

Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice¹

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Background

Nobody knows how many traditional courts² are currently operating in Namibia. There are 46 recognised traditional authorities³ in the country and most of them run a traditional court at the level of the “chief”, i.e. “the supreme traditional leader”⁴ of the community. There are a number of unrecognised traditional communities, which are nevertheless governed by their customary laws and also have courts and decide matters brought before them.⁵ The territories of many traditional communities are subdivided into districts under the leadership of what are normally referred to as *senior headmen*, who all preside over district courts. Within districts, there are villages under headmen who adjudicate cases in their village courts.⁶

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- 1 The reader of this article should take note of the fact that more empirical research is needed for an adequate assessment of traditional courts: research that would follow the methodology used by d’Engelbronner-Kolff (1997) in her study of the traditional justice system of the Sambyu in Namibia’s Kavango Region. Her study compiles data on several carefully selected communities, and draws generalising conclusions (d’Engelbronner-Kolff, FM. 1997. *A web of legal cultures: Dispute resolution processes amongst the Sambyu of northern Namibia*. Maastricht: Shaker Publishing). It can only be hoped, therefore, that the following preliminary remarks may prompt an interest in having such a broader study done.
 - 2 The Act that deals with traditional courts, i.e. the Community Courts Act, 2003 (No. 10 of 2003), refers to *traditional courts* as “community courts”. Although in force, the Act has not yet been implemented. What the Namibian government has thus far failed to do is to approve the nominations of traditional justices in terms of section 8 of the Act. I prefer the term *traditional court* to any other, as it describes the courts of *traditional authorities* – as the latter are defined in the Traditional Authorities Act, 2000 (No. 25 of 2000).
 - 3 Recognised in terms of sections 4–6 of the Traditional Authorities Act.
 - 4 This is the language of section 1 of the Traditional Authorities Act, at “chief”. The use of the title *chief* is not appreciated by many traditional leaders, however. They prefer traditional titles in line with section 11 of the Act. For lack of a better term, I will follow the language of the Act.
 - 5 Rukoro (2008), for example, reports on cases dealt with by traditional courts in Ovitoto under Chief Kapuuo; both he and his community do not enjoy recognition under the Traditional Authorities Act. Rukoro, RM. 2008. “Overgrazing and grazing rights: A case study of Ovitoto”. In Hinz, MO & OC Ruppel (eds). *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, p 101ff.
 - 6 Before the enactment of the Traditional Authorities Act, *senior headman* and *headman* were

However, differences between the communities exist as regards the degree of formalisation of traditional structures. Communities in the far north of the country⁷ in particular, where the colonial administrations had basically followed the British policy of indirect rule, traditional structures remained largely intact as they emerged from precolonial times, and even accepted further formalisations in their administrations.⁸ Others, however, such as the Nama-speaking communities, were very exposed to the direct rule of colonialism and, thus, were not left with much space to practice their inherited forms of governance.⁹ The same applies to the so-called “communities at large”,¹⁰ i.e. the Damara and *Otjiherero*-speaking communities, who were forced out of their ancestral lands into small pockets of land surrounded by commercial farms in order to make space for colonial settlers. Apart from this, a few communities, such as the San, only provided relatively informal structures for the settlement of disputes.¹¹

If one takes the example of the *Ondonga*, one of the *Oshiwambo*-speaking communities in the far north of the country, the *Ondonga* territory is divided into ten districts,¹² each under the leadership of a senior headman.¹³ A district comprises

generally used as titles for traditional leaders below the level of chief. The Act does not know these titles any more, but refers to leaders under the authority of the supreme leader as “senior traditional councillors” and “traditional councillors” (section 2). Nevertheless, it is still common practice to refer to certain traditional leaders as *senior headmen* or *headmen*, particularly in cases where these leaders hold authority over defined areas in the territory of the traditional community.

- 7 That is, in what was formerly referred to as *Owamboland*, *Kavango* and *Caprivi*.
- 8 As one can see in the establishment of almost uniform buildings erected by the South African administration in the far north of the country, and which, still today, accommodate the offices of the traditional administration.
- 9 This was gleaned by the author of this article while conducting research in 1991–1995 for his publication entitled Hinz, MO. 2003a. *Customary law in Namibia. Development and perspective*. Windhoek: Centre for Applied Social Sciences. The publication is now in its eighth edition. The difficulty experienced by Nama-speaking communities in respect of reconstructing their traditional administration of justice can still be seen today. Cf. here Mapaire, C. 2007. *Residence with tradition: The functionality and administration of the Topnaar traditional court. Internship Report*. Windhoek: University of Namibia, Faculty of Law.
- 10 A term used by the Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders. Republic of Namibia. 1991. *Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders*. Windhoek: Government of the Republic of Namibia, pp 66ff, 76f.
- 11 Cf. Marshall, L. 1976. *The !Kung of Nyae Nyae*. Cambridge, MA/London: Harvard University Press, p 287ff.
- 12 Cf. Kamati, ET. 2008. *Internship report on the official daily activities at the Ondonga Traditional Authority*. Windhoek: University of Namibia, Faculty of Law, p 1.
- 13 Or *omwene gwoshikandjo*, which, in Oshiwambo, literally means “the one who holds the authority in the district”.

hundreds of villages under the authority of headmen.¹⁴ The traditional structure in the other seven *Oshiwambo*-speaking communities¹⁵ is similar to that in *Ondonga*. The same applies to most of the communities in the Kavango¹⁶ and Caprivi Regions.¹⁷ Although one has to note that the size of the communities differs, thousands of courts deal with all sorts of day-to-day problems and conflicts in these areas of the country. Although the rest of the country is not as comprehensively covered in terms of institutions of traditional governance, they do exist.

If it is already difficult to assess the number of traditional courts, it is even more difficult to establish the number of cases decided by them. When I participated in the court hearings by a Sambyu senior headwoman who holds court in the eastern part of Rundu, I was told that six to eight cases are dealt with at each court session, and sessions take place every Saturday.¹⁸ A recent investigation into *Ondonga* court practices noted that the highest level of court sits for a week once a month, during which time it handles up to nine cases a day.¹⁹ The statistical projections based on the latter information support the assumption that the *Ondonga* court alone, in its 12 annual sessions over five days, with an average of five cases a day, processes a court record of 300 cases a year. If one adds to this the number of cases that are finally decided by the courts of the districts (where such districts exist) and those of village authorities, and one multiplies that number by seven (i.e. the other *Oshiwambo*-speaking authorities) or by 17 (the already cited communities in the far north), an unbelievably high number of cases can be seen to be adjudicated by traditional courts every year. Even if only some of these cases wound up in magistrates' courts, the latter would collapse!

14 *Headman* is *omwene gwomukunda* in *Oshiwambo*, which literally means “the one who holds the authority in the village or ward”. Cf. also the list of recognised *Ondonga* traditional leaders in *Government Gazette* 65 of 1998. The list contains more than 800 names of headmen.

15 *Ombadja*, *Ombalantu*, *Ongandjera*, *Oukwanyama*, *Uukolonkadhi*, *Uukwaluudhi*, and *Uukwambi*.

16 This appears to be the case in the Gciriku, Kwangali, Mbunza and Sambyu communities. The Mbukushu community knows only a two-layered structure: the level of the chief, and the level of the village.

17 *Mafwe*, *Mashi*, *Masubiya*, and *Mayeyi*.

18 In 1993, as part of research for Hinz (2003a).

19 Zenda, SE. 2008. *Customary law assignment*. Windhoek: University of Namibia, Faculty of Law, p 2; Kamati (2008:3f, 14f).

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It is surprising, therefore, that the Community Courts Act²⁰ – the result of some ten years of work,²¹ and representing a comprehensive framework for the uniform operation of traditional courts in Namibia – has still not been implemented although it is in force. One can only speculate as to why the Ministry of Justice has so far not processed the applications for appointments of traditional justices in the various traditional communities.²² It is rumoured that the Ministry has experienced difficulty with the provisions for appeal against the decisions of traditional courts. According to the Community Courts Act, appeals lie with the magistrates' courts.²³ The alternative under consideration is to follow Botswana's model, where a special customary law court of appeal hears appeal cases.²⁴

Apart from changes prompted by officials in the Ministry of Justice, politicians, practising lawyers, and academics in the field of law have raised other questions which, in one way or another, may have influenced the delayed implementation of the Act. Are traditional courts actually courts at all? Are they in fact courts of law? Are they subject to the same constitutional requirements as state courts are, i.e. are they subject to the rules on the independence of the judiciary? And if so, will they be able to comply with these rules? These are some of the questions that need answers.

Looking at the legal anthropological and jurisprudential debate as documented over the years since anthropologists and lawyers started studying traditional justice systems, one will learn that questions about the functioning of traditional courts have occupied scholars and politicians for many years. This was particularly true of the time when African states, after achieving independence, had to make a decision about the place of the administration of justice under customary law in their post-independence legal orders.²⁵ However, what was debated then only provides limited answers to the concerns of today. The early

20 Act No. 10 of 2003.

21 Cf. Hinz, MO. 2008. "Traditional governance and African customary law: Comparative observations from a Namibian perspective. In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 70ff.

22 As required by section 8 of the Community Courts Act.

23 See section 26 of the Act.

24 Cf. here Hinz (2003a:145ff).

25 Cf. Allott, AN, AL Epstein & M Gluckman. 1969. "Introduction". In Gluckman, M (ed.). *Ideas and procedures in African customary law*. London: Oxford University Press, p 1ff; Okupa, E. 1998. *International bibliography of African customary law. Ius non scriptum*. Hamburg: Lit Verlag, p 115ff. The United Nations Institute for Namibia applies the earlier discussion to Namibia, using the work of Sichelongo, MDF. 1981. *Toward a new legal system for independent Namibia*. Lusaka: United Nations Institute for Namibia, pp 34ff, 61ff.

post-independence discussion perceived the traditional administration of justice mainly as something that, if not entirely eliminated, would somehow be integrated into the mainstream system of justice. This meant that, although customary law would remain applicable, the courts applying this law would either be state courts in the specific sense, or state-integrated local courts, modelled after magistrates' courts.

This early post-independence option to integrate the inherited traditional administration of justice into the mainstream state-run justice system has lost ground with the recognition of traditional governance as part of the overall national governance, and the need to accept that adjudication is part of this traditional governance.²⁶

Against this background, this paper first looks at the practice of traditional courts as part of traditional offices, and at the customary law rules that relate to such courts. Secondly, some aspects of the Community Courts Act that relate to the problem of this paper are highlighted. Thirdly, I will revert to constitutional questions arising from the latter discussion, while a more general statement forms the conclusion.

Traditional courts in the interface between customary and statutory law

The traditional courts under customary law

According to the Traditional Authorities Act,²⁷ the overarching function of traditional authority is to promote peace and welfare.²⁸ What section 3 of the Act stipulates in detail shows that the functions of a traditional authority can be fully compared with the functions of the state government. Traditional authorities adjudicate cases brought before them; they have executive functions and “make customary law”, as section 3(3)(c) of the Act says. In other words, the doctrine of the separation of powers, as developed in the theory of modern constitutionalism and implemented in modern constitutions,²⁹ does not apply to systems of traditional governance. *Traditional* offices are those which attend to all sorts of issues of relevance to the community, irrespective of their nature in terms of the doctrine of the separation of powers.

26 See Hinz (2008).

27 Act No. 25 of 2000.

28 Section 3(1), Traditional Authorities Act.

29 Cf. Article 1, Namibian Constitution.

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The first point of entry for a community member who seeks assistance from a traditional authority is at village level. In some instances, the headman will not attend to the matter in substance, but forward it to the next (i.e. district level, where it exists) or even the highest level. In other cases, the headman's view will only be of an advisory nature to the higher level. Serious matters, such as cases of murder, go directly to the level of the chief. At the level of the chief, administrative professionalisation occurs in the sense that different people administer different matters. Whether a traditional authority possesses such professionalisation will depend on the degree of administrative formalisation in place, which again will depend on the financial means available to the authority. The quoted internship report on the *Ondonga* traditional office³⁰ indicates that this office has nine staff members in total: the secretary to the traditional authority, as provided for also in the Traditional Authorities Act;³¹ a spokesperson; five clerks; a police officer; and a cleaner. In this staff establishment, the traditional leaders as such – Senior Councillors, who form the King's Council, and councillors, etc. – are not included.

Traditional authorities administer communal land, they allocate it, and are involved in the registration of communal land rights, as is now required by the Communal Land Reform Act, 2002 (No. 5 of 2002). They issue customary marriage certificates³² as well as certificates for customary marriage divorces,³³ and are involved in the issuing of death certificates.³⁴ Furthermore, they form part of the administration process for applying for a firearm licence. Liquor licences are granted for *cuca* shops in remote areas by traditional authorities, as are permits to transport livestock. The *Ondonga* Traditional Authority sells permits to collect building sand for brick-making; traditional authorities in the Caprivi and Kavango Regions are involved in the regulation of tourist businesses. Where conservancies and community forests exist, traditional authorities are involved in their administration.³⁵

30 Kamati (2008:2f).

31 See section 10(3).

32 This has long been standard practice in the Caprivi Region, and is now also observed in the Kavango Region.

33 Recent personal communication from an informant originating from the Caprivi Region.

34 This and the following are supported in Kamati (2008) and Anyolo, P. 2007. *Internship report on the daily official activities at the Ombadja Traditional Authority*. Windhoek: University of Namibia, Faculty of Law.

35 Cf. Hinz, MO. 2003b. *Without chiefs, there would be no game. Customary law and nature conservation*. Windhoek: Out of Africa, p 33ff; and the contribution by Muhongo, M. 2008. "Forest conservation and the role of traditional leaders: A case study of the Bukalo Community Forest". In Hinz, MO & OC Ruppel (eds). *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society, p 197ff.

Traditional lawmaking, in the sense of official enactments of customary law, happens only at specially designed occasions. This is documented at least in the cases of kings in the *Oshiwambo*-speaking areas, who are said to have announced their new laws when ascending to the throne. One famous example of this was the new laws of King Mandume ya Ndemufayo.³⁶ When his reign over the *Oukwanyama* kingdom began, he enacted far-reaching laws by means of which he intervened in certain practices that he did not want to see continue, such as cattle raiding from neighbouring communities.³⁷ One famous example of recent lawmaking was recorded when *Oshiwambo*-speaking traditional authorities changed parts of their customary law, which is based on the matrilineal kinship structure that prevails in those and in Kavango communities, in order to protect widows and their children with respect to the occupation of fields after their spouse's/father's death. The new law now provides for the widow's right to remain on the land and to continue with its cultivation.³⁸ The proposed new constitution of the Sambyu community also has provisions on lawmaking, as well as for a legislative council at the level of the chief.³⁹

As stated in the introduction, traditional authorities perform judiciary functions at all levels, where different levels exist. Some traditional authorities have included relevant procedural rules in their *self-stated* customary laws.⁴⁰ The Laws of *Ondonga* deal with procedural matters in their first section. Section 1

36 Mandume ruled *Oukwanyama* from 1911 to 1917.

37 Cf. Loeb, EM. 1962. *In feudal Africa*. Bloomington. Mouton & Co., p 33ff.

38 Cf. Hinz, MO & P Kauluma. 1994. "The laws of Ondonga – Introductory remarks". In Elelo lyOpashwana lyOshilongo shOndonga. Traditional Authority of Ondonga. *OoVeta (OoMpango) dhoShilongo shOndonga: The Laws of Ondonga*. Oniipa: Evangelical Lutheran Church in Namibia, p 27ff; Hinz, MO. 1997. "Law reform from within: Improving the legal status of women in northern Namibia". *Journal of Legal Pluralism and Unofficial Law*, 39:69; and section 9 of the Laws of *Ondonga*. Similar protection of widows is now part of the Communal Land Reform Act; cf. section 26(2).

39 Articles 7–9, proposed constitution of the Sambyu community, April 2008. The proposal can be found in the files of the Human Rights and Documentation Centre, Faculty of Law, University of Namibia.

40 There is agreement to call exercises of communities writing up pieces of their customary laws *self-stating of customary law*. *Self-stating* is not the same as codifying; and is also not what the School of Oriental and African Studies of the University of London envisaged with its project of restating customary law. Rather, *self-stating* refers to community efforts in which aspects of importance in customary law are put down on paper. Under the auspices of the Human Rights and Documentation Centre, a first compilation of the self-stated laws of the communities in northern Namibia will appear in 2009. Cf. Hinz, MO & JW Kwenani. 2006. "The ascertainment of customary law". In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, p 203ff.

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informs potentially aggrieved persons that they have the right to launch a legal case; if they do so, it must be done at the lowest level. Should a complainant or respondent not be satisfied with the decision at the level of the headman, s/he may request a letter from the headman; the letter is the procedural requirement for continuing with the case at the level of the senior headman.⁴¹ Should one of the parties not be satisfied with the senior headman's decision, the same procedure will be available to take the case up to the court of the King and the King's Council – or *Ongonga*, as the laws put it in *Oshiwambo*.⁴²

It is practice in *Ondonga* that cases to be heard at the King's level have to be registered in the first three weeks of the month, i.e. before the court session in the fourth week. While in some communities the highest court is chaired by the chief, many communities have special officers who preside over the courts. *Oshiwambo*-speaking communities know the position of chairperson: in the *Ondonga* King's court, the chairperson is a very experienced senior traditional leader. In the communities of the Caprivi Region, it is the *Ngambela* who chairs the highest court. After the chief, the *Ngambela* is the highest traditional officer, and presides over the senior councillor meetings. This author was informed that the chief of the communities in the Caprivi Region did not attend court hearings, although he was consulted by the *Ngambela* before the court's final decision.⁴³ Nonetheless, in his report on the Ombadja traditional office, Anyolo⁴⁴ notes that the chief sat in on the hearings held under the chairman of the court, but only intervened in matters of law, i.e. when, to his knowledge, understanding customary law was not being properly observed. Although there is no evidence about the consultations between the *Ngambela* and the chief, it can be assumed that the purpose of the consultation, again, is to ensure compliance with customary law.⁴⁵

Some of the communities that have completed the self-statement of their customary law have explicitly provided for rules to secure the rule of law in the proceedings of their courts. The Laws of *Ukwangali* specifically do not want to see a murderer being fully exposed to both the general law and the customary law.

41 Sections 2.1 and 2.2.

42 Section 2.3. The King is *Omukwaniilwa* Immanuel Kauluma Elifas. *Omukwaniilwa* is the traditional title of the King of *Ondonga*. The Traditional Authorities Act contains some regulations of the Chief's or Traditional Council in section 9.

43 Personal communication by *Mafwe* traditional leaders during field research for Hinz (2003a).

44 Anyolo (2007:8).

45 Similar to the process of automatic review in respect of certain magistrates' cases by judges of the High Court.

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According to the latter, a defined number of cattle have to be paid by the family of the murderer to the victim's family. The Laws of the Kwangali require that the traditional court consider a balance between the sentence of the state court and the sentence of the traditional court, allowing the traditional court to reduce the customary law compensation in accordance with any years the convicted person has already spent in prison.⁴⁶ The self-stated laws of the *Mayeyi* in the Caprivi Region have a special section on procedures.⁴⁷ It has ten subsections, respectively entitled "How to submit a complaint"; "Who may be accused of a crime"; "Investigation"; "The decision to prosecute"; "Issuing of warnings"; "How a case is conducted"; "Who may appear before the court"; "Rights of the accused"; "Rights of victims and witnesses"; and "How a case is appealed". The previously mentioned proposed constitution of the Sambyu community has a chapter on the administration of justice that contains a provision according to which no traditional office-bearer is permitted to interfere with justices in the exercise of their judicial functions. The Law of the Mbukushu provides for village headmen who adjudicate cases below the level of the chief to call on neighbouring village leaders to join them in deciding cases that concern members of the village headman's family.⁴⁸

Traditional courts and statutory law

Apart from the Community Courts Act, the Traditional Authorities Act is relevant when looking at the statutory framework in which traditional courts are to operate. The first version of the Traditional Authorities Act came into force some eight years before the Community Courts Act did.⁴⁹ The lawmakers, in their attempt to set out the legal framework for traditional authorities in a broad sense, obviously found it appropriate to include provisions on the judiciary function of traditional authorities, such as the section that deals with the jurisdiction of traditional courts – to which I will revert below. There are, however, two sections in the Traditional Authorities Act that are of more principal importance, as they have a bearing on the position of traditional courts and the potential judicial officers in these courts. The first is section 15, according to which holding the office of chief and holding a political office are incompatible. *Political office* is defined to be the office of President, a Member of the National Assembly or the National Council, or the leader of a registered political party. Although the chief of a traditional community does not necessarily preside over the highest

46 Section 1.

47 Section 3.

48 Personal communication, Mr B Mushongo, Mukwe, 16 September 2008.

49 The Traditional Authorities Act in force repealed its earlier version of 1995; see section 20(1) of the 2000 Act.

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court in his/her area, and is not even necessarily member of the court, as can be seen above, for all those cases where the chief does in fact attend court, the incompatibility rule of the Traditional Authorities Act has meaning: it at least ensures that the highest officer in the traditional set-up is not bound to loyalties of a political office and, therefore, will not find him-/herself in a formal conflict of interests.

The second section of importance in the Traditional Authorities Act is section 16. This section determines the relationship between the organs of the state and traditional authorities. Section 16 requires that traditional authorities –

... give support to the policies of Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions.

The scope of this support clause does not distinguish between the various functions a traditional authority performs. The introductory part of section 16 stipulates that a traditional authority, in the exercise of its powers and the performance of its duties and functions under customary law as specified in the Act, is obliged to do what the support clause demands. *Judiciary* functions are those specified in the Act in section 3(1)(b), which refers to the administration and execution of customary law as one of the tasks of the traditional authority. I will not repeat here what I have stated elsewhere about the history and debatable content of the support clause.⁵⁰ Suffice it to say here that the reasons to question the constitutionality of section 16 receive additional grounds when looking at the judicial functions of traditional authorities. As the section stands, it is open to be used as gateway for influencing traditional authorities when adjudicating cases in which government has an interest!

I now turn to the Community Courts Act. The tasks of the Community Courts Act are manifold and difficult. Despite the socio-political differences of the various traditional communities, a uniform approach had to be developed to replace the fragmented legal scene inherited from the time before independence.⁵¹ Areas for legislative interventions had to be determined and attended to in a way that would follow the principles of law reform according to which changes had to be reasoned, limited to the necessary, stated in clear language, and investigated in view of their acceptance by the addressees of the new law.⁵² The constitutional basis for law reform in this direction is Article 66(2) of the Constitution, which

50 See Hinz (2008:82ff).

51 See Schedule to the Community Courts Act.

52 Cf. Noll, P. 1973. *Gesetzgebungslehre* (“Theory of lawmaking”). Reinbeck bei Hamburg: Rowohlt.

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gives the lawmaker the authority to repeal and modify customary law and any part thereof, subject to the terms of the Constitution. In other words, repeals and modifications of customary law have to accept that customary law is confirmed as such by the Constitution – even as regards part of the enforceable right to culture.⁵³

What I will do in the following is, firstly, submit some general observations on the Community Courts Act. Secondly, I will consider some, in my view, problematic provisions of the Act that are relevant to the status and functioning of traditional courts.

The following general observations are guided by an interest to depict the legal environment in which the Community Courts Act perceives traditional courts to be.

The Community Courts Act is the result of a Ministry of Justice project that started soon after independence.⁵⁴ After an assessment of the inherited pre-independence law was done, consultations were held all over Namibia, and the various drafts of the envisaged bill were discussed with all possible stakeholders. The result, which took more than ten years to emerge, came into effect in 2003 and is a kind of compromise between common law principles on the one hand, and on the other, the increasingly appreciated need to accept approaches under customary law that differ from common law. One important feature with respect to compromising common law can be found in the section on jurisdiction,⁵⁵ which avoids the common law distinction between civil and criminal law, and confirms that community courts have jurisdiction –

... to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law.

This was done to recognise that customary law, in its main focus on compensation for wrongs committed, does not draw the same distinction between civil and criminal law that exists under the general or common law. The reference to *compensation* by customary law also notes that customary law compensation

53 Article 19, Namibian Constitution. The limitations to law reform flowing from this provision in the Constitution needed special consideration, as did the possible consequences for repeals and amendments to customary law arising from the fact that law reform inroads into customary law are inroads into law that owes its existence to tradition and traditional lawmakers.

54 Cf. what I summarised in Hinz (2008:70ff).

55 Section 12, Community Courts Act.

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is standardised and does not expect proof of loss as is the case for common law compensation, i.e. in accordance with section 300 of the Criminal Procedure Act.⁵⁶

Another area where the Community Courts Act confirms customary law is in the law of procedure applying to hearings before a traditional court. Section 19(1) of the Act states the following:

Subject to this Act, the practices and procedure in accordance with the proceedings of a community court shall be conducted, including procedures and rules relating to evidence, the manner of execution of any order or decision and the appropriation of fines shall be in accordance with the applicable customary law, but shall be in accordance with the principles of fairness and natural justice.

The implications of this are far-reaching as regards incorporating procedural customary law in general terms into the law applicable to the courts operating under the Community Courts Act. Traditional courts employ inquisitorial principles and not adversarial ones, as state courts do. Traditional courts allow hearsay evidence, which state courts do not accept. Traditional courts accept submissions that a state court may rule out as being unrelated to the case. Traditional courts have their own presumptions on which to base conclusions, but state courts may have difficulties with such presumptions.⁵⁷

However, looking at Article 66 of the Constitution, the definition of *customary law* in the definition sections of the Community Courts and Traditional Courts Acts (sections 1 of the respective Acts), and taking into account what the quoted section 19 of the Community Courts Act emphasises with its reference to the “principles of fairness and natural justice”, there is no doubt that the confirmation of procedural customary law is meant to be subject to the overarching law of the state. However, the question remains to what extent the provisions on the independence of the judiciary (see Article 78(2) of the Constitution), including consequences flowing from the doctrine of the separation of powers, apply to traditional courts.

The Community Courts Act does in fact contain some provisions that deserve mention here. The general intention of this Act is to provide some structural uniformity to the traditional administration of justice. Apart from offering traditional courts a uniform, nationally applicable system of enforcing the orders

⁵⁶ Act No. 51 of 1977. Cf. Hinz (2003a:175ff).

⁵⁷ See here d’Engelbronner-Kolff (1997:149ff, 226ff).

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of community courts,⁵⁸ the Act also intends to provide for (although whether it in fact does so is debatable, as will be seen later herein) standardised schemes for the establishment of traditional courts⁵⁹ as well as the appointment and removal of traditional justices⁶⁰ and the composition of traditional courts.⁶¹ The Act also sets the framework for the possibility of appealing the decisions of traditional courts.⁶² Again, whether the Act achieves this is debatable, since it does not really take note of the possible tensions between traditional courts and magistrates' courts with respect to the choice of fora existing for potential complainants, and the consequences of playing with the option to proceed either to a traditional or a magistrate's court – an issue to which I will return below.

Apart from these debatable provisions, the Community Courts Act contains two procedural provisions that deserve mention here. Section 18 of the Act declares every community court a court of record. For years, many traditional courts have employed the practice of keeping court books in which they note basic information on cases decided before them. Although these court books are valuable sources of information about the way cases are dealt with,⁶³ they do not always give enough information when it comes to what a court of appeal may wish to see. This is where section 28 comes in: traditional courts are now obliged to record the adjudicated cases in a manner expected by a court of record. Section 16 of the Act allows parties in a traditional court case to “be presented by any person of his or her choice”. Although this is interpreted to implement Article 12(1)(e) of the Constitution, according to which all persons in trial “shall be entitled to be defended by a legal practitioner of their choice”, many traditional leaders question this provision. In their view, legal practitioners should not be allowed in traditional courts as they do not understand the procedures of traditional courts and, by intervening on the basis of common and statutory law, will only disturb the traditional way of solving conflicts.⁶⁴

58 See section 23, Community Courts Act.

59 See sections 2, 3 and 4, Community Courts Act.

60 See section 8, Community Courts Act.

61 See section 7, Community Courts Act.

62 See sections 26 and 27, Community Courts Act.

63 It was one of the tasks of the Constitutional and Customary Law Project (CoCuP) which I directed in the Centre for Applied Social Sciences at UNAM's Faculty of Law from 1994 to 2000 to collect and evaluate the case books of traditional courts; see Hinz, MO. 2006. “Legal pluralism in jurisprudential perspective”. In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, pp 1ff, 8.

64 In many meetings with traditional leaders conducted since the enactment of the Community Courts Act, the issue of legal representation was debated at length.

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A special word is needed on the financial situation of traditional courts.⁶⁵ The administration of justice costs money; it is common knowledge that under-financing institutions that are expected to deliver justice in an unbiased manner is tantamount to inviting inroads into the independence of the judiciary. The financial situation of traditional leaders has been a point of contention since the enactment of the first version of the Traditional Authorities Act in 1995. However, even in the 2000 Act, only a limited number of traditional authorities receive a personal allowance in terms of section 17. Apart from this, the financial support of traditional offices is left to the administrative discretion of the minister of justice. Other than this, traditional communities are expected to generate their own income, be it through collecting traditional levies, or projects conducted in their areas of jurisdiction. For income of this nature, the Traditional Authorities Act offers the possibility of establishing a Community Trust which would be responsible for the administration of funds paid into it.⁶⁶ In addition, the Community Courts Act provides for allowances to traditional justices and the remuneration of traditional court clerks and messengers,⁶⁷ but goes beyond the Traditional Authorities Act in that it explicitly obliges the Minister of Justice to give financial assistance to traditional courts.⁶⁸ The terms in which this is expressed are nevertheless weak:

... the Minister shall at any time grant to a community court such financial assistance as may be necessary for defraying expenses in connection with the administration of such community court.

The “shall” in the Act is, therefore, not really a *shall*, as it is left to the Minister to decide what grant is given, when, and to which court. In view of financial sustainability, transparency and the need to provide an independent service to justice, the respective part of the Community Courts Act needs revision. Instead of leaving all decisions to the executive, the Council of Traditional Leaders⁶⁹ could be called on for their input.

65 A recent conference on the independence of the judiciary (Entebbe, 24–28 June 2008, organised by the Konrad Adenauer Foundation) stressed the need to consider to what extent the independence of the judiciary was at stake if the authority to decide on its finances lay in the hands of the executive.

66 See section 18, Traditional Authorities Act, as well as sections 4ff of the Regulations thereunder, GN 94 of 2001.

67 See section 10, Community Courts Act, but also section 12 of the Regulations under the Traditional Authorities Act, GN 94 of 2001.

68 See section 5, Community Courts Act. It is not known whether or not the Ministry of Justice has determined any formula according to which traditional courts would receive financial assistance.

69 A body created under the Constitution, as provided for in Article 102(5); cf. also the Council of Traditional Leaders Act, 1997 (No. 13 of 1997). Although the Council does not enjoy the status of a parliamentary body, it is seen by many traditional leaders to be their (third) ‘house’, next to the National Assembly and the National Council.

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Like the Traditional Authorities Act, the Community Courts Act provides for a “Revenue Account” into which “all moneys accruing to such courts” are to be paid.⁷⁰ Interestingly, the section of the Community Courts Act that deals with the said revenue account does not take any note of the provisions on the Community Trust Fund in the Traditional Authorities Act.⁷¹

In more recent versions of self-stated customary law, in the consequences for committed offences it can be seen that fines indicate a certain number of cattle having to be paid to the aggrieved, and one head of cattle to the traditional authority. The still deliberated standardised version of the laws of the five Kavango communities⁷² even adds another head to be paid to the chief. Developments of this nature are obviously responses to financial needs of the traditional authorities, and the expectation not to run local affairs at the mercy of governmental subsidies.

The special areas taken up from the Community Courts Act, besides those mentioned above, are particularly important to questions about fairness in the traditional administration of justice, its independence from governmental influence, and its adequate positioning in the overall justice system. The yardstick for my judgments is the degree of acceptance of the customary law which governs traditional courts, or in other words, the degree of interference with customary law.⁷³ The areas selected concern the following:

- The application for recognition of traditional courts (sections 2ff)
- The composition of traditional courts (section 7)
- The appointment and removal of justices (section 8)
- The limitations of liability for compensation (section 24)
- The provision on transferring cases between traditional courts and magistrates’ courts (section 21)

⁷⁰ See section 6, Community Courts Act.

⁷¹ The drafters of the Community Courts Act obviously did not fully consider what the Traditional Courts Act – enacted much earlier – entails. Another point of discrepancy can be found in comparing the applicability of customary law. Section 14(b) of the Traditional Authorities Act states that customary law only applies to the members of that traditional community and to any person who by his or her conduct submits himself or herself to customary law of that community, whereas sections 12 and 13 of the Community Courts Act appear to allow for an interpretation according to which customary law would apply as long as the cause of action arose within the area of jurisdiction of that community, i.e. irrespective of whether the party to the matter is a member of the respective community or has submitted him-/herself to customary law.

⁷² As referred to above.

⁷³ Or in more jurisprudential language, the degree of accepted legal plurality; cf. Hinz (2006:29ff).

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- The rule that obliges traditional courts to furnish records to state courts (section 18(3)), and
- The appeals against decisions by traditional courts (sections 36ff).

Although the Act is aware that traditional courts possess a layered structure in many communities,⁷⁴ the provision on recognition focuses on the highest level of the respective traditional justice system and leaves the status of those in lower levels quite open.⁷⁵ The more appropriate way would have been to recognise the traditional justice system as established according to customary law. Such a recognition could keep the administration of justice at the lower levels as it is, including its relatively less formal procedural set-up, which, for example, allows participation of the village in assessing cases before it. Recognition by the word of the law would nevertheless be of importance, as it would acknowledge the peacemaking quality of those courts and their contribution to law and order.

While the composition of the court is to some extent left to customary law – a community court shall be presided over by one or more justices⁷⁶ – there is a change to customary law in so far as the judges who will sit on the traditional bench have to come from the list of judges appointed by the Minister of Justice. Under customary law, it is up to the traditional authority to appoint members to the court.⁷⁷ Comparing the Community Courts Act with the Traditional Authorities Act, one has to note that the latter has mechanisms to control appointments only for the highest office in the community, i.e. the chief, and not for leaders below the position of chief.⁷⁸ It is not clear why the Community Courts Act, which in fact deals with one branch of traditional governance – the judiciary, suggests an approach different from the general rule in the Traditional Authorities Act.

According to section 8 of the Community Courts Act, it is the mandate of the Minister of Justice to appoint and remove traditional judges. Requirements for the appointee are that s/he –

- must be conversant with the customary law applicable to the area of jurisdiction
- must be fit and proper to be entrusted with the responsibility of the office of justice
- does not hold an office in Parliament, or a regional or local authority council, and
- is not a leader of a political party.

74 Section 2(1)(b), Community Courts Act; section 11(1)(a), Regulations of Community Courts under the Community Courts Act, in Government Notice 237 of 2003.

75 See sections 2 and 3, Community Courts Act.

76 Section 7(1).

77 Cf. Zenda (2008:3).

78 See section 10, Traditional Authorities Act.

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As to the removal of a traditional judge, the Act stipulates that the Minister can remove a traditional judge from office if the latter becomes subject to any disqualification which would not allow his/her appointment. Before the Minister takes action, however, the relevant traditional authority has to be consulted.

As to the last point, one can in fact refer to the Traditional Authorities Act, which has incompatibility rules for supreme traditional leaders, similar to what is found in the Community Courts Act. Otherwise, what has been said above on the composition of community courts applies to the rest of the reasons for appointment or removal of judges, respectively. In addition, no criteria are given that would allow the Minister to assess whether a judge is conversant with his/her customary law, or is fit and proper for his/her office. Should one really think that appointments and, more so, removals have to be regulated in line with what the Community Courts Act stipulates, it would be advisable to determine an authority away from the administration to handle such matters. A committee of the Council of Traditional Leaders would have more insight into matters of customary law than the Minister of Justice would, and would simultaneously keep the system of traditional justice away from the influence of the administration.⁷⁹

Section 24(1) deals with cases where a court other than a traditional court grants a compensation order. In such a case, a complainant will not have the option to claim additional compensation in a traditional court. Such a rule of conflict is important, but it only covers part of the potential conflicts with respect to concurrent jurisdiction between state courts and traditional courts. For example, what is the position when, in a murder case, a traditional court decides to grant compensation to the aggrieved family under customary law, and the murderer is additionally called to stand trial in state court? What is the position when the murderer is sentenced in a state court and the aggrieved family claims customary law compensation in a traditional court? The problems in answering these questions are twofold: the first being that compensation under customary law is not just civil, but has a punitive element. This leads us to consider whether or not the prohibition on being tried twice (Article 12(2) of the Constitution) is violated in cases of this nature.⁸⁰ Statutory assistance is needed to clarify the potential

79 Noting what happened in the case of magistrates (cf. the case of *Mostert v The Minister of Justice 2003 NR 11*, which prompted the Namibian government to introduce the Magistrates' Commission – see section 5, Magistrates Act, 2003 (No. 3 of 2003)), one could expect a similar constitutional veto with respect to the quoted provisions in the Community Courts Act.

80 Hinz (2003a:175ff); Horn, N. 2006. "Criminal or civil procedure? The possibility of a plea of *autrefois* in the Namibian Community Courts Act". In Hinz, MO (ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Berlin: Lit Verlag, p 183ff.

conflict. Such assistance should be based on the equal treatment of the courts, meaning that state courts would have to accept that, in applying traditional justice, traditional courts conclude even murder cases.⁸¹ The equal positioning of court orders would contribute towards avoiding cases where complainants lodge a charge against a wrongdoer with the police, but very often withdraw their cases after receiving compensation from a traditional court. This practice, by which state law is used as a means to enforce customary law, would lose importance with the proposed change of the law. It would also release prosecutors from the difficult task of deciding whether or not to pursue prosecution in such cases of withdrawal, because they are very often faced with unwillingness on the part of the people who originally laid the charge, who then no longer wish to cooperate with the prosecution.

Section 21 of the Community Courts Act provides for the possibility of transfer of a case from the traditional court to the magistrate's court. It also offers the possibility of re-transfer of the case by the magistrate's court back to the traditional court. The Act, however, does not regulate the possibility of transfer from a magistrate's court to a traditional court. Why not? It is, indeed, quite easy to think of cases that would be better adjudicated under customary law than under common law.

Section 18(3) of the Community Courts Act determines that copies of court records are to be furnished to the magistrate's court and the permanent secretary of the Ministry of Justice. Why to them? Why not to the High Court? Why at all? The Act is silent and does not indicate what the magistrate and the permanent secretary are to do with the records coming from all the community courts – again, a rule which is likely to indicate the uncertainty lawmakers and law-reformers have when it comes to the positioning of traditional authorities into the overall system of law!

Appeals from traditional courts to magistrates' courts will not serve the purpose of achieving justice based on customary law. For magistrates, appeals of this nature will be cases amongst the others they have to deal with. Very often, magistrates will also not have the necessary expertise in customary law. The Botswana model as referred to above would be far more appropriate to adopt in Namibia. Composed of particularly knowledgeable traditional leaders, who may even have formal training in a school of law, a helpful hand would be assigned to the application of customary law which also takes note of the diversity of customary law on the one hand, and the need to provide certain standardisation on the other.

81 Cf. Hinz, MO. [Forthcoming]. "Introduction". In Hinz, MO (ed.). *Traditional and informal justice systems*.

Traditional courts: Courts of law?

Are the constitutional requirements for the judiciary, such as those in Articles 78(3) or 12(1)(a), binding in the same way on traditional courts as they are on the judicial organs of the state?

On the one hand, the confirmation of customary law can be acknowledged as it reads in Article 66(1), namely that the customary law in force at independence is to remain valid to the extent that it does not conflict with the Constitution or any other statutory law. This also confirms the existence and operation of traditional courts, since traditional courts are an integral part of customary law. However, and in view of the second half of Article 66(1), which subjects customary law to the Constitution and any other statutory law, one may ask whether the requirements set out in Article 12(1)(a) of the Constitution – which guarantee all persons fair and public hearings by an independent, impartial and competent court or tribunal – and the constitutionally accepted principle of the separation of powers would not require that the same also apply to traditional governance and the various distinguishable functions applied by it. If the two questions were answered in the affirmative, failing to comply with the separation of power would render traditional governance unconstitutional. Such a result would certainly violate the intention of the Constitution to provide space for inherited traditional structures to operate governmental functions.

What are *traditional courts*? Are such courts “courts” or “tribunals” in the sense of Article 12, that is, are they courts of law? The Constitution recognises, apart from the supreme and high court, lower courts.⁸² Are traditional courts lower courts? The answer to this question will differ, depending on the jurisprudential position one wishes to take. From a Kelsenian perspective, there will be no alternative other than to consider traditional courts as lower courts in a strict sense. Having the need for a hierarchical construct in which all state authority has its place and is bound to its respective higher authority, out of jurisprudential necessity, traditional courts ought to range close to magistrates’ courts: either at the same level of these courts or below them. In the latter case, the level of magistrates’ courts would be the place to appeal to from a traditional court. From a customary law perspective, however, traditional courts are difficult to accommodate in a hierarchy where they would be at the bottom. It is their foundation in ancestral legitimacy that makes members of traditional communities refer to the court at the chiefs’ level as the *traditional high court*. This high court is the highest court of the community, setting the tone for all its courts. The statutory provision

82 See Article 78(1)(c).

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for appealing against the decisions of these high courts to magistrates' courts appears, therefore, not to appreciate the status traditional high courts have in accordance with customary law. The fact that there are only a few cases of appeal from traditional courts to state courts is proof of this. A supreme traditional leader, when consulted about the Community Courts Act, stated that appeals against court decisions at the chiefs' level were unheard of and would not be acceptable – a view which is a further reflection of what has been said about the status of traditional high courts under customary law. Although such a view will find it difficult to win in a unitary state, it should promote the understanding of traditional courts in line with what has been accepted for traditional authorities as a whole, namely that they are *sui generis*.⁸³ As traditional authorities are *sui generis*, traditional courts as part of traditional authorities have this quality as well.

Is what Article 12(1)(a) guarantees also guaranteed under customary law? When the procedural requirements as recorded in the research referred to above are considered, a considerable number of rules in the self-stated customary law noted above can be seen to have an obvious basis in the rule of law. There are rules that govern all procedures at the various levels. The previously quoted case of the Laws of *Mayeyi* is a good example of the awareness on the side of traditional stakeholders that procedural rules are not only a requirement under customary law as it is interpreted today, but are also to be put on paper to give them additional weight. To what extent this can be generalised is open to research. However, what the High Court of Namibia held in the case of *Kahuure v Mbanderu Traditional Authority* is an indication of how possible procedural deficits in the application of customary law will can be remedied. What Justice Parker suggests is to draw on the principles of fairness and reasonableness in terms of Article 18 of the Constitution.⁸⁴

The issue of the separation of powers and traditional governance leads to three possible arguments. The first would be to consider what two relevant South African court decisions have to offer with respect to the issue at stake, and which hold that the doctrine of the separation of powers does not apply to traditional

83 Cf. Hinz, MO. 2002. "Traditional authorities: Sub-central governmental agents?". In Hinz, MO, SK Amoo & D van Wyk (eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: University of South Africa, p 81ff.

84 *Erastus Tjiundika Kahuure and Others v Mbanderu Traditional Authority and Others*, High Court Judgment of 13 April 2007, Case No.:(P) A 114/2006 – unreported. The powerful decision of Justice Parker needs to be analysed in further detail, also in view of the decision of the Supreme Court in the same matter, which could not be accessed yet at the time of writing this paper.

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courts.⁸⁵ The second way would be to go back to the origins of the doctrine – instead of applying the doctrine of power in a very literal manner, to ask for the rationale behind it, and to enquire whether traditional governance may not perhaps have alternatives which serve the same purpose as the doctrine of separation. A third way of dealing with the question of the separation of powers in traditional governance would be to place what are known as *traditional courts* into the wider societal context in which these courts operate, and by doing so, to put particular emphasis on the main function of customary law, namely to restore communal harmony in a sense that allows the aggrieved person and his/her family to continue to live side by side with the wrongdoer and his/her family.⁸⁶

I will briefly deal with the first two ways before elaborating on the third, since the third way will be the one that gives justice to traditional courts as courts sui generis.

The judge of the first-quoted South African case is of the very clear opinion that the fact that traditional governance does not separate power as modern constitutions does not lead to verdicts of unconstitutionality. Justice Madlanga holds that –⁸⁷

[t]here seems, in my view, to be no reason whatsoever for the imposition of the Western conceptions of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to “public policy”. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the Africans and, for that matter, the public policy of the rest of the South African people who were not in power. The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial function. The imposition of anything contrary to this outlook would strike at the very heart of the African legal system, especially the judicial facet thereof.

In concluding this statement, Justice Madlanga refers to section 31 (the right to culture), section 33(3) (just administrative action) and section 181 (establishment of state institutions supporting constitutional democracy) of the Constitution of the Republic of South Africa.

This position certainly supports concepts inherent in customary law and, by

85 *Bangindawo and Others v Head of the Nyanda Regional Authority and Another* 1998 (3) BCLR 314 (Tk), but also *Mhlekwana and Feni v Head of the Western Tembuland Regional Authority and Another* 2000 (9) BCLR 979 (Tk).

86 Cf. Hinz (2003a:9ff).

87 At 327.

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doing so, assists in maintaining a vanguard against inroads from the modern legal system. In this respect, it would deserve more detailed analysis, particularly in view of the second South African decision, which deviated from the first in certain aspects. It is not within the scope of this paper to undertake such an analysis, but I will instead revert to the position held by Judge Madlanga below, and view it from a different perspective.

The second way of dealing with the question of the separation of powers in traditional governance enquires about what the proponents of the doctrine of the separation of powers – the philosophers Montesquieu and Locke, during the Enlightenment – had in mind when they propagated the separation of powers, and asks whether traditional governance would offer alternatives that would serve the same intention as envisaged in this doctrine. Montesquieu and Locke's interest was to support the rule of law by preventing undue influence of one branch of government on the other. Each branch of power was expected to run its affairs by applying the law relevant to it. Decisions, be they in the field of administration, the field of lawmaking, or the field of adjudicating, were to be based on the generally applicable law and not on personal preferences or in pursuance of personal interests.

In view of this, when I revisit what was said earlier on the structuring of traditional courts, on the composition of courts at the chief's level (recall what has been recorded about the institution of *chairperson* of the court), it can indeed be affirmed that there are mechanisms in place in the traditional administration of justice that employ concerns as they inform the doctrine of the separation of powers. The said mechanisms are additionally supported by the way decisions are reached in the traditional set-up. The consultations that precede decisions are usually not restricted to the same kind of stakeholders as those defined by law to appear before state courts. A dispute is something that concerns everybody in the village, and not only the parties involved. At the chief's level in particular, the submissions of opinions are structured in such a manner that all arguments, starting from the more junior persons and proceeding to the senior ones, are heard, taken up, summarised and integrated into the final word, with which everyone is expected to be in agreement. Nevertheless, all this is not really a satisfactory answer to the problem of the separation of powers in traditional circumstances!

The third way to look at the doctrine of the separation of powers in the context of traditional courts takes as its starting point the arguments submitted by Judge Madlanga, but goes further by contextualising traditional courts in the broader socio-legal environment in which they operate.

D’Engelbronner-Kolff analyses in her “web of legal cultures” the working of normative orders from the widest possible perspective with respect to one of the traditional communities in the Kavango Region.⁸⁸ When people talk about traditional courts, it is very often overlooked that, apart from the relatively formalised traditional courts – as one has in mind when talking of traditional courts – there are even less formalised bodies beneath and around traditional courts, which play important roles in the management of problems and solution of disputes. There is the family in its various appearances; there are church bodies of various sorts; there are individual community stakeholders such as traditional healers; and there are government offices! They are all important as institutions to assist in the maintenance of peace in the community. Procedural formalities are not their first concern, however. Instead, they are results-driven – and the result they are after is this: solve the problem in a way that is accepted by all. Procedural formalities, i.e. the formalities protecting the rights of the parties to a dispute in terms of the rule of law (including the guarantee to fairness through mechanisms as entailed in the doctrine of the separation of powers), are also subject to this orientation, i.e. achieving a generally accepted solution of the problem. As the less formal ways of achieving results fail and the dispute moves on to gradually more formalised, higher fora, the said procedural formalities gain increasing importance. Procedural formalities appear to be stricter the higher the case moves in the adjudicating hierarchy. Higher instances of this nature may be the first levels below the traditional administration of justice, followed by the various levels of the traditional administration of justice, and then by the state courts. To the latter, all procedural requirements, including those that follow from the doctrine of the separation of powers, apply in full. In other words, what is propagated here is a view that, on the one hand, allows the traditional administration of justice to operate in its inherited ambit, and on the other, accepts that what has become standard in the operation of the state and its institutions need not be forced onto structures which work on societal matters from a different perspective.

88 D’Engelbronner-Kolff (1997:106ff).

Conclusion

This article has demonstrated that the Community Courts Act, which deals with the traditional administration of justice, could be improved in various ways. Indeed, some of these improvements would, by avoiding questionable statutory interventions, actually strengthen the constitutional confirmation of customary law. Other improvements, like getting the Council of Traditional Leaders involved in the appointment of traditional justices and giving the Council a say in the financial operation of the courts, would contribute to the independence of traditional courts. The following concluding remarks will focus on the more general need to provide traditional courts their appropriate place in the system of the judiciary as a whole, and, by doing so, to respond to the plea of traditional authorities to be respected as authorities of justice in their own right.

I wish to lead to the conclusion by referring to the case of *S v Haulondjamba*, a case that was originally adjudicated by a traditional court and re-adjudicated by a magistrate's court.⁸⁹ The opinion delivered by the reviewing judge of the High Court amply indicates the unfortunately limited knowledge professional lawyers have with respect to the traditional administration of justice. While the traditional court sentenced the person convicted for attempted rape to pay compensation to the complainant in terms of a certain number of cattle, the magistrate amended the traditional verdict by sentencing the accused to pay a certain amount of money to the state or face imprisonment, but confirmed the traditional court by ordering compensation amounting to two head of cattle to the complainant. The case came to the High Court on automatic review. While the judge at the High Court confirmed the sentence of payment to the state or, alternatively, imprisonment, the court set aside the order of payment of compensation for the following reasons:⁹⁰

Insofar as the sentence imposed by the tribal court has been made part of the magistrate's sentence, this is an irregularity. Any person can submit to the jurisdiction of a tribal chief and agree to be bound by the judgment of the tribal court. The law will not interfere with such procedure, provided such procedure complies with the principles of natural justice. Unless there are special conditions present and all interested parties agree to have the decision of the tribal court made an order of the magistrate's court or High Court (this is, where the position is analogous to the position where parties agree to have an arbitration award made an order of court) a court of law cannot make the tribal court's sentence an order of court. This does not mean the court of law concerned sets aside the tribal court's judgment and sentence. As far as the parties are concerned, the tribal court's decision in this case will stand but it does not form part of the sentence of the magistrate.

89 1993 NR 103.

90 (ibid.:103f).

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This quotation prompts two observations at least. The first is that the learned judge obviously missed that Article 66 of the Namibian Constitution reconfirmed customary law to be the law of the land, which, by virtue of this confirmation, also required attention by the courts of the state. To place the order of the traditional court next to an arbitration order is therefore really unacceptable. The second observation is more of a general nature. Whereas the magistrate's decision tried to accommodate the customary law concept of compensation, which is in line with the customary-law-based concept of justice and according to which the payment of compensation to the aggrieved party is essential to achieving societal peace, the judge of the High Court did not even attempt to pay attention to this. It is as if the administration of justice proper starts with the state-administered courts, the courts of law. What the High Court did in the *Haulondjamba* case reflects the very attitude against which Judge Madlanga argued in the case where the doctrine of the separation of powers was invoked. Only when the seriousness of traditional justice and its administration are respected will justice be done to customary law and its operations. Only when traditional justice and its operation are respected as having their own rationale will it be possible to argue for changes to improve justice and its administration at all levels, in line with the wider debate about the rights of the parties involved in a dispute. Without an openness towards alternative approaches, communication with those who stand for such alternatives will fail. Without such openness, law reform will not be able to learn about the need to employ creative legal mechanisms that will give the traditional administration of justice the legally accepted and protected space not only to operate, but also to develop.

I submit my full agreement to what a prosecutor, who works in a magistrate's court close to the efficient centres of traditional justice, recently expressed in a meeting with students of the Faculty of Law,⁹¹ namely that he found it inappropriate that an appeal from a traditional high court would be heard by a magistrate's court.⁹² Why? "The traditional high court and the magistrate's court are on a par," the prosecutor said.⁹³ "How can the latter revisit a case coming from a court which operates at the same level?"

91 Customary law field work in the Kavango Region, 17 September 2008.

92 After the repeal of legislation in place before the Community Courts Act, and because the Act is not yet implemented, it is uncertain whether appeal from a traditional court is possible at all.

93 This argument gains even more power when one considers that magistrates' courts are statutory creations. There are good reasons to argue that traditional courts have, like the High and Supreme Court, original jurisdiction. Interestingly, the now repealed Civil and Criminal Jurisdictions. – Chiefs, Headmen, Chiefs' Deputies and Headmen's Deputies, Territories of South West Africa Proclamation R348 of 1967 referred to the civil jurisdiction of traditional courts of the northern part of the country as "original and exclusive jurisdiction" (see section 4(1)(a)).