritance law might be desirable—administrative convenience, problems faced by urban "detribalized" Africans, to name only two—but the Commission's silence gives the reader no assistance.

The main body of the Report is directed at a second issue. Assuming the proposed comprehensive code is to be uniform despite the nation's diversity, what provisions should the code contain? Ignoring, perhaps wisely, the possibility of introducing a wholly foreign law or simply extending the law of one community to cover the entire population, the Commission assumed that the new code should synthesize existing rules applied by the various communities.

The Commission's method was to examine each community's existing law in an abstract fashion in order to determine which of its

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3 The Indian Succession Act of 1865 applied to the entire non-African population of Kenya, except Hindus, Muslims, and Buddhists, while the Probate and Administration Act of 1881 applied to the Asian population (mainly persons from India). REPORT, supra note 1, at \[30.\]

4 In 1961 some of the provisions on wills contained in the Indian Succession Act of 1865 were made applicable to Africans. Id. \[31.\]

5 The Islamic law of succession applied to the estates of certain Muslims by virtue of § 4 of the Mohammedan Marriage, Divorce and Succession Act. Jurisdiction to administer Islamic law of succession is vested concurrently in the High Court and the Kadhi's courts. Id. \[35.\]

6 Id. (unpaginated Letter of Transmittal).

7 "Uniform law is part of nation building." Id. \[61.\]

8 The Report recommended that the uniform law of intestacy should not apply to agricultural land and crops thereon, or to livestock situated in certain administratively determined areas. Id. \[74.\] (Recommendation No. 1).
rules were "defective." Whatever one thinks of this method, the Commission's application of it, though thorough and competent, is open to criticism. Remarkably, the Commission found nothing defective about the laws currently being applied to Europeans and Asians, except uncertainty and failure to reflect changes recently adopted in England and India. It found, however, five basic defects in the content of African customary laws: (1) the testator may not apportion shares of his estate with complete freedom; (2) the rights of women to share in inheritance are very limited; (3) division of property in polygamous families is normally made without regard for the number of children each wife has; (4) customary laws were designed for property such as land and cattle and are inadequate for modern forms of property such as insurance policies; and (5) the deceased's son or brother usually acts as trustee for the family.

Once it adopted the goal of uniformity, the Commission faced a series of issues about which there was fundamental disagreement. To allow free testamentary disposition, for example, would contradict basic philosophical and religious beliefs of the Muslims, while not to allow it would run counter to basic traditions of the European community. To grant women rights of inheritance would upset traditionalists, while a law which did not protect wives and daughters would be unacceptable to more progressive elements of the population. Yet, despite its multiracial composition and its obvious attempt to maintain objectivity, the Commission wound up characterizing the African viewpoint on many of these issues as "defects" in African law.

The Commission seems to have made only two important concessions to the legal traditions of the African majority tribes as it understood them. It decided to allow oral wills (but only if made within three months of death) and in cases of intestacy to follow the African custom of holding estates in trust rather than distributing them (but with the widow rather than her son or brother as the trustee). In

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9 For its knowledge of the rules applied by the African tribes of Kenya, the Commission relied wholly upon the work of the Restatement Project contained in, 2 E. Cotran, Restatement of African Law: Kenya II: The Law of Succession (1969). Eugene Cotran, who directed the Kenya Restatement Project, was also a member of, and secretary to, both commissions discussed here.

10 It is somewhat disturbing that the Report does not appear to recognize that rules are only part of the total scheme by which conduct is regulated in human society—and indeed, that formal rules often bear little relation to what actually happens. See Llewellyn, The Normative, the Legal and the Law-Jobs: The Job of Juristic Method, 49 Yale L.J. 1335 (1940); Twining, Two Works of Karl Llewellyn, 31 Mod. L. Rev. 165, 174-80 (1968) (discussing Llewellyn's "Law-Jobs" theory).

11 Report, supra note 1, at ¶¶ 40-45.

12 Id. ¶ 53-57.

13 See note 28 infra.

14 See Report, supra note 1, at ¶ 43.

15 Note 27 infra.

16 See Report, supra note 1, at ¶ 135.

17 Id. ¶ 88 (Recommendation No. 8).

18 Id. ¶¶ 133, 135 (Recommendations Nos. 31, 32).
most respects the Commission seems to have been guided by its own, and perhaps the Kenya Government’s, progressive concern for the plight of women and children, and by its familiarity with common law adversary legal traditions. Thus the provisions for written wills, probate in adversary courts, and rather specific and inflexible rules to govern cases of intestacy generally have a familiar common law flavor.

Whether one agrees with its methods and conclusions or not, the Report is an important document. The discussion it has so far engendered both in East Africa and abroad provides a valuable contribution to the literature on law reform. The most interesting commentary on the Report to date has been provided by the Kenya National Assembly, which received the Commission’s draft bill in November, 1970. To the surprise of those observers who expected the one-party legislature to rubber-stamp it, the bill provoked lengthy debate and was ultimately tabled for six months, a procedure which may have killed it.

The debates make fascinating reading. The main conclusion which emerges from these colorful and sometimes emotional arguments is that the members of the Assembly saw little need for a uniform law of succession and feared that the enactment of the Commission’s draft bill would produce chaos because it was wholly out of step with African tribal traditions. Muslim speakers urged that the proposed uniform code would be contrary to their religion. Others claimed that the bill was designed to favor foreigners and those Africans who had recently amassed sizable fortunes and now wanted to disinherit their own tribesmen. The bill was decried as too foreign, and its provisions for increasing the rights of women and illegitimate children were attacked as contrary to African traditions and to Islamic law.

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19 Id. ¶¶ 105, 107, 109-12, 114 (Recommendations Nos. 20-26).
20 Id. ¶¶ 115, 117, 118, 120, 162-214 (Recommendations Nos. 27-30, 48-81).
21 Id. ¶¶ 133-58 (Recommendations Nos. 31-47).
24 Id. 2039 (remarks of Mr. Araru).
25 Id. 2016 (remarks of Mr. Magugu); id. 2021 (remarks of Mr. Ayah); id. 2082 (remarks of Mr. Mutiso).
26 Id. 1955-56 (remarks of Mr. Mwithaga); id. 2018 (remarks of Mr. Ayah); id. 2040 (remarks of Mr. Araru); id. 2082 (remarks of Mr. Ahmed); id. 2091 (remarks of Mr. Mwangole).
27 Id. 2022 (remarks of Mr. Ayah); id. 2037 (remarks of Mr. Mwamzandi); id. 2016 (remarks of Mr. Magugu); id. 2009-10 (remarks of Mr. Munyasia); id. 1955-56 (remarks of Mr. Mwithaga).
28 Id. 2039-40 (remarks of Mr. Araru).
The Assembly's rejection of the Commission's work may mean that Kenya is to have separate laws of succession for some time to come, but the question will probably resurface eventually. One hopes that during the interim more study will be made of African law-ways (as opposed to mere rules of law) so that the next commission will be in a better position both to define the problems caused by separate systems of law and to propose workable solutions. The next commission would in any event probably be well advised to seek more modest reform, thereby embroiling itself in fewer basic value disagreements.


Marguerite Johnston †

The problems arising from the establishment of uniform personal law are manifest nowhere more clearly than in attempts to formulate marriage and divorce laws. Legislating in this area of fundamental human concern ought to be approached sensitively, not only because of the impact on every individual citizen, but also because of the ramifications of any action for the institutional legitimacy so important to a newly independent nation such as the Republic of Kenya.¹

The Commission was appointed to make recommendations for a uniform law of marriage and divorce applicable to all persons in Kenya. The new law was to replace existing customary law, Islamic law, Hindu law, and relevant acts of Parliament.² The Commission was "to pay particular attention to the proper status of women in relation to marriage and divorce in a free democratic society."³ In formulating its methods and general approach, the Commission endeavored to reconcile two obviously competing interests: (1) that any uniform law must be founded on the African way of life, and (2) that traditional rites and customs should not be codified because to do so would impede the rapid change that is occurring in the African way of life.⁴


¹ For a discussion of institutional legitimacy in another context, see the preceding review of Public Law and Political Change in Kenya in this series.

² REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE (1968) (introductory page signed by the commissioners) [hereinafter cited as REPORT]. For an indication of the current lack of uniformity in the law of marriage and divorce, see id. ¶¶ 42, 43.

³ Id. (introductory page signed by the commissioners). For examples of manifestations of the current inferior status of women, see id. ¶¶ 54, 55. In seeking to draft a uniform law, the Commission was not attempting to collate systems of tribal law, a task which had been previously undertaken in E. Cotran, THE LAW OF MARRIAGE AND DIVORCE: RESTATEMENT OF AFRICAN LAW, KENYA (1968).

⁴ Id. ¶ 9.
siderations in constructing the recommendations, according to the Commission, were the objectives of promoting marriage stability and discouraging divorce. This Review will evaluate the Commission's Report by examining the apparent conception of African customary marriage inherent in the recommendations, and by judging the consonance of these proposals with the stated objectives and approach of the Commission.

It is significant that the "unsatisfactory features of the [customary] law," selected by the Commission for revision, have appeared elsewhere as the "distinguishing features of customary marriage": prevalent polygamy; difficulty in determining which ceremonies establish the legality of the marriage; the supposed function of brideprice as establishing validity; the woman's lesser legal status than her husband's; easy, extra-judicial divorce; and marriage contracted between families rather than individuals. Against this background the Commission premised its approach on the principle that customary marriage laws must be changed; however, the distinguishing features actually are drawn not from one type, but from many types, of marriage in Africa. The criterion for selection appears to have been the degree of divergence from an ideal form of marriage in Western culture. This systematic elimination of "undesirable" features—with the reluctant exception of polygamy—from the particular legal marriage proposed in the Report, serves as one indicator of the Commission's rather ethnocentric conception and treatment of African marriage.

The concept of the "potentially polygamous marriage" will now mean that a marriage can, regardless of form, be declared monogamous from its inception. When marriage takes place, the parties explicitly declare the nature of the marriage. Fixing the nature of a marriage by an agreement appears an attempt to increase a woman's rights by ensuring that she will never be an unwilling party to a polygamous marriage. But the ramifications of this attempt, when combined with those of connected recommendations, are problematical. Marriage is declared to be binding for life, and can only be modified "by a joint declaration of husband and wife freely made in the presence of a registrar and

5 Id. ¶12.
7 See REPORT, supra note 2, at ¶¶ 47-58.
8 Under current law, the legal consequences of marriage differ under the different bodies of law, even beyond the permissibility of polygamy. One of the purposes of the Report is to eliminate these disparities. Id. ¶¶ 47-58.
9 Id. ¶ 82.
10 Id. ¶ 82 (Recommendation No. 11).
recorded in writing at the time of making." The Report does provide for divorce, but none would be permitted until three years after marriage. In addition, it is suggested that a petition for divorce should not be permitted unless the dispute has first been referred to a conciliatory body, and that body has failed to settle the dispute. The only legitimate ground for divorce would be "that the marriage has irreparably broken down."

While the program underlying these provisions appears to comprise both a basic policy determination to discourage divorce and an attempt to elevate the status of women, it suffers from undue emphasis on one set of cultural values. Polygamy is quite prevalent in Kenya, and, formerly, most societies were polygamous. One gets the impression from reading the Report that the authors generally disapproved of polygamy (although polygamy does not in itself indicate low female status), but declined to recommend abolition because of the substantial weight of public opinion in favor of retaining it. Indeed, the Report states, "We think polygamy will die out and that it is in the national interest that it should. . . . We believe that the law should do everything reasonably possible to discourage the practice of polygamy." The proposals in their entirety reflect Western inclinations and can hardly be said to be founded on the African way of life.

It is not unlikely that at the time of marriage two people may wish to contract a binding monogamous marriage; however, it is known that additional unions, even when legally invalid from the point of view of the state, may still frequently occur. The difficult impediments to escaping a monogamous marriage, which, of course, reinforce the stated policy of discouraging polygamy, have been outlined, and should be scrutinized in predicting the systemic effect of the proposals in their entirety. Although the Commission has given some consideration to African tradition in formulating these proposals, greater margin for gradual change might have been provided by facilitating divorce or change in the nature of a marriage. One proposal, instituting governmental conciliation agencies, does appear oriented toward this goal.

To regularize marriages, the Commission proposes uniform requirements for valid unions. The proposed law leans toward presuming validity despite irregularities in formalities. For example, the bride—

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11 Id. ¶ 85 (Recommendation No. 12).
12 Id. ¶ 286 (Recommendation No. 112). In addition, divorces after three years of marriage are to be granted according to the discretion of the court. See id. ¶ 293.
13 Id. ¶ 288 (Recommendation No. 113(a)).
14 Id. ¶ 298 (Recommendation No. 114). Factors to be considered in determining whether there has been a breakdown are discussed in ¶¶ 299-312.
15 Id. ¶ 73.
16 Id. ¶¶ 73-81.
17 Id. ¶¶ 78, 81.
18 But certain irregularities—for example, failure to meet the age requirement—would nullify the marriage. Id. ¶ 65 (Recommendation No. 4).
price would be eliminated as a prerequisite to a valid marriage.\textsuperscript{19} The Report notes that brideprice is not a purchase price; it indicates the prospective groom's ability to care for the bride, and—through a series of payments—provides an opportunity to build viable social relations with in-laws and ultimate affinal solidarity.\textsuperscript{20} For the state, the difficulty in determining the legality of nuptial ceremonies has always been a troublesome feature of customary marriage; but the great variation in brideprice rights from society to society had rendered use of the brideprice unsatisfactory to indicate marriage validity. The Commission's uniform criteria for legal marriages are somewhat more consistent with the Western concept of marriage validity than with the former dependence on brideprice payments.

Perhaps the most serious fault of the Report is the Commission's conception of social change and urbanization, which seems to underlie the neglect of indigenous African law in the proposed law.\textsuperscript{21} The Commission seems to believe the preferences of the population in the area of personal laws are evolving in the direction of the proposals, because of intertribal mixing in the cities and consequent loosening of indigenous legal systems and individuals' obligations to rural kin. Anthropologists, however, have found that the dichotomy between urban and rural dwellers has been drawn too sharply. For example, in the Kenya coastal city of Mombasa, the majority of Africans are said to maintain family and lineage ties in rural areas; intertribal marriages are exceptions to marriages within the tribal category.\textsuperscript{22} In fact, the retention of indigenous customs in personal, domestic spheres, as opposed to the economic or political spheres, has caused some anthropologists to separate analytically these domains in studies of cultural change; becoming a wage-earner or politician is no guarantee of parallel changes in an individual's views on marriage, or his relations with his family.\textsuperscript{23}

David Parkin, an anthropologist, has found that a society's traditional social and political organization, rather than mere presence in a city, affects the adaptations marriages make to the urban setting.\textsuperscript{24} Members of a major Kenya society, the Luo, are frequent migrants to the city of Kampala, Uganda, and many remain there permanently. Although the Luo reside in tribally mixed housing developments, even those who are economically and politically quite successful have a negligible rate of tribal intermarriage. Parkin ascribes this situation,

\textsuperscript{19} Id. ¶ 115 (Recommendation No. 24).
\textsuperscript{20} Id. ¶¶ 107-15.
\textsuperscript{21} Id. ¶¶ 9, 52.
\textsuperscript{22} Wilson, Mombasa—A Modern Colonial Municipality, in Social Change in Modern Africa 98 (A. Southall ed. 1961).
\textsuperscript{23} For a discussion of "situational change," as well as other approaches to cultural change, see Mitchell, Theoretical Orientations in African Urban Studies, in The Social Anthropology of Complex Societies 37 (M. Banton ed. 1966).
\textsuperscript{24} Parkin, Types of Urban African Marriage in Kampala, 36 Africa 269 (1966).
in part, to the strong agnicl Luo descent groups, which corporately own land and retain an interest in their female members, for whom high, recoverable brideprice is paid. Urban tribal associations and agnicl clansmen residing in the city maintain surveillance over their members there and continue to regulate their marriages. It seems, then, that societal diversity would make it difficult not only to draft and implement a uniform law, but also to predict a single direction for social change.

Kenya is a structurally plural society politically dominated by a cultural minority. In their colonial government of Kenya, the British recognized pluralism in family law as a practical necessity. To the newly independent state seeking to consolidate its power and unite its peoples, measures which tend to restrict pluralism, such as the Commission's proposed law, are understandably attractive. The goal of a uniform law in this area, however, should have been approached with greater deference to the diversity and tenacity of indigenous law and customs in domestic relations.


Edward Lee Rogers †
John F. Hellegers ††

Recently renewed and expanded public awareness of the environmental crisis has spawned a goodly number of popular environmental books. Most of them reflect a pervasive gloom about the prospects for preserving the quality of our rapidly deteriorating environment for ourselves and our progeny. Professor Sax's book, written for both the general public and the lawyer, is at once pragmatic and theoretical. Without much pause for gloomy environmental prognoses, Professor Sax devotes his book to explaining how citizens can become effective guardians of the environment by bringing lawsuits on behalf of the public's interest in environmental resources. The author, a Professor of Law at the University of Michigan, is an eminent authority on environmental law. The book reflects a painstaking and perceptive consideration of fundamental flaws in our governmental system that have contributed heavily to our inability to cope with environmental problems. Professor Sax offers no complete remedy for such flaws but persuasively argues that properly prosecuted citizen lawsuits are necessary, if we are to alleviate the effects of those flaws.

Paradoxically, despite the proliferation of statutes and agencies charged with protecting our environmental resources, the environment


3 He is also the author of Michigan's Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1971), which gives citizens the right to maintain suits "to obtain declaratory and equitable relief against [private and public entities] for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." Id. § 691.1202(1). Similar bills (e.g., S. 1082, 92d Cong., 1st Sess. (1971)) are pending at the federal level.
has continued to deteriorate. Although we have hardly begun cleaning up our air and waterways, the industrialization and power generation that will be needed to sustain present rates of economic and population growth promise to impose even greater burdens on those resources. Hopes for amelioration lie with a relatively slender but growing pollution abatement technology, with more intelligent allocation of resources, and with a stabilization of the population. Environmental problems are, of course, far broader than pollution problems. Many projects—such as dams, barge canals, land fills, highways, and the channelization of free-flowing streams—obliterate rivers, marshes, wetlands, and other increasingly rare and valuable resources. In many instances, objective analysis would show that the damage of such projects outweighs their alleged social or economic benefits or, at least, that sound environmental planning would disclose feasible, less damaging alternatives.

As Professor Sax's book demonstrates with interesting and detailed case examples, the public agencies responsible for promoting or permitting such projects repeatedly fail to make responsible environmental decisions. While the author agrees that administrative agencies should have an important part in regulating and monitoring activities that have environmental impact, he argues that placing sole reliance on bureaucrats or elected officials to protect the public's interest in environmental resources is a grave mistake. He objects strenuously to the notion that has prevailed until relatively recently that the bureaucrat, because of his expertise, should be the final arbiter of the "destiny of our air, water, and land resources."

His case analyses demonstrate that the necessity of accommodating many interests often prevents administrative agencies from making or adhering to decisions based upon their supposed expertise. The most obvious reason is political pressure. When there is a truly important environmental issue in a proposed action, with high political and economic stakes in the outcome of the administrative decision, the administrator will come under pressure from a number of sources. Above all, he will feel constrained to protect his agency. An excellent example was the behavior of the Department of Interior in considering a proposal to fill in a portion of the Potomac River at the mouth of Hunting Creek, within sight of the Nation's Capitol. Attempting to respond to conflicting outside pressures, the Department vacillated in its decision regarding the fill permit, which would allow the destruction of a wildlife and waterfowl habitat for the construction of luxury apart-

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4 See, e.g., NADER TASK FORCE REPORT ON WATER POLLUTION: WATER WASTELAND (D. Zwick ed. 1971).

5 Query, for example, whether an economy that depends upon planned obsolescence and artificial creation of demand to maintain prosperity is consistent with long-range environmental imperatives. See, e.g., V. PACKARD, THE WASTE MAKERS (1960); cf. Treires, Kicking the Defense Habit, 210 NATION 200 (1970).

ments. The initial decision not to oppose the permit was, in Professor Sax's description:

a classic case of "sub-optimizing"—that is, a case in which a decision was made that seemed best to those who had power to decide when all the many constraints, pressures, and influences at work were taken into account. From the inside perspective of a government agency, hard choices must be made. An agency has its own priorities and legislative program; it has conflicting constituencies among which it must mediate, and in whose eyes it must—for its own good—appear to have a balanced position; it has a budget to consider and thereby a need for friends in the legislature.7

Professor Sax also believes that excessive reliance for environmental protection upon public administrators, acting under vague and broadly discretionary standards, has contributed to the failure of our system to recognize and develop an adequate legal theory of public rights in environmental resources. That no member of the public, as such, has been considered to have a legal claim to clean air, water, and other fundamental environmental resources equivalent to those he could make for private property interests has undoubtedly contributed to the notion that such resources are free for the taking.

The author discusses various administrative arrangements that might make the development of a privately enforceable public right unnecessary, and finds them wanting. Public hearings held prior to the taking of administrative action are helpful in informing the citizen of what may occur, but they give him little leverage. A citizen participates in such hearings not as a party with protected rights, but as an interested person whose only right is to be heard. Often the net effect of such ineffective "participation" is simply citizen disillusionment, as members of the public discover that insiders view these hearings mainly as devices for citizen catharsis. Advisory and planning councils may have valid roles to play in policymaking, but they cannot begin to investigate and monitor every situation threatening the environment. Each case must be decided on its own merits. In Professor Sax's view there is no way to assure that such decisions will be made fairly and objectively unless the public has full access to the courts where those determinations can be reviewed by non-insiders, that is, judges.

The concept of judges as non-insiders is at the heart of Professor Sax's analysis. While they may be no wiser than administrators and in many instances have substantially less technical expertise, federal or other judges with secure tenure do stand somewhat apart from the agency system and the political process. Thus they are not subject to

7 Id. 53.
the kinds of political pressures that plague even the most competent and honest administrators and politicians.

Professor Sax points out that not only are tenured judges relatively independent after appointment; they are also unlikely to be appointed on the basis of a particular attitude toward environmental issues, since these issues are likely to occur in only a small portion of a judge's anticipated case load. At present this is probably true; but as environmental issues become more pressing, as they enter into a larger proportion of cases, and as powerful economic interests experience the impact of adverse judicial decisions, great pressures will accumulate for the appointment of "safe" judges. The recent history of the involvement of courts in race relations and civil rights furnishes an instructive parallel.\(^8\)

In addition to stressing the independence of the judiciary, Professor Sax notes that while agency decisions or plans may be deferred indefinitely, the filing of a complaint and the rules of practice impose deadlines for action, enabling the citizen to take the initiative in having the dispute resolved. Another advantage the author sees in litigation is that it requires issues to be refined and narrowed for decisionmaking. Thus, asserted environmental protection guarantees in any particular project will be analyzed and measured against the case presented by the opposing party. Finally, the author points out that judges have relevant fields of expertise of their own. In addition to their fact-

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\(^8\) The controversy surrounding the attempt of the Nixon administration to alter the complexion of the Supreme Court provides an illustration of this process. See *Hearings on the Nomination of Clement P. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court Before the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969);* *Hearings on the Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970).* Although earlier controversies may not have surfaced to the same extent as those over recent nominations, judicial appointments on the basis of individual attitudes toward important or emerging social issues are by no means a recent development. See, e.g., D. Danelski, *A Supreme Court Justice Is Appointed* (1964) (treating the nomination of Pierce Butler to the Court in 1922).

Pressures of this sort, although not specifically directed toward judicial appointments, have already been felt in the environmental area. In the fall of 1970, the Internal Revenue Service, in what some observers saw as a politically motivated appeal to business interests, temporarily suspended the tax-deductible status of contributions to groups formed to litigate in the public interest. Had this suspension become permanent, environmental litigation against well-financed defendants would have become exceedingly difficult. As to the long-run receptivity of the courts to such litigation, see *N.Y. Times,* July 4, 1971, § 1, at 20, col. 1 (*Excerpts From Interview With Chief Justice Warren Burger on Role of Supreme Court*). Chief Justice Burger expressed the opinion that:

> Young people who decide to go into the law primarily on the theory that they can change the world by litigation in the courts . . . . may be in for some disappointments. . . . [T]hat is not the route by which basic changes . . . should be made. That is a legislative and policy process, part of the political process. And there is a very limited role for courts in this respect.

*Id.*

Justice Burger was not addressing himself specifically to the environmental area, and there is some reason for reading his remarks narrowly, since he is also the author of one of the decisions that goes furthest in according standing to citizen groups in public interest litigation. *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966).
finding abilities, judges are skilled in perceiving the areas of actual dispute underlying the issues framed by the parties. In the author's view, a judge's lack of technical expertise in environmental areas will not preclude him from determining whether the party with the burden of persuasion has adequately carried it any more than it would in other areas of complex litigation.

Unfortunately, however, as the author recognizes, courts are often asked to decide environmental cases on grounds that bear little or no relation to their merits, because of the restrictive rules governing judicial review of administrative actions. For example, the Hudson Expressway decision,9 which preserved a river gorge by enjoining the construction of a freeway, was premised on a finding that the causeway to be constructed in the river was a "dike" within the meaning of a long-forgotten provision of the Rivers and Harbors Act of 1899,10 construction of which required explicit congressional approval. Since approval had not been obtained, the citizen-plaintiffs were able to obtain an injunction. Professor Sax would prefer a system in which our courts decided the issues before them on their merits, rather than on such niceties. He believes that the rules of review—the arbitrary-and-capricious standard and the substantial-evidence rule11—have led some courts to give undue deference to the decisions of administrators. After describing several cases in which highway location decisions were challenged, he states: "[T]hose opinions treat as a fact to be believed rather than an assertion to be tested the statement of a highway department that it has amply considered all relevant alternatives."12 Where the courts have thus refused to determine whether such alternatives have been adequately considered there may have been "a judicial failure to recognize the citizens' right, enforceable by law, to environmentally sound planning. It is this right that is the essence of a true law of the environment . . . ."13

Several recent environmental cases14 give reason to hope that, within the existing limits of judicial review, courts are beginning to scrutinize agency decisions more thoroughly and will require articulation of the bases for agency decisions and justification of the rejection of alternative proposals. Such a trend could go far in achieving recognition of the citizens' right to sound environmental planning.

12 J. Sax, supra note 6, at 146.
13 Id. 147.
Professor Sax recognizes that there may be ongoing administrative practices and programs that deserve to be challenged by litigation. As an example he cites *Environmental Defense Fund, Inc. v. Corps of Engineers*, in which the plaintiffs successfully sought an injunction against the construction of the Cross-Florida Barge Canal, which was "first authorized in 1942 in the interest of national defense." In his view, however, the most important and effective function of public environmental litigation lies in seeking "preventive" injunctions against proposed actions. Indeed, the National Environmental Policy Act of 1969 (NEPA) already requires agencies to make a detailed study of, and statement on, proposed actions having environmental impact, including the study of alternative courses which might achieve the objectives of the Act. The NEPA has been the basis for several injunctions against proposed projects and new work on continuing projects.

To enable courts to reach the merits of environmental disputes and recognize that citizens have enforceable rights against both private and public entities, Professor Sax calls for revitalization and expansion of the public trust doctrine. Referring to the origins of that doctrine in Roman law, he notes that "[i]t was founded upon the very sensible idea that certain common properties, such as rivers, the seashore, and the air, were held by government in trusteeship for the free and unimpeded use of the general public."

After briefly reviewing the manner in which the doctrine has been applied by American courts only to certain types of properties such as "shorelands and parks," and referring to the maxim applicable to private property, "*sic utere tuo ut alienum non laedas*—use your own property in such a manner as not to injure that of another," he calls for application of the same principle, through the use of the doctrine of public trust, to all of the aspects of the environment in which the

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16 J. Sax, supra note 6, at 210. Plaintiffs obtained a preliminary injunction on January 15, 1971, 2 [Cases] BNA Env. Rep. 1173, and a few days later President Nixon ordered work on the project halted.

Generally, however, Professor Sax suggests that seeking preliminary injunctions against ongoing projects and programs—attempting to upset the status quo—is hardly worthwhile because "such cases are amenable to problems of delay, protracted appeals, and debilitating legal warfare." J. Sax, supra note 6, at 120. Undoubtedly, he is right, but for the very reasons he so eloquently expresses, of all available remedies, the lawsuit may still be the best choice. See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (controversy over the continued registration of pesticides containing DDT).
19 J. Sax, supra note 6, at 163-64.
20 Id. 164.
21 Id. 158-59.
public has an important interest. That trust would be enforceable directly by citizens as owners of the public interest involved, not just by a bureaucrat acting as middleman. This would not mean that such resources would never be legitimately subjected to other, incompatible public uses, or even to certain types of private use. But in the event of such proposed reallocation, courts would be ready to scrutinize the proposal as non-insiders, and to enforce the public trust in those resources in the manner appropriate for the particular case. This would require an offsetting public benefit to justify the proposed new use, either in the proposed new activity itself or through other arrangements. On occasion, a review and decision by the legislature of the propriety of the new use would be necessary before the courts would permit it.

To implement the public trust doctrine, the author calls for the use of the “legislative remand” and the “judicial moratorium” and provides illustrative cases in which they have been effective. If either conflicting legislative policies respecting the use of a particular resource, or conflicts between an apparent legislative policy and the public interest in a resource arise, an injunction might be appropriate to maintain the status quo pending legislative review of the controversy. Similarly, a policy decision by the legislature may appear to call for a particular public use of certain resources, and a public agency’s proposed decision regarding that resource may preclude that use. An injunction preventing implementation of that agency decision will act as a “moratorium” on further action, and provide an opportunity for reflective agency action geared to implementing the declared legislative policy.

One argument made persuasively at several points in the book is that the innovative public litigation and exhaustive judicial review that Professor Sax suggests would compel better environmental planning. Further, the case examples given and the underlying strategy espoused by Professor Sax make clear that such litigation is not designed to invite the courts to substitute their will or their view of appropriate public policy for that of the legislature. To the contrary, by preserving

22 Id. 175-92, 193-211.

23 Chief Justice Burger has expressed concern about this point. See note 8 supra. While Professor Sax would like to see the courts take an active role in enforcing the public trust in environmental resources, he doubts the wisdom of proposals calling for the recognition of a constitutional right to a decent or healthful environment because, inter alia, the courts rather than the legislatures would become the ultimate authority for declaring such rights; they could not be overruled by the legislature. J. SAX, supra note 6, at 237; cf. Roberts, The Right to a Decent Environment: Progress Along a Constitutional Avenue, in LAW AND THE ENVIRONMENT 134 (M. Baldwin & J. Page eds. 1970). Since a decent environment, however, is a basic necessity for human happiness—indeed, meaningful survival—it would appear that judicial recognition of a constitutional right to it, in the flexible and reasonable manner that Professor Sax would have the courts apply the public trust doctrine, need not give rise to the constitutional crises that Professor Sax fears. One federal judge has stated in an air pollution case:

[There is] no difficulty in finding that the right to life and liberty and prop-
erty are constitutionally protected . . . and surely a person’s health is what,
the status quo where the legislative intent is ambiguous, by bringing public and legislative attention to the controversy, and by compelling (in the instance of the remand) clarifying legislative action, such litigation serves to focus attention on the underlying policy considerations involved, keeps public agencies from violating legislative directives, may enhance the deliberative aspects and quality of the legislative process, and may lead to new ways of preserving the quality of our environment.

in a most significant degree, sustains life. So it seems to me that each of us is constitutionally protected in our natural and personal state of life and health.

BOOKS RECEIVED


The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231. Translated by James M. Powell. Syracuse: Syracuse University Press, 1971. Pp. xxxviii, 163. $8.00.


