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COMMENT

A CRITIQUE OF POSITIVISM AS A BELIEF SYSTEM

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Our prevailing understanding of law is built largely on positivist premises and is focused mostly on the coercive processes of the State. Positivism attempts to separate the coercive processes of the State from other forms of coercion like religious injunctions and social pressure.[1] Looking at the issue from a historical and sociological perspective, R.M. Unger identifies a point at which "the division between state and society has been established."[2] It is at this point that positive law emerges. Positive law "is a law deliberately imposed by government rather than spontaneously produced by society."[3]

Thus, positivist legal theorists have taken a largely top-down approach to law and have generated the belief that the law is something to be directed by professionals acting on the authority of the sovereign and functioning somewhat apart from ordinary citizens who are the subjects of the law. The police are part of this group of professionals and enforce laws on the State's authority and against citizens. The actions of the police are to be distinguished from mere social pressure, which is part of the administration of morals and more of a bottom-up enforcement technique in the sense that everyone is involved in enforcement.

Positivism is a belief that is held so closely that it has become difficult to imagine any alternative.[4] There are alternatives, however. Simply because a State has a government with posited laws, that does not mean that it has a positivist system. In many senses, the laws of earlier times were merely the written expression of a people's sense of right and wrong. The writing itself

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[1] *See e.g.* H.L.A. HART, THE CONCEPT OF LAW 6-8 (1961). This central idea has become known as the "separation thesis" and requires a strict separation of law and morality. *See e.g.* JOSEPH RAZ, THE AUTHORITY OF LAW (1979).

[2] R.M. UNGER, LAW IN MODERN SOCIETY (1976).

[3] *Id.*

[4] Positivists themselves bemoan this fact and long for a dissenting voice to give positivism something new to say. *See* Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 AUSTRALIAN J. OF LEGAL PHILOSOPHY 1, 2 (2007).

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did not make a right or a wrong. Rather, the written law gave a more permanent expression to the commitments of the community. The very idea of the common law is that law can be reasoned out and discovered by judges after the incident in question in a case has occurred. For positivists, the law should be published first and then applied. This is how most people now think of the law – it comes from legislators and is applied to the populace.

The primary role, then, has been given to the legislator who appears to mold the behaviors of citizens and who is voted into office often on ideological grounds in the hope that he or she will mold the behaviors of citizens in the right way. It is surprising then that positivists for the most part avoid discussing the legislator's role and avoid evaluating the contents of his or her laws. This exact issue came up when, after the collapse of Nazi Germany, some scholars concluded that positivist theory had the effect of making Germans living under the Nazi regime more obedient to "law as law."[5] Positivists like Hart countered that positivism actually encourages greater scrutiny of laws – and less obedience – because it separates law and morality and allows a person to look back on the law and evaluate it from a moral (and personal) perspective.[6] Whether or not this is true in theory, it is certainly not the case that positivists have spent much time in their scholarship discussing the morality of various types of laws. Hart himself claimed to be doing "descriptive jurisprudence" rather than "interpretative jurisprudence" and subtly disparaged the moral "evaluative" discourse of theorists like Ronald Dworkin.[7]

In fact, as with Auguste Compte's less popular type of "positivism," legal positivists are concerned with science, not morality. The first positivist Jeremy Bentham attempted not so much to separate law and morality as to replace traditional morality with a new idea, with a utilitarianism based on scientific principles. Bentham narrowed people's life choices down to one: "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as

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[5] This point was made in a 1946 article by Gustav Radbruch, a German scholar who experienced first-hand the horrors of the Nazi regime and in reaction disavowed his positivist beliefs. *See* Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in GUSTAV RADBRUCH, GESAMTAUSGABE (A. Kaufmann ed., 1990).

[6] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[7] Hart clearly disavows what he calls an "evaluative" enterprise: "My account is descriptive…: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law…" HART ("Postscript"), *supra* note 1, at 240.

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well as to determine what we shall do."[8] Seemingly, Bentham is offering advice – that people should be guided by the principle of utility – and at the same time relating a command of Nature that utility will determine their behavior anyway, whether they accept his advice or not.[9] This illogical proposition is not significant as a representation of positivist thought – indeed positivists later moved away from utilitarian views such as this – but it well demonstratives the general and pervasive desire of positivists to supersede normal moral considerations with Newtonian-type forces. When it later became apparent that this desire could not be fulfilled, most positivists simply dropped the simplistic assumptions of Bentham's utilitarianism and gave up evaluating the contents of laws. It is noteworthy in this regard that, although Bentham and the Utilitarians were law reformers, later positivists have contributed very few suggestions for legal reform.

Positivists instead have focused on the procedures necessary to pass valid law. It is easier to describe procedure in objective scientific terms. Positivists say that they do not care what the lawgiver does and what type of law he or she creates so long as it can be classified positively as "law" or "not law." This avoids any non-scientific discussion of what the lawgiver should and should not do. So although Hart lays out "rules of change" that tell the lawgiver *how* he or she can pass laws, there is no rule of policymaking that tells the lawgiver what laws are best. Again, positivists like Hart do not engage in moral "evaluative" discourse.[10]

Mostly, positivists do not offer moral guidance to lawmakers and furthermore do not discuss in detail the forces governing the lawmaker's decisions. Thus, turbid conclusions like those of Bentham are avoided. There are two interesting exceptions in this regard, however. First, Ronald Dworkin attempts to draw attention to the "principles" of a judge that come from the judge's conscience and that influence judge-made law.[11] Dworkin's overall position really only makes sense when situated within a positivist conversation, and, unfortunately, Dworkin is thrown off course while attempting to engage positivists on their own terms. In the end Dworkin's "principles" sound like a natural force akin to gravity rather than a moral

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[8] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Burns and Hart, eds., 1970).

[9] As will be seen, this is not a matter of mere historical interest. Many modern economists take Bentham at his word and adopt his assumptions about human behavior. *See e.g.* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

[10] HART ("Postscript"), *supra* note 1, at 240.

[11] *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

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choice.[12] Second, law and economics theorists have taken the lawmaker's role seriously and have attempted a more sophisticated elaboration of Bentham's ideas. The decisions of a lawmaker bring him a certain positive utility. Richard Posner explains that, for judges, a decision in a case is like a vote, and voting is a consumption activity that people enjoy.[13] According to Public Choice theory, legislators also work for their self-interests.[14] The problem with such descriptions is that they oversimplify lawmakers' motives and do not account very well for why we might prefer one type of legislation – or one type of legislative process – rather than another.

Positivism, then, appears to be a program to avoid moral discussions about the law. This in fact strengthens the positivist position that there is a separation between law and morality and that the law is simply what is written in our statutes. It is not appropriate, however, to engage positivists in a discussion about whether their propositions are true. In fact, positivist "descriptions" are also "prescriptions" for a certain way of doing things. To the extent that positivism has become the predominant theory – implicitly accepted by legal professionals – it has made its own propositions true. In other words, positivism has become a very popular belief. A more relevant question would be, is positivism useful, or would some other belief be more useful?

Likely positivists would say that they do not have a belief system at all but rather merely share a critical perspective. Positivists, although originally utilitarian in policy, claim that they can be pluralistic in their policy positions. They say that it is legal moralists who have a belief system and are intolerant of other ideas.[15] In fact, a belief in the value of self-criticism is still a belief,

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[12] Thus Dworkin is overly concerned with judges instead of legislators and gets caught up in discussing the rules that govern decision-making. *See* Dworkin *id* at 45-46. When Dworkin first distinguishes principles from rules, he makes principles seem flexible. "[A principle] does not necessitate a particular decision." *Id* at 26. Then, when Dworkin elaborates on his theory of how principles function in the law, the principles become rigid. "[T]here is nothing in the logical character of a principle that renders it incapable of binding [a legal official]." *Id* at 35. Dworkin's attempt to balance these two positions is unsatisfying, and he lands on the conclusion that the judge will weigh competing principles but then, if they are not of equal weight, "he *must* decide accordingly…" (emphasis added). *Id* at 36. Thus, if principles are weighed correctly, the result will dictate the judge's decision.

[13] Richard Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME COURT ECONOMIC REVIEW 1, 12 (1993).

[14] *See e.g.* James M. Buchanan, *What is Public Choice Theory?* 32 IMPRIMIS No. 3 (2003).

[15] Hart maintained that the positivist separation between law and morality allows positivists to be more critical of law and policy because positivists do not assume that

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and it is, I think, a belief that anyone can have, not only positivists. (It is the same thing to say that humility is a valuable character trait.) Positivists have beliefs, and they are beliefs that strongly affect the thoughts and actions of their adherents.

Positivists believe that it is important to define "law" clearly and distinguish between legal obligations and other types of obligations like moral obligations. The unstated implication is that morality is a lower level obligation – less reliable and less consistent. This understanding forms part of the positivist criticism of natural law. It is because moral views are so variable that they cannot provide a good basis for law. If a citizen can rebel against any law that he happens to find immoral, then there will be no law. "…[T]he natural tendency of such doctrine is to impel a man, by a force of conscience, to rise up in arms against any law whatever that he happens not like."[16] Law – understood as *posited* law – is something we can know and enforce. Morality is vague and vacillating and, therefore, weak.

Positivists also believe that people will not obey their own rules without some external force. In this, the positivists take up an understanding of human nature going back to St. Augustine that people are born greedy and selfish rather than good and law-abiding. Philosophers in this long tradition contrast the passions and natural inclinations of people with "law" and morals which are things external to people to be imposed on them.[17] This explains, I think, the positivist concern with enforceability. Without real enforcement mechanisms there will be no regularity of law. If people or nations obey certain laws without being forced, then this must be explained by reference to some other deterministic factor such as self-interest.[18] The idea of people or nations obeying laws because they *want* to obey or because they share common beliefs is completely foreign to positivist thinking.

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law is somehow inherently "right." This argument was raised in response to criticisms of positivism that came out of the experience of Nazi Germany. *See* Hart, *supra* note 6.

[16] JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (James H. Burns & H.L.A. Hart eds., 1988) (1776).

[17] This point is made clearly by Hobbes when he describes the state of nature as a kind of anarchy. THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier 1962) (1651). Later writers in the capitalist tradition – apologists for luxury like Bernard Mandeville and David Hume – also thought of people as being by nature full of lawless passions.

[18] A recent theory of international law follows this exact logic. To explain the apparent conformity of States with international rules despite the absence of enforcement mechanisms, the theorists posit four possibilities: coincidence of interest, coordination, cooperation, and coercion. All four are tactics in pursuit of self-interest. *See* JACK L. GOLDSMITH, ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

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Positivism presents obvious problems for the international system. There is no international sovereign government that can enforce international laws. For positivists, if there is no enforcement by a government in a top-down manner then there is no law. This has been explained by positivists themselves, as for example when John Bolton says, "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits."[19] Such a belief as Bolton's detracts from the credibility of international treaties and customs. Mr. Bolton himself as a policymaker has come out against U.S. participation in the United Nations and U.S. adherence to treaties and customs that are against U.S. interests.[20]

In this we see the dynamic aspect of positivist theory. In posing the question, "Is international law really 'law'?" positivists do not merely inquire into the current state of the international legal system but also prescribe an attitude that officials should bring to future policymaking, namely that, since international law might not be "law" and since other nations are not likely to treat it as such, the U.S. should feel free to break its international commitments to suit its own interests. People's beliefs are affected by the writings of scholars and prevailing opinion. Thus, positivists are not reciting an already existing truth about international law; rather, they are creating a belief system and making their truths true.

Oddly, international law has attempted to embrace the very philosophy that is killing it. Authority in the positivist scheme flows from the sovereign as head of State. Unfortunately there is no international sovereign, so we must look to individual State sovereigns to create international laws. Under positivism, then, it has become necessary to show the consent of each State to every international rule.[21] In point of fact, international law existed before this fiction of "State consent" was devised. Originally, "sovereignty" meant the exclusive control by the State over its internal affairs and its relative

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[19] John R. Bolton, *Is There Really 'Law' in International Affairs?* 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 48 (2000).

[20] *See* John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186. Bolton says that "[t]he idea that nations and individuals can be bound through 'international law" is "naïve" and "in many instances simply dangerous." *Id* at 192.

[21] *See* Jonathan I Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 23 (Lori Fisler Damrosch, Gennady M. Danilenko & Rein Mullerson eds. 1995). For an interesting account of the historical shift in focus from natural law to State consent, *see* William S. Dodge, *The Story of the Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES (Laura Dickinson et al. eds., 2007).

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autonomy at the international level vis-à-vis other States. If a State was thought to be free with respect to other States, it was not thought to be free with respect to greater principles. The sovereign was bound by higher laws like that of Nature and God, whether the sovereign consented or no.[22] It is hard to think that State consent is necessary for international law if international law existed before State consent became so important to international lawyers. This is clearly the case of a philosophical perspective changing people's attitudes about an existing legal practice and thereby changing the practice.

As part of international law, international custom too has shifted from a law based on what is "natural" to a law based on the consent of the sovereign. The new view requires proof of States' practice as evidence of those States' consent. It is consent by action. Since custom is binding on all States in the world, one would expect that courts would want unanimous consent of all States. This does not happen, however, in part because it is simply too much to ask a court to look at State practice from all States and in part because no one takes seriously the idea that unanimous consent is required. In the end most States are bound by customs that they never practiced or "consented to." Some scholars have responded to this criticism with the idea of tacit consent – that the States that said nothing during the formation of the custom expressed agreement by their silence. This explanation is somewhat forced. In the first place, if this explanation were to hold, then courts would be required to tally the number of silent consents. This the courts do not do. Second, there are States that cannot consent, evenly tacitly, because they are not in existence during the formation of the custom. These States nonetheless are bound by the custom. More to the point, it seems that if we really want consent, we should just ask for it. Why not jettison customary law altogether and rely only on clear expressions of consent like treaties? In fact, this is something that positivists have suggested that we do.[23]

Unfortunately, similar problems arise in international treaty law. At first glance, treaty law lends itself well to the positivist idea of an international system based on the consent of sovereign States. In some ways, this explains the excitement over the increased use of treaties to express international rules. In reality, however, positivists are as critical of treaties as they are of international customs. The problem again is with sovereignty and State consent. A treaty may express State consent very clearly on the day it is

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[22] J.L. BRIERLY, THE LAW OF NATIONS 10 (H. Waldock, 6th ed. 1963).

[23] Jeremy Bentham himself felt that increasingly fine-meshed treaty agreements would resolve most international disputes. *See* Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 4-8 (1983).

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signed. What will happen over the long term though? A treaty cannot provide for its own bindingness any more than a house can be built up on thin air. A sovereign that by definition has the power to consent seemingly has the power to remove consent at any time. A sovereign may agree to "bind its own hands" so-to-speak, but who will tie the bonds? A sovereign that can tie the bonds can untie them as well. A State that consents to a treaty today may remove its consent tomorrow and simply take the bad consequences. When the treaties in question are agreements between equally powerful States, then the treaty is more secure because enforcement by use of force is realistically possible for both sides. One wonders what the point of the treaty is, however, if force will accomplish the same thing as the treaty from moment to moment. In the past what made treaties binding was the generally-accepted belief that it is good to be trustworthy as a State much the same as it is good to be trustworthy as a person. This is the international custom *pacta sunt servanda* – a kind of international pressure to keep one's promises. A State does not *consent* to keep its promises; a State is compelled to keep its promises.

To understand why positivism is so unhelpful in international relations, one has to imagine what affect an alternate belief would have on the behavior of officials and, hence, States. Let me give two examples. In ancient times, superstitious leaders made pacts with foreign nations by swearing to the gods. The belief was that a violation of the pact then would bring down the forces of divine retribution. The belief changed people's behavior in that it made the parties more likely to keep the agreement. A more complex example comes out of European history of the early modern period. European leaders often floated in the same social circles, and certain behaviors in war were considered barbaric and ungentlemanly by those social circles. Thus, an individual officer who pursued brutal tactics would lose his reputation in society. The basic belief in "civilization" gave effect to standards of warfare, at least as concerned upperclassmen.

Another area where positivism fails us is in legal reform projects in developing countries. By the positivist logic, a central government needs to promulgate rules and invest in an extensive legal infrastructure to see to the enforcement of those rules. The greater the infrastructure, the better the enforcement, the more successful the laws at regulating human behavior. There seems to be a misunderstanding out there that, because the largest and most complex legal machinery is found in developed countries, then that means that this legal machinery must be part of the advance of civilization from less to greater law-abidingness.[24] This is to ignore certain basic facts,

[24] There are better explanations for why economically developed countries have greater legal infrastructure. For example, economic development has negative effects on social

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such as the lower crime rates in cities in certain developing nations where the legal infrastructure is rather weak.

Some have claimed that legal reform will lead to economic development, as though in this area also behavioral changes can be accomplished best by top-down imposition of the law.[25] Unfortunately, laws designed to promote economic development often are undermined by persistent social practices and mafia-like influence that continue in "free" markets. In fact, great economic progress has been made in countries like China and Vietnam where legal infrastructure is weak.[26] This would seem to argue against the positivist notion that law and order – or at least the law and order necessary for economic development – come from the application of force by the State.

In certain developing countries, governments have spent years trying to enforce laws adopted from European countries. Most such projects have failed.[27] It is true that some countries like Japan and India have copied European laws with limited success, but it is hard to attribute this success to the process of drafting, adoption, and police enforcement that makes for posited law. In Turkey, for example, western commercial law was imposed with little difficulty whereas western family law was resisted.[28] One suspects that this difference was not because Turkish family law judges were singularly incompetent but rather because the Turkish people had a different attitude towards western family law than towards western commercial law. Transplanted laws usually fail because of the problem of "legal absorption."[29] People choose not to obey the new laws. That is, the laws are ignored in practice because most people believe in something else.

Ethiopia gives us one example of the problems of transplanted law. A legal reform project was begun in Ethiopia with the adoption of laws beginning in the 1950s modeled largely on the French code. The principal drafter of the Ethiopian Civil Code, René David, took the position that

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order, and thus more legal infrastructure is necessary as the "functional complement of a weak posttraditional morality." Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. R. 937, 938 (1999).

[25] *See* Richard Posner, *Creating a Legal Framework for Economic Development*, 13 THE WORLD BANK RESEARCH OBSERVER 1, 2 (1998).

[26] *Id* at 2.

[27] This is especially true of Westernization projects in sub-Saharan Africa. *See* Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 542 (1999).

[28] *See* K. Lipstein, *The Reception of Western Law in Countries of a Different Economic and Social Background with Special Regard to Problems Arising Out of Industrialization*, 6 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL 10 (1956).

[29] *See* Beverly I. Moran, *Homogenized Law: Can the United States Learn from African Mistakes?*, 25 FORDHAM INT'L L. J. 361, 371 (2001).

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whatever he wrote in the code was the law of Ethiopia.[30] This is a distinctly positivist perspective. Someone less influenced by positivist philosophy might have deferred more to the morals and customs of the people. Instead, David looked forward to the slow and steady implementation of the code by the Ethiopian courts and police. Ten years after the adoption of these new laws, a study found that they had made little impact.[31]

It was understandably difficult for David to incorporate customary laws into the new code. The customs of Ethiopia varied from region to region, and the task given to David was to make Ethiopian laws uniform. In addition, very little was known or published about the different Ethiopian customs at the time.[32] David himself had the modest expectation that the Code would be implemented gradually, starting with the major cities.[33] The point is not that customs should have been incorporated wholesale into the positive law but rather that the positive law should have been less exclusively positive. The positive law in Ethiopia could have given more discretion to local courts to apply local customs in particular situations. Something similar has been done in the Uniform Commercial Code in the U.S. which allows courts to consider customs and practices in the particular industry concerned.

The fact that the Ethiopian code has not been implemented successfully in Ethiopia now after fifty years should tell us something about the positivist ideas on which it is based. What is surprising is that positivists – normally so critical – have not confronted such failures. Rather, like other true believers, they make excuses for bad results and go on believing. ■

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[30] *See* Norman J. Singer, *The Early Days of the Faculty of Law, AAU*, 2 MIZAN L.R. 137, 144 (2008).

[31] *See* John H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 AM. J. COMP. L. 557 (1973). "[Empirical] evidence shows a country hardly aware of the new codes and a judiciary still struggling to comprehend them in basic particulars – even in the major urban areas." Id. at 582. Beckstrom himself was undaunted by his study and hinted that Ethiopia's code would be successful eventually if given enough time. *Id.* It is clear, however, that, looking back from 2009, the Ethiopian code continues to have the same problems of legal absorption.

[32] Even the Ethiopian members of the Codification Commission did not know the customs of their own regions. A summary of decisions by local bodies was put together for the use of the drafters of the code, but the summary was never translated from the Amharic. *See* Norman J. Singer, *Modernization of Law in Ethiopia: A Study in Process and Personal Values*, 11 HARV. INT'L L. J. 80, 85 n. 44 (1970).

[33] *See* René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TULANE L. REV. 187, 202 (1963).