

THE COMMON LAW AND ZAMBIA

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Like most other countries formerly tied to England, Zambia is recognized as a common law jurisdiction. The description is supported by the history of the country as well as by current statutory guidelines and judicial declarations. While there is a consensus that Zambia falls within the common law camp, however, there is little agreement as to what this actually means either in theory or in practice, and still less as to what it should portend for the future. As used in different contexts or by different people, the term, “common law”, is remarkably flexible—and correspondingly ambiguous. So are most of the lesser constituent terms associated with it, such as “*stare decisis*” and “binding” or “persuasive” precedent. These terms can and do encompass a wide range of possible meanings. Thus, it is entirely possible for societies with equal claim to common law status to manifest widely different judicial attitudes that reflect altogether different approaches to the law.

What is common law?

There are several different definitions of the common law. The term may refer, for instance, to an historical and geographic concept; that is, to the totality of the law of England and its former colonies. It sometimes is taken simply to mean any of various substantive and procedural rules and concepts. While such definitions are useful and appropriate in some contexts, they do not impart nearly enough particularity to be of much assistance in a detailed review of any one legal system. Here the common law will be more narrowly defined. We will be concerned not with actual rules of law or with history, but with the method of the law, with the approaches to problem-solving and adjudication that have come to be identified with the common law as a system. Focus here will be on the methodology of the law, and more especially of the courts, on the manner in which they reach decisions, and the derivation and articulation of legal rules and principles by judges. It is said that the common law differs from other legal systems in this its judicial methodology. In this context then, what is the personality of the common law?

In the common law, the rules of today are to a high degree derived from preceding decisions of courts in similar past cases. If a judge, or any other person, wants to determine the answer to a legal question, he reviews past judicial decisions and analogizes from them to the facts of the current case. The common law is typified by this reference to the collective judicial wisdom of the past as the primary source of rules applicable to the problems of the present.

There is, of course, nothing unique about the reverence for the past thus displayed. In all walks of life, people tend almost automatically to mould their patterns of behaviour on those followed by others. We justify the rightness of our actions on the grounds simply that others are doing or have done likewise.¹ This tendency is pervasive in the

law. It is reflected in the processes of the civil law jurisdictions, where there is more reliance on case and textual precedent than is often recognized by common law lawyers.² It is perhaps also the most significant ingredient of most of the customary law systems of Africa where acceptable principles of behaviour are often frankly based purely on the standards practised by past generations.

What is unique about the common law is the way in which the customs of the past are carried over from past cases into the legal rules of the present. In no other major legal system is there such emphasis on the opinions of the courts themselves as the major source of the law. Rather, in most other systems, the courts have to share their law-making and interpretive powers more with political institutions and scholarly opinion. They tend to look elsewhere than other judicial opinions to ascertain what law must be applied to a particular case.

Although it is accurate to describe the central method of the common law as a reliance by courts on their own past cases as the primary source of the law, an important problem concerning control over the courts arises when judges themselves are allowed to determine the law without constant reference to non-judicial sources of authority. This method potentially embodies the delegation of a very high degree of political and social power to the judiciary, a power viewed jealously by other centres of authority, and often, with some suspicion by the rest of the population. In order to meet this concern, the authority of judges, even in common law jurisdictions, is usually stated to be severely constrained: they can look to other, past cases for their answer, but they must stay within the confines of these cases unless the legislature changes the rules involved. That is, they must follow the past cases fairly rigorously and are not allowed to deviate much from them on their own. Their role is said to be only to discover the law of today from past cases and custom, not to create a new law based upon their own personal views. Accordingly, a court may be bound to follow an applicable decision of an equal or superior court in the same jurisdiction, and it must acknowledge as a minimum that it is very much persuaded by such decisions as well as by applicable decisions from sister jurisdictions.

This is the theory, at least, of the method of the common law. It is not difficult thus to depict it in the broad. Its simplicity is deceptive, however. When one notes that the courts ascertain the law for a case by applying rather rigorously the results of previous cases, he has stated only the barest outline of what really happens in the actual cases.³ The reality of the common law method is much more subtle, and can be much more flexible in the hands of individual judges.

To begin with, no two cases are completely similar—there are always factual differences between them. Equally, no two cases are absolutely different—there are always factual similarities common to each. Cases are like snowflakes; they are always a bit alike but never congruent. Thus, a refined review of the common law method reveals that it cannot be merely the location and application of “an analogous” precedent case. It involves instead a selection from a nearly infinite multitude of *relatively* analogous past cases. The critical points in the process—just what it is that renders one case analogous to another, and what degree of factual similarity is required before one case can be considered influential in the resolution of the other—have always defied precise, abstract description.

It is generally agreed that the process involves a grouping of facts into categories or classes in accordance with their relevance to a particular legal theory deemed applicable to both cases so that some facts can be retained as significant and others dismissed as inconsequential. Then a comparison can be made of the pertinent facts without regard to the others, so the cases can be equated despite dissimilarities respecting these other facts. But agreement has never been reached respecting the method of choice for the particular legal theory deemed applicable.

In order to discover a legal theory for a case that will give coherence to its facts, recourse traditionally has been had to the issues of the case, the court's holdings on these issues and the court's reasoning to support these holdings, the *ratio decidendi*, as it is called. However this process of verbal refinement has not brought clarity to the methods of analogizing cases: there is no certain way to perceive a correct statement of the issues, holdings or reasoning of a case. Instead there are as many different perceptions of the legal posture of a case as there are imaginative and persuasive critics to review it. Sometimes—too rarely—a case decision will be so lucidly explained by the judge who wrote it that there will be little room for doubt about his perception of its legal posture, although there may still be doubt about the influence of other perceptions of its essence.⁴ More often the decision will be silent or ambivalent in its exposition of what the court saw as the significant issues and its holdings and reasoning, and it will be up to other judges and lawyers to supply a comprehensive explanation of the place of the case in the law.⁵

Most common law scholars agree that the most important, most influential, part of a case is the holding of the court, whether this be ascertained directly by the court's express statement or by implication or interpretation offered later and by others in aid of an unclear case opinion.⁶ But even if agreement on this point is assumed, clarity still has not been brought to common law methodology, for there are an almost infinite number of possible holdings in every case. In the first place, it is entirely possible for a case, particularly an important or complicated case, to yield plausible holdings based on quite unrelated legal issues. There are many examples of this. One well-known instance is the American case of *Shelley v Kraemer*,⁷ in which private, racially restrictive covenants affecting real property were struck down under constitutional prohibitions against public racial discrimination. Ever since the decision there has been controversy over whether the court's holding was that enforcement by the courts, that is by government, of such covenants amounted to public action, even though the covenants themselves were privately contracted, or whether the case holds instead that where many people in one area are party to such covenants then they are really public, or at least quasi-public in themselves. Each of these holdings can be derived from the case. Each gives rise to very important, though very different consequences for the law of the future. An isolated reading of *Shelley v Kraemer* does not, cannot, reveal which holding is "correct". There is no way to reach such a precise determination—the case is malleable enough to permit either or both. Thus its future use as precedent depends upon which interpretation is accepted by future courts, that is, its final meaning cannot be ascertained except through the eyes of later influential observers.

The frustrations inherent in the process of trying to delimit a firm holding for common law cases are not confined to problems arising from the possible application of

completely, qualitatively, different holdings of a single case. Even if plausible interpretations are restricted to a single general theory of the law, there are still all manner of quantitative gradations that may be possible.⁸ This problem arises in nearly all cases. *Shelley v Kraemer* is again an apt example. Even if we assume that the case stands for the proposition that some apparently private covenants are actually quasi-public because of attendant circumstances, we have certainly not formulated a precise holding for the case. Still to be resolved is the degree of the court's statements. Are all contracts quasi-public if enough people are significantly affected thereby? Do the appropriate number of people have actually to be signatories? Is the principle effective only if the people involved are in close physical proximity? Only if the contract is restrictive, negative in nature? Only if the contract affects real property? Only if it relates to racial discrimination? There are in every case a whole series of possible holdings, all pertaining to the same generic principle, but ranging from the very general to the very specific. All of them lead to acceptable rules of law derived from the case. There is no way to predict with sureness which of the possibilities will later be recognised as influential in later cases, except to note the general principle that the more specifically a rule is derived narrowly from the facts of a case, the more persuasive it is likely to be in later cases with the same narrow factual circumstances. Solace may be taken from the fact that at least with respect to some issues, successive courts will offer increasingly well defined interpretations, which taken as a whole may permit a relatively refined and precise rule to be articulated over time, so that where a single legal issue has been repeatedly before courts, it may be possible to predict with certainty the law respecting it. This measure of certainty, however, attaches only to relatively routine and simple cases. It diminishes with the social significance and complexity, and of course with the newness of the legal issues involved.

Faced with the ambiguity of *stare decisis* as a method of deriving legal rules, and concerned about the artificiality of most attempts at analogizing cases and their facts, some observers have urged that the "real holding" of a case ought not to be restricted closely either to the facts or the court's reasoning. Rather, it is suggested, each case should be perceived as a single instance of a balancing of significant public policies, so that the holding of each case is that one or a group of these policies is more important than the others present. Looked at in this light the *Shelley v Kraemer* decision might be said to relate only incidentally to covenants of any sort: its holding might instead be that public policies respecting integration and racial equality have moved up in relative importance, forcing changes in all areas of law that touch on this issue. This approach to case analysis has the merit of forcing practical meaning into the law. However, it hardly helps to simplify the original dilemma of the unavoidable ambiguity and resultant flexibility inherent in *stare decisis*, for it is not possible to formulate hard, precise rules of law out of building blocks acknowledged to reflect the fundamental attitudes and beliefs of a society. If the essence of a case is thus to be but a mirror image of basic public policy choices, then the common law method of case precedents must be doomed to the same eternal doubt and vacillation that surrounds such policies. To ignore the policies is to depart from reality and deny rational purpose in the law. Yet to account for them in the process of applying *stare decisis* is to preclude precision or stability in all areas of current legal importance.

Nor is the complexity of the common law method exhausted by showing that it involves more subtlety than a simplified matching of cases on the basis of relative factual similarity or even a comparison and application of case holdings or judicial reasoning or policy hierarchies derived from past decisions. There are at least two other complicating factors. Firstly, there is the problem of contradiction among precedent cases. Secondly, there is the dilemma posed by the usual rule that even if a case is applicable, it is only persuasive, not binding on a later court.

In any jurisdiction that has a large number of previously decided cases on record, there will regularly occur instances where review of precedent reveals some contradiction. The inconsistency may be direct, in that opposite versions of the same principle may be articulated in cases seemingly similar on the facts. Such obvious contradiction is rare in a jurisdiction with a monolithic judicial structure, but it does occur everywhere. More pervasive and harder to cope with is the inconsistency that occurs when different principles appear to emerge from factually unconnected cases. One could, for example, distil a principle of the absolute sanctity of contractual commitments from a whole series of "frustration-of-purpose" cases and a principle calling for responsibility notwithstanding contractual limitation from a series of manufacturers' liability cases. Which principle should then apply, say, in a case involving a badly one-sided lease contract? As applied to this new problem the past cases are seen as conflicting, even though they previously appeared not to be related to one another at all.⁹ For nearly every rule of law, for every principle derived from past cases, a skilful lawyer should be able to come up with at least a partial antidote, one with fully acceptable credentials of its own in precedent.¹⁰ Confronted with the choice thus inevitably posed, how should a court select among the various precedents available? And faced with this opportunity of choice by the court, how can the lawyer or scholar predict the status of the law on a difficult question?

The problem becomes greater still when it is recognized, as it is openly in most common law jurisdictions, that past precedent is not actually binding on current courts, but is only "persuasive".¹¹ Of course, no case is unavoidably binding in any jurisdiction, if a court feels strongly enough about it, for by the "limiting-it-to-its-facts" device, all cases can be distinguished. But in most jurisdictions today a court does not need to engage in the dissatisfying, arcane process of making narrow factual distinctions. It can merely decline to follow a past case or even expressly overrule it. One can never be certain in advance that an apparently solid precedent from the past will continue to control the future.

Here again the complexity of the method deepens on closer analysis. It is not only that a past case may be ignored completely or openly rejected. There are degrees of persuasiveness, there is a whole range of possible reactions to a previous case. This is particularly so because of the degree of flexibility in the interpretation of past holdings described above. A court might feel positively persuaded by a holding in a previous case that emerged directly, rigorously from the facts of the case, while it might be much less impressed with a more generalized, abstracted principle derived from the very same case. Similarly, a court will tend not to be much impressed with a legal principle articulated in an earlier case but not necessarily derived from the facts of that case. Such judicial statements will be labelled *obiter dicta* and may be considered not binding, or even very

persuasive. However, in practice the line between *obiter dicta* and a legitimate holding of a case is too often blurred and artificial. The more a legal rule is abstracted from the strict factual foundation permitted by the case, the more like *obiter dicta* that rule becomes, and accordingly the less weight it is likely to receive later. Although it is easy enough to state the process of using a past case as applicable precedent as a function of shifting, relative degrees of its persuasiveness, this only increases the doubt about the actual meaning and significance of any single case.

What then is "the method" of the common law? There is no one precise, correct answer to the query. The system is far too complicated to permit that. All the common law jurisdictions subscribe to the dogma of *stare decisis*. All agree that the legal principles of today are derived inductively from case precedents of the past. But within this framework there is a broad range of possible methods which might actually be used. These vary with the degree to which rigorous factual similarity is required before a past case is allowed status as a precedent at all. It varies as well with the flexibility permitted in determining the holding or *ratio decidendi* of a precedent case, with the degree of conflict perceived between precedent cases, and with the degree to which precedent cases are perceived as persuasive in later ones. Thus, the concepts of *stare decisis* in the common law are inherently ambiguous. As a set of rules for dealing with precedent, they reveal no single method at all but a whole range of possible uses of past cases.

For this reason, it is not possible to obtain with any precision a true picture of the common law method at work in any jurisdiction merely by reiterating the standard, generalized definitions. These are far too soft, too vague. For anything like an accurate portrayal to be obtained, the history and personality of the courts under inquiry has also to be studied. Liberally construed, the common law permits judges almost untrammelled authority to reach any decision they please, requiring only that they rationalize the result in the familiar jargon of precedent. Narrowly construed, it imposes very rigorous constraints on the capacity of current judges to deviate from the literal holdings of past decisions, regardless of their own policy preferences. In order to appreciate which of these or of the many possible common law methods in between is actually practised within a jurisdiction or society, recourse must be had to the cases themselves, to study the attitudes of the courts. In order to predict what method will be used in the future, it is further necessary to know something about the personalities of the judges involved. Abstract models just do not serve adequately to describe the methods of the common law in any of the jurisdictions where the system operates.

The degree to which common law methodology varies from place to place is well demonstrated by the very different nature of the derivation of the law in separate common law jurisdictions. For example, legal methodology in England is widely conceded to be much different than it is in America. The two systems, of course, had a common historical origin and both are clearly common law systems. But the status and practice of *stare decisis* in each is not at all similar. In England, it seems fair to say,¹² adherence to past judicial precedent is quite rigorous. For many years the highest court, the House of Lords, held itself absolutely bound by its previous decisions,¹³ on the famous reasoning, of Lord Halsbury: "There may be a current of opinion in the profession that such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience of

having each question subject to being re-argued and the dealings of mankind rendered doubtful".¹⁴ Other appellate courts, including the Court of Appeal, Civil Division (and to a lesser degree, the Criminal Division), have reflected a similar reluctance ever to deviate from their own past decisions.¹⁵

The degree of adherence to strict *stare decisis* by the English courts cannot be measured only by their unwillingness to overrule their own prior cases. It is reflected more pervasively in their reluctance to distinguish prior cases factually, or to find conflict in the precedent available, or to perceive and exploit ambiguity in the reasoning offered by a court in a prior case. A court could call itself bound by its prior decisions but then rarely locate any decision found to be applicable and controlling. The English courts have not done this. The method generally followed, at least for about the last century, has been affirmatively to seek out precedent and apply it, and if no cases are found squarely in point, to apply the nearest ones available. Thus in England the common law method has developed into a system of rigorous *stare decisis*, with relatively little room left to judges to read into the law their own notions of public needs and substantive policies. The law of today is narrowly confined to the results of past decisions, extended forward slowly and only within prescribed limits. New inputs of policy are not left to the courts. They are the province of other branches of government.

This is not to say that the development of English methodology has always been inexorably orthodox, or that there has never been any deviation from a purely abstract, mechanical application of *stare decisis*. English jurists and scholars have long been as aware as anybody else of the ultimate flexibility potentially conceived by a liberal approach to *stare decisis*.¹⁶ There has in recent years been vigorous renewed interest in the nature of case precedent. The House of Lords has finally repudiated its refusal ever to overrule its former decisions.¹⁷ There are today signs that "a compromise is being gradually worked out between a slavish subjection to precedent on the one hand and a capricious disregard of consistency on the other hand. There seems to be less reluctance than formerly in superior courts either to overrule previous, and sometimes old, precedents, or else to sterilize them by the semi-fictions of 'distinguishing' them on tenuous grounds of fact or law or by recourse to the doctrine of *incuria*".¹⁸ Thus, the doctrine of precedent in English law remains open to continuing challenge, and it appears that cases will be followed less strictly in the future than previously. Nevertheless, the doctrine maintains much of its orthodox force in England. There is still relatively little policy discretion accorded to individual courts and judges. A reading of today's English cases reveals that in the overwhelming majority of them the decision is explained primarily on the application of that precedent located by the judges which is nearest not so much in its policy implications as in its orthodox substantive and factual context.

The status of *stare decisis* is considerably different in American law. Precedent is still cited with great regularity by all the courts, but there is also a substantial element of the judges' notions of public policy present in many cases, particularly those deemed by the courts to be important cases. Relative to their English counterparts, American judges are very much more explicitly concerned with the practical consequences of a decision and whether these will accord with policy needs than with the logical consistency between a case and past precedent.¹⁹

In cases of social importance or where relatively novel issues are raised, many American courts tend explicitly to consider explanations for their conclusions that are not based on precedent decisions. More precisely, they examine in depth the public policies deemed applicable to such cases, and often justify the legal result reached in terms of policy. Lawyers arguing before the courts in such cases accordingly attempt to show both that the result they contend for is technically permissible under the current state of the law, that is, that precedent supports it, and that it is desirable from the viewpoint of public policy. The law as a result is "more plastic, more malleable, the mould-less definitively cast, the bounds of right and wrong less preordained and constant, that most of us, without the aid of some such analysis, have been accustomed to believe".²⁰ To be sure, there is in America, as in England, a considerable variation among courts and judges over the methods each uses to reach decisions. On the whole, however, the courts in America are much more inclined to decide on the basis of policy than the English courts. America remains a common law jurisdiction, and it follows a doctrine of case precedent. But that doctrine is not the same one adhered to in England. The terminology used in both places is often comparable; the method of the law is not. In a comparison of the method of the law in these two societies, the great flexibility possible within the framework of "common law methodology" stands revealed: the range of possible choices is very considerable indeed.

Given this range of choice, the question for societies that are in the process of formulating their own legal system is not whether to adopt the common law or a methodology incorporating *stare decisis*. It is which of the several possible alternatives to select within the wide limits still permitted by overall adherence to the basic system. The guidelines for the choice will of course depend on the practical consequences of one method as opposed to another—an area of review far too often ignored in the literature on legal methodology. The discussion below cannot pretend to be an exhaustive analysis of the practical consequences attendant on the selection of one methodology or another, but it is designed to offer at least some preliminary observations of some of the strengths and weaknesses of the common law doctrines of *stare decisis*. These in turn will serve as a base for later discussion concerning the choice of methodology most suitable specifically for Zambia.

Justifications for the common law method

It is not a sufficient background to a normative analysis of the legal methods appropriate for a particular society merely to indicate that within the limits of common law methodology, there exists a wide range of potential approaches to judicial decision-making. This establishes only that there are many different possibilities available for selection and adoption. It sets forth the parameters of choice, but says nothing about how the choice should be guided within the given limits.

In order to make the process of choice for Zambia within the permissible range of common law methodology a rational process, another factor must be weighed into the balance. This factor concerns the theoretical justifications for the methods of the common law and the relative merits of different approaches to *stare decisis*. Only from this pers-

pective can the special needs and circumstances of Zambia itself then be considered and of suggestions made respecting the future development of its law.

Judges and other commentators have ascribed a number of benefits to the doctrine of precedent in the common law. The lists offered usually include at least some of the following advantages each of which will be discussed separately below: adherence to *stare decisis* promotes legal certainty; it serves as a desirable check on the power and perhaps the prejudices of judges; it assures equality for all before the law; it increases the efficiency of justice; it serves as a vehicle for preserving the accumulated wisdom of the past; and it is logical, even aesthetically pleasing. None of these claimed attributes is above controversy or without its detractors, but there does seem on balance to be merit in each of the claims.

However, as the ensuing review will make clear, the "advantages" of *stare decisis* are too often locked in internal conflict with one another. For example, one strength classically claimed for the common law method is its ability to make the law predictable; another is its problem-solving, practical immediacy. Neither, of course, is absolutely attainable. But as one is emphasized, the other is correspondingly frustrated. Thus it should be noted right at the outset that in every instance a law of diminishing returns begins to operate whenever any approach to legal methodology is carried to extreme. If *stare decisis* is applied with total rigidity, especially in novel or difficult cases, the gain for certainty and predictability is slight, if any, as compared with milder application of the doctrine, while the cost in terms of other legal goals such as immediacy is heavy. The converse is also true. If, particularly in relatively routine cases, *stare decisis* is systematically ignored by all judges, the value of the resulting immediacy of the law is overshadowed by the chaos of uncertainty. Carried too far, reliance on any one goal for a legal system will throw the methodology of the system out of balance. A methodology responsive only to certainty, or immediacy, or to any other goal cannot lead to an effective system of law.

Certainty

Outside of anarchists, there are few who challenge the assumption that certainty—or perhaps better, predictability—is a desirable goal for any legal system.²¹ There are several reasons for the near unanimity on this point. Firstly, and most importantly, a legal system which does not attain predictability cannot hope to accomplish the goal of affecting the behaviour of those to whom it applies. No system has ever been completely successful in reaching this goal, and none ever will be, but all systems strive in this direction. If the law, however, is to influence behaviour, those involved must be able to predict the legal consequences of their conduct. To the degree that law is capricious and unpredictable, the people will perforce be unable to mould their actions in accordance with its design. Irrational and ignorant men may act without regard to legal constraints and rewards in any event, but others will seek to maximise their position under the law—if only they know with fair certainty what the law is. Thus, in order to reach these people, the law must be comprehensible and predictable enough to be understood. In this way, the law is said to help generate a stable, ordered society, providing the only really viable environment for co-operation, initiative and progress.²²

Another justification for the need for certainty in the law concerns the factor of reliance on the part of those who do try to conform their behaviour to its mandates. When the law changes, unless such change itself has been predictable, those who have relied on its continuity may find themselves actually disadvantaged by their very faithfulness. This is hardly defensible; it is certainly self-defeating for any system of law seeking respect from the people it governs. The strength of the point is particularly felt in the area of criminal law, where it is widely reflected in the principle that no man should be convicted for a crime which is not clearly defined in the law. It is applicable as well, though, to civil law generally, and explains the revulsion to *ex post facto* laws and retroactive case decisions departing from past precedent.

A final justification sometimes offered in support of legal predictability is based purely on deterministic grounds.²³ Regardless of the moral rectitude of the position, it is said, it is in fact a need common to nearly everyone to have a high measure of security in his surroundings. Laws that are ambiguous and unpredictable are not subject to our understanding and can only contribute to insecurity. As we all share an aversion to the unknown, a legal system which does not strive for, and at least partially achieve certainty, runs counter to the basic wants of the human personality and cannot be counted a meritorious system. It is accordingly written in our nature that every legal system will strive for predictability (and in fact, all do) and that one critical measure of the success of any system must be the extent to which legal certainty is realized in practice.

While there is general agreement on the universal need for predictability in the law, however, there is considerable controversy over the degree to which this can be attained under the doctrine of *stare decisis*, even as rigorously applied. In the first place, a system committed to *stare decisis* affords no basis for reaching a predictable conclusion in any case which is novel and for which there is no precedent squarely applicable. One might answer to this point that in such an instance the system can merely adopt another methodology than the obviously inappropriate doctrine of precedent, and that in any event, after the passage of centuries, the common law had developed precedent cases for nearly every conceivable contingency, so that the problem will rarely occur. The problem is not so easily dispensed with, however. Unfortunately the momentum of the common law commitment to *stare decisis* seems inevitably to carry over into all cases, novel or standard, so that even where there really is no precedent directly applicable, a selection is none the less made from various near-analogies. As a practical matter it is often almost impossible to predict which analogy will be selected—human logic refuses to conform to universal standards in such cases. Hence *stare decisis* does in truth often fail to help reduce legal uncertainty in novel cases. Nor is it sufficient to suggest that by now novel cases are rare. This position ignores the truism that the uniqueness of a case is merely a matter of degree—all cases are different in at least some respects from the past. The question in every instance is how great their difference is, and the doctrine of *stare decisis* has never been able to develop a precise, predictable guide to determine how great this must be in order to permit use of a precedent case in a current case. Although the doctrine imparts sufficient legal certainty to work well in areas where the law is simple and well settled, particularly in cases before the lower courts where appeal is unlikely, it fails to achieve the goal of predictability in the very cases which are of the greatest current social concern.

The consequences of this are especially noticeable in a jurisdiction like the United States where, as noted above, there are so many "persuasive" cases now in the reports that no one can possibly digest more than a tiny fraction of them and anyone with a little imagination and diligence should with luck find at least one to support his position whatever that may be. The problem is made still more serious because of the failure of the doctrine of precedent ever to define precisely just what a holding of a prior case really is or how broadly or narrowly that holding should be construed in order to be regarded as binding or persuasive.

The result of this is that in a common law jurisdiction only fools pretend to know the law with certainty from their own memory. Wise lawyers and judges always look up the answer to a legal question in the library before they venture their opinion; and that opinion, at least in any case of importance or difficulty, is expressed only in terms of possibilities or probabilities, never as a concrete, certain answer. Even for the legal experts, the common law fails to yield a high measure of predictability in such cases. For the rest of the population, especially that part of it that cannot afford to hire expertise to explain the law, predictability is largely illusory. The average person has only the vaguest notions of rules of law; and he is considerably less knowledgeable about rules derived from cases than those derived from statutes and other sources.

This is not to suggest, as some very strongly have, that *stare decisis* actively promotes uncertainty. To oblige a court to look backwards to a known source of law, that is to previous cases, in order to formulate its opinion in a present case does impose some at least partially discernible limits on the rules that the court will come up with. Particularly in relatively routine cases, *stare decisis* does afford a fair measure of legal predictability, as any practising lawyer knows. What is suggested, however, is that a rigid adherence to *stare decisis* does not assure nearly the degree of certainty sometimes claimed for it. In important cases and in cases involving significant new circumstances, it imparts very little predictability indeed, and any advantages of certainty it might attain in many easier cases rarely filters down to non-lawyers anyway. In a society where the forces of uncertainty inherent in the common law method are magnified by practical problems—and Zambia is such a society as is discussed below—the beneficial impact of *stare decisis* is open to serious question. It may well be in such circumstances that rigid adherence to the doctrine adds little to predictability in the law. It may even be that, compared to other sources for judicial decisions, such as reference to broadly articulated public policies, rigid adherence to *stare decisis* actually detracts from legal certainty because it introduces so much refined, arcane complexity into the resolution of issues that are more social, political and emotional than purely logical or technical. "Public policy is an uncertain horse", it has been remarked. In some respects, *stare decisis* is even less secure.

Restraint on judicial power

Second only to its claimed connection with predictability, the common law doctrine of precedent is defended as a desirable control on the powers, and sometimes the biases, of individual judges. This position has been criticized on the grounds that all the doctrine does is to perpetuate the powers and biases of former judges, but even this much does act as a constraint on the caprice of contemporary courts and does compel the courts to articulate formal and objective grounds for their decisions. If a judge did not need to

demonstrate some consistency between his decisions and those of other judges beyond his control, all manner of excess and abuse of power would be possible, and justice too often would not be seen to be done. Compliance with precedent does correct these evils, regardless whether the precedent itself once was tainted.

A more serious criticism of the position is that it overstates the degree of constraint imposed on the courts. Because of the nature of the doctrine of precedent, as noted above, it may be possible for a court to justify any of several different, even contradictory decisions in a case, on the basis of *stare decisis*. To the extent that this is so, the doctrine does not operate as a very effective control over judges. This point, again, is particularly telling where important or novel cases are involved, because in such instances *stare decisis* fails to yield precisely predictable results.

Perhaps the most serious criticism of *stare decisis* as a measure of controlling judges is the suggestion that in some instances it may actually facilitate arbitrary decisions. This is because the doctrine permits a court to defend a judgment solely in terms of past precedent—no other justification or explanation need be offered. Since precedent, in skilful hands, can be used to support so many different conclusions, this means that a court can submit an opinion which artfully conceals the real reasons behind it (or the fact that there are no reasons behind it). Citation of precedent may only be a rationalization, not the actual basis of a decision, but there will be no way to detect this and no sure way to attack the decision as “incorrect”, given the flexibility of precedent. Thus the doctrine may provide a sophisticated camouflage to obscure an exercise of uncontrolled judicial power and present it in a respectable form. Where *stare decisis* is not recognized as a completely satisfactory basis for judicial decisions, it is necessary for the courts to augment their citation of the past with what must appear to be an objective analysis of the needs of society in the present. Where this is required, the result is probably a greater, not a lesser degree of control over judicial powers. It involves an open admission that the courts do have the power to consider public policy as they see it in their decisions. But they have this power anyway in good measure, and this at least forces them to expose for public review their perception of public needs. If the explanation thus offered for the public needs fail to persuade others of their validity or standing in the hierarchy of policy goals, there are ample mechanisms available for bringing the courts back into line.²⁴

Some form of control over the arbitrary exercise of power by judges is clearly necessary if what nearly all regard as the aims of justice are to be secured and if an appearance of fairness is to be maintained. The doctrine of precedent provides a measure of such formal control, particularly in routine cases. As with respect to its role in achieving legal certainty, however, the doctrine's part in providing effective constraints in other cases is less clear. *Stare decisis* adds little to, and it may even detract from, the practical control over judges that would exist if courts felt compelled to justify their decisions on grounds of public policy as well as on grounds of prior cases.

Equality

Another justification for the doctrine of precedent is that it helps to achieve equality of treatment for all litigants. If there were no obligation on the part of courts to conform their decisions to those reached in other cases, there would be no guarantee that the same

facts and issues would not be found to yield different results for different parties. It is generally conceded that this would be intolerable, both because it would violate one of the common law's and democracy's fundamental postulates and, more practically, because it would undermine respect for the law and thus its effectiveness.²⁵ It is sometimes argued that this is insufficient cause for sustaining the force of iniquitous, badly considered precedents. It might further be charged that the doctrine of precedent is not a very effective device for ensuring equal treatment before the law because, as noted, a determined judge in a non-routine case may reach precisely the result he pleases while still nominally satisfying the requirements of *stare decisis*. Nevertheless the doctrine does have some usefulness in promoting equality and thus in enhancing respect for the law. There are many cases in which the losing party will better accept the decision if he appreciates that he lost mostly because others similarly situated have lost in the past. At least he will understand that he has not been singled out, either arbitrarily or accidentally for adverse treatment, and for many this is a comforting realization.

Efficiency

It is also argued that adherence to *stare decisis* serves as an efficient method of streamlining litigation and developing orderly, rational progress in the law. At first blush, this strikes some as a point of minor significance, but on fuller reflection it contains important connotations. One aspect of the argument is that lawyers and judges tend to favour *stare decisis* because this preserves for them their unique and exalted status in society. *Stare decisis* enshrines the myriad rules and decisions of the past and conduces to a highly sophisticated, refined methodology. Neither the rules, nor still less the mysteries of the processes involved are ever likely to be understood by those not initiated through an artificially complex and comprehensive education in the law. Hence the profession is able to secure for itself a nice monopoly as unavoidable middlemen in the settlement of disputes, even to justify legislation disqualifying others from paid involvement, to the grudging envy of other trade unions.²⁶ The observation is, it is to be hoped, overly cynical, and it is more an explanation of an historical cause of the doctrine of precedent than a reason for justifying its continuance. However, it does help to make plausible the tenacity which characterizes many lawyer's devotion to the doctrine, even where the precedent involved may have derived from a wholly different society in a time long past.

Stare decisis however, has a much more subtle and important role than this to play in the contribution to efficiency in the law. When perceived in the light of the full degree of judicial flexibility it tolerates, it is seen to play a critical part in the smooth development and growth of law. This is because the doctrine is uniquely able to allocate and utilize the widely varying talents of different individual judges.

A rather high proportion of judges, as with lawyers generally, lack either the time or the inclination, or both, to analyse every issue in every case in its full depth in order to reach a decision that maximally balances the infinitely competing policy considerations always present. This is after all, a forbidding challenge, one undertaken lightly only by the impetuous. Once entered, the realm of public policy surrounds the conscientious servant of truth with frustrating, shifting complexity, assuring that at best he will have to

be content with reconciling contending forces and beliefs into a compromise working solution, whose only claim to respect will be that it takes account of as many factors as objectively as possible. The challenge is especially hard in a society which, like most common law countries, frowns on the easy answers provided by ideological orthodoxy.

It is far easier to look up the answer in precedent than it is to try to reason out all the variables anew. A judge who has to decide several cases a day, even several a week, really has no choice in the matter: no man has the ability to reason out cases and problems in depth so quickly. Under the doctrine of precedent, a judge does not have to reason out each case if he does not want to or is unable to for lack of time. He can simply locate a previous case on approximately the same subject—or, better still, he can ask the lawyers involved to present him with several cases they think are analogous—and then simply apply it without further ado. A reading of the case reports in any common law jurisdiction reveals that this is precisely what occurs in the overwhelming majority of cases. It enables judges to reach a perfectly respectable decision with a minimum of time and effort. In these cases, precedent is used not to obscure analysis based on other factors; it is used as a substitute for such analysis. This use of precedent is especially noticeable, and efficient, in the lower courts, where case loads are very heavy but usually consist of a recurrence of relatively simple legal issues, easily disposed of by quick reference to precedent. It is thus perhaps no accident that the strength of *stare decisis* is greatly increased with respect to lower courts; they are clearly “bound” by higher court decisions.

Such use of the doctrine of *stare decisis* would be merely trite and ultimately indefensible if this were all the judicial input ever contemplated by the common law method. However, the flexibility of the method also permits a much different role for judges who are so inclined. A judge who, having analysed a problem thoroughly on the basis of his own ideas, finds himself faced with solutions seemingly offered by past precedent that to him are disagreeable has several choices open to him. He can merely select precedent that supports his position, even though there may be other and opposite cases that seem closer. He can openly overrule or criticise precedent he regards as adverse to justice. He can also base all or part of his decision on policy in lieu of precedent. Any of these options will satisfy his perceived policy demands. More significantly though, his decision will then itself become part of “past precedent” available for use in the future. To the extent that his decision has departed from other such precedent, it will be an unsettling element in the operation of *stare decisis*. This will automatically introduce still more flexibility, more room for future manoeuvre in the legal area concerned. It will serve notice on all judges and lawyers who become involved in that area that there is at least one critic, who is entitled to respect by the legal system, that feels that the older precedent can be improved upon.

Any judge who does deviate from the apparent course of precedent, and especially one who challenges it openly, can thus focus the attention of the law on what seem to him to be areas in need of change. If his reasons are persuasive, other judges will agree, and the course of precedent will change; this area of law can then return to quiescence until some other future critic re-opens it to further policy scrutiny. If a critical judge's reasons are not persuasive in the context of the policy perceptions of other judges, and of society as a whole, his decision will remain isolated, dwindling in importance as it becomes obscured by time.

Common law methodology can thus incorporate strong, wilful judges, who demand that their notions of justice receive consideration as well as more passive judges, who tend to follow the past rather than to initiate and impose changes. In times of social stress, when judicial strength is likely to be a critical need, judges will be apt to look especially searchingly at fundamental policies and to agitate for substantial changes in the law; in more placid times the same method may yield only minor adjustments and incremental changes in the law. In this way the methodology can utilize the abilities of both kinds of judges and accommodate itself to different degrees of social upheaval with marvellous efficiency. It allows the majority of judges to reach simple decisions quickly and consistently. At the same time it permits those with the time, capacity and confidence to suggest changes and improvements for the betterment of all, providing a smooth mechanism for institutionalizing prophetic innovations and for adroitly ignoring those that are out of step with the march of time.

This ability to utilize the ideas and personalities of all, or at least nearly all, judges is one of the greatest strengths of the common law. It depends on the one hand on a foundation rooted in *stare decisis*, for without this no way is left for the majority of judges to legitimize their decisions. It also depends, however, on a recognition that despite the formal doctrines of precedent, law exists to achieve social, economic and political purposes, and that to serve these purposes effectively, to achieve justice, there must be an opportunity to open past and existing rules to continued challenge and review. The doctrine of *stare decisis* permits a very efficient allocation of judicial talent and energy. Pursued too rigorously, it leads to sterility; but coupled with an opportunity for constructive criticism and change, it conduces to an effective yet progressive system of law.

Preservation of past wisdom

Another virtue claimed for the method of the common law is that it most effectively preserves the accumulated social wisdom of past generations for application to current problems. This, of course, represents the very essence of the justification for relying on past precedents in any legal system; but the common law method is said to be unique in its ability to build on the lessons of the past. This is because of the way the common law utilizes the insights and practical experience of judges, and not the macro-constructs of academic or ideological theorists, to provide suggestions for current problem resolution. Moreover, because the judges can express their opinions only in actual cases, where the specific social consequences of one judgment or another, and the attitudes and beliefs of society are hard to ignore, their decisions should reasonably faithfully reflect the customs and practices of society as a whole. As compared with other systems, the common law makes use of the inputs of far more legal experts—in the form of the many individual judges called upon to contribute to the development of the law—and affords far more decision-making power to widely dispersed and ideologically, politically and geographically decentralized institutions peculiarly responsive to local feelings and opinions. The result is that what comes out in a common law case opinion is not a social theory, divorced from the practical constraints of the day and the aspirations of the people. The process is deliberately conditioned to embody both of these ingredients, and thus to ensure that the maximum value will be extracted from the experience of the times, to be accumulated into an ever growing, ever more broadly based legal system.

This process of building on the experience of the past need not be expressly articulated by the judges. In a case of first impression, the court may favour one side for stated or unstated policy reasons. As other courts consider the same kind of problem, they too may simply announce a decision, based mostly on a largely unconscious application of current attitudes and policies. Then, as the amount and authority of precedent grows on an issue, future courts will be constrained to reach a like decision, based not only on their own opinion but on their deference to the unexpressed reasoning of the prior decisions.

It can be argued that this process proceeds perfectly well without any need for conscious expression of policy goals at any point along its line of progression, that the strength of precedent lies more in the results of past cases and their number than on the persuasiveness of their policy reasoning. Some even claim that this is the genius of the common law; this ability to give coherent voice to policy aspirations left largely unarticulated by decisions past. It should indeed be recognized that this is one of the strengths of the common law, that it does enable present jurists to distil the best from past experience without a requirement of rigorous rationalization or conformity to abstraction, so that the law can build on experience as well as theories. At the same time, however, it must also be emphasized that more often progress of the law will be enhanced if the policy foundations for case decisions are explicitly articulated, so that they can be challenged, reconsidered and then re-applied to future cases. The common law relies much on the unspoken of prior experience. The law is more difficult to develop, but it reflects the social aspirations of society far more faithfully if the policy basis of judicial decisions are more often frankly set forth. Particularly in cases of legal moment and social importance, the growth of the law demands full, open discussion of the critical policy issues involved.

Logical consistency

A final justification for *stare decisis* that sometimes is offered is that it helps impart logical order into a legal system. Rigid adherence to precedent enables relatively exact, "correct", answers to be given for legal questions, at least for questions that have arisen before. A good part of the value of such consistency, of course, lies in the certainty and legal predictability it engenders, as noted above. But there are some observers who find positive value in the very existence of a logical system, even as considered purely in the abstract and without any particular reference to more practical benefits that may also be involved. Such a defence of the doctrine of precedent, based as it is wholly upon considerations of form, almost of aesthetic appreciation, has drawn the fire of critics who look more for substance in their search for the best method of case adjudication. However, it should be recognized that an attraction for mere formal unity and consistency is itself a practical value for most people, including jurists. It may be an irrational goal, in so far as it is unrelated to pragmatic ends, but it is nevertheless a desired attribute of the law in the eyes of most lawyers. Hence, it is probably a mistake to discount the significance of the drive towards logical consistency in the law. For many judges it is a major, even the primary, reason behind the decision given in a case, even if at bottom, ironically, it may not itself be logically defensible as a goal of the law. At the same time, it is well to recall that mere legal consistency, remorselessly pursued, leads to stagnation. If it is short-

sighted to ignore the importance of abstract logic in the law, it is at least as dangerous to ignore the other practical policy needs that face every legal system, most of which turn out to be incompatible with formal consistency. Placed in perspective, the latter is but one of many factors that should define the application of the doctrine of *stare decisis*, and a not very critical one at that.

Precedent in Zambia

The general theories of *stare decisis* are too elastic to be of much help to an attempt to offer a precise description of the common law method at work in a single jurisdiction. Little insight into the processes of law in Zambia can be gleaned from the simple assertion, though it is quite true, that Zambia is a common law country. Rather, proceeding from this point as a base, the discussion below examines the nature of Zambia's common law in more detail, both with respect to its statutory framework and, more importantly, to the declarations and attitudes of its judiciary. This examination will yield at least an approximate picture of the actual status of *stare decisis* in Zambia.

The statutory framework

If there were any doubts that Zambia, as a former part of Britain's colonial empire, is a common law jurisdiction, they would immediately be dispelled by the statutory legacy remaining from the past. Nearly all the former English colonies had one form or another of a basic reception law duly codified into legislation.²⁷ As a general rule, most or all of the then existing laws of the colonies were carried over beyond independence.²⁸ As a result, the old reception statutes are still on the books in many independent African countries. Zambia is no exception. There are several specific references to English law in her statutes.²⁹ By far the most important of these is chapter 4 of the Laws of Zambia (1970), The English Law (Extent of Application) Act, which provides that "(a) the common law; and (b) the doctrines of equity; and (c) the statutes which were in force in England on the 17th August, 1911 ...; and (d) any [later English statutes applied to Zambia] shall be in force in the Republic".

For a statute of fundamental significance, chapter 4, like the similar enactments found elsewhere in Anglo-phonetic Africa, is uncomfortably vague. There is doubt about the significance of the 1911 date;³⁰ about precisely which pre-1911 English statutes are applicable;³¹ and about what the term "doctrines of equity" means.³² Most of all, however, there is doubt over the meaning of "the common law".

Probably the most important ambiguity concerns the substantive content of the term. "Common law" might refer to the myriad and detailed rules of law that have been developed by the courts in various common law jurisdictions, particularly in such areas as contracts and torts. If this is the intended meaning of chapter 4, or part of that meaning, then the rules of the law of Zambia are merely those of such other jurisdictions. This is a natural enough interpretation of the term, and remains favoured by many judges and lawyers. It may have been a part of the meaning of the predecessors of chapter 4 as intended by the original statutory draftsmen—although some of the draftsmen appear to have been remarkably pragmatic men, who would not have wished so to fetter the colonial courts.³³ In any event, with the passage of time and the coming of independence and the currently changing circumstances, these original intentions are becoming less

and less relevant—and this interpretation is no longer automatically acquiesced in. The problem with it is that it is so comprehensive that it leaves little room for manoeuvre by the courts. In requiring the legal rules themselves to be taken without modification from alien sources, the interpretation is too restrictive to satisfy all of today's courts or scholars in Africa. Sometimes openly,³⁴ more often by quiet implication, this interpretation is simply not being followed: court-made legal rules are being forged out of local needs and experiences in relative independence from older substantive rules produced by other common law systems.

For a court that seeks a more flexible interpretation of the term "common law" in chapter 4, there are at least two salient choices available. The first of these is to restrict the term to include only those few vestigial concepts that have come to be sanctified as the real essence of the common law edifice.³⁵ Such concepts might include the basic rules of procedure that have developed, such as the right to be able to present one's case in open court and to confront and cross-examine hostile witnesses. In addition, fundamental concepts of substance, such as the notion of the freedom of contract or of responsibility as the basis for liability in tort or of the overall supremacy of law over men might be said to be included. But this interpretation would leave it to a Zambian court to follow its own instincts in reaching decisions in cases dealing with lesser issues than these—that is in nearly all litigation, the only constraint imposed by the statute would be to force the courts to stay within the broad limits of a few, fundamental common law principles.³⁶

Another, not unrelated, interpretation of "common law" also yields a rather flexible result. The term can be said to refer not so much to the actual rules of law, neither to substance nor procedure, but to the method by which those rules are derived. Under such an interpretation, a Zambian court could seek the answer to a legal question not covered by legislation either in previous judicial decisions or from the other sources that are permitted to have influence under the common law method. However, if that method proved flexible enough to justify more than just one answer, one solution, to the question, the court could adopt its own preference among the several possible answers. As has been described above, common law methodology is potentially very flexible indeed. If chapter 4 were construed to mean only that some such methodology be followed and the courts adopted the most liberal approach permissible within these limits, there would be ample room for Zambian needs and public policy to be utilized as a source of law. The latitude thus afforded would be wholly different than the narrower limits imposed by an interpretation of "common law" as including the actual, substantive rules of law developed elsewhere.

The ambiguity of chapter 4 is compounded by the doubt existing over possible geographic restrictions on its application. It is possible to argue that the common law referred to can include only English common law, not that developed by any other jurisdiction.³⁷ The history of the enactment supports that view, although as noted, past history is increasingly of questionable significance. The title of the Act, as well as the side notes to it,³⁸ also support the view that it refers exclusively to England, although these, too, are not necessarily determinative of the issue.³⁹ So also is this construction favoured by the preliminary definition given in the interpretation and general provisions of the statutes, although there is, again, room for dispute left open on the point.⁴⁰

Apart from the technical arguments applicable there are compelling reasons of practical policy that favour a broad geographical referent for "common law" in chapter 4. It is clear, of course, that sources drawn from Zambia and Northern Rhodesia must be influential. What is less certain is the significance of other non-English, common law sources. There is a strong temptation for a court in Africa to open up the definition to include sources from other jurisdictions within the continent, particularly from near neighbours. The problems faced by the developing nations of Africa often have much in common, are framed by identical or similar statutory provisions and have led to similar approaches towards solutions. In contrast, English law has not changed greatly in recent times and remains geared to the problems and attitudes of a much different society. There are times, too, when other non-English sources may prove valuable for an African judge or lawyer, sources from such diverse jurisdictions as India, Australia or America, both because of the substantive insights they may offer and merely because their use itself may bring more room for manoeuvre into the law. In so far as these are all common law jurisdictions, they fit into the sources of law potentially permitted by a liberal interpretation of chapter 4.

If chapter 4 is construed to refer primarily to the methodology of the common law, its geographic limitations become critical. If it is said to be restricted to English methodology, then a relatively rigorous application of *stare decisis* is required, for as noted above, this is the English common law method.⁴¹ If, however, the methods developed by other common law jurisdictions are permissible, then the Zambian courts remain free to choose from a wide range of possibilities, and could, if they wished, adopt a much more liberal approach to *stare decisis*.

Chapter 4 itself does not reveal precisely what meaning should be given to the common law that is to be in force in Zambia. As noted, the history of the provision, such extraneous clues as the title and side notes, other statutes,⁴² and a substantial body of opinion all tend to support an interpretation restricting the term to both the substance and methodology of English law. The changing times, the forces of legal nationalism, other statutes,⁴³ and a significant body of opinion tend to support a much more flexible interpretation, one that would relax the rules of *stare decisis* as these have been relaxed in other jurisdictions, so that the case law of Zambia might be drawn from many legal sources, and based as well directly on the country's public policy needs as perceived by the courts. The statutory framework can be made to sustain either of these interpretations and many others between them. Thus, the effort to describe with precision the method of the common law, the rule and status of *stare decisis*, in Zambia cannot be satisfactorily concluded with a review of the statutes. It is necessary in addition to go to the decisions and attitudes reflected by the courts.

Stare decisis in Zambia's courts

As with the rest of Zambia's legal system, the method of approach to precedent adopted by the courts did not spring full bloom into existence at the instant of independence. It too carried on, though with differences, from traditions already established during the colonial period. Thus, it is necessary to take at least a brief look at the colonial traditions as a prelude to a review of current conditions.

Pre-independence

Throughout most of the British colonial courts the doctrine of precedent commanded stern respect. This is perhaps not surprising given the philosophy of the dual legal system; one for the settlers and colonial administration, the other for everybody else. The problems of attempting to implant a wholly new European legal system in such alien soil as that of Africa (and Asia) were exacerbated by the poor quality of legal training for all but a very few high government figures and by the need to focus limited resources of money and talent on more important matters than legal development. In consequence, it can fairly be said that the institutions of law were not generally characterized by creative vigour during the colonial period. Local customary laws were largely ignored by the colonial officials;⁴⁴ and the English law was applied literally, without consideration for local conditions even for those affecting the European settlers. The courts were bound by decisions of higher English courts, especially the House of Lords and the Privy Council (at least with respect to cases appealed to it from the same jurisdiction).⁴⁵ Where colonial statutes could be said to be a "potted product of the English legislation", English decisions construing the latter were followed exactly, even if "strange results" were produced.⁴⁶ The result was that the substantive and procedural rules of England were applied to the colonies with almost no deviation at all. *Stare decisis* was pursued with even more rigour than in England itself. The substance and all the technicalities of English law were mercilessly applied, not the English common law methods of analysing cases at least in part on their own merits, much to the dismay of leading English scholars: "Blind following of English precedents according to the letter can only have the effect of reducing the estimations of the common law by intelligent judges to the level of its more technical and less fruitful portions, and making these portions appear, if possible, more inscrutable to Indian than they do to English lay suitors".⁴⁷

Much the same approach was followed in the Federation and Northern Rhodesian courts. A thorough review of the published cases derived from the colonial period reveals an almost wholly positivist reliance on English precedent with an automatic application of the rules of English common law to the nearly complete exclusion of any inputs based on local needs. As a partial explanation of why so few civil cases appeared in the published reports, it was suggested for example that "most of the judgments and decisions have turned upon the construction of the English Law of Contracts, Torts, etc.; few throw any light on the law peculiar to Northern Rhodesia".⁴⁸ The only major exceptions to the pattern of reflexive reliance on the correctness of English rules and decisions tended to occur in cases dealing with the law of sedition and civil liberties⁴⁹ (in which the courts were harsher than in England) and in cases where the level of education and "development" of individuals were at issue⁵⁰ (in which the courts displayed an embarrassing paternalism). Even in cases dealing with uniquely local concepts of witchcraft, the courts insisted on referring to the then current laws and standards of England.⁵¹ In nearly all the more ordinary decisions that have been published, the needs and public policies of Northern Rhodesia were completely ignored in favour of that English case or rule found to be closest in point.⁵²

In case after case decided during the period of Northern Rhodesia's colonial status the courts meekly followed what they considered to be the literal mandates of English law, without even attempting to examine whether the results thus produced were parti-

cularly appropriate under the circumstances. The dogma of *stare decisis* was merely routinely used, often on a mechanical basis. The process may have suited the needs of a rather poorly trained, inadequately staffed judicial system, manned as it was by temporarily transplanted administrators; but the colonial period contributed little either to the development of rules of law well suited to the conditions of the country or to the development of a method of analysis sufficiently flexible and creative to enable the law to move forward.

Post-independence

With the coming of independence in 1964 it was manifestly impossible for the courts to continue to reflect complete dependence on a foreign jurisprudence as the primary source for Zambian law. The tide of national identity was running strong, and the bond of political and economic subservience were formally severed. It was incumbent that the law too should move ahead, both in order to serve the image of sovereignty and, much more importantly, to stimulate, or at the least to participate, in the growth and culture of the new republic.

The law did change. The remaining vestiges of the colonial era disappeared—the unhappy attitudes formerly displayed by some of the courts were unthinkable, and are no longer to be found in any of the cases emanating from Zambia's courts. More subtly but equally significantly, the cautious, conservative methodology in practice before independence was no longer suitable. It was not possible any more to fail to see law as an instrument of social policy or to misapprehend the fact that as society and its policies change, so too must the law be re-adjusted. In Zambia, as throughout Africa, the emphasis began to switch from preserving the past to preparing for the future. Under such conditions, it was inevitable that the method of the law would turn away from automatic recourse to past precedent, especially precedent from outside the country, and toward considerations of the practical needs of society as perceived by the law-makers.

Immediately upon independence the law did indeed begin to reflect a more open attitude about the value of the past and about the relative importance of legal certainty. At the same time, however, it must be noted that although the conditions of Zambian society changed radically overnight, the actual institutions charged with running the country could not hope to transform themselves nearly so quickly. Particularly with respect to the institutions of the law, change could be expected to occur only rather slowly as the personnel involved began the arduous process of work and education necessary to bring lasting change to firmly imbedded traditions.

A review of the decisions of the courts in Zambia from independence to the present bears out these expectations. There are indications in the cases that the former rigid adherence to *stare decisis* has been relaxed, that the method of the law is coming to be based, at least somewhat more than it was, on considerations of public policy and less on pure, policy-neutral legal authority. Despite this, however, a careful reading of the recent cases reveals that the method of the law here still does retain a definite-authoritative component, with primary reliance continuing to be lodged not on policy analysis but on precedent cases, including many decided in England. There have been changes in the method of the law, but the pace of change has been slow.

There are a number of cases in which the Zambian courts have explicitly stated their determination not to be bound irrevocably by the past. "The United States Supreme Court, the Supreme Court of the Republic of Ireland, the ultimate courts of Canada, Australia, South Africa and most European countries hold themselves free if they think it right to do so, to refuse to follow a previous decision. Recently the House of Lords in England has abandoned its rigid adherence to the rule of *stare decisis*. I have no doubt that this court as the ultimate court of appeal for Zambia is not absolutely bound by its previous decisions".⁵³ Of course, the capacity of the courts to break from the past extends as well to case authority from jurisdictions other than Zambia; cases from the Northern Rhodesian courts are not binding on Zambia's courts today;⁵⁴ nor are English cases;⁵⁵ and nor are cases from other common law jurisdictions such as the United States (whose decisions in constitutional law may be "the subject of consideration" by Zambia's courts but not more,⁵⁶ former African colonies and independent African countries.⁵⁷

A similar flexibility has been expressed respecting the interpretation of statutes where these have been copied from or modelled on foreign (usually English) legislation that in turn has been construed by the foreign source's courts. Some of the rigidity of the colonial era has disappeared. In its place, the Zambian courts now firmly admonish that statutes can be construed only in their own context, regardless of what the position of various foreign authorities may be.⁵⁸ The point is equally true whether the foreign authority refers to court-made law that has been codified into legislation in Zambia or to foreign cases construing legislation that has been used as model for a Zambian statute.⁵⁹

In at least one instance, parliament has itself exhibited concern over the method of interpretation of statutes by the courts, particularly the practice of defining statutory terms strictly in accordance with the definitions expressed by foreign courts in cases involving statutes which are themselves the basis of Zambian legislation. The Penal Code of Zambia is modelled directly and indirectly on English criminal law, and reference to this source is made explicit in the Code itself. The Code formerly provided that "this Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed so far as is consistent with their context and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law".⁶⁰ In a series of cases, the courts construed the law to mean that Zambia's Penal Code had been received complete "with the gloss and interpolations from expositions of the law of England, because this section is a plain directive to construe the provisions of the Penal Code in accordance with English judicial decisions. . . the law of Zambia in this respect is the equivalent of the English law".⁶¹ This position proved too strong for some, and the courts later modified it.⁶² Instead, it was suggested that only "correctly decided" English cases should be consulted, as these are a substantial, but are not the entire, source of Zambian law.⁶³ Seemingly, however, parliament was not satisfied with this modification, and in 1972 the old provision was criticized as "too restrictive" and amended by deleting the portion emphasized above.⁶⁴

Thus, it seems clear that both parliament and the courts agree that Zambian statutory law is now free to move away to some degree from its English predecessors. What is not

so clear, of course, is the extent of such permissible movement. One possibility is that the parliamentary command implicit in the amendment to the Penal Code is that all previous criminal law precedent, both English and Zambian (in so far as the latter in turn is based on the "gloss and interpolations" of English law), should now be open to critical review in the courts. Indeed, as this appears to be the only time that parliament has explicitly considered the issue of common law methodology, it can even be argued that the legislative mandate should not be restricted to questions arising out of the Penal Code alone, but should be extended across the whole range of statutory interpretation and foreign precedent. This is perhaps an intriguing proposition to those seeking justification for inducing more flexibility into Zambian legal methodology. It is, however, not the only possible interpretation of the legislative reaction to the allegiance to *stare decisis* and English precedent formerly announced in the criminal law area. It is equally—some would say, more—possible that a much milder departure from past practices has been envisioned by parliament, a position that receives support both in subsequent cases and in some of the statements made during the pertinent parliamentary hearings.⁶⁵

On balance, then, the position today with respect to the use of precedent cases as an aid to statutory construction is much the same as it is with respect to ordinary *stare decisis*: there have been acknowledged calls for more flexibility, and for more consideration of current Zambian policy factors, but the full impact of change remains uncertain. On the one hand, the courts and other legal authorities have urged that "English decisions must be considered in the Zambian context and applied subject to such qualifications as local conditions and circumstances render necessary".⁶⁶ On the other hand, it is clear from any sustained reading of Zambian cases today that the doctrine of *stare decisis* is still a very powerful notion indeed, which continues to exercise pervasive influence in the law. Even in decisions in which the courts express their unwillingness to be "bound" by the past, especially by English precedent, they more often than not reveal that they do regard themselves as persuaded by such precedent "in the highest degree".⁶⁷ Accordingly, although the doctrine of precedent is no longer required to be followed without even minimal deviation, if it ever was, escape from it is said to be permitted only "for very compelling reasons" and only where a previous case was wrong. The relaxation of the rule is not abandonment and ordinarily the rule of *stare decisis* should be followed. Abandonment of the rule would make the law "an abyss of uncertainty".⁶⁸

In Zambia, as elsewhere, reference to abstraction and generalizations about the theory of *stare decisis* is thus in the last analysis insufficient to present a clear picture of the real status of the doctrine in the courts. Abstract statements about the doctrine that appear in the cases are mildly contradictory and ambivalent. Recourse is necessary to the cases in more depth to review not so much what the courts say about precedent but how they in fact actually deal with it. It is after all not very enlightening to learn that past precedent is no longer binding, but rather merely persuasive, if it turns out that in practice in nearly every instance decisions are made solely on the basis of what previous courts have written.

A review of the actual method of problem resolution currently utilized by the courts of Zambia indicates that the use of precedent continues to be more or less axiomatic. There are, of course, some decisions in which no explanations at all, either in terms of precedent or policy, are offered for the conclusion reached, as regrettably as

there seem to be in all jurisdictions. There are also at least a few cases—both routine cases and novel ones—in which a conscious effort is made by the courts to analyse the problems presented in the full context of the needs, wants and philosophies of Zambia.⁶⁹ In the great majority of cases, however, the issues presented are explained and apparently resolved purely on the basis of past precedent, without any discussion at all of any of the real problems or the myriad policy considerations present in them. It may sometimes be that the policy factors were indeed duly considered by the court but were merely not articulated for one reason or another. It may also be that in some instances the cases do reflect Zambian needs of which even the court was not expressly conscious, but which nevertheless did significantly influence the decision. Despite these possibilities, however, it remains clear that in many decisions the doctrine of *stare decisis* is being utilized as a replacement for, and not a supplement to, the reasoning out of a decision on its own merits, that precedent is being applied without consideration of its usefulness in the context at hand. Of course this practice is not confined to Zambia, However, a review of the cases indicates that the practice is indulged in here to an unfortunate degree.

One example of such an instance is the case of *Upton v Walker*.⁷⁰ The case involved an attempt to sue an estate that was barred on technical grounds, because the writ was served on an “administrator” who had been only informally, and erroneously, appointed. The Court of Appeal appeared to recognize that the extenuating circumstances of the case⁷¹ called for understanding and flexibility—in fact, one judge stressed that the merits were entirely “on the side of the plaintiff”.⁷² Nevertheless, the Court declined to permit any deviation from “the rule” that once defective, a writ is an absolute nullity which can never be revived or amended. This rule was derived from a series of five English decisions.⁷³ No other authority and no arguments of public policy were mentioned. Yet all of the five cited cases can easily enough be distinguished from the *Upton*⁷⁴ circumstances. Had the court wanted to, it would have had no difficulty in avoiding application of a rule derived from such sources in order to decide the case on “the merits”. What the opinion reveals is that the court was not looking primarily for an analysis in depth of precedent cases, one that would allow it to rationalize that precedent with its own notions of public policy applicable to the problem at hand. Instead, the court affirmatively reached out for the security of past cases, even if these came from another jurisdiction, were really not very similar on the facts, and came to a conclusion frankly described by the court as regrettable. There may well have been reasons, sound policy reasons, to support the court’s resolution of the case;⁷⁵ but the method used to explain the result at best obscured these. By relying on the authority of five distant, distinguishable and technical cases to the virtual exclusion of other sources of persuasion, the court appears to have utilized an overly rigid application of *stare decisis* to by-pass the real issues in the case.

In another well-known case, *Chama v the People*,⁷⁶ foreign precedent was again used to explain in a somewhat mechanical fashion a result that may have important consequences for the future. The case concerned the standards of diligence and anticipation to which the courts should hold the prosecution in criminal trials. There are, of course, considerable differences in the legal training of public prosecutors at present in England and Zambia. Yet the High Court appears routinely to have regarded as controlling several English cases it found on the subject of the relative obligations of the prose-

cution and defence that are implicit in the adversary system of procedure. In so doing, it largely ignored analysis of the whole issue of what form of procedure may best be suited for Zambia, utilizing an unimaginative application of *stare decisis* to put a veneer finish on an essentially unexplained decision. Certainly it would be unfortunate if the impact of that decision were to be to commit Zambia for the foreseeable future to the same adversary system as that practised elsewhere, at least without a much more thorough review of the demands on Zambia's criminal justice system.⁷⁷

There are many other instances, throughout the full range of civil and criminal cases, in which Zambia's courts appear to have cited precedent rather automatically and seemingly in lieu of thoughtful analysis.⁷⁸ There are also several decisions in which the mere recitation of precedent has been used to explain the result in matters of fundamental importance, where the significance of the issues involved is so obvious that it is scarcely credible that the courts did not resolve them on other unmentioned grounds. It is, of course, a widespread, if not always admired, practice for courts to obfuscate the grounds for their decisions in controversial cases,⁷⁹ but the consequences can sometimes be seriously inhibiting for the future development of the law. For example, in one case the High Court dealt with an "important constitutional issue" of the degree to which the judiciary should intervene where there are allegations of serious irregularity levied against the legislative branch by one of its members.⁸⁰ In a two page opinion, the court noted that according to precedent, the judiciary should not interfere with the "internal affairs" of parliament—with no attempt made to analyse when a claimed breach of constitutional guidelines might cease to be an "internal" affair or to harmonize the precedent with the constitution and philosophy of government of Zambia.⁸¹ In another case, the court summarily rejected the argument that, under the circumstances prevailing, evidence taken from the body of the accused should not have been admitted.⁸² This conclusion seemingly was based on foreign precedent. No analysis was offered of the basic policy choices presented respecting the nature of the powers of the public and the police and the limits implied on the personal liberty of individuals, nor of the constitutional provisions affecting these issues in Zambia, nor even of the particular circumstances of the case. The holding of the case, however, seems explicit⁸³ and could have far reaching significance for the future. Thus, a decision of possibly critical importance was reached without sufficient explanation. Past precedent was sought out and applied even though it was at best remote and even though the issues involved cried out for exhaustive, dispassionate review.⁸⁴

The principal difficulty arising from this approach is not so much that precedent appears sometimes to be recited as an automatic ritual, as an expression of the special incantation that duly signifies that the product involved has emanated from one well-trained in the mysterious litany of the common law.⁸⁵ Were this the only difficulty, the law could merely be faulted for being over-sophisticated and clannish, and as a result, somewhat more confusing than it might otherwise be. The real danger, far more serious, raised by the high degree of reliance on pure *stare decisis* by the Zambian courts is that in their eagerness to rationalize their decisions in terms of ill-fitting past cases they too often are ignoring discussion, perhaps even consideration, of the great issues of the day that are the cause, and ultimately the only rational source for the solution, of litigation. Precedent is not being used as an analytical tool with which to probe into the problems

of society; it is being used instead to reach conclusions independently of current policy considerations. In the cases cited above, and to too great a degree generally in the case decisions since independence, the social economic and political needs of the country seem somehow to have been relegated to a minor place in the law. Since they are the foundation of all law and its only plausible explanation, this approach can only be described as unfortunate.

Precedent can operate as a unifying, simplifying force in the law, as well as a convenient vehicle for preserving the best of the past period. But when adherence to precedent becomes merely automatic, when the decisions of the past are applied to the present without full, explicit analysis of whether or not they suit the needs of the present, the result is that the law as a whole becomes progressively aloof from the society it is supposed to serve. Unity, simplicity and preservation of the past are not the only attributes of a sound legal system. Thus concentration on these goals to the exclusion of others pulls the law away from its more immediate, and more important function as a fluid, pragmatic crucible in which society's problems are tested, debated and resolved. Zambia's courts have not ignored the problems of today; but they have tended in too many instances to use reference to precedent as at least a partial shield from consideration (in any event, explicit consideration) of her needs.

There are several factors in Zambia which have probably helped to mould the method of *stare decisis* now practised in the courts. At the same time, conditions in Zambia make this method particularly undesirable, and there is likely to be growing pressure for change in the future. The following section attempts to outline the factors which have to date helped restrict an imaginative application of *stare decisis* and to describe the nature of the forces that lead to a prediction of future change. Finally, specific suggestions are offered respecting practical steps which might be made in anticipation of such change and to facilitate the growth of a truly viable legal system.

The Zambian context

As noted previously, there are several significant reasons for the development of a rigorous method of *stare decisis*, the most important of which is the need for certainty universally perceived in the law. In colonial Northern Rhodesia and for a time at least in independent Zambia it is possible to isolate several special local factors which help explain the rigorous devotion to precedent, especially English precedent, manifested by the courts in the past. It is surely due in some degree to the presence of these factors that the yearning for tangible legal certainty has expressed itself in nearly automatic reliance on an alien jurisprudence. Correspondingly, it is possible to predict that, as and when some of these conditions become ameliorated in the future, the need for this sort of certainty will decline in relative importance with other demands on the legal system so that in time the present judicial methodology may no longer be appropriate.

The most serious constraint on the development of an approach to law stressing the importance of local policy needs has been the nature and level of education available, both for lawyers and others. That education has not been satisfactory, especially for lawyers. There was no formal legal education available at all in Northern Rhodesia or

in Zambia for the first few years of independence. This has had a profound impact, in several different respects, on the legal system.

Most obviously, the lack of local educational facilities has meant that whatever training in law there was had to be acquired elsewhere. Right up to the present, Zambia's legal system has been manned primarily either by expatriates brought in from abroad, largely from England, or increasingly in recent years, by Zambians trained abroad, also largely in England. It is inevitable that lawyers and judges, like others, will tend to revert back to their own experience and training to provide guidelines for the problems they confront—thus that Zambia's lawyers will rely heavily on English law.⁸⁶ This inclination is greatly compounded for expatriates. Not only do they fall prey to the natural temptation to seek out the security of a familiar tradition; they face as well the unsettling reality that they are operating in a society with a culture and traditions that must always be at least partially inscrutable to them. It is difficult for them to refer to Zambian needs and policies when they know little about them. It may be mildly dangerous as well, for they lack any local political base or power and cannot afford to take much risk of exposure from daring decisions. Under such circumstances, it is not surprising that the courts have tended to seek out past precedent as the primary, even the sole, basis of their decisions and that much of that precedent has automatically been English—they have been distracted by an inability to understand fully or deal comfortably in local policies and attracted inherently by their own traditions. The problem, moreover, is heightened because so high a proportion of both the bench and the bar has come from abroad, for the opinions written by the judges thus are read and evaluated primarily by others who share inherent unfamiliarity with Zambia as their authors. The socializing effect of writing for such an audience can only be to reinforce the original weaknesses.

There has been another more subtle consequence of Zambia's legal educational history. Because legal training was relatively remote from the practical circumstances faced daily in Zambia, the substantive legal consciousness the training was designed to promote tended to become fixed as of the point at the end of formal training, unable to grow easily in the Zambian surroundings of the new lawyer. When legal understanding thus becomes fixed and unchanging, two things happen. One is caused in part by the fact that it is precisely the past, though alien, training that is perceived—accurately enough, usually—as the recipient's ticket to professional esteem and advancement: the more remote, and hence vulnerable, that training is, the more obdurately it must be clung to in defence of position, for to concede doubt over the relevance of the training or the authority of the law learned is to challenge the whole basis of the stature conferred by the foreign degree or certificate. The other result is that, because the fixed understanding of the law necessarily recedes and diminishes as time goes by it is incomplete. In such circumstances it is natural that the lawyer concerned will not feel sufficient mastery even over the foreign law to deviate from it with confidence. When a partially trained lawyer is confronted with a system of the size and complexity of the English common law, his typical reaction is one of respect and deference. When he knows it better he may perceive possibilities for improvement and become willing to try to change it or even consciously to disregard it, but until then he is much more likely to approach it with diffidence. As Professor Gower has remarked, lawyers who deal with English

law in a foreign context seem imbued with a belief in its perfection "which surpasses that of any Englishman".⁸⁷

Yet another consequence of the general lack of education is that one cannot expect most of the ordinary people of Zambia to be fully conversant with either the national laws or the common law. In this context, paradoxically, the need for simple certainty in the law is increased. Where the law is educationally and culturally remote, people tend to seek firm, yes-or-no answers to legal questions. They cannot tolerate all the further doubts that go with a flexible, constantly relative application of the law. Where the basic framework of the law is alien and a little mysterious, it is too disquieting to seek and expose all its ambiguities and to mix in the added uncertainties of public policy.

The difficulties put in the way of legal flexibility are greatly compounded by one obvious practical constraint on any effort to introduce large doses of Zambian policy needs into its case law. This is the grave lack of any Zambian materials, but particularly past case decisions, to draw from. There is a disheartening dearth of such materials available. Only now are the Zambian law reports available.⁸⁸

The lack of local authority of course reinforces the tendency to look abroad for precedent. It also contributes to a reluctance to consider local policy needs, for any judge seeking to do so is forced to strike out entirely on his own—a forbidding prospect for all but the most venturesome. Thus, the lack of precedent analysing Zambian conditions and needs is itself an impediment to the production of such decisions now. The circle can only be broken by aggressive judicial assertion, coupled with the ever increasing flow of Zambian case decisions that will come in the future.

The factors above help explain and to some extent justify the stern reliance shown to date on the doctrine of precedent by Zambia's courts. It is noteworthy, however, that most of them should have only a relatively temporary impact. In particular, although educational deficiencies cannot be made good overnight, steady progress is now being made. The University of Zambia Law School annually graduates thirty to forty lawyers well-versed in Zambian law and both trained and disposed to consider Zambian needs and policies in the resolution of legal problems.⁸⁹ As these graduates begin to filter upwards in the legal system, they should have the capacity to begin to challenge systematically the notion that one need look no further than the nearest past case to discover the answer to a current problem. Indeed, they may come to have extra motivation for instituting changes from the procedures of the past and present: just as a substantive knowledge of foreign law has been the primary source of professional status in the past, so an appreciation of the uniqueness of African and Zambian problems is likely to be seized as the measure of prestige among new lawyers whose education has been distinguished by its attention to this aspect of the law.

In addition, there are other factors present which are likely to cause considerable pressure for innovation. Some of these factors are merely technical, practical constraints which render imperfect present efforts towards legal certainty and thus blunt the force of such efforts. Others are more fundamental, more emotional and harder to control. All of these factors, however, are likely to remain at least as influential, or even to gain in impact in the future. As some of the underpinnings of current methodology are cut away, an imbalance thus should be created which will call for modifications to return the system to equilibrium.

The advantages of strict adherence to the doctrine of *stare decisis* are marred in several respects under the practical circumstances existing in Zambia. The primary advantage claimed for the doctrine, as noted, is that it helps make the law certain by tying it to known past cases, so that its future application can accurately be predicted by those persons who seek to mould their behaviour according to its dictates. One limit on this, as discussed, is that in actual practice most people do not often consciously mould their important behaviour to the law anyway—most activity is performed in ignorance, or even in deliberate disregard, of the law. Another problem with it is that in any event, rigid *stare decisis* does not achieve in reality the degree of legal predictability claimed for it, for all the reasons noted. Both of these problems are compounded in Zambia.

The major difficulty stems from the fact that much of the case law relied on comes from abroad. It was noted that it is difficult for foreigners to feel at home in Zambian legal policy questions. The converse is equally true: it is difficult for most Zambians to obtain a full understanding of English law. There are just too many barriers to permit the full access to case precedent that is a prerequisite for the wholly successful application of *stare decisis*. Firstly, there is the fact that the precedent is written in a language that is foreign for most Zambians. It is sometimes thought, because English is in many respects a *lingua franca*, as the official language and the language of education, that the deficiency with respect to law written in English is not very serious. This, however, misconstrues the problem. Wide use of a language as a second tongue is not enough for the total fluency that automatically is the birthright for all those who speak it natively. Few Zambian lawyers can sit down and easily digest fifty or more pages of cases in English in an hour. Few can be expected happily to sift through dozens or hundreds of cases to find the one in point, or to engage in the facile and subtle process of exploring and exploiting all the nuances of English terminology in aid of case or statutory interpretation. The result is that for most people in Zambia, it is not realistically possible to expect a full scale review of all the precedent that may be available, simply because the difficulty of doing it all in a language learned only academically makes it too forbidding.

This problem will remain for as long as it is necessary to use English as an official, but largely second language—that is, for the foreseeable future. It affects Zambian cases and statutes as well as foreign common law materials, for all are in English. Its consequence however, is that *stare decisis* does not lead to a high degree of certainty, for until all the cases in the subject area have been considered, one can never be very certain that the case he did find will be the one seen as persuasive by the court. If all the cases and other sources potentially pertinent to a question of law have been reviewed in depth, the reviewer can be sure that he has a full picture of the state of the law—at least to the degree that he is able to comprehend the implications derived from the sources. If only some of these sources have been consulted, however, the reviewer can hardly be quite so confident. Native speakers can minimize the problem by reading masses of cases and materials. For others, the solution is not as simple.

Other factors conspire to complicate matters still further. English cases and concepts are the products of her history and culture. They can be studied by outsiders, but rarely understood as they are by English natives as a part of their very personality. The background of much of the substance of the common law is completely alien to Zambian experience and culture. The common law of real property, for instance is

perhaps an anachronism even in England, but it is understandable there. But what can all the stale, old intricacies of land law and the offspring of feudal terminology mean in Zambia? In one sense, the common law of real property represents the height of legal certainty. No one thinks it is certain when it is applied to Africa, however.

Moreover, the achievement of predictability through rigorous use of *stare decisis* requires broad access—at least indirect access through lawyers—to precedent law for the population concerned. Apart from the problems of access inherent in the use of terms and concepts drawn from abroad, there are very real purely physical handicaps in Zambia. There are only three or four libraries that can make any claim to having a reasonable collection of Zambian or English law materials. Even these, of course, are far from complete, and not all the collections are congruent. One can never be sure that the precedent he is consulting is exactly the same that others will find on the same question, unless they happen all to be using the same particular library for their research. The problem is especially acute with respect to unpublished materials of limited distribution, such as most Zambian cases, but it applies to all materials. Many of the legal materials in the libraries thus are often not fully usable for most Zambians because they present a seemingly random and badly indexed selection from among the monstrous profusion of old and new common law case reports and other materials. At best the libraries are fathomable to the limited extent of their resources to a few highly trained lawyers; for many they are hardly usable at all. Indirect access to the law by the public is severely limited because there are far too few lawyers with any training, although even if there were more, most of the population would be unable to afford the cost of their advice. It is all very well to suggest that strict adherence to *stare decisis* is potentially a way of providing clear, certain answers to precise questions of law. It is of little solace, however, to say to a person a few miles (or a few kwacha) away from one of the few libraries that the exact answer to his question is probably in there somewhere. If he cannot find it, that answer is not there for him. For all of the population to some degree, and for most of it to a very high degree, the legal predictability theoretically guaranteed by rigorous application of *stare decisis* is illusory in Zambia.

These practical obstacles in the way of an efficient system of law by case precedent have always existed, especially where the system has been largely imported from abroad, and have tended to make the law in such places seem formal and artificial. The approach may have been necessary in the past because local educational weaknesses and the dearth of local cases precluded the substitution of viable alternatives. As noted, however, these factors are slowly moderating. The pressure for change that will result will be greatly augmented because of the rise of the desire for a legal system geared explicitly and exclusively to local needs that is a concomitant of political independence. The forces of nationalism seem to be growing all over newly independent Africa, with predictable implications for the method of the law in former colonies. One manifestation of the new drive is a distrust of anything connected with a past colonial power. The African states are busy carving out new economic and social philosophies appropriate for their own perceived needs and pointedly different from European models. At least the educated and social elites are brimming with new confidence in their own way. The result has been that the received law is increasingly being viewed as tainted because of its past association with colonialism, as at best an encrusted relic merely temporarily inherited at indepe-

ndence. Continued application of the substance and the methods of the common law is thus now confronted with the emotional force of resurgent national and racial identity. This has already led to suggestions in some countries for a radical departure from old legal ways,⁹⁰ and sometimes to a flat refusal by the courts to carry out the implications of a received European jurisprudence.⁹¹ Comparable pressure is beginning to be felt in Zambia as well, and this clearly will increase as lawyers and judges are drawn in the future from the growing number of Zambians trained mostly or exclusively in the country. There will be yet another consequence of the increased recruiting of judges who have been locally trained: their accountability and acceptability to the people should increase commensurately, as well as their own, independent political power base. Correspondingly it will become more difficult, and less necessary, to tie them down through the control of unyielding *stare decisis*.

It is difficult to predict confidently the magnitude of the forces for change that are building up, or the pace at which they will begin to be reflected in attitudes towards the law. It is easy, however, to foresee the direction of change and to state that the change will be significant. In future years and decades there is going to be less and less willingness to rely merely automatically on past precedent as the sole justification for the solution to legal issues. This will be true especially for precedent that is not Zambian. It is perhaps conceivable, but not likely and certainly not desirable, that a movement away from rigid adherence to the principles of *stare decisis* will not be compensated for through resort to other legitimizations of judicial power, that is, that the pressure to desert *stare decisis* will simply leave a vacuum that will be filled by undisguised judicial fiat. This, of course, would be a disaster. No democracy can applaud a methodology which tolerates judicial decisions based merely on the unexplained whim or inclination of the judges. It is much more likely that instead a new form of rational methodology will rise to complement a less restrictive use of *stare decisis*, that a new combination will be offered to justify and explain the law of the future. The new ingredient in that process will be public policy. As routine recitation of prior cases becomes less convincing, so analysis of legal issues in terms of their social, economic and political implications will become more persuasive as a reason for reaching a legal conclusion.

As it must by now be apparent, it is the conviction of the author that the direction of change that seems to be coming is all for the good. *Stare decisis* is a marvellous device, when it is used to extract the wisdom of the past and to supply an element of continuity, of solidity to the law. But *stare decisis* is not the real reason behind the law—no methodology is itself the reason for the law. When *stare decisis* is imposed for its own sake, when a legal method is decreed applicable as if by definition and the specific legal answers sought are certified as correct solely by virtue of their conformance to the dictates of this definition, then the whole purpose of civilized law is lost in the shuffle, and justice is metamorphosed into a Kafkaian nightmare of bureaucratic ritual.

The purpose of law is everywhere the same: it is to provide for the orderly, rational resolution of disputes, to allocate endlessly changing and eternally competing rights, needs and power relationships, and to help to put into practical effect the moral, social and ideological aspirations of a society. To function effectively in this its only real role the law must have the use of methods of analysis and explanation that permit—that coerce—reference to the practical needs and circumstances of the day, that maintain the

finger of the institution of the law constantly on the pulse of the contemporary currents that define the life of a society. Reference only to the past cannot provide this part of the law. Too great a reliance on *stare decisis* conduces in the end to mere judicial formalism, with victory in litigation going to the most adroit players in the game. This makes the law confusing and inaccessible to most people. Far worse, it makes law a process of rationalization, not reason.

Suggestions for the future

The changes likely to come in legal methodology will be caused largely by the ground shifts of practical and emotional considerations described previously. Their impact will be to decrease reliance on past precedent as the source of legal authority, and if this can be offset by an equivalent increase in the stature of public policy as a source of legal authority, the result should be highly beneficial. It is perhaps inevitable that Zambian courts will pay more heed to practical, policy considerations if and as they pay less to past precedent. Nevertheless, the value of ensuring that this is indeed accomplished, and in an orderly, thoughtful fashion, is so critical that it does not seem presumptuous to offer a few practical suggestions to help to prepare for smooth passage into the future. Continued heavy reliance almost exclusively on *stare decisis* would be unsatisfactory, and is unlikely in any event. Unrestrained power in a court to decide cases solely according to its own mere preference or solely on the basis of its own unexpressed notions of public policy would be intolerable. What is needed is a blend of the vitality of public policy with the conservation of cautiously circumscribed judicial discretion. It should not be prohibitively difficult for Zambia to achieve such a blend in the future. To aid in the development of the law to this end, the following are offered as possible suggested rules of judicial method and as practical steps which could be taken to hasten the growth of a new system.

Stare decisis and legal authority

The courts should explicitly recognize that they are never irrevocably bound by any past cases, Zambian or foreign, except that lower courts must remain bound by decisions of higher ones. As noted, the courts have already stated very much the same position; but they have not often enough realized this position in practice. It is emphatically not here suggested that precedent should simply be ignored by the courts. What is urged instead is that it should be analysed, not merely applied. A court should never be satisfied with a mere factual similarity between a past case and a current one as grounds for the application of what is perceived as the holding of the former. It should rather explore the past case in depth, analysing the reasons, expressed and unexpressed, for the earlier decision. This means that the past case should be understood primarily in terms of the issues of social policy contained, and resolved, in it. The important, determinative policy factors should be isolated and identified. The court should then make and express its own review of those policy factors as they apply to the current case. If the court agrees that they apply much as they did previously, it should say so and use the prior case as

precedent. If the court is uncertain on how to resolve the current case it should also apply the past case. If, however, the court concludes that conditions have changed, so that the policy factors have altered, or if it perceives new policy considerations that seemingly were ignored previously, and the impact of these is greater than the need for mere legal continuity,⁹² it should feel wholly free to deviate from the past case.

There are two critical differences in this method from that largely applied now. The first is that the courts should be more willing to deviate from precedent than they are at present. If past cases do not seem suitable today, in Zambia, the courts should not follow them. They should not flinch from critical review of all precedents, even if this means that much of that precedent is tacitly or expressly overruled. The second change of emphasis is much more important. This is the requirement that all precedent be analysed in terms of its usefulness to the problems at hand, whether or not that precedent ultimately is followed. The key point is that recourse to precedent should never be axiomatic as it so often is now. It should always be seen as an obligation on the part of the courts to review and express in their opinions precisely why it is that a precedent case is either being applied or rejected. And the reason tendered by the court should never be a mere, always superficial, factual analogy between the two cases. Rather, the reasoning process should place both cases in their policy context. The consequences of the former decision, practical and other, should be analysed and a specific determination made whether to induce similar results in the current case. Precedent should have relatively little standing on its own. It should be used not as a reason for a decision but as a convenient starting point for real analysis of a current problem, as the focus of a practical review of public policy, and perhaps as a source of inspiration and wisdom where a prior judge has contributed his incisive analysis of the problem and its implications in his decision. Where a prior decision fails to provide such insights it should simply be discarded unless the current judge is not himself able to reach a firm policy conclusion.

It is not possible for this method to be applied in all litigation. Most judges lack the time, and some may lack the inclination to analyse so carefully all the precedent that seems applicable. Nevertheless it should be the working rule that precedent must be proved to be appropriate, not merely cited as similar. This should be insisted upon particularly in all cases dealing with demonstrably critical policy issues, including certainly all significant decisions involving matters important enough to be enshrined in the Constitution. The method should be applied to all prior cases; but it should especially be used when English, other foreign, or Northern Rhodesian cases are considered. The courts should remain ever alert to the possibility that such cases may have made policy sense where they were decided, but not now in Zambia. They should be especially reluctant ever to cite such cases without offering an explanation as to what the earlier legal and policy reasoning was and why it seems suitable in the present circumstances.

The increase in the consideration of public policy as a part of a judicial decision should not be restricted only to use as the explanation of the relevance of past cases. The courts should also feel free to cite policy concerns wholly on their own merits as justification for a decision, whether or not precedent is also cited. If a review of precedent fails to turn up any helpful explanations of why one result should be favoured over another in a case, the courts should not give up the battle; they should make their

own probing analysis, the better to solve the problem before them and to serve as a sounding board and source of wisdom to other judges following them. Above all, the courts should strive never to give any decision without at least working out for themselves, and preferably not without expressing in their opinion, the full policy basis for their conclusions.

If such an approach is adopted, there will be a much different emphasis in the law than there has been in the past. The law will become less formal and contrived, less remote. It will also be a much more significant force for social progress, as this is perceived by contemporary society. It might at first glance seem that this will also lead to hopeless uncertainty and to a dangerous extension of essentially unfettered judicial power. In practice, however, neither of these consequences is likely to be realized as long as the new considerations of policy are made to adhere strictly to the methods described. Critical in this respect is the requirement that as often as possible the policy bases of a decision be explicitly articulated.

This will, firstly, go a long way towards supplying certainty in the law. As more and more decisions are handed down, the policy factors considered critical by the courts will become clearer and clearer. Indeed, a whole new body of precedent will be developed, a collection not of fact situations coupled with judgments, but one of basic, widely recurring policy preferences. As this body of precedent fills out it should be possible for a lawyer to gauge with reasonable precision the hierarchy of practical concerns and value choices that are dominant at the time, across the society as a whole and in the eyes of individual judges as well. To the extent that this is so, the lawyer should be able to make a highly sophisticated prediction respecting the outcome of any case, whether or not it appears on all fours with a past decision. And, as the decisions will generally contain more discussion of public needs and fewer recitations of technical law, they should be more understandable to the public as well. The net result should be an increase in legal certainty and accessibility over the rather dubious levels presently achieved.

If judges feel obliged to articulate the policy bases for their decisions, there will not be a dangerous increase in their power, either. The judicial branch in Zambia is subject to considerable potential pressure from both the executive and legislative branches.⁹³ If the policies announced by the courts are seriously displeasing to these elected representatives, they can be corrected easily enough, by legislation or by more subtle means. As long as the real reasons for decisions are expressed, this should be a sufficient control in itself. More than this source of constraint, however, the opinions of the judges and even of society as a whole, should operate as a very real restraint on judicial power in all but a few instances. Most judges are dedicated, objective servants of their society. If they offer a reason for a decision which others promptly criticize, most judges will then tend to rethink and modify their own position in the future. Even if they do not, they will become isolated from the growth of the law as a whole, and their impact will be minimal. It can be argued, indeed, that this represents a purer reflection of the practical limits on judicial discretion envisioned by the theory of the common law than the effects of rigid adherence to *stare decisis*, which renders the law outside the limits of meaningful inspection by most members of society and which permits any determined judge to disguise the real basis of an arbitrary decision so that even other lawyers find it difficult to produce irrefutable criticism of the result or of the way in which it was reached.

The greater danger stemming from increased reference to policy by the courts may actually be that judicial power and independence are reduced to impotence, not magnified to excess. If judges do express the policy basis of their decisions publicly in their opinions, those more powerful in government may take the occasion to ensure a more exact compliance with official goals and philosophies. This would eliminate one of the great roles of the judiciary in most of the world's common law societies—the capacity to act as buffer between the single-minded dogma of a governmental few and the conflicting diversity of the people. In an era where parliamentary diversity, in Zambia and elsewhere in Africa, is being affected by the institution of a one-party state, it is probably especially critical that the courts do maintain their traditional de-centralized independence. Paradoxically, one of the surest guarantees of continued democracy lies in the institution of courts that are at least partially free from the control of the majority of people or power—or its elected political representatives. It is not, to be sure, a very convincing argument to suggest that courts should achieve this by concealing the basis of their decisions in a labyrinth of legal formalism. However, if the law is made more open, if it is more explicitly tied to always debatable and understandable public policies, all concerned should maintain vigilance to ensure judicial independence. Given awareness of the potential problem it does not seem likely that the independence of the courts could be in serious jeopardy in Zambia. The principle is implicit in the Constitution. It has forcefully been reiterated by the president of the country.⁹⁴ As the bench achieves a measure of political power of its own, it should increasingly be able to protect its independence by its own devices. Finally, it should be noted that the frank inclusion of policy arguments in judicial decisions will not necessarily bring down the wrath and censure of the other branches of government, even if different value priorities are expressed. Like most judges, most legislators and other government personnel are genuinely concerned with the progress of the country, and their reaction to new arguments and policy conclusions by the courts may be to expand their own point of view rather than to force all others arbitrarily into line. A creatively critical approach to matters involving the interpretation of statutes would be especially helpful to a parliament faced with very heavy demands for comprehensive new legislation and equipped with too few trained lawyers among its members of staff.

Thus, the dangers posed by increasing substantially the consideration of public policy as a basis for judicial decisions are slight, as long as a tradition develops for ensuring that the reasons for a decision are indeed expressed and as long as the existing tradition of judicial independence is rigorously maintained. This does not mean, of course, that it would be enough for a judge to decide a case merely on general grounds of equity or policy—it means as well that the precise policy considerations involved should be explicitly stated. If this is achieved, however, the benefits for the law should be momentous. To a much greater degree than at present, the law and specifically the courts, would be able to participate directly and influentially in the process of nation-building now under way.

Practical suggestions

As is discussed above, it is more than likely that the development of the law in Zambia will move in the desirable direction of less reliance on a rigid application of *stare decisis*

as a result of forces already operating. However, this does not mean that it is not now possible or advisable for several purely practical steps to be taken to help influence the pace of this development and to help ensure that as reflexive reliance on prior cases diminishes it is beneficially replaced by controlling principles of policy review. Of course, the primary drive for constructive change must emanate from the courts themselves—they will automatically become the catalyst for progressive movement if they adopt a methodology that focuses constant attention on the actual impact of legal decisions within the context of stated public policies. In order to augment the central role of the courts, though, the following supplementary actions might profitably be undertaken.

Attorneys' briefs

If the courts make it plain that success in litigation depends at least in part on the extent to which one's legal cause is shown to be consistent with important public policies, it is evident that most lawyers will promptly begin themselves to give careful consideration to policy arguments in their presentation to the court. The contribution of thoughtful, competing attorneys to the development of the law is perhaps the greatest virtue of the adversary process of litigation that is widely extant in the common law world, including Zambia. Two competent, zealous lawyers battling out the merits of the positions of their respective clients can provide immeasurable assistance in exposing all the ramifications of an issue present in a case. At present, in most instances, previous little of this jousting seems to have much to do with considerations of policy. Argument is more likely to be devoted exclusively to matters of evidence and positivistic assertions about precedent and statutory sources of law. This would change of itself if the courts announced a shift of their own to greater emphasis on policy. The change would be greatly facilitated, however, if the practice of calling for written briefs from the attorneys in a case were instituted, even if only on a modest scale. Present practice varies somewhat, but it seems overall to discourage serious inquiry into the policy purposes of the law in question in a case. One procedure sometimes followed, even in appellate cases, is for the lawyer to locate the precedent he wishes to rely on and then merely submit to the court the various volumes of law reports containing such precedent with a book-mark inserted at each of his cases. This certainly does not encourage critical analysis of the precedent by either the lawyer or the court. Another procedure in use is for the lawyer to give the court a photocopy of each case he intends to rely on.⁹⁵ It is possible for a lawyer to supplement his submission with oral argument, including analysis both of precedent and policy if he desires, but in many cases this is in practice kept to an unfortunate minimum.

If lawyers instead submitted their argument, not just their authorities, in writing they would be forced automatically to think more about what the sources for their conclusions really were. They would thus tend to question each other's precedent much more searchingly and to defend their position with reasoned analysis of public policies. It is possible for this to be accomplished at least in part through lengthy oral confrontation, as is now the case in many jurisdictions, notably England. But the process of considering the reason of the law cannot help but be nudged along by encouraging written statements, especially in socially important cases. The very act of writing one's position down coerces a more careful consideration of what it is that is being so convincingly

demonstrated. If written briefs were instituted in Zambia, this would go a long way toward opening up current attitudes about proper legal methodology.

Court clerks

Another relatively simple innovation could have rather far-reaching effects. This would be to begin the practice of utilizing recent law graduates or even law students as clerks for judges, especially those on the appellate bench. This is an institution widely practised elsewhere, with considerable success. The role of the young clerk should not be confused with the purely administrative role of other court clerks or registrars, nor could it involve actual adjudicating powers. Rather, the clerk can best assist the judge in researching the law in cases before the court, supplementing objectively the efforts of the lawyers involved. This yields the addition of yet another reasoned, often refreshing review of the precedent and policies involved. It also releases the time of the judge on minor issues so that he is free to concentrate on what seem to him to be the critical points. In the end a more thoughtful case opinion is likely to result, to the ultimate benefit of the law. Enthusiastic and energetic legal manpower, trained but untainted by doctrinal allegiance is available in Zambia, at very modest cost. The growth of the law might well be accelerated if this resource were more fully exploited.

Legal publication

As noted previously, one of the critical constraints on the process of breaking away from reliance on foreign precedent and substituting therefore analysis of local needs and policies is the dearth of published Zambian cases and other materials. It should go without saying that the production and publication of such materials should remain one of the highest priorities of the legal system. This problem is not unique to Zambia. It is common throughout most of the developing world, and it generally evokes pleas for remedial action from all concerned. Somehow, however, little seems to get accomplished. The publication of all sorts of legal materials, especially of many more cases, should constantly be encouraged. All these materials should be bound together into a usable whole by the preparation of a single, comprehensive master index repeatedly referred to in each legal volume published. Equally importantly, those materials, and again especially the cases, should themselves reflect much more directly than at present an analysis of Zambian problems and their possible resolution. Publication of legal materials from the ordinary judicial, academic and governmental sources might profitably be supplemented by the output of a formally constituted law review commission, charged with the specific task of reviewing both statutory and case law with an eye to recommending changes, perhaps both of methodology and substance. Legal development, of course, is everywhere a long, arduous process, one that cannot successfully be hurried too much. That process depends, however, on the accumulation of insights and wisdom from many sources over a period of time. Without full-scale distribution of as many ideas and reflections as possible, legal growth must inevitably be retarded.

Education

Finally, brief mention should be made of another factor that seems obvious but is not always fully emphasized. Both the quality and quantity of legal education available in

a society will very largely determine the overall quality of its legal system. To date, Zambia has placed great stress on legal education, but again, still more could be done. Little use of student lawyers is made outside of law school, to the detriment both of their education and a personnel-short legal system. To too great a degree, the educational processes themselves, like the courts, tend to equate the study of law with the memorization of foreign and Zambian cases and legal rules, placing far too little emphasis on the role of law as a creative, vital force designed for the purpose of aiding in the growth and progress of society. There even have been a few preliminary indications on the part of some that legal education is too liberal already, that lawyers need more "practical", i.e., rule-oriented, training and further that there may be too many law students for the legal system to assimilate over the coming years. If law is to become an active participant in the growth of Zambian civilization, it must be able to draw upon the services of a great many lawyers and law-makers as will be able to analyse and resolve social problems as to quote precedents and rules.⁹⁶ A relaxation of the commitment to broad-based, concentrated and liberal legal education would have disastrous long-range implications for the law.

Conclusion

This chapter has tried to outline the nature of the common law method of *stare decisis*, its strengths and weaknesses, and its application to date in Zambia. That method is itself almost infinitely complex and variable, and ideally can provide a rationally controlled yet flexible and immediate approach to law, one that retains the element of certainty and formality seemingly necessary in law, yet affords due consideration of policy needs as well. In the past, the application of *stare decisis* in the courts of Zambia has tended to emphasize formality at the expense of immediacy. Most cases seem to be determined on the basis of the nearest factually similar precedent, even if that precedent is really rather remote, and all without much expressed regard for factors of public policy. This is unfortunate. Law is nothing more than the resolution of competing, conflicting policies; "justice" can occur only when this resolution keeps all the policies in at least approximate balance. When adjudication is determined largely without conscious reference to those policies, it is too likely to result in injustice.

In a system where *stare decisis* is applied too automatically, the law becomes the sterile hand-maiden of past precedent, not the cutting tool of social policy. If precedent is to be utilized constructively it must instead itself be reviewed through the eyes of policy, and that review must further be augmented by open, direct confrontation of the policy issues applicable to each case. This process represents the methodology of the common law in its most useful form in a growing, rapidly changing society. Some of the factors which have impeded this process in Zambia in the past have been or will in the future be ameliorated. It is thus unlikely that past precedent will long continue to be enthroned as the sole, or even the primary source of the law. It is at least possible that as this occurs, the courts and the law will turn instead increasingly to explicit concern with the social, economic and political policies that lie behind all law as the source for their legal reasoning, and as the unifying explanation of the legal principles they apply. It is very much to be hoped that this development will come to pass and that all practi

cable measures will be taken to facilitate it: "If the law is to be an effective instrument of social order it must be a stabilizing influence, but it must be flexible and it must be progressive, else it will hinder society in its progress and development instead of advancing it".⁹⁷

Notes

1. Frank, *Courts on Trial*, Princeton Press, Princeton, 1959, at p. 373.
2. See, e.g. Amos and Walton's *Introduction to French Law*, Clarendon Press, Oxford, 1967.
3. The point is put bluntly by Herbert, writing in a hypothetical case included in *Uncommon Law*, Methuen, London, 1969, at p. 156, concerning the "agreeable fiction (of the declaratory theory) that the decision was there already, though hidden till that day in the inexhaustible womb of the Common Law. My Lords, as you know, this is nonsense."
4. Note, for instance how the holding expressed by the court in *South Staffordshire Water Co. v Sharman* [1896] 2 QB 47, is re-interpreted by a later court in *Hannah v Peel* [1945] 1 KB 509.
5. See Oliphant, *A Return to Stare Decisis*, 14 Am. Bar J. (1928); excerpted in Auerbach, *et al.*, *The Legal Process*, Chandler, San Francisco, 1961, at p. 48.
6. See, e.g., the famous dispute between Stone and Goodhart, contained in Auerbach at pp. 51-64.
7. 314 U.S. 1 (1949).
8. See Murphy, *An Analysis of Holding and Dictum*, Chicago Press, Chicago, 1948.
9. See *Hynes v New York Central R. Co.*, 131 NE 898 (1921), and the comments on it by Justice Cardozo in *The Growth of the Law*, New Haven, Yale, 1924, p. 99.
10. See Professor Llewellyn's well-known review of precedent respecting the canons of statutory interpretation, in which he lists 26 rules, together with their 26 opposite rules—all duly supported by case precedent. Remarks on the Theory of Appellate Decision, 3 Vanderbilt L. Rev. 395 (1950).
11. With the caveat, of course, that decisions of higher courts are fully binding on lower courts on the same system.
12. See Wasserstrom, *The Judicial Decision*, Stanford, 1961, at p. 50.
13. The practical commencement dated for this position was 1861, in the case of *Beamish v Beamish* (1861) 9 H.C.L. 274, but its origin lay much further back in the development of English Law. See Holdsworth, *A History of English Law*, London, Methuen, 7th ed., 1966, Vol. I, ch. IV at p. 375.
14. *London Streets Tramway Company v London County Council* [1898] A.C. 375.
15. See *Young v Bristol Aeroplane Co.* [1944] K.B. 718. Three exceptions to the rule that the Court of Appeal is bound by its own decisions are recognized: (i) if the precedent is itself in conflict; (ii) if the precedent appears inconsistent with a House of Lords decision; and (iii) if the precedent was given *per incuriam*, that is, in obvious ignorance of a statute or earlier case. See in general, Phillips, *A First Book of English Law*, 6th ed., Sweet & Maxwell, London, 1970, ch. 12.

16. See, e.g. Cross, *Precedent in English Law*, 2nd ed., Clarendon Press, Oxford, 1968.
17. The House of Lords Practice Statement of 1966 recognized as an "indispensable foundation" of the law and as "normally binding", but noted that too rigid adherence to *stare decisis* may lead to "injustice", and accordingly promised "to depart from a previous decision when it appears right to do so".
18. Allen, *Law in the Making* 7th ed., Clarendon Press, Oxford, 1969, p. 357.
19. "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of the public policy, avowed or unconscious, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Holmes, *The Common Law*, Boston, Little Brown, 1881.
20. Cardozo, *The Nature of the Judicial Process*, New Haven, Yale, 1921 excerpted in Auerbach at p. 365, ff. The same judge contemptuously dismisses technical distinctions of law as established by past cases: "Rights and duties in systems of living law are not built upon such quicksand. We may be permitted to distrust the logic that leads to such conclusions." *Hynes v New York Central R. Co.*, *supra*, note 9.
21. Daniels, *Common Law in West Africa*, Butterworths, London, 1964, at p. 174.
22. See in general Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972, Wis. L. Rev. 720.
23. See Wasserstrom, *The Judicial Decision*, *supra*, note 12, p. 60 ff.
24. Public criticism, if widely aired, would of itself be sufficient to influence most judges, who after all are not so vain as to disdain the views of others.
25. This, of course, has long been a major source of criticism for the dual legal systems imposed by the British on their colonies and still maintained today. It is hoped ultimately to integrate the customary and European systems completely, although progress has been slower than perhaps was anticipated. See Spalding *et al.*, "One Nation, One Judiciary: The Law Courts of Zambia", 1972, *Zambia Law Journal*, I.
26. See Frank, *Courts on Trial*, *supra*, note I, at p. 271, quoting Lord Ellenborough: "If this rule were to be changed a lawyer who was well stored with these rules would not be better than any other man without them."
27. See Allott, *Essays in African Law*, Butterworths, London, 1960.
28. See for example, Section 4 of the Zambia Independence Order, 1964 which provides that "the existing laws . . . shall continue in force".
29. For instance, the statutes respecting the subordinate courts, The High Court and the Supreme Court of Zambia all refer—residually only—to the law and practice of their English counterpart courts. See Laws of Zambia (1970) Cap. 45, Sec. 12; Cap. 50, Sec. 11; and Cap. 52, Sec. 8. These provisions have sometimes been applied with a vengeance by the courts. See *Patel v Attorney-General*, 1969 SJZ 124. In other cases, however, some courts have seemed reluctant to carry out all the possible implications of such provisions. See e.g. *Roettgen and Sampter v Harocopos*, (1931) II NLRL 5. It is also provided that "Law and equity shall be administered concurrently", Laws of Zambia (1970), Cap. 50, sec. 13 (see also Cap. 45 Sec. 15). Specific reference to English Law is made with respect to certain substantive areas of law, such as probate and divorce (Cap. 50, Sec. 11) and criminal law (Cap. 146, Sec. 4). The inclusion of named British statutes is provided for the

Cap. 5, the British Acts Extension Act, which lists several British Acts as "deemed to be of full force and effect within Zambia". In at least one instance, however, the Laws of Zambia expressly limit the application of English Law. Section 360 of the Criminal Procedure Code (Cap. 160) provides that the U.K. Criminal Evidence Act, 1898, "shall not apply to the Republic".

30. It can be argued that the 1911 cut-off date modifies both the common law and equity provisions of chapter 4 as well as the statutes in section C. See Seidman, "A Note on the Construction of the Gold Coast Reception Statute", 1969 J.A.L. 45. If so, of course, the role of the common law today would be greatly reduced, since only older sources could be referred to. This position seems to make little practical sense, however, and it is clear by implication, that the Zambian courts have not favoured it.
31. It is generally stated that only statutes of general application are included. The difficulty lies in distinguishing such legislation from "purely local acts", which are not included. See Allot, *supra*.
32. The term "equity" has many possible meanings, including the particular principles developed, primarily by the former Court of Chancery in England, the practical, problem-oriented procedures pioneered by the same court, the flexible legal methodology thus exhibited, or more broadly, an amorphous concept of fairness and good conscience.
33. See Seidman, "A Note on the Construction of the Gold Coast Reception Statute", *supra*, note 30.
34. See, for instance, the recommendations put forth by Sawyer and Hiller in *The Doctrine of Precedent in the Court of Appeal for East Africa* Tanzania Publishing House, 1971, Dar es Salaam.
35. East African reception statutes referred to the "principles" of the common law, while West and Central African models referred only to the "common law". From this technical discrepancy, one might argue that the latter versions should be construed even more broadly than the former but that both should refer to no more than very general substantive principles.
36. Such an interpretation would coincide nicely with the formula for disregarding customary law that is found to be "repugnant to justice, equity or good conscience"; Laws of Zambia (1970) Cap. 45, Sec. 16.
37. See, e.g. *Kaniki v Jairus*, 1967 SJZ 92.
38. A side note states: "Extent to which the law of England is in force in the Republic".
39. It is a general rule of statutory construction that titles, chapter heads and marginal notes, while they may have some relevance, cannot seriously influence the interpretation of the body of the statute. See *R v Machi*, (1940) II NRLR 90; also Llewellyn, "Remarks on the Theory of Appellate Decision" *supra*, note 10.
40. See Laws of Zambia (1970) Cap. 2 Part II of which states: " 'Common Law' means the common Law of England". "Common Law" is capitalized in this section but not in chapter 4, and it is possible to argue on this basis that the legislature intended to limit the impact of the former on the latter.
41. One result of this would be to tend to limit Zambia to English substantive rules as well as English methodology, since the existing case law of Zambia and Northern

Rhodesia is heavily influenced by English substantive concepts. Under a rigorous application of *stare decisis*, it would be difficult to deviate from this base.

42. See chapter 2 and the several statutes referring specifically to English substantive and procedural law listed at note 29, *supra*.
43. It was well recognized even in the colonial period that the literal application of English Law and concepts in the context of Africa would inevitably lead to serious problems. Accordingly, statutory authorization for the courts to modify British acts applied to Africa was introduced during the colonial period, and has been carried over after independence.
44. The only major occasions on which customary law received attention from the colonial judiciary occurred when a court considered whether such laws were "repugnant" to a vague statutory standard of acceptability. See note 36 *supra*. The courts candidly construed this to mean as "against justice as we people in England see it", *R v Matengula*, (1951) 5 NRLR 149; *Gwao Bin Kilimo v Kisundi Bin Ifuti*, (1938) 4 T.L.R. 63.
45. See Daniels, *Common Law in West Africa*, *supra*, note 21.
46. *Manmohandas Davachand v Kalnganji*, (1950) EACA. Compare also the method used to define terms in the Penal Code of Northern Rhodesia in *Regina v Lazaro*, [1958] R. & N. 971.
47. Pollock, *The Genius of the Common Law*, Cambridge, University Press p. 114, as quoted in Daniels, *Common Law in West Africa*, *supra*, note 21, p. 195.
48. Introduction, (1938) I LRNR XXVI.
49. See, e.g., *R v De Jager*, (1935): I NRLR 13 *R v Matengula*, (1951) 5 NRLR 148.
50. See, e.g., *R v Singombe*, (1936): I NRLR 33 *Attorney-General v Nkala*, [1961] R & N. 774.
51. *Attorney-General v Jackson*, [1957] R. & N. 443. See also *R v Musunki*, (1934), IV NRLR 193 where the court analyses an English witchcraft act of 1736. Compare also *Muhengous v R.*, 1959 Fed. Sp. Ct. Judg. No. 22, concerning whether or not dagga could have an effect on the mind of a criminal defendant.
52. *R v Chineya*, II NRLR 1119 (1941).
53. *Paton v Attorney-General*, 1969 SJZ 10, 15.
54. "With the greatest respect, I regard *People v Lubumba*, (1952) 5 NRLR 210 as having been wrongly decided." *Kalimukwa and the People*, 1971 SJZ 189, 194.
55. *Mullan and the People*, 1971 SJZ 78, 92: "For all the reasons set out, I find myself unable to follow" a cited English precedent. See also *Samavu v the People* (HLA—24/71).
56. *Patel and the People*, 1969 SJZ 124, 131. Ordinary substantive cases from the United States simply are not available in Zambia in any event.
57. Other African decisions of course, have always been accorded "great respect" *R v Smith* (1949) III NRLR 14, and they are regularly cited, but even before independence, the Federal Supreme Court made it clear that it would not be bound by outside decisions. See *Estate of Mehta* [1958] R. & N. 570. In the same case, the court argues persuasively that it ought to be less bound by its own precedent than its approximate counterpart, the English Court of Appeal. (See also *Attorney-General v Dimakopoulos* 1961 Fed. Sp. Ct. Judg. No. 67). The court also

rejected the contention that because it was residually bound to follow English "law and practice", (as Zambia's courts are today, as above noted) it should follow English methodology and notions of *stare decisis*.

58. *D.P.P. v Lukwosha* 1966 SJZ 1, 12.
59. *Kalimukwa and the People, supra*, note 54, at p. 194.
60. Penal Code of Zambia, sec. 4 (now sec. 36 Cap. 146).
61. *Chitenge v The People*, 1966 S.J.Z. 32, 35 (See also *Mwiinga v R* [1963-64] ZNRLR 81). In *Chitenge*, the court distinguished, largely on the basis of section 4, the well-known case of *Wallace-Johnson v R* [1940] 1 ALLER 241, in which the Gold Coast Penal Code was said to be "no doubt designed to suit the circumstances of the people of the colony . . . free from any glosses or interpolations derived from any exposition, however, authoritative, of the law of England or Scotland".
62. *D.P.P. v Chirwa* 1968 SJZ 49, 53.
63. *Ibid*.
64. See the Penal Code (Amendment) Act, No. 5 of 1972; and also Hansard, Zambia National Assembly, Vol. 29 p. 1183 (1972).
65. Mr. Chuula (Minister of Legal Affairs & Attorney-General in 1972) also indicated that he felt that even under the amending bill the principles of interpretation obtaining in England would be "kept intact". *Ibid*, at p. 1183.
66. *Sinabu v Attorney-General* (HP. 575/1969). See also *Graynor v Crowley* (1970/HP/802).
67. *Mullan v The People, supra*, note 55. Compare also *Samavu v The People, supra*, note 55: "In this court we are mostly guided by the *ratio decidendi* expounded in English cases. They are not binding on us, but we apply the principles they express."
68. *Paton v Attorney-General, supra*, note 53.
69. See for instance, *Gaynor v Crowley*, and *Mullan v the People, supra*, notes 66 and 55. In the latter case, the Zambian courts proved prophetic; the rule which was expressly disavowed on policy grounds in the Court of Appeal was later repudiated in England as well. See *R v Gosney* [1971] 3 All ER 220.
70. Court of Appeal Judgment No. 31 of 1971, overturning the High Court decision (1970/HN/1077).
71. The plaintiff sought to sue the defendant estate, but the latter had been tardy in securing the formal appointment of an administrator. The plaintiff then applied to a justice of the High Court who indicated, erroneously, that an informal appointment of an administrator should resolve the dilemma. Upon this appointment, the plaintiff served the writ, within the statutory time limit. However, unknown to the plaintiff, the actual administrator of the estate had already been formally appointed shortly before. Unfortunately this did not come to light until the statutory period had run. The plaintiff requested successfully, in the High Court that the writ be amended to substitute the name of the right administrator with its vital date being left intact.
72. Judgement delivered by Baron, J. A., p. 1.
73. *Ingall v Moran* [1944] 1 All ER 97; *Hilton v Sutton Steam Laundry* [1945] 2 All E R 425; *Stebbins v Holst & Co. Ltd.* [1953] 1 All E.R. 925; *Finnegan v Cement-*

ation Co. Ltd. [1953] 1 All E.R. 1130; *Bowler and John Mowlem & Co. Ltd.* [1954] 3 All ER 556.

74. At least three distinctions apply to all five cases: (1) In none of them did the losing party actually get a portion of his erroneous advice from a public official—let alone from a Justice of the High Court. (2) All five cases involved suits by an unappointed “administrator”, not against one. (3) As all five cases are from England, they may also be distinguished on the basic, background fact that all involve a society filled with lawyers and one long imbued with a tradition of happy adherence to abstruse legal complexities, neither of which circumstance accurately reflects conditions in Zambia.
75. It may, for example, be possible to justify the seemingly harsh result reached on the grounds of the need for simplicity and certainty in the law.
76. High Court of Zambia (HNA/121/1972).
77. See the comment on *Chama* by the author in 1971-72 *Zambia Law Journal*, at p. 162.
78. See, e.g., *The People v Tomato* (HL/58/70); *The People v Lwembe* (HL/59/70); *Sialubi v the People*, 1971 SJZ 305; *In the matter of Zambia Eagle Developments Ltd.* (1971/HP/1142); *Mukonga et al. v the People* (HNA/202/1971—in which the court appears to rely on a citation of another case itself only recited as authority by a legal treatise); *The People v Mwape* (HN/85/1970); *The People v Mutenda* (HP/85/1970).
79. See the comment by the author respecting the treatment accorded Zambia’s stock theft statutes by the courts, contained in 1973 *Zambia Law Journal*.
80. *In the matter of Mundia* (1971/HP/326).
81. The precedent referred to was again English, which automatically renders it at least questionable in Zambia because of its written constitution. The substance of the constitutions of former British colonies was originally based on the Westminster model, although in different form. With the passage of time the substance too has generally become quite different now. See, in general, Nwabueze, *Constitutionalism in the Emergent States*, Hurst, London, 1973, chap. III.
82. *Mulwenda v the People* (HPA/83/1971).
83. See, on the same point—though with more analysis—*Patel v the People*, *supra*, note 56.
84. Another example of this occurs in *Kachasu v Attorney-General*, 1969 S.J.Z. 60.
85. Mercifully, one anachronistic remnant of that litany seems at last to be dying out in Zambia: the excessive use of Latin words and phrases.
86. Zambia may perhaps count itself lucky that, to a large extent, only one metropolitan legal source is thus preferred. In other countries, such as Ethiopia, a deliberate effort has been made to ensure that no one foreign legal system is allowed to dominate the law. A partial result of this is that the law is an incomprehensible tower of Babel, each substantive part of the law and each differing methodology staunchly defended by all those trained in its particular source country.
87. L.C.B. Gower, *Independent Africa, the Challenge to the Legal Profession*, London, Oxford University Press, 1967, p. 30.
88. *Mumba v The People*, 1971 SJZ 234, 238.

89. The shortage of locally trained and oriented lawyers has, of course, affected legal education itself as much as other legal institutions.
90. See, e.g., Sawyer & Hiller, *The Doctrine of Precedent in the Court of Appeal for East Africa*, *supra*, note 34.
91. See, e.g., *Avakian v Avakian*, Supreme Imperial Court of Ethiopia (Oct. 24, 1963).
92. There are, to be sure, some areas of the law—such as land law—where a need for continuity is particularly acutely felt. In most areas of current significance, however, considerations of substantive policy needs should far outweigh a formal concern for legal continuity.
93. Under the Zambian Constitution, for instance, considerable influence in the process of hiring and firing judges is retained directly or indirectly by the executive branch. The usual power over the budget, as well as power to delineate (within constitutional limits) the jurisdiction of courts and to increase the number of judges sitting in the High Court and the Supreme Court, is retained by the legislative branch. See Parts VI and VIII of the Constitution.
94. “I must not be understood to be in any way questioning the principle of the independence of the judiciary. This is a fundamental principle of the Rule of Law and one which we in Zambia are committed and determined to uphold.” Kaunda, “The Function of the Lawyer in Zambia Today” 1971-72 *Zambia Law Journal*, 1, 3.
95. See the Court of Appeal (Supreme Court) Practice Direction No. 5, 1971 SJZ 329. It should perhaps be noted that duplicate copies need not be filed for cases in the All England Law Reports and that copies are due for filing up to a mere 48 hours before the scheduled hearing date.
96. See Gower, *Independent Africa, The Challenge to the Legal Profession*, *supra*, note 87.
97. Kaunda, “The Function of the Lawyers in Zambia Today”, *supra*, note 94.

