

The Persistence of Colonial Laws:
Why Rwanda is Ready to Remove Outdated Legal Barriers to
Health, Human Rights, and Development

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I. INTRODUCTION

Rwanda has earned a reputation as a trailblazer among developing nations. Especially in the health sector, it is often the early-adopter of international recommendations and new technologies. Yet at times, Rwanda's momentum is impeded when it must grapple with a challenge that post-colonial societies commonly face: the persistence of colonial laws. When left in force, these legal vestiges, once designed to oppress and subordinate, can rear their head at unexpected moments, causing delays in policy implementation, uncertainty, or unjust outcomes. In public health, the delayed implementation of better health policies can mean the difference between life and death. In such circumstances, these obscure legal impediments warrant serious consideration. Following Rwanda's independence, the country suffered through a civil war and a genocide against the Tutsi, a minority ethnic group. Since then, however, Rwanda's institutions have evolved to a point that, in the authors' view, they are now well-equipped to finally cure the legal code of its latent colonial pathologies, clearing the way for greater progress ahead.

II. HOW A COLONIAL-ERA LAW INTERFERED WITH TREATMENT OF VITAMIN AND MINERAL DEFICIENCIES IN RWANDA

Among the public health challenges that Rwanda has had to confront are micronutrient deficiencies, which present a serious detriment to global health. They are a significant contributing factor to malnutrition¹ and contribute to the spread of infectious disease.²

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Supporting micronutrient fortification of staple foods is among the steps a government can take to reduce malnutrition and improve health-related outcomes in the population.³ For these reasons, in 2010 the Rwandan Ministry of Health developed plans to promote micronutrients.

That year, the Permanent Secretary presented on behalf of the Minister of Health a draft order, *Minister of Health Instruction on Micronutrients*, at one meeting of the Inter-Ministerial Committee, chaired by the Right Honorable Prime Minister. To the Permanent Secretary's surprise, during the course of the meeting it was discovered that the Minister was not lawfully permitted to sign the instructions. Rather, the Head of State was the only person in Rwanda vested with the legal authority to sign and approve instructions on micronutrients. This legal arrangement, still in force until 2012, was created by a colonial precedent: prior legal instructions regarding micronutrients had been signed by the Governor of Congo-Rwanda-Burundi in 1940.⁴ Because those earlier instructions had issued from the highest executive authority, in today's executive branch, only the Head of State has the power to abrogate or amend them. In other words, an outdated law designed to empower Rwanda's colonial oppressor with control over crucial

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¹ See WORLD HEALTH ORGANIZATION, WORLD HEALTH REPORT 2000 at 57 (“[malnutrition] is often a combination of micronutrient deficiency and absolute shortage of calories”), http://www.who.int/whr/2000/en/whr00_en.pdf?ua=1.

² See, e.g., Alice M. Tang, Ellen Smit & Richard D. Semba, *Nutrition and Infection*, in INFECTIOUS DISEASE EPIDEMIOLOGY: THEORY AND PRACTICE at 305-27 (Kenrad E. Nelson & Carolyn Masters Williams eds.) (3d ed. 2014) (“It has been established that adequate nutritional status is necessary for the normal functioning of various components of the immune system. Malnutrition may affect the course of infectious disease through a variety of mechanisms, including compromising host immune function, diminishing response to therapies, and promoting comorbidities.”); JOINT STATEMENT BY THE WORLD HEALTH ORGANIZATION, THE WORLD FOOD PROGRAMME AND THE UNITED NATIONS CHILDREN’S FUND, PREVENTING AND CONTROLLING MICRONUTRIENT DEFICIENCIES IN POPULATIONS AFFECTED BY EMERGENCY (2007) (“Micronutrient deficiencies increase the general risk of infectious illness and of dying from diarrhoea, measles, malaria and pneumonia. These conditions are among the 10 leading causes of disease in the world [in 2007]”), http://www.who.int/nutrition/publications/micronutrients/WHO_WFP_UNICEFstatement.pdf?ua=1.

³ See WORLD HEALTH ORGANIZATION AND FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, WHO/FAO GUIDELINES ON FOOD FORTIFICATION WITH MICRONUTRIENTS (2006); WORLD HEALTH ORGANIZATION, WHO GUIDELINE: FORTIFICATION OF MAIZE FLOUR AND CORN MEAL WITH VITAMINS AND MINERALS (2016), <http://apps.who.int/iris/bitstream/10665/251902/1/9789241549936-eng.pdf?ua=1>.

⁴ See Legislative Order no. 57/A.E. of 10/05/1940 *Establishing regulation of commerce, detention and consumption of food stuffs*.

domestic commercial activities—in this case, food production—was still legally binding on Rwanda’s modern democratic processes. It delayed a public agency’s ability to efficiently pass modern regulations in the best interest of Rwandans’ health.

This was a shocking revelation for three reasons. First, it was alarming that more than five decades after independence, colonial rules that are hardly known remained in place and were still enforced. Second, the insufficient revisions made after independence to outdated, pre-independence laws related to health, provided a possible explanation for some difficulties faced by the health sector, which had been making unprecedented progress in virtually all areas but not in combatting malnutrition. Lastly, it was disconcerting that the Head of State, who is engaged in pressing issues and high-level decisions across all domains of the government should be diverted from those priorities in order to focus on miniscule, fine-detailed health-related decisions, such as the level of Vitamin A in food.

Armed with these facts, we explored further to unearth other colonial laws and to address the latent problems they present. But first, a brief summary of Rwanda’s historical and developmental background is necessary to contextualize these events.

III. RWANDA’S HISTORICAL AND DEVELOPMENTAL CONTEXT

Rwanda’s recent history has required Rwandans to reinvent their country according to their own design. Following independence in 1962, Rwanda—then still a client state of European powers—suffered through decades of violence and civil war, culminating in the atrocities of 1994 when the former extremist regime prosecuted a genocide against the Tutsi, a minority group, in the span of just 100 days. Twenty-three years later, Rwanda is still mending some of the damage that resulted from its colonization and that was compounded up to 1994.

Rwandan society, abandoned by the international community at that tragic hour,⁵

⁵ See, e.g., Rep. of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, transmitted by Letter Dated 15 December 1999 from the Secretary-General to the President of the Security Council, at 30, U.N. Doc. S/1999/1257 (Dec. 15, 1999) (describing “the failings of the United Nations to prevent and stop the genocide in Rwanda,” including “a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide.”). See also Samantha Power, *Bystanders to Genocide*, THE ATLANTIC, Sept. 2001, at 18-21, 30 (describing countries’ prioritization of their national interests and evacuation of national staff rather than assisting the victims, the international community’s failure to respond to the genocide, and “Belgian requests for a full UN exit”); *id.* (quoting the head of the UN Assistance Mission in Rwanda, Romeo Dallaire: “Mass slaughter was happening, and suddenly there in Kigali we had the forces we needed to contain it, and maybe even stop it . . . [y]et they picked up their people and turned and walked away.”).

subsequently took it upon itself to rebuild a nation reflecting its own vision and values. And Rwanda's narrative has changed: today, the country is focused on priorities that include human development, equity, reconciliation, accountability, and universal health care.⁶ The path to progress did not come serendipitously; it required arduous efforts. In this context, Rwanda has prided itself as an early-adopter of bold public health initiatives, achieving ambitious targets. For example, its ability to move swiftly has put Rwanda on the forefront of universal access to healthcare in Africa; has permitted the development of a health extension worker program that serves as a model for other countries; and has enabled the early adoption of recommendations for improved HIV treatment, as new guidelines become available.

Nevertheless, some aspects of the legal system in Rwanda still date back to colonization. Rwanda was initially colonized by Germany from 1894 until 1918, as part of German East Africa. Following Germany's defeat in World War I, Rwanda was made a Belgian protectorate under the League of Nations, as part of the "Territory of Ruanda-Urundi." Between 1919 and 1962, the central legislation governing Rwanda was established by Belgian authorities, who had replaced many traditional laws. Ignoring the unique characteristics of Rwandan and Burundian society, Belgium imported the civil and criminal codes of the then Belgian Congo to Rwanda and Burundi.⁷

The 1994 Genocide against the Tutsi has its roots in colonial institutions: colonial authorities and complicit national leaders and intellectuals imposed social and legal frameworks to transform the traditional clan stratification of pre-colonial society, replacing it with artificially constructed ethnic divisions designed to dominate and oppress contemporary society. Those structural injustices were carried forward by the former, post-independence regime to perpetuate a similar system of domination, but now

⁶ See, e.g., REPUBLIC OF RWANDA, RWANDA VISION 2020.

⁷ The Rwandan civil law system was based on Belgian and German legal systems as well as customary law, which it largely imported from the Belgian Congo, subject to the discretion of the vice governor general of Ruanda-Urundi. La loi du 21 août 1925 sur le Gouvernement du Ruanda-Urundi, article 3 ("Les décrets et les ordonnances législatives du gouverneur général, dont les dispositions ne sont pas spéciales au Ruanda-Urundi, ne s'appliquent à ce territoire qu'après y avoir été rendus exécutoires par une ordonnance du vice-gouverneur général qui l'administre"); *id.* article 5 ("Les droits reconnus aux Congolais par les lois du Congo Belge appartiennent, suivant les distinctions qu'elles établissent, aux ressortissants du Ruanda-Urundi."). See also Sam Rugege, "Judicial Independence in Rwanda," (Oct. 28, 2005), http://www.mcgeorge.edu/Documents/Conferences/JUDIND_RUGEGE_MASTER.pdf (describing some of Rwanda's "very old" laws, "some dating back to nineteenth century Belgian laws or King's decrees, which must be replaced").

with Rwandans in power.⁸ To cite one prominent example, the Belgian authorities instituted an identity card system in 1933-1934, imposing an ethnic label (*ubwoko*) on all Rwandans, which continued after independence and was used by the genocidal regime to further entrench a race-based system of suppression and promote violent objectives.⁹

While the most prominent discriminatory laws have since been abolished, some lesser known laws or subtle remnants were never repealed. Those colonial laws remain presumptively valid until they are either repealed or otherwise revoked, or until the judiciary strikes them down. For this reason, some of the laws are likely to still have some power over Rwandan citizens today. If brought to the attention of a court, or if identified by a government official, such laws could be enforced or litigated.

Yet, the published text of many of these laws is nowhere to be found in Rwanda.¹⁰ Law libraries are missing volumes, as a result of the war or because portions of collections were taken from the country and sold overseas.¹¹ This makes it challenging to predict when and how such problematic vestiges of the past might resurface to interfere with the rule of law, social justice, and development today.

IV. AN ATTEMPT TO PREVENT FUTURE LEGAL BARRIERS TO HEALTH: A WORLDWIDE INVESTIGATION INTO THE PERSISTENCE OF RWANDA'S COLONIAL HEALTH LAWS

As we reviewed colonial-era laws governing public health, we encountered references to

⁸ See, e.g., Paul Rutayisire & Charles Kabwete Mulinda, *The Role of History and Political Studies in Post-Genocide Reconstruction and Development*, 2 J. OF AFR. CONFLICTS AND PEACE STUD. 1, 4 (Sept. 2013) (describing the promotion of “a historiography that would divide the Hutu and the Tutsi of Rwanda given their interaction for centuries. ‘The story of the Hutu and the Tutsi is always recounted as if the two groups were divided by an impregnable Chinese wall. Centuries of interaction between the two groups had not only produced a common language and similar cultural institutions and symbols but also a cultural and political space which made it possible for them to coexist peacefully.’”) (citing Arnold Temu, *Not Telling: African History at the End of the Millenium*, S. AFR. HIST. J. 42, 4 (2000)).

⁹ For example, this colonial vestige was specifically cited by the genocidal regime’s infamous and much reviled “Bahutu Manifesto,” as a tactic for oppression. (“Aussi, pour mieux surveiller ce monopole de race, nous nous opposons énergiquement . . . à la suppression dans les pièces d’identité officielles ou privées des mentions ‘muhutu,’ ‘mututsi,’ ‘mutwa’”).

¹⁰ See, e.g., Brian D. Anderson, *A Survey of Law Libraries in Rwanda*, 107 L. LIBR. J. 225, 235 (2015) (documenting some limitations in law libraries and noting a law library worker’s concern that “in Rwanda there is ‘a need for the rule of law and a need for access to laws, and many do not know where to find it.’”).

¹¹ Based on authors’ discussions with librarians in Rwanda and rare book collectors in the United States during 2014-2016.

older laws that had been repealed.¹² We searched for the repealed laws to understand what had been modified, and more importantly, to identify whether *other* laws may be referenced in those which were repealed, but which may themselves *not* have been repealed. Such laws could still impact the health sector.

The health laws that the colonial authorities imposed on Rwanda commonly discriminated between the rights or liberty interests of “*les indigènes*” or “*les noirs*” and all others. For example, the 1954 regulations concerning outbreaks expressly mandated that indigenous Rwandans infected with tuberculosis had to be hospitalized, even while the same law provided that other patients could be treated without being detained.¹³ Meanwhile, in the event of an outbreak of plague, the houses of infected patients were to be “carefully disinfected and rid of insects,” but should cases be found among indigenous patients in the villages, then *their* homes – as well as the directly neighboring homes of other “*indigenes*” – were to be completely “destroy[ed] by fire.”¹⁴ This was all the more egregious in the context of a colonial society that not only imposed harsher (and more punitive) preventive measures on the local population, but also systematically provided better treatment services for the colonists.

Other colonial laws may seem less discriminatory on their face, but would undoubtedly have discriminatory effects on the poor if enforced. For example, a 1959 law prohibited maintaining living conditions that would be favorable for the breeding of flies and mosquitos, punishable by up to two months imprisonment.¹⁵ A 1940 law required “*les*

¹² See, e.g., Décret du 19 juillet 1926, “Hygiène et salubrité publiques” § 18 (citing, *inter alia*, l’Ordonnance du 22 août 1888; Décret du 20 octobre 1888 sur les maladies contagieuses; Décret du 22 février 1895 sur la vaccination, Décret du 20 janvier 1921 sur la tuberculose, Décret du 12 avril 1923 sur les maladies vénériennes).

¹³ Mesures à prendre en application de l’ordonnance du 22 juin 1954 N°74/213, relative a la lutte contre les maladies quaranténaires, épidémiques, endémiques et autres affections transmissibles [Measures to take in application of the ordinance of 22 June 1954 N°74/213, regarding the fight against quarantined illnesses, epidemics, endemics, and other transmissible diseases], CODES ET LOIS DU RWANDA [Codes and Laws of Rwanda], Dec. 31, 1994, at 1712, Ch. XXIX Art. 3-4 (“Toute personne [...] trouvée atteinte de tuberculose ouverte ou évolutive . . . sera . . . soumise au traitement *ou* hospitalisée...”; but mandating: “Tout indigène atteint de tuberculose ouverte ou évolutive . . . doit être hospitalisé.”) (emphasis added).

¹⁴ *Id.* at Ch. III Arts. 7-8 (“La maison du malade sera soigneusement désinfectée et désinsectisée.”; but also mandating: “Dans les villages [*indigènes*], en cas d’épidémie, la destruction par le feu de toutes les cases occupées par les pestiférés et les cases contiguës sera ordonnée par l’autorité locale, suivant avis de l’autorité locale, suivant avis de l’autorité sanitaire.”).

¹⁵ L’ordonnance du 28 juin 1959 N°74/345: Hygiène publique dans les agglomérations Arts. 1, 10 (“Dans les villes, les circonscriptions urbaines, les centres résidentiels . . . il est interdit de maintenir des conditions favorables a l’éclosion ou à la multiplication des mouches ou des moustiques . . . Les

indigènes” to maintain the interior of their homes in “a perfect state of cleanliness,” punishable by up to seven days imprisonment.¹⁶

Many laws and regulations pertaining to infectious disease can be traced back to a precursor law that was central to Belgium’s original public health framework in Ruanda-Urundi: *Ordonnance du 22 aout 1888, relating to infectious and epizootic diseases* (the “1888 Ordonnance”). Although the 1888 Ordonnance was ultimately replaced by other laws,¹⁷ we sought to understand the regime it established and the framework of which it was part, what other health laws may have been promulgated or codified with it, and what other laws the 1888 Ordonnance may have referenced. We also sought to identify such laws because some of them might never have been repealed, unlike the 1888 Ordonnance itself.

Our search for the 1888 Ordonnance started in Rwanda, in the archives of the Ministry of Justice and the Ministry of Health. Failing to locate a copy of the 1888 Ordonnance within the country, we followed up with phone calls to the Rwandan Embassies in the capitals of the former colonial states - Germany and Belgium. Those embassies were not able to locate a copy of the law either.¹⁸ We continued by searching even farther afield, soliciting assistance from a reference librarian at Stanford University’s law library.¹⁹ It

contraventions à la présente ordonnance seront punies d’une peine de servitude pénale de deux mois au maximum et d’une amende que ne dépassera pas 2.000 francs ou d’une de ces peines seulement.”).

¹⁶ L’ordonnance du 10 octobre 1940 N°375/Hyg.: Hygiène dans les circonscriptions indigènes et les groupements traditionnels non organizes, Arts. 1, 6 (“Dans les circonscriptions indigènes et les groupements traditionnels non encore organizes, les indigènes sont tenus de maintenir en parfait état de propreté l’intérieur de leur habitations Les infractions à la présente ordonnance seront punies d’une peine de servitude pénale de sept jours au maximum et d’une amende qui ne dépassera pas 50 francs ou d’une de ces peines seulement.”).

¹⁷ The Decret du 19 juillet 1926: Hygiene et salubrité publiques, which was brought into force in Ruanda-Urundi by O.R.U. n° 38 du 19 octobre 1926, provided for the abrogation of the Ordonnance du 22 août at a date to be determined by the governor general. That abrogation was later effectuated by Ordonnance n° 74/Hyg. du 10 octobre 1931. See CODES ET LOIS DU RWANDA. Éditées par Filip Rentjens et Jan Gorus. Volume III. Mis à jour au 31 décembre 1994, 2ème édition 1995. It is notable that even the veracity of such older treatises themselves is questionable, as they were edited by European collaborators of the genocidal regime. This is yet another reason why the continued enforcement of colonial laws is problematic – oftentimes, one is left to rely not on an original publication of the law itself, but rather on a secondary source of problematic provenance.

¹⁸ At the time of this research, the Royal Museum for Central Africa in Tervuren, Belgium, was closed for renovations. The closure may have prevented the Rwandan embassy in Belgium from locating materials it may otherwise have had access to at other times.

¹⁹ Conversations and email correspondence with Sergio Stone, Foreign, Comparative, and International Law (FCIL) Librarian, Stanford Law School (May-June 2014).

was this step, on the other side of the world, that finally produced results. At an off-site depository of Stanford University's library system – essentially, a storage facility – we located a treatise of Belgian Congolese law which contained the 1888 Ordonnance: Octave Louwers' 1905 publication, *Lois en vigueur dans l'État indépendant du Congo: Textes annotés d'après les instructions officielles et la Jurisprudence des Tribunaux*.

We determined that it would be worthwhile to investigate even further and understand how the only accessible record of a Rwandan law – one which was rumored to exist in the country with sufficient credibility to raise questions within the country's Ministry of Health – had ended up so far from Rwanda. Our questions went beyond mere curiosity; understanding the means by which laws were dispersed and scattered might allow us to identify whether other problematic laws may be lurking out of sight, threatening to resurface at another inopportune moment. We pursued the trail.

Stanford's reference librarian learned that Stanford had acquired the treatise from the University of California, Berkeley. We followed this information to Berkeley's law school but, it turned out, the librarian who had been responsible for procuring African law books, Tom Reynolds, was now retired. However, we contacted Reynolds for more information.²⁰ Through him, we learned the story of the book's arrival at Berkeley. Reynolds had been responsible for personally traveling to Europe in search of rare African law books for the library's collection. Based on information Reynolds provided, we identified the possible booksellers in Europe that were in business during the late 1950s and early 1960s, and from whom the treatise may have been purchased. In particular, Reynolds recalled that one of the rare book dealers, and a likely source of the procurement, was Martinus Nijhoff Publishers. Martinus Nijhoff was originally based in The Hague and had since been acquired by other publishing houses, most recently by Brill Publishers. In a three-part series of articles that narrates the history of Martinus Nijhoff and American Research Libraries, Hendrick Edelman wrote: "Martinus Nijhoff, publisher and bookseller of The Hague . . . had by far the longest successful tenure in supplying American libraries with European books and periodicals."²¹

Our efforts to reach a Senior Acquisitions Officer at Brill remained unanswered, by phone and by e-mail. An expedition to Brill's office in the Netherlands did not yield results neither. We suspected that if Martinus Nijhoff was indeed the bookseller, the book

²⁰ Example: Telephone interview with Tom Reynolds, former librarian, Berkeley University (Oct. 3, 2015); Email correspondence (Jun. 5-18, 2016).

²¹ Hendrik Edelman, *Nijhoff in America Booksellers from the Netherlands and the Development of American Research Libraries*, 42 *QUAERENDO* 46, 46 (2012) (available at <http://booksandjournals.brillonline.com/content/journals/10.1163/157006912x640801?crawler=true&mime-type=application/pdf>).

may be recorded in one of its catalogs. Every time we inquired with rare book publishers and distributors, we received the same response: there was no paperwork or information on how such a treatise may have been procured for their inventory.

Here the trail grew cold. Our quest to trace the procurement of Louwers' treatise back to its source – and to the potential discovery of other similar compilations of colonial Rwandan laws that may have traveled through the same distribution stream – proved to be unsuccessful. Nor would we know the integrity of the chain of custody through which such representations of Rwandan law had passed. The National Archives, located in Amsterdam, and the municipal Haags Gemeentearchief archives, located in The Hague, had no record of the treatise. Libraries that had the treatise in their collections were unable to provide us with traceable information about its acquisition; our telephone calls to libraries in Belgium led to another dead-end.²² In fact, the acquisition of Louwers' treatise throughout an array of international collections²³ remains a mystery. However, during this search, librarians across the world anecdotally shared with us a common suspicion: that, in general, the supply chains for rare African legal texts are poorly documented because much of their materials were improperly appropriated from African countries, republished and subsequently sold internationally (though none disclosed sources to substantiate that theory).

This dead-end, however, offers important conclusions. So long as the colonial era laws continue to be recognized as possibly valid and enforceable, we cannot rule out the possibility that other problematic health laws will emerge at an inopportune moment. Nor can we pronounce with certainty what the body of positive law is that governs health in Rwanda. Additionally, in the absence of a gazette publication of such law, our reliance on Louwers' representation, for example, of the content of the law – and confidence about the accuracy of what precisely had been repealed by Ordonnance n° 74/Hyg. du 10 octobre 1931 and about what actual provisions may otherwise still resurface another day – will necessarily retain a degree of uncertainty.

The challenges associated with tracking down the country's laws also carry normative implications. When the country achieved its independence, an incomplete portion of its culture and history had been retained, due to the stripping of its traditional laws and the imposition of foreign laws. By missing an important part of its history – in particular, that

²² The authors sought this information by contacting the Royal Dutch Library, the Peace Palace Library, the the Belgium Royal Library, the Library of Congress, the University of Pennsylvania's library, and Cornell University's library.

²³ Libraries and collections including, but not limited to: The Royal Dutch Library, The Library of Congress, Belgium Royal Library, The Peace Palace Library, Stanford University, Harvard University, University of Pennsylvania, and Cornell University.

where the roots of public health disparities, development obstacles, and even the artificially constructed ethnic divisions leading to the 1994 Genocide against the Tutsi, could be identified²⁴ – Rwanda was deprived of one of its tools for effectively eliminating those divisions.

Colonial mismanagement, the selling of public goods without recording what was sold by whom and to whom, and ethical lapses of colonial academia, are among the factors that conspired to hinder the development of an autonomous legal system. How is a country expected to evolve and move from its past colonization when it lacks necessary materials and information to do so? The availability of information and administrative memory are essential for the country to comprehensively move forward.²⁵

V. LEGAL IMPLICATIONS OF THE COLONIAL LEGACY

Legal theory offers some pragmatic suggestions for how agencies charged with executing the laws and the courts may accommodate these vestigial pathologies in the code. For example, a “dynamic” theory of interpretation calls for statutes to be “interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”²⁶ An “institutional” theory of interpretation would justify broad ministerial discretion to interpret problematic colonial statutes, emphasizing the role of governmental institutions to promote certain “substantive principles” when they execute the laws.²⁷ Such substantive principles would include, *inter alia*: (i) a principle of interpreting statutes so as to promote constitutional norms and to avoid constitutional invalidity;²⁸ (ii) a principle of avoiding irrationality and injustice;²⁹ (iii) a principle of protecting disadvantaged groups;³⁰ (iv) a principle of administrative discretion;³¹ (v) and a principle of interpreting

²⁴ See *supra* note 8.

²⁵ Further information on the importance of archives and their societal roles can be found at the following website (<http://www.clir.org/pubs/reports/pub89/role.html>). The Council on Library and Information Resources offers an overview of the impact that libraries and archives have on societies.

²⁶ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987).

²⁷ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

²⁸ *Id.* at 468–69.

²⁹ *Id.* at 482 (“In such circumstances, what might appear to be aggressive construction is entirely legitimate – at least if the injustice or irrationality is palpable and there is no affirmative evidence that the legislature intended the result”).

³⁰ *Id.* at 483 (When there is ambiguity, “resolve interpretive doubts in favor of disadvantaged groups”).

³¹ *Id.* at 474–75 (among “interpretive principles [that] respond directly to institutional concerns and are designed to improve the performance of governmental entities” is a principle of “administrative discretion,” whereby “[c]ourts defer to agency understandings of policy and fact in cases in which discretion has lawfully been conferred. This idea is based on a recognition of the superior democratic accountability and fact-finding capacity of the agency.”); see also *id.* at 465 (discussing the U.S. Supreme Court’s application

statutes so as to avoid regulatory failures.³² Such approaches to statutory interpretation may offer justifications for a ministry of health to take proactive measures by interpreting older statutes aggressively and to fill in gaps. Such theories might even justify the selective refusal to enforce discriminatory provisions, curtailing certain “rights” as they may appear in the plain language of the statute (e.g., refusing differential treatment based on race, ethnicity, or nationality during a public health emergency).

To some extent, the justification for relying on these flexible interpretive solutions is heightened in the unique context of a developing country, where there are particular pragmatic considerations. For one, the capacity of courts and the legislature cannot realistically handle all necessary corrections in a timely manner; executive agencies are forced to make choices. Second, in a rapidly developing society, statutes become outdated faster. Institutions are young and evolving. Even legislative procedures are evolving. This, too, may require more agency and judicial discretion in interpreting statutes. Third, in a developing country such as Rwanda, there is less litigation of public law. Administrative choices tend to be challenged less frequently in court than they are in western developed jurisdictions.³³ Courts may not necessarily be called upon to interpret a problematic colonial law or its application. In any event, when courts do intervene, judicial rulings have less precedential value in Rwanda’s system than in a typical

of “the principle of deference to agency interpretations of law,” described as a “contestable institutional norm,” in its decision to uphold the U.S. Food and Drug Administration’s view that the agency could refrain from promulgating certain regulations under a statute seeking to limit unsafe substances in the food supply) (citing *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986)).

³² *Id.* at 476 (Interpretations should “avoid characteristic failures in regulation – caused, for example, by [the Legislature’s] failure to understand the systemic effects of regulation or to coordinate statutes regulating the same area.” The system should “permit *de minimis* exceptions [created by agencies], assume proportionality in regulation, and generously construe statutes designed to protect disadvantaged groups and nonmarket values”).

³³ For example, resources may be more limited for public interest institutions or NGOs to bring challenges through impact litigation, doctrines of standing may take time to fully develop, and a culture of litigating such issues may take time to emerge. See, e.g., Ana Paula de Barcellos, *Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil*, 16 HEALTH & HUM. RTS. J. 34, 41–42 (Dec. 2014) (empirical data from Brazil suggesting that although some individuals who have resources may successfully litigate their own rights to certain health services, communities with more limited resources benefit from less public law litigation related to health); Seres Djoyou Kamga, *An Assessment of the Possibilities for Impact Litigation in Francophone African Countries*, 14 AFR. HUM. RTS. L. J. 449, 454, 465, 467–68 (2014) (discussing the above factors as among those that may explain why certain types of impact litigation have been slow to develop in Francophone African countries, particularly where the inherited legal systems were based on the French model).

common law system.³⁴

However, in the face of a system-wide statutory infirmity, such as the perseverance of colonial statutes, theories of flexible interpretation offer *ad hoc* band-aids, and not an adequate long-term solution. Furthermore, encouraging such flexible interpretation for a variety of laws *en masse* runs into other serious, theoretical concerns. To name one, separation of powers doctrine counsels against relinquishing so much of the legislative clean-up to the executive agencies alone.³⁵ Far from a theoretical concern, the Rwandan constitution commands as much, creating three “separate” and “independent” branches of government (Article 61), in which the “Legislative power is vested in a Parliament” (Article 64).³⁶ For these reasons, a more comprehensive solution is warranted.

The legal uncertainties that emerged in the health sector have broader implications for the country’s development. As the micronutrient program illustrates, hidden colonial laws can suddenly re-appear if someone produces them, obstructing the development of positive policies for the population, disrupting settled expectations, and undermining the rule of law. As our team’s hunt for colonial statutes demonstrates, only those who have significant resources can dig up antiquated laws, which are hard to find. A government minister or a Stanford lawyer can deploy the resources to search the world and find one, but that access is not possible for most ordinary citizens. Yet an ordinary citizen could find herself defending against one such law in a court of law, where ignorance of the law is no defense.³⁷ The *effect* is discriminatory, as it privileges some people who can cite laws that others cannot access.

There are also strong normative and ethical implications. The persistence of discriminatory laws imposed by colonial sovereigns degrades the dignity of Rwandan law. And it certainly offends the dignity of Rwandan citizens. Some colonial laws are not obviously discriminatory on their face, but they preserve latent vestiges of a colonial

³⁴ See Organic Law N° 03/2012/OL of 13/06/2012 determining the organization, functioning, and jurisdiction of the Supreme Court (Official Gazette of Rwanda, July 9 2012). The law gives the Supreme Court the power to bind the lower courts with its rulings, but this transition away from civil law traditions has not yet been implemented in lower levels of the judicial system

³⁵ See, e.g., MONTESQUIEU, DE L’ESPRIT DES LOIS, Book XI, Part VI (separation of powers is necessary between the legislative, executive, and judicial powers: “Tout serait perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire des lois, celui d’exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers.”).

³⁶ 2003 Const. 61, 64 (Rwanda) (revised 2015).

³⁷ See CONSTITUTION OF THE REPUBLIC OF RWANDA OF 2003 REVISED IN 2015, Art. 176 (“Ignorance of a duly published law is not an excuse”). *But see also* discussion *infra* (discussing constitutionally suspect enforceability of colonial laws pursuant to Article 176).

scheme. This can perpetuate structural injustices.

As a matter of social justice, human rights, and due process, *no* Rwandan should *ever* be subjected to a decree of a colonial governor or even wonder if she might be. Even if a court correctly refuses to enforce a colonial law, the damage is already done: no citizen (or even government officer, for that matter) should be subjected to the indignity of standing before a judge to defend herself against a colonizer's decree, brought into the court by a creative opponent.

The persistence of colonial statutes can have certain effects that erode good governance, which also justifies taking action to definitively remove such statutes and minimize those effects. Whether they are ultimately enforced or not, laws influence behavior. From the administrative standpoint, a well-intentioned government official who is uncertain of the extent or validity of certain colonial laws may be deterred from taking well-justified risks or may curtail important reforms in order to steer clear of potential violations of a law which may only be rumored to exist or which may not even hold up in court if it were formally challenged. Finally, the persistence of such statutes weakens the rule of law, inviting authorities to pick and choose which laws to implement, and ultimately allowing them to determine when to substitute their own rules in place of rules they consider outdated.

Across the board, every colonial law, no matter the content, is in conflict with certain provisions of Rwanda's Constitution, just by virtue of its ignoble provenance. First, laws imposed by foreign sovereigns, which were designed to promote oppressive policy objectives, and which are not the product of the Rwandan democratic process, reflect an unconstitutional infringement on the Republic's sovereignty by a past colonial power.³⁸ Second, even if a law is not unconstitutional on its face, because it was designed to advance a discriminatory colonial scheme, its underlying public policy is tainted by an unconstitutional objective.³⁹ Third, the *effect* of maintaining such laws is discriminatory and unjust: it grants legal privileges to those who have more resources, because they can access hard-to-find laws that others cannot access. Fourth, for the reasons described *supra*, the perseverance of colonial laws undermines essential, formal principles of the

³⁸ See *id.* Art. 1 ("National sovereignty belongs to Rwandans who exercise it directly by means of referendum, elections, or through their representatives"); *id.* Art. 4 ("The Rwandan State is an independent, sovereign, democratic, social and secular Republic. The founding principle of the Republic is: 'Government of Rwandans, by Rwandans and for Rwandans.'"); *id.* Art. 10(4°) ("The State of Rwanda commits itself to ... building a State governed by the rule of law, [and] a pluralistic democratic government...").

³⁹ See, e.g., *id.* Art. 10(2°) ("The State of Rwanda commits itself to ... [the] eradication of discrimination").

rule of law.⁴⁰ In addition to rule of law concerns elaborated above, laws must be enforced uniformly, not selectively. Finally, there may be a colorable question whether hard-to-find colonial laws may be procedurally defective under the present Constitution, which states, “Laws and orders cannot enter into force without their prior publication in accordance with procedures determined by law.”⁴¹

In addition to the cross-cutting constitutional violations that are common to all pre-independence laws, as a body of law such statutes are replete with individual policies that are discriminatory on their face and patently unconstitutional: many are in violation of the fundamental principles of Article 10 of the Constitution and the constitutional protections against unequal treatment and discrimination.

These concerns are enough to warrant a sincere debate as to whether colonial statutes should be retained.

VI. OPTIONS FOR RWANDA

If Rwanda chose to eliminate its statutory colonial baggage, there are a number of reasonable options. Fortunately, a strong Law Reform Commission is already established, and a law revision project is expected to eventually produce a revised code of Rwandan law.⁴² The long-term mechanism for fundamental reforms and their subsequent

⁴⁰ *See id.* Art. 10(4^o). In its most basic form, the Rule of Law is commonly described as encompassing at least certain minimum, formalistic requirements. “A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with, that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the coherent rules, that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270 (1980). *See also* LON FULLER, *THE MORALITY OF LAW* 46 (1964) (describing the formalistic requirements of the rule of law).

⁴¹ CONSTITUTION OF THE REPUBLIC OF RWANDA OF 2003 REVISED IN 2015, Art. 176.

⁴² In a recent interview, the former Chairman of Rwanda’s Law Reform Commission was quoted as explaining, “[c]urrently, the country is in a peculiar position because we have laws from colonial times that are still applicable, yet virtually nobody knows them. These laws are scattered because we don’t have a consolidated and update compendium of Rwandan laws.” *Rwanda Law Reform Commission to produce a fully revised edition of legislation within 5 years*, HOPE MAGAZINE (July 20, 2017), <http://www.hope-mag.com/index.php?com=news&option=read&ca=6&a=3166> (documenting interview with John Gara, former Chairman of Rwanda Law Reform Commission). Notably, in recent years, Parliament and the institutions of Rwanda’s legal sector have worked to revise fundamental portions of the code, including, *inter alia*, their work on a revised Penal Code, *see, e.g., Vote on new Penal Code kicks off tomorrow*, THE

maintenance is therefore in place. That effort must be supported.

In the meantime, other options may be used to clear the problematic statutes from the books. For example, a “task force” might review obsolete health laws, in order to clean up an area of law that is particularly critical to the population. However, task forces can introduce costs and bureaucratic delays. Ultimately, the task force would also encounter costly scavenger hunts and even some dead ends, as illustrated by our own experiences described above. Furthermore, because the problem is not limited to health, colonial laws would persist in other areas.

The most ambitious measure during this interim period, until a more fulsome and comprehensive revised code is available, would be to invalidate all colonial laws. One wholesale repeal of all pre-independence statutes would be efficient and definitive.

The choice is not unprecedented. The former American colonies continued using British statutes for a period of time after independence, while developing a legal tradition of their own.⁴³ In time, however, states responded to the growing need for certainty about the body of valid positive law in their jurisdictions.⁴⁴ That need led to the repeal of all British statutes that had not been affirmatively re-enacted after independence: in 1788, for example, just 12 years after declaring independence from England, the New York legislature repealed all British statutes.⁴⁵ Virginia did the same in 1792.⁴⁶ As did New Jersey in 1799.⁴⁷ And more followed.⁴⁸

NEW TIMES (Dec. 27, 2017) <http://www.newtimes.co.rw/section/read/226429>, and the recently passed Law N° 27/2017 of 31/05/2017 Governing Companies, updating core commercial laws.

⁴³ See Elizabeth Gasper Brown, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836*, at 23-31 (1964) (describing the continuity of certain colonial and British laws for a period of time after American independence).

⁴⁴ *Id.* at 31 (“pressure for greater certainty [about which laws were valid and in force] developed”).

⁴⁵ Act of Feb. 27, 1788, ch. 46, 1788-1792 vol. 2 N.Y. Laws 116 (“from and after the first day of May next, none of the Statutes of England, or Great-Britain, shall operate or be considered as Laws of this State.”).

⁴⁶ Act of Dec. 27, 1792, ch. 79, 1792-1806 vol. 1 Va. Acts 200 (“And whereas the good people of this commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws ... [b]e it therefore enacted by the General Assembly, That so much of the above recited ordinance as relates to any statute or act of parliament, shall be, and is hereby repealed; and that no such statute or act of parliament shall have any force or authority within this commonwealth.”).

⁴⁷ Act of June 13, 1799 § 4; Act of May 25, 1820, ch. 126, 1820 N.J. Laws 726.

⁴⁸ See, e.g., Act of Jan 2, 1806, 1806 Ohio Laws 38 (repealing all British statutes in Ohio); Act of Feb. 10, 1807, ch. 5, 1807 Miss. Laws 23 (repealing all British statutes in Mississippi); Act of Sept. 16, 1810, 1810 Mich. Pub. Acts 563 (repealing all British statutes in Michigan); Act of Jan. 23, 1837, ch. 26, 1836-1837 N.C. Sess. Laws 143 (repealing all British statutes in North Carolina); Act of Oct. 14, 1857, ch. 1,

More recently, Singapore made the same bold choice. In 1993, just 25 years after its independence, Singapore passed the Application of English Laws Act. The reform preserved some elements of British common law, but it repealed all British statutes at once, except for just a few that were expressly singled out for preservation.⁴⁹ In a speech to the New York Bar Association, Singapore's Chief Justice, Chan Sek Keong, explained the country's decision:

English law and English legal institutions are fine for England but not necessarily for Singapore because the political, social and cultural conditions are not the same ... The legal framework imposed by the British continued, even after independence in 1965, as the need for change did not appear to be necessary. By the late 1980s, the need for change became apparent, and in 1993, Parliament enacted the Application of English Law Act to 'retire' the Charter and the 1878 law. That, together with the abolishment of appeals to the Judicial Committee of the Privy Council in 1994 gave Singapore complete control of its own laws.⁵⁰

Like New York and other U.S. states, Singapore's approach stripped the colonizer's statutes out of the code with one wholesale repeal.

Another option might come through the judiciary, rather than a parliamentary repeal. Under Article 96 of the Constitution, the Rwandan judiciary has jurisdiction over the "[a]uthentic interpretation of laws."⁵¹ A request for such an interpretation may be made through the Bar Association by "[a]ny interested person."⁵² If an interested person sought an advisory opinion or brought a challenge against colonial laws, the judiciary may find grounds for invalidating all colonial laws due to the cross-cutting constitutional concerns described above, which are common to all colonial laws.⁵³

Some may hesitate before making such a bold move. Skeptics are likely to raise a counterargument that a wholesale repeal or invalidation of all colonial laws might leave "gaps" in the code if it is not known exactly what laws are being repealed. However, the actual effects of such "gaps" would be far less than it may seem: those "gaps" would

1858 Tenn. Pub. Acts 1 (ceding to the US exclusive jurisdiction over Tennessee lands); Ch. 146, 1873 S.C. Acts 778 (repealing the colonial statute in South Carolina).

⁴⁹ Application of English Laws, Act § 5.1 (1993) (Sing.) ("Except as provided in this Act, no English enactment shall be part of the law of Singapore").

⁵⁰ Chan Sek Keong, Chief Justice of Sing., Speech to the N.Y. State Bar Assoc. (Oct. 27, 2009).

⁵¹ Additional bases for jurisdiction are also likely. For example, Article 43 gives the judiciary jurisdiction over certain matters as "the guardian of human rights and freedoms." CONSTITUTION, art. 43 (2003) (Rwanda).

⁵² CONSTITUTION, art. 96 (2003) (Rwanda).

⁵³ *Supra* Section IV.

necessarily implicate laws that are largely unknown and generally unused. The potential risks resulting from such “gaps” need not outweigh the potential benefits to the rule of law, to improved governance, and to Rwandans’ human rights.

First, as the examples from the Ministry of Health illustrate, it is already the case that people do not know what pre-independence health laws are even there in the first place.⁵⁴ One either does not know exactly what is being preserved or one does not know exactly what is being repealed. Invalidating all pre-independence laws would therefore bring greater clarity about what law is *in force*, which is the more important alternative between the two.

Second, some may question how to deal with a potential “gap.” *However, filling that void with laws of a colonizer is no better than a gap.* A superior solution is already provided for in Rwandan law, where Article 6 of the Civil Procedure Law allows a judge to consider *contemporary* (rather than colonial) policies for addressing an issue not contemplated by statutory law:

Judges shall decide cases by basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, guided by judicial precedents, customs and usages, general principles of law and written legal opinions.⁵⁵

Importantly, the invalidation of colonial laws would not only expose “gaps” but it would also *excise* the malignant vestiges of a once pathological code.

Fortunately for Rwanda, the country has successfully managed ambitious reforms that disrupt old models many times before. To deliver better social services, Rwanda has managed bold choices to expand universal health care⁵⁶ and to establish English as the language of primary education,⁵⁷ to name just a few. Among its ambitious legal reforms,

⁵⁴ See, e.g., Part II *supra* (describing Ministry of Health’s experience with instruction on micronutrients); footnote 42 *supra* (Hope Magazine interview with Rwanda Law Reform Commission).

⁵⁵ Law N° 21/2012 of 14/06/2012 Relating to the Civil, Commercial, Labour and Administrative Procedure, Art. 6.

⁵⁶ See, e.g., *An African Trailblazer: How a Poor Country Brought Health Insurance to 91% of the Population*, THE ECONOMIST (Sept. 15, 2016) <https://www.economist.com/news/middle-east-and-africa/21707226-how-poor-country-brought-health-insurance-91-population-african> (describing how “government engagement” enabled Rwanda to achieve health insurance coverage that is “by far the highest in Africa”).

⁵⁷ See, e.g., *Speak English? Invest here. French need not apply*, THE ECONOMIST (Oct. 15, 2012) <https://www.economist.com/blogs/johnson/2012/10/language-rwanda> (“It isn’t strange that a country seeking more foreign investment is turning to English. What’s notable about Rwanda’s policy shift from French to English is its speed.”).

Rwanda introduced binding judicial precedent to the Supreme Court,⁵⁸ aligned laws with the East African Community, and promulgated a revised constitution all in recent years. Rwandan society is experienced at capitalizing swiftly on disruptive reforms that shake off old systems in favor of better ones; that experience positions it well to finally cast off the legal remnants of its colonial past. The next time science identifies new best practices to address public health needs, colonial baggage need not slow Rwanda down from blazing the trail right alongside other early adopters.

VII. CONCLUSION

A post-colonial nation can only restore its full sovereignty once it frees its legal system from undemocratic colonial remnants, now outdated, that hinder progress. Rwanda is certainly not the only country to face this post-colonial hurdle. But Rwanda is a trailblazer. By taking action on the colonial legal barriers to health, human rights and development, Rwanda also has an opportunity to inspire other formerly colonized countries to dig deep into their legal traditions and consider doing the same.

Ultimately, whether the moment comes after a lengthy review process or with an ambitious stroke, Rwanda will need to take a leap of faith and cast aside colonial laws. The country has never been more ready.

⁵⁸ N° 03/2012/OL of 13/06/2012 Organic Law determining the organization, functioning and jurisdiction of the Supreme Court, art. 47 RWANDA GAZETTE NO. 28.