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CONSITUTIONAL RIGHTS AND AFRICAN CUSTOMARY LAW: BRIDGING THE GAP BETWEEN LEGAL AND JUDICIAL PLURALISM WITHIN THE POST COLONAL CONTEXT

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Abstract

Legal pluralism is widely practiced in many post-colonial African states, and Namibia is no exception. The Republic of Namibia has constitutional, Roman-Dutch, common, and customary legal systems at work within its legal and judicial framework. Although the constitution enjoys legislative supremacy within the Namibian legal system, traditional decisions are still recognized in lower courts and even more so amongst their communities. This paper will focus on Namibia as a case study for the analysis of legal plurality and the approach that the nation takes in making the multiplicated nature of its legal system work to protect human rights and liberties. The paper aims at finding a middle ground between customary rights, the right to culture and human rights. This paper aims at answering the following research question; how post-colonial nations manage the duality of legal systems caused by legal transplantation, and what approaches do they take that best protect the constitutional and human rights and liberties of their people. This was done through a process of in-depth literature review and case study on constitutional rights and African Customary law.

Key words: Legal Pluralism, Constitution, Human Rights, Customary law, Right to Culture

Introduction

Namibia is one of many African countries that recognizes and incorporates traditional customary laws into its legal system. The country represents a rich historical background which contributes to its multifaceted nature. This is true not only in social and cultural sectors but also in legal and judicial sectors as systems adopted through colonialism, independence, and ancient standing tribal laws mix, co-exist and function alongside one another.

The Republic of Namibia has with in its legal and judicial framework, Constitutional, Roman-Dutch, common, and customary legal systems at work. With this in mind, although the constitution enjoys legislative supremacy within the Namibian legal system, traditional decisions are still recognized in lower courts and even more so amongst the communities to which they belong.

For many individuals living in rural areas of Namibia, the ability to contest customary court decisions heavily restricted due to factors such as lack of recourse, lack of knowledge or literacy, and poverty that act as significant barriers to justice[1]. Thus, for many residents of Namibia's most rural areas, customary or traditional decisions become absolute. This becomes an especially troublesome issue when considering the standing conflict between traditional customary law and human rights. Thus, an absence of the ability to counter customary law may leave many individuals living in rural areas vulnerable to potentially discriminatory traditional values, and subsequently, to a violation of the rights and liberties awarded to them through the very constitution in which they have vested their powers. This especially holds true for women who often bear the brunt of discriminatory traditional law, especially those to do with private law matters such as marriage, divorce, and succession rights. Such discriminatory traditional law can be exampled in the participation of patrilineal and matrilineal succession as seen in many parts of Africa.

Further, while customary law may pose a potential threat to the constitutional and human rights of a nations populous, there are those who contest that it is the key to solving the problem of limited access to state justice system, which in itself can be considered a gross violation to the constitutional rights and liberates. Those who defend the holding of customary law, its origins and integrity argue that its usefulness as an Alternative Dispute Resolution (ADR) method provides the accessibility to justice which is barred by institution, social and geographical factors on the state level. Additionaly, finding a common ground between state and non state legal and judicial sectors may prove to aid in the fostering, development and upholding of the rule of law.

That siad, this thesis aims to analyze legal pluralism as a symptom of colonial legal transplantation and the effect thereof on post-colonial nations in order to answer the research question; how do post-colonial nations manage the duality of legal systems caused by legal transplantation, and what approaches do they take that best protect the constitutional and human rights and liberties of their people.

More specifically, this paper will focus on Namibia as a case study for the analysis of legal plurality and the approach that the nation takes in making the multiplicated nature of its legal system work to protect human rights and liberties. In doing so, the author hopes to highlight some drawbacks to Namibia's approach and offer a possible better way of handling legal and judicial plurality in which justice is available and accessible to all.

[1] OECD Expert Roundtable Background Notes (2015) Equal Access to Justice https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf

The author will be conducting a qualitative study of literature, in depth case study, as well as a comprehensive scholarly review of academic articles and books about legal pluralism within the context of post-colonial legal structuring. Furthermore, the author will also analyze Namibian primary and secondary sources of statutory law and the nation's Judicial and procedural systems to understand her approach to legal and Judicial pluralism.

Chapter 1 of this paper will briefly introduce the concept of legal pluralism, its history and its context withing colonialism in order to better understand its application to Namibia as a case study. Chapter 2 will discuss the conflict cause by the plurality in law, specifically, those conflict that manifest by means of the discrimination of women. Chapter 2 will also offer a discussion into the constitutional, international obligations that Namibia has to protect women, as well as the contrasting right to culture. Chapter 3 will offer a look into the different approaches to reconciling customary and state laws, aiming to find the best proposition or solution to the issues posed.

1 Legal Pluralism

1.1 What is Legal Pluralism

By definition, legal pluralism is the existence and operation of two or more legal systems within the sphere of influence of a single social or political group[2]. That said, the concept first saw its introduction into academia in the 1970s through the study of transplanted and indigenous law in the colonial and post-colonial setting[3].

Much of the discussion into the theory of legal pluralism is centred around the conceptual definition thereof. That said, to be able to find a conceptual definition for legal pluralism, scholars have first had to find a conceptual definition of law itself. The attempt at defining law to explain legal pluralism has seen the theoretical contribution into the topic divided into separate two groups, parted by their belief as to how much law exists within or without the confines of what is described as the state, or state law.

On the one hand, you find contributors to the topic who have a state-centric view of the law. These contributors are often found to be jurists and legal theorists, most notably legal positivists, who believe that law is derived from the state. These theorists believe that the state is a central, unified institution from which law and governance are derived[4]. From this definition of law, legal pluralism is achieved solely by the recognition of alternative forms of law by the state, thus the validity of any such law if founded from the state institution. This school of thought is often referred to as the "weak" conceptual view into legal pluralism[5] and those scholars who derive their view of law from such thought are often referred to as legal centralists[6]. The above views on law can be exampled by John Austin in his theory of law being derived from the " sovereign" and such law gaining validity through the customary practises of state institutions such as the courts[7]. Further, H.L.A Hart's concept of primary and secondary rules of law also offers a "legal centralist"[8] view of law and legal plurality. Legal centralism is often criticized for the implication that laws founded and validated through the recognition of state law are "primitive" in nature[9]. This notion is especially encompassed in the context of legal transplantation in the colonial era and legal centralists have often been criticized for their inability to recognize societies with alternatives to state law as having law, deeming many indigenous societies as "primitive" or "savage"[10].

On the other hand, legal anthropologies and sociologists offer a perspective on law as existing outside the confines of state institutions, often regarding other normative social ordering as being law. In this regard, state law is viewed as one such order which interacts with many others, creating a plural legal environment. This view of law for the sake of a conceptual definition of legal pluralism exists within a spectrum depending on just how much the contributing scholar perceives

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[2] Pimentel, D. (2010). Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique. *Yale Human Rights and Development Law Journal,* Vol. 14, 59 -104

[3] . K. von Benda-Beckmann, B. Turner (2018) Legal pluralism, social theory, and the state, *The Journal of Legal Pluralism and Unofficial Law*

[4] Griffiths, J. (1986). "What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24, 1-56

[5] *Ibid*

[6] *Ibid*

[7] Hart, H.L.A. (2012). *The Concept of Law.* (3rd ed.). Oxford, UK: Oxford University Press

[8] Griffiths, J. (1986).Supra nota 4

[9] Griffiths, J. (1986).Supra nota 4

[10] Griffiths, J. (1986).Supra nota 4

law as existing outside of the recognition or validation of state law[11]. Pospisil founds his definition of legal pluralism in his concepts of legal levels. The scholar explains that law exists in every subgroup of a whole of society, thus, the plurality in law exists as there are as many legal systems as there are sub-groups to society[12]. M.G. Smith explains the concept through the point of view of politics, citing that an individual's cooperative membership is the original and the fundamental source of his social rights and obligations[13]. Smith furthers that these cooperations to which individuals hold memberships, form the sociological framework of law in society[14]. As there are many cooperations operational within society, there exists plurality in law. Eugenie Elrich's contribution to the concept of legal pluralism involves the distinction of law into "laws of conduct" and " laws of decision"[15]. The law which is deemed to be "law of conduct" is described as that which is active in society in the practical sense, not just that which lawmakers use to institute statutes and regulations. Law in this practical sense, Elrich argues, can be names "living law"[16]. Living law can be exampled by any socio normative orders or rules which have vast societal influence, for example, customary law. Since there are many such legal orders, there exists legal plurality in law[17]. Sally Falk More describes these socio normative ordering as being " Semi-Autonomous Social Fields"[18]. The social fields represent rules which could have or do have a regulatory influence on any given society[19]. More's concept entails that there are no boarders between these social files, thus they are often overlapping, intertwining and mixing, with one regulatory system of rules having the ability to coexist with one or multiple others, thus, existing a normative plurality[20].

The concept of legal pluralism is not exclusive to the context of state and non-state laws. In fact, contributions into the concept have extended beyond the state law debate to the discussion of the interactions of international laws such as those involving international private and public law as well as that of the interaction of the state with global regulatory institutions[21]. The interaction between the state law and that of the laws and customs of international trade, such as the interaction between sates laws and the International Convention on Sale, are examples of the vastness of the concept of legal pluralism. However, for the sake of this paper, only legal pluralism within the context of colonial legal transplantation, or "classic legal pluralism"[22], will be considered.

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[11] Krisch, N. (2015), Pluralism in International Law and Beyond. In: J. d'Aspremont, S. Singh (Eds), *Fundamental Concepts for International Law: The Construction of a Discipline,* p1- 18

[12] L. Pospisil. Anthropology of Law: A Comparative Theory. New York, Harper and Row (1971) referenced in Griffiths (Griffiths, J. "What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24, 1-56 Publishing 1986)

[13]M.G. Smith. Cooperations and Society. London, Duckworth (1974). Referenced in Griffiths. (Griffiths, J."What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24, 1-56 Published 1986)

[14] *Ibid.,* 18

[15] E. Ehrlich. Fundamental Principles of the Sociology of Law. Cambridge, Harvard University Press (1936). Referenced in Griffiths. .(Griffiths, J."What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24, 1-56 Published 1986)

[16] *Ibid.,* 26

[17] *Ibid.,* 27

[18] S. F. Moore. Law and social change: the semi-autonomous social fieldas an appropriate subject of study. London, Routledge & Kegal Paul. Referenced in Grifiths. .(Griffiths, J."What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24, 1-56 Published 1986)

[19] *Ibid.,* 30

[20] *Ibid.,* 35

[21] Tamanaha, B.Z. (2007), Understanding Legal Pluralism: Past to Present, Local to Global. *Sydney Law Review*, Vol. 29; St. John's Legal Studies Research Paper No. 07- 0080. 10.

[22] . K. von Benda-Beckmann, B. Turner (2018) Legal pluralism, social theory, and the state, *The Journal of Legal Pluralism and Unofficial Law*

1.2 State and Non-State Law

Before the acceptance of the concept of "state law" being the primary institution of law as being the norm, much of the world operated in varying degrees of plurality[23]. Different normative orderings had a regulatory influence on the individual. In the feudal societies of Europe, it was the norm for one person to be subject to the rules of the monarch, the church, the family etc[24]. It was only in about the 15th – 19th century that the state became the main regulatory institution[25]. This change was facilitated by many factors, however, the growing need for one institution for the regulation of customs or rules became more and more apparent with the growing economic interaction between individuals of different nationalities[26]. This need for one institution to regulate growing global economic interaction between different nations and populous of people can be an exampled in other areas in law, such as that of the creation of the lex merchatoria[27].

That said, the idea of state law as the supreme law, saw their spread with the age of colonization. As European states began to conquer most of the world, their ideas of state law as being the primary institution for law and governance was transplanted to indigenous societies. Additionally, western jurists and legal theologists' inability to recognise indigenous societies as those having "law", as it was viewed at the time, demanded the need to impart their view of law and governance as a reflection of the principle of terra nullius. Colonising governments saw a need to control largely public areas of society, for example, their expatriate as well as economic producing activities, however, were generally unwilling to govern the indigenous community any further than to suppress[28] and control due to the financial implication of a more robust and direct approach[29]. The resulting effect was the governing of public, primarily economic, areas of society by foreign transplanted law and areas of private law, such as laws of marriage and succession, primarily being governed by the laws and rules of the indigenous societies[30]. This divide can still be seen today, where public areas of law in post-colonial countries are governed by transplanted legal systems, while matters of private law such as family law and succession are allowed to be governed by customary laws. An example of this would be the case of Namibia who has as the primary law of the land Roman-Dutch Constitutional law governing areas of public law and governance, while there exist constitutional and statutory regulations which recognize customary sources of law.

1.3 Difference between State and Customary law

Customary law is not exclusive to the African diaspora. As stated above, before the consolidation of the state institution as being the central regulatory body of law, the European populous was subject to many different customs[31]. In fact, it can be argued that the origins of law and legal systems themselves are in the customs of the people. That said, customary law in the context of Africa and the African continent refers to indigenous or tribal rules which act as regulatory systems

[23] Tamanaha, (2007) supra nota 21, 8
[24] *Ibid.,* 5
[25] von Benda-Beckmann, K. Turner, Bertram. (2018) Legal pluralism, social theory, and the state. *The Journal of Legal Pluralism and Unofficial Law*
[27] Tamanaha, (2007) supra nota 21, 8
[28] Himonga. C, Nhlapo T, (2014). *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*, (1st ed), South Africa: Oxford University Press
[28] Tamanaha, (2007) supra nota 21, 8
[29] Himonga. C, Nhlapo T, (2014). Supra nota 28, 9
[30] Tamanaha, (2007) supra nota 21, 8
[31] Tamanaha, (2007) supra nota 21, 8

of law to the societies in which they exist[32]. African customary law differs significantly from the legal systems which were transplanted during the colonisation of the continent[33]. Differences can represent both positive and negative digression between the two. That said, probably the most notable difference between the two is that African customary is often unwritten, relying on the oral dictation of said rules by its community for its survival[34]. This gives customary law the pleasure of fluidity and flexibility which many transplanted laws do not enjoy. That said, the lack of codification implies the lack of integrity and predictability in the legal system which results in difficulty in functional aspects of the coexistence of both legal systems.

[32]Himonga. C, Nhlapo T, (2014). Supra nota 28, 9

[33] Hinz, M., (2012). The Ascertainment of Customary Law: What is Ascertainment of Customary Law and What is It For? The Experience of the Customary Law Ascertainment Project in Namibia. Oñati Socio-Legal Series, 2 (7), 2012,

[34] *Ibid., 88*

2. Customary Law and Human Rights

2.1 Inheritance as an example of Conflicts inLegal plurality

One of many ways in which the conflict caused by the multiplicated nature of law is manifested in Namibia is through the discrimination of women concerning succession and inheritance. Contrary to constitutional rights, certain customary traditions originating from some tribes discriminate against women. Many times, these customary laws do not award widows an inheritance duly owed to them according to state laws. The initial study into the successful bridging between state and customary law originated in the late 1990s from the publicised plight of widows, many of whom lost all of their possession to their deceased spouse's family[35].

Property grabbing is a practice among several Namibian indigenous communities that involves the stripping of a widow of her estate by the family of the deceased spouse. In some cases, the widow will also be chased off of the marital home or land. This property grabbing is mainly practised by matrilineal communities where a deceased husband's family will take away a woman's property rights[36], oftentimes even leaving the children without an inheritance. The practice is a clear violation of the rights awarded to women through the Namibian constitution and can be deemed an unlawful act, however, the practice remains to be a devastating part of many cultures.

2.2 Namibia's Constitutional Obligations to Protect Women

Article 14 of the Namibian Constitution provides for the right to found a family. The article, among other provisions, awards the nationals equal marriage rights, during marriage and equal dissolution of a marriage. Further, Article 10(2) of the constitution awards nationals the right not to be discriminated against based on sex, race, colour, ethnic origin, religion, creed, or social or economic status[37]. These two constitutional provisions in tandem infer the constitutional right to fair and equal inheritance resulting from the dissolution of a marriage.

That said, no fundamental right is absolute[38]. Each right, in one or another form, is subject to limitation. One way in which fundamental rights can be limited in terms of their application is when the horizontal vs vertical relationships of the state and its citizens are considered[39]. Historically, constitutional application was limited to the vertical relationship between the state and the individual in public sectors of law while the private relationship between individuals was left out of the scope of application of the constitution and its fundamental rights. This has changed over time. However, the application of constitutional rights in private relationships is subject to the consideration of the fundamental right in question, the rule of law, and social policy[40]. For example, while the rights awarded in Articles 17 and 15 can interpret the state as the only duty

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[35] Legal Assistance Centre (2005), Marital Property in Civil and Customary Marriages. http://www.lac.org.na/projects/grap/Pdf/marriageprop.pdf

[36] *Ibid.,*

[37] Namibian Constituion of 1990 (GG 2014)

[38] T.W. Bennet (1996), Customary Law and the Constitution: A Background and Discussion Paper, *Namibian Law Reform and Development Commission.*

[39] *Ibid.,*

[40] *Ibid.,*

bearer, the langue and nature of Article 10, on the other hand, remains vague as to who should carry the duty of upholding equality and freedom from discrimination based on sex[41].

To that, Article 5 of the constitution seems to provide an answer. The article states that "The fundamental rights and freedoms enshrined in this chapter (3) shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all-natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed"[42]. All be the language vague, the interpretation of the Article seems to conclude that constitutional rights are extended to the application of private matters between private individuals, including those matter involving the protection of constitutional rights to non-discrimination in marital affairs. Further evidence of this conclusion is the South African *Du Pessis* case[43]. The case used Namibia's Article 5 to establish that the similar South African constitutional article does not have horizontal application, implying that its corresponding Namibian constitution does. The case brought forth a fear by South African courts that horizontal applicability would imply that the courts would effectively usurp the legislature by performing legislative functions rather than simply scrutinizing legislative[44] acts with Justice Sachs stating that "the issue is not about our commitment to the values expressed by the Constitution but about which institutions the Constitution envisages as being primarily responsible for giving effect to those values."[45]

Further, aside from the horizontal applicability of the constitutions being a point of concern regarding the limitation of Article 10 and Article 14 in the context of the protection of women's inheritance rights, another limitation to these rights are other fundamental rights themselves. When put into competition with each other, the question is then raised; which rights will override the applicability or limit the applicability of another. T.W.Bennett proposes that when fundamental rights compete with one another, the limitation of one or the other must be done as a balancing of interests. That said, some fundamental rights have explicitly been given limitations, automatically making them subordinate to most other fundamental rights and freedoms. For example, Article 19 awards the right to culture only insofar as that right does not impede on the other constitutional rights. Thus, when it comes to the non-discrimination against women in terms of inheritance, Articles 10 and 14 are deemed superior rights to the right to culture awarded in Article 19.

2.3 Namibia's International obligations to Protect Women

Namibia's duty to protect women in terms of equality and non-discrimination is not limited to the nations constitutional obligations. Article 144 of the constitutions states that all law "Unless otherwise provided by this Constitution or Act of Parliament…..international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." Thus, the international agreements to which Namibia is party become an integral part of laws in place to protect the rights to equality and nondiscrimination.

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[41] *Ibid.,*

[42] Namibian Constitution of 1990 (GG 2014)

[43] SA 850 (CC)

[44] T.W. Bennet, (1996), supra nota 38, 11

[45] SA 850 (CC)

That said, Namibia is party to several international agreements specifically geared toward the protection of women's rights. One such agreement is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979. Article 16 of the convention requires that all acceding parties "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations"[46] and further specifies that men and women must have "same rights and responsibilities during marriage and at its dissolution"[47]. Thus, Namibia's obligation to protect the equal dissolution of a marriage and inheritance is not confined to the national level. In addition to the protection of equal marital rights, the conventions goes on to establish a seemingly intolerant attitude to the consideration of culture in the context of women's rights. Article 5(a) reads that all acceding parties to the convention must "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"[48]. This same sentiment seems to be the predominant attitude towards the relationship between human rights, especially those pertaining to women, and the right to culture. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, an additional international convention to which Namibia is party, further provides evidence of this trend toward intolerance of cultural values when it comes to women's human rights, using similar language such as "modify" in connection to culture. This implies the same subservience of cultural rights and customary law in the international law field that is seen on the national level and signifies a contradiction between the international obligations Namibia has to protect the rights and equality of women and the recognition of customary law and the right to culture seen in the nation's Constitution.

2.4 The Right To Culture

Furthering the contradiction seen above, T.W Bennet argues that the right to culture seems to have a justifiable basis in international human rights law with the concepts of right to self-determination being the foundational argument. Article 1(1) of the International Covenant on Economic, Social and Cultural Rights of 1966 requires that "all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development"[49]. Bennett argues that as Article 144 of the constitution allows for international conventions to become laws, the nation has an obligation to protect the cultural rights of its people as a means at the preservation of the right to self-determination.

Further Article 19 of the Namibian constitution provides for the right to culture; thus, the nation fulfils its international obligation. However, as mentioned previously, the right is immediately limited and placed under submission over all other constitutional rights. As for the recognition of customary law in the country, Bennett argues that this stems from the explicit provision in Article 66 and from the implicit right award to customary law as a derivative from Article 19. Bennett argues that through the interpretation of Article 19, particularly "Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture…."[50], implies the right to maintain any cultural customs, rules and laws. Thus, customary law is awarded the status of an implicit fundamental right[51]. As such, customary law is thrown into competition with other fundamental

[46] Convention on the Elimination of all forms of Discrimination Against Women Article 16
[47] *Ibid,*
[48] Convention on the Elimination of all forms of Discrimination Against Women Article 5(a)
[49] Convention on Economic, Social and Cultural Rights Article 1(1)
[50] Supra, 42
[51] T.W. Bennet (1996). supra nota 38, 11

rights and any conflicts that arise with one or the other should be resolved by a "balancing of the conflicting rights."[52] To this, the Legal Assistance Centre (LAC) argued in opposition, stating that Bennet's interpretation "does not seem tenable when tested against the plain language of the various constitutional provisions"[53]. This is in reference to the internal limitation of both Article 19 and Article 66 in that they must not impinge on the rights of others or the national interest, this is further supported by *Myburgh v Commercial Bank of Namibia*[54]. Thus this limitation must have been an intentional one since it can only be referenced in the right to culture.

Nevertheless, the subordination of the right to culture and the customary law becomes a more complex topic when we put into consideration that they seemingly aid in the implementation of other important rights, including those rights awarded to women. Access to justice is notorious within the African diaspora as a subject that needs much attention, growth and development[55]. Namibia is no stranger to this dilemma. Many citizens face major barriers to justice, with the main culprits being of geographic financial and educational origins. That said, the coexistence of and incorporation of customary legal systems within the nation may serve not only as a means to protect the cultural identity of the people who serve it but also as a means to overcome common barriers to justice within the country.

Access to justice is a right awarded by the Constitution. Article 12 provides that all people are entitled to "a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law", not only in criminal cases but also in "the determination of their civil rights and obligations"[56]. The right awarded by Article 12 does not only apply to the hearing of cases involving the fundamental right and freedoms awarded in chapter 3 but rather guarantees access to judicial institutions in the hearing and determination of an individual's civil rights and obligations.Thus, the right of access to the courts is not only a means of protection or enforcing other substantive rights. Rather, but it is also a substantive right in itself.

In addition to constitutional obligations, Namibia is privy to many other international obligations regarding the right to access to justice through the international treaties it has acceded. One such obligation stems from the Convention on the Elimination of All Forms of Discrimination Against Women. Having agreed to the convention, Namibia has an objective responsibility not only to foster and protect the human rights of her women but also to protect against discrimination. This is reflected in Article 7 of the convention which awards an obligation to provide and make available to women competent judicial institutions with an aim at ending sex-based discrimination as well as to award women the ability to seek redress[57].

That said, there exists in the nation fundamental barriers which inhibit the ability of women to find the justice to which they are constitutionally entitled. "Common barriers to accessing justice services found in OECD countries range from institutional to economic, social, and cultural hurdles"[58]. This is true for Namibia. Among the biggest hurdles which indigent women face before bringing a case of inheritance discrimination to court is that of culture itself. The general belief in cultural principles such as witchcraft bar women, especially those in rural areas, from seeking

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[52] *Ibid.,*

[53] Legal Assistance Centre (2005), Marital Property in Civil and Customary Marriages. http://www.lac.org.na/projects/grap/Pdf/marriageprop.pdf

[54] SA 2/2000

[55] Pimentel, D. (2010)., supra nota 2, 7

[56] Supra Nota, 42

[57] Convention on the Elimination of all forms of Discrimination Against Women Article 7

[58] Supra nota 1, 5

redress for their misfortune[59]. This is further perpetuated by the lower educational standards of these women. That said, a lack of knowledge of the rights awarded to them as well as a lack of an understanding of state judicial institutions and their administrative rules and customs is another major barrier in seeking fair and equal justice. The fact that most governmental institutions are situated in urban areas adds to the ever-growing list of factors that obstruct aggrieved women from seeking justice for customary succession discrimination.

[59] O.C. Ruppel, (2010), Women's Rights and Customary Law in Namibia: A Conflict between Human and Cultural Rights?, *Basler Afrika Bibliographien*

3. Reconciling Human Rights and Customary Law

When considering the multiple elements that contribute to women's plight due to legal pluralism in Namibia, it is clear that any approach in reconciling or bridging state and customary laws is translated into the bridging of fundamental human rights principles and customary laws. The general trend as evidenced above seems to be at the suppression of customary laws in favour of the internationally founded rights. However, this may not be the best approach to reconciling the two. "Human rights activists and traditionalists are divided over whether customary norms are compatible with human rights norms found in international conventions and national bills of rights in national constitutions"[60]. While traditionalists argue that customary law promotes traditional values and thus contributes to the advancement of human rights, proponents of human rights argue that certain customary law norms undermine women's dignity and justify treating women as second-class citizens. It is common among Sub-Sharan African countries that customary laws be recognized as constitutional. In the same breath, as discussed in Chapter 2, these constitutions also guarantee the prohibition of discrimination. African traditionalists such as B. A. Rwezaura and Josiah A.M. Cobbah share the assertion that the attempt to project international standards of human rights onto African customary laws is an attempt at the westernization of the source of law. Instead, Cobbah argues, there should rather be an attempt to find "homeomorphic equivalents in different cultures"[61]. Thus, the answer to a successful bridging of customary and human rights would be to return customary laws ownership to the communities to which they belong, signifying independence to customary law adjudication.

3.1 The Colonial Approach

Historically, the approach used by colonising parties to enforce their rule on indigenous peoples was either through direct or indirect rule. Generally, however, the colonial approach was characterized by western colonizing powers balancing their own transplanted laws with those customary laws that did not contradict common law principles or so long as they did not contradict justice and moral value, which represented repugnancy laws at the time. In the case of Namibia, the nation was first subjected to indirect rules by the German colonising authorities. German colonial rules made use of traditional authorities and customary laws to govern then South West Africa's indigenous population. However, although German law was pronounced the law of the land through the promulgation of ordinances, "various peoples were allowed to retain their courts and legal systems which suggest that they were considered sovereign peoples"[62].

After the fall of the German colonial empire, Namibia fell under South African rule as a mandate state as per the treaty of Versailles. When South African rule was extended to then South West Africa, so too was the Roman-Dutch legal system through the Administration of Justice Proclamation, which announced that "all laws within the protectorate in conflict therewithin [Roman Dutch Law]shall, to the extent of that conflict and subject to the provisions of this section, be repealed'[63]. Thus, with the promulgation of the Proclamation, it was implied that Roman-Dutch common law superseded customary rules. However, the case *Kakujaha v Tribal Court of Okahitua* and the general indirect ruling practices of the British colonial empire at the time suggest that customary laws were still applicable to the African population insofar as it was not deemed

[60] Ndulo, M. (2011). "African Customary Law, Customs, and Women's Rights", *Cornell Law Faculty Publications*. (87-120) Paper 187.
[61] *Ibid.,*
[62] T.W. Bennet (1996), supra nota 38
[63] *Ibid.,*

uncivilized. In 1928, customary law saw official recognition in South West Africa through the Native Administration Proclamation, with the scope of application limited to cases between the African population. However, this recognition was short-lived as in 1985, the limited recognition awarded to African customary law was withdrawn.

With this, a common trend at the subordination and limitation in recognition of customary law can already be seen during the colonial era, suggesting that this particular legal system has always been seen as a lower form of law and justice even during a time where human rights was not a consideration. This may suggest that the conflict between customary laws and other legal systems are not inherently an issue with fundamental human rights but rather the foundational aspects between western legal values and traditional African values. This assertion is further evidenced by the need for transplanted colonial legal systems to subject customary laws to repugnancy provisions that only reflect morality and justice in terms of western European ideals.

3.2 State Approach

There are three approaches in handling customary law taught in African universities[64]. Some countries choose to altogether remove the existence of the legal order by abandoning the idea of customary law recognition. This approach is called the abolitionist approach. Then, some embrace the reality of the multiplicity of law and governance. These nations aim to maintain the dualist nature of their legal system. Thus, this approach is appropriately named the dualist approach. A further step to the dualist approach is not merely the maintenance of plural legal orders but the engulfing and unifying of the alternative legal system into the dominant state legal order. This approach would be called the integrationist approach to legal pluralism. Further, legal pluralism only exsists in the dualist approach since both the abolitionist and integrationist approaches imply a single legal system. Thus, the discussion regarding the linking of customary and state laws only exists within nations that adopt the dualist method in their national governance.

After the breakdown of the age of colonisation, newly independent African states became the keepers of customary legal systems. Like the colonial approach, the state approach places the responsibility of recognising traditional or customary laws on the state authority[65]. As mentioned previously, the general trend throughout the continent is towards the official recognition of indigenous laws. However, the common tendency would also be toward the limitation of the right to culture, legal pluralism and customary law. The subordination of customary law was inherited into newly sovereign states. As discussed in chapter 2, Namibia is no exception to this trend. South Africa reflects this trend through Section 211 of its constitution stating that the institution, status, and role of traditional leadership are recognised subject to the constitution. That said, the state approach is divided into states who went through the African age of democracies during what Muna Ndulo calls "post-democratisation"[66] and those who gained independence earlier. Most of sub-Saharan African countries, including Namibia, gained independence through this age. For these countries, the pledge to democracy signified a new age of independence and a pledge to

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[64] K. Chanda, (2006). Continuing Legal Pluralismwith Gradual Juridical Integration: The Way Forward for Post-Colonial Africa. M.O. Hinz, H. K. Patemann (Eds), *The Shades of New Leaves Governance in Traditional Authority: A South African Perspective* (47-58) Die Deutsche Bibliothek

[65] Pimentel, D. (2010)., supra nota 2, 7

[66] Ndulo, M. (2011)., supra nota 59, 16

democratic principles such as the rule of law and human rights. Thus, the dualist state approach is characterised by balancing customary laws and fundamental human rights.

Another characteristic of the state approach to linking customary and state law is the element of the appellant review. In most African countries, including Namibia, the judicial system is modelled after either French or English court systems, often including supreme courts, high courts, and lower courts[67]. With the emergence of independent states, African countries added at the bottom of this hierarchy of court institutions "bridging courts". These courts served as the forum of the first instance and are often subject to the appeal by lower courts, then to a high court, and finally to a supreme court[68]. In this way, most African states, including Namibia, can ensure constitutional application to customary cases. Thus, the application of articles 10 and 14 protection against discrimination towards women.

3.3 Written vs Unwritten Law

It is a common understanding, as Pimentel states, that the "state approach will inevitably create pressure to reduce the customary law to writing"[69]. Benefits to the writing of customary laws include addressing human rights issues in that if certain principles of customary law are incompatible with constitutional and human rights norms, those provisions can be formally removed from a written law. Human rights issues are difficult to isolate and resolve as long as the law is unwritten, preserved, and applied solely through oral tradition[70]. Another need and benefit to the codification of customary laws would be the ability to apply the appropriate law in courts. The recognition of customary laws creates a choice of law consideration which inevitably requires the ascertaining and proving of the laws in question. In other words, the writing down of customary law is necessary to prove the existence of certain customary laws so that it can be applied to the appropriate case. Thus, written law seems to be imperative to the issue of applicable law. Accordingly, written law may also be a necessary precursor to meaningful appellate review[71].

On the other hand, proponents of African traditionalism argue that the writing down of customary law is opposed to the very nature of the legal system. The oral nature of customary law has been deemed one of its overall benefits as it allows for flexibility and its ability to evolve. Traditionalists argue that rendering the legal system in writing would be detrimental to the evolution of customary law towards universal human rights norms. Written law is static and frozen in time, reflecting the issues and concerns present when the law was adopted. This is especially concerning that there is standard understating within the discussion of post-colonial legal pluralism that the customary law observed today is distorted. "The sources of customary law that are historically and presently accepted as authoritative are a product of social conditions and political motivations. It is influenced **by** the recent interaction between African customs and colonial rule"[72]. In *Alexkor Limited v. Richtersveld Community,* the Constitutional Court of South Africa observed that "although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced **by** the political, administrative and judicial context in which it was applied"[73]. Thus, customary law is characterised by its division into two subtypes. Official customary law is that

[67] *Ibid.,*
[68] *Ibid.*,
[69] Pimentel, D. (2010)., supra nota 2, 7
[70] *Ibid.,*
[71] *Ibid.,*
[72] Ndulo, M. (2011)., supra nota 59, 16
[73] CCT 19/03

law that has been processed, either by colonial age jurists or by the rules of the current state legal system or rules of common law.

On the other hand, customary living law refers to Eugin Elrich's theory, reflecting the current practical observance of cultural rule by the communities they belong to. Whether or not customary law is living essential to applying said law as it genuinely reflects a custom's nature. Alternatively, official customary law will reflect a static version of traditional values processed by transplanted ideas. It is also essential to realise the difference between the two when considering the proof, ascertainment, and writing down customary laws.

The issue of a written form of customary law does not escape the Namibian context. The Community Courts Act of 2003 and the Traditional Authorities Act of 2000 call for the "ascertainment" of customary laws for choice of law and applicable law considerations. To the methods of ascertainment that could be used, section 13 of the Community Courts Act states that "if the court has any doubts as to the existence or content of a rule of customary law relevant to any proceedings, the court may consult , consult decided cases, textbooks and other sources, and may receive opinions, either orally or in writing to enable it to arrive at a decision in the matter". Thus, the ascertainment of customary laws does not inherently mean codification. To ascertain customary law, the Customary Law Ascertainment Project was spearheaded by prominent Namibian customary law professor Manfred O. Hinz aimed at the self-statement[74] of customary law. The self-statement of customary law refers to the ascertainment and writing down of cultural rules by the cultures to which they belong. Thus, unlike the official law, which codification would create, self-stating customary laws allows for the ascertained rules to reflect the living laws of the community. Additionally, allowing traditional authorities to control the recording of their laws places the ownership of those laws squarely where it should be, in the hands of the communities to which they belong. This allows customary law a degree of dignity outside its subordination for decades after colonialism began.

3.4 Linking Approaches

Having now an understanding that Namibia’s main approach to the protection of human rights is through the means of the recognition of customary laws, the ascertainment of customary laws all to aid the process of appellant review, we can now analyse other mechanisms the nation uses in linking state and non-state laws. The most apparent mechanics the nation uses to link legal pluralism is through law reform. Since independence, Namibia has enacted legislation to bridge customary and constitutional rights better. Based on constitutional provisions, the Traditional Authorities Act was enacted not only to establish traditional authorities within indigenous communities but also to define and limit their powers and duties. This Act aided in limiting the autonomy with which customary leaders were permitted to operate. The Act also makes customary adjudication more accountable by providing traditional authorities with guidelines on carrying out customary dispute resolution.

Additionally, the Community Courts Act lift the burden of some fundamental barriers to justice for individuals who live in rural areas of the country. The establishment of governmental institutions in the form of customary or community courts in the communities they belong to lift

[74] Hinz. M., (2012)., supra nota 33, 10

economic, geographic and cultural barriers as individuals can bring cases to be heard in their communities by their community leaders.

The Communal Land Reform Act is customary law legislation explicitly aimed at protecting women's property rights. This Act seeks to ensure equal land distribution for women and protect widows from property grabbing practices.

3.4.1 Namibia's Gender Policy

Aside from the route of law reform as a mechanism to link customary and state legal systems, the Namibian government has taken to policy to better the situation of women in the customary law context. Namibia's Gender Policy strongly "urges changes to aspects of culture that discriminate against women and has a specific strategy aimed at the objective to increase women's participation at all levels of decision-making and provide support for women in governance and decision-making positions"[75]. This includes the participation of women in traditional authority roles. The acceptance of women in traditional authority roles would not only shift the balance in favour of women in a community court setting as women would tend to be more sympathetic to the issues faced by women, but it would signify an internal shift in social and tribal normative thinking that more closely resembles universal gender norms. In turn, this would mean a smaller gap in the difference between universal human rights and traditional African laws.

In addition to promoting women in authoritative roles, the nation's Gender Policy also seeks to foster policies in the area of legal affairs and human rights to "promote the human rights of women and ensure legal protection of women's rights through an enhanced legal framework, effective implementation of laws and policies, and meaningful access to the justice system"[76]. This area in policy development is especially important when considering areas in protecting women's rights that can't be changed simply by law reform alone, for example, the lack of participation by women in rural areas in court setting due to a lack of education regarding their constitutional right to be able to bring their issues to court as representing their locus standi. Altogether, gender policies in the country aid in the bridging of legal pluralism and protection of women in areas that cannot be touched by law reform alone.

3.5 Collateral Review Approach to Customary law Adjudication

Considering the subjugation Customary law has endured through the years, the appellant review approach to reconciling it and other sources of law within the country may not be the best method. Moreover, the system that Namibia has taken in handling customary law recognition very closely resembles the offensive repugnancy provisions customary law was subject to during colonial times. The difference is that principles of morality and justice are replaced with universal human rights norms.

Further, just because African customary laws do not resemble the norms seen in western human rights values does not mean that the legal system is without human rights principles. African doctrines such as ubuntu entail principles of collective humanity that often resemble and surpass those values seen in universal human rights norms. Where customary laws seem to conflict with universal human rights in contradiction to protect a particular group of people, many have argued

[75] Ministry of Gender Equality and Child Welfare (2010) National Gender Policy https://landportal.org/sites/default/files/namibia_national_gender_policy.pdf
[76] Supra nota 74,

that traditional African laws can evolve towards the eradication of said discriminatory values through social reform due to their flexible nature, if given a chance. Thus, the subordination of customary law through the system of appellant review unjustifiably denies customary law the dignity it deserves.

On this premise, the "collateral review approach"[77] to legal pluralism was created. The approach awards ownership of customary law back to African communities. The approach, described by Pimentel, calls for the autonomy of customary law from state law. Of course, the creator of this approach recognizes the harm that the total separation of customary law from state law can do to the human rights and liberties of the people subject to such a rule. Thus, the approach calls for the review of customary laws only to the point that the matter of constitutionality is concerned. If the matter is deemed unconstitutional, the approach calls for the matter to be returned to customary law courts for law reform considerations. In this way, the ownership of customary laws, even those subject to the constitution, are given the dignity of ownership back to the communities to which they belong. This approach closely resembles constitutional court review in civil law jurisdictions in some European countries; Germany, Italy and Spain are some examples.

Thus, customary law will finally have a degree of freedom from external influence, except where it is held accountable by the constitution. That being said, this approach inevitably invokes applicable law, jurisdictional questions.

While it seems obvious that customary courts will only hear matters pertaining to customary communities and not public or criminal law matters, the issue then rests on which customary courts are privy to hear a specific matter. This consideration becomes an issue when you consider that Namibia has 13 ethnic communities and 49 total recognized community courts operational to date. The question then arises how customary court jurisdiction is to be separated to avoid forum shopping. The answer to this may well lay in the geo-ethnic organization of already existing community courts in that matters are heard by the communities in which a particular community court is situated. In this case, no changes will be made to applicable law consideration in terms of current legislation as Article 13 of the Community Court Act states, "In any proceedings before it a community court shall apply the customary law of the traditional community residing in its area of jurisdiction: Provided that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter."[78] In fact the same can be said for jurisdictional, and choice of forum considerations as already existing legislation seems appropriate to apply the collateral review approach.

[77] Pimentel, D. (2010)., supra nota 2, 7

[78] Community Courts Act 10 of 2003 (GG 3044)

Conclusion.

Namibia's rich background is definitively reflective of the complexity of its legal system. A history riddled with racial, ethnic, and gender divides manifested in many of the nations modern-day laws. The plural legal environment which the transplantation of western colonial law created has resulted in many areas in law and society with conflicting rules and laws. This has left many gaps in the functional relationship between customary and state law, which is detrimental to the nation's most vulnerable individuals.

As the nation's constitution states, Namibia has a duty to uphold democracy, the rule of law and justice for all. These principles form the three foundational principles of the constitution, society, and state governance. That said, the integrity of these principles is challenged by the awarding of recognition to a legal system that is notoriously deemed to be in direct conflict with principles of fundamental human rights. Customary law poses a threat to some constitutional and rights to women in this country. All this true, customary law also holds a unique task of facilitating other human rights, that being, access to justice. This contradiction forms the basis to the research question to paper, that being, how does the state handel the recognition of customary law while protecting the rights of its women?

Namibia has both constitutional and international obligations to protect its women from discrimination. Articles 10 and 14 of the constitution provide specific protection against sex-based discrimination. Additionally, the nation has accessed several international and regional conventions which protect women and provide for equality. While these conventions and constitutional provisions seem to have an intolerance towards cultural values regarding the discrimination of women in Namibia, the nation also has a pledge towards the right to culture, as seen in article 19. This is further complicated when the right to access to justice seems to be supported by the right to culture via traditional courts. When presented with these conflicts, the research question is then revoked, how do post-colonial African countries manage the duality in-laws created by legal transplantation?

Through the course of this paper, we have recognised that the typical approach taken by Sub Saharan African countries is through the recognition of the duality in legal systems instead of either the abolition of or integration of dual systems. Further, the dualist superior state approach at bridging the gap between state and non-state laws seems to be the dominant approach, with the specific aim to recognise customary law and simultaneously protect human rights. This is true of Namibia as well. It is clear that the nation has no attempt at the complete abolition of customary law. However, the supremacy at which it holds constitutional rights is just as clear. Further, the supremacy of constitutional rights is also subjected to a hierarchal order in which the right to culture is at the bottom. This trend at the suppression and subordination of cultural rights and customary laws is a trend replicated in the international community, which seem unwilling to compromise the rights of women.

Along with the general duality approach to legal pluralism, law reform can be seen as a mechanism implemented to bridge the gap between customary and human rights. Namibia enacted several legislative documents to facilitate a functional relationship between the two legal systems.However, if consideration is made to Sally Falk Moore's theory of "Semi-Autonomous Social Fields", there comes an understanding that law reform alone cannot sustain the bridging of multiple normative orders, thus, internal reform of customary law is also need for the bridging to work. Further, the foundational differences in African tradition and human rights may be the issue at hand, not necessarily their compatibility. There seems to be a general misunderstanding of

African customary law that results in the demonisation of its core values and the general and contrite attempt at suppressing and controlling the legal system. This suppression dates back to colonial-era repugnancy provisions. However, it was inherited into a newly independent African state. The author is of the belief that this suppression is at the root of the conflicts between human rights and customary laws to the detriment of women. Alternative to the suppression of customary laws and understanding its flexible and adaptable nature will yield the realisation that customary law has the real ability to evolve towards universal human rights norms. As a possible solution, the collateral review approach at legal pluralism offers customary law the ownership and dignity it has been deprived of while still holding it accountable to constitutional and fundamental human rights, facilitating said evolution all while really solving the issues of access justice. Thus, the collateral review approach can liberate customary laws and uphold democratic principles such as human rights and justice for all.

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