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Customary Law in a New South Africa: A Proposal

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Abstract

This Article explores avenues open to South African politicians and jurists in their search for a more equitable South Africa. Part I examines the international position of customary law. Part II considers the treatment of customary law elsewhere in Africa and gives particular attention to unification of laws and legal systems. Part III reviews the experiences of legal dualism in South Africa's neighbors, Botswana, Lesotho, and Swaziland. Part IV discusses customary law in South Africa. Part V contends that although the unification of laws is a desirable long-term goal for South Africa, at present it is impractical. Part V also suggests that an integration model that combines elements of dualism and unification is the most prudent solution to the problems presently facing South Africa's legal system.

CUSTOMARY LAW IN A NEW SOUTH AFRICA: A PROPOSAL

Lynn Berat *

INTRODUCTION

As many in South Africa endeavor to rescue their country from the horrors of apartheid and transform it into a non-racial democracy, there is much debate over the nature of the constitution that will underpin a new legal order.¹ Of particular concern to many politicians and jurists is the question of a bill of rights.² While major and minor players in the political struggle all seem committed to adopting a new constitution,³ there remains considerable debate about its contents.⁴ Unfortunately, these players focus little attention on what may prove to be one of the most explosive issues confronting a transformed South Africa, the status of customary law.

Educators and linguists speak often of a right to culture in South Africa.⁵ Indeed, the draft bill of rights of the African National Congress, South Africa's main anti-apartheid organization, appears to mirror this thinking.⁶ Article 5 of the draft,

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1. See generally, e.g., Lynn Berat, *Harmonizing Competing Ethnonationalisms?: A Bill of Rights for a New South Africa*, 19 J. POL. SCI. 90 (1991); Lynn Berat, *A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary*, 13 LOY. L.A. INT'L & COMP. L.J. 467, 469-78 (1991).

2. See generally, e.g., Berat, *A New South Africa?*, *supra* note 1, at 469-78.

3. See David Breier, *Raw Power is the Name of the Game*, SUNDAY STAR (Johannesburg), Aug. 11, 1991, at 6; Shaun Johnson, *ANC Throws Down the Gauntlet*, STAR (Johannesburg), Aug. 8, 1991, at 1; Shaun Johnson, *Interim Rule Now Thrust of Negotiations, Says ANC*, STAR (Johannesburg), Aug. 8, 1991, at 6. These political groups include the African National Congress, the Democratic Party, the Inkatha Freedom Party, the ruling-National Party, and the Pan Africanist Congress.

4. See, e.g., Berat, *A New South Africa*, *supra* note 1, at 469.

5. See, e.g., Mbulelo Mzamane, *Towards a Pedagogy for Liberation: Education for a National Culture in South Africa*, presented at Yale University Southern African Research Program Spring Workshop, Apr. 1991 (on file at office of Southern African Research Program, Yale University).

6. Constitutional Committee of the African National Congress, *A Bill of Rights for a Democratic South Africa: Working Draft for Consultation*, reprinted in MONITOR, Dec. 1990, at 64 [hereinafter *Draft Bill of Rights*]; see *Constitutional Guidelines for a Democratic South*

for example, is entitled "Rights of Association, Religion, Language and Culture."⁷ The draft's provisions, however, make no attempt to consider whether the right to use customary law is part of a right to culture.⁸ Moreover, the draft bill's discussion of South African courts does not explicitly mention cus-

Africa, 21 COLUM. HUM. RTS. L. REV. 235 (1989) [hereinafter *Constitutional Guidelines*] (reprinting ANC's guidelines). For additional information about the ANC, see, for example, TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945*, at 1-4, 6, 8-11, 25-30, 36-38, 80-84, 103-10, 120-29, 158-59, 180-82, 201-02, 339-43 (1983).

7. *Draft Bill of Rights*, *supra* note 6, art. 5.

8. *Draft Bill of Rights*, *supra* note 6. The ANC's proposals provide in part that a South African Constitution "shall include a Bill of Rights based on the Freedom Charter. Such a Bill of Rights shall guarantee the fundamental human rights of all citizens irrespective of race, colour, sex or creed, and shall provide appropriate mechanisms for their enforcement." *Constitutional Guidelines*, *supra* note 6, at 237. The Draft Bill of Rights states that "[t]here shall be freedom of association, including the right to form and join trade unions, religious, social and cultural bodies, and to form and participate in non-governmental organisations." *Draft Bill of Rights*, *supra* note 6, art. 5, § 1. It also states that "[s]porting, recreational and cultural activities shall be encouraged on a non-racial basis." *Id.* art. 5, § 11.

In 1989, the government-appointed South African Law Commission, the views of which do not necessarily reflect those of the ruling National Party, produced a working paper that proposed the adoption of a bill of rights. SOUTH AFRICAN LAW COMM'N, PROJECT 58: GROUP AND HUMAN RIGHTS 471-80 (Working Paper 25, Aug. 31, 1989) [hereinafter Working Paper]. After receiving many comments on its findings and proposals, the Commission produced a report that reviewed the comments and proposed a revised bill of rights. SOUTH AFRICAN LAW COMM'N, PROJECT 58: GROUP AND HUMAN RIGHTS (Interim Report, Aug. 1991) [hereinafter Interim Report]. The Interim Report endorsed recognition of a "right, individually or in community with others, freely to practice the religion and culture and freely to use the language of his or her choice, so that there shall be no prejudice to or favouring of anyone on account of his or her religion, culture or language." *Id.* at 692, art. 18. The Commission considered the role of customary law in Article 33 of the revised draft bill, which states that

[e]veryone has the right to have South African law, including the rules of South African Private International Law, applied in all proceedings before a court of law: Provided that legislation may provide for the application of the choice of legal rules relating to and judicial notice of the law of indigenous groups or the religious law of religious groups: Provided further that in civil proceedings such indigenous or religious law shall be applied only if all the parties agree thereto.

Id. at 697, art. 33.

The Commission had received a large number of recommendations that it delete the provision in the Working Paper draft bill that partially formed the basis for Article 33 in the revised bill. *Id.* at 430; see Working Paper, *supra*, at 479, art. 29. The Commission concluded, however, that to delete the earlier provision would invalidate all legislation providing for the application of indigenous law, a result the Commission considered unjustified. Interim Report, *supra*, at 430. It also refused an entreaty to propose extension of indigenous courts' statutory authority to apply indigenous law to criminal proceedings. *Id.* at 430-31.

tomary courts.⁹

South Africa has a dual system of laws and courts.¹⁰ The customary system has courts of chiefs and headmen, and divorce courts with jurisdiction over African parties.¹¹ The national system is composed of specialized and administrative tribunals, magistrates' courts, supreme courts, and the Appellate Division, South Africa's highest court.¹² Many, in their understandable zeal to dismantle apartheid, may ignore the continued existence of customary law, even though such law affects large numbers of people. It is an issue that the makers of a new order avoid at their peril.

This Article explores avenues open to South African politicians and jurists in their search for a more equitable South Africa. Part I examines the international position of customary law. Part II considers the treatment of customary law elsewhere in Africa and gives particular attention to unification of laws and legal systems. Part III reviews the experiences of legal dualism in South Africa's neighbors, Botswana, Lesotho, and Swaziland. Part IV discusses customary law in South Africa. Part V contends that although the unification of laws is a desirable long-term goal for South Africa, at present it is impractical. Part V also suggests that an integration model that combines elements of dualism and unification is the most prudent solution to the problems presently facing South Africa's legal system. This Article concludes that the integration of customary and national law in South Africa would create a social order likely to make the eventual unification of South Africa's legal systems possible.

I. *THE INTERNATIONAL POSITION OF CUSTOMARY LAW*

In recent years, governments around the world have

9. See *Draft Bill of Rights*, *supra* note 6, art. 2, §§ 8-24.

10. See J.D. Van der Vyver, *Human Rights Aspects of the Dual System Applying to Blacks in South Africa*, 15 *COMP. & INT'L L.J. S. AFR.* 306, 306 (1982).

11. *Id.* at 308-09. The fact that African homelands maintain customary law complicates this situation. South Africa has granted a fictional independence to four of these homelands, an "independence" that no other state recognizes. See *infra* notes 193-96, 206 and accompanying text (discussing homelands and current South African definition of customary law).

12. *Id.* at 309. The magistrates' courts took over the customary law jurisdiction of both the commissioners' courts and the appeals court for the commissioners' courts in 1986. See *infra* note 198 and accompanying text.

shown much interest in customary or indigenous law. This interest affects the development of both national and international policies. Aside from domestic organizations tied to national governments,¹³ a number of private and public international organizations are also examining issues involving the use of customary law.¹⁴ In the international sphere, it is clear that the status of local customary law is a matter of international human rights law that guarantees indigenous peoples the right to enjoy their own cultures. One aspect of this right is the right to use their own law.

This position of customary law derives from the incorporation of the right of non-discrimination into the jus cogens of the post-World War II period.¹⁵ In a departure from the Covenant of the League of Nations, the United Nations Charter propounds universal respect for human rights and fundamental freedoms, equality and non-discrimination.¹⁶ The Universal Declaration of Human Rights of 1948, like the Charter, does not deal specifically with the question of minorities.¹⁷ Since 1948, however, the United Nations has, in certain instances, concerned itself with the position of minorities.¹⁸

13. See, e.g., AUSTRALIAN LAW REFORM COMMISSION, *THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS* (1986).

14. James W. Zion, *Searching for Indian Common Law*, in *INDIGENOUS LAW AND THE STATE* 121, 122 (Bradford W. Morse & Gordon R. Woodman eds., 1988) (discussing international bodies engaged in studying use of customary law); see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, *REPORT OF THE SECOND (SOCIAL) COMMITTEE* 2, 11-12, U.N. Doc. E/1982/59 (1982) (adopting Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities, thus authorizing Sub-Commission to establish annually working group on indigenous populations).

15. See LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW* 470-71 & nn. 104-07 (1988); *infra* notes 16-24 and accompanying text. Jus cogens is defined as basic, fundamental, imperative, or overriding rules of international law, or peremptory norms "which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (4th ed. 1990).

16. U.N. CHARTER art. 1, ¶ 3.

17. See generally Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71, 77-78 (1948).

18. See, e.g., COMMISSION ON HUMAN RIGHTS, *STUDY OF THE LEGAL VALIDITY OF THE UNDERTAKINGS CONCERNING MINORITIES*, U.N. Doc. E/CN.4/367 (1950); COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *ACTIVITIES OF THE UNITED NATIONS RELATING TO THE PROTECTION OF MINORITIES*, U.N. Doc. E/CN.4/Sub.2/194 (1958); COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *ACTIVITIES OF ORGANS OF THE UNITED NATIONS IN THE FIELD OF*

Following the adoption of the Charter, the Universal Declaration, and other instruments, the protection of minorities no longer remained a political problem restricted to certain areas of the world. Rather, it became an issue concerning all states, one whose solution had to be found in the need to respect human rights and fundamental freedoms. Thus, for example, although the International Covenant on Civil and Political Rights of 1966 states that minorities have the right to enjoy their own culture, language, and religion, such a right clearly requires recognition by states.¹⁹ It seems inconceivable that a state can have obligations toward its minorities that it does not have toward its entire population. In this context, customary law appears to be a part of a people's culture.

The emergence of a right to culture since the 1950s provides additional support for the argument that states are bound to foster customary law. Indeed, many conferences held under the auspices of the United Nations Economic, Scientific, and Cultural Organization ("UNESCO") have emphasized the central role of governments in promoting cultural development.

Participants at a 1965 UNESCO seminar on multinational society urged the "recognition of the importance of maintaining permissible legal traditions" in many fields of law.²⁰ The seminar's participants unanimously agreed that states should not impose limitations on the customs of traditional groups.²¹ The 1970 Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies stressed that all governments are responsible for the adequate financing and appropriate planning of cultural institutions and programs.²² In 1972, the Intergovernmental Conference on Cul-

PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/81, 83, 84, 86 (1949).

19. See INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 27, reprinted in 6 I.L.M. 368, 375-76 (1967).

20. See SEMINAR ON THE MULTI-NATIONAL SOCIETY, U.N. Doc. ST/TAO/HR/23 (1965).

21. See *id.* The seminar's participants concluded that a state should intervene only when a custom "threatened the freedom of others or was contrary to public order, morality or health—in the sense of constituting an offence known to the law—or conflicted with the technological, social or economic advancement of the nation as a whole." *Id.* para. 115.

22. See U.N. Doc. SHC/MD/13 (1970), ch. 1, para. 51.

tural Policies in Europe suggested that governments have a duty to promote the right to culture.²³ Two years later, the UNESCO Seminar on the Promotion and Protection of Human Rights of National, Ethnic and Other Minorities encouraged public financing to support local customs.²⁴ These pronouncements suggest that international law guarantees a right to culture and thus binds states.

Given the commitment of various South African political organizations to promote the cultures of all groups and, therefore, customary law, the makers of the new order must overcome many dangers associated with an attempt to create a customary legal system truly representative of and responsive to the people's needs. Merely to accept the body of law that anthropologists designate as customary will do nothing to advance groups' cultures.²⁵ It may nevertheless be exceptionally difficult, if not impossible, to discern what exactly the customary law is because, by its nature, customary law is in a greater state of flux than written law.

II. THE AFRICAN EXPERIENCE: ATTEMPTS AT UNIFICATION

In light of these difficulties, as well as the problems of creating cohesion and national identity in a society in which

23. See *Final Report of the Intergovernmental Conference on Cultural Policies in Europe*, U.N. Doc. SHC/MD/20 (1972). A report to the conference suggested that [t]he right to culture implies a duty for governments and for the international community to make it possible for everyone, without distinction or discrimination of any kind, to take part in the cultural life of his community and of mankind generally. For this universal participation to be effective, the State must furnish the necessary means.

UNESCO Doc. SHC/EUROCULT/1, para. 7.

24. See *United Nations Seminar on the Promotion and Protection of the Human Rights of National, Ethnic and Other Minorities*, U.N. Doc. ST/TAO/HR/49, paras. 10-13 (1974) [hereinafter *UNESCO Seminar*] (urging states to adopt "concrete measures" to encourage development of minorities' cultures and to promote fundamental freedoms). The participants deemed it "the responsibility of the authorities to guarantee in law and in practice the maintenance and preservation of such traditions and customs and to provide for their autonomous development, where necessary by public financing." *Id.* para. 79. See generally *UNESCO Seminar, supra*.

25. See, e.g., Robert Gordon, *The White Man's Burden: Ersatz Customary Law and Internal Pacification in South Africa*, 2 J. Hist. Soc. 41, 41-46, 58 (1989) (concluding that South African anthropologists who adhere to crude ignorance of or hostility to customary law contribute to attempts to effect "internal pacification" of South Africa).

apartheid's adherents elevated the strategy of "divide and rule" to a high art, many may not view the continued existence of customary law as a good thing.²⁶ Over the years, some scholars and politicians have advocated legal unification rather than dualism.²⁷

Throughout the developing world, governments often point to the requirements of modernization and the necessity of fostering national unity as reasons to abandon customary law and replace it with unitary, national systems.²⁸ In many African states, governments have viewed customary law with hostility. As colonizers applied customary law on a racial basis, many Africans considered its use to be tainted by discrimination and antithetical to the goals of African nationalism.²⁹ Many nationalists have seen it as representative of the old, unprogressive order, and have considered Western law, be it capitalist or socialist in orientation, as representative of the forces of modernity, especially in the civil and economic arenas.

Consequently, various African countries dispensed with customary law when the regimes considered such law to be a colonial relic.³⁰ New governments often addressed questions of customary law through codification. African codification

26. On the divisiveness of apartheid policies, see LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 187-242 (1990).

27. For example, the London Conference on the Future of Law in Africa, chaired by Lord Denning and held from December 1959 to January 1960, during the dismantling of much of the British empire, concluded that

uniformity of law would undoubtedly make a valuable contribution to the administration of the law, and is therefore desirable in principle. . . . [B]etween communities and areas there are many variations—especially in native law and custom—which could and should be eliminated, thereby creating a greater degree of uniformity than at present exists.

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, 64 (1984) (quoting Conference's conclusions). Not all of the Conference's participants, however, represented Great Britain. Certain African lawyers and judges were present, but they had been trained in Great Britain and were not necessarily sympathetic to the needs of those who continued to follow customary law.

28. See M.W. Prinsloo, *Pluralism or Unification in Family Law in South Africa*, 23 *COMP. & INT'L L.J. S. AFR.* 324, 329 (1990).

29. See *id.*

30. In Western law, prime examples of the desire to harmonize law are the *Code Napoléon* and Justinian's *Corpus Juris Civilis*. See Maurice Amos, *The Code Napoléon and the Modern World*, 10 *J. COMP. LEGIS. & INT'L L.* 222, 224 (1928) (discussing *Code Napoléon*); Stephen L. Sass, *Medieval Roman Law: A Guide to the Sources and Literature*, 58 *L. LIBR. J.* 130, 130 (1965) (discussing *Corpus Juris Civilis*).

commissions typically adopted one of two methods of treating customary law in their search for its appropriate role in a new legal order. First, as in Ethiopia, they have endeavored to change legal systems dramatically by all but abolishing customary law.³¹ The resulting Ethiopian legal code was a synthetic work based on the civil codes of Egypt, France, Greece, Italy, and Switzerland.³² The framers' only concession to Ethiopian customary law was to permit the country to refuse to incorporate any law that was antithetical to Ethiopian values.³³ Yet, even this grudging acknowledgement of customary law would have been permitted only if the customary practice were widely followed, in harmony with the Ethiopian concept of justice, in accordance with economic progress, and clear enough to be expressed in civil law terminology.

The second approach to codification has involved the creation of codes that recognize the continuing vitality of customary law. This sympathetic approach which, curiously, often enjoys more support from Western scholars than from African politicians, derives from a belief that customary law best mirrors social reality and comports with people's value systems. The 1959 Madagascar Code was representative of this view.³⁴ The framers of that code intended to furnish the country with a unified law,³⁵ but the code did not fully retain customary law. Rather, it too, albeit in a less pernicious way than in Ethiopia, modified existing customary law. Madagascar harmonized

31. The French drafter of the Ethiopian Civil Code believed that "it is not an evolution that the country needs, it is a revolution." René David, *La Refonte du Code Civil Dans Les États Africains*, ANNALES AFRICAINES 160, 161 (1962). He viewed customary law as unstable, not jurisprudential, too varying, and responsible for Ethiopian underdevelopment. *Id.* He concluded that

Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done . . . by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a "ready-made" system; they force 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.

René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187, 188-89 (1963).

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

33. *See id.* at 53-56.

34. Resolution of the Malagassy Legislative Assembly, June 2, 1959.

35. *Id.* (providing that Madagascar would adopt a "unified legislation, adapted to the customs of the different populations of Madagascar and accepted by them" (translated by the author)).

conflicting rules, removed rules that the central government deemed unacceptable, and, in certain instances, consolidated customary and civil law. In Madagascar, therefore, the change was evolutionary, while in Ethiopia it was revolutionary.

Nevertheless, attempts to codify or abolish customary law have generally been doomed to failure.³⁶ Some scholars of customary law in Africa liken these attempts to the 1926 introduction of the Swiss civil code in Turkey.³⁷ While the imported Swiss code was adequate for urban elites and members of the legal profession, the vast majority of the people neither understood nor used it.

It is unrealistic to believe that people will automatically abandon local customs because an edict comes from their central government. The attempts of central governments to remove customary law and thereby undermine the power of "traditional" authorities who uphold it may have unintended results, causing great resentment among populations whose traditional law is challenged and, rather than foster national unity, invigorate separatist movements. Codification attempts often fail because many African countries have high degrees of illiteracy,³⁸ and written codes thus have no attraction for the people.³⁹ This is also true in South Africa, where years of apartheid and "Bantu education" have left many persons illiterate.⁴⁰

Some countries, on the other hand, have attempted to unify only customary laws. The argument advanced in such cases is that differences in customary law divide the country.⁴¹ Thus, in the 1960s the Tanzanian government, with the express objective of fostering national unity, began a unification

36. See generally, e.g., John H. Beckstrom, *Handicaps of Legal-Social Engineering in a Developing Nation*, 22 *AM. J. COMP. L.* 697 (1974).

37. See J. Keuning, *Some Remarks on Law and Courts in Africa*, in UNIVERSITY OF IFE INSTITUTE OF AFRICAN STUDIES, *INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* 58, 63-64 (1971) (citing UNESCO, *INT'L SOC. SCI. BULL.*, Vol. IX, No. 1, at 7-85 (1957)).

38. See, e.g., *THE WORLD ALMANAC AND BOOK OF FACTS 1991*, at 684-771 [hereinafter *WORLD ALMANAC*].

39. Cf. Beckstrom, *supra* note 36, at 710 (noting difficulty of population accepting written code in Ethiopia, where illiteracy is high).

40. See FRANCIS WILSON & MAMPHELA RAMPHELE, *UPROOTING POVERTY: THE SOUTH AFRICAN CHALLENGE* 138-49 (1989).

41. Allott, *supra* note 27, at 65.

program⁴² that produced only superficial uniformity. Yet, it would seem that conflicts among types of customary law, as when persons in different groups marry, are insignificant in comparison to the more substantial problem of the conflict between customary law and national law. Such conflicts will continue to occur even if customary law is made uniform or codified.⁴³

Thus, as South Africans come to terms with apartheid's legacy, and as concerned politicians, lawyers, and activists work to instill in them an often nonexistent respect for the rule of law, it could prove a fatal mistake for the crafters of a new system to attempt to unify the laws prematurely. In order to avoid a socio-legal cataclysm, those fashioning a new legal framework instead should maintain a form of legal dualism, as have some of South Africa's neighbors with a similar legal past.

III. LEGAL DUALISM IN SOUTHERN AFRICA: THE SOUTH AFRICAN INFLUENCE AND THE EXPERIENCES OF BOTSWANA, LESOTHO, AND SWAZILAND

A. *The Rise of a Hybrid Legal System*

The Western system of law that prevails in South Africa is a hybrid which influenced the laws of Botswana,⁴⁴ Lesotho,⁴⁵ and Swaziland.⁴⁶ Each country derived the peculiar character of its laws from South African law, whose hybrid or mixed legal system draws from three main sources of law—Roman, Roman-Dutch, and English.⁴⁷ Roman law evolved from 753 B.C.,

42. *Id.* See generally Jash Ghai, *Ethnicity and Group Relations*, in UNESCO, *Two Studies on Ethnic Group Relations in Africa: Senegal, The United Republic of Tanzania* 107-09 (1974).

43. Allott, *supra* note 27, at 66.

44. See *infra* notes 72-105 and accompanying text (discussing Botswana's legal system).

45. See *infra* notes 106-31 and accompanying text (discussing Lesotho's legal system).

46. See *infra* notes 132-58 and accompanying text (discussing Swaziland's legal system).

47. See W.J. Hosten et al., *Introduction to South African Law and Legal Theory* 132 (1983) (discussing South Africa's mixed system of law); Imre Zajtay & W.J. Hosten, *The Permanence of Roman Law Concepts in the Continental Legal System and South African Law*, 2 *COMP. & INT'L J. S. AFR.* 181, 197 (1969) (discussing South Africa's mixed system of law).

the traditional date of the founding of Rome, to 565 A.D., when Emperor Justinian died. Roman law survived in medieval Europe and influenced its traditions.⁴⁸

From the thirteenth to the sixteenth centuries, the Netherlands incorporated elements of Roman law into its own law. "Roman-Dutch law" soon developed. This law, which enjoyed its classical period from the sixteenth to the late eighteenth centuries, synthesized Roman law, German customary law, canon law, feudal law, and perhaps some natural law concepts.⁴⁹

The Dutch East India Company imported Roman-Dutch law when it established a presence at the Cape of Good Hope in 1652.⁵⁰ Roman-Dutch law continued as the common law of the Cape during the Company's rule from 1652 to 1795.⁵¹ When Great Britain's occupation of the Cape began in 1795, Articles of Capitulation empowered the Raad van Justitie, renamed the Court of Justice, to administer Roman-Dutch law in civil and criminal matters.⁵² Great Britain lost control of the Cape to the Netherlands in 1803, but regained control in 1806.⁵³

British ascendancy did not signal the end of Roman-Dutch law at the Cape. The Cape Articles of Capitulation of January 1806 provided that citizens would retain the rights and privileges that they previously enjoyed.⁵⁴ Some scholars have argued that this provision ensured the perpetuation of Roman-Dutch law.⁵⁵ In fact, a well-established principle of English law

48. See WOLFGANG KUNKEL, *AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY* 168-78 (1966). For more on Roman Law, see, for example, FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (1946).

49. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 8 (1978); HOSTEN ET AL., *supra* note 47, at 175.

50. THOMPSON, *supra* note 26, at 41-43.

51. For studies of the Cape Colony during the period of Dutch control, see *THE SHAPING OF SOUTH AFRICAN SOCIETY, 1652-1820* (Richard Elphick & Hermann Giliomee eds., 1979).

52. HOSTEN ET AL., *supra* note 47, at 195.

53. *Id.* at 195-96.

54. Cape Colony, Articles of Capitulation, 18 Jan. 1806, art. 8, *reprinted in* *THE CAPE OF GOOD HOPE GOVERNMENT PROCLAMATIONS FROM 1806 TO 1825* (1838).

55. See, e.g., H.D.J. Bodenstein, *English Influences on the Common Law of South Africa*, 32 S. AFR. L.J. 337, 338 (1915); J.C. de Wet, *Die Romeins-Hollandse Reg in Suid-Afrika na 1806*, 21 *TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG* 239, 239 (1958).

Later, the First and Second Charters of Justice of 1827 and 1832, respectively, confirmed the retention of Roman-Dutch law as the common law. See H.J. Erasmus, *Roman Law in South Africa Today*, 106 S. AFR. L.J. 666 (1989).

provided that a conquered country should retain its laws until the conqueror changed them.⁵⁶

Nevertheless, the Cape's legal system did not escape English influence.⁵⁷ In 1826, a two-man commission appointed by the British government to inquire into Cape affairs reported on Cape judicial matters.⁵⁸ It suggested that existing Roman-Dutch principles be assimilated into English principles, that future legislation follow principles of English jurisprudence, and that English common law be adopted gradually.⁵⁹ In subsequent years, many legislative enactments accorded with these recommendations, effecting great change in laws of procedure, evidence, and estate administration.⁶⁰ The Cape adopted many statutes from English law verbatim or by repromulgation, thereby restructuring laws concerning mercantile exchange, companies, and bankruptcy.⁶¹

English law achieved a special influence in the Cape as the language of the courts. English judges occupied the bench, and English legal training was required of all advocates. The use of the English system of government also meant the introduction of English principles of constitutional law. By the end of the nineteenth century, while Roman-Dutch law remained the basic common law of the Cape,⁶² much English law had

56. *Campbell v. Hall*, [1774] 1 Cowp. 204, 209, 98 Eng. Rep. 1045, 1047 (K.B. 1774) (providing that "laws of a conquered country continue in force, until they are altered by the conqueror"); see DUGARD, *supra* note 49, at 8.

57. For overviews of English legal principles, see, for example, J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955); W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1926).

58. See generally GEORGE MCCALL THEAL, 25 *RECORDS OF THE CAPE COLONY*, 1 Jan.-6 Feb. 1826, at 44; C. Graham Botha, *The Early Influence of the English Law Upon the Roman-Dutch Law in South Africa*, 40 S. AFR. L.J. 396, 401-03 (1923).

59. See HOSTEN ET AL., *supra* note 47, at 199-202.

60. See, e.g., Ordinance 40 (1828) (adopting English principles of criminal procedure); Ordinance 72 (1830) (adopting English principles of evidence); Ordinance 104 (1833) (replacing Roman-Dutch law of universal succession of heirs with English system of executorship); Ordinance 15 (1845) (establishing English underhand form of will); Succession Act, No. 23 (1874) (removing other restrictions on testamentary transfers); see also Zajtay & Hosten, *supra* note 47, at 193 (discussing changes).

61. See, e.g., Merchant Shipping Act, No. 13 (1855); Joint Stock Companies Limited Liability Act, No. 23 (1861); General Law Amendment Act, No. 8 (1879) (revising maritime and shipping law); Companies Act, No. 25 (1892).

62. See Leslie Rubin, *The Adaptation of Customary Family Law in South Africa*, in *AFRICAN LAW: ADAPTATION AND DEVELOPMENT* 196, 198 (Hilda Kuper & Leo Kuper eds., 1965).

modified it.⁶³

Although throughout much of the nineteenth century the Cape did not formally recognize customary law, it generally recognized transactions based on customary law when they were not immoral, contrary to public policy, or in conflict with Cape law.⁶⁴ In 1864, for example, the Cape enacted the Native Succession Act, which recognized the application of customary law in the administration of the estates of permanent resident Africans.⁶⁵

During this period, Roman-Dutch law, as modified by English law, spread from the Cape to the British colony of Natal and to the Afrikaner Republics of the Orange Free State and the Transvaal.⁶⁶ While all three territories adopted the Roman-Dutch system, English law, operating through the law of the Cape Colony, modified the Roman-Dutch law of each. Each territory recognized customary law, but to different degrees.⁶⁷ After the South African War of 1899-1902,⁶⁸ when the

63. Zajtay & Hosten, *supra* note 47, at 193.

64. Rubin, *supra* note 62, at 200.

65. *Id.* British Kaffraria, incorporated the next year, recognized the same exception. *Id.* Nevertheless, British Kaffraria continued to permit magistrates to apply "their own ideas of equity, Cape and native law." *Id.*

The Cape Colony, in fact, also had a second system for the recognition of customary law. *Id.* at 201. In the Transkei, customary law was recognized from the day the territory was incorporated into the Cape Colony. *Id.* at 200. Magistrates were required to apply colony law, but could apply customary law when all parties were Africans. *Id.*

66. For a constitutional history of the Afrikaner republics, see Leonard Thompson, *Constitutionalism in the South African Republics*, BUTTERWORTH'S S. AFR. L. REV. 49 (1954).

67. See Rubin, *supra* note 62, at 201-03.

In Natal, which Great Britain annexed in 1843, customary law could prevail except when it was repugnant to general principles of humanity. *Id.* at 201. At first, African chiefs could exercise their traditional judicial functions, and after 1875 courts of administrators of native law could rule on customary law. *Id.* Natal did exempt certain Africans from the operation of customary law, although these Africans did not acquire the legal status of whites. *Id.* at 202.

The Transvaal at first did not recognize customary law. *Id.* In 1885, however, it adopted Law 4, which provided for the recognition of customary law not inconsistent with "general principles of civilisation," but subjected the judgments of native commissioners, subcommissioners, government-appointed chiefs, and appeals tribunals to government modification or reversal. *Id.*

In the Orange Free State, where few Africans settled, the question of recognizing customary law was not pressing, although, as in the Cape, the colony recognized customary law in certain administrative proceedings. *Id.* at 203.

68. See Lynn Berat, *Constitutionalism and Mineral Law in the Struggle for a New South*

two former Afrikaner republics and the two British colonies joined to form the Union of South Africa, Roman-Dutch law remained the common law.⁶⁹ This system continued after the Union became the Republic of South Africa in 1961.⁷⁰

In gaining rule over Botswana, Lesotho, and Swaziland, Great Britain intended that the three eventually be incorporated into South Africa.⁷¹ In addition to installing South African law as the territories' national law, however, Great Britain also chose to retain customary law, the hallmark of its policy of indirect rule. This decision created a dualism in all three instances which, to varying degrees, exists to the present day. The following discussion of these countries' legal systems will identify issues and concerns that the framers of the new South African legal order should consider.

B. Customary Law in Botswana

Formerly the Bechuanaland protectorate, Botswana, which is largely desert, occupies an area the size of France and has a population of about one million.⁷² The country, unlike the vast majority of African states, is a democracy.⁷³ Its democratic tradition was not developed under Western influence,

Africa: The South African War Revisited, 15 SUFFOLK TRANSNAT'L L.J. — (1992) (forthcoming) (discussing war of 1889-1902).

69. See L.M. THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-1910*, at 459 (1960).

70. THOMPSON, *supra* note 26, at 188. South African law had effectively become a "three-layer cake" of Roman, Dutch, and English law. Zajtay & Hosten, *supra* note 47, at 197. One South African justice explained:

Our country has reached a stage in its national development when its existing law can better be described as South African than Roman Dutch. . . . No doubt its roots are Roman Dutch, and splendid roots they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying to return the oak tree to its acorn.

Ex parte de Winnaar, [1959] 1 S. Afr. 837, 839 (Natal).

71. See generally THOMPSON, *supra* note 69, at 271-79 (discussing anticipated annexation of Bechuanaland, Basutoland, and Swaziland to South Africa). At the time, Botswana and Lesotho were known as Bechuanaland and Basutoland, respectively.

72. See A.J.G.M. Sanders, *Constitutionalism in Botswana: A Valiant Attempt at Judicial Activism*, 16 COMP & INT'L L.J. S. AFR. 350, 350 (1983).

73. *Id.* at 351; see THOMAS TLOU & ALEC CAMPBELL, *HISTORY OF BOTSWANA* 235 (1984).

but rather is centuries old.⁷⁴

Botswana inherited a dual legal system. The formula by which the country received the common law dates to the adoption of the General Administration Proclamation of 1891.⁷⁵ The General Law Proclamation of 1909 amended the 1891 proclamation and provided that the written and common laws of the Cape as of 1891 would become the laws of Botswana.⁷⁶

The move toward unification since the 1960s has occurred primarily in law, and to a lesser extent in the nature and structure of the court system. The major instrument regarding customary law is the Customary Law (Application and Ascertainment) Act of 1969 (the "Act").⁷⁷ The Act codifies rules to resolve conflicts between customary and common law,⁷⁸ and defines customary law as the law of any tribe or tribal community that is compatible with written law and not "contrary to morality, humanity or natural justice."⁷⁹ Under the Act, all other law is common law.⁸⁰ Customary law applies in proceedings between tribesmen unless: (1) the transaction is intended to be considered under the common law; (2) the transaction is unknown to customary law, or (3) the parties agree to adjudication under the common law.⁸¹

74. See TLOU & CAMPBELL, *supra* note 73, at 71-72.

75. General Administration Proclamation (1891).

76. General Law Proclamation, No. 36, § 2 (1909).

77. Customary Law (Application and Ascertainment) Act, No. 51 (1969) [hereinafter Customary Law Act]; see C.M.G. Himsworth, *The Botswana Customary Law Act, 1969*, 16 J. AFR. L. 4 (1972).

78. Customary Law Act, *supra* note 77, §§ 4-10. For example, section 6 requires that in all child custody cases, the welfare of the child must be the primary consideration in determining which law to apply. *Id.* § 6. Section 7 requires that customary law apply in cases of intestate succession when tribesmen are involved. *Id.* § 7. Section 8 stipulates that common law must be applied in a suit for damages for death or personal injury that involves a tribesman. *Id.* § 8.

79. Customary Law Act, *supra* note 77, § 2. The act defines a "tribesman" as a member of either a tribe, a section of a tribe, a tribal community, a community organized in a tribal manner living outside tribal territory of Botswana, or any African country's tribe or tribal community as prescribed by a posted notice of the Minister of Justice. *Id.* Although modern scholars generally avoid using the words "tribe," "tribesman," and "tribal," this Article will retain their use in discussing legislation that uses the terms.

80. *Id.* (defining common law as "any law, whether written or unwritten, in force in Botswana other than customary law").

81. *Id.* § 4; see Anne Griffiths, *Legal Duality: Conflict or Concord in Botswana?*, 27 J. AFR. L. 150, 150 (1983).

The Customary Law Act does not reveal how to determine tribal membership.

Conflicts between different sets of customary laws often arise as well.⁸² Section 10 of the Customary Law Act resolves conflicts between customary laws⁸³ and provides that if a court cannot ascertain a particular system of customary law, it shall determine the applicable law "in accordance with the principles of justice, equity and good conscience."⁸⁴ In order to aid the ascertainment of customary law, the Act permits courts to take notice of customary law and to consult experts, reported cases, and textbooks if there is any uncertainty about a particular facet of customary law.⁸⁵ In addition, any statements of customary law authorized by Botswana's president constitute *prima facie* evidence of customary law.⁸⁶

Although Botswana's private law system remains dualistic, the country has made great strides toward the unification of

The question of who is a tribesman occasionally arises when a party disclaims such a label. In those cases, the Customary Courts Act of 1961 provides for a Customary Courts Commissioner who, after due inquiry, issues a certificate that binds the party to his finding. Customary Courts Act, No. 19, § 2(3) (1961).

82. This situation prevails because Botswana's African population is not ethnically homogeneous. The majority Tswana group is divided into the Kgatla, the Kwena, the Maletse, the Ngwaketse, the Ngwato, the Rolong, and the Tlokwa. Other ethnic groups are the Birwa, the Herero, the Kalanga, the Kgalagadi, the Mbukushu, the Sarwa, and the Subiya. For a discussion of Tswana law, see, for example, SIMON ROBERTS, *TSWANA FAMILY LAW* (1972) and I. SCHAPER, *A HANDBOOK OF TSWANA LAW AND CUSTOM* (1970).

83. Customary Law Act, *supra* note 77, § 10. The Act provides:

(1) In any case where customary law is applicable and the question arises as to which system of customary law is applicable—

(a) in land matters the applicable customary law shall be the customary law of the place where the land is situate;

(b) in cases and proceedings arising from inheritance the appropriate customary law shall, subject to the provisions of paragraph (a), be the customary law applying to the deceased;

(c) subject to the provisions of paragraphs (a) and (b) the court shall apply the customary law which the parties intended or may reasonably be deemed to have intended should regulate their obligations in the matter or, in the absence of such actual or deemed intention, the customary law of the place where the action arose.

Id. § 10(1).

84. *Id.* § 10(2).

85. Customary Law Act, *supra* note 77, § 11. Before the act's passage, national courts considered customary law a factual matter to be proved. See, e.g., *Gideon v. Malusalila*, 1926-53 High Comm'n Terr. L.R. 114, 115E. Courts thus could not take judicial notice of customary law.

86. Customary Law Act, *supra* note 77, § 12. In practice, however, because most national court judges are still foreigners, they tend to rely on a few general publications which, unfortunately, fail to capture the dynamic nature of customary law.

public law. An almost uniform system of substantive criminal law derives from the Penal Code,⁸⁷ the African Courts (Amendment and Supplementary Provisions) Act of 1968,⁸⁸ and the Customary Courts (Amendment) Act of 1972.⁸⁹ Other acts have regulated the functions of tribal chiefs.⁹⁰ Botswana's 1966 constitution nevertheless contained a bill of rights that protected certain aspects of customary law.⁹¹

Despite its considerable progress toward the unification of its legislation, Botswana has been slow to unify its court system. The colonial court structure remains intact. While the national courts consider the national law their primary law, the subordinate customary courts primarily apply customary law.

The statutory authority for the customary courts is contained in the Customary Courts (Amendment) Act. The act establishes a hierarchy of customary courts, including a customary court of appeal.⁹² The Customary Courts Commissioner oversees the customary courts and exercises discretion "in the interests of justice" in transferring cases between customary courts, or from a customary court to a national court.⁹³

The Customary Courts (Amendment) Act states that customary law usually applies in customary courts. The act distinguishes between criminal and civil cases, a non-existent distinction in customary law.⁹⁴ In criminal cases, customary courts have jurisdiction only over "tribesmen" or those who agree in writing to the courts' jurisdiction. A customary court may review offenses committed wholly or partly within its area of jurisdiction.⁹⁵ Customary courts' criminal jurisdiction is

87. Penal Code, No. 2 (1964); see A.J.G.M Sanders, *The Internal Conflict of Laws in Botswana*, in Y.B. AFR. L. 137, 138 (Kurt Madlener ed., 1984).

88. African Courts (Amendment and Supplementary Provisions) Act, No. 57 (1968); see Sanders, *supra* note 87, at 138.

89. Customary Courts (Amendment) Act, No. 6 (1972); see Sanders, *supra* note 87, at 138.

90. See generally Tribal Land Act, No. 54 (1968) (giving major administrative powers of chiefs concerning land to non-tribal public bodies); Matimela Act, No. 25 (1968) (giving major administrative powers of chiefs concerning stray cattle to non-tribal public bodies); Chieftainship Act, No. 29 (1965) (regulating recognition and functions of chiefs).

91. BOTSWANA INDEPENDENCE ACT, ch. 23, § 2 (1966).

92. Customary Courts Act, *supra* note 81.

93. See Sanders, *supra* note 87, at 147-48.

94. Customary Courts Act, *supra* note 81, § 12.

95. *Id.* § 11(1)(b). The Customary Courts Commissioner may, following a de-

similar to that of national courts, with certain exceptions.⁹⁶

In civil cases, customary courts have jurisdiction if all parties are "tribesmen" or if the defendant consents in writing to the court's jurisdiction.⁹⁷ A customary court may assert territorial jurisdiction when a defendant resides in the court's jurisdiction, or if a cause of action arises in that jurisdiction.⁹⁸ The Minister of Local Government and Lands determines the courts' material civil jurisdiction.⁹⁹ As in the criminal law field, the act excludes certain civil actions from customary courts' jurisdiction.¹⁰⁰

The Customary Court (Procedure) Rules, promulgated under the Customary Courts Act, govern evidentiary and procedural matters in customary courts.¹⁰¹ In both criminal and civil cases, however, customary courts have some discretion to apply national laws.¹⁰²

defendant's request, transfer a case to another customary court or a lower national court. *Id.*

96. *Id.* § 12. Offenses over which customary courts have no jurisdiction include bankruptcy and company law, bigamy, bribery, "corruption and abuse of office," counterfeiting, extortion, offenses allegedly affecting the state's security or safety, offenses allegedly causing death, offenses relating to the administration of justice, offenses relating to precious metals and stones, rape, riot, treason, and other offenses that may be prescribed. *Id.*

97. *Id.* § 10(1)(a).

98. *Id.* § 10(1)(b).

99. *Id.* § 6.

100. *Id.* § 12. These include bankruptcy and other transactions non-existent under customary law, termination of marriages not concluded according to customary law, testate succession and decedents' estates when national law applies, and, unless the Customary Courts Commissioner consents to the assertion of jurisdiction, witchcraft. *Id.*

101. *See* Customary Courts (Procedure) Rules (1971).

102. In *S. v. Thokomelo*, 1981 Bots. L.R. 272, High Court Justice Corduff noted that "there is substantially less difference than might be supposed between the law and rules of evidence and procedure applicable in customary courts and those applicable in other courts." *Id.* at 273. Although the difference between national and customary rules differ more markedly in civil cases than in criminal cases, High Court Chief Justice Dendy-Young commented, perhaps optimistically, that the customary courts retain the "fundamental, all-pervasive rule of fairness, sometimes called natural justice, [which] still demands that no evidence shall be relied upon unless the opposing party has been given an opportunity to comment thereon." *Gombgwa v. Gombgwa*, No. CIV/APP/3, at 4 (High Ct. 1970).

In criminal law cases, customary courts apply customary law but may consult the Penal Code. Customary Courts Act, *supra* note 81, at § 11. They may impose fines or imprisonment, or authorize corporal punishment. *Id.* §§ 11(2), 11(5), 16-19. In civil cases, customary courts may use national law provisions, as national law or a ministerial order may permit. *Id.* § 15.

The Botswana system of allowing a plaintiff to sue in national court even though a customary court has jurisdiction has created a problem of forum shopping.¹⁰³ Botswana's legislature partially addressed this problem in the Subordinate Courts (Amendment) Act of 1969 by providing limitations on plaintiffs' ability to choose the forum.¹⁰⁴ It provides that once a case has begun in a lower national court, the court may transfer the case to a customary court if it deems customary law applicable, provided that such a transfer is "not contrary to the interests of justice."¹⁰⁵

C. Customary Law in Lesotho

Lesotho, a country of nearly two million that is entirely surrounded by South Africa and has few natural resources, is the poorest country in this study, although it has one of Africa's highest literacy rates.¹⁰⁶

Legal dualism in Lesotho is an enduring legacy of colonial rule. In 1884, Lesotho, then known as Basutoland, adopted General Law Proclamation 2B, which provided that the British High Commissioner in Cape Town would administer Basutoland through the officers of a deputy commissioner who, in turn, would be represented locally by a resident commissioner.¹⁰⁷ The establishment in 1911 of the Court of the Resident Commissioner effected a curious separation of powers. The resident commissioner was still responsible to the High Commissioner in administrative matters, but answered to the Privy Council in London on judicial matters.¹⁰⁸ The Resident Commissioner's Court applied customary law in all cases between Africans.¹⁰⁹ Eventually, a judicial commissioner took charge of the resident commissioner's court, and the Central and Local Courts Proclamation of 1938 established a dual

103. T.W. BENNETT, *THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA* 34 (1985).

104. *See id.* at 93 (discussing Subordinate Courts (Amendment) Act, No. 23, § 31A (1969)).

105. *Id.*

106. *See* WORLD ALMANAC, *supra* note 38, at 728.

107. General Law Proclamation 2B (1884); *see* W.C.M. Maqutu & A.J.G.M. Sanders, *The Internal Conflict of Laws in Lesotho*, 20 *COMP. & INT'L L.J. S. AFR.* 377, 378 (1987).

108. *See* Maqutu & Sanders, *supra* note 107, at 378.

109. *Id.* at 378-79.

court system that has existed to this day.¹¹⁰ The proclamation established customary courts, which were inferior to national courts and whose presidencies went not to "traditional" chiefs but to government appointees.¹¹¹

Lesotho's national courts generally apply the national law, while the customary courts apply the customary law.¹¹² For "Africans," however, customary law remains as important as national law.¹¹³ General Law Proclamation 2B gives national courts the discretion to apply customary law when they serve as courts of first impression if all parties to a suit are "Africans."¹¹⁴ In practice, national courts generally apply customary law when they hear appeals from customary courts.¹¹⁵ The

110. Central and Local Courts Proclamation, No. 62 (1938); see Maqutu & Sanders, *supra* note 107, at 379. The Proclamation was originally named the Native Courts Proclamation. VERNON V. PALMER & SEBASTIAN M. POULTER, *THE LEGAL SYSTEM OF LESOTHO* 490-91 (1972).

111. Maqutu & Sanders, *supra* note 107, at 379. Although the customary courts are statutorily inferior to national courts, "so far as the African inhabitants of Lesotho are concerned, African law stands basically on an equal footing with the common law. In no sense is the customary law placed in a fundamentally inferior or subsidiary position as it is in some other African countries, e.g., Botswana and Swaziland." PALMER & POULTER, *supra* note 110, at 99-100.

112. See BENNETT, *supra* note 103, at 87.

113. See *Motali v. Moreira*, No. CIV/T/193 (High Ct. 1977), *quoted in* 11 COMP. & INT'L L.J. S. AFR. 347 (1978). The court found that

[i]t appears abundantly clear . . . that the common law of the Cape of Good Hope was the law to be administered by the courts of Basutoland. The exception permitting the application of African law was confined to matters in which all the parties are Africans. . . . Sesotho law remains on an equal footing with the common law in so far as Africans are subject to that law.

Id.

Lesotho once considered an "African" to be "any aboriginal African belonging to any tribe of Africa, and all persons of mixed race living as members of any African community, tribe, kraal, village or location in the Territory." General Interpretation Proclamation, No. 12 (1942). Today, "African" is undefined in Lesotho law because a 1977 act repealed the 1942 proclamation and left the determination of who is an African to the courts. See Interpretation Act, No. 19 (1977). See generally Maqutu & Sanders, *supra* note 107, at 392 n.31 (discussing changing understanding of meaning of "African").

"Customary law," "Sesotho law," and "Sotho law" all describe the customary law applied among the Basotho people in Lesotho. See PALMER & POULTER, *supra* note 110, at 99.

114. General Law Proclamation 2B, *supra* note 107, § 2.

115. See *Chabaseoele v. Mohale*, 1977 Lesotho L.R. 283, 288-89. See generally High Court Act, No. 5 (1978). Although the High Court Act indicates that the High Court must give permission if the court wishes to be the court of first impression, it need not do so in cases involving customary law. Maqutu & Sanders, *supra* note 107, at 394.

proclamation includes a repugnancy clause, which provides that customary law is that law used by the people that is not repugnant to "justice or morality" or inconsistent with legislation.¹¹⁶ The clause limits the use of customary law to cases in which its application comports with justice or morality.¹¹⁷

Before Lesotho's independence in 1966, the judges of the High Court used assessors or expert witnesses to ascertain customary law.¹¹⁸ The Court sometimes required that to prove the existence of customary law, a party had to show that a customary law rule was well-established and "reasonable."¹¹⁹ Since Lesotho's independence, the High Court has continued to use assessors, but now takes judicial notice of customary law.¹²⁰ Three main factors contributed to this shift. First, the judiciary began to be indigenized, and the new judges believed that requiring proof of customary law demeaned Lesotho's independent status.¹²¹ Second, an increasing number of works on Basotho law appeared.¹²² Third, there is a growing body of

116. Central and Local Courts Proclamation, *supra* note 110, § 9.

117. *Id.* Judge Goldin of the Court of Appeal wrote that "it could never have been intended that in applying customary law in other courts . . . it can be done regardless of its repugnancy to morality or justice." *Ntle v. Khaketla*, No. CIV/APP/3 (1983), *quoted in* Maqutu & Sanders, *supra* note 107, at 380. Judge Goldin interpreted "justice or morality" broadly, arguing that

Sesotho customary law will not be condemned or not applied on the ground that it is repugnant to justice and morality merely because it is different from and does not accord with concepts of morality or justice under Roman-Dutch law. It is implicit and obvious that where two systems of law exist, each of them may be based on different principles or concepts of morality or justice.

Id.

In practice, the High Court has invoked the repugnancy clause in only a few cases. *E.g.*, *Ntsoele v. Ramokhele*, 1974-75 Lesotho L.R. 130, 132E-133A; *Malofotane v. Mpho*, 1959 High Comm'n Terr. L.R. 107; *see* Maqutu & Sanders, *supra* note 107, at 380. A possible reason is that most High Court judges, including all High Court judges before 1974, were foreigners who found it difficult to rule on a system of law foreign to them. *See id.* at 381.

118. *See* Maqutu & Sanders, *supra* note 107, at 383.

119. *See* *Griffith v. Griffith*, 1926-53 High Comm'n Terr. L.R. 50; Maqutu & Sanders, *supra* note 107, at 383.

120. High Court Act, No. 4, §§ 8-9 (1967) (permitting use of assessors in courts); *see* BENNETT, *supra* note 103, at 34. The Court will try to determine and use customary law only if "its content or authority is brought into question and the [pending] matter cannot be determined in any other, more convenient manner." *Id.*

121. Maqutu & Sanders, *supra* note 107, at 384.

122. Only a few written sources of Basotho customary law exist. PALMER & POULTER, *supra* note 110, at 105. One is an 1872 report on the laws and customs of

customary law precedent.¹²³ The Judicial Commissioner's Court and customary court decisions are not published, however, and no readily available compilation exists for judicial reference.¹²⁴

The nature of Lesotho law, and the High Court preference for maintaining the dual court system, contribute to a lengthy, unwieldy appeals process.¹²⁵ When a case reaches a central court or the Judicial Commissioner's Court, the court may decide it or send it back to the court of first impression or to another customary or magistrates' court.¹²⁶ Magistrates' courts may send cases to other customary or magistrates' courts.¹²⁷ The efficiency of the appeals process is also hindered by the Judicial Commissioner's Court, a colonial relic that sits only once a year in each district.¹²⁸

Forum shopping is also a problem.¹²⁹ Few statutory conflict of laws rules exist.¹³⁰ As a result, courts have developed

the Basotho. *See id.* at 105-06 (citing REPORT AND EVIDENCE OF COMMISSION ON NATIVE LAWS AND CUSTOMS OF THE BASUTOS (1873)). Another source is the Laws of Lerotholi, which contains an incomplete declaration of Sesotho law and custom. PALMER & POULTER, *supra* note 110, at 106-07; *see* Sebastian Poulter, *The Place of the Laws of Lerotholi in the Legal System of Lesotho*, 71 AFR. AFF. 144 (1972) (discussing Laws of Lerotholi). Other sources include a few books, monographs, and court decisions. *See* PALMER & POULTER, *supra* note 110, at 107-08; *see also, e.g.*, PATRICK DUNCAN, SOTHO LAWS AND CUSTOMS (1960); VERNON V. PALMER, THE ROMAN-DUTCH AND SESOTHO LAW OF DELICT (1970); SEBASTIAN POULTER, FAMILY LAW AND LITIGATION IN BASOTHO SOCIETY (1976). Unfortunately, because customary law is particularly fluid, these sources may be of little or no help to modern jurisprudence.

123. *See* Maqutu & Sanders, *supra* note 107, at 384.

124. *See* PALMER & POULTER, *supra* note 110, at 116. These authors note that customary law, "being dependent upon the practises of those who are subject to it[,] is liable to change in accordance with usage and is therefore not constant. . . . [I]t is difficult of access for those who do not regulate their lives by it since it is still largely unwritten." *Id.*

125. Under the Central and Local Courts Proclamation, *supra* note 110, appeals lie from the local to the central courts, from the central courts to the Judicial Commissioner's Court, from the Judicial Commissioner's Court to the High Court, and from the High Court to the Court of Appeal, Lesotho's highest court. *Id.* § 28. Appeals to the High Court and the Court of Appeal require the permission of the court concerned, and appeals to the Court of Appeal must be on a point of law. *Id.* §§ 27-28. *See generally* PALMER & POULTER, *supra* note 110, at 481.

126. Central and Local Courts Proclamation, *supra* note 110, § 30.

127. *Id.* § 26.

128. Maqutu & Sanders, *supra* note 107, at 394. The Judicial Commissioner usually has an interest and experience in customary law, and uses an assessor when necessary. PALMER & POULTER, *supra* note 110, at 488.

129. Maqutu & Sanders, *supra* note 107, at 394-95.

130. *Id.* at 389.

their own rules to deal with such cases as succession and marriage.¹³¹ Unfortunately, these judicial decisions have not resulted in a coherent body of conflicts laws.

D. Customary Law in Swaziland

Swaziland, a country of 800,000 persons which gained independence in 1968, accepted principles of foreign law in 1907.¹³² It adopted many Roman-Dutch legal principles as its own, including statutes from the Transvaal.¹³³

In Swaziland, which is dominated by a monarchy, there is considerable respect for customary law. Section 62(2) of the 1968 Constitution, which established Swaziland's independence, prohibited legislative interference with a number of customary institutions.¹³⁴ In 1973, a royal proclamation repealed the 1968 Constitution,¹³⁵ but in 1981 another royal

131. *Id.* at 389-92; see, e.g., *Rakhoabe v. Rakhoabe*, 1967-70 Lesotho L.R. 210, 211-13 (noting that South African law on marriage in community of property, which controlled at start of instant marriage, no longer controlled in Lesotho, although opinion did not refer to comparable or applicable Basotho law); *Khatala v. Khatala*, 1963-66 High Comm'n Terr. L.R. 97, 100B (relying on Basotho custom and law to resolve dispute concerning marriage and succession).

132. General Law and Administration Proclamation No. 4, § 3 (1907). For histories of Swaziland, see, for example, ALAN R. BOOTH, *SWAZILAND: TRADITION AND CHANGE IN A SOUTHERN AFRICAN KINGDOM* (1983); J.S.M. MATSEBULA, *A HISTORY OF SWAZILAND* (1987); JOAN SCUTT, *THE STORY OF SWAZILAND* (1983).

133. General Law and Administration Proclamation, *supra* note 132, §§ 1-2. Sections 1 and 2 provided:

- (1) The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be the law in Swaziland;
- (2) Save and except in so far as the same have been repealed or amended, the statutes in force in the Transvaal on the 15th day of October, 1904, and the statutory regulations thereunder, shall *mutatis mutandis* and as far as they may be applicable be in force in Swaziland

Id.

134. INDEPENDENCE CONST., No. 50, § 62(2) (1968). These institutions included the appointment and removal of chiefs, the composition and rules of procedure of the Swazi National Council, the "first fruits ceremony," the offices of the King and Queen Mother, the regency, and the regimental system. *Id.*; see *id.* § 135.

135. Proclamation by His Majesty King Sobhuza II, Apr. 12, 1973 [hereinafter Proclamation]; see Peter Nanyenya Takirambudde, *External Law and Social Structure in an African Context: An Essay About Normative Imposition and Survival in Swaziland*, 16 *COMP. & INT'L L.J. S. AFR.* 209, 225-26 (1983) (discussing Proclamation). The proclamation did not refer to section 62(2) of the 1968 Constitution, *supra* note 134, because the King disbanded parliament. See King's Proclamation, *supra*. Swaziland created a new parliament in 1978. See Establishment of the Parliament of Swaziland, Order 23 (1978).

proclamation referred to the customary institutions enumerated in the 1968 constitution as "matters to be regulated by Swazi law and custom."¹³⁶ In 1983, an amendment to this proclamation indicated that such customary matters were beyond the jurisdiction of national courts.¹³⁷

Swazi customary law is not statutorily defined. The Swazi Courts Act of 1950 contains a repugnancy clause, which restricts the use of customary law if it is contrary to "natural justice or morality."¹³⁸ Such a vague standard may make judges' personal conceptions of natural justice and morality determinative and, as in other African countries with many white judges, may offer a way for national courts to strike down many aspects of customary law. It is quite remarkable, therefore, that the High Court has only twice remarked upon the repugnancy clause, both times in dicta, once by a Swazi judge and once by a white judge.¹³⁹

The duality of laws has given rise to a dual court system, to difficulties in proving the primacy of customary law, and to confusing conflict of laws rules. National courts generally review national law, while the customary courts, established by the Swazi Courts Act of 1950,¹⁴⁰ generally review customary law.¹⁴¹ Swazi courts are inferior to national courts.¹⁴² The appeals provisions in the Swazi Courts Act illustrate this relation-

136. King's Proclamation (Amendment) Decree 1 of 1981. This decree made official recognition of customary law retroactive to 1979. *Id.*

137. King's Proclamation (Amendment) Decree 1 of 1983.

138. Swazi Courts Act, No. 80, § 11(a) (1950) [hereinafter Swazi Courts Act]. This vague standard resembles those that once prevailed in Botswana and Lesotho. See *supra* notes 79 & 117 and accompanying text (discussing similarly vague statutes restricting use of customary law in Botswana and Lesotho).

139. *Dlamini v. Twala*, 1979-81 Swaz. L.R. 117 (High Ct.) (disallowing customary practice of giving child born out of wedlock to father's family upon payment to mother's family of cattle or money); *R. v. Mhlabane*, 1977-78 Swaz. L.R. 188 (High Ct.) (permitting customary marriage of fourteen-year-old girl and recognizing her consent to sexual intercourse with husband); see A.J.G.M. Sanders, *The Internal Conflict of Laws in Swaziland*, 19 COMP. & INT'L L.J. S. AFR. 112, 114 (1986).

140. Swazi Courts Act, *supra* note 138, § 3.

141. BENNETT, *supra* note 103, at 96. Swazi courts may receive statutory permission to hear cases involving national law, while national courts may in some instances apply customary law. Sanders, *supra* note 139, at 122-23.

142. Sanders, *supra* note 139, at 123. High Court Chief Justice Nathan once noted that

[a]lthough a certain degree of autonomy is conferred by the legislature upon the Swazi National Courts, they are not a law unto themselves; they are a limb of the administration of justice in this kingdom, and they must

ship. In civil cases involving customary law, appeals lie to a Swazi Court of Appeal and then a Higher Swazi Court of Appeal, before going to the national High Court.¹⁴³ The procedure for appeals in criminal cases differs. Before they may lie to the High Court, criminal appeals from the Higher Swazi Court of Appeal lie first to the Judicial Commissioner's Court, a colonial relic staffed by civil servants who are usually foreigners and are neither lawyers nor individuals trained in Swazi customary law.¹⁴⁴ In practice, this system of appeals seems quite unwieldy for a small country with limited resources.¹⁴⁵

As in Botswana, Swaziland makes other distinctions between the treatment of criminal and civil cases in customary courts.¹⁴⁶ In criminal cases, Swazi courts may assert personal jurisdiction in a case when the complainant and the accused are "members of the Swazi nation."¹⁴⁷ A customary court may assert proper venue when the alleged offense was committed entirely or partially within the court's jurisdiction.¹⁴⁸ Swazi courts may mete out any punishment allowed by Swazi customary law, except death, as long as the punishment is not contrary to "natural justice and humanity."¹⁴⁹ In both civil and criminal matters, however, all parties must be members of the Swazi nation.¹⁵⁰ The defendant must ordinarily reside within the territorial area of the court's jurisdiction, or the cause of action must have arisen there.¹⁵¹

work in harmony and in conjunction with other limbs thereof, notably the High Court.

Fix Gama v. R., 1970-76 Swaz. L.R. 462, 462H (High Ct.).

143. Swazi Courts Act, *supra* note 138, §§ 28(1), 33(4).

144. *Id.* §§ 28(1), 33(3).

145. See *Fix Gama*, 1970-76 Swaz. L.R. at 464C-F. The court stated that "the Swazi Courts Act requires revision and streamlining in many respects. . . . [T]he system of appeals through the Swazi Court of Appeal, Higher Court of Appeal, and Judicial Commissioner to the High Court and thence, if necessary, to the Appeal Court, is in my opinion unnecessarily prolix and cumbersome." *Id.* at 464C-D.

146. See *supra* note 94 and accompanying text (noting Botswana's distinction between criminal and civil cases).

147. Swazi Courts Act, *supra* note 138, § 8(2). In practice this definition refers to members of the Swazi ethnic group, not Swazi citizenship. *Sanders*, *supra* note 139, at 125.

148. Swazi Courts Act, *supra* note 138, § 8(2).

149. *Id.* § 12. Punishment must be "commensurate with the nature and circumstances of the offence and the circumstances of the offender." *Id.*

150. *Id.* § 7(1).

151. *Id.*

There are many instances of considerable divergence between national and customary law, particularly in matters of damages, estates, evidence, and family law.¹⁵² The scattering of conflict of laws rules is also a problem.¹⁵³ These problems, combined with the vagueness of and qualifications to civil and criminal rules, encourage forum shopping, one of the major difficulties with Swaziland's system.¹⁵⁴

Another obstacle to harmonizing the court systems is that many judges in national courts are still foreigners.¹⁵⁵ Moreover, national judges need not always apply customary law, even when it may be applicable.¹⁵⁶ As a result, many courts do not take judicial notice of Swazi customary law.

Unfortunately, little material is available to prove the primacy and principles of customary law. Few texts exist, and decisions of customary courts are not published.¹⁵⁷ To remedy this problem, as in Lesotho, the High Court often turns to "assessors,"¹⁵⁸ who try to explain the relevant prevailing elements of customary law. Unfortunately, because customary law is dynamic, an assessor's comments on old texts may bear little resemblance to prevailing customary legal reality.

IV. LEGAL DUALISM IN SOUTH AFRICA

At present, the amount of literature on South African cus-

152. Sanders, *supra* note 139, at 127.

153. See, e.g., *id.* at 124-27; see also Swazi Courts Act, *supra* note 138, § 8(2) (discussing customary courts' territorial jurisdiction over criminal matters), §§ 9(a)-(c) (discussing customary courts' subject matter jurisdiction), §§ 30, 31, 33, 35 (discussing appeals); High Court Act, No. 20, § 4(1) 1954 (discussing appeals to High Court); Magistrate's Courts Act, No. 66, § 16(1) (1938) (discussing ability of clerk of magistrate's court to transfer case to customary court when both parties are Swazi and cause of action may be suitable for customary court).

154. See Sanders, *supra* note 139, at 124-27.

155. See *id.* at 128.

156. In *Dlamini v. Nhlengethwa*, 1977-78 Swaz. L.R. 79, 81 (High Ct.), Chief Justice Nathan concluded that when a magistrate believes that a case is appropriate for a customary court but does not transfer it, the magistrate need not apply Swazi law and custom. *Id.* at 81. He added that "[a] fortiori is the position the same in the High Court where there is no machinery for transfer of an action to a Swazi court." *Id.*

157. See generally, e.g., J.M.A. FANNIN, PRELIMINARY NOTES ON PRINCIPLES OF SWAZI CUSTOMARY LAW (1967); B.A. MARWICK, THE SWAZI (1940); N.N. RUBIN, THE LAW OF MARRIAGE AND DISSOLUTION OF MARRIAGE (1964).

158. Swazi Courts Act, *supra* note 138, § 35 (providing for assessors); see High Court Act, No. 20, § 6(1)(b) (1954) (providing for assessors).

tomary law compares favorably with the amount in other African countries.¹⁵⁹ In the mid-1800s, following decades during which informal sources provided discussions of customary law, several texts that detailed customary laws appeared.¹⁶⁰ Thereafter, other texts, incorporating Western or African anthropological perspectives, were published.¹⁶¹ Nevertheless, customary law in South Africa remains largely unwritten.¹⁶²

In South Africa, the first law that considered the status of customary law was the Black Administration Act of 1927.¹⁶³ The act provided for chiefs' and headmen's courts, which could apply only customary law,¹⁶⁴ and commissioners' courts and native appeals courts, which could apply either customary or common law.¹⁶⁵ Section 12 of the act empowered chiefs or headmen to hear civil cases between Africans.¹⁶⁶ In addition, section 20 gave chiefs or headmen the authority to try and punish any African who committed particular offenses.¹⁶⁷

Section 11(1) of the Black Administration Act, which concerns commissioners' courts and native appeals courts, was based upon laws that had existed in the Transkei province prior to the South African union in 1910.¹⁶⁸ It authorized

159. See BENNETT, *supra* note 103, at 26.

160. See *id.* at 25-26. These texts included the Compendium of Kafir Laws and Customs and the Natal Code of Zulu Law. See *id.*; see also J.C. BEKKER, SEYMOUR'S CUSTOMARY LAW IN SOUTHERN AFRICA 11 (5th ed. 1989).

161. See BENNETT, *supra* note 103, at 26 (discussing books on South African and Tswana native law).

162. BEKKER, *supra* note 160, at 11. For a further discussion on the ascertainment of customary law in South Africa, see *infra* notes 214-20 and accompanying text.

163. Black Administration Act, No. 38 (1927). The act was once also known as the Bantu Administration Act.

Perhaps the most significant case on customary law prior to passage of the Black Administration Act was *Van Breda v. Jacobs*, 1921 App. Div. 330. The court concluded that for a court to take notice of a custom, "first [the custom] must be immemorial, secondly it must be reasonable, thirdly it must have continued without exception since its immemorial origin, and fourthly it must be certain." *Id.* at 334. The party seeking application of customary law bore the burden of proving a custom's existence. *Id.* at 333.

164. Black Administration Act, *supra* note 163, § 12(1).

165. *Id.* § 11(1); see BENNETT, *supra* note 103, at 26 & n.66. The act authorized commissioners' courts and the appeals court for commissioners' courts to use African assessors in an advisory capacity. See Black Administration Act, *supra* note 163, § 19; BENNETT, *supra* note 103, at 29 & n.91.

166. Black Administration Act, *supra* note 163, § 12.

167. *Id.* § 20.

168. *Id.* § 11(1); compare *id.* with BEKKER, *supra* note 160, at 3-4 (discussing

these courts to determine whether African customary law was to be applied in each case.¹⁶⁹ Thereafter, native appeals courts deemed several factors relevant in determining whether they should apply customary law, including the nature of the act,¹⁷⁰ the intention of the parties,¹⁷¹ the residence of the parties,¹⁷² whether a defense existed in only one legal system,¹⁷³ and *stare decisis*.¹⁷⁴

Compounding the confusion, courts differed as to their discretion to use customary law. In some cases, courts assumed that they had discretion,¹⁷⁵ but could not exercise it arbitrarily.¹⁷⁶ In other decisions, courts determined that commissioners did not have complete discretion.¹⁷⁷

The uncertainty about which legal system deserved primacy was another problem. At least one South African court thought that the common law was primary,¹⁷⁸ while others sug-

Transkei magistrates' courts' discretion to apply customary law). Section 11 provides, in relevant part, that

[n]otwithstanding the provisions of any other law, it shall be in the discretion of the courts of Bantu Affairs Commissioners, in all suits or proceedings between Bantu involving questions of customs followed by Bantu, to decide such questions according to the Bantu law applying to such customs . . . [p]rovided that such Bantu law shall not be opposed to the principles of public policy or natural justice.

Black Administration Act, *supra* note 163, § 11(1); see R.S. Suttner, *Towards Judicial and Legal Integration in South Africa*, 85 S. Afr. L.J. 435, 435 n.1 (1968) (quoting section 11(1)). "Bantu law" concerned "those aspects of African tribal law which have been recognized by the courts as well as certain additions and amendments which they have made." *Id.*

169. Black Administration Act, *supra* note 163, § 11(1); see Suttner, *supra* note 168, at 435 n.1 (quoting section 11(1)).

170. See, e.g., *Bakacu v. Mbuwana*, 1930 N.A.C. 78, 79 (Cape & Orange Free State).

171. *E.g.*, *Dodo v. Sabasaba*, 1945 N.A.C. 62, 63 (Cape & Orange Free State).

172. See, e.g., *Mhlongo v. Sibeko*, 1937 N.A.C. 34, 37 (Natal & Transvaal).

173. See *Dhlamini v. Ngubane*, 1948 N.A.C. 14, 15 (N.E.); *Lebona v. Ramokone*, 1946 N.A.C. 14, 16 (Cape & Orange Free State).

174. *Fuzile v. Ntloko*, 1944 N.A.C. 2, 3 (Cape & Orange Free State); *Moima v. Matladi*, 1937 N.A.C. 40, 43-44 (Cape & Orange Free State).

175. *Mhlongo v. Mhlongo*, 1937 N.A.C. 124, 126 (Natal & Transvaal); *Magadla v. Hams*, 1936 N.A.C. 56, 58 (Cape & Orange Free State).

176. *E.g.*, *Magidela v. Sawintshi*, 1943 N.A.C. 52, 53 (Cape & Orange Free State).

177. *E.g.*, *Nqanoyi v. Njombeni*, 1930 N.A.C. 18, 19 (Cape & Orange Free State).

178. *Id.*

gested that customary law should prevail over common law.¹⁷⁹ Still others thought that the two systems enjoyed equal status.¹⁸⁰

The Appellate Division of the Supreme Court entered the fray in 1948 in *Ex parte Minister of Native Affairs: In re Yako v. Beyi*.¹⁸¹ Justice Schreiner wrote that the native commissioner should exercise his discretion "without regarding either of the systems of law as *prima facie* applicable," although he provided no guidelines as to how the commissioner could make that determination.¹⁸² Nothing more specific emerged from the 1953 case of *Umvovo v. Umvovo*,¹⁸³ in which Justice Schreiner indicated that a court should determine not whether the assistant native commissioner had exercised his discretion properly, but rather "whether the conclusion that native law should be applied was in the circumstances a proper one."¹⁸⁴

After *Yako*, the Native Appeals Court began delivering a number of decisions that laid down rules defining the limits of a commissioner's discretion and prescribing certain requirements. For example, the court held that a commissioner could consider the intention of the parties,¹⁸⁵ the areas in which the parties lived,¹⁸⁶ and whether a cause of action existed only under one system of law.¹⁸⁷ While such pronouncements helped clarify the nature of discretion in the Native Appeals Court, confusion reigned in the magistrates' courts, which also considered the effect of customary law.

Section 54A(1) of the Magistrates' Courts Act of 1944 was

179. *Sawintshi v. Magidela*, 1944 N.A.C. 47, 47 (Cape & Orange Free State); *Moima v. Matladi*, 1937 N.A.C. 40, 44 (Natal & Transvaal).

180. *E.g.*, *Mhlongo v. Mhlongo*, 1937 N.A.C. 124, 125 (Natal & Transvaal).

181. [1948] 1 S. Afr. 388 (App. Div.).

182. *Id.* at 397. Justice Schreiner concluded that Parliament, in enacting section 11(1) of the Black Administration Act, *supra* note 163, "appears to have used a device which may have been expected to permit of some elasticity and provide scope for development . . . without laying down any hard and fast rule as to the system of law to be used [to achieve equitable decisions]." *Id.*

183. [1953] 1 S. Afr. 195 (App. Div.).

184. *Id.* at 201. Although the Appellate Division did not set down clear rules on conflicts of law after *Yako* and *Umvovo*, the frequency with which reported cases concerned conflicts lessened considerably. BENNETT, *supra* note 103, at 79.

185. *See Mbonjiwa v. Scellam*, 1957 N.A.C. 41, 43-44 (S.).

186. *Mokoba v. Langa*, 1952 N.A.C. 76, 77 (S.).

187. *E.g.*, *Ngwenya v. Zwane*, 1959 N.A.C. 28, 29 (N.E.); *Langa v. Khuzwayo*, 1958 N.A.C. 63, 65 (N.E.).

similar to section 11(1) of the Black Administration Act.¹⁸⁸ The section gave magistrates discretion to apply customary law in cases between Africans that involved questions of customary law, including matters related to the criminal judgments of chiefs' courts.¹⁸⁹ In essence, the magistrate and the commissioner had the same jurisdiction in applying customary law.

Decades passed before this system changed. In 1983, after widespread dissatisfaction with many aspects of the legal system, a government-appointed Commission of Inquiry into the Structure and Functioning of the Courts, also known as the Hoexter Commission, issued a report that urged many reforms.¹⁹⁰ The Commission recommended the abolition of the separate criminal jurisdiction of the commissioners' courts and the abolition of the civil jurisdiction of both the commissioners' courts and the appeals court for commissioner's courts.¹⁹¹

A major difficulty with the Hoexter Commission's report was that the drafters did not consider the report's implications for South African customary law in the so-called "national states." These "national states" are homelands to which South Africa intended to grant fictional independence in order to "denationalize" Africans in the land of their birth.¹⁹² The National States Constitution Act of 1971 had granted the homelands the authority to enact legislation concerning magis-

188. Compare Magistrates' Courts Act, No. 32, § 54A(1) (1944) with Black Administration Act, *supra* note 163, § 11(1); see A.J. Kerr, *Customary Law in Magistrates' Courts and in the Supreme Court*, 103 S. AFR. L.J. 526, 528 (1986) (discussing section 54A(1)).

189. Magistrates' Courts Act, *supra* note 188, § 54A(1); see Kerr, *supra* note 188, at 528. Section 54A(1) provides, in relevant part, that "[n]otwithstanding the provisions of the Act or any other law a court may in all suits or proceedings between Blacks . . . involving questions of customs followed by Blacks, take judicial notice thereof and decide such questions according to the Black law applying to such customs." Magistrates' Courts Act, *supra* note 188, § 54A(1); see Kerr, *supra* note 188, at 528.

Similar to laws in Botswana, Lesotho, and Swaziland, section 54A also provided that laws not be contrary to public policy and natural justice. Magistrates' Courts Act, *supra* note 188, § 54A(2); see Kerr, *supra* note 188, at 530-35 (discussing section 54A(2)). The section also codified conflict of laws rules. Magistrates' Courts Act, *supra* note 188, § 54A(2); see Kerr, *supra* note 188, at 530-35 (discussing section 54A(2)).

190. COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING OF THE COURTS (1983).

191. *Id.* at 413-14.

192. See John Dugard, *South Africa's "Independent" Homelands: An Exercise in Denationalization*, 10 DENV. J. INT'L L. & POL'Y 11 (1980) (discussing homelands).

trates' courts.¹⁹³ As a result, any such South African legislation passed after the act came into force would have had no effect in these homelands. An additional problem was that the act gave the homelands authority over chiefs' courts, thereby nullifying the effect of African legislation.¹⁹⁴ Moreover, the Commission completely ignored the systems of customary law existing in the four "independent" homelands of Bophuthatswana, the Ciskei, the Transkei, and Venda, and thus maintained the fantasy that they are not part of South Africa.¹⁹⁵

The government disregarded these problems when it enacted the Special Courts for Blacks Abolition Act in 1986.¹⁹⁶ The Act retained the chiefs' courts, the National States Constitution Act courts, and the African divorce court.¹⁹⁷ However, it abolished other courts for Africans, specifically the commissioners' courts and the appeals court for commissioners' courts, and transferred their jurisdiction to the magistrates' courts.¹⁹⁸ In doing so, the act made no provision for magistrates to receive training in customary law, and did not stipulate that the Supreme Court was to take judicial notice of customary law.

The Law of Evidence Amendment Act of 1988,¹⁹⁹ which repealed section 54A of the Magistrates' Courts Act,²⁰⁰ partly

193. Self-Governing Territories Constitution Act, No. 21, sched. 1, item 12 (1971). The act was formerly known as the National States Constitution Act, but was renamed pursuant to the National States Constitution Amendment Act, No. 111 (1990).

194. *See id.*

195. Each of the "independent" homelands has a system governing customary law embodied in its constitution and its indigenous courts' act. *See* Bophuthatswana Constitution Act, No. 18, § 67(2) (1977); Ciskei Constitution Act, No. 20, § 61 (1981); Transkei Constitution Act, No. 15, § 53(2) (1976); Venda Constitution Act, No. 9, § 51(2) (1979); *see also* BEKKER, *supra* note 160, at 65. For more on these territories' constitutions, *see generally* THE CONSTITUTIONS OF TRANSKEI, BOPHUTHATSWANA, VENDA AND CISKEI (M.P. Vorster et al. eds., 1985). Each of these homelands also has an indigenous courts act. *See* Traditional Courts Act, No. 29 (1979) (Bophuthatswana); Administrative Authorities Act, No. 37 (1984) (Ciskei); Chiefs' Courts Act, No. 6 (1983) (Transkei); (South African) Black Administration Act, No. 38 (1927) (Venda); *see also* BEKKER, *supra* note 160, at 18-22.

196. Special Courts for Blacks Abolition Act, No. 34 (1986).

197. *See generally id.*

198. *Id.* § 1. The act repealed many sections of the Black Administration Act, including section 11(1), discussed *supra* at notes 169-70 and accompanying text.

199. Law of Evidence Amendment Act, No. 45 (1988). *See generally* A.J. Kerr, *Customary Law in All Courts*, 106 S. AFR. L.J. 166 (1989) (discussing act).

200. Law of Evidence Amendment Act, *supra* note 199, § 2.

remedied the problems related to judicial notice of customary law. Section 1(1) permits *any court* to take judicial notice of foreign state law and indigenous law.²⁰¹ Significantly, this section omits the requirement in section 54A(1) of the Magistrates' Courts Act that both parties to a case must be black South Africans for a court to apply customary law.²⁰² Section 1(2) permits any party to the proceedings to offer evidence of the relevant customary law.²⁰³ Section 1(3) attempts to resolve conflicts among customary laws,²⁰⁴ while section 1(4) defines "indigenous law" as "the Black law or customs as applied by the Black tribes," including those in the "territories which formerly formed part of the Republic," meaning the independent homelands.²⁰⁵

Unfortunately, the act does not require that judicial officers always take notice of customary law. Given the inability, and in many cases the unwillingness, of white judicial officers to ascertain customary law, the framers of the act could at least have permitted courts to call expert witnesses when they are unable to establish relevant customary law by other means. Unlike earlier acts, the act does not provide for the courts' use of assessors to ascertain custom.²⁰⁶ Sections 1(1) and 1(2) together place the evidentiary and financial burdens of proving

201. *Id.* § 1(1). Section 1(1) of the act provides, in relevant part, that "[a]ny court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice." *Id.*

202. Compare Law of Evidence Amendment Act, *supra* note 199, § 1(1) with Magistrates' Courts Act, *supra* note 188, § 54A(1) and Kerr, *supra* note 188, at 528.

203. Law of Evidence Amendment Act, *supra* note 199, § 1(2).

204. *Id.* § 1(3). This section provides that

[i]n any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.

Id.

205. *Id.* § 1(4).

206. *See id.* The Black Administration Act had permitted courts the use of assessors. *See* Black Administration Act, *supra* note 163, § 19(1); *supra* note 165 (discussing section 19(1)).

customary law on the parties. These burdens may prove excessive, particularly if the parties are, like so many Africans, illiterate and impoverished. Such a system favors the parties with better connections, education, and financial resources.

V. *THE WAY FORWARD?: AN INTEGRATION MODEL FOR SOUTH AFRICA*

The destructiveness of apartheid in South Africa has left the country with daunting social welfare problems that demand urgent attention. To ensure the efficient administration of justice, while at the same time guaranteeing a right to culture, the architects of the new order should follow an integration model. This approach requires the greatest possible integration of customary law and the supreme national law. While unification, the imposition of a uniform law, is more desirable in terms of efficiency, legal integration is more viable in the near future because it will bring together laws of diverse origins without destroying them and minimize social dislocation.²⁰⁷ Legal integration would allow the varying laws to continue to exist, but would standardize their effects and remove conflicts among them.²⁰⁸

Integration will not be easy to achieve because of fundamental differences between customary and national law. The onslaught of corrupting colonial influences has not removed the communal nature of customary law and the individualistic nature of national law.²⁰⁹ Under customary law, kinship permeates the social structure, and legal proceedings concern the community as much as the individual, because communities often strive to foster reconciliation and harmony.²¹⁰ As a result of this communal orientation, customary law is usually unwritten.²¹¹ The lack of legislation and written law makes it difficult to ascertain precedent. Codes such as the Laws of Ler-

207. Allott, *supra* note 27, at 65; see Prinsloo, *supra* note 28, at 325 (concluding that "[i]ntegration embodies a practical approach to the question of unification, namely that unification can be achieved gradually or by a cumulative process, unifying rules where this is possible and leaving matters which cannot be unified to the personal laws of the parties").

208. Allott, *supra* note 27, at 65.

209. See A.J.G.M. Sanders, *Legal Dualism in Lesotho, Botswana and Swaziland: A General Survey*, 1 *LESOTHO L.J.* 47, 57 (1985).

210. See *id.*

211. See BEKKER; *supra* note 160, at 11; BENNETT, *supra* note 103, at 17 & n.3.

otholi in Lesotho²¹² and the Natal Code of Zulu Law in South Africa²¹³ are merely restatements, not bodies of original legislation. Treatises on customary law are few and not necessarily reflective of the dynamic nature of customary law. Moreover, the customary law emphasis on conciliation and communalism makes it difficult for Western-trained jurists to think of customary law in terms of a national law that is divided, as is much Western law, into public and private law.

Nevertheless, if South African jurists are to make any strides in modifying the legal system, the precise content of customary law must be determined. In 1983, a Committee on Indigenous Law, which advised the South African government on research projects on indigenous law, ceased operations before jurists could restate the findings of the Committee's anthropologists.²¹⁴ Another group, working at the Centre for Indigenous Law of the University of South Africa, began restatement work in 1977²¹⁵ and has thus far produced four books and two introductions to indigenous law.²¹⁶

The completion of a comprehensive restatement project in South Africa will be particularly difficult. There are relatively few African lawyers and, consequently, only a few qualified jurists with any facility in indigenous languages.²¹⁷ Compounding the problem is the fact that these African lawyers have received their training in schools that do not imbue students with sensitivity to customary law and legal institutions.²¹⁸

212. See *supra* note 122 (discussing Laws of Lerotholi).

213. See BEKKER, *supra* note 160, at 11.

214. See M.W. Prinsloo, *Restatement of Indigenous Law*, 20 COMP. & INT'L L.J. S. AFR. 411, 417 (1987).

215. *Id.* at 417-18.

216. See, e.g., INDIGENOUS CRIMINAL LAW IN BOPHUTHATSWANA (A.C. Myburgh ed., 1980); A.C. MYBURGH, PAPERS ON INDIGENOUS LAW IN SOUTHERN AFRICA (1985); A.C. MYBURGH & M.W. PRINSLOO, INDIGENOUS PUBLIC LAW IN KWANDEBELE (1985); M.W. PRINSLOO, DIE INHEEMSE ADMINISTRATIEFREG VAN 'N NOORD-SOTHOSTAM (1981); M.W. PRINSLOO, INHEEMSE PUBLIEKREG IN LEBOWA (1983).

217. Black lawyers comprise less than ten percent of South Africa's 10,000 lawyers. Interview with Arthur Chaskalson, National Director of the Legal Resources Centre of South Africa at the Ford Foundation, in New York, N.Y. (May 29, 1991).

218. See generally J.B.K. Kaburise, *The Role of Legal Education in a Changed South African Society: An Outsider's Reflections*, 20 COMP. & INT'L L.J. S. AFR. 316 (1987).

In recent months there have been calls for a new law school curriculum. Some schools have instituted courses intended to heighten students' concern about the relationship between law and society. For example, since 1985, students at the University of Natal School of Law have been required to take a course entitled "Race Legis-

These lawyers have not been trained in the research and fieldwork techniques that would be required for the ascertainment of customary law.²¹⁹ In view of the small number of highly educated black South Africans, the anthropologists who would likely accompany the lawyers in the fieldwork would almost certainly be white South Africans or foreigners. Informants may view such anthropologists with suspicion or even hostility. Many errors of interpretation of customary law could occur as a result.

Once customary law is ascertained, South Africa should undertake a two-step process to integrate it into a national legal system. First, in the initial period, the basic dualism of the legal system would remain, but the laws of the different ethnic groups would be harmonized.²²⁰ Second, after a period in which, ideally, South Africa will develop a more favorable social climate, the country could replace the diverse customary and national systems with one integrated system that would allow for dualism when necessary.

The road to national-customary integration may be long and difficult. The experiences of other African nations with dual legal systems suggest that South Africa should pay particular attention to procedural matters.²²¹ Rules regulating conflicts between customary and common law rules should be developed and codified. For the sake of simplicity, these should be devised for all areas of law and located in a single statute. In addition, one might consider the adoption of a rule that customary law will apply in civil matters unless both parties clearly intend that national law apply. A further rule might empower or even require customary courts to apply national criminal law, a field in which customary and national law already tend to

lation." See, e.g., *RACE AND THE LAW IN SOUTH AFRICA* vii (A.J. Rycroft et al. eds., 1987). The author is not aware of any discussion of integrating customary law into the curriculum.

In contrast, law faculties in all South African universities teach Roman law, whose study is required for bachelor's degrees in law. See Erasmus, *supra* note 55, at 673.

219. Cf. Kaburise, *supra* note 218, at 317 (discussing need for more training in customary law in South African law schools).

220. See Prinsloo, *supra* note 28, at 325 (stating that harmonization "seeks to eliminate points of friction between . . . different legal systems but leaves the systems to continue to exist separately").

221. See *supra* notes 72-158 and accompanying text (discussing dual legal systems of Botswana, Lesotho, and Swaziland).

be closely related. Such changes would help eradicate the problem of forum shopping.²²²

National courts in South Africa must also be required to take judicial notice of customary law. Such a directive will prove impossible to fulfill, however, as long as whites dominate the national judiciary and magistracy. Even if increasing numbers of Africans occupy such positions, it will be exceedingly difficult for those not trained in customary law to take judicial notice of it.

The need for training in customary law requires a recasting of the South African law school curriculum that tailors it to the needs of the country.²²³ The law schools should emphasize and require the study of customary laws for graduation. Particular attention should be devoted to inculcating the view that customary law is neither ineffective nor inferior to national law.

The goal of integration should be to make eventual unification possible. As suggested above, while Botswana is following a definite trend toward unification²²⁴ South African unification may still be far off. Before government officials and jurists begin to think about unification schemes, many other battles must be waged, including those for national reconciliation, eradicating illiteracy, and improving the economy. Only in such a changed environment would it be possible for a commitment to unification to gain popular support and thrive.

CONCLUSION

As South African politicians and jurists debate the nature of the new constitution that South Africa must have to help dismantle the legacy of apartheid, their discussions fail to consider the fate of customary law. While there is mention of a right to culture, there is no examination of whether that right includes the rights to apply and to use customary law. Under international law, however, the right to culture incorporates the right to use customary law. Should agreement be reached in South Africa that customary law will continue to exist, the

222. In countries such as Swaziland, the retention of strict dualism has proved to be one of the greatest obstacles to creating legislative and judicial harmony. *See supra* notes 140-58 and accompanying text (discussing Swaziland's court system).

223. The law schools could also serve as venues for the training of magistrates.

224. *See supra* notes 87-91 and accompanying text (discussing Botswana's progress toward unification of laws).

form in which it will survive remains unclear. Some African governments, in their zeal to create uniformity and speed development, have chosen to abandon customary law, while others have maintained a strict dualism between customary and national law. In general, however, unification has been unsuccessful. A survey of the experiences of three of South Africa's neighbors—Botswana, Lesotho, and Swaziland—indicates that dualism is also fraught with problems. Accordingly, for now South Africa should adopt an integration model that would foster the social harmony that one day may make legal integration possible.