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Rwanda's Transition from Civil to Common Law

By Prof. William E. Kosar*

Overview

Rwanda currently has a dual legal system that embraces aspects of both civil and common law although it is gradually moving towards a more common law based system. In practice this means that new pieces of legislation (e.g. recent changes in Rwanda's commercial laws) tend to be drawn more from principles of common law countries rather than civil law jurisdictions. As far as commercial laws are concerned, this shift is related to Rwanda's drive to encourage/increase local and foreign investment. Countries at the top of the World Bank's "Doing Business Index", and to whom Rwanda has looked for inspiration when reforming its commercial laws tend to operate a common law system.

A persistent challenge faced by Rwanda is the transformation from civil law to common law. Rwanda as a civil law country is finding that certain concepts of common law practices are not being readily accepted. The introduction of commercial laws and procedures leaning toward a middle point between the civil and common law systems will require additional and rigorous training for judges and advocates. It will take time for all involved at the Institute of Legal Practice and Development to get acquainted with the various aspects of reform and to generate the skills required to meet the demand they have created.

The move to common law also means that Rwanda's Judiciary is increasingly relying on *precedent* as a source of law in addition to written statutes. This change to rely on what can be described as 'judge made law' as well as statute law has been effected by changes in practice, to some effect led by expatriate judges currently sitting in the Commercial Court. The Judiciary has embraced the implications of this change, with the Supreme Court's 2011-12 work plan including the publication of law reports which are vital to for a precedent-based system to operate effectively. In spite of some initial discomfort the overall response to the reforms has been positive.

EAC Obligations

The Republic of Rwanda joined the East African Community ("EAC") on July 1, 2007. It later joined The Commonwealth in November 2009.

Rwanda's move towards a common law based system is not necessitated by its membership in the EAC nor The Commonwealth, neither as a matter of legal obligation nor as a matter of practicality.

However, EAC Deputy General in charge of political federation, Beatrice Kiraso, indicated that the plan is for the EAC to adopt the common law tradition, and it is essential that all the member states do so. Kiraso added that "public and private institutions [of Member States] will have to be unified." The President of the Rwandan High Court and a principle judge at the East Africa Court of Justice, Johnston Busigye, noted in an interview that the Rwandan legal system has been undergoing reforms since 2001 that are geared towards making the switch to the common law tradition. The difference in the legal

traditions of EAC Member States is due to the fact that their legal systems were modeled after the systems of their colonizers. While the Kenyan, Tanzanian, and Ugandan legal systems were modeled after the U.K. common law system, the Rwandan and Burundi systems were heavily based on the Belgian civil law system. The move will help the two countries to conform to the EAC ahead of the on-going negotiations to form a political federation among the five member-states that make up the regional bloc.

All the EAC countries apart from Burundi already have 'approximated' commercial laws because they are all based on UK law. Rwanda has gone further than all the others in modernising its commercial laws in line with best practice in English common law countries and the real threat is that Rwanda's laws will be dragged down to the lowest common denominator (e.g. Tanzania's 'new' Companies Act is in fact the widely recognised to be unsatisfactory UK 1985 Act). Countries within the EU operate with very different commercial laws – particularly the UK with its common law system. But provided individual countries ensure that their domestic laws are aligned with the principles set out in EU directives, there is no problem.

The EAC Treaty provides for this under Article 126 which refers to 'the standardisation of the judgments of courts within the Community.' This does not necessarily imply a total harmonisation of judicial procedures across the EAC. What is required is for Rwandans to be able to take action in the courts of other member states, and for judgments thus obtained to be enforced. In addition Rwandans need to be able to enforce judgments of Rwandan courts in other member states. Currently Rwandan courts will enforce judgements of foreign (including EAC) courts through the *exequator* procedure, but this needs to operate both ways, with judgments of Rwanda courts being enforceable through registration with the courts of other Member States.

Overview of the Common Law

Judge–made law, or ***common law***, was carried over to Canada, the United States, India, Pakistan, Australia and New Zealand and numerous other countries as Great Britain established her colonies including EAC partners Kenya, Tanzania and Uganda and soon, South Sudan. Some have considered the common law to be the crowning achievement of British civilization and the best thing that it left behind in the nations that it colonized.

Under the doctrine of precedent, the decisions of a higher court are more persuasive and ought to be followed over a conflicting decision of a lower court. For example, given the exact or similar set of circumstances, where the Supreme Court or Court of Cassation and a Small Claims Court have rendered a decision, the decision of the Supreme Court is of course more persuasive and is the decision that subsequent judges must follow.

Notwithstanding the above, judges will often follow the decisions of judges in other countries, particularly England and other Commonwealth countries and the United States particularly in commercial law matters. Decisions of the UK House of Lords are the most persuasive. One now retired justice of the Ontario [Canada] Supreme Court once remarked that "When the House of Lords sneezes, the [Ontario] Court of Appeal stands on its head."

Other Countries Views of Common Law Principles

The "application of the principles of justice, equity, good conscience and judicial precedents of the English Common Law may further require the Court or Judge to apply the provisions of:-

(ii) International Treaties & Conventions; and

(iii) The general principles of other different legal systems provided they are in conformity with the local values or conditions in the Southern Sudan.[1]

Section 3 of the **Judicature Act,** Cap. 8 Laws of Kenya, has similar wording.

Hybrid Systems

In various places in the world one can see a strong merging of the common and the civil law traditions. In criminal law it regards in particular the adversarial and inquisitorial penal systems, either or not with customary law influences. Merging penal systems is not an easy task. It is one thing to pick and choose from both systems whatever sounds appealing.. Creating a consistent and coherent system, a system with an internal logic, is another thing.

When deliberately merging two systems it is crucial to know all ins and outs of both systems and not the least the differences and commonalities. The moment a lawyer or legal scholar steps out of his or her own legal system into a new one, he cannot be sure of the law any longer.

Scotland, South Africa and the province of Quebec in Canada are three of the leading jurisdictions which integrate English common law with Continental civil law.

One of the major steps for Rwanda in moving from the civil towards the common law is considered to be the introduction of the "precedent" system, the common law system of referring to leading Supreme Court decisions. This is seen as a major move away from the civil law, where such a system would not exist. A good glossary, trying to translate words and concepts in another language, and describing the meaning of words and concepts in their context, would show however that the French "jurisprudence" comes very close to the common law "precedent" system, although called differently. It would show that also in the civil law, lower courts adhere to Supreme Court decisions as they are very well aware of the fact that their decisions will be overruled by the Supreme Court if they go against a previous Supreme Court decision. It would show that it should not be considered typically civil law but typically Rwandan that Supreme Court decisions have no influence at all on lower courts, because of the history of the court system in Rwanda and the fact that never Supreme Court decisions have been published.

THE WAY FORWARD

The Challenges

Since English, in addition to Kinyarwanda has become the official language in Rwanda, exclusively used in legal education at universities, with Kinyarwanda being the daily language in the courtroom and the majority of the legal professionals still mastering French better than English, the need for a concise dictionary is dearly felt. This becomes even more urgent with the intended move from the civil law to a more common law oriented system. The combination of working in various languages and various systems at the same time makes this a challenging exercise.

An ordinary French-English legal dictionary however would not be sufficient. A system is not just the sum of separate elements; a system is the combination of elements that are linked to each other in a very particular way. The elements do not have an autonomous meaning; each element gets its meaning in light of other elements in that system. What is needed therefore is a glossary describing the meaning of words within their context.

[1] South Sudan Judicial Circular No. 1/2007 dated July 12, 2007

Context is not so much the knowledge of the "words" as such and their characteristics – male or female, singular and plural – but much more encyclopaedic knowledge, "world-knowledge", knowledge of the law in a particular culture.[2] In fact this is the first and most basic lesson: not the words or concepts as such are most important but the meaning they acquire through their context formed by the text in which the word or concept can be found – the crime definition, the code, case-law, literature and jurisprudence – as well as through socio-political factors, such as existing trust in authorities in a country for instance or opinions about heroism. An example: a concise glossary would show that the presumption of innocence, thought to be absent in the civil law system, very well exists in that system also, although guarded in a slightly different way than in the common law system.

This will be a huge task to move from civil law to an effective common law/hybrid system. The crucial steps in this process will be:

- Training of judges, lawyers, prosecutors, and law students on common law principles/basics
- Training of judges, lawyers, prosecutors, and law students on common law legislative interpretation
- Developing and implementing an accessible and thorough case reporting system (Rwanda could contract one of the established American legal resource/research entities such as West or Lexis to shorten the path)
- Training of judges, lawyers, prosecutors, and law students on legal research
- Training of judges, lawyers, prosecutors, and law students on critical thinking/creative problem solving[3]
- Codifying common law principles, such as: stare decisis; the role of international law in deciding cases (as referenced with regard to South Sudan & Kenya)
- Continued training of judges, lawyers & prosecutors in the English language

Key Issues requiring clarity:

- How does Rwanda get from where it is to having a solid foundation of good case law to guide future decisions? It will be problematic if, as judges discover how to operate within a common law system, a higher court makes a bad decision on law (whether it be civil, commercial, or criminal) as a result of lack of experience/guidance. Will other judges' decisions be guided by this poor precedent?

- How does a legal system get to the point of having an established body of case law? In an adversarial system, this is developed by ensuring that each party has adequate, passionate, persuasive legal representation. Of course, the civil law system is inquisitorial not adversarial. Bad case law inserted into a system not accustomed to an adversarial process is likely to perpetuate bad law. Lawyers, judges, and prosecutors will have to learn a completely new way of functioning.

- The entity charged with training judges, lawyers, and prosecutors is the Institute for Legal Practice & Development (ILPD) (page 1), as opposed to the Center for Legal Development.

[2] Marjanne Termorshuizen, *Legal semantics; a contribution to the methodology of legal comparison, jurisprudence and legal translation*, Wolf Legal Publishers, Tilburg/Nijmegen 2007 (original in Dutch 2003).

[3] This is beyond the scope of this policy paper; it is a more general need in the Rwandan legal system/culture

The Way Forward for Rwanda

Training and study tours to countries with legal systems based upon French civil law with elements of English common law, such as Mauritius and Quebec, Canada might also be helpful.[4]

Legislative Drafting

Codification of English Common Law in new statues—Contract Law, Law on obligations arising out of no agreement; law on specific contracts. The proposed Law on obligations—is an attempt to codify the common law where there is currently no judicial precedent. Likewise with law on Guarantees.

- Legislative drafters need training in incorporating common law concepts into the existing legislative scheme. In addition, given the need for practitioners to receive notice of significant changes to the law, legislative drafters should be trained in how to use the Ministry of Justice web site to reflect these changes.[5]

- All judges and prosecutors are now required to have a law degree. To bolster integration with other countries in the region, Rwanda is increasingly drawing upon the common law tradition in its reforms.[6]

- Capacity to edit and organize the publication of law journals and official gazettes;[7]

- Few legislative drafters are familiar with common law principles and they have found it difficult to adapt common law principles to the existing Rwandan legislative scheme, hindering the adoption of desired legislation.

- Ministers often submit expedited requests for draft legislation. Because of their poor English and research skills, drafters often rely only on their own drafting skills to create draft bills, without first researching legislation from other countries, especially those in the region, that have successfully addressed the same problems.[8]

- How to adapt legal concepts and model legislation from common law systems into drafts that may be incorporated into Rwanda's civil law based codes, with an emphasis on commercial legislation.[9]

<u>Trainers: Desired Levels of Knowledge, Skills, and Abilities</u>

- Understanding of and ability to instruct on civil law and common law traditions;

- Rwanda has a pool of returnees who have practiced in foreign courts. These returnees are familiar with best practices in other countries as well as the common law tradition and are a possible source of training expertise. [10]

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4 Rwanda Justice Sector Capacity and Training Needs Assessment, (USAID & MCC, October 30, 2009), p. 37

5 Ibid.p.5

6 Ibid, p. 6

7 Ibid. p. 35

8 Ibid p. 36

9 Ibid. p. 37

10 Ibid. p. 9

The Penal Law System in Rwanda[11]

The civil law system that dominated the Rwandan legal system in years past has contributed to making prosecutors less interested in developing persuasive drafting and pleading skills. This is largely due to the fact that in the old system, the investigation and conclusions of the prosecutor were presumed to contain the truth and were therefore not usually exposed to challenges. With the new reforms, prosecutors need to be more transparent, persuasive, and follow the procedural rules thoroughly. They must also master the rights of the defense and communicate better with suspects and their attorneys.

Due to the civil law tradition that dominated Rwanda for so long, Rwandan lawyers have come to rely upon written conclusions that they submit in court rather than upon oral arguments. In the civil law tradition, oral arguments were perceived to be of secondary importance. As a result, a significant number of lawyers, particularly young lawyers, lack basic lawyering, drafting, and lawyer-client communication skills. Briefs prepared by some lawyers, as well as oral arguments and closing remarks presented in court, are often not persuasive and reflect a lack of knowledge of the law, and of sound analysis.

The Way Forward—EAC Obligations

With the entry of Rwanda into the East African Community, prosecutors will have to learn common law theories and practices. They also need to be proficient in English in order to serve citizens of the East African Community and collaborate with other justice departments in the region. Skills in investigating and prosecuting cross-border criminal activities will also be required.[12] Most prosecutors do not conduct legal research. This is largely due to the lack of a culture of research that dominated the Rwandan justice system in the past.[13]

Rwandan judges have little knowledge of the common law tradition and the comparative law of the East African Community. Also, many have poor English language skills. With the entry of Rwanda into the East African Community, these deficits should be addressed.[14]

In addition, with Rwandan membership in the East African Community, Rwandan lawyers in general will have to understand and master principles and practices of common law, especially if they wish to offer their services beyond the borders of Rwanda. Lawyers will need to also learn English. Nevertheless, the Kigali Bar Association does not appear to have a strategic plan to prepare its lawyers for these challenges, particularly regarding how to serve clients from the East African Community. It also does not have a plan regarding how to collaborate with other bar associations in the region.[15]

Likewise, training in the comparative law of countries of the East African Community[16] is essential.

Other Issues

- Consultation with legal practitioners on areas of training
- Training and workshops on the basics of common law including Contract Law, Tort Law and Legal Research and Drafting

11 The author of this paper drew heavily on the unpublished paper of Dr. Roelof H. Haveman entitled *MERGING PENAL SYSTEMS: Some extraordinary examples of the Rwandan and supranational practice* for this section.

12 Ibid. p. 23

13 Ibid. p. 24

14 Ibid. p 17

15 Ibid. p. 28

16 Ibid. p. 29

- Training on Common Law legislative interpretation

**Prof. William E. Kosar, Senior Legal Advisor, UNDP*