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ABSTRACT

In this Article, the authors discuss Namibia's dual legal system, inherited from the previous South African regime, in light of the new governmnent's goal of national reconciliation. After a brief introduction, the authors in Part II address customary law on a theoretical level. They point out that the customary law emerging in Namibia during the colonial era was not a reflection of a true communal tradition, but rather was a tool used to control resources and to redistribute power.

In Part III, the authors review the history of the colonial system in Namibia. The German colonial authorities divided Namibia into the Police Zone and the northern area, dominated by the Ovambo region. The authors outline the different political and legal systems of these regions, focusing first on the situation within the Police Zone, in which white authorities ruled directly, and second, on the situation beyond the Police Zone, in which most rule occurred indirectly via indigenous political institutions.

Part IV discusses Namibia's new Constitution and its relationship to customary law. Certain provisions evidence that customary law continues to exist, but the nature of that system remains unclear. After examining

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three unsuccessful approaches that Namibia could take to resolve its customary law problem, the authors suggest an integration model. Under this model, the customary law systems followed by various ethnic groups would be integrated and harmonized with the national law system.

To utilize the proposed integration model, Namibian jurists must determine precisely the content of customary law and then must integrate it by creating a single legal system. The authors warn of several problems the government may encounter and provide possible means of handling them. In conclusion, the authors state that the integration model will eventually further the government's unification efforts.

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I. INTRODUCTION

When Namibia became independent in 1990, more than a century of colonial domination, first by Germany and then by South Africa, came to an end.[1] The legacy of those years, however, is exceedingly difficult to escape. The new government must battle not only an export-based economy, horrendous poverty, deficient or nonexistent health care, and widespread illiteracy, but also it must effect national reconciliation, particularly through fostering respect for the rule of law.[2] The government will not be able to create a culture of respect unless it comes to terms with the dual legal system it inherited from the previous regimes. Under this

1. For the history of Namibia until independence, see LYNN BERAT, WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW 2-12, 184-86 (1990).

2. National reconciliation has been much on the minds of politicians. On November 15, 1989, the day after the results of Namibia's independence elections were announced, South West Africa People's Organization (SWAPO) leader and now President, Sam Nujoma, stated, "SWAPO wants to reassure the nation that it will standby its policy of national reconciliation. In this connection, we re-state our readiness to cooperate with all sectors of our society, including those in business, the Public Service, the farmers and the workers, in moving our society forward." Sam Nujoma, *quoted in* Jeffrey Balch and Jan S. Scholten, *Namibian Reconstruction and National Reconciliation: Putting the Horse Before the Cart*, REV. AFR. POL. ECON., Winter 1990, at 82, 91.

dispensation, national laws and courts apply to all, and customary laws and court systems operate with regard to the African population. Both systems are problematic. On one hand, the national laws and courts are alien institutions to the vast majority of the Namibian people.[3] On the other hand, one can argue that during the period of South African domination, the white authorities so cynically manipulated customary law that it bears an indelible colonial taint and must be abandoned.[4] The government undeniably manipulated customary law, customary legal institutions, and the individuals who administered them. Nonetheless, the so-called traditional authorities have real power bases with which the government will tamper at its peril.

This Article offers the Namibian government a way out of this legal quagmire. Section II briefly discusses the nature of customary law on a theoretical level. Section III examines the colonial legal system that prevailed in Namibia. Section IV surveys the treatment of customary law elsewhere in independent Africa, and Part V suggests that Namibia adopt an integration model that will harmonize the two legal systems.

II. THE NATURE OF CUSTOM: A THEORETICAL DISCUSSION

Much of the writing on customary law offers a questionable image of custom as a cohesive, integrated body of unchanging law. This image is found not only in the works of colonial legal scholars,[5] but also in the materials produced by those ostensibly in favor of liberation.[6] These writings avoid the question of how colonial regimes manipulated custom to assist them in their quest for continued domination.

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3. Under South African rule, the vast majority of the Namibian people saw western-derived law as an instrument of oppression. *See generally* DAVID SOGGOT, NAMIBIA: THE VIOLENT HERITAGE (1986). At present, many have the perception that the system is experiencing a crisis of legitimacy. *See, e.g.*, Pearlie Joubert, *Is Ons Regstelsel in 'n Geloofwaardigheidskrisis?*, VRYE WEEKBLAD, Nov. 30, 1990, at 11 (translatted by author).

4. One example of colonial interference that eventually reached the Appellate Division of the Supreme Court, South Africa's highest court, concerned the notorious tradition of flogging both male and female SWAPO supporters with the epokolo, a traditional weapon. SOGGOT, *supra* note 3, at 67-68. This article will use the terms "customary law" and "customary courts," and "national law" and "national courts." The literature often refers to national law and national courts as general law and general courts.

5. For a discussion of their program with reference to South Africa, see Robert Gordon, *The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa*, 2 J. HIST. SOC. 41 (1989).

6. *See, e.g.*, UNITED NATIONS INSTITUTE FOR NAMIBIA, THE LEGAL SYSTEM OF NAMIBIA: PAST, CURRENT AND FUTURE PERSPECTIVES, Working Paper, n.d (unpublished and on file with author).

Settler magistrates and native commissioners spent considerable energy ensuring that customary law would continue to exist in a form that suited their colonial designs. Customary law, as it emerged in the colonial era, was not the product of some authentic communal tradition, but rather was a tool developed by colonizers and indigenous elites to control resources.[7] Therefore, institutionalization of customary law was part of a process for redistributing power.[8]

Customary law must be viewed within the context of how so few officials effectively managed to dominate a large population for a considerable time. Chiefs and headmen had to be kept strong enough to control their own people, but weak enough for the regime to control them. Ironically, the system worked precisely because so few whites were there to supervise it. Whites generally lent quasi-recognition to customary law by underlining its ritual aspects. For example, white officials and their entourages made periodic tours of the countryside. Visits to chiefs and headmen typically involved the ceremonial slaughter of cattle. As Karen Fields has pointed out in her work on Central Africa, by engaging in ritual activity, both the colonizers and the colonized endeavored to legitimate their rule and create autonomy for their political actions.[9] Thus, as jurist Richard Abel has written, customary law became particularly appealing to the colonizers for whom it was "a mechanism by which the state extends its control so as to manage capital accumulation and defuse the resistance this engenders."[10] This was particularly true in the case of South African-controlled Namibia.

III. THE COLONIAL SYSTEM: GERMAN AND SOUTH AFRICAN RULE

In 1884, Germany declared a protectorate over all of present-day Namibia, except Walvis Bay and certain offshore islands.[11] The German colonial administration of what was then known as the South West Africa Protectorate proved to be one of the most brutal in Africa.[12] South African forces occupied South West Africa during the First World

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7. *See* Gordon, *supra* note 5, at 57-60.

8. Robert Gordon, *Vernacular Law and the Future of Human Rights in Namibia*, *in* ACTA JURIDICA (forthcoming 1991).

9. KAREN E. FIELDS, REVIVAL AND REBELLION IN COLONIAL CENTRAL AFRICA 61-90 (1985).

10. RICHARD L. ABEL, *Introduction*, in 1 THE POLITICS OF INFORMAL JUSTICE 6 (Richard L. Abel ed., 1982).

11. BERAT, *supra* note 1, at 4.

12. *See* SOGGOT, *supra* note 3, at 1-12.

War.[13] After the war, according to the terms of article 119 of the Treaty of Versailles, Germany renounced its sovereignty over its South West African protectorate in favor of the Allied and Associated Powers, which placed the territory under the mandate system of the League of Nations (the League).[14] The Union of South Africa (the Union) administered the territory on behalf of the British Empire as a class C mandate.[15] The mandate agreement permitted South Africa to administer the territory as an "integral portion" of the Union, subject to a trust obligation to advance "to the utmost the material and moral well-being and the social progress" of its indigenous inhabitants.[16] South Africa also was to submit an annual report to the League describing its administration in detail.[17]

The major administrative legacy from the German colonial era was the division of the territory into the Police Zone, an area in which the government encouraged white settlement, and the northern area, in which minimal direct settler penetration occurred.[18] In the Police Zone, the white authorities forcefully proletarianized most of the indigenes and each magisterial district had a small "native reserve," mostly for the elderly and infirm. Conversely, the densely-populated Ovambo region dominated the northern area.[19] Ovamboland was divided into what Loeb described as feudal states.[20] Along with its cultural satellite, the Kavango, Ovamboland contained over half the nation's population. Unlike the Police Zone, in which white authorities directly ruled the reserves, in the north, indirect rule through the extensive use of indigenous political institutions was the norm. This occurred because Ovambo-speakers were so well-armed and organized that direct settler conquest would have been exceedingly costly, both financially and in terms of human lives. Ovamboland soon became a source of pride for the South African admin-

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13. BERAT, *supra* note 1, at 4.

14. *Id.*

15. *Id.* Article 22 of the Treaty of Versailles divided the former German and Turkish colonies into A, B, and C mandates, according to the level of civilization—from highest to lowest—that the nations at the conference believed the indigenous inhabitants had attained. League of Nations Covenant art. 22, *reprinted in* F.S. NORTHEDGE, THE LEAGUE OF NATIONS, app. A, at 324-25 (1986).

16. *Id.* (citing South West Africa Mandate Agreement, Dec. 17, 1920, art. 2, *reprinted in* THE SOUTH WEST AFRICA/NAMIBIA DISPUTE 72 (John Dugard ed., 1973)).

17. BERAT, *supra* note 1, at 4.

18. On the German legacy, see J.H. ESTERHUYSE, SOUTH WEST AFRICA 1880-1894, 237-39 (1986); *see also* André du Pisani, *Namibia: The Historical Legacy*, in NAMIBIA IN PERSPECTIVE 13, 15-18 (Gerhard Totemeyer et al. eds., 1987).

19. *See* sources cited *supra* note 18.

20. EDWIN M. LOEB, IN FEUDAL AFRICA 42-46 (1962).

istrators, who, ever ready to make a virtue out of necessity, emphasized in their annual reports to the League of Nations that this vast area with some 300,000 inhabitants required only a handful of white officials and police.[21] Indeed, several commentators, including Lord Hailey, glowingly commended Messieurs Hahn and Eedes, the long-term commissioners stationed in the area for forty years, as serving as a blueprint for the administration of any African colony.[22]

While South African rule brought the South African legal system to the territory as the primary legal system,[23] the complex that became known as customary law was divided by the "Red Line," which split the territory into the Police Zone and the area beyond it.[24] This division emerged despite, and probably was amplified by, the overarching paternalistic and patronizing administrative practice of actively discouraging intervention by legal practitioners in native administration on two grounds: 1) indigenes had free and unrestricted access to unbiased, competent expert opinion within the Department of Native Affairs; and 2) if indigenes were dissatisfied with a native commissioner's judgment, they could appeal to the Chief Native Affairs Commissioner.[25]

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21. Permanent Mandates Commission, Minutes, 6A League of Nations Publications (15th Sess.) (1929); Permanent Mandates Commission, Minutes, 6A League of Nations Publications (14th Sess.) (1928); South African reports to the League include Permanent Mandates Commission, Minutes, 6A League of Nations Publications (3d Sess.) (1923). For a description of South Africa's administration of South West Africa under the mandate system, see JOHN H. WELLINGTON, SOUTH-WEST AFRICA AND ITS HUMAN ISSUES 270-319 (1967). According to United Nations figures, by 1970, the nearly 700,000 Ovambo comprised almost 55% of modern Namibia's population of 1,252,500. SWAPO, TO BE BORN A NATION 4 (1981) (quoting 1970 census figures from the U.N. Institute for Namibia which indicated the 670,000 Ovambo constituted 53.5% of the population whereas whites accounted for 11.8% of the population).

22. *See, e.g.*, Nissen Davis, *"Shongola" Cocky Hahn "The Whip,"* S.W. AFR. ANN. 33 (1977).

23. South Africa's hybrid or mixed legal system contains three main elements: Roman, Roman-Dutch, and English law. For a discussion of South Africa's mixed system, see Imre Zajtay and W.J. Hosten, *The Permanence of Roman Law Concepts in the Continental Legal System and South African Law*, 2 COMP. & INT'L L.J. S. AFR. 181, 192-205 (1969). *See also* W.J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 133 (1980).

24. On Ovamboland, see generally Gervase Clarence-Smith & Richard Moorsom, *Underdevelopments and Class Formation in Ovamboland 1844-1917*, *in* THE ROOTS OF RURAL PROPERTY IN CENTRAL AND SOUTHERN AFRICA (Robin Palmer & Neil Parsons eds., 1977).

25. *See, e.g.*, General Circular 24 of 1952, file A50/22/1 (unpublished and available in the State Archives, Windhoek, Namibia).

A. *The Situation Within the Police Zone*

Indigenes were concentrated either in towns or reserves within the Police Zone, and many were scattered on settler farms and ranches. Poorly paid, poorly qualified welfare officers administered the reserves. Later, reserve superintendents administered the reserves. They reported to the local magistrate, who served on an agency basis as the local native commissioner. In this task, a coterie of headmen and councillors assisted the magistrates.[26]

In brief, while headmen had unlimited access to any reserve inhabitant's house, they had no rights to allocate land, to hear any criminal cases, and to levy fines or charges.[27] Most of their duties entailed assisting the welfare officer. Specifically, they had to see that inhabitants were registered, to report new arrivals of people and livestock, to assist in the collection of taxes, and to keep the reserve vagrant-free. Subject to administrators' instructions, they might be required to act as guardians for orphans and children "according to ruling native law and custom."[28] Headmen were to exercise general control over their authorized areas in which they were to "enjoy the privileges provided by the long-established and generally recognized norms and instances lent to them by their tribes."[29] Otherwise, they were not to use any force or other deliberate means to obtain any fee, reward, or gift from any person.[30]

In contrast to the situation in either South Africa or the northern part of South West Africa, no provision existed for chiefs or headmen within the Police Zone to hear civil cases. A proclamation, however, allowed for the establishment of special civil courts presided over by the magistrate or native commissioner to hear civil and especially matrimonial cases, even in instances when indigenes were married according to colonial laws.[31] In these courts, the native commissioner could call up individual

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26. Their mode of appointment, powers, and duties were defined by GN 68/1924, as amended. Government Notice 68/1924, Official Gazette of South West Africa, June 16, 1924, at 1651 (as amended) [hereainfter GN 68/1924]. Government Notice 60/1930 and Government Notice 239/1930 defined these powers for headmen and concillors in the Berseba and Bondelswart Reserves, respectively. For all intents, they were the same as those discussed in this Article.

27. GN 68/1924, *supra* note 26, at 1651.

28. *Id.*

29. *Id.*

30. Government Notice 60/1930, Offical Gazette of South West Africa, Mar. 15, 1930, at 6374.

31. Native Administration Proclamation 15/1928. Indeed, these courts could grant inexpensive divorces and had one indirect, but major, consequence for ethnicity. Many so-called coloureds (people of mixed descent), who would have had to obtain a divorce in

assessors who could be, but rarely were, indigenes. Lawyers could appear in these courts only with the commissioner's permission. Appeals from this court were to the Supreme Court,[32] but the appellate system was not actually used. A survey of Supreme Court records from 1920 to 1985 failed to reveal a single appeal.[33] As one official explained, "[t]he disputes that arise between native and native are usually very trivial and generally settled out of court. The cases brought to court are as a rule actions for divorce."[34]

In the urban areas, indigenes were compelled to live in proclaimed townships, controlled by a white municipal official known as the location superintendent or, later, the township manager.[35] Invariably, most towns were magisterial seats, and thus, the native commissioner directly heard legal disputes. In 1947, after a study of the Northern Rhodesian urban courts,[36] similar institutions were established in the larger Namibian towns. Typically, they consisted of the local indigene Advisory Board member and four local residents. They were empowered to try all minor civil matters and offenses under either "Native law or Common law" and could impose fines to be paid to the location superintendent.[37] These courts initially were successful since they had a "most sobering effect, especially on the younger people, who were inclined to be rather immoral and disrespectful towards their parents and elders. Many people who were living together in concubinage have been persuaded to marry legally; breaches of the peace now very seldom occur."[38] These courts drifted, however, into disuse.[39]

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the Supreme Court, a costly exercise, simply changed their ethnic classification via a pro forma procedure to become members of some indigenous group. Having made the change, these individuals were then able to obtain an inexpensive divorce.

32. Government Notice 59/1930, Official Gazette of South West Africa, Mar. 15, 1990, at 6367.

33. Survey conducted by Rorbert J. Gordon (memo on file with author).

34. M. Olivier, Inboorlingbeleid en Administrasie in die Mandaatgebied van Suidwes-Afrika 227 (1961) (unpublished Ph.D. thesis, University of Stellenbosch) (on file with author).

35. File A50/44, Native Law and Customs (unpublished and available in State Archives, Windhoek, Namibia) [hereinafter A50/44].

36. Northern Rhodesia is now Zambia.

37. File A50/44, *supra* note 35.

38. *Id.*

39. *Id.*; *see* WADE C. PENDLETON, KATATURA: A PLACE WHERE WE DO NOT STAY 29 (1974).

B. *The Situation Beyond the Police Zone*

The South African colonizers initially had no clear policy for the area beyond the Police Zone. Budgetary considerations resulted in a policy of indirect rule. This occurred after the death of Chief Mandume, the last king of the Kuanyama Ovambo, the largest Ovambo kingdom that spanned what is today the Namibia-Angola border. Mandume died resisting the South Africans and became a hero of mythic proportions.[40]

Once Mandume was deposed, the South African Administration created a Council of Headmen to administer the most populous Kuanyama area.[41] As early as 1917, their traditional courts received de facto recognition. The Kuanyama model rapidly became the administration's favorite example of the successful adaptive application of indirect rule and customary law. It later was extended to other areas such as Ukuambi and the Kavango.

The dispute hierarchy went from subheadmen, mostly wealthy Ovambo who had bought their wards from headmen, to local headmen, and then to a Council of Headmen, which consisted of all but three headmen. The remaining three served on a rotation basis and, together with the assistant native commissioner, formed an appeals court.[42] The native commissioner appointed headmen from the traditional elite for life, on the condition that they give satisfactory service to the administration. Headmen's duties entailed maintaining law and order, reporting all unnatural deaths, and ensuring an adequate supply of contract migrant workers to the Police Zone.[43] The native commissioner also could create special Ovambo police to assist these functionaries.[44]

The jewel in the crown of this system was undoubtedly the Council of Headmen Court. It consisted of all the headmen or their substitute subheadmen and met once a month for three days in its heyday.[45] The tribal secretary played a key role, serving as both bailiff and prosecutor.[46] He

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40. According to Ovambo belief, Mandume's body was buried in Endola (now Angola), and his head was buried at the Ovambo War Memorial in Windhoek. No written or photographic evidence of this belief can be found. The belief, however, comes from an old Kaunyama practice that victors beheaded enemy kings. It also gives symbolic sustenance to the phrase "Otate ulili Mandume," or we weep for Mandume. Many Ovambo speakers used this to justify theft while working for colonial institutions. Gordon, *supra* note 8.

41. Olivier, *supra* note 33, at 237.

42. *Id.*

43. *Id.* at 238.

44. *Id.*

45. *Id.*

46. *Id.*

was responsible for taking statements and serving as court messenger. Later, special offices of prosecutor and registrar were created. In 1956, this court heard eighty-nine civil and two criminal cases, of which eleven went on appeal, when "it is not at all unusual for Tribal Court judgments to be reversed."[47] Parties found guilty would be handcuffed at the Tribal Offices until relatives could pay the fine determined by a set scale.[48]

During the Second World War, wartime exigencies demanded that these traditional courts expand their already considerable autonomy. While some offenses, such as high treason, remained beyond their purview, other crimes, such as rape, could be dealt with according to "native law and custom since they are not considered crimes in the same sense as we regard them." Cases involving "revolting cruelty," however, were to be reported to the police.[49] "Less serious cases" of murder and homicide, at the discretion of the commissioner, could be dealt with by native law and custom, with the proviso that the prohibition against invoking the death penalty was emphasized again.[50]

Between 1949 and 1951, certain South African administrators recognized that the chiefs' and headmen's courts outside of the Police Zone had no legal status, native law had no legal recognition, and an avenue of appeal from these courts did not exist.[51] The native commissioner's courts informally would hear appeals from chiefs' and headmen's courts, but then the courts heard the cases de novo. Under conventional South African wisdom, appeal then would have been directly to the administrator in his capacity as supreme chief, but the commissioner's courts had no authority except in matrimonial cases.[52] While the administrator was the supreme chief, no provision existed for appeals to him or his delegated representative in civil or criminal cases.[53] Commissioner's courts

47. *Id.*

48. *Id.* For example, in cases of culpable homicide, the fine was ten head of cattle, eight of which went to the family of the deceased, one to the tribal trust fund, and one to the headman of the area in which the case occurred. *Id.*

49. Circular from Administrator, Dec. 30, 1942, File A50/79, Native Administration Proclamation (unpublished and available in the State Archives, Windhoek, Namibia).

50. *Id.* According to officials, traditionally the death sentence had been used frequently for those found guilty of theft of the chiefs' property, while homicide "[was] regarded lightly by the Ovambos. . . . In the eyes of the natives a small fine of, say a few head of cattle, was a severe punishment for taking a life." Oliver, *supra note* 34, at 230.

51. NC to CNC, Nov. 8, 1949, File NAO 51, Tribal Affairs, General Administration (unpublished and available in the State Archives, Windhoek, Namibia).

52. *Id.*

53. *Id.*

had the discretion to apply either native law or common law, but dealt exclusively with matrimonial cases arising from unions created according to western law.[54] This issue surfaced only in the 1950s, indicating that resolution of most legal disputes occurred at the local level. A survey of the holdings of the State Archives in Windhoek revealed no appeals beyond the commissioner level.[55]

Generally, the South African overlords were highly satisfied with their system. Also pleased were the indigenous rulers, who were the major beneficiaries of the system and who, thus, consistently opposed attempts to institute legal reforms that would undermine their authority. For example, in 1968 at the first meeting of the Legislative Council of the Ovambo Tribal Authority, the South West African Administrator-General urged legal reform as a high priority of his administration. His proposal received a negative reception from the traditional leaders, who feared they would be deprived of both their power and wealth because the fines they levied were a major sources of income.[56] This thinking undoubtedly will prove one of the most formidable obstacles to the Namibian government in its quest to reform the legal system.

IV. THE WAY FORWARD?

The Namibian Constitution of 1990, in many respects, is a model for the world.[57] The eighty-page document, which represents the first time the people of an African country drafted their own constitution, contains many human rights guarantees. Among the rights protected are fundamental freedoms,[58] life,[59] liberty,[60] and human dignity.[61] Also guaranteed is the right to culture. According to article nineteen:

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54. *Id.*

55. Survey conducted by Robert J. Gordon (memo on file with author). In broad sweeps, other parts of Ovamboland and the Kavango, replicated the system in which the indigenes were reluctant to use it. For example, the Kavango native commissioner complained that "[t]here is still a reluctance on the part of Tribesmen to lodge appeals against the judgment of Headmen and or Chiefs . . . I think the position is that natives are still afraid to appeal for fear [of victimization]." Extract, bimonthly meeting, May 1949, File A50/44/1 (unpublished and available in the State Archives, Windhoek, Namibia).

56. GERHARD TÖTEMEYER, NAMIBIA: OLD AND NEW 76 (1978).

57. NAMIB. CONST. (1990), *reprinted in Republic of Namibia, in* 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1991) [hereinafter *Republic of Namibia*].

58. *Id.* art. 21, at 23 (including the freedom of speech, thought, and religion).

59. *Id.* art. 6, at 19.

60. *Id.* art. 7, at 19.

61. *Id.* art. 8, at 19.

> Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.[62]

Although not explicitly mentioned, good authority exists for the proposition that culture includes the right to customary law.[63] The Constitution, however, does not address the issue. It indicates only that the Constitution is the supreme law[64] and that there will be a Supreme Court, a High Court, and lower courts "subject only to this Constitution and the law."[65] Moreover, the Constitution states:

> The laws which were in force directly before Independence governing the jurisdiction of Courts within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges, Magistrates and other judicial officers, shall remain in force until repealed or amended by Act of Parliament.[66]

Thus, with regard to customary law, article 66 provides:

> (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
> (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.[67]

The only other reference to customary law comes with regard to citizenship.[68] According to article 4(3)(aa), "a marriage by customary law shall be deemed to be a marriage: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which defines

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62. *Id.* art. 19, at 22.

63. *See generally* FRANCESCO CAPOTORTI, STUDY OF THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1; JOSÉ R. MARTINEZ COBO, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub. 2/1986/7/Add. 4, U.N. Sales No. E.86.XIV.3.

64. NAMIB. CONST., pmbl., *reprinted in Republic of Namibia, supra* note 57, at 15.

65. *Id.* art. 78(1), (2), at 43-44.

66. *Id.* art. 138(2)(a), at 60.

67. *Id.* art. 66, at 40.

68. Chapter 2 of the Namibian Constitution deals with citizenship matters. *Id.* at 16.

the requirements which need to be satisfied for a marriage by customary law to be recognized as such."[69] While these provisions, taken together, point to the continued existence of customary law, the nature of that system remains a vexing issue.

In its quest for an equitable system, the Namibian government has many avenues it can explore. In recent years, governments around the world have shown much interest in customary or indigenous law. This interest impacts the development of both national and international policies. Besides bodies that are domestic organizations tied to national governments,[70] a number of private and public international organizations also examine issues involving the use of customary law; these include the North American Working Group of the Commission on Folk Law and Legal Pluralism[71] and the Working Group on Indigenous Populations of the United Nations Human Rights Commission.[72] Despite the global attention, African states generally have not arrived at a satisfactory solution to the problem of legal dualism. Three unsuccessful approaches are common.

First, in many African states, customary law has been viewed with hostility.[73] Since the colonizers used customary and western law on a racial basis for the purpose of implementing divide-and-rule strategies, many Africans saw it as tainted by discrimination and as antithetical to the goals of African nationalism. Indeed, many nationalists have thought of it as representative of the old, unprogressive order, while western law—whether capitalist or socialist in orientation—represented the forces of modernity, especially in the civil and economic arenas. These nationalists have sought to eliminate customary law.

In Ethiopia, for example, the government endeavored to change the entire legal system by all but abolishing customary law. Displaying a remarkable lack of cultural sensitivity, the French drafter of the Ethiopian Civil Code believed that "it is not an evolution that the country

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69. *Id.* art. 4(3)(b), at 18.

70. An example is the Australian Law Reform Commission. For the recent work with regard to customary law, see AUSTRALIAN LAW REFORM COMMISSION, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS (2 vols.) (1986).

71. The Working Group involves individuals who deal with Native American common law on a professional basis. *See* James W. Zion, *Searching for Indian Common Law*, in INDIGENOUS LAW AND THE STATE, at 121 (Bradford W. Morse & Gordon R. Woodman eds. 1987).

72. E.S.C. Res. 1982/34, U.N. ESCOR, Supp. No. 1, at 26, U.N. Doc. E/1982/82 (1982).

73. *See infra* notes 74-75 and accompanying text.

needs, it is a revolution."[74] In his opinion, customary law was unstable, not truly jurisprudential, and not sufficiently uniform. He also argued that it was responsible for Ethiopian underdevelopment. Therefore, "Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique in itself, as was done . . . by the Romans and the English."[75] To develop and modernize Ethiopia requires "the adoption of a 'ready-made' system; they enforce the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations."[76]

With such views, the resulting Ethiopian code not surprisingly was a synthetic work based on the civil codes of Italy, France, Switzerland, Greece, and Egypt.[77] The only concession to Ethiopian customary law was that no law would be incorporated into the code if it were entirely antithetical to Ethiopian values.[78] Yet the code permitted even this grudging acknowledgement of customary law only if the customary practice was widely followed, was in harmony with the Ethiopian concept of justice, was in accordance with economic progress, and was clear enough to be committed to civil law terminology.[79] That those in the government could have thought that people would abandon their traditions overnight because an edict came from a remote central government is astonishing. This rapid change probably caused great resentment on the part of the populations whose law was challenged and, instead of fostering national unity, helped invigorate separatist claims.[80]

A second approach to customary law used by some African governments has been to deal with customary law through codification. These governments have taken their cue from western law, whose prime examples of the desire for harmony appear in Justinian's *Corpus Iuris Civilis*[81] and the *Code Napoléon*.[82] Adherents of this approach have en-

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74. René David, *La refonte du code civil dans les êtats africaines*, ANNALES AFRICAINES 160, 161 (1962) (translation by author).

75. René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TULANE L. REV. 187, 188-89 (1962-63).

76. *Id.*

77. KENNETH R. REDDEN, THE LEGAL SYSTEM OF ETHIOPIA 53-54 (1968).

78. *Id.* at 75-76.

79. *Id.* at 76.

80. Those claims appear to have come to fruition with the recent collapse of the government of Mengistu Haile Mariam. *See* Clifford Krauss, *Ethiopian Capital in Rebels' Hands*, N.Y. TIMES, May 29, 1991, at A1.

81. The Roman Emperor Justinian's *Corpus Iuris Civilis* has four parts: 1) the Institutiones, 2) the Digest or Pandecta, 3) the Codex, and 4) the Novellae. For a further discussion of the CORPUS IURIS CIVILIS, see Stepehen L. Sass, *Medieval Roman Law: A Guide to the Sources and Literature*, 58 L. LIBR. J. 130 (1965).

82. The Code Napoléon was promulgated in 1804.

deavored to create codes that closely follow customary law. This more sympathetic approach, which, in many instances, has enjoyed more initial support from western scholars than from African politicians, derives from the notion that customary law is that which best mirrors social realities and comports with people's value systems. The 1959 Madagascar Code reflected this view.[83] The aim of that code, for which customary law was the basis, was to furnish the state with "unified legislation, adapted to the customs of the different population of Madagascar and accepted by them."[84] Nevertheless, the Madagascar Code did not retain customary law. It, too, was a change from the existing customary law, although a less pernicious one than in the Ethiopian case. In Madagascar, the change was moderate, while in Ethiopia it was revolutionary. Hence, the Madagascar Code modified customary law to harmonize conflicting rules, to remove aspects deemed unacceptable by the central government, and in certain instances, to consolidate it with civil law. One problem with these codification attempts is that African states have a high rate of illiteracy, and therefore written codes do not appeal to the vast majority of the people.[85]

A third approach to the problem of customary law has been to retain strict legal dualism between customary and national law. With few modifications, this continuance of colonial practice frequently has produced legal confusion. The dual system, such as that existing in Swaziland, frequently is unwieldy and extremely costly in a state with limited economic resources.[86]

In Namibia, the sordid legacy of German, and later South African, rule has left the inheritors of its fragile democracy with daunting problems of social welfare that demand urgent attention. To ensure the efficient administration of justice, while at the same time abiding by the constitutional guarantee of a right to culture, the Namibian government should follow a fourth path: integration. This approach would mean integrating the plurality of systems as much as possible; the systems of customary law followed by the various ethnic groups would be harmonized with one another and with the supreme, national law. While unifi-

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83. Résolution de l'Assemblée Malgache, 2 juin 1959 (translation by author).

84. *Id.*

85. Among the literate, a large number of functional illiterates probably exist. For a description of Namibia's problems in education, see INTERNATIONAL DEFENCE AND AID FUND FOR SOUTHERN AFRICA, NAMIBIA: THE FACTS 47-50 (1989).

86. For a detailed description of the Swazi system, see Lynn Berat, *Customary Law in a New South Africa: A Proposal*, FORDHAM INT'L L.J. (forthcoming 1991) (manuscript at 17-24, on file with author).

cation—the imposition of a uniform law—may be more efficient, integration is more viable for the foreseeable future because it will bring together, without obliterating, laws of diverse origins and will minimize social dislocation. Therefore, integration is a juridical halfway house between pluralism and uniformity. While it allows varying laws to continue to exist, it promotes standardizing them and removing conflicts between them.

Integration will not be achieved easily because fundamental differences exist between the customary law and the national law. Despite the onslaught of corrupting colonial influences, customary law has remained communal, as opposed to the individualistic nature of the national law. Under customary law, kinship permeates the social structure, and legal proceedings are about the community as much as they are about the individual. The goal of these proceedings is to foster reconciliation and harmony within the community. As a result of this orientation, customary law is nonspecialized and unwritten. Since decisions generally are not reported, and since a lack of legislation and written law exists, ascertaining legal precedent is difficult. Codes, such as the Laws of Lerotholi[87] in Lesotho and the Zulu Code[88] in South Africa, are restatements, and not bodies of original legislation. Treatises on customary law, as in Swaziland, are few and do not reflect the dynamic nature of customary law.[89] Moreover, the emphasis on conciliation and communalism creates difficulties for western-trained jurists who think of customary law in terms of the national law that follows the western division into public and private law.

Nevertheless, if Namibian jurists are to make any strides in modifying the legal system, the content of customary law must be determined precisely. Attempts at ascertainment and restatement of customary law have been made in Malawi, Kenya, and certain states of West Africa with varying degrees of success.[90] Carrying out this project in Namibia, however, will be particularly difficult. Namibia has only a few African lawyers, and consequently, only a few qualified jurists with facility in any of the indigenous languages.[91] Compounding the problem is that these Afri-

87. For a discussion of the Laws of Lerotholi, see Sebastian Poulter, *The Place of the Laws of Lerotholi in the Legal System of Lesotho*, 71 AFR. AFF. 144 (1972).

88. For a description of the Zulu Code, see THE INTERNAL CONFLICT OF LAWS IN SOUTH AFRICA 35-38 (AJGM Sanders ed., 1990).

89. *See* Berat, *supra* note 86 (manuscript at 23).

90. *See* A.N. ALLOTT, *What Is to Be Done with African Customary Law?: The Experience of Problems and Reforms in Anglophone Africa from 1950*, 28 J. AFR. L. 56, 65-70 (1984).

91. Namibia inherited from South Africa the British model of a bifurcated bar. Only

can lawyers have received their training abroad in schools that do not imbue students with sensitivity to customary law and legal institutions as part of the curriculum.[92] Also, these lawyers have not been trained in the research and fieldwork techniques that would be required for a project of ascertaining customary law.

The lawyers could be accompanied by anthropologists, but because of the small number of educated black Namibians, the anthropologists almost certainly would be white foreigners who would have to work through translators, and who conceivably would be viewed with suspicion by their informants.[93] Since few have studied Namibia's peoples, a real prospect exists that many errors of interpretation would be made in the ascertainment of laws. Identifying who the informants should be is a lesser problem. Presumably the consultations should be with as many of the most respected members of the relevant communities as possible so that their shared values will emerge.

Once the law is ascertained, the next step would be to integrate it. This would mean the creation of a single legal system applicable to all. Integration should occur in two phases. First, in the initial period, the basic dualism of the legal system would remain, but the laws of different ethnic groups would be harmonized according to the process described above and then standardized. Second, after a period of time in which the process of nation-building hopefully will create a favorable social climate, the diverse systems—customary and national—could be replaced with one system that would allow for dualism when necessary.

By harmonizing only customary laws, some African states have stopped short of entering the second phase. The argument advanced in such cases, as in Tanzania, is that differences in customary law divide the state.[94] Thus, in the 1960s, with the express objective of fostering national unity, the Tanzanian government began a unification program that produced only superficial uniformity.[95] Reconciling customary law with the national law, however, is imperative. Conflicts between the two are more likely to generate problems than possible conflicts between types of customary law, which are few, although possible, as when people of different groups marry. Such customary-national conflicts will

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two Africans are advocates in private practice. Among Namibian attorneys in private practice, only four are African.

92. The University of Namibia does not yet have a law school.

93. *See* sources cited *supra* note 85.

94. *See generally* Yash Ghai, *Ethnicity and Group Relations*, in UNESCO, TWO STUDIES OF ETHNIC GROUP RELATIONS IN AFRICA: SENEGAL, THE UNITED REPUBLIC OF TANZANIA 107-08 (1974).

95. *See id.* at 109-10, 117-19.

continue to occur if customary law is made uniform or even codified.

The road to national-customary integration may be long and difficult. Particular attention should be paid to procedural problems. Conflict of laws rules must be developed and made statutory. For the sake of simplicity, these should be devised for all areas of the law and located in a single statute. In addition, a rule that customary law will apply in civil matters unless both parties clearly intend that national law applies might be adopted. A further rule might empower, or even require, customary courts to apply national criminal law, a field in which the two types of law tend to be closely related anyway. These changes would help eradicate the problem of forum-shopping that plagues the national courts in states such as Swaziland, in which the retention of strict dualism has proved to be one of the greatest obstacles to creating legislative harmony.[96]

National courts also must be permitted, or even required, to take judicial notice of customary law. It would be impractical to insist that customary law be a matter of proof, even though little is available that can be used to prove such law. As indicated, few texts exist, and the decisions of the customary courts are not published. Even once the ascertainment called for above is completed, the position of customary law in national courts will remain the same, as long as foreigners dominate the judiciary.[97] With the shortage of Namibian lawyers, that will certainly be the situation for some time to come. If black judges are chosen from other African states, or from among Namibia's handful of black lawyers—unless, of course, they participated in the ascertainment project—the situation will remain the same until those lawyers receive training in customary law. Training of the lay magistracy in customary law must also occur. All of this training requires the development of a Namibian law school with a curriculum tailored to the needs of the state.[98] At such a school, customary law should be part of each subject and required for graduation. Particular attention should be devoted to inculcating the view that customary law is neither inferior to, nor ineffective when compared with, the national, western-style law. The law school also could serve as a venue for the training of magistrates.

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96. *See* Berat, *supra* note 86 (manuscript at 21).

97. Foreigners tend to dominate the judiciary in many African countries. This is the case in Namibia's southern African neighbors Swaziland, Lesotho, and Botswana. On this subject, see Berat, *supra* note 86 (manuscript at 17-36).

98. The University of Botswana may furnish a model for Namibia. That University has a law department that, for nearly a decade, has been producing graduates trained not only in the national law, but also in the customary law. Berat, *supra* note 86 (manuscript at 41).

Perhaps the ultimate goal of integration should be to make eventual unification possible. In Botswana, for example, a definite trend toward unification exists.[99] As of now, however, the day of unification is far away. Before government officials and jurists should even begin to think of unification schemes, many other battles must be waged and won, including national reconciliation, eradicating illiteracy, and expanding the economy. Only in this changed environment will sentiments for unification be able to gain popular support and thrive.

V. CONCLUSION

As Namibian politicians and jurists address the problem of national reconciliation, the dual legal system inherited as a legacy of foreign domination deserves much consideration. If agreement is reached that customary law should continue to exist, the form in which it will do so remains unclear. As Namibian politicians and jurists endeavor to fix the place of customary law in the new Namibian legal order, their options are many. Some African governments, in their zeal to create uniformity and to speed development, have chosen to abandon customary law. Others have maintained a strict dualism between customary and national law. Unification generally has been unsuccessful. Dualism also is fraught with problems. Accordingly, for the time being at least, Namibia should adopt an integration model. This would mean integrating the plurality of systems as much as possible; the systems of customary law followed by the various groups would be harmonized with one another and with the supreme, national law. This plan would foster the social harmony that one day may make unification possible.

99. This trend in Botswana is examined in detail in Berat, *supra* note 86 (manuscript at 32-42).