

***Customary law ascertained. Volume 1. The customary law of the Owambo, Kavango and Caprivi communities of Namibia; Manfred O Hinz (Ed.), assisted by Ndateelela E Namwoonde, Windhoek, Namibia Scientific Society in association with the Human Rights and Documentation Centre, Faculty of Law, University of Namibia, 2010, 566 pages<sup>1</sup>***

Nico Horn\*

I received the new book by Manfred Hinz with great interest. Not only did I work with the then Minister of Justice, Dr A Kawana, in a training programme for traditional authorities in the mid-2000s in preparation for the enactment of the Community Courts Act,<sup>2</sup> but I was also involved in the Ascertainment Project. As the former Director of the Human Rights and Documentation Centre (HRDC), I wrote the proposal for the donors.<sup>3</sup>

During the first part of the funded Ascertainment Project, a Swedish intern, Ms Linda Engvall, and I combined our efforts with Mr Steve Swartbooi in the south and Traditional Councillor Rudolph Hangoze in central Namibia, and conducted workshops on the Namibian Constitution and the ascertainment of customary law. When I left the HRDC in 2007, I played no further role in the Project.

It is too early to know how our efforts will fit into Hinz's ideological framework, since we did not work with the traditional authorities whose laws were used for the first volume. But I suspect that Prof. Hinz will categorise us as observers believing in the superiority of common law. It is not that we were right-wing ideologists, but we operated from the position of constitutional superiority and we attempted to guide the traditional communities into writing their then

---

\* Associate Professor of Law, University of Namibia.

1 ISBN 978-99916-40-96-9 (Namibia), 978-3-941602-51-9 (Germany).

2 No. 10 of 2003.

3 I am in no way insinuating that I initiated the project. Hinz had already worked on similar projects with his organisation, the Centre for Applied Social Sciences, in the early 1990s and had compiled the self-stated Laws of Ondonga with traditional leader Peter Kalangula in the mid-1990s. The idea of approaching a donor through the HRDC came from Prof. Hinz, at the time a Director of the HRDC and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair for Human Rights and Democracy.

unwritten laws down in a form that was in compliance with the Constitution of the Republic of Namibia.

Ms Engvall, with my consent, even drafted a pro forma indicating to the communities what should generally be included in an ascertained set of Constitution-friendly laws. By the time I left the HRDC, the groups we worked with had just started to file their written laws with us. Many of them followed our pro forma and excluded older laws that were explicitly against the principles of the Constitution. Hinz is at pains to make it clear that he and his colleague, Emilia Namwoonde, are external observers and not participants in the process of ascertaining customary law. The ascertainment is the work of the people who know the laws and they need to work without the interference of academics or bureaucrats. Consequently, the compilers/editors see ascertainment as an exercise by and for the people themselves. Those living under customary law are the ones who should benefit from its ascertainment.<sup>4</sup> Consequently, the laws are published both in the language of the traditional authority of the specific community concerned and in the official language, English.

*Ascertainment*, Hinz points out, is not *codification*. In his understanding, *codification* has all the elements of interference in the historical law-making process. For him, *codification* ends in an Act of Parliament: the legislator becomes the future arbiter of the development of customary law. If this were to happen, traditional authorities would lose the right to legislate for their communities – a right acknowledged by the Traditional Authorities Act, 2000.<sup>5</sup>

Hinz states that he is not aware of any codification of customary law in Africa. However, if we use a less restrictive definition for *codification* to signify written laws, including non-statutory laws such as the secondary legislation of local governments, then the written laws of traditional authorities may well be seen as codified customary law without parliamentary intervention. I will return to this issue later.

Hinz and Namwwoonde collected laws from communities across northern Namibia. These included the Caprivan, Kavango and Owambo communities. All except two of the self-stated law documents are duly signed by an authoritative member of the traditional authority concerned.<sup>6</sup> Such documents serve not only as an authentication of their content, but also as permission

4 See his introduction entitled “The ascertainment of customary law: What is *ascertainment of customary law* and what is it for?”, pp 3–11.

5 No. 25 of 2000, section 3(3)(c).

6 The Mafwe Traditional Authority did not cooperate at all. The editors used an old 1989 version of their laws and noted that they did not know if the laws had been updated since (see p 411). The Shambyu Traditional Authority also did not provide the editors with a signed consent to publish their laws (see p 340).

to the editors to publish the laws.<sup>7</sup> The book is, therefore, the first extensive project in Namibia to ascertain the laws of several traditional authorities and publish them in one volume.

There are some indications that the Owambo and Kavango traditional authorities are moving towards harmonising the customary laws of their respective communities. For example, four of the five traditional authorities in the Kavango Region presented a single set of ascertained laws, approved by all four of the authorities concerned.<sup>8</sup> It also seems as if several Owambo authorities came together to resolve the burning issue of inheritance rights of widows in 1993.<sup>9</sup> The fines for different crimes are all more or less the same amongst the Owambo authorities.

In the Caprivi communities, the traditional social and political differences are clearly demonstrated in the publication. Every presentation starts with a Profile of the community written and presented by the traditional authority concerned.<sup>10</sup> Most traditional authorities wrote a short history of their particular community. The *Mashi* Traditional Authority used it to highlight the age-old feud between the *Mafwe* (as the *Mashi* call themselves) and the *Masubia*.<sup>11</sup> They also criticise government policy and the ineffective national reconciliation policies. The *Mayeyi* refer to their 'colonisation' by the *Mafwe* in the 1700s in the same breath as the Western powers' later colonisation of the area that became known as the Caprivi Strip. They also mention 1992 as the time when they finally appointed their own Chief.<sup>12</sup>

---

7 The issue of permission emanates from an event in the Caprivi referred to by Hinz (see p 11), where a traditional authority – possibly the Mafwe Traditional Authority – took offence when he quoted from the written laws at a workshop attended by that traditional authority and two others from the Caprivi. The written laws had been given to him by a previous chief. It is interesting, therefore, that the editors decided to publish a version of the Mafwe laws despite not having the community's consent or participation in the Project.

8 The HRDC did not get official approval from the traditional authorities to publish the laws due to a lack of time, but the editors were sufficiently convinced of the status of the laws to use them.

9 See p 42: "In accordance with the Traditional Law passed at the meeting of traditional leaders in Ongwediva on 25–26 May 1993, widows shall not be expelled from the homestead of their late husbands, and they shall not be asked to buy those homesteads". The wording seems to refer to several authorities coming together. While the quotation is part of the Laws of Ombadja, Footnote 2 on the same page notes that the minutes of the meeting were published in Traditional Authority of Ondonga. 1994. *The Laws of Ondonga* (Second Edition). Oniipa: Evangelical Lutheran Church in Namibia/ELCIN, pp 75ff.

10 For some reason, the Ondonga Traditional Authority did not present its own Profile.

11 See under the heading "Traditional conflicts" in the Profile, pp 433ff.

12 Profile, p 491.

The laws published in the book vary from the very sophisticated document of the Mashi Traditional Authority, carefully weighing every traditional practice and customary law against the Namibian Constitution, to a mere list of prices and offences, as delivered by the Mafwe Traditional Authority.

The drafters of the *Mashi* laws constantly measure the traditional laws against the Constitution and modern trends. The writers explain *polygamy* in the light of the needs of migrant workers and the fact that men need women to assist in the house and the field. The Traditional Authority nevertheless recommends monogamous marriages “because many Westernised countries regard this as norm under civil law, and because of the risk of HIV and AIDS”.<sup>13</sup>

On the issue of inheritance, the authors are very traditional. “When a woman’s husband dies, one of his brothers shall marry or take care of her”.<sup>14</sup> The land is, however inherited by the deceased’s sons. This traditional law is contradicted a few paragraphs later under the heading “Protection of widows”. With reference to the Communal Land Reform Act, 2002,<sup>15</sup> the *Mashi* drafters conclude that the “largest share of the deceased’s property shall be given to her [the widow] because she is the custodian of the children”.<sup>16</sup>

The drafters of the *Mashi* laws are obviously engaged in their own debate on the development of customary law in the modern world. The struggle of maintaining customary law as a legal system while adhering to the expectations of a constitutional democracy and developments in the modern world reflects another battle: that between an idyllic world where the Seventh Day Adventist Church is the official religion of the Mafwe,<sup>17</sup> where the Bible commands that women are never equal to men (1 Timothy 2:11–12, and Ephesians 5:22–25),<sup>18</sup> and where the ancestors share the wisdom and secrets of the tribe with the ‘godlike’ chief at night,<sup>19</sup> and the world of the 21st century, where the Constitution commands gender equality and equal treatment of different religious beliefs – and even atheism. The modern world and the attractiveness of Western legal systems exert a strong influence, and the Mashi Traditional Authority seems to have bowed out of polygamy because of these pressures.

Reading the – in a legal sense – more sophisticated laws, it seems as if the Mashi Traditional Authority and most Owambo Traditional Authorities either used a template or had access to a legal practitioner or a law student. Some

---

13 “Number of wives”, p 447.

14 “Inheritance”, p 446.

15 No. 5 of 2002.

16 p 447.

17 “Denominations of the *Mafwe* area”, p 432.

18 “Gender equality”, p 452.

19 Pp 463ff.

Traditional Authorities even quote Article 66 of the Constitution as a justification for measuring their own laws against it.

However, there are also several cases where customary laws contravene the Constitution. The Kavango Traditional Authorities, the Mafwe Traditional Authority and the Masubia Traditional Authority<sup>20</sup> all apply corporal punishment despite the judgment in *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State*.<sup>21</sup> Several authorities have Sabbath laws. In fact, the Mashi Traditional Authority even chose the Seventh Day Adventist Church to be their rightful denomination.<sup>22</sup> Although polygamy in customary law is possibly not against the law, Namibia ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>23</sup> which encourages monogamous marriages. Yet, among both the Kavango and the Caprivi communities, polygamy seems to be the prominent form of marriage for men, while polyandry is generally prohibited. The list goes on.

Hinz hopes that the written laws will be only one of many sources of customary law.<sup>24</sup> However, Hinz and Namwoonde's book can easily become the codified law for those traditional authorities who have allowed the HRDC to publish their customary law. The amended Laws of Ondonga, for example, which date back to 1993, are a good example of how the ascertainment of law takes the form of codified law. Thus, while Hinz and Namwoonde state that the New Laws of Ondonga are not a codification, the New Laws do in fact replace previous laws, i.e. the Old Laws of Ondonga of 1989. The editors also do not tell us how the Old Laws came to be in written form, but publish them as a clarification of where changes can be detected in the New Laws. It clearly points to the importance and significant role of written laws vis-à-vis the living oral tradition, which is not even mentioned. Furthermore, the development of the written version of the Ondonga customary law – with the dates on which the King's Council approved the changes – are reprinted in *Customary law ascertained* from an earlier publication.<sup>25</sup> If *codification* means that the traditional authority hands over its power to the national legislator, this process of writing down the Ondonga laws in 1989, to the changes of 1993 and then the work of Hinz and Namwoonde is not codification. However, the New Laws

20 See pp 380, 418, 420 and 484. Firstly, the *Mafwe* laws predate the Namibian Constitution, and, secondly, their publication was not authorised by the Mafwe Traditional Authority. It is nevertheless interesting to notice that even beating one's wife is only prohibited when the whipping is applied "without [her] being guilty" (p 418).

21 1991 (3) SA 76 (NMS).

22 p 432.

23 Article 6(c): "[M]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected".

24 pp 7–8.

25 Traditional Authority of Ondonga (1994).

clearly replaced older written laws, and gained general acceptance. If the New Laws of Ondonga changed old written laws, it seems logical to accept that the New Laws also replaced older unwritten laws. Why make a difference between old and new laws if the differentiation process is not a codification? Even Hinz does not call it “The Written Laws” or “Part of the Laws”: in 1993, he and co-compiler Kaulunga called it *The Laws of Ondonga*.

If some of the laws of the traditional authorities whose customary laws were published by the editors were not included in the compilation, it would be interesting to know why. Is it because they form part of the “holy covenant and traditional secrets”?<sup>26</sup> If so, these metaphysical experiences and rules can hardly be seen as ‘laws’ in the modern sense of the word. And if these secrets are only revealed to a small elite,<sup>27</sup> they can only be construed as binding laws once the chief or his council or another authoritative body representing the traditional community makes them known to the people. Thus, if the living unwritten laws are anything else, one can ask why the traditional authorities might have wanted to keep them out of the ascertained laws.

We already know that unconstitutional customary law is not part of the Namibian legal structure.<sup>28</sup> It is doubtful that the unwritten customary laws will pass the constitutionality test in future. And if we are going to live with both written and unwritten laws, can the written laws be changed by unwritten laws? The process described by Hinz in respect of the changes in the 1989 laws of Ondonga indicate that written laws can only be changed by new written laws approved by the King and/or the King’s Council. Will the same rules apply to oral laws?

We have learned from Derrida<sup>29</sup> and the deconstructionists that words are not self-sufficiently meaningful, but only meaningful within the contexts that they are used. As part of the development of customary law in Namibia, there does not seem to be a difference between *ascertainment* and *codification*: both will eventually lead to a fixed written customary law.

If the ascertained laws are going to play a role in the new Community Courts under the Community Courts Act, 2003,<sup>30</sup> the process of ascertaining

26 See pp 463ff on the secrets of the Mashi Traditional Authority.

27 See p 463.

28 See Article 66 of the Constitution. See also *Myburgh v Commercial Bank of Namibia* 1999 NR 287 (HC) 1999 and *Myburgh v Commercial Bank of Namibia*, unreported case of the Supreme Court of Namibia, Coram Strydom CJ, O’Linn AJA and Manyarara AJA; CA, SA 2/00 of 2000, delivered on 8 December 2000.

29 See Derrida, J. 1973. *Speech and phenomena*. Translation by DB Allison. Evanston: Northwestern University Press. Originally published in French in 1967 under the title *La Voix et le Phénomène*, Paris: Presses Universitaires de France.

30 No. 10 of 2003. The Act has been passed, and is only now in the process of being effected.

customary law is unavoidable. A new set of laws at least codifies law of the aspects dealt with in such courts. In our stare decisis common law system, the Magistrates' Courts, the High Court and eventually the Supreme Court will, in all possibility, use this published volume as the primary source of customary law in Namibia – especially since the appeals from the Community Courts lie with the Magistrate's Court. Most of the magistrates are not experts in customary law; and, in terms of the general rules of interpretation, the courts will always give preference to written laws where there is a conflict between written and unwritten versions of legislation – particularly since some traditional authorities still see the unwritten laws as mystical secrets.

The *Mashi* laws determine that the Chief is “simultaneously legislator, ruler, judge, preserver of welfare, distribution of gifts, war leader and priest to his people. He has been elevated to an almost godlike status”.<sup>31</sup> The Chief shares the secrets of the tribe with his confidants in secret meetings. One can expect that magistrates with little knowledge of customary law will use the ascertained laws of the book as a primary source, rather to go into the unwritten secrets of the tribe.

If customary law is going to become part of the mainstream as envisaged by the Community Courts Act, the Traditional Authorities will also have to deal with the fact that only those customary laws that are in harmony with the Namibian Constitution will survive under the new constitutional dispensation. The *Mashi* Traditional Authority and the *Owambo* Traditional Authorities began by amending their inheritance laws, for example, and this process will go on. If the Traditional Authorities resist bringing their laws in line with the Constitution, the courts will take the lead, as Hinz suggests.<sup>32</sup>

*Customary law ascertained* will undoubtedly open the debate on the desirability of ascertainment if it leads to a ‘playing for the pavilion’ approach, where the living customary law has to bow before formal constitutional principles. Those who believe that customary law is a spontaneous, organic process that is best left as an oral tradition will never be happy with any ascertainment project. However, despite the hopes of the editors that the book will neither be seen as codification nor as the only source of customary law, my guess is that the book will contribute to the inevitable route to written, codified customary law – albeit not necessarily codified by an Act of Parliament. Even if Hinz gets his wish and the courts and legal fraternity do not treat this source as the only source of traditional law or as a codified law book, it will nevertheless become a major and important source of customary law.

As a last word, there is also the old *autrefois* issue. It is clear that many traditional authorities, while having no problem in referring murder, assault and other violent crimes to the police and common law courts, are reluctant

---

31 “Holy covenant and traditional secrets”, p 463.

32 See p 9.

to abandon their jurisdiction in rape cases. Until the promulgation of the Community Courts Act, customary law was a fringe set of rules policed by fringe communities outside the official legal system. Under that dispensation, the jurisdiction of both systems in rape cases could easily be maintained.

Today, traditional authorities try to gain some jurisdiction in the new Community Court dispensation by stating in their written laws what they will do if a magistrate refers a rape case back to them – which will possibly never happen. The real question is this: what will a common law court do if an accused has already been fined seven cows and has paid the fine under customary law in a Community Court, and then pleads *autrefois* convict when he appears in a Magistrate's Court or High Court? If one consults *Customary law ascertained* one thing is clear: the line between the jurisdictions of common law and customary law still needs to be drawn.

None of my comments above should be seen as criticism of a worthy project and an excellent book. It is meant to start the public discourse that Hinz himself envisaged.<sup>33</sup> *Customary law ascertained* is an invaluable contribution to the development of customary law in Namibia. It may well become the most quoted and debated of all Hinz's thought-provoking books in the development of a customary law jurisprudence.

---

33 See p 9.