

# Campbell University School of Law

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From the Selected Works of J. Rich Leonard

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## So Where is Namibia?

J. Rich Leonard, *Campbell University School of Law*



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BY J. RICH LEONARD

**I**n February of 1998, the chief justice of Tanzania invited me to make a presentation on automation and court management at an International Conference on the Rule of Law he was hosting in Dar es Salaam. Present were most of the chief justices from southern and eastern Africa. A lengthy conversation over lunch with the Namibian judge present led, a year later, to a formal invitation from the minister of justice of Namibia to visit his country, familiarize myself with their system, and make recommendations about how to improve court administration and case management there. I spent two weeks in July in Windhoek, the capital of Namibia, trying to quickly master a very different judicial system.

In part because it is one of the newest countries in the world, Namibia is not a place with which most of my acquaintances have been instantly familiar. Nevertheless, it has a fascinating history. Originally a German colony, it was known as German South-West Africa. When Germany was stripped of its colonies after its defeat in World War I, South-West Africa became a protectorate of the League of Nations. Administration of the protectorate was assigned to South Africa, which treated the country as its fifth province for most of the twentieth century. After the demise of the League of Nations, the status of the country was in dispute; South Africa took the view that it was now free to annex the former colony. Most of the rest of the world

asserted that the United Nations had succeeded to the role of the League of Nations, and that South-West Africa should remain a protectorate. The issue went before the International Court of Justice on three separate occasions, with the South African position eventually rejected. Under enormous diplomatic pressure, and in the face of a growing internal liberation movement, South Africa grudgingly gave up control in the late 1980's. Elections were held in 1989, and the independent country of Namibia came into existence in 1990.

The country is starkly beautiful, with most of the population living in a central plateau; the Namib Desert, one of the driest places on earth, separates the plateau from

the Atlantic Ocean on the west. On the east, the Kalahari Desert provides a natural barrier between Namibia and its neighbor, Botswana. Although roughly twice the size of California, the entire country only has 1.7 million people. This is largely because less than five percent of the land is arable.

Although a new country, Namibia has substantial resources and a good infrastructure. It is rich in minerals, and mining (particularly diamonds) provides a quarter of the national revenue. It has an excellent system of tar and local roads that make its stunning scenery easily accessible, charming restaurants and inns, and good communication and banking systems. It is also very safe. One of the recent guidebooks claims that there is not a single documented incident of an American ever being mugged anywhere in the country, and I felt perfectly comfortable moving about the capital city and surrounding country on my own.

The new Namibian constitution is hailed by scholars as one of the most progressive in the world. It abolishes capital punishment, forthrightly permits affirmative action, guarantees equality of the sexes, and contains a litany of personal rights not dissimilar from our Bill of Rights. It has been interpreted broadly, its provisions used to outlaw corporal punishment in schools and prohibit any use of leg irons on prisoners. In the later ruling, the Supreme Court said that leg irons were too reminiscent of the manner in which earlier generations had been forced into slavery to be tolerated today in a civilized African democracy. Fortunately, democracy exists not just on paper. A recent international survey rated Namibia first among countries in central and southern Africa in its "index of dem-

ocratic governance.”

The legal system is largely derivative of South Africa. It uses a civil procedural code that is largely British, and thus reasonably familiar. However, it takes its substantive law from the Dutch-Roman tradition. Its court structure is three-tiered, with a Supreme Court, a High Court, and magistrate courts. The Supreme Court—which occupies a striking new building overlooking downtown Windhoek—at present consists of only one judge, the chief justice. He designates two other judges to sit with him when necessary, either from the High Court bench or from neighboring countries. Two associate justices are expected to be appointed next spring. The High Court—roughly equivalent to our federal district court—has eight judges who hear more serious criminal and civil cases. Magistrate courts are located throughout the country, and hear smaller civil cases and the bulk of criminal cases. Fifty-four magistrate positions are authorized. Thus the entire national judiciary consists of only 63 judges. The courts are heavily used and highly respected. Like here—and unlike in so many African countries—the most talented members of the bar aspire to sit on the High Court. The strain on the courts comes primarily from the inability to keep up with spiraling caseloads. Although the number of judges and administrative staff have not increased at all since independence in 1990, the caseloads at all levels have at least tripled. Like here, their courts are seeking more efficient ways to do more work with the same resources.

I was able to observe the High Court in session, and was struck by the formality of the proceedings there. Although wigs have been abandoned, lawyers still robe. Seating in front of the bar is done strictly in order of seniority of admission, which unfortunately puts most of the black and women lawyers in the rear. Exchanges between lawyers and the court are ritualistic. For instance, to obtain an unopposed default judgment, the following litany takes place.

**Advocate:** My Lady, I make application for judgment by default in Cause Number.... I submit that the papers are in order, and pray that My Lady hand down the judgment.

**Judge:** I hand it down.

**Advocate:** May it please My Lady (as he bows).

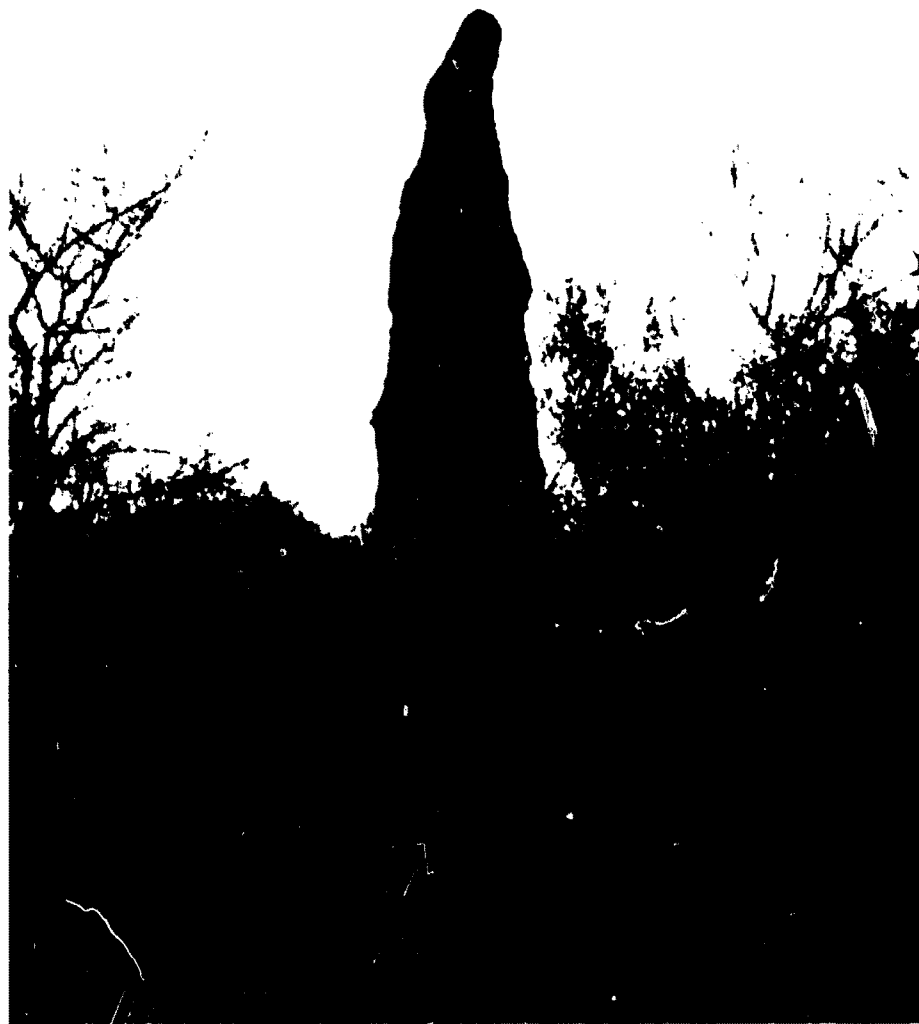
Young lawyers complain that the excessive

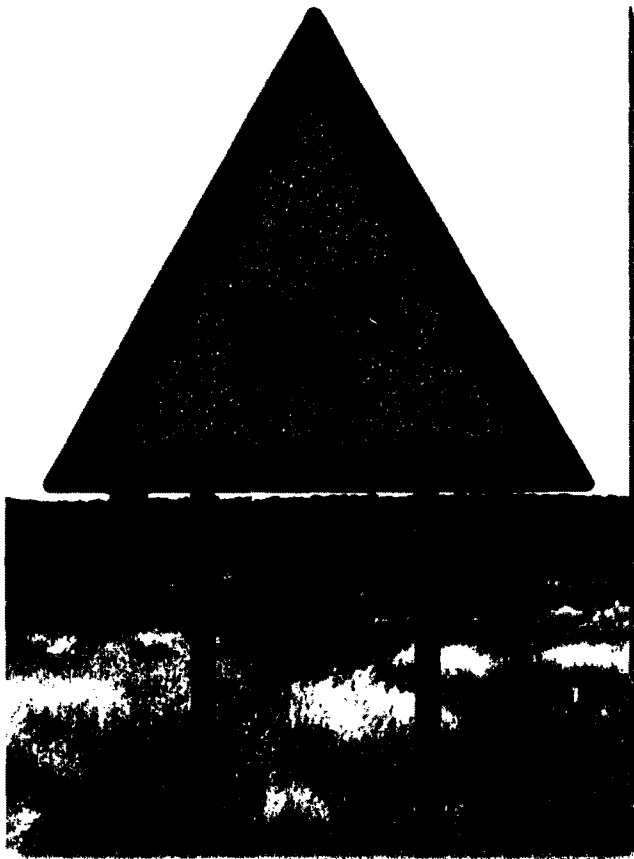
formality suppresses vigorous advocacy; as even oral arguments on substantive matters tend to be the delivery of set pieces rather than give-and-take with the court. Not surprisingly, the judges appreciate the deference shown them.

One of the pleasures of my visit was the opportunity to spend a fair amount of time with Namibian lawyers. They are a small group, only 238 licensed legal practitioners in the entire country. Until 1994 the bar was dual, separated into advocates and barristers. Although the distinction is now abolished, there is a *de facto* bar of about 20 lawyers who do most of the litigation in the High Court. One of the residual effects of apartheid is that the bar is overwhelmingly still white, with less than ten percent of its membership black. These percentages will soon change dramatically, as the University of Namibia produced its first set of law graduates only last year. Before the law program there started, it was very difficult for a black Namibian to obtain a legal education. At the time of independ-

ence, all of the judges and magistrates were white, although whites make up only about seven percent of the population. Six of the eight High Court judges are now black, but this was accomplished largely by appointing non-Namibians to the bench. Judges there now are from Zambia, Zimbabwe, and England. The judges are also predominantly male, more so than in many African countries. Only one of the eight High Court judges is female, although half of the magistrates in Windhoek (including the senior resident magistrate) are women. The law school demographics in Namibia are similar to here, with about half of the students female, so these numbers will eventually change.

Namibia is the third African country in which it has been my privilege to work with its judiciary, so it no longer comes as a surprise to realize that the United States is often not the dominant player when it comes to foreign aid. As generous as we are, many countries contribute a much higher percentage of their GNP to international develop-





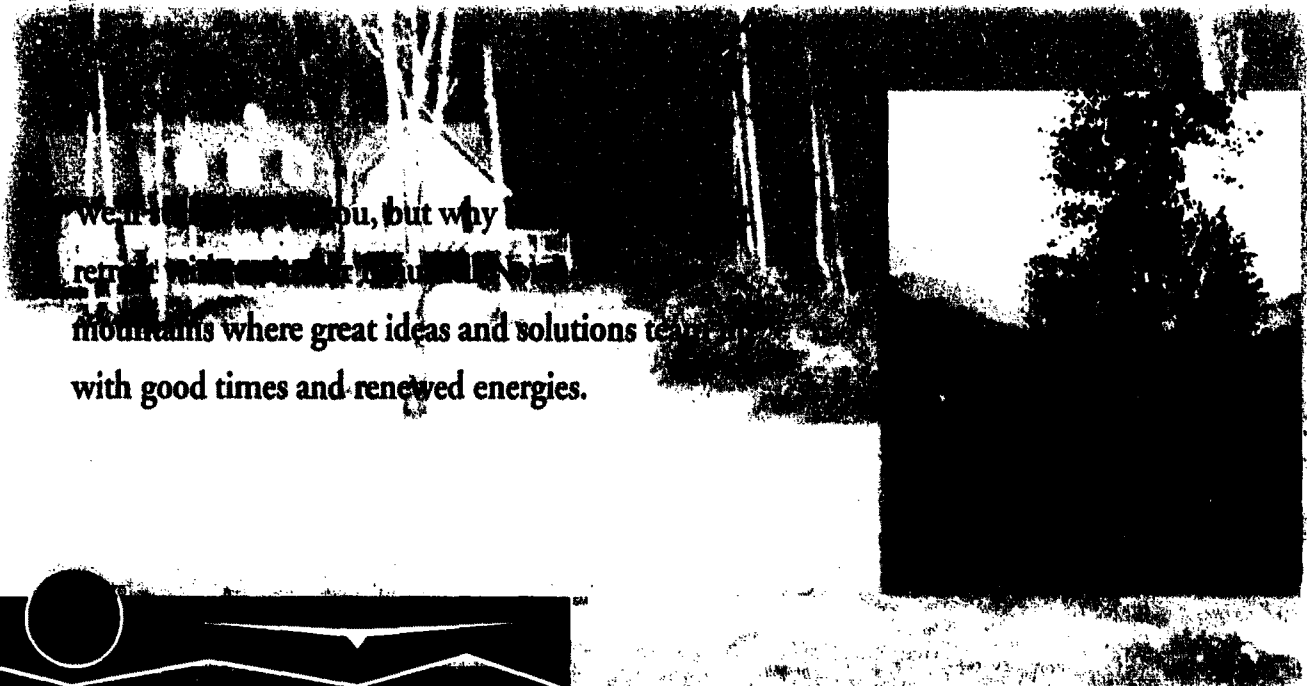
ment efforts. In Namibia, where the need for automation in their courts is evident to everyone, the German government is mounting a multimillion dollar effort to install hardware and develop software for both case management and general court administration. Both the new Supreme Court building, and the new magistrate court under construction in the former township, are being built by the Chinese. The United States is a modest player there, with our aid now anticipated to terminate entirely in another three years.

My time there was both exhausting and exhilarating. Days started early and ended late, usu-

ally with discussions continuing over dinner. I met with over three dozen judges, lawyers, administrators, academics, and politicians in an attempt to grasp their system quickly, and spent my spare time reading their criminal code and rules of civil practice. At the end, the chief justice and I agreed on two possible future efforts: to reconstitute the High Court Rules Committee to explore procedural simplification and aggressive case management, and to work as a resource person on the overall automation effort. Realistically, whether I return depends not only on an invitation from the Namibians, but also on the pressure of my docket here and the vagaries of American funding. Nonetheless, I again come away struck by how much we take for granted the pivotal role courts play in our society, and how critical it is to the survival of fledgling democracies that they similarly institutionalize the rule of law. It is a remarkable privilege to be a small part of that effort.

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