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Colonialism, Spurious Traditions, and Modernization: American Law Professors and the Downfall of African Customary Law

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Abstract

The purpose of this paper is to explore the involvement of American law schools in a little known and ultimately failed attempt to formulate restatements of indigenous African customary law during the 1960s and 1970s, and in the process, changes in the concept of normative pluralism. Current studies in legal pluralism demonstrate an acute case of the blank state fallacy due to an amnesia regarding its own history.

The incorporation of indigenous law to the legal system was a concern all over Africa during the 1960s, but African countries were often torn between contradictory impulses of preserving traditional African legal heritage and the demands of modernization, progress, and nation-building. At the same time, British scholars were compiling restatements of African customary law. Columbia law professor and the founder of the African Law Center A. Arthur Schiller (1902-1977) began a similar project that focused on East Africa in co-operation with the American-led law school in Addis Ababa in Ethiopia.

Schiller's method of inquiry was based on a combination of case law and legal tradition, the decision of local courts and ancient writings of tribal authorities. Law was, in essence, based on the culture of the people and it was the task of legal scholars to reduce it universal rules. This essentialist view of law and culture was based on 19th century German legal theory.

This model of legal pluralism contained, however, a fundamental error that led to the downfall of most of the restatement projects, including the one led by Schiller: the material they drew on was mainly the decision of colonial "native courts" and tribal councils. As interpretations of native law by Western or Western-educated lawyers, they were intended to be compatible with colonial administration. Tainted by colonialism, these spurious traditions were shunned by local leaders aiming at modernizing law through codification.