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Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy

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Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy

Sandra Fullerton Joireman¹

Do particular types of legal institutions influence the effectiveness of the rule of law? This is a question that scholars have long answered with conjecture. Common law lawyers and judges tend to believe that the common law system is superior. This opinion is based on the idea that the common law system inherited from the British is more able to protect the rights of the individual than civil law judicial systems. Quite the opposite point of view can be found in lawyers from civil law countries who may view the common law system as capricious and disorganized. This paper compares the effectiveness of the rule of law in common law and civil law countries in Africa. A cross-national statistical comparison using Freedom House and Political Risk Services data is used. The comparison reveals that common law countries in Africa are generally better at providing 'rule of law' than are civil law countries.

Effective colonization in Africa demanded a legal system to both maintain control of a country and resolve disputes within it. Everywhere the colonial metropolises established their own systems of law and dispute resolution, disregarding pre-existing

¹ Thanks go to Shannon Hacker and Matt Jwayad for research assistance. I am grateful to, Christopher Clapham, Pierre Englebert, Joel Horowitz, a reviewer for this journal who gave a particularly insightful set of comments and the multitude of people who have given me comments as I have presented this paper. All of the faults of the paper, including the recklessness of the topic, are my own.

mechanisms of conflict resolution as primitive or appropriate for ‘natives’ only.² Since the establishment of colonial legal institutions, anthropologists and historians have investigated the relationship between state and traditional law. They have been concerned with the dissonance between the institutional structures and patterns of behavior prior to colonization and those that developed because of the presence of a dominating foreign power. Much of this research has related to individual choices, for example, the decision to have a complaint heard by a council of elders rather than a local small claims court, or the recourse to traditional laws and customs when confronted with modernizing forces such as land reform or agricultural commercialization. Beyond these traditional vs. state institutional issues, lie another set of questions relating to African legal systems and also rooted in the varied colonial experiences of the continent. These questions pertain to the political detritus of colonization, to the customs and institutions left when the colonial power withdrew. Of particular interest at the national level is the performance and effectiveness of the various legal systems inherited from the metropolises. Specifically, do the civil law institutions, inherited from the continental European powers and the common law institutions inherited from Great Britain perform equally well in assuring the rule of law in colonial Africa? More specifically, are civil law and common law systems equally effective at preventing violent conflict and ensuring impartial access

² Indeed, virtually all of the metropolises viewed it as their goal, if not obligation, to share their advanced legal systems with their colonies. This type of thinking undergirded the whole colonial administration and mission.

to dispute resolution? The analysis presented in this paper will not fully answer these questions, but address the answers provided by existing assessments of the rule of law.³

The effectiveness of legal institutions is an issue of importance to legal scholars, academics, politicians and policy makers because it has long been suggested (and only recently subjected to any rigorous test) that the rule of law is intricately connected to democracy and capitalist development.⁴ Recent studies have suggested that individual countries, insofar as they wish to grow economically should be concerned with the rule of law and the effectiveness of their legal institutions (Engerman and Sokoloff 1998; Knack and Keefer 1995). It is clear that strong legal institutions also assure a better human rights record and deepen democracy within countries (Carrothers 1998; Coliver 2000). Moreover, the efficacy of legal institutions is important to the international community as well as within a nation's borders. A country which is able to ensure its citizens physical protection and equal treatment under the law is less likely to be engaged in violent internal conflict and will not be, therefore, the source of potentially destabilizing refugee flows (Dowty and Loescher 1996; Mandel 1997).

³ Let the reader beware. I make this distinction early in the paper so as to warn those who think definitive conclusions are contained herein. They are not. What is present is a comparison of extant data that examines the rule of law from particular, and some might argue, flawed points of view.

⁴ Though to what degree democracy and capitalist development are related is still a disputed area of political science, see Jeffries, Richard (1993). There is also a theoretical argument regarding the role of law in a society with Nicos Poulantzas (1973) and Antonio Gramsci (1971), arguing that law is inherently political, involving the hegemonic control of the state over the society sometimes through persuasion (Gramsci) and sometimes through domination in the articulation of law that favors the ruling classes and limits the role of the state. John Rawls (1971) also argues that justice is always more than just the impartial and regular administration of rules.

This paper will first identify the differences between common law and civilian legal systems and then discuss their establishment and development on the African continent. The middle section of the paper will examine two cross-national data sets that address the concept of rule of law. These data sets will be used to probe the issue of the effectiveness of common law and civil law systems in countries that have been colonized. The final section of the paper will offer some conclusions resulting from the data analysis and the implications for African legal development.

Civil Law and Common Law

From the earliest days of their development there have been fundamental differences between the English common law system and the continental European systems of justice. The continental systems of law evolved out of the codes of the Roman Empire and developed into a system of statutes that we now know of as civil law. Perhaps because civil law developed in the context of an expanding empire in need of regulation, civilian law is articulated in terms of the rights and duties of the citizen (David and Brierley 1978). Civilian systems, such as that of the French, emphasize the role of the individual within the state and apply the rights and duties of the citizen to a particular case. The rights and responsibilities of the individual are believed to be different in the public and private realms. Hence there is a division in civilian systems, particularly those that are influenced by the French Napoleonic code, into distinct civil, criminal and commercial codes.

If we are to try and discern a difference in originating conceptions, it would be that civilian systems begin with the idea of the state as supreme and the role of individual in obedience to it. Alternatively, common law systems have developed with the idea of the protection of individual rights *from* the state as a primary goal. This goal is achieved through a particular process of investigation and decision-making. The common law was developed as a procedure that if properly followed, would result in a judgment for the plaintiff or defendant. *The process, rather than the application of a code, leads to justice.* Perhaps due to the emphasis on process, the English legal system gives us the idea of legal precedent and the reliance on the body of cases decided in the past to guide the present decision of a judge. This allows for the development and flexibility of a legal system over time. It is also this reliance on case law that appears so unorganized to civilian lawyers (Merryman 1985). Employment of the common law is a methodology of resolving disputes rather than the application of a particular rule.

In addition to these differences in the understanding of law in the two judicial systems there is also a fundamental distinction in the way the two systems of law are applied. The practice of English common law has been coupled with an adversarial system of justice. An adversarial system, such as that which is in use in both the United States and Britain is one in which the parties to a dispute are pitted against one another in a relatively brief, oral contest with the expectation that competition between the two sides will reveal the truth.⁵ The plaintiff, the defendant and lawyers representing them are gathered together to present their case before a jury and a judge, who is expected to be an

⁵ Because of the oral argument in common-law systems they make for good television. The same cannot be said of civilian systems in which the majority of the action takes place in a written format.

impartial arbiter of justice. This system is typified as adversarial because of the oppositional relationship between the lawyers for the plaintiff and the defendant in the trial.

Alternatively, the civilian, code based system of law has historically been coupled with an inquisitorial system of practice. The inquisitorial system is characterized by the unique role of judges who are required to gather evidence and question witnesses in order to find truth. The inquisitorial system is also distinguished by the written nature of the proceedings. Motions by the various sides must be made in writing to the judge, who considers them and responds in writing. Witnesses are brought to testify before the judge and lawyers in an intermittent fashion, rather than one right after another. A written account of the testimony of witnesses is then presented at trial, if one occurs. Lawyers are involved in the inquisitorial system of justice, but as advisors to their clients rather than as key actors in a trial. One of the results of an inquisitorial application of the law is that cases rarely go to trial unless the judge who conducted the investigation, is convinced of the guilt of the accused and the preponderance of evidence that would support that decision.⁶ Trials are simply reviews of the written record that has been collected by the judge. Guilt and sentencing are then decided by a panel of judges or lay assessors, though jury trials are also used for criminal matters. Thus, common law and civil law systems of justice are distinct in the way the law is applied.⁷

⁶ Judges in civil law systems are specially trained to fulfill the role of investigators. The judge who hears the case is not the same one who lead the investigation and jury trial are often used in criminal cases.

⁷ There are examples of civilian countries, such as Italy, that are moving towards an adversarial method of applying the law because of a back-log of cases and the tedious and drawn out method of conducting an investigation with an inquisitorial model. This is, however, controversial. Others such as Gordon Tullock

Some scholars in Great Britain and America have suggested that common law systems are superior due to their origins. The systems evolved to support different purposes. English common law developed to protect the property of individuals and limit the power of the state to expropriate resources. Civil law, in the Roman tradition, on the other hand, developed as an instrument for expanding and administering the empire. It was, in effect, a tool used by the state to regulate its citizens rather than to protect them from the encroachment of the state.

Another reason identified in the belief of the superiority of the common law over civil law is the role that lawyers play in common law systems. The role of lawyers in former British colonies has traditionally been much stronger and more influential than in former French colonies and is given as part of the explanation for stronger legal institutions in those countries colonized by the British and adopting British institutions. Merillat observes that, “In many former British territories lawyers have typically played an important role in independence movements and, in the post-independence period, have continued to occupy positions of prestige and power in the government and civil service” (Merillat 1966:72). Lawyers and strong law associations can provide an important alternative locus of power to the state, thereby increasing the chances for democratic development and a thriving civil society.⁸ Lawyers played a tremendously important role in Ghana in the period leading up to independence as well as after. They organized in an

(1997) argue against the common law and adversarial system because of the lack of efficiency in processing cases.

⁸ Lawyers and bar associations may not always play such a positive role. In Pakistan, for example, the bar has been strongly criticized for corruption and its role in funneling money to judges in order to influence their decisions.

attempt to gain more representation in the colonial government and push Britain towards granting Ghanaian independence (Edsman 1979).⁹ This was not everywhere the same, in Kenya lawyers associations were not active in their support of constitutionalism after independence, but rather complicit with the government in trying to carve out some position of societal power. Immediately following independence perhaps due to the fact that it was monopolized by expatriates during the years of colonization, the bar did not develop a strong position of advocacy for the Kenyan people (Ghai and McAuslan 1970). This situation has changed in recent decades and the Law Society of Kenya has since taken an important role in trying to reign in abuses of government power and corruption (Gathii 1999).

Other observers have argued that the common law system was superior in Africa both because the courts acted as a check on the executive, as noted above, and because by the time independence arrived on the African continent judicial review in some common law systems had a long and stable history. France, on the other hand, had what some have called a ‘timid’ system of judicial review (Fombad 1998:173) first introduced in the 1958 French Constitution and then exported to the newly independent African states in the 1960s before it had even become fully rooted in France! Fombad notes that the net effect of this system in francophone Africa was to further empower an executive that already held too much strength. In effect making ‘the heads of states the supreme judges of the constitutionality of the laws’ (Fombad 1998:185).

⁹ Though Edsman would argue lawyers were most influential prior to 1945 rather than post 1945 and we can note a similarly influential role of lawyers in Nigeria and Gambia (Davidson 1992).

One final explanation for any difference between the two systems is the importance of the bureaucracy in civilian systems. The emphasis on the written argument in the civil law institutions, alongside the bureaucratic demands that written motions, written records of interviews and the necessity of keeping all of these documents in order and safe before a case is brought to trial, demands an efficient bureaucracy for the proper application of the law. While this may work well in Belgium and Germany, many countries in Latin America and the developing world do not have efficient bureaucracies. This was noted by the French as a problem in the administration of justice in West Africa during the colonial era (Robert 1955). The lack of an efficient bureaucracy can mean a system unable to apply the law and all of the consequent ramifications. The common law, with its emphasis on oral argument, is somewhat less dependent on an effective bureaucracy, at least with regard to the proceedings of a case.¹⁰

African legal systems have had a chance to adapt and change, becoming more specifically suited to their particular environment (North and Thomas 1970; Stone Sweet 1999). Indeed, African countries have now established law schools and university programs for the training and education of lawyers and judges. There is now in each African country, a cadre of trained legal professionals with extensive knowledge both of the law and its specific application in their country. The lessons learned from an examination of the African cases as they approach a half century in existence are of great consequence as they can be applied to other countries in the world, specifically the

¹⁰ This is of course, all a matter of degree. The loss of critical evidence and/or forms, briefs, etc. in either system can have a determining effect on the outcome of a case in either system.

former Soviet Central Asian states, which are embarking on institutional restructuring in similarly resource deprived settings.

Colonial Law in Africa

Without exception in Africa, colonies adopted the legal system of the metropole at independence. This occurred for two distinct reasons. First, throughout the entire colonial experience, indigenous peoples were forced to live with a particular system, either the continental civil codes or British common law. At independence, what experience of a national legal system existed was that designed by the continental European powers or the British. Therefore, just as newly independent colonies chose to keep the languages of the metropolises for the conduct of governmental activities, so too they retained the legal and other political institutions left behind. Examining the French African colonies Delavignette notes that at independence the same administrative core was retained, 'The machinery had changed hands but not the parts.'(Delavignette 1950:276) Gower notes a similarity in English speaking Africa where 'English law was applied without consideration of its suitability to local conditions' (Gower 1967:29). This is not because these systems were necessarily better than traditional African legal systems, but rather because there was a lock-in that occurred, a particular path that prevailed because of the earlier experience with a specific set of institutions (Arthur 1989; David 1985). It is this experience with and knowledge of a particular system of law that led Senegal to adopt a civil code as late as 1960 that resembled the French and rejected traditional and customary law (Le Roy 1994). Those Africans who were educated in the law, and there were few, were educated in the law of the metropolitan

power. Closely related to this point is the second reason that African countries adopted the institutions of the metropole; elites within the country became adept at negotiating the common law or civilian structures and, as a result, had a vested interest in seeing them continue. African elites became experts at working within each legal system, particularly during the struggle for independence. It was to be expected that African leaders would choose to pick up the reins of a system with which they were already familiar rather than constructing something completely new. Indeed, in Nigeria and Kenya at independence, the courts and legal systems became closer to English common law than they had been under British colonial rule. This was largely due to the fact that the English colonial government allowed special legal status to Muslims, minorities and people under customary law.¹¹ At independence, free Kenyan, Ghanaian Nigerian judiciaries were less inclined to favor these distinctions with special rights though customary and sharia law were still recognized (Cohen 1969; Ghai and McAuslan 1970; Woodman 1994).

Though certainly the dominant players, France and Great Britain were not the only countries active in the scramble for Africa. Belgium, Germany, Portugal and Italy all retained control of some part of the continent by the early 1900s. That changed after World War I as Germany was forced to relinquish her colonies on the continent, German Southwest Africa, Cameroon and Tanganyika, as a consequence of her defeat. Italian colonies such as Italian Somaliland, Eritrea and Libya, experienced a similar fate after World War II. Belgium, Italy and Germany all also had civilian legal systems as did Portugal, which unlike the rest of the European powers, maintained control of its African colonies until 1975.

¹¹ See Chanock (1991a) for a discussion of the construction of customary law under colonial rule.

The British believed that one of the greatest legacies of colonization was the imposition of the ‘civilizing’ British judicial institutions (Ghai and McAuslan 1970:125). Yet, civil law systems are considered superior in Europe where they are thought to be both fairer and more efficient (Merryman 1985). There are even bold American scholars such as Tullock (1997) who have crossed the continental divide and argued for the superiority of civil law systems.

From the earliest dates of colonial administration in Africa, British colonies and colonies of the continental European powers were exposed to the legal systems of the metropolises. Though attempts were originally made to shield all but the citizens of the metropole from the application of European law through the formation of ‘Native Courts’ and ‘customary law’; these actions were largely ineffective. Historians and legal scholars now engage in a debate as to whether ‘customary law’ was truly indigenous or whether it was formed in relation to European law, often as a response to colonialism and to the encroachment of the colonial administration Chanock (1991), Mann and Roberts (1991) and Snyder (1987) argue that customary law did not exist in a pristine state before the arrival of the Europeans, but rather was both developed and demanded by the presence of a colonizing power. Max Gluckman and others would disagree and offer documented cases of indigenous African law (Davidson 1992; Gluckman 1955; Gluckman 1965; Nadel 1947; Rattray 1923). In the early colonial period, before the turn of the 20th century, when the administration of colonies in Africa typically was left to a small number of locally based administrators or officials of one of the large trading companies (Ghai and McAuslan 1970:128), law was applied on a fairly ad hoc basis in the African

colonies. This was particularly true in the interior where even missionaries might be called upon to serve as judges in disputes (Chanock 1991).

Almost immediately after attaining control of territory, the British established courts where the common law was applied. They also created local ordinances. Yet, the British courts were not well staffed by trained judges until the latter half of the nineteenth century. British courts in the colonies began hearing cases and recording them, thus establishing a body of case law that could subsequently be referenced (Mann and Roberts 1991:14). In theory, the application of the common law systems should be flexible and evolve to accommodate the local environment. But the need for control of the colonies took precedence over the flexible application of law.

The expressed intentions of the Colonial Office officials, and the slight but significant variations in the wording of the successive reception statutes suggest a continued interest by the Colonial Office that the received law be applied flexibly to respond to local conditions. It was a frustrated desire, brought to naught by a rigid adherence to English precedent and a dogma of legal uniformity. Together these doctrines ensured that English law as transplanted, far from accommodating to the specific problems of the colonies, would be applied rigidly and uniformly in accordance with English authorities (Seidman 1989:110).

Indeed, law and administration were regarded as inseparable, a view which accounts for the early and vigorous attempts by the British to establish legal systems in their colonies.

The most egregious application of law in the early colonial period of Africa was perhaps the French indigénat which gave colonial officials the right to punish African subjects on the spot with up to two weeks in prison as well as a cash penalty, if they deemed there to be an offense (Mann and Roberts 1991:17). Although its use became less frequent, the indigénat remained the law of the French colonies until 1944 (Marshall 1971). In the four Senegalese French communes the French civil code was applied to the French and Africans alike. But, in the rest of the areas of these states and the other French colonial territories there were two sets of codes: the *statut civil français* for French citizens and the *statut personnel* for subjects. However, the *statut civil* was also applied to subjects if a dispute involved either the colonial government or French citizens.

Just as the different colonizing powers used various methods of administering justice in the early decades of colonization, they continued to use divergent techniques with the turn of the twentieth century and following. The British, following a policy of indirect rule enacted a legal system in which they trained and employed Africans to adjudicate disputes between Africans. Arguably this may have left British colonies better off following independence as there was a cadre of experienced legal practitioners within the British colonies. The use of traditional leaders for dispute resolution through customary law was a responsibility that the leaders did not necessarily possess prior to colonization. In some areas of Africa, where kingdoms were well established, for

example among the Ashanti and Barotse, not only was there a group of traditional leaders who resolved disputes, there was often a well-formed body of law (Gluckman 1955; Gluckman 1965; Nadel 1947; Rattray 1923). These were the optimal situations for the British as they needed traditional leaders in order to make their policy of indirect rule work. Where they did not find the leaders they needed, the British created them. The empowerment of traditional leaders in this regard, almost all of them older men, had the effect of marginalizing women and young men (Chanock 1991). However, the role of Africans as adjudicators in the 'Native Court' system was not paralleled by an equally important role in the common law courts that served the whole country and particularly the expatriate community. This meant that while Africans could serve as judges in 'traditional' settings, in many British colonies training in the law was restricted, some have argued that this was a result of the fear of lawyers that the British developed after watching lawyers lead the Indian nationalist movement (Ghai 1987:751). In Tanganyika, for example, the colonial government had a policy of preventing Africans from receiving scholarships in the law while at the same time requiring British law degrees in order to become a lawyer.

...all the judges in Colonial Africa were non-African until the tag end of the imperial era, when a few West African judges were appointed, all of whom, however, were trained and qualified in England. This was hardly accidental; the East African Protectorates (Court of Appeal) Order-in-Council 1902, for example, specifically provided that any additional member appointed (besides the High Court judges of Zanzibar and the

Protectorates) had to be 'a member of the bar of England, Scotland or Ireland, of not less than five years' standing' (Seidman 1989:111).

This British policy, coupled with the fact that there was no legal training available in Tanganyika, meant that at independence there were only 25 lawyers in the country and only two of them were Africans (Twaib 1997:33). This lack of legal professionals was true in most African countries with the exception of Ghana and Nigeria, which had a small number of African lawyers working on customary issues such as land and inheritance during the colonial period (Edsman 1979; Luckham 1987). In Nigeria this was due to an allowance before 1945 for lawyers to practice law with no degree as long as they had enrolled at one of the English Inns of Court and passed the bar examination (Gbadamosi 2001). A similar situation prevailed in other British West African colonies where private money fueled the education of a small cadre of legal professionals (Ghai 1987:752).

In the case of the French colonies, the judicial and administrative apparatus changed significantly at two points in French colonial history. At the turn of the twentieth century the first change occurred as the French shifted from a position of trying to peacefully coexist with African customs and traditions to an explicit attempt to change African traditions and customs so as to promote economic production and strengthen French control over the empire (Okou 1994). Another shift occurred after the Second World War, when the French colonial administration eliminated the *indigénat* entirely and developed a *code indigène*, which was supposed to protect African customs while promoting the advancement or 'evolution' of the African legal systems. However as one

French scholar aptly noted, the intentions of the French to promote the development of a specifically African legal system which would be better suited to the colonies was likely lost on the African population. *'Mais, ce qui est le plus grave, c'est l'incompréhension parfois totale des peuples africains sur nos intentions'*(Robert 1955:205).

Belgium and Portugal, both countries with civil law systems, were also negligent in training qualified indigenous professionals in the law. As Belgian and Portuguese colonies became independent they had virtually no trained legal professionals to handle disputes in the national court system. In Angola, in 1968, before the country became independent, the total number of practicing lawyers (and one assumes here that all or most are Portuguese) in the country was 87 (Bender 1978:231). At independence every colony had a need for experienced legal professionals if people were to have access to the judicial system as a method of resolving disputes. The fact that so little attention was given to building the judiciary and the legal profession in the colonies prior to independence had two immediate consequences. The first, was the obvious impediment that weak and nascent legal systems posed to the use of the courts as a nonviolent solution to conflict and as arbiters of contractual disputes. The second, less obvious, but malignant consequence of the weak judiciary and legal profession was that they in no way could serve as a foil to the concentration of power in the hands of the central state and the executive.¹² The lack of a powerful or even a stable legal profession and judiciary in most African countries at independence combined with the impetus for the

¹² See. Robert H. Jackson, and Carl S. Rosberg (1982), Peter Shraeder (2000) and Crawford Young (1994)

concentration of power in the executive made authoritarian rule an inevitability in post-colonial Africa.

It is the intent of this paper to compare the legal legacy of the continental and common law institutions in African countries. Are common law countries in Africa and elsewhere truly better at providing the 'rule of law' than civil law countries? This assumption will provide the basis for the null hypothesis; that civil legal systems and common law systems are relatively approximate in their ability to provide effective rule of law.

Comparing the Legal Systems

In the following section I will evaluate and interpret the correlation between a particular system of legal institutions and the rule of law as measured by the International Country Risk Guide (ICRG) rating system distributed by Political Risk Services (Syracuse, NY) and the Freedom House assessments of civil liberties. Both of these measures assess a certain set of characteristics of a country and give it a numeric tag to signify its ranking in relation to other countries. Measures of this sort can be idiosyncratic, dependent on the assessments of a particular researcher or team (Cheibub 1999). Moreover, they are inevitably the impressions of elites within the country or reports from expatriate scholars and businesspeople. I am using both the ICRG ratings and the Freedom House assessment to arrive at more robust conclusions that are less vulnerable to this accusation.¹³ It should be noted that both of these ratings originate in

¹³ By less vulnerable I do not mean invulnerable, as these problems are pernicious and difficult to eradicate. One need only reflect on the difficulty of getting a similar and accurate measure from the perspective of the

America and therefore may have a common law bias.¹⁴ Because I am using the indices of two established data sets rather than constructing my own, I am confined to the use of their particular definitions of rule of law. I have indicated how these are defined in the section below, but would like to note before beginning that the definition of ‘rule of law’ is particularly vexing and ultimately vacuous as it can mean anything from a ‘state’s commitment to provide its citizens with legal remedies against unlawful exertions of state power,’ (Collier and Starr 1989:15) to simply good government (LaPorta et al. 1998). To avoid confusion and maintain the integrity of the conclusions of this paper, then, I make no wider claims or definitive statements herein than to compare these measures using the criteria stated by both Political Risk Services (ICRG) and Freedom House.

The ICRG rating system consists of a panel data set on political, financial and economic risk in selected countries from the early 1980s through to 1997. Among other purposes, this data set evaluates the effectiveness of rule of law in many countries around the world. The ICRG rating includes variables assessing a county’s law and order tradition and corruption in government. The dataset includes at least 32 African countries and has recently been used in the work of several scholars to determine the impact of law on the economy (Keefer and Knack 1995; Poirson 1998). Two specific variables will be examined. The first rates the rule of law in a country as indicated by the strength of the court system, the reliance on the use of physical force or illegal means to settle disputes and the provision for an orderly succession of power (Political Risk Services 1996). A

working class in any developed country to understand the problems inherent in these measures. However, as we have no others, it is worth examining what these measures tell us.

¹⁴ To the best of my knowledge there is no such measure that is generated from a government or research organization in a civil law country.

low rule of law rating (countries are rated on a categorical scale of 0-6) means that there is more reliance on the physical use of force and/or illegal means to settle conflict. The second variable is that which measures corruption. The specific definition of this variable is the degree to which ‘...high government officials are likely to demand special payments, and illegal payments are generally accepted throughout the society’ (Political Risk Services 1996). Lower ratings (again on a categorical scale of 0-6) are assigned to countries that are generally nondemocratic and in which the government has been in power for more than 10 years. While the reasons for using the rule of law variable are obvious, the justification for the use of the corruption variable may be less so. We assume that to the extent corruption exists in a society (and can be measured) it will stand as an impediment to the proper functioning of institutions. Landes (1997) and others have noted this fact. We would, therefore expect to see a strong correlation between corruption and rule of law variables. Additionally, corruption is included in the Freedom House Civil Liberties rating, so examining Rule of Law and Corruption scores together give the best equivalent to the Freedom House Civil Liberties rating.

The Freedom House Civil Liberties rating is an annual assessment of political and civil rights in countries around the world. It rates at least 48 African countries from 1973 through 1998.¹⁵ Freedom House rates countries in three categories, civil liberties, political rights and a freedom rating which is a combination of the previous two statistics. Of all of the Freedom House ratings, the civil liberties rating comes the closest to being comparable to the ICRG Political Risk Services ratings on both rule of law and

¹⁵ The data actually extend to the present, but I have truncated them at 1998 to make them correspond better to the ICRG data which end in 1997.

corruption. The civil liberties variable is also an ordinal ranking based on the degree to which civil liberties are allowed in a country. In assessing civil liberty scores for a country Freedom House evaluates whether or not there is a free and independent judiciary; whether the ‘rule of law prevails in civil and criminal matters’; and whether ‘there is protection from political terror, and from unjustified imprisonment, exile or torture whether by groups that support or oppose the system’ (Karatnycky 1998:18). The civil liberties rating also includes factors such as gender equality, freedom of movement and freedom of the media and expression, variables which go beyond what we wish to consider in this paper. Therefore the Freedom House rating is less precise than the ICRG assessments. The issue of government corruption is also evaluated in the Freedom House civil liberty rating as ‘Government corruption can pervert the political process and hamper the development of a free economy’ (Karatnycky 1998:18). The civil liberties rating is ordinal, ranging from 1 to 7 with seven being the worst possible score and 1 being the highest. Since the ICRG data were ranked from 0 to 6 with six being the best possible score a country could receive, I transformed the Freedom House rating to make 7 the best possible score and 1 the worst possible score. Doing so makes the data more comparable.

Examining the Data

ICRG Rule of Law data for common law and civil law countries are presented in the two figures below. These figures are not consistent enough to allow conclusions in and of themselves, but we can make some observations by just looking at them.

Figure 1 here

Figure 2 here

The first thing that becomes immediately apparent upon looking at these two graphs is that civil law countries in Africa follow a more consistent trend than common law countries in Africa. Lower Rule of Law scores in the late 1980s plateau in the late 1980s followed by a dip in the statistic for most civil law countries with the end of the Cold War in about 1990. From that point forward the scores scatter across the measure with the North African countries of Morocco and Tunisia scoring comparatively high and troubled war-torn countries such as the Democratic Republic of Congo, Algeria and Angola scoring at the lower end of the scale.

Trends in common law countries are far less obvious to the eye. While it is clear that the end of the Cold War brought a general rise in the Rule of Law scores in countries such as Zimbabwe, Namibia, Malawi, Uganda and the Gambia, there are countries such as Botswana and Tanzania that perform consistently throughout the time period. In addition to these two groups of countries there is a third group with inconsistent Rule of Law scores. Egypt and South Africa both have measures that rise and fall inconsistently, not surprising given the internal political problems in these two countries; South Africa with the fall of apartheid and the changing expectations of the new regime and Egypt with the struggle against Islamic fundamentalist groups within the country.

Examining the data over time in this fashion is interesting, but inconclusive. It can show us the complexity and variety of and between countries as well as indicating the problems with putting all civil law and common law countries together in the same category. Yet, I will be proceeding to do just that below in order to correctly identify any overarching trends that may exist. In the next section the data are analyzed statistically by comparing the mean scores and examining the variance within each group of countries.

Comparing the Data for Civil Law and Common Law Countries

The Freedom House and ICRG data are used below to test the null hypothesis that there is no difference between the rule of law, corruption and civil liberties scores for civil law and for common law countries. I tested the hypothesis using a nonparametric test for two independent samples on SPSS statistical software and evaluated the data through the use of the Mann-Whitney U statistic, which is an analysis of variance test for non-parametric data.¹⁶ It was necessary to use the Mann-Whitney U rather than the standard ANOVA technique because the data used was ordinal and not normally distributed. Instead of a normal distribution there tended to be more data points in the

¹⁶ This technique is better than using regression analysis because we know and acknowledge that the effect of income on a country's rule of law score is both positive and significant. The question left to answer is whether a particular type of system influences the rule of law at all levels of income. We can also identify two independent groups in which we are concerned with the distribution of scores, rather than specific causality.

higher values and virtually none in the lowest.¹⁷ The Mann-Whitney test assigns ranks to all of the available scores for the two groups of data then detects the number of times a data point from Group A precedes a data point from Group B. It also reports on the rank sums and on the means of both sets. The idea behind the test is that if the two groups are approximately equal in location then the ranks should be randomly mixed between the two samples. If the null hypothesis, that the samples are similar, is true, then the average rank sums and the average means should be about equal and the significance statistics in the last two columns of the table should be greater than .05. Where these significance statistics are at or below .05 we can be 95% certain that the two samples of civil and common law countries are not alike.

Figure 3 here

There was no significant difference in the ICRG Rule of Law and Corruption scores for civil law and common law countries in Africa when all years were examined together. However, after 1990 there is a significant difference in ICRG Rule of Law scores between the two sets of countries. An examination of the mean ranks and the sum of ranks will show that the common law countries are doing better at assuring rule of law in Africa according to the ICRG rating. The Freedom House Civil Liberties rating

¹⁷ An interesting effect partially caused by the fact that those countries which ranked near the bottom of both assessments because of their poor rule of law records had mixed system of law, i.e. Islamic and common or Islamic and civil and were, therefore, dropped from the sample as their institutional structure was neither truly civil nor truly common law.

showed significant differences between the two groups when all years were analyzed but not after 1990. Thus the two measures are indicating divergent trends with Freedom House identifying less difference between the two groups of countries after 1990 and the ICRG data identifying more divergence between the two. It is difficult to say conclusively why this might be the case. However, as the Freedom House Civil Liberties measure is a catch all for everything from the independence of the judiciary to the equality of women in the society it could be capturing some societal change outside of the rule of law. The ICRG measure is far more specific to our interests here.

As a second step I included in the data set all countries that have been colonized rather than just those in Africa. The intention in doing so was to see how Africa compared to the rest of the colonized world. Figure 4 displays the results.

Figure 4 here

Data analyzed from the set of colonized countries demonstrates that when we examine all available data together, the African cases reflect a trend. Overall, there is a significant difference in ICRG Rule of Law and Freedom House Civil Liberties ratings in colonized countries with common law countries having significantly higher scores on average. This is true for all colonized countries, for those that became independent after 1949, for those that became independent prior to 1949 and for countries both before and after the Cold War (Joireman 1999). However, the data presented in Figure 3 show that African common law countries do not seem to be as effective at providing civil liberties according to the Freedom House measure in either time period analyzed. The same could be said of civil law countries, which not only show a significant difference in the

Freedom House category, but also in the ICRG Rule of Law ratings after 1990 where they are significantly worse on average than in other colonized countries.

Figure 5 here

The data indicate two identifiable trends. First, at the aggregate level, using the measures of rule of law and corruption that we have discussed above, common law systems appear to be better at providing the rule of law than are civil law systems. Second, this is increasingly the case in Africa as well. After 1990, there is a significant difference between the effectiveness of civil law systems in Africa and elsewhere according to the ICRG Rule of Law ratings and the less specific Freedom House civil liberties rating. Somewhat surprisingly Africa did not come out as statistically worse in terms of its ICRG Corruption rating in any time period or category.

Possible explanations

African common and civil law systems show a similarity to colonized countries in other parts of the world with common law countries appearing more effective in their provision of the Rule of Law and civil law countries worse in Africa and worse overall on average. Why might this be the case? We know the African continent is unique in having many countries with low GNP/capita, and we can posit several ways in which a low GNP/capita might interfere with the provision of legal services and ultimately affect

the rule of law as it is defined by both Political Risk Services and Freedom House. The more money a country has, the better its judiciary will be trained and paid, and the stronger the judicial institutions will be overall. Economic historians, such as Douglass North and Robert Thomas (1993) have noted that a rising level of income in a country will lead to more complex and efficient institutions.¹⁸ Closely related to the issue of national wealth, is that of personal wealth. Lawyers cost money and good lawyers cost a lot of money. If justice can be bought then in countries with low levels of personal wealth, there will be little justice. Where people do not have the resources to litigate injustices may exist unchecked by the law.

A second reason why we may see the poor performance of civil law systems in Africa relates very closely to the historical discussion in the first part of this paper. The legal profession in both civil and common law African countries was not fully developed at independence and legal professionals are critical to the functioning of any legal system. When independence was achieved many African states had a very small number of African lawyers, limited if any legal education and a dual court system. The dual court system, which allowed for the functioning of 'native courts' applying customary law and using individuals not trained in civil or common law as judges was particularly harmful to the formation of a politically active bar after independence. The use of native courts was typically jettisoned by the independent African nations. Few wanted to retain the notion that one type of law was for Africans and another for Europeans and the well

¹⁸ This is one of the reasons why any multiple regression analysis will demonstrate that both civil and common law institutions are more effective at higher levels of income. In fact, if we include in our sample countries such as France and Belgium, which have not been colonized, the differences between the two groups of cases disappear.

educated. Thus, the pattern was for countries to apply common or civil law justice to all peoples while trying to integrate the important aspects of customary law into the legal system. Thus, the legal profession at independence had several concerns: to develop some means of legal education; to adapt to a new court system; and to recruit new lawyers and judges into the field.¹⁹ Typically, it was not large enough in terms of membership, nor strong enough in political power to provide an effective parry to government attempts to expand the role of the state or the power of the executive.

I have made an argument as to why the legal profession could not provide an alternative focus of political power in the newly independent era, but most African countries have been independent for 50 years. What about recent decades? Have bar associations and the judicial branches of African countries played a more active role politically? This certainly seems to be the case in Kenya where the Law Society, which was co-opted by the state in the early years of independence (Ghai and McAuslan 1970) is now active in trying to restrain the power of the government and fighting corruption (Gathii 1999). Jennifer Widner (1999) has examined the changing role of the judiciary in common law Africa. She argues that the attempt by the judiciary to influence politics in a more democratic fashion is underway, but it is often constrained by partisan pressure in its bid for greater independence. In Widner's research in three common law countries in Africa, 73.9 percent of lawyers in Tanzania and 78.9 percent of lawyers in Uganda identified the judiciary as more independent than ten years ago while only 3.2 percent of lawyers in Botswana thought the same. Widner was not attempting to identify the role of the bar in particular, but her research illustrates some improvement in judicial

¹⁹ Ghai (1987) discusses the different strategies and effectiveness of West African countries in so doing.

independence over the past decade. Common law countries in Africa do seem to be making gains relative to civil law countries in these ICRG assessments. Figure 6 below illustrates the growing divergence between the paths of civil law and common law countries in the ICRG assessments.

Figure 6 here

If Widner's research and the experience of Kenya are at all indicative of trends, and that much remains to be seen, we can expect this gap to grow.

What are the explanations for this divergence in the African civil and common law countries? The issue of bureaucratic effectiveness mentioned in the earlier part of the paper seems the most convincing explanation at this point. Insofar as the proper functioning of a bureaucracy can impact the effectiveness of a legal system, the existence of an underpaid and inefficient bureaucracy can have devastating effects on the application of justice. If there is a greater reliance on the bureaucracy in an inquisitorial system under the civil law then there will be a less effective application of the law. My own experiences working in the legal archives in Ethiopia and Eritrea, both civil law countries, lead me to believe that this is a salient and understudied issue. Witnessing the long duration of some cases²⁰, the effort needed to ensure that each legal document was filed in the proper office with the correct stamp, and the multitudinous reasons for the delay of a hearing, I became convinced that the process of acquiring a legal verdict was tremendously expensive in terms of both money and opportunity costs. Whether

²⁰ I have documentation of land tenure cases that lasted as long as six years.

common law systems are more effective because they rely less on bureaucratic processes remains to be proven in further research.

Conclusions

Colonization mattered. In all countries, it provided an overall legal, institutional system to African states at independence, however colonial metropolises nowhere trained a sufficient number of lawyers and judges to take the leadership of this institutional system. Therefore at independence there existed a political paradox of elites with vested interests in the continuation of the particular legal institutional setting, but no real personnel or infrastructure to maintain that system. Numerous African and Africanist scholars have noted this fact (Bender 1978; Ghai and McAuslan 1970; Twaib 1997, Ghai 1987). Moreover, because of profound changes that were made to each legal system at independence, typically in an attempt to allow all citizens access to a legal structure that had previously been reserved for the expatriates, we cannot really speak of the legal system as existing in its current form prior to independence. Therefore, an analysis of the development and effectiveness of African legal institutions after independence is both wholly appropriate and theoretically compelling. Indeed, the conclusions from the cross-national data presented here are intriguing insofar as they indicate a similarity of African cases with trends around the world and significantly worse civil law systems. This is particularly important given the fact that in the African cases we are comparing like to like, the civil law and common law countries have similar political challenges and resource endowments. From the data analyzed here, it appears that as a group African

common law systems have become more effective over time while the civil law systems have remained stagnant.

Time may increase the effectiveness of both civil and common law systems in Africa. If legal training and the strengthening of the judiciary have the potential to increase the rule of law then we should see an improvement over the next few decades as many programs have been developed by USAID and the World Bank to “strengthen” the judiciary in the developing world (Coliver 2000; Gathii 1999).²¹

If ever there was a needful call for further research it is in this area of the effectiveness of legal institutions. We need more indigenous, scholarly assessments of the effectiveness of law and legal systems in Africa, and for that matter in the rest of the developing world, in order to determine which institutions and strategies work best in countries with low income levels. Moreover, it is essential that we develop more broadly comparative research in this area rather than research targeted at either civil or common law countries with similar institutions. With all of the international aid money flowing into projects aimed at ‘strengthening’ legal institutions, we should know more about what is being strengthened and the processes of the application of justice in Africa and the rest of the developing world.

²¹ Gathii addresses the underlying theoretical premises of these programs and their effectiveness in the African context from a theoretical perspective.

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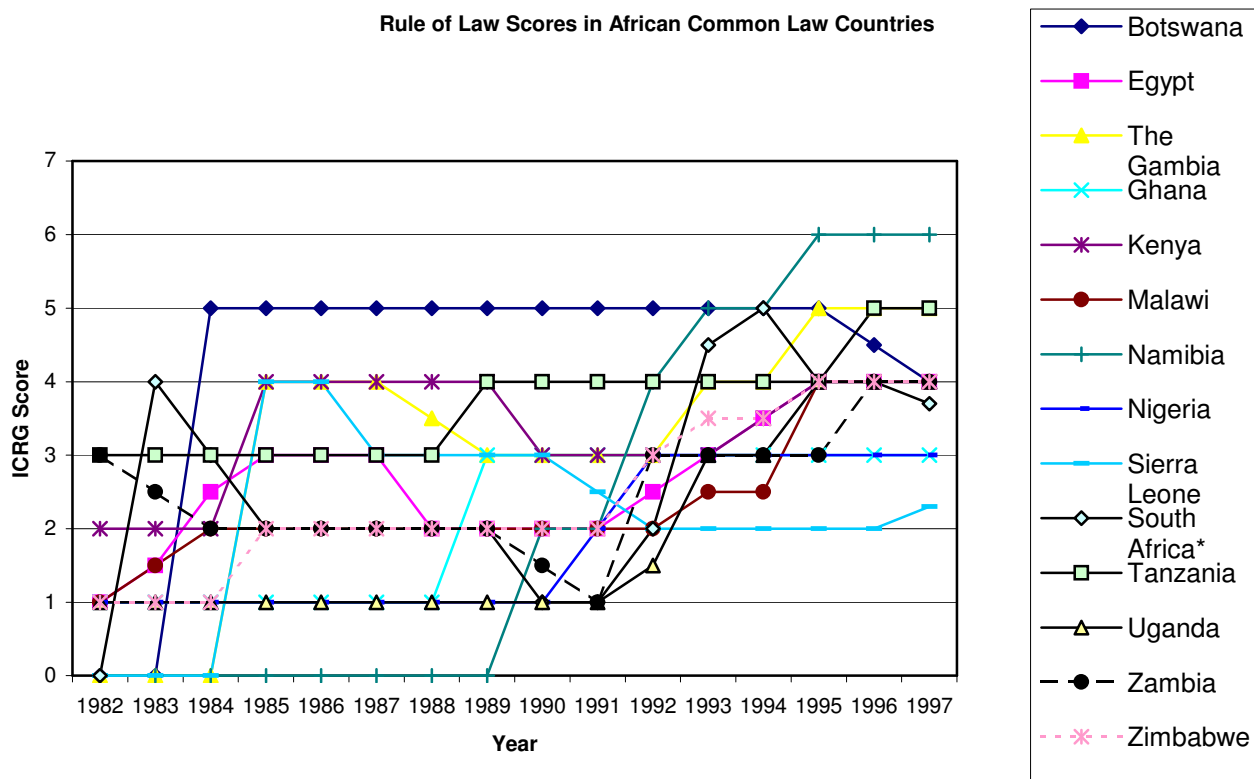
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Figure 1



* Though South Africa is included here, it is deleted from the statistical analysis because of its mixed system of civil and common law.

Figure 3 Mann-Whitney Test of Legal Systems in Africa

<i>Legal Tradition</i>							
<i>All data years</i>		<i>N</i>	<i>Mean Rank</i>	<i>Sum of Ranks</i>	<i>Mann-Whitney U</i>	<i>Asymp. Sig. (2 Tailed)</i>	<i>Exact Sig.</i>
<i>ICRG Rule of Law</i>	Civil Law	18	15.19	273.5	102.5	.372	.377
	Common Law	14	18.18	254.5			
<i>ICRG Corruption</i>	Civil Law	18	16.17	291	120	.820	.837
	Common Law	14	16.93	237			
<i>Freedom House Civil Liberties</i>	Civil Law	30	19.80	594	129	.003**	
	Common Law	18	32.33	582			
<i>Post 1990</i>							
<i>ICRG Rule of Law 90-97</i>	Civil Law	18	12.83	231	60	.012**	.011**
	Common Law	14	21.21	297			
<i>ICRG Corruption 90-97</i>	Civil Law	18	14.89	268	97	.270	.283
	Common Law	14	18.57	260			
<i>Freedom House Civil Liberties 90-98</i>	Civil Law	30	22.68	680.5	215.5	.245	
	Common Law	18	27.53	495.5			

** significant at the .01 level

* significant at the .05 level

Figure 4 Mann-Whitney U Test of all Common Law and Civil Law countries

<i>Mann Whitney Results for all available years</i>						
		<i>N</i>	Mean Rank	Sum of Ranks	Mann-Whitney U	<i>Asymp. Sig. (2 Tailed)</i>
<i>ICRG Rule of Law</i>	Civil law	43	36.95	2589	643	.022*
	Common Law	42	49.19	2066		
<i>ICRG Corruption</i>	Civil Law	43	40.41	1737.5	791.5	.327
	Common Law	42	45.65	1917.5		
<i>Freedom House Civil Liberties</i>	Civil Law	59	50.06	2953.5	1183.5	.001**
	Common Law	63	72.21	4549.5		

** significant at the .01 level

* significant at the .05 level

Figure 5 Mann-Whitney test on all colonized countries

Common Law Countries							
<i>All years</i>		<i>N</i>	<i>Mean Rank</i>	<i>Sum of Ranks</i>	<i>Mann-Whitney U</i>	<i>Asymp. Sig. (2 Tailed)</i>	<i>Exact Sig.</i>
<i>ICRG Rule of Law</i>	Africa	14	16.89	236.5	131.5	.085	.085
	Not in Africa	28	23.80	666.5			
<i>ICRG Corruption</i>	Africa	14	19.39	271.5	166.50	.431	.436
	Not in Africa	28	22.55	651.5			
<i>Freedom House Civil Liberties</i>	Africa	18	20.81	374.5	203.50	.002**	
	Not in Africa	45	36.48	1641.5			
Post 1990							
<i>ICRG Rule of Law 90-97</i>	Africa	14	17.00	238	133	.093	.093
	Not in Africa	28	23.75	665			
<i>ICRG Corruption 90-97</i>	Africa	14	20.11	281.5	176.5	.603	.607
	Not in Africa	28	22.20	621.5			
<i>Freedom House Civil Liberties 90-98</i>	Africa	18	23.22	418	247	.016*	
	Not in Africa	45	35.51	1598			
Civil Law Countries							
All Years							
<i>ICRG Rule of Law</i>	Africa	17	20.21	343.5	190.5	.449	
	Not in Africa	26	23.17	602.5			
<i>ICRG Corruption</i>	Africa	17	22.12	376	219	.960	
	Not in Africa	26	21.92	570			
<i>Freedom House Civil Liberties</i>	Africa	29	21.19	614.5	179.5	.000**	
	Not in Africa	30	38.52	1155.5			
Post 1990							
<i>ICRG Rule of Law 90-97</i>	Africa	17	17.26	293.5	140.5	.045*	
	Not in Africa	26	25.10	652.5			
<i>ICRG Corruption 90-97</i>	Africa	17	21.35	363	210	.784	
	Not in Africa	26	22.42	583			
<i>Freedom</i>	Africa	29	21.67	628.5	193.5	.001**	

<i>House Civil Liberties 90-98</i>	Not in Africa	28	38.59	1024.5			
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** significant at the .01 level
 *significant at the .05 level

Figure 6

