Transplanting and Customizing Legal Systems: Lessons from Namibian Legal History

Martin Cai Lockert

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TRANSPLANTING AND CUSTOMIZING LEGAL SYSTEMS: LESSONS FROM NAMIBIAN LEGAL HISTORY

By: Dr. Martin Cai Lockert*

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This article draws on the author's doctoral thesis "Entwicklung und Kontinuität des namibischen Rechtssystems von der deutschen Kolonialzeit bis zur Unabhängigkeit Namibias am Beispiel des Bergrechts", due to be published in 2014. It cannot substitute for a thorough introduction to Namibian history or a complete overview of the Namibian legal system as whole. Accordingly, descriptions are limited to providing the appropriate framework for the scope of this article. References for further reading are provided.

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I. INTRODUCTION

The key aim of this article is to provide an addition to the list of practical examples of legal transplants by examining the legal history of Namibia's mixed jurisdiction. As Walker and Pekmezovic argue, the literature on legal transplants, while rich in theory, generally lists few case studies or examples of the transplant process.

The legal history of Namibia shows multiple challenges pertaining to the amalgamation of laws originating from different legal traditions. Apart from the customary law of indigenous tribes, the origins of which can be traced back thousands of years, the area of southwestern Africa that comprises the territory of modern-day Namibia has been subjected to the influence of three distinct legal families in the last 130 years. The era of Imperial German colonialism started in 1884 and came to an end in 1915 when the Union of South Africa successfully invaded Southwest-Africa. The highly controversial period of South African occupation ended in 1990 when the Republic of Namibia declared its independence. As a result, German civil law, English common law, and South African Roman-Dutch law have all left their traces in Namibian legal history.

Because Southwest-Africa was neither fully integrated into the German Empire nor annexed by the Union or Republic of South Africa, but has remained a distinct legal entity, different legal influences provide rich material for studying the practical aspects of moving laws from one jurisdiction to another. In addition, studying the provisions of the Namibian Constitution may give insight into the extent to which the founding fathers of the newly independent nation-state approved of or changed the results of earlier influences.

After a brief overview of the notion of legal transplanting, this article examines the introduction of German and South African laws to Southwest-Africa and the provisions of the Namibian Constitution pertaining to their continuing validity. Following a historical overview

3 Notwithstanding the respective political situation, this area will simply be referred to as Southwest-Africa in this article.
of each period, this article analyzes and evaluates the respective sources of law to determine if the law in force at the time constitutes a legal transplant that contains an element of customization. Special regard is given to the question of whether and to what extent the succeeding powers have reverted back to the legal system and the laws established by their respective predecessors.

Based on these analyses, the author examines the practical conflicts caused by the implementation of the German, South African, and Namibian legal systems and laws. A concluding section attempts to distill lessons learned and caveats for possible consideration in future processes of legal transplanting.

II. LEGAL TRANSPLANTING

The phenomenon of legal transplants has been extensively researched and is said to occur "where law travels from one jurisdiction to another by way of transposition, imposition, reception or intended borrowing."6 As Alan Watson points out, moving a system or a rule of law from one country or people to another has been common since the earliest recorded history.7

The desire to promote the rule of law in developing countries through law reform projects,8 often fostered by international financial institutions, has rekindled academic interest in the transplantation of laws as a means of legal development. Following Walker and Pekmezovic's classification,9 the legal transplant literature can be divided into three strands:

Heralded by Watson, the first strand deems it possible to successfully transplant both legal rules and structures into other jurisdictions without having to consider the political structure of the donor system or the political, social, or economic context of the transplant law in the process.10 While not being a prerequisite for the success of the process itself, such knowledge is merely presumed to facilitate a more efficient execution of the transplant.11

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6 Chen Lei, Contextualizing Legal Transplant: China and Hong Kong, in Methods of Comparative Law 192 (2012).
9 Walker & Pekmezovic, supra note 2, at 563-64.
10 Alan Watson, Legal Origins and Legal Change 293 (1991); see Walker & Pekmezovic, supra note 2, at 563.
11 Watson, supra note 10.

The third strand, favored by Walker and Pekmezovic, presumes that law is connected to politics, economics, and culture and—even though socio-economic, historic, or linguistic barriers may arise—may be successfully transplanted if adequately customized or adapted to the legal culture of the host jurisdiction.\footnote{Walker & Pekmezovic, supra note 2, at 564; Pierre Legrand, What “Legal Transplants”? in Adapting Legal Cultures 55 (David Nelkin & Johannes Feest eds., 2003); Otto Kahn-Freund, On the Uses and Misuses of Comparative Law, 37 MOD. L. REV. 1, 1-27 (1974).} In order to ascertain the required degree of such customization and the probability of a transplant taking root, this view requires that the sociological, geographic, and political differences between donor and host jurisdiction be considered.\footnote{Kahn-Freund, supra note 14, at 12-13.}

In this article, the author does not argue for any one of these three strands. Instead, by looking at transplants that occurred in Namibian legal history and “reverse-engineering” the processes used for implementing such new rules of law, the author attempts to expose and define the conflicts and difficulties encountered therein, while considering possible problems raised by all three strands.

The results of the analysis should not be overly generalized. As Randall Peerenboom points out, the prescription of a common set of “best-practices” for all countries or the establishment of “one-size-fits-all, off-the-shelf blueprints” is prone to produce only meager and lack-luster results.\footnote{Randall Peerenboom, Toward a Methodology for Successful Legal Transplants, 1 CHINESE J. COMP. L 4, 4 (2013).} By looking at and evaluating the “craftsmanship” of the transplantation processes in Namibian legal history, the author seeks to assist in the creation of a workable methodology for law reform through legal transplants—a major task far beyond the scope of this article.
III. LEGAL SYSTEMS IN NAMIBIA

This section of the article describes the formation and development of the Namibian legal system on a macro level. For each of the three major regimes—Imperial German colonialism, South African occupancy, and Namibian independence—a historical overview is followed by an examination of the origins of the legal systems constituted for Southwest-Africa by the relevant powers. For each period, an evaluation as to if and to what extent customized legal transplants have been used for this purpose is provided. Where applicable, this article gives special regard to the question of whether and to what extent the regime in power drew on the legal system put in place by its predecessor. After a closer look at the processes of customization or lack thereof, this section analyzes the conflicts and shortcomings resulting from the methods used by each regime.

A. Imperial German Colonial Period

1. Historical Overview

To be sure, the legal history of Southwest-Africa did not start with Imperial German colonization. The origins of the indigenous hunter-gatherer tribe of the San can be traced back to 5000 B.C., while the present tribes of the Nama, Damara, Ovambo, and Herero migrated to Southwest-Africa around the 14th century. Each of these tribes had their own rules of law; mainly focusing on family law, the right of succession, damages, and liabilities. Though different in content, all these rules had one commonality: they were not recorded in writing. Instead the native peoples passed on these rules via oral tradition.

Excluding two landings by the Portuguese sailors Diogo Cao and Bartolomeu Dias in 1485 and 1487, the first advances of European and South African missionaries and merchants can be dated to the early 19th century. None of these endeavors, however, had a lasting legal impact on Southwest-Africa.

The Imperial German colonial period began on April 24, 1884, when Imperial Chancellor Bismarck instructed the German Consul in

Cape Town via telegraph to officially declare to British officials that the land on the coast of Southwest Africa, which the German merchant Adolf Lüderitz had bought from indigenous chieftains in the years before, was now under protection of the German Empire.21 It ended on July 9, 1915, when Imperial Governor Theodor Seitz surrendered at Khorab in front of Louis Botha, the commander of the victorious expeditionary force sent to conquer the colony by the Union of South Africa.22 The thirty-one years of Imperial German rule can be roughly split up into three phases. During the first phase, lasting from 1884 until 1890, the German Empire strove to keep its commitment to the new colony to a minimum. Following the example of “Royal Charters” given by the British Empire, all administrative matters were left in the hands of privately owned and funded “colonial companies,” which were tasked with providing the infrastructure and administration necessary for prolonged settlement in return for freedom in exploiting the resources of the new territories.23 However, these plans did not come to fruition, as the newly founded companies lacked capital and largely remained inactive.24

The Imperial Government decided in 1890—mainly for reasons of international prestige—to deploy troops, quell the uprisings, and take control of the administration itself when an insurgency of local tribesmen forced the German Empire to either reinforce or abandon the colony.25 Colonial growth was steady, although slow and predominantly contingent on cattle-farming, as the large deposits of natural resources remained undetected.26 The end of this second phase is marked by the uprisings of the Nama and Herero tribes from 1904 until 1907. German colonial troops brutally repelled these uprisings, changing the relationship between the indigenous inhabitants of Southwest Africa and the German oppressors.27

The defining moment for economic breakthrough marks the beginning of the third phase. In 1908, a railway worker, Zacharias Lewala, found what he called a “moi klip” (beautiful stone) near the town of Lüderitzbucht, which his German supervisor August Stauch at

22 Declaration of Khorab, July 9th 1915; see MICHAEL SILAGI, VON DEUTSCH-SÜDWEST ZU NAMIBIA: WESSEN UND WANDLUNGEN DES VÖLKERRECHTLICHEN MANDATS 142-44 (1977).
23 KAULICH, supra note 20, at 281.
24 Lockert, supra note 21, at 47.
25 ESTERHUYSE, supra note 20, at 145-47.
26 See Dugard, supra note 4.
27 KAULICH, supra note 20, at 247-67.
once recognized as a diamond.\textsuperscript{28} This discovery started a diamond rush of unparalleled proportions. Between 1908 and 1913, 4.7 million carats of diamonds worth 150 million Reichsmark were mined in Southwest Africa, equaling one-fifth the mass and one-quarter of the worth of worldwide diamond production.\textsuperscript{29} The sudden prospect of wealth attracted an influx of new settlers and fostered economic growth. Taxes and royalties payable on diamonds also enabled the administration of the colony to almost fully\textsuperscript{30} sustain itself financially, greatly heightening its degree of independence from the German Empire.\textsuperscript{31}

All ambitions of the colony to further emancipate itself from the German Empire were cut short in January 1915, when the Union of South Africa invaded German Southwest Africa.\textsuperscript{32} While the Union of South Africa officially did so as a Dominion of the British Empire at the behest of the Crown, other reasons may include the perceived threat to South Africa’s territorial integrity and the urge to claim the rich Southwest African diamond fields as spoils of war.\textsuperscript{33}

2. Introduction of German Law
a) Sources of German Colonial Law
(1) Schutzverträge

The first trace of German colonial law in Southwest Africa is purely contractual in nature. The so-called Schutzverträge (protection contracts), entered into with indigenous chieftains—first by German merchant Adolf Lüderitz, and, later by emissaries of the German Empire—laid the basis for German sovereignty in Southwest Africa.\textsuperscript{34} Through these contracts—the formal basis for which often was either the conveyance of land or the granting of mining rights—the chieftains surrendered their sovereignty to the German Empire which in turn offered protection and agreed to refrain from trifling with the purely indigenous affairs of the tribes.\textsuperscript{35} By 1894, almost all the tribes of

\textsuperscript{29} Bernd Langin, Die deutschen Kolonien: Schauplätze und Schicksale 1884-1918, at 149 (2005); Oskar Hintrager, Südwestafrika in der deutschen Zeit 177 (1956).
\textsuperscript{30} With the exemption of the costs for the upkeep of the Schutztruppe (colonial military forces).
\textsuperscript{31} Kaulich, supra note 20, at 191-97.
\textsuperscript{32} See Dugard, supra note 4.
\textsuperscript{33} Lockert, supra note 21, at 66-67.
\textsuperscript{34} Id. at 50-52.
\textsuperscript{35} See id. at 51, n.79 (discussing further examples).
Southwest Africa had entered into such contracts with the German Empire.\textsuperscript{36}

(2) Imperial Constitutional Law

In the German Imperial Constitution (\textit{Reichsverfassung}) of April 16, 1871,\textsuperscript{37} the only references relating to colonization are found in Article 4. While Article 4 gave the Imperial Government jurisdiction for all colonial matters, including emigration to "non-German countries," and provided the legal basis for consular representation abroad, the legal status of German colonies remained shrouded in uncertainty.

It should not come as a surprise that the exact legal nature of German colonies at the time was highly controversial.\textsuperscript{38} While most jurists held that colonies did not fall under the jurisdiction of the Imperial Constitution, which restricted itself to the area of the German Empire as positively defined in Article 2, they could not agree on the question of whether the colonies could legally be seen as territorial extensions of Germany, or whether instead they had to be compared to sovereign, foreign nations.\textsuperscript{39} While courts assessed the legal nature of German colonies on a case-by-case basis when necessary, the dispute remained theoretical in nature. Even with different reasoning, none of the various schools of thought denied the Empire its power to rule.\textsuperscript{40}

(3) Protectorates Law

On April 17, 1886, the Reichstag\textsuperscript{41} of the German Empire enacted the \textit{Gesetz, betreffend die Rechtsverhältnisse in den deutschen Schutzgebieten} (law relating to the legal status of the protectorates).\textsuperscript{42} This law, which was subject to numerous amendments and re-enact-

\textsuperscript{36} Esterhuyse, \textit{supra} note 20, at 98-101.
\textsuperscript{37} \textit{Verfassung des Deutschen Reichs} [Constitution of the German Reich], Apr. 16, 1871, \textit{Reichsgesetzblatt} [RGBl.] 63 (Ger.).
\textsuperscript{39} \textit{Franz Florack, Die Schutzgebiete, ihre Organisation in Verfassung und Verwaltung} 14-16 (1905); \textit{Erich Bauerfeld, Verordnungsgewalt in den deutschen Schutzgebieten} 26-28 (1917).
\textsuperscript{40} \textit{H. Edler von Hoffman, Einführung in das Deutsche Kolonialrecht} 7-21 (Goschen'sche Verlagshandlung ed. 1907); see also Lockert, \textit{supra} note 22, at 52.
\textsuperscript{41} The legislative body of the German Empire.
\textsuperscript{42} Gesetz, betreffend die Rechtsverhältnisse in den deutschen Schutzgebieten [Law Relating to the Legal Status of the Protectorates], Apr. 17, 1886, \textit{Reichsgesetzblatt} [RGBl.] at 71 (Ger.).
ments, was subsequently relabeled Schutzgebietsgesetz (protectorates law) in 1900.\textsuperscript{43}

Section 1 of the Schutzgebietsgesetz transferred the newly coined term Schutzgewalt (power to protect) to the German Emperor.\textsuperscript{44} While, in accordance with the original German plans to leave internal administration in the hands of private entities, legal science at first deemed this power to only relate to the repulsion of external threats posed by third countries, at the outbreak of the 1904 uprisings it was unanimously agreed that the Schutzgewalt equaled full sovereignty.\textsuperscript{45}

\textit{(4) Imperial Ordinances}

The German Emperor (Kaiser) exercised the Schutzgewalt through ordinances (Verordnungen).\textsuperscript{46} The German Emperor deferred this power in part to the Imperial Chancellor and the Imperial Colonial Administration.\textsuperscript{47} Apart from this derivative power, the different iterations of the Schutzgebietsgesetz also provided the Imperial Chancellor with powers to enact ordinances "where necessary for the execution of the law."\textsuperscript{48} While this provision contradicted the notion of the Schutzgewalt of the German Emperor to be all-encompassing in theory, the supreme rule of the Emperor remained unchallenged in practice.\textsuperscript{49}

\textit{b) Transferring German Statutory Law}

A two-fold reference introduced German civil and criminal statutory law into the colony. In Section 2,\textsuperscript{50} the Schutzgebietsgesetz referred to the provisions of the Konsulargerichtsbarkeitsgesetz of July 10, 1879.

This law regulated the use of German statutory law for German expatriates. Its application in a third country was usually depen-

\textsuperscript{43} See Lockert, supra note 21, at 52, n.83-86 (listing all amendments and re-enactments). The last iteration of the law came into effect on July 22nd, 1913. For ease of reading, this article uses the term Schutzgebietsgesetz for reference henceforth.
\textsuperscript{44} Schutzgebietsgesetz von 1886 [SchGG] [Reserve Act], Apr. 17, 1886, REICHSGESETZBLATT [RGBL.] at 75, § 1, last amended by Schutzgebietsgesetz von 1900 [SchGG], Sept. 10, 1900, RGBL. at 812 (Ger.).
\textsuperscript{45} BAUERFELD, supra note 39, at 34.
\textsuperscript{46} See Lockert, supra note 21, at 55.
\textsuperscript{47} Id.
\textsuperscript{48} See id. at 54 n.101.
\textsuperscript{49} BAUERFELD, supra note 39, at 66.
\textsuperscript{50} Section 3 in the re-enactment of the Schutzgebietsgesetz of September 10th 1900. See Schutzgebietsgesetz von 1900 [SchGG] [Reserve Act], Sept. 10, 1900, RGBL. at S. 812 at § 3 (Ger.).
dent on a bi-lateral contract. According to Sections 3 and 4 of the Konsulargerichtsbarkeitsgesetz, all German statutes relating to civil law and criminal law were applicable to German citizens and persons declared to be equal by ordinance of the Imperial Chancellor. The Schutzgebietsgesetz generalized this application insofar as Section 2 declared these provisions applicable to everybody within the colony—with the exception of all indigenous people.

Whereas the criminal law was introduced in full, all other German laws had to be checked as to whether they should be classified as public or civil law. This is because the introduction of the German civil law was not tied to a specific group of statutory laws, but relied solely on the nature of each single regulation or rule of law in the whole body of German statutory law.

3. Evaluation

It is debatable whether the transfer of German civil and criminal law to the newly founded Southwest African colony can be labeled as a legal transplant at all, or whether it just constitutes a "natural" extension of German law into new German territories. From a factual point of view, one might argue that theory, as the executive and legislative powers effectively share nation of origin or the "donor nation" (the German Empire) and the "host nation" (the Southwest African colony). The legal perspective, however, contradicts this assumption: the Imperial Constitution made it clear that colonies did not directly fall under its jurisdiction. Hence, the legal nature of newly founded colonies remained, at best, unclear.

The German Empire was presented with the task of providing a legal system for the colony while facing two major restrictions: the absence of almost all legal or administrative institutions and the necessity for utmost flexibility in reacting to the challenges and changes encountered in the new territory. While the first obstacle could have been circumvented by instrumentalizing the provisions of the Konsulargerichtsbarkeitsgesetz alone, which in itself provided a simplified framework for administrating German law abroad through an ap-

51 Konsulargerichtsbarkeitsgesetz [Law on Consular], July 10, 1879, REICHSGESETZBLATT [RGBL.] at 197-206, § 1, last amended by Gesetz über die Konsulargerichtsbarkeit, Apr. 7, 1900, RGBL. at 213-28 (Ger.).
52 Sections 2(2), 19 in the re-enactment of the Konsulargerichtsbarkeitsgesetz of April 7th 1900. See Gesetz über die Konsulargerichtsbarkeit [Law on Consular Jurisdiction], Apr. 7, 1900, RGBL. at §§ 2(2), 19 (Ger.).
53 See Konsulargerichtsbarkeitsgesetz, supra note 51, at 213-28, § 3-4.
54 See Schutzgebietsgesetz von 1900, supra note 50, §§ 3, 4.
55 See Schutzgebietsgesetz von 1886, supra note 44, § 2.
56 Hoffman, supra note 40, at 107.
pointed consul,\textsuperscript{57} the latter restriction—although mainly a question of public law—required an additional means to tweak and adjust the material civil law where needed. Rather than focusing on alterations of single statutes, the Schutzgebietsgesetz provided a framework which altered or added to the German civil law statutes where required and also allowed for on-the-spot adjustments through executive ordinances.

For example, provisions of the Schutzgebietsgesetz for Kolonialgesellschaften (colonial companies) supplemented German company law\textsuperscript{58} had not been known to German company law before. These companies enjoyed relative freedom from the restrictions otherwise imposed by German company law.\textsuperscript{59} In addition, apart from the German Emperor's all-encompassing Schutzgewalt,\textsuperscript{60} the Schutzgebietsgesetz also provided the Imperial Chancellor with jurisdiction to amend all laws for colonial use through ordinances.\textsuperscript{61}

Notwithstanding the classification or definition of the act of transferring the law itself as a transplant or a simple extension, some contend that by filtering the implementation of German civil (and criminal) law through the provisions of the Schutzgebietsgesetz and Konsulargerichtsbarkeitsgesetz, an attempt at customization or adaptation was made.

4. Conflicts

The potential for conflict was limited insofar as the German Empire transferred civil and criminal law of the German Empire as a whole. The customization through Schutzgebietsgesetz and Konsulargerichtsbarkeitsgesetz merely added to this coherent system. The Konsulargerichtsbarkeitsgesetz made a clear reference to the civil law in force in the German Empire.\textsuperscript{62} Thus, all changes made by Imperial German legislation were automatically applicable in the colony unless specific colonial ordinances enacted by the Emperor or Imperial Chancellor stated otherwise.

\textsuperscript{57} Compare sections 4-18 of the Konsulargerichtsbarkeitsgesetz. Konsulargerichtsbarkeitsgesetz, supra note 51, §§ 4-18. Also, under these regulations, the Imperial Chancellor acted as a substitute for every other German government agency. Bauerfeld, supra note 39, at 70; See Lockert, supra note 21, at 55.

\textsuperscript{58} See Schutzgebietsgesetz von 1900, supra note 50, at § 11.

\textsuperscript{59} Especially relating to the mandatory capital base of companies. See Hoffman, supra note 41, at 110-111; Lockert, supra note 21, at 63-64.

\textsuperscript{60} Schutzgebietsgesetz von 1886, supra note 44, § 1.

\textsuperscript{61} See supra Part III. A. 2. a) (4).

\textsuperscript{62} Konsulargerichtsbarkeitsgesetz, supra note 51, § 3; Gesetz über die Konsulargerichtsbarkeit, supra note 52, § 2(2), 19.
However, we can see cause for conflict in the ambiguity of this jurisdiction. The central term Schutzgewalt in section 1 of the Schutzgebietsgesetz was not positively defined, but was instead open to legal interpretation.\textsuperscript{63} The letter of the law extended this jurisdiction to both the Emperor as well as the Imperial Chancellor, without providing a binding method for dissolving possible conflicts. Also, as the legal nature of the colonies remained vague, it remained legally unpredictable as to whether the constitutional hierarchies of the German Empire were also applicable in the colony.

Finally, the provisions of Schutzgebietsgesetz and Konsulargerichtsbarkeitsgesetz did not provide for a resolution where subsequent civil or criminal legislation of the German Reichstag contradicted amendments or addendums made by prior colonial ordinances of either the Emperor or the Imperial Chancellor.\textsuperscript{64}

5. Summary

In transferring the body of civil and criminal law to the new colony and allowing for a degree of customization, the German Empire set up a framework with the Schutzgebietsgesetz. The Schutzgebietsgesetz, in turn, drew on the Konsulargerichtsbarkeitsgesetz as a system for bringing German law to subjects abroad already in place.

This setup was cohesive, as it kept the transferred bodies of law connected to the legislation of the German Empire as the country of origin. The methods for customization were practical and allowed for quick, functional, and advantageous adaption to the needs of a newly founded colony. At first, the German Empire defined these needs. While the colony was subsequently granted more and more autonomy and rights of self-governance, World War I abruptly cut short the process of emancipation.\textsuperscript{65} Because of this, the political struggle of turning over the tools for customization from the Emperor and Imperial Chancellor to a local administration, which was sparked by Imperial mining legislation and diamond taxation (and in 1914 had just begun being fought), was not essential.\textsuperscript{66}

On a jurisprudential level, the framework for customization displayed various shortcomings. While German constitutional law is responsible for the lack of a definition of the legal status of colonies, the overlapping competencies between Emperor, Imperial Chancellor, and the Imperial legislation of the Reichstag are manifest in the Schutzgebietsgesetz. As all legal ambiguities were always resolved in

\textsuperscript{63} See Schutzgebietsgesetz von 1900, supra note 50, § 1.
\textsuperscript{64} See id.; Konsulargerichtsbarkeitsgesetz, supra note 51.
\textsuperscript{65} See Lockert, supra note 21, at 57-59.
\textsuperscript{66} See id. at 59, 185-93.
favor of the Emperor in practice,\textsuperscript{67} possible conflicts posed by these inaccuracies never surfaced.

B. South African Mandate and Occupancy

1. Historical Overview

After the outbreak of World War I, the Union of South Africa fielded an expeditionary force of 50,000 men and invaded German Southwest-Africa, where it faced less than 5,000 German troops.\textsuperscript{68} The Union troops were victorious during hostilities drawn out until May 1915. These hostilities were due to an uprising among the mainly Boer\textsuperscript{69} soldiers of the Union army and various tactical retreats of the German defenders.\textsuperscript{70} The Treaty of Khorab of July 9th, 1915, established a South African Military Governorate in the former German colony, which was now officially called the Protectorate of Southwest-Africa. While German soldiers were interned and all traces of German administration were disestablished,\textsuperscript{71} German civilian life remained largely untouched.\textsuperscript{72} Like German colonial influence, the South African period in Southwest-African history can be roughly split up into three phases. These are discussed in subsequent paragraphs.

When World War I was coming to an end, it was foreseeable that the South African influence in Southwest-Africa would be perpetuated. While South Africa originally strived to annex Southwest-Africa as a fifth province, the proposal of administering the territories of the Axis powers through a newly incorporated League of Nations gained the support of South Africa when presented by United States President Woodrow Wilson in 1917.\textsuperscript{73} After the Peace Treaty of Versailles established the League of Nations on January 10th, 1920, the League required South Africa to administer the territory of Southwest-

\textsuperscript{67} See Bauerfeld, supra note 39, at 66.


\textsuperscript{69} The term refers to the self-proclaimed name of the original Dutch settlers in South Africa. The revolt against the British elite can mainly be attributed to Boer sympathies for their German neighbors, who supported the Boer population during the Boer Wars (1899-1902), which the Boers lost to the British. See Lockert, supra note 21, at 66-67.

\textsuperscript{70} See id. at 65-68.

\textsuperscript{71} Exempting the police force. See id. at 67.

\textsuperscript{72} For example, attorneys were allowed to continue their practice, with German still being considered an official language in court. See id. at 71-72.

\textsuperscript{73} See Michael Silagi, Von Deutsch-Südwest zu Namibia 22-48 (1977).
Africa on December 17th, 1920. Article 2 of this so-called C-Mandate gave South Africa full administrative and legislative powers.

The economic growth of the Mandate largely relied on diamond mining, which developed into a high-technology industry and a mainstay of the economy, making up between 45% and 60% of the Southwest-African export volume from 1920 to 1930. Though heavily consolidated in the aftermath of the world-wide economic crisis of 1931, which led to a downfall of diamond mining to just 5% of the export volume, the quota stabilized between 10% and 25% in the late 1930s.

The outbreak of World War II heralded a second phase, which refueled the original intentions of South Africa to fully annex Southwest-Africa. The Southwest-African Legislative Assembly unanimously voted for integration into the Union of South Africa as a fifth province in 1943, South African Prime Minister Smuts proclaimed that he considered the Mandate of the League of Nations to have come to an end and that Southwest-Africa would be annexed after necessary negotiations with member states of the League of Nations had been held. This proposed annexation did not take place. Instead, after the founding of the United Nations on October 24th, 1945, South Africa was asked—and expected—to place Southwest-Africa under the administration of the International Trusteeship System created by Chapters XII and XIII of the Charter of the United Nations in 1946. After the United Nations turned down an official request by the Union of South Africa to fully annex Southwest-Africa, South Africa refused to recognize the new Trusteeship System and sought to uphold the status quo and administer Southwest-Africa “in the spirit of the League of Nations-mandate.”

As a result, the conflict escalated from a political to a legal level, when the International Court of Justice was tasked with deter-

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74 See The Covenant of the League of Nations, art. 22, para. 5-6.
75 See Lockert, supra note 21, at 68-71.
76 See Silagi, supra note 73, at 148-50.
78 Id. at 254.
79 The legislative body of the Territory of Southwest-Africa. See Lockert, supra note 21, at 89-90.
81 See Lockert, supra note 21, at 73-75.
mining the legal status of Southwest-Africa in 1949, and held that South Africa could not be forced to place Southwest-Africa under the Trusteeship System itself. They obligated South Africa to fulfill the obligations incurred by the C-Mandate to the United Nations as successor to the League of Nations.\textsuperscript{83} In 1960, the United Nations backed two former members of the League of Nations, Ethiopia and Liberia, in their lawsuit against the Union of South Africa for violating the provisions of this Mandate through promotion of racial inequality in its administration of Southwest-Africa.\textsuperscript{84}

The \textit{Odendaal-Report} provided for the introduction of \textit{Apartheid} into Southwest-Africa—the racial segregation already practiced in South Africa—and this segregation took place in 1964.\textsuperscript{85} This report advocated the most administrative reorganization of the territory into ethnically divided areas and henceforth constituted the basis for all political and economic decisions made by South Africa for Southwest-Africa until 1975.\textsuperscript{86}

Economically, Southwest-Africa continued to rely on diamond mining as its backbone. Beginning in 1961, new maritime mining techniques, through which diamonds could also be extracted from the shoreline and the seabed on an industrial scale, led to record results.\textsuperscript{87} While the mining of non-precious base minerals stagnated in the late 1960s, the mining of uranium, which was taken up in 1973 in the Rössing-Mine (one of the world’s largest opencast pits near Swakopmund), added to the economic importance of the mining sector.\textsuperscript{88}

The legal action of the United Nations turned out to be unsuccessful on July 18th, 1966, when the International Court of Justice held in one of its most controversial decisions that both Ethiopia and Liberia lacked the power to sue.\textsuperscript{89} As a reaction to the implementation of the \textit{Apartheid} system and the failure of the lawsuit, the positive outcome of which the United Nations had relied on for their future plans for Southwest-Africa, the General Assembly of the United Nations terminated the South African Mandate through Resolution 2145 (XXI) on October 27th 1966:

The General Assembly, . . .

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\textsuperscript{83} International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11); \textit{See generally} \textit{Silagi}, \textit{supra} note 73.

\textsuperscript{84} \textit{Du Pisani}, \textit{supra} note 80, at 140.

\textsuperscript{85} \textit{Dugard}, \textit{supra} note 82, at 236.

\textsuperscript{86} \textit{Du Pisani}, \textit{supra} note 80, at 161-63.

\textsuperscript{87} \textit{Schneider}, \textit{supra} note 77, at 229-45.

\textsuperscript{88} \textit{See} \textit{Lockert}, \textit{supra} note 21, at 225-26.

\textsuperscript{89} \textit{South West Africa Cases}, Advisory Opinion, 1966 I.C.J. 4 (July 18); \textit{see} \textit{Dugard}, \textit{supra} note 82, at 292-324.
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1) Reaffirms . . . the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;

2) Reaffirms further that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;

3) Declares that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;

4) Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under direct responsibility of the United Nations.90

A third phase began with the armed resistance of the indigenous South West Africa People's Organization (SWAPO) on August 26th, 1968.91 The General Assembly of the United Nations explicitly approved of this struggle.92 Also, as a sign of support, the General Assembly officially re-labeled Southwest-Africa "Namibia," a term hitherto exclusively used by SWAPO.93

South Africa, at first, blocked all attempts by the United Nations to politically defuse the situation. South Africa gave up its goal of fully annexing Southwest-Africa and agreed to set foot on a path that would eventually lead to Namibian independence only in the mid-1970s, when the various international sanctions called for by the United Nations Security Council took effect and the guerrilla struggle of SWAPO was backed by communist countries and turned into a Cold War proxy-conflict.94 These plans, which were subsequently laid out in United Nations Security Council Resolution 435 of September 29th,

91 See Lockert, supra note 21, at 78-79.
93 Namibia is an artificial word, based on the Namib desert in the west of the country. U.N. GAOR 22nd Sess., 1671st plen. mtg. at 1, U.N. Doc. A/RES/2372 (June 12, 1968).
94 See Lockert, supra note 21, at 78-81.
1978, called for free elections supervised by an United Nations Transition Assistance Group (UNTAG) and a Special Representative.95

In order to prepare Southwest-Africa for these elections, South Africa once again tightened its administrative grip on the territory. The execution of Resolution 435 was put to a halt when, in 1980, the United States government linked their consent to the withdrawal of Cuban troops from Angola. This fully elevated the conflict to the global scale of the Cold War.96 Accordingly, a solution was only reached in the course of the Soviet Perestroika in the late 1980s, and free elections for the Constituent Assembly of Namibia were held from November 7 until November 11, 1989.97

2. Introduction of South African Law

The following part of the article analyses the various sources of law introduced to Southwest-Africa during the period of South African occupancy. This analysis does not take into account their—highly controversial98—legal validity according to international law, and is merely focused on the bilateral legal relationships and connections between South Africa and Southwest-Africa.

a) Constitutional Laws for Southwest-Africa

(1) Martial Law

After the German surrender at Khorab, the Minister of Defence of the Union of South Africa proclaimed a Military Governor on July 11th, 1915, who ruled Southwest-Africa on his behalf under martial law as follows:

... do hereby appoint you to be Military Governor provisionally throughout the said territory which shall be known as the South West African Protectorate... I do further authorize and empower you as such Military Governor, but subject to any instruction which you may from time to time receive from the Minister of Defence for the said Union, to take all such measures, and by proclamation to make such laws, and enforce the same, as you may deem necessary for the peace, order and good government of the Protectorate.99

95 The so-called “Namibia-Plan.” See Du Pisani, supra note 80, at 335-68.
97 See Lockert, supra note 21, at 83-86.
98 See supra Part III. B. 1.
99 Dugard, supra note 82, at 27.
Through proclamation by the Union Minister of Defence, the office of Military Governor was subsequently re-labeled as Administrator, and the term Protectorate was substituted by the term Territory of South West Africa.\footnote{100}

After the end of World War I, the Parliament of the Union of South Africa—still acting under the provisions of martial law—transferred all legislative and executive powers from the Territory of South West Africa to the Governor-General of South Africa in order to prepare for the execution of the Mandate granted to South Africa by the League of Nations.\footnote{101} They, in turn, delegated these rights to the Administrator. After the withdrawal of martial law, which was declared on January 2nd, 1921,\footnote{102} all executive and legislative powers were once again concentrated in the office of the Administrator, who in turn acted on and was subject to the instructions of the South African Parliament and Governor-General.\footnote{103}

(2) \textit{South West Africa Constitution Act 1925}

The South West African Constitution Act laid out a constitutional basis for the administration of the Territory of South West Africa under the C-Mandate of the League of Nations. The South African Parliament passed this act in 1925.\footnote{104} This granted the local white population limited rights of participation: legislation was partially put in the hands of an elected Legislative Assembly, while executive powers were shared by the Administrator and members of an Executive Committee, who were nominated by the Legislative Assembly.\footnote{105} The South African Parliament and the Governor-General, who at any time could step in and take over administration of the Territory as a whole, could overrule all legislative and executive decisions.\footnote{106} Because the Southwest-African population was not represented in the South African Parliament at all, and rights of participation were limited to the white minority only, this Act did not further the goals of Southwest-African autonomy set out by the League of Nations Mandate, but instead tightened the grip of white South African supremacy.\footnote{107}

\footnote{100} \textit{Id.}  
\footnote{101} Treaty of Peace and South West Africa Mandate, Act No. 49 of 1919, Union Gazette of September 19th 1919.  
\footnote{102} Indemnity and Withdrawal of Martial Law, Proclamation No. 1 of 1921, Union Gazette of January 2nd 1921.  
\footnote{103} See Lockert, \textit{supra} note 21, at 88-89.  
\footnote{104} Dugard, \textit{supra} note 82, at 425.  
\footnote{105} See Lockert, \textit{supra} note 21, at 89-90.  
\footnote{106} South West Africa Constitution Act No. 42 of 1925 (Union), section 44.  
\footnote{107} DU PISANI, \textit{supra} note 80, at 71.
(3) South West Africa Affairs Amendment Act 1949

A major amendment of the South West African Constitution Act of 1925 took place in 1949, when, after the downfall of the League of Nations and growing conflicts with the newly founded United Nations, the Union of South Africa shifted its political focus to the outright annexation of Southwest-Africa in the second phase of the occupational period. The amendment granted the white population the right to elect representatives for both Chambers of the South African Parliament. In addition, it extended the jurisdiction of the Southwest-African Legislative Assembly and made exclusive for certain areas. While the Governor-General lost his power to overrule Southwest-African legislation in these areas of exclusive jurisdiction, he kept all administrative powers. Also, all ordinances by the Legislative Assembly were still subject to suspension by Act of the South African Parliament.

(4) South West Africa Constitution Act 1968

The new South West African Constitution Act of 1968 repealed the South West African Constitution Act of 1925 in its amended form in order to implement the recommendations made by the Odendaal-Plan. While the provisions regarding the representation of the Southwest-African white minority in the Parliament of the Republic of South Africa were carried over, the administrative process itself altered the former rights of self-governance in order to accommodate the incorporation of the ethnically divided homelands or bantustans envisioned by Odendaal. While still having a unique role on paper, the jurisdiction of the Legislative Assembly was further curtailed in favor of the South African Parliament and the State President, thereby effectively placing it on par with the Provincial Councils of the four South African provinces. Under the provisions of the South West Africa Constitution Act of 1968, the territory could rightfully be

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108 Dugard, supra note 82, at 120.
109 Id.
112 Du Pisani, supra note 80, at 188-89.
113 As successor to the Governor-General as head of the executive after South Africa proclaimed itself a Republic on May 31st, 1961.
claimed to equal a fifth province of South Africa for all administrative matters, even though it had not been officially annexed.115

(5) South West Africa Constitution Amendment Act 1977

In the wake of the fundamental change in South African policy during the third phase of the occupancy, the constitutional setup of Southwest-Africa was effectively revoked. In preparation for transitioning the territory to independence, all legislative and executive powers for Southwest-Africa were transferred to the South African State President, thereby disempowering the South West African Parliament.116 The State President delegated these powers in full to the newly established office of the Administrator-General for the Territory of South West Africa.117 The Southwest-African Legislative Assembly and Executive Committee effectively lost jurisdiction and fell back to a purely advisory role.118

From 1985 until 1989, the newly formed Transitional Government of National Unity demoted the Administrator-General to a mere advisor to the legislative and executive organs.119 South African supremacy was upheld at all times as this government was established on behalf and by authority of the South African State President. He reserved a right to veto all propositions and exempted key elements such as matters of defense and foreign policy from its jurisdiction.120

b) Acts, Proclamations, and Ordinances

As shown above, all acts of lawmaking between the German surrender in Southwest-Africa in 1915 and Namibian independence in 1990 can be traced back to South African authority. They were legally based on martial law and the provisions of the C-Mandate of the League of Nations at first. While, during the second and third phase of the occupancy, South African sovereignty over Southwest-Africa was subject to highly controversial international debate, it was undisputed on a practical level.

115 Du Pisani, supra note 80, at 189; Bertelsmann, supra note 114, at 337-38.
118 Du Pisani, supra note 80, at 430-31.
120 See Lockert, supra note 21, at 93-95.
Legislation in and for Southwest-Africa has largely been a combined effort between the South African Parliament and Governor-General, on one side, and the appointed Administrator and Southwest-African Legislative Assembly on the other.\(^{121}\) The highest and most important sources of law were the Acts passed by both Chambers of the South African Parliament. Up until the appointment of the Administrator-General in 1977, these Acts formed the premiere law of Southwest-Africa, followed by the Proclamations issued by the representatives of the South African executive and their Southwest-African proxies.\(^{122}\) The Ordinances issued by the Southwest-African legislature within its limited jurisdiction were subordinate to these sources of law, as they were largely dependent on the approval of the executive and subordinate to the Acts of the South African Parliament.\(^{123}\)

c) Introduction of Roman-Dutch Law

After the end of World War I, the South African administration decided to introduce the common law of South Africa to Southwest-Africa as the new law of the land after a prolonged South African engagement in Southwest-Africa became foreseeable while negotiating the Peace Treaty of Versailles and the foundation of the League of Nations.

The Administrator introduced Roman-Dutch Law as practiced in the South African Cape Province through the Administration of Justice Proclamation No. 21 of 1919,\(^{124}\) section 1 of which reads as follows:

(1) The Roman Dutch Law as existing and applied in the Province of the Cape of Good Hope at the date of the coming into effect of this Proclamation shall, from and after the said date, be the Common Law of the Protectorate, and all Laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this Section, be repealed.

(2) Notwithstanding the provisions of paragraph (1) of this Section, all Proclamations which have been issued during the Military occupation of the Protectorate and are still in force on the said date shall continue to be in force.

(3) All rights, privileges, obligations or liabilities acquired, accrued or incurred prior to the said date

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\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) See Lockert, supra note 21, at 95-96.
\(^{124}\) Administration of Justice Proclamation No. 21 of 1919, (GG) (S. Afr).
shall be determined according to the law in force in
the Protectorate at the time of acquisition, accrual
or incurrence."\textsuperscript{125}

The introduction came into effect on January 1st, 1920.\textsuperscript{126} In order to
assess if and to what extent this implementation can be considered a
legal transplant and what types of problems and conflicts were posed
by its adaptation, a historical overview\textsuperscript{127} of the development of Ro-
man-Dutch Law and its inception in South Africa will be followed by
an in-depth look at the range and scope of its introduction to South-
west-Africa.

(1) \textit{Historical Overview}\textsuperscript{128}

(a) \textit{Reception of Roman Law in Holland}

Academic studies of Roman law in medieval Europe started in
the 11th century in Bologna, when scholars—the so-called “glossa-
tors”—started to add commentaries and explanations to the \textit{Corpus
Iuris Civilis}. After this practice had spread to various universities in
northern Italy and southern France in the following centuries, the so-
called “postglossators” or “commentators” started to adapt these rules
of Roman Law to the contemporary practical needs of the 14th cen-
tury.\textsuperscript{129} As a result, even without official reception, Roman laws per-
meated the local laws of large parts of Europe. Such an official
reception subsequently took place in 1495, when the Holy Roman Emp-
ire, which saw itself as the successor to the Roman Empire, installed
the Roman law as adapted by the “glossators” and “commentators” as
the subsidiary law of the land in the \textit{Reichskammergerichts-
sordnung}.\textsuperscript{130} The area of this reception included the seven provinces of
the Netherlands, which at the time were part of the Holy Roman Em-
pire.\textsuperscript{131} After having been intermixed with the existing Germanic law,
this new form of Roman law was called \textit{usus modernus pandectarum}.\textsuperscript{132}

The term Roman-Dutch Law refers to the amalgamation of Ro-
man law as received in medieval Europe and the Germanic common

\textsuperscript{125} Id.
\textsuperscript{126} Id. \textsuperscript{16}.
\textsuperscript{127} \textit{See} H.R. \textit{Hahlo} \textit{& Ellison Kahn, The South African Legal System And Its
Background} (1968); \textit{Loureens Marthinus Du Plessis, An Introduction to Law
16} (2\textsuperscript{nd} ed. 1995).
\textsuperscript{128} \textit{See} Lockert, \textit{supra} note 21, at 97-105.
\textsuperscript{129} Id.
\textsuperscript{130} \textit{Hahlo \& Kahn, supra} note 127, at 503; \textit{Franz Wieacker, Vom römischen
Recht. Wirklichkeit und Überlieferung} 222-51.
\textsuperscript{131} \textit{Hahlo \& Kahn, supra} note 127, at 515-16.
\textsuperscript{132} \textit{Amoo, supra} note 19, at 91; \textit{Wieacker supra} note 130, at 252-66.
law, which was used in the Dutch province of Holland in the 17th and 18th century. Contemporary sources of law are not only the statutes of the province of Holland (so-called Placaaten, Ordonnantien, and Diplomata), but also collections of decisions (Observationes), opinions and expertises (Consultatien), which originally got compiled by judges and jurists for unofficial personal use. By far, the biggest influence on the legal practices in court have (and still is today) been attributed to the books and treatises of contemporary legal scholars, who tried to systematically summarize the law for the sake of practical manageability.

The most influential of these works is the textbook “Inleiding tot de Hollandsche Rechtsgeleertheid” by Hugo Grotius (1583-1645), which was published in 1631 and was first to portray the connection between Roman and Dutch law as a legal system in its own right, rather than depicting the Dutch parts as mere addendums to a Roman code of law. It still is considered to be the unofficial codification of Roman-Dutch Law and is frequently cited in modern legal practice.

Another such book of continuing legal importance is the “Commentarius ad pandectas” by Johannes Voet (1647-1713), published in 1698 (Vol. I) and 1704 (Vol. II.), which contains an extensive commentary on all fifty books of the Digest, followed up by a description of contemporary Dutch law.

(b) Reception of Roman-Dutch Law in South Africa

On March 20th, 1602, four rival shipping companies banded together and formed the Dutch East India Company (the Vereenigde Oost-Indische Compagnie or “V.O.C.”). The V.O.C. was based in the province of Holland and had been granted far-reaching trade-

134 Hahlo & Kahn, supra note 127, at 329.
135 Id. at 543-48; Reinhard Zimmermann, Das Römisch-Holländische Recht in Südafrika. Einführung in die Grundlagen und Usus Hodiernus 59 (1983) [hereinafter Zimmermann 1]; Gibson, supra note 133, at 25-27.
136 Hahlo & Kahn, supra note 127, at 548-62; Zimmermann 1, supra note 135, at 58-62; see Reinhard Zimmermann, Römisch-holländisches Recht - ein Überblick 26-49 (Robert Feenstra & Reinhard Zimmermann eds., 1992) (providing a description of the seven most important authors and their works) [hereinafter Zimmermann 2]
137 Gibson, supra note 133, at 21; Zimmermann 2, supra note 136 at 29-30.
139 Hahlo & Kahn, supra note 127, at 556-57; Gibson supra note 133, at 28; Zimmermann 1, supra note 135, at 60.
140 Vereenigde Nederlandsche Geoctroyeerde Oost-Indische Compagnie, abbreviated V.O.C.
rights and even a limited degree of sovereignty by the government of the United Netherlands (the so-called Staten-Generaal). This sovereignty allowed the V.O.C. to found and administer new outposts and colonies abroad. On April 6th, 1652, Dutch merchant Jan van Riebeeck arrived at the Cape of Good Hope and built an outpost on behalf of the V.O.C. in order to provide supplies to the company’s ships en route to India.

As a result of a directive of the Directorate of the V.O.C. dating back to 1621, the Roman-Dutch Law as practiced in the Province of Holland was introduced as the law of the new outpost. The authorities of the V.O.C. regulated local matters through the use of ordinances (Placaaten), which—according to the economic nature of the enterprise—were singularly focused on providing a stable environment for the ongoing trade operations.

From a legal point of view, the validity of both the directive of 1621 and the ordinances of local V.O.C. authorities is questionable, as the original rights granted to the V.O.C. by the Staten-Generaal in 1602 did include the right to install courts of law, but explicitly excluded legislative powers. However, given the scope of this article, this question can remain unanswered because the introduction of Roman-Dutch Law to Southwest-Africa does have a valid basis in the Administration of Justice Proclamation No. 21 of 1919, issued under martial law.

In the 19th century, Roman-Dutch Law was carried from the Cape Colony to the newly founded Boer-Republics of Transvaal, Natal, and the Orange Free State by the migrating Trekboers.

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141 Oskar Hintrager, Geschichte von Sudafrika 27 (1952).
143 Hahlo & Kahn, supra note 127, at 572 (the Province of Holland was chosen for its economic importance and because the V.O.C. was headquartered in Amsterdam).
145 Zimmermann 1, supra note 135, at 4; Fagan, supra note 144, at 38-39.
146 See Administration of Justice Proclamation No. 21 of 1919, (GG) (S. Afr.).
147 Hahlo & Kahn, supra note 127, at 575-76.
(c) British Influences on South African Roman-Dutch Law

From 1795 until the formation of the Union of South Africa in 1910, the British Empire ruled the Cape Colony and large parts of southern Africa.\(^{148}\)

After a slow and steady decline, the V.O.C. declared bankruptcy in 1794.\(^{149}\) In order to withdraw it from the grasp of Napoleon, the government of the Netherlands agreed to allow the British Empire to occupy the Cape Colony from 1795 to 1803. In 1806, the Napoleonic Wars took on a trans-continental dimension and the British Empire once again\(^{150}\) took control of the Cape Colony as a means of protecting the sea routes along the Cape of Good Hope.\(^{151}\) After the end of the Napoleonic Wars, the British government decided to maintain its presence at the Cape, promote immigration, and transform the Colony into an integral part of the British Empire.\(^{152}\)

According to contemporary colonial policy,\(^{153}\) the British Empire did not substitute the local law in the Cape Colony with its own common law but kept the prevailing Roman-Dutch Law as the law of the land.\(^{154}\) As a result, Roman-Dutch Law continued to apply in the Cape Colony, even when its country of origin, the Netherlands, abandoned the implementation of the Napoleonic Code Civil in 1811.\(^{155}\) It was only because of these colonial advances of the British Empire, which had legally separated the former Dutch colonies from the Netherlands, that the Roman-Dutch Law did survive as a living legal system—not only in the Cape Colony, but also in Ceylon and Guyana.\(^{156}\) As a result of the expansion of British hegemony during the course of the 19th century, Roman-Dutch Law as practiced in the Cape Colony spread to other parts of southern Africa.\(^{157}\)

As in other British colonies, the government successfully established itself in South Africa and replaced the equivalent rules of the Roman-Dutch Law. These replacements included methods of adminis-


\(^{149}\) Harald Bilger, *Südafrika in Geschichte und Gegenwart* 56 (1976).

\(^{150}\) See Hooker, *supra* note 148, at 250 (the Cape Colony had been administered by the Dutch Batavian Republic from 1803 until 1806).

\(^{151}\) Bilger, *supra* note 149, at 63.

\(^{152}\) Zimmermann 1, *supra* note 135 at 8.


\(^{154}\) Hahlo & Kahn, *supra* note 127, at 575.

\(^{155}\) Zimmermann 1, *supra* note 135, at 7.


\(^{157}\) Amoo, *supra* note 19, at 61 (noting the Roman-Dutch Law spread to Rhodesia, Botswana, Lesotho and Swaziland, as well as the future South African provinces of Transvaal, Natal and the Orange Free State); see Zimmermann 1, *supra* note 135, at 20-23.
tration, criminal, and civil procedural law, and the corresponding laws of evidence.\textsuperscript{158}

The ongoing expansion of these British influences, which permeated the laws of procedure but quickly spread to other areas of the law and led to a subtle Anglicization of the Roman-Dutch Law, can for the most part be attributed to the fact that almost all contemporary jurists practicing in South Africa were legally educated in England\textsuperscript{159} and the official change of the language of the colony and the courts to English.\textsuperscript{160} Through forced translation, many legal concepts of Roman-Dutch Law were substituted by terms of English legal terminology, which often differed in content, eventually replacing the respective rules of Roman-Dutch Law in practical use.\textsuperscript{161} In difficult cases or when in doubt, a lack of knowledge of the Roman-Dutch Law also often led English jurists to simply substitute an allegedly comparable English rule of law.\textsuperscript{162} This effect was especially prevalent in the Privy Council, the court of last instance for all appeals against decisions of South African courts, where the intricacies of the Roman-Dutch Law were simply not known.\textsuperscript{163}

The legal principle of \textit{stare decisis et non quieta movere}, which was unknown to Roman-Dutch Law before, was introduced into South Africa due to a final court of appeals in England, close political and economic ties, an underdeveloped indigenous legal culture, and the professional habits of English jurists practicing in the Cape Colony.\textsuperscript{164} English statutory law explicitly replaced certain aspects of the Roman-Dutch Law, such as the rules pertaining to company law, securities law, and trade law.\textsuperscript{165}

Despite—or because of—these myriad influences, the South African legal system cannot be classified as positively belonging to either the Roman or the common law legal traditions.\textsuperscript{166} This indistinctiveness is a classifying characteristic of the so-called \textit{mixed jurisdictions},\textsuperscript{167} which the South African legal system exemplifies.

\textsuperscript{158} Hahlo & Kahn, supra note 127, at 503, 576.
\textsuperscript{159} Zimmermann 1, supra note 135, at 13.
\textsuperscript{160} Hahlo & Kahn, supra note 127, at 576.
\textsuperscript{161} Zimmermann 1, supra note 135, at 14.
\textsuperscript{162} Id. at 13.
\textsuperscript{163} Id. at 15.
\textsuperscript{164} See Hahlo & Kahn, supra note 127, at 578; Zimmermann 1, supra note 135, at 14-15; Erasmus, supra note 1, at 47-48.
\textsuperscript{165} Kötz & Zweigert, supra note 138, at 234; Amoo, supra note 20, at 61; Zimmermann 1, supra note 135, at 12.
\textsuperscript{166} Kötz & Zweigert, supra note 138, at 235; Hahlo & Kahn, supra note 127, at 585.
\textsuperscript{167} Erasmus, supra note 1, at 44.
(d) Current Legal Practice in South Africa

The cultural clashes between the urban British elite and the rural Boer population during the 19th century culminated in the Boer War (1899-1902).168 Following their defeat in the field, the Boers were nonetheless able to successfully negotiate their claims of independence and self-determination against the victorious British. The British Parliament consented to the founding of the Union of South Africa169 in 1910. This unified the former Cape Colony and the conquered Boer Republics of Transvaal, Natal, and the Orange Free State under one constitution, which—although the Union continued to be part of the British Empire—granted the Boer population equal political rights.170

The formation of the Union prompted a cultural emancipation of the Boers, which quickly came to encompass the concepts and the perception of law. After the legal system in the Union was standardized, the affinity for falling back to English concepts of law continuously became replaced by a new focus on traditional Roman-Dutch rules of law.171 This change can be attributed to a newly found Boer sense of national pride, the adoption of Afrikaans as an official language of the Union, and the beginning scientific examination of Roman-Dutch Law at the newly founded South African universities.172

These developments led to the following rearrangements in the ranking order of South African sources of law which is still in force today: the most important source, statutory law, comprises all legislation enacted for South Africa, ranging from the Acts of the South African Parliament to the ordinances (Placaaten) of the Staten-Generaal of the Netherlands.173 The Roman-Dutch Law as the common law of South Africa is considered to be the second most important source of law, even outranking case law.174 The decisions of South African superior courts, notwithstanding their major role in legal practice, are considered to only follow in third place.175

The resurgence of Roman-Dutch Law in the early 20th century also curtailed application of stare decisis insofar as prior decisions are considered not to have a binding effect if they violate core principles of

168 See Jörg Fisch, Die Geschichte Südafrikas 212-17 (1991); Bilger, supra note 149, at 332-38.
169 South Africa Act 152 of 1909.
170 Erasmus, supra note 1, at 212, 217-25.
171 Zimmermann 1, supra note 135, at 35-37.
172 Fagan, supra note 144, at 60-64; Zimmermann 1, supra note 135, at 233.
173 Hahlo & Kahn, supra note 127, at 151; Gibson, supra note 133, at 38.
174 Gibson, supra note 133, at 38.
175 Zimmermann 1, supra note 135, at 52; see also Hahlo & Kahn, supra note 127, at 214-82.
Roman-Dutch Law. Because the courts’ decisions are not simply based on pure case law, but have to adhere to the rules set out by the Roman-Dutch Law, the works of famous Dutch jurists of the 17th and 18th century, the so-called Ou Skrywers, and modern legal scholars are used by the courts for interpreting the law and reaching and explaining their judgments. Through referencing these scholarly writings, contemporary laws of the medieval Netherlands and decisions reached by Dutch courts find their way into South African jurisprudence. Even though there is no uniform rule for the assessment and evaluation of these writings, which are largely dependent on soft factors like the reputation of the author or the accessibility of the relevant sources, the writings of legal scholars are classified as a fourth source of law.

(2) Range and Scope of Introduction to Southwest-Africa

In determining the range and scope of the introduction of Roman-Dutch Law to Southwest-Africa, the provisions of section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 must be examined. Through this provision, on January 1st, 1920, the Roman-Dutch Law became applicable “as existing and applied” in the Cape Province. It was introduced with specific limitations in respect to the time and place of its application not in an abstract, pure, and all-encompassing form.

d) Continuing Validity of German Colonial Law

From July 9, 1915 until January 1, 1920, various German laws were repealed and numerous individual provisions had been enacted under martial law. Nonetheless, up until the implementation of Roman-Dutch law, the bulk of the remaining German statutes continued to serve as a legal framework for Southwest-Africa.

According to section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919, on January 1st, 1920 all laws in conflict with the Roman-Dutch Law were—to the extent of this conflict—repealed. The proclamation did not include any other specific provisions as to the continuing validity of German statutory laws. Thus, in

176 Zimmermann 1, supra note 135, at 55; see Dukes v. Marthinusen 1937 (12) AD at 23.
177 Bilger, supra note 149, at 40-41.
178 Zimmermann 1, supra note 135, at 61-62.
179 Gibson, supra note 133, at 39; Hahlö & Kahn, supra note 127, at 303.
180 Administration of Justice Proclamation 21 of 1919 §§ 1 (1), 16 (S.W. Afr.).
181 See Lockert, supra note 21, at 60.
182 See id.
183 Administration of Justice Proclamation No. 21 of 1919 § 1(1).
order to answer the question of the continuation of a German law or rule of law, such law must be individually compared to the Roman-Dutch Law.

A definite answer can only be given in those cases where the new South African or Southwest-African legislation explicitly repealed German law, which often happened in the area of public law. In Schedule I of the Liquor Licensing Proclamation, the Verordnung des Kaiserlichen Gouverneurs, betreffend Einfuhr und Handel mit alkoholischen Getränken vom 11. März 1911—the preceding German equivalent to this proclamation—was repealed in full. As another example, the Dienstanweisung für die Vermessungsverwaltung vom 12. Juni 1912 was repealed by Schedule I of the Land Survey Proclamation of 1920.

Likewise, German statutory law’s positive continuation was easily assessable where new laws expressly referred to it. This usually did not occur by mere declaratory statements of law, but rather implicitly through either amending existing German statutes which otherwise continued to be in force—exemplified by the additions to the Kaiserliche Bergverordnung vom 8. August 1905 as the German mining law or by taking over specific provisions of German statutory law as part of new legislation, such as the transfer of those parts of the German Handelsgesetzbuch (trade law) relating to Kommanditgesellschaften auf Aktien (limited partnership by shares) into the new Companies Proclamation of 1920.

The continuing validity of German colonial law must therefore be assessed on an individual case-by-case basis. While most of the existing German laws had been explicitly repealed in the abovementioned manner even before World War II, the South African administration never issued a provision through which the existing German law for Southwest-Africa was repealed in complexu.

3. Evaluation

The above analysis of the Southwest-African constitutional law shows that under martial law as well as during the following times of international mandate and occupancy, custom-made legislation of South African origin set up the underlying legal framework for Southwest-Africa. These measures of constitutional legislation, even though

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184 Proc 6/1920 (S. Afr.).
185 Amtsblatt für Deutsch-Südwestafrika of June 24th 1912.
186 Proc 7/1920 (S. Afr.).
187 Proc 12/1920 (S. Afr.).
188 Proc 35/1920 (S. Afr.).
they provided for an interconnection with South African constitutional law of varying depth, can thus not be classified as legal transplants.

However, all South-West Africa Constitution Acts and their various amendments established Southwest-Africa as a stand-alone jurisdiction. From a legal perspective, even though a de facto annexation by South Africa might have taken place in the second half of the 20th century,^190 Southwest-Africa remained independent at all times during this period. As a result, the concept of legal transplants continued to be generally applicable under the South African regime, as Southwest-Africa retained its status as a valid “host jurisdiction” for laws transplanted from a “donor jurisdiction.”

The introduction of the Roman-Dutch law^191 of South African origin as the new common law of Southwest-Africa constitutes an imposition of law and we can therefore classify it as a legal transplant. Also, as this introduction was limited in range and scope,^192 a degree of customization can be said to have been applied to this transplant.

As to the material laws enacted by the South African and Southwest-African legislation, whether through acts or ordinances,^193 no generalizations can be made. A legal transplant occurred where either a specific law or a set body of rules was transferred wholly from another jurisdiction. The same holds true where a law customized or tailored to Southwest-African circumstances at least contained a rule or element of law with foreign roots. In order to classify any given legislative measure as a legal transplant, these preconditions must be ascertained on an individual basis.

The retention of German Colonial law, either through express referral in new acts, ordinances, or proclamations or through the general clause in section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919,^194 can also be classified as a legal transplant. Even though in most cases no direct or express act of transfer^195 took place, “intended borrowing” passively transplanted the law of the former German colony. The new South African administration deliberately opted to hold on to the German laws in place to some degree even though the implementation of martial law and the subsequent South African Constitution Acts provided ample opportunity to “clean the slate” from a legislator’s point of view.

^190 See supra Part III. B. 2. a) (4).
^191 See supra Part III. B. 2. c).
^192 See supra Part III. B. 2. c) (2).
^193 See supra Part III. B. 2. b).
^194 See supra Part III. B. 2. d).
^195 Such as express referral to or use of German provisions in new legislative measures. See supra Part III. B. 2. d).
The newly established legal system carried over numerous provisions of German colonial law through the general provisions of the Administration of Justice Proclamation No. 21 of 1919 or declaratory references in more specific statutory law. As shown above, the transplanted law of the former German colony has been customized by either subordinating the law to the rules of the Roman-Dutch Law in general, or by re-packaging or re-integrating certain provisions from German statutory law into new legislative measures, as seen in numerous specific cases.

4. Conflicts

At first glance, both the transplantation of Roman-Dutch Law—a rounded-out legal system in itself—and German colonial provisions do not seem to carry any intrinsic cause for conflict. But since the introduction and applicability of the Roman-Dutch Law, and through it the continued validity of German colonial law, were limited in range and scope, a closer look is imperative.

a) Transplanting the Roman-Dutch Law

In view of a lack of authoritative codifications of the Roman-Dutch Law, which could be relied upon as reference for the scope of the Roman-Dutch Law in effect at a certain place at a specific point in time, no easy assessments as to the effects of the limitations of its transfer into Southwest-Africa can be made. The wording of Proclamation No. 21 of 1919 makes explicit reference to the Roman-Dutch Law "as existing and applied" in the Cape Province, but does not answer the question of whether, or to what extent, any influences that the common law or statutory law of English origin may have had on the body of Roman-Dutch Law are to be taken into account.

Since Proclamation No. 21 of 1919 only makes provisions for transferring the common law, but not the statutory law, of the Cape Province, it can be argued that because of its deep intermixture with elements of English law—both common law and statutory—the body of Roman-Dutch Law as referred to in Proclamation No. 21 of 1919 has been full of "gaps" or "cavities." Owing to the primacy of statutory law, such "gaps" or "cavities" tear into the body of Roman-Dutch Law of the Cape Province whenever one of its parts had been "broken off"

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196 See supra Part III. B. 2. d).
197 See Lockert, supra note 21, at 145-260 (exemplary and extensive analysis of the continuity of the German Colonial mining law provisions of the Kaiserliche Bergverordnung vom 8. August 1905).
198 Id.
199 Id. §1(1) (S.W. Afr.).
200 Id.
and substituted by a statutory rule of law of English origin.\textsuperscript{201} One has to accurately differentiate whether British legislation indeed substituted specific parts or rather simply added to certain underdeveloped aspects or areas of the Roman-Dutch Law, or whether through “subtle reception”\textsuperscript{202} new rules of law or legal procedures had been introduced without a basis in statutory law. One must also examine whether these new rules classified part of the Roman-Dutch common law by contemporary jurists.\textsuperscript{203}

Only in this last case did Proclamation No. 21 of 1919 bring about a reception of English rules of law and procedures in Southwest-Africa, provided that these English influences permeated the Roman-Dutch Law before the date of January 1st, 1920 and were indeed accepted in the Cape Province itself. Therefore, the claim\textsuperscript{204} that all English rules of law in effect in the Cape Province were also transferred to Southwest-Africa by Proclamation No. 21 of 1919 is to be rejected as too broad and imprecise. The provisions of this Proclamation merely introduced a perforated body of the Roman-Dutch Law into Southwest-Africa, the gaps in which could only be closed through the enactment of the specific pieces of legislation responsible for this erosion in (or for) Southwest-Africa.

It hence comes as no surprise that after the introduction of the Roman-Dutch Law in 1920, an abundance of such legislative measures were being realized, which not only dealt with areas of public law not covered by the Roman-Dutch common law, but also entailed changes of or additions to the body of the Roman-Dutch Law. By looking at specific acts, these legislative measures and their relation to and influence on the body of Roman-Dutch Law in Southwest-Africa can be classified and exemplified as follows:

- The regulation of an issue of public law, which as such is not comprised by the Roman-Dutch Law itself, can be exemplified through the aforementioned Southwest-African Administrator’s Liquor Licensing Proclamation.\textsuperscript{205} This act regulates importing and trading alcoholic beverages. This is an area of public law to which the Roman-Dutch Law does not refer. Accordingly, in Schedule I of the Liquor Licensing Proclamation, the preceding German equivalent to this

\textsuperscript{201} Id.

\textsuperscript{202} Zimmerman 1, supra note 135, at 13 (for use of term “subtle reception”).

\textsuperscript{203} The abolishment of this practice was one of the main goals of South African jurists when re-focusing on the Roman-Dutch Law in the beginning of the 20th century. See Zimmerman 1, supra note 135, at 52; Haiilo & Kahn, supra note 127, at 214-82.

\textsuperscript{204} See Amoo, supra note 19, at 60.

proclamation is repealed in full.\textsuperscript{206} Under section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 this would be unnecessary had this area of law been encompassed by the Roman-Dutch Law.\textsuperscript{207}

- To the contrary, the area of labor law as regulated by the Southwest-African Administrator's Masters and Servants Proclamation No. 34 of 1920\textsuperscript{208} is covered by the legal figure of \textit{locatio conductio operarum}\textsuperscript{209} of the Roman-Dutch Law. This figure had not been replaced in full by the Masters and Servants Acts of the Cape Colony in 1856 and 1873,\textsuperscript{210} as their provisions only applied to a certain class of employees,\textsuperscript{211} but remained in force alongside the statutory regulations of these Acts.\textsuperscript{212}

- As this prior British legislation thus had not torn away parts of the body of the Roman-Dutch Law, the Masters and Servants Proclamation was obviously meant not to patch, add to, or specify, but rather to effect an outright change to the Roman-Dutch Law in this regard. This proclamation can therefore be seen as an example of legislation intended to replace parts of the Roman-Dutch Law.

- Prime examples for the necessity to patch up cavities left in the body of the Roman-Dutch Law by British or South African statutes through legislation for Southwest-Africa can be found by looking at company law and the law of succession. British statutory law in the 19th century replaced almost all parts of Roman-Dutch Law related to company law.\textsuperscript{213} The Southwest-African Administrator introduced the company law enacted for the South African Province Transvaal in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} Administrative Proclamation Act 21 of 1919 (Cape).
\item \textsuperscript{209} See Zimmermann 1, supra note 135, at 129-31; Eltjo Schrage, \textit{Locatio Conductio}, \textit{in Das Romisch-Holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert} 245, 262-68.
\item \textsuperscript{210} Masters and Servants Act 15 of 1856 (Cape); Masters and Servants Act 18 of 1873 (Cape).
\item \textsuperscript{212} Jordaan, \textit{supra} note 211, at 397-415; Le Roux, \textit{supra} note 233, at 145-46.
\item \textsuperscript{213} Zimmermann 1, supra note 135, at 12.
\end{itemize}
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1909 in toto to Southwest-Africa in order to fill this gap.

English rules of law substituted from certain fundamental parts of the Roman-Dutch laws of succession. In 1874 the formal Succession Act replaced the rules of the Roman-Dutch Law relating to the legal portion of the share for heirs at law. The provisions relating to the freedom of the testator to make a will thus were not part of the body of Roman-Dutch law transferred to Southwest-Africa and had to be re-established by Southwest-African statutory law. Accordingly, in 1920 the Administrator declared the Wills Proclamation.

- The difficulty of categorizing the various receptions of English rules of law into the body of the Roman-Dutch Law, and the legal uncertainties caused by its mere fragmentary transfer to Southwest-Africa can be exemplified by the short phrasing of the Bills of Exchange Proclamation. Without relating to any specific act or proclamation, the Administrator simply introduced all laws on cheques and bills of exchange in force in the Cape Province to Southwest-Africa and declared all other provisions possibly in conflict therewith to be repealed.

The law on cheques and bills of exchange as codified in the Bills of Exchange Act of 1893 is thus considered to be one of the areas of the Roman-Dutch Law which had been influenced and changed the most by English-influenced legislation. The wording of the Bills of Exchange Proclamation of 1920, simply transplanting the relevant law of the Cape Province as a whole, allowed circumventing the complex legal question of the extent of these influences on the body of Roman-Dutch Law at the cost of customization and flexibility.

214 Transvaal Companies Act (Act No. 31/1909) (Transvaal).
216 Succession Act §2 (Act No. 23/1874) (Cape).
219 Bills of Exchange Act 19 of 1893 (Cape).
In summary, the Administration of Justice Proclamation No. 21 of 1919 caused a great degree of legal uncertainty, because it did not provide for a transfer of statutory laws that had taken the place of the Roman-Dutch Law in certain areas. The extent to which the Roman-Dutch Law was transplanted to Southwest-Africa had to be checked in every single case of doubt, as no authoritative codification could be referred to for the status quo of the Roman-Dutch Law as practiced in the Cape Province at the time of transfer. While changes in the Cape Province after January 1st, 1920 did not apply to the Roman-Dutch Law transferred to Southwest-Africa, all legislation enacted in and for the Cape Province before this date had to be checked for possible effects on the body of the Roman-Dutch Law.

b) Transplanting German Colonial Law

This uncertainty in regard to the scope of the transplant of Roman-Dutch Law also affected the continuing validity of German colonial law. When examining whether a German rule of civil law was repealed under the provisions of section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919, one did not only have to compare the rule in question to the Roman-Dutch Law in a first step, but to further investigate whether a contrary provision of the Roman-Dutch Law had been modified or substituted by English-influenced legislation before having been transplanted to Southwest-Africa. In that case the German rule of law could only be repealed under the Proclamation No. 21 of 1919 if the “gap” caused by this influence in the body of the Roman-Dutch Law had been subsequently closed through corresponding legislation, thus necessitating a third step of confirmation. At least when relying on section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 to repeal German laws, the legislators were bound to thoroughly investigate the relationship of these laws to the body of Roman-Dutch Law as transplanted to Southwest-Africa.

However, looking at how contemporary legal practice dealt with possible conflicts, it becomes evident that this scientific approach was often neglected in favor of more practical solutions: When the existing Gesellschaften mit beschränkter Haftung (companies with limited liabilities) were—instead of being transformed or replaced—simply legally equated with newly founded proprietary limited companies through the Companies Proclamation of 1920, the resulting legal question as to whether the rules of the German Handelsgesetzbuch (trade law) or the Southwest-African Companies Act of 1920 were to be applied for actions such as an increase in share capital, was circumvented. This was achieved by simply transforming the Gesellschaften

mit beschränkter Haftung into proprietary limited companies, even though the Companies Act of 1920 did not provide a legal basis for this. Thus, it did not become necessary to scrutinize if and to what extent the rules of the German Handelsgesetzbuch had been carried over into the new Southwest-African legal system.

In effect, because of the elusive restrictions imposed on the introduction of the Roman-Dutch legal system, the provisions of the Administration of Justice Act No. 21 of 1919 and thus the transplantation of both the Roman-Dutch Law and the German colonial law were laden with conflict.

5. Summary

After subjugating the former German colony in 1915, South Africa implemented custom-made constitutional legislation in Southwest-Africa. This legislation subsequently tailored and adjusted the changing political goals of the South African administration during the three phases of occupation. While it allowed for small and variable degrees of Southwest-African self-determination, it secured South African supremacy at all times.

Through the Administration of Justice Proclamation No. 21 of 1919, the Roman-Dutch Law "as existing and applied in the Province of the Cape of Good Hope" on January 1st, 1920 was introduced as the new common law of Southwest-Africa. At the same time, this Proclamation only repealed laws or rules of law in force at the time in conflict with the Roman-Dutch Law. Because of these provisions, German colonial laws were not abolished in their entirety. Instead, German laws not in conflict with this customized form of the Roman-Dutch Law were effectively transplanted into the new jurisdiction, either through "passive" perpetuation or explicit declaratory (re-)enactment.

The Roman-Dutch Law in general was disconnected from future legal developments in South Africa, unlike the prior framework implemented by the German Empire, which kept the underlying foundations of the legal system transplanted to the colony connected to the donor jurisdiction through the Schutzgebietsgesetz and Konsulargerichtsbarkeitsgesetz. While discrepancies between the fundamentals of the transplanted legal system and subsequent statutory law enacted for or transferred into the host jurisdiction—the legal inconsistencies that threatened the German colony—were thus ruled out and were in turn replaced by another grave problem.

223 Proclamation 21 of 1919 (Cape).
224 See supra Part III. A. 5.
225 See supra Part III. A. 4. and 5.
The body of the Roman-Dutch Law was received fragmented and inchoate due to a number of influences—most notably the English common law and conflicting statutory provisions. It had not been transferred to Southwest-Africa in its whole form. As a result of this, the base on which further legislative measures had to be built was fragile and difficult to predict. This most notably became apparent when trying to ascertain the extent to which German colonial laws continued to apply.

It can be questioned whether these conflicts had been considered by contemporary jurists at all, as Southwest-African legal and legislative practice in general did not let itself be perturbed by the possibility of ramifications resulting from these shortcomings. Nonetheless, the “gaps” and “cavities” in the body of the Roman-Dutch Law and the relating uncertainty as to the perpetuation of German colonial law constituted a veritable theoretical obstacle, restraining the diligent lawgiver and lawyer.

C. Namibian Independence

1. Historical Overview

The South African occupancy officially ended on March 21st, 1990, the Namibian Day of Independence, when former SWAPO-leader and newly appointed State President Sam Nujoma swore an oath in front of the General Secretary of the United Nations to uphold the Namibian Constitution, which had been developed in less than three months by the Constituent Assembly.

The constitution introduced a presidential democracy and a catalogue of basic rights, modeled after the German Grundgesetz. A myriad of international experts, legal scholars, and human rights organizations took part in its development, and it claimed to be one of the most modern constitutions of its time.

Even though the constitution places much power into the hands of the president, and Namibian political realities often grant the majority party SWAPO—which has continuously been voted into power since the days of independence—an absolute majority in parlai-

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226 See supra Part III. B. 4 a); Lockert, supra note 22, at 105-11.
228 Id. at 19.
ment, the constitution has stood the test of time. This is due to the well-functioning and largely independent judiciary.\textsuperscript{229}

In the Namibian national economy, even though the importance of the tertiary sector with a focus on tourism has steadily grown in the years following independence, the natural resources still continue to play a vital role. The primary industries of fishing, farming, and mining formed a quarter of the gross domestic product in 2009.\textsuperscript{230} The share of the gross domestic product of mining alone measured 8\% in 2012, while the mining sector at the same time accounted for 50\% of the export volume of Namibia.\textsuperscript{231}

Diamond mining especially is still the driving force of the Namibian economy and continues to contribute to industrial growth just as it had during German colonial times and the days of South African occupany. Between 1990 and 2006, diamond mining alone earned an average of 8-10\% of the gross domestic product, while the rest of the mining industry averaged a share of 3\%.\textsuperscript{232} Accordingly, it continues to be highly regulated.\textsuperscript{233} Apart from diamond mining, the rise of corresponding prices on the world-market in the wake of the economic crisis of 2008 also has led to a renewed upsurge in the mining of uranium. In two mines, Namibia supplies 10\% of the world's demands of uranium oxide, making Namibia the fourth largest producer in the world.\textsuperscript{234}

2. Namibian Constitution

The interesting question of whether and to what extent the Namibian Constitution itself draws on other legal systems and incorporates transplants of legal rules cannot be answered in the scope of this analysis.\textsuperscript{235} With regard to the questions posed by this article and the results of its prior sections, the following description of the Namibian Constitution therefore limits itself to the examination of provisions relating to the transfer and incorporation of statutory laws as well as the Roman-Dutch Law into the nascent Namibian legal system.

\textsuperscript{229} See Lockert, supra note 21, at 120-23 (giving a detailed introduction to the Namibian judiciary); id. at 132-42.
\textsuperscript{230} See id. at 36.
\textsuperscript{232} Schneider, supra note 77, at 303.
\textsuperscript{233} See Lockert, supra note 21, at 180-87, 204-06, 224, 244.
\textsuperscript{235} See Lockert, supra note 21, at 116-26 (providing an introductory overview of the Namibian Constitution); Watz, supra note 227 (providing a detailed analysis of the Namibian Constitution).
a) Continuing Validity of Existing Statutory Laws

In order to prevent the creation of a legal vacuum through the declaration of independence, the Namibian Constitution incorporates an all-out adoption of all laws in effect in Namibia on the date of independence, March 21st, 1990, in its Article 140 section 1:

The Law in Force at the Date of Independence

(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.236

In its Article 25 section 1 lit. (b), the Namibian Constitution makes further provisions for legal protection against laws predating the Constitution and the declaration of such laws as unconstitutional.237 Article 140 of the Constitution only provides detailed rules for the transfer and the interpretation of statutes of alleged South African origin—i.e. Acts, Proclamations and Ordinances—in its sections 2 to 5.238 Because of the clear wording of its section 1, which merely contains the broad and all-encompassing term “laws,” in lack of any clear provisions to the contrary, the Constitution’s Article 140 can only be interpreted in a way as to also encompass all German laws or rules of law still in force at the day of independence. Thus, the Namibian Constitution does not provide for a “clean cut” in legislation either, but upholds the basic line of legal continuity that can trace its beginnings back to German colonial times.239

b) Continuing Validity of the Roman-Dutch Law

The question whether the term “laws” of Article 140 section 1 of the Constitution can also be read to encompass the Roman-Dutch Law is made superfluous by Article 66 of the Constitution:

Customary and Common Law

(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed

237 See Namib. Const. Art. 25 § 1 cl. b.
239 See Lockert, supra note 21 (analyzing this line of continuity).
or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.\textsuperscript{240}

According to the Constitution, both the customary law\textsuperscript{241} and the Roman-Dutch Law as the common law of the land are valid sources of law, which—like all other sources of law—have to adhere to the primacy of the Constitution\textsuperscript{242} and can be suspended or replaced by statutory legislation. In judicial practice, the constitutionality of all rules of the Roman-Dutch Law employed in court after the day of independence has to be put to a fundamental examination.\textsuperscript{243} A specific constitutional court does not exist. While there are no formal rules for this examination, courts must state the considered constitutionality of a rule when relating to a certain rule of the Roman-Dutch Law.\textsuperscript{244}

3. Evaluation

The declaration of independence did not bring sudden cataclysmic changes to the everyday workings of the Namibian legal system. Instead, the newly elected Namibian government aimed for slow and smooth adjustments, fostering change without endangering the status quo of legal praxis.

The practice of transferring the Roman-Dutch Law and all statutory laws into the newly established Namibian legal system through the explicit provisions of Articles 66 and 140 of the Constitution can—just like the transfer of German colonial law during the times of South African occupancy\textsuperscript{245}—be classified as a conscientious legal transplantation by means of “intended borrowing.”

While those transplants were not accompanied by acts of customization per se, both Roman-Dutch Law and statutory laws preceding independence were subjugated to the supremacy of the Namibian Constitution as the “supreme law of the land.”\textsuperscript{246} As such, the Constitution provided for means of customizing these transplants either directly through the powers vested in the new Namibian executive and

\textsuperscript{240} Namib. Const. Art. 66 §§ 1-2.
\textsuperscript{241} See Amoo, supra note 19, at 102-06; for a detailed examination of the customary law see Hinz, supra note 18.
\textsuperscript{242} Because its Article 1, section 6 states that the Constitution is the supreme law of the land in Namibia, the provisions of its Article 66, section 1 are merely of a declaratory nature.
\textsuperscript{243} Myburgh v. Commercial Bank of Namib., 1994 NR 41 (HC); see Amoo supra note 19, at 105.
\textsuperscript{244} See Amoo, supra note 19, at 125 (comparing this to the practice of obiter dicta).
\textsuperscript{245} See supra Part III. B. 3.
\textsuperscript{246} See Namib. Const. Art. 1 § 6.
legislative branches of government, or indirectly through review of their constitutionality by the judiciary.

4. Conflicts

The provisions of Article 66 of the Namibian Constitution ensure a continuity of the application of the Roman-Dutch Law ever since its introduction into Southwest-Africa by the Administration of Justice Proclamation No. 21 of 1919. All vagueness and all ambiguities as to the range and scope of its application are evened out by the wording of Article 66 section 1 of the Constitution. This section does not relate to the Roman-Dutch Law as such, but merely to the "common law of Namibia" in force at the day of independence. This formulation does not only encompass the Roman-Dutch Law in its original or an amended form, but also all rules of law that have grown to become considered part of the common law of Namibia, whether as additions, supplements or substitutes to rules of the Roman-Dutch Law. In theory, this wording also allows for specific German rules of law to be part of the Namibian common law, provided that these rules had grown to be accepted as parts of the common law before the day of independence.

This provision, however, does not alleviate the effects of the shortcomings of the Administration of Justice Proclamation No. 21 of 1919 itself. The necessary examinations described above theoretically still must be performed every time a specific rule of the Roman-Dutch Law is employed. While in practice all possible "gaps" or "cavities" in the body of the Roman-Dutch Law might have been filled by almost a century of South African and Namibian legislation, a source of legal uncertainty remains and has to be factored in by the diligent jurist.

Another source of legal uncertainty in praxis is the mandatory constitutional review of every rule of the Roman-Dutch Law, which makes it necessary for careful law-users to keep track of all decisions which have put the constitutionality of certain areas of the Roman-Dutch Law to a test, a task which is complicated by the fact that there is no dedicated constitutional court.

247 See Namib. Const. Chs 5-8; see Lockert, supra note 22, at 116-29.
248 See Namib. Const. Ch. 9; see Lockert, supra note 22, at 129-40.
251 See supra Part III. B. 2. c). (2).
5. Summary

For the first time since the days of German colonialism, Namibian independence enabled the people of Southwest-Africa to determine the course of their country's politics free from any external influence. The declaration of independence on March 21st, 1990 and the resulting sovereignty of the Republic of Namibia marked a political turning point in Southwest-African history.

However, this clear cut theory was not extended ad hoc from politics to the legal system. In order to avoid the creation of a legal vacuum, Namibian legislators, just like the South African oppressors before them, favored the slow and consecutive adjustment of the legal system, and opted for the—if only temporary—perpetuation of existing laws.

Through Articles 66 and 140 of the Namibian Constitution, the Roman-Dutch Law and existing statutory laws already applicable before the date of independence were intentionally “borrowed” and thus transplanted into the jurisdiction newly established by the Namibian Constitution. While the transfer itself had been all-encompassing, it did not alleviate the shortcomings of the Administration of Justice Proclamation No. 21 of 1919 of South African origin, namely the fragmentary introduction of the Roman-Dutch Law. In addition, the pre-existing laws were subjected to the supremacy of the Namibian Constitution. While this allowed for ample customization of these laws on the one side, the necessity of constitutional review by the judiciary—naturally—overshadowed the scope of their applicability with legal uncertainty of some extent on the other side.

As a result, parts of the underlying fundament of the Namibian legal system continue to be—at least in theory—weakened as to this day. Before a specific rule of traditional Roman-Dutch Law is put to use in Namibia, law-users not only have to ascertain whether this rule is indeed encompassed by the fragmented and therefore unique iteration of this body of law in force in Namibia, but also have to ensure its constitutionality by referencing it against the provisions of the Namibian Constitution.

IV. CONCLUSIONS

Notwithstanding the indigenous customary law practiced in Southwest-Africa since primeval times, the introduction of systematic, codified law can be traced back to the formation of the Schutzverträge with local chieftains by German colonialists. Starting from these humble beginnings, this article outlined the development of the modern Namibian legal system, re-tracing the implementation of German colonial law, the introduction of the Roman-Dutch legal system by South African occupants in the course of the 20th century, and the coming-into-effect of the Namibian Constitution.
Even though the Republic of Namibia only reached full sovereignty through its declaration of independence in 1990, the territory of Southwest-Africa formed a distinct jurisdiction during German and South African hegemony. This article portrayed how and to what extent legal transplants were used to introduce both German colonial legislation and South African laws and subsequently analyzed the resulting problems and conflicts encountered by the respective legislators and their successors.

As outlined in the introduction, these findings are not meant to be generalized, but should rather be seen as stand-alone examples for the execution of legal transplants. The feasibility of applying any lessons learned or caveats derived from these examples to upcoming undertakings of legal transplantation will have to be assessed on a case-to-case basis in the future.

For the German period, the use of legal transplants is exemplified by the introduction of German civil and criminal law within the set of rules provided by the Konsulargerichtsbarkeitsgesetz and the Schutzgebietsgesetz. This legal framework kept the transplanted laws connected to corresponding legal proceedings and developments in the “donor jurisdiction”—the German Empire—while also allowing for customization as a means of adapting to local circumstances. It lacked provisions for regulating conflicts between legislative changes originating in the donor jurisdiction and local acts of customization. Due to the political realities—the German Emperor effectively ruled supreme—this never became an issue during the lifespan of the Southwest-African colony. However, in light of the proceeding emancipation of the colonists, such conflicts were not to be ruled out completely. Had the “host jurisdiction” not been as dependent on the “donor jurisdiction” as it was in the given colonial setup, it might have become necessary to face these problems after all.

The South African period most notably stands for the introduction of the Roman-Dutch Law into Southwest-Africa. While the limitation of range and scope of its introduction served to circumvent the conflicts mentioned in the above paragraph, in this particular case it caused other, even more severe problems instead:

The introductory portrayal of the Roman-Dutch Law in this article shows that, after it had been subjected to English legal practice and legislation for more than a century, the body of the Roman-Dutch Law as practiced in the Cape Province on January 1st, 1920 had been full of “gaps” and “cavities.” As the South African statutory law that effectively filled out these “gaps” had not been transplanted into or enacted for Southwest-Africa in complexu, the body of Southwest-African Roman-Dutch Law remained incomplete.

This shortfall in turn not only affected the subsequent South African legislation for Southwest-Africa in general and the perpetua-
tion of German colonial law in particular, but continues to be a detri-
ment to the jurisprudential manageability of Namibian common law
and pre-independence statutory legislation as to this day. While in
practice most of these “gaps” may have been filled out by subsequent
statutory enactments, a readily accessible overview of these “patches”
does not exist.

Due to lack of explicit provisions in statutory law, both diligent
practitioners of law and academic scholars are forced to trace back the
history of every single rule of the Roman-Dutch Law well into the 19th
century before making a definite assumption about their applicability
in Namibia. Likewise, unless ruled out by statutory enactment or an
in-depth analysis on a case-to-case basis, the perpetuation of German
colonial law into the Namibian jurisdiction remains a possibility.\textsuperscript{252}

The Namibian example shows that successful legal transplant-
ing not only demands consideration of the cultural, economic, and po-
litical backdrop in light of the connection between “host jurisdiction”
and “donor jurisdiction” and corresponding customization of the laws
in question, but first and foremost: accuracy, adequate care, and due
diligence in jurisprudential execution.

\textsuperscript{252} See Lockert, \textit{supra} note 21 (providing an in-depth analysis of aspects of con-
tinuity in the development of the Namibian legal system and the perpetuation of
basic rules of Imperial German mining law).