

Traditional governance and African customary law: Comparative observations from a Namibian perspective

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Introduction⁸⁵

The traditional versus the modern, the modern in the traditional, the traditional in the modern: topics high on the agenda of scholars and politicians! Emphasising one's own (past) culture is widely practiced and part of political discourses at local, national and even international levels. The focus on one's own culture may serve different purposes. It may be a pretext for covering otherwise unacceptable behaviour or it may be used to legitimise political and societal strategies of identity (re-)construction.

Scholars of anthropology and sociology have been creative in interpreting political movements of this kind and in offering conceptualisations for their understanding. There are two important scientific discoveries that are of special interest to legal and political anthropology for the analysis of the *re-appropriation of traditional governance and customary law*. The first discovery is referred to as the *invention of traditions*,⁸⁶ or more precisely: the societal enactment of practises based on and developed out of what is said to be *tradition* in that particular society. We know from working in the field of African customary law that there are rules, which traditional authorities submit as having been in place *since time immemorial*,⁸⁷ but are nevertheless results of recent legislative actions. That recent legislative acts are said to be in existence for long is only a contradiction for those who do not understand the operation of tradition as a socio-political

85 This article is the slightly extended version of a contribution made to the Conference *Estado, Direito e Pluralismo Jurídico – perspectivas a partir do Sul Global*, organized by the Centro de Estudos Sociais of the University of Coimbra, Portugal, on 10 May 2007, with which the Faculty of Law of the University of Namibia has a partnership. The Portuguese version of the article will appear as part of the conference proceedings.

86 Cf. Hobsbawm, E., Ranger, T. (1983) (Eds) *The invention of tradition*. Cambridge: Cambridge University Press.

87 *Since time immemorial* is the formula used in traditional context to ascertain legitimacy.

concept. As such, tradition can marry recent enactments with so-called tradition said to be in existence *since time immemorial*, as long as the enactments of today find their foundation in that tradition.⁸⁸

While the first discovery of repositioning tradition has its firm place in anthropology, the second is still in the phase of exploration. The fact that something appears to be traditional, but has nevertheless been recently created and integrated into the otherwise currently existing set of rules led scholars to speak of *alternative modernities*.⁸⁹ *Modernity* has more than one face. Modernity is not just the one possible face, which is the opposite of pre-modernity or tradition. This simplifying evolutionist model that knows, at the end of its evolutionist lane, only one mode of modernity and places the non-modern rest into the past of tradition does not do justice to the multiple choices cultures have in responding to realities. The concept of modernity that accepts the plurality of cultures irrespective of obviously universal trends of globalisation and cosmopolitanism as societal ways to accommodate the plurality of environments is necessarily multi-dimensional.

However, accepting the plurality of modernities, will not render the use of *modern* and *traditional* obsolete. We will, for the lack of better analytical concepts, but also in view of the fact that, for example, legislation employs the language of traditional⁹⁰ (and with this implicitly of *modern*), still speak of something being *modern* and something else being *traditional*. The fact that a given complex situation can be interpreted as part of an alternative modernity will still leave us with the need to analyse the given complexity and to identify within it elements that find their foundation in African tradition or in imported western modernity. This analytical dissection will, however, not necessarily find an equivalent in the perception of people who live in their environments. In other words, the dissection will primarily be a tool for the interpretation of a given societal situation, but will not

88 Hinz, M.O. (1997a): *Neither natural death nor suicide – Traditional government in Namibia – Remarks from experience*. In *Traditional leadership in Southern Africa*. Johannesburg: Konrad-Adenauer-Stiftung, pp. 163-176.

89 De Sousa Santos, B. (2003), *O estado heterogéneo e o pluralism jurídico*. In De Sousa Santos, B., Trindade, J.C. (Eds.) *Conflito e transformação social: Uma paisagem das justiças em Moçambique*. Vol 1. Porto: Edições Afrontamento, pp. 73ff; *Ibid.*, (2006) *The heterogeneous state and legal plurality*. In De Sousa Santos, B., Trindade, J.C., Meneses, M.P. (Eds): *Law and justice in a multicultural society. The case of Mozambique*. Coimbra: Centro de Estudos Sociais, pp. 17ff. (18).

90 Sec. 1 of the Traditional Authorities Act, 25 of 2000, of Namibia, which contains definitions important for the understanding of the act, uses the word *tradition* 35 times, the references to acts that have traditional in its title not counted.

automatically be a proper reflection of the consciousness in a society for which all dissected elements may form a well-structured whole.

The following observations about the re-appropriation of traditional governance and customary law are based on the two mentioned anthropological discoveries. They will take note of some developments in Southern Africa with the main focus on Namibia⁹¹ and some references to South Africa and a few to Angola. South Africa has been chosen (due to the common history which the two countries share), which nevertheless led into different political avenues after Namibia's independence and the change to democracy in South Africa. Angola has been chosen because this country is at an interesting beginning in its efforts to determine an approach to its traditional governance.⁹²

I divide my observations into five parts. After this introduction (1), I will, in the second part of this paper (2), describe five possible models, which I have developed to analyse the policies of governments to relate the inherited traditional structures of governance to the structures of modernity as expressed in their constitutions. The case of Namibia will be looked at in the third part (3). Three special topics of this case study will be highlighted in the fourth part of the paper (4): namely, the interest of state governments to *structure* traditional authorities; the governmental expectation to have mechanisms for the linking of those authorities to the authorities of the state; and the Namibian nation-wide traditional project to *self-state*⁹³ customary law. Concluding remarks (5) will relate parts 2 to 4 back to the framework set out in the introduction.

Five models

There is no African country that is free of African traditions or free of at least some elements that belong to western modernity. It is therefore that African

91 Where the author of this article worked as legal adviser to the Ministry of Justice from 1990 to 1993 before joining the Faculty of Law of the University of Namibia in 1993 / 94 as professor of law. In both positions, traditional governance and African customary law have been the main focus of work.

92 Based on his experience with Namibia and South Africa, the author of this paper was asked to assist the Angolan parliament and non-governmental organisations in drafting proposals for the re-appropriation of traditional governance and customary law in Angola. See Hinz, M.O. (2006e): *Direito costumeiro pilot project proposal*. Windhoek, Luanda (unpublished paper) and *Ibid.*, (2006f): *Proposal for the preparation of the white-paper process on traditional authorities in Angola*. Windhoek, Luanda (unpublished paper).

93 The meaning of *self-stating customary law* will be explained in part 4 of the paper.

governments have, in one way or the other, to make decisions about the legal and political position of both tradition and modernity in their social and legal systems.⁹⁴ Five models, or better: ideal types (Max Weber) are theoretically possible for the characterisation of the position of African tradition in a given society:⁹⁵

- **The model of strong modern monism**

In this model, African traditions are, by way of legislative act, abolished. Where the model of strong modern monism is adopted, the society could still know traditional leaders. They would, from the political viewpoint however, be at no other level than other stakeholders and opinion leaders in the society. Traditional leaders would not form part of the overall governmental structure of the society. African customary law would not be accepted as law in the sense of law defined by the *grundnorm* of the given society.

- **The model of unregulated dualism**

In this model, the state ignores (explicitly or implicitly) the existence of traditional governance and African customary law, but tolerates both without formally confirming or recognising⁹⁶ their existence, performance and acceptance.

94 There is a growing amount of literature that reflects the position of African governance in the modern African state. Cf. *inter alia*: Hofmeister, W., Scholz, I. (1997) (Eds.) *Traditional and contemporary forms of local participation and self-government in Africa*. Johannesburg: Konrad-Adenauer-Stiftung; Keulder, C. (2000) (Ed) *State, society and democracy. A reader in Namibian politics*. Windhoek: Gamsberg Macmillan; Oomen, B. (2005) *Chiefs in South Africa. Law, power and culture in the post-apartheid era*. Oxford Pietermaritzburg: James Curry, University of KwaZulu-Natal Press.

95 The following five models have been the topic of the author's research on traditional authorities for some time. See the first published reflection in Hinz, M.O. (1999) *Dezentralisierung im Schnittfeld traditioneller und demokratischer Strukturen: Das Beispiel Namibia*. In Rösler, J., von Trotha, T. (Eds.), *Dezentralisierung, Demokratisierung und die lokale Repräsentation des Staates*. Köln: Rüdiger Köppe Verlag, pp.221-232.

96 Jurisprudential considerations tell us that there is a difference between *confirmation* and *recognition*. The use of the latter adheres to an understanding according to which the state is the only source of legitimacy of government and law (legal and political centralism in the sense of Hans Kelsen). The use of *confirmation* is bound to legal and political pluralism, which accepts the state-independent existence of societally legitimate governance and law within a state-run overarching system. I, therefore, prefer the use of *confirmation*.

- **The model of regulated (weak or strong) dualism**

In this model, the state confirms traditional governance and African customary law. Both enjoy their own places apart from the authority structures of state government and the law of the state. In other words, the overall political and legal system would be a dual, or better, plural system with the state-run system on the one side and a plurality of traditional systems on the other. Dual or plural systems are systems in which traditional governance and African customary law represent officially recognised *semi-autonomous social fields* as defined in the theory of legal pluralism.⁹⁷ Whether a given dualistic situation will be called *weak* or *strong*, will depend on the degree of autonomy the state accepts to grant to those semi-autonomous social fields.

- **The model of weak modern monism**

In this model, the state takes note of the existence of traditional governance and African customary law, but does not acknowledge their existence by giving them a semi-autonomous status as in model 3. Instead, the state provides for a set of rules that integrate traditional authority and African customary law into the overall state system. Traditional leaders could become civil servants and thus be fully responsible to the state as any other civil servant. They would be entitled to perform official functions not because of their traditional legitimacy, but because of the legitimacy of the state. Customary law would be law of the state as any other law.

- **The model of (strong) traditional monism**

In this model, African traditional characteristics will prevail at the level of the state. The government of such a state would have the form of traditional authority and the law in the state would be African customary law.

The five models are in reality of different importance. Swaziland is the only African example that comes close to model 5. Model 1 is often found in French-speaking African countries, but also in some English-speaking countries. However, traditional authorities may officially not play any governmental role

⁹⁷ Cf. Moore, SF (2000) *Law as process. An anthropological approach*. Hamburg, Oxford: Lit Verlag, p. 55.

while customary law, administered by institutions of the state, can still be part of the law of the land. The abolition of traditional authorities in such cases would, therefore, go hand in hand with the integration of the administration of justice into one state-centred justice system. Could this be called a dual justice system? Most probably not, as, in such a constellation, customary law would just be the same as any other part of the law, interpreted by the same law interpreters and in the same manner as any other part of the law. Such a situation will, therefore, be more adequately be seen as a combination of models 1 and 4.

Unregulated dualism as decided political option will mainly occur in situations of transition. Angola is an example of this. The pre-colonial traditional reality of Angola has gone through many changes.⁹⁸ It is only now, after the end of the civil war, that the Angolan government has started looking into the various forms of non-statal governance and the rules and customs applied in the various communities.⁹⁹

Many African countries maintain situations which fall under model 3. What characterises political and legal dualism? What makes dualism to be strong or weak?

Looking at traditional authority, the official confirmation of traditional authority as part of the overarching governmental structure is certainly an important criterion for the degree of regulated dualism. The Constitution of South Africa recognises traditional authority as an *institution*.¹⁰⁰ This is an indication of strong dualism – at least in view of an interpretation of this provision as constitutionally guaranteed institution.¹⁰¹ However, the picture becomes more complicated when one goes into details.

98 UAN (2003) Universidade Agostinho Neto. Faculdade de Direito. *Mesa redonda sobre direito costumeiro*. Luanda (ms); Pacheco, F (2005) *Um breve olhar sobre o papel das instituições do poder tradicional na resolução de conflitos em algumas comunidades rurais de Angola*. Luanda (ms).

99 MAD (2003) Ministério da Administração do Território. *Primeiro encontro sobre a autoridade tradicional em Angola*. Luanda: Editorial Nzila.

100 Sec. 211(1) of the 1996 Constitution of South Africa.

101 The concept of institutional guarantee has, eg., a long history in the constitutional law of Germany going back to the time of Weimar. See for the approach on *Einrichtungsgarantie* taken by the German Federal Constitutional Court BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*) 58, 300.

The judicial functions of traditional authorities in South Africa are still basically the same as they were in existence before the change to democracy. The re-regulating of the traditional courts is still a matter of discussion and has not been translated into an act of parliament.¹⁰² What about the administrative and legislative powers of traditional authorities?

The amount of administrative power of traditional authorities does not necessarily correspond with what one would expect after having noted the institutional guarantee of traditional authority in the Constitution. The *wall-to-wall* system of local government according to which there is no area in South Africa, which is not under local government, limits the executive scope of traditional authorities substantially.¹⁰³ Despite the resistance of traditional authorities against the wall-to-wall system of local government and promises made by the South African government to address the concerns of the traditional authorities, the so far weakened dualism remained in force as the wall-to-wall system is also constitutionally required.¹⁰⁴ The wall-to-wall system restricts traditional authority in favour of the authority of elected representatives of the communities as it forces the operation of traditional authorities into the framework of local government structures.

Whether or not traditional authorities have the power to make law used to be a debated issue.¹⁰⁵ At least with respect to customary land law, the South African Communal Land Rights Act¹⁰⁶ responded to the debate by empowering communities with communal land to make and adopt community rules on the administration of communal land.¹⁰⁷

Apart from this, the Constitution of South Africa provides for political platforms on which traditional leaders are able to raise their voices with respect to all

102 South African Law Commission (2003) *Report on traditional courts and the judicial function of traditional leaders*. Pretoria: South African Law Commission.

103 Cf here and for the following Hinz, M.O. (2000) *Traditional authorities: Sub-central government agents*. In: Hinz, M.O., Amoo, S.K., van Wyk, D. (Eds.), *The constitution at work. 10 years of Namibian nationhood*. Pretoria: UNISA, pp.81-93.

104 Sec 151(1) of the Constitution of South Africa of 1996.

105 D'Engelbronner-Kolff, M. (1998) *The people as law-makers: The judicial foundation of the legislative power of Namibian traditional communities*. In D'Engelbronner, M., Hinz, M.O., Sindano, J.L. (Eds.), *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books.

106 Act 11 of 2004.

107 Secs. 19 and 20 of the Communal Land Rights Act, 11 of 2004.

governmental matters that are related to them. The Constitution knows the institutions of a national and provincial houses of traditional leaders.¹⁰⁸

In contrast with the situation in South Africa, the Namibian Constitution refers to the traditional structures of the country only indirectly. Art 102(5) of the Namibian Constitution calls for the establishment of a Council of Traditional Leaders the function of which is limited to advising on communal land matters and any other matter referred to it by the president of the country. This indirect reference receives additional constitutional support by art 66 of the Constitution of Namibia, which states that the customary law of Namibia is part of the law of the land and at the same legal level as the common (ie. Roman-Dutch law) of the country.¹⁰⁹ Traditional authorities are part of customary law and, thus are implicitly confirmed by the Constitution although the Constitution of Namibia does not express this as it is the case in the Constitution of South Africa.

Namibian traditional authorities have maintained administrative functions, as Namibia has large areas, which are not under local government although there is a growing tendency to give villages and settlements of some size local government status.¹¹⁰ Traditional courts are lower courts in terms of art 83 of the Namibian Constitution. The Community Courts Act, 10 of 2003, repealed legislation that was inherited from South Africa during colonial times.¹¹¹ The new Namibian act envisages a new uniform structure of traditional courts that also takes note of constitutional requirements, but has not been fully implemented yet.¹¹² Traditional courts nevertheless continue operating as they used to do before the enactment of the Community Courts Act. As to the legislative function of

108 Sec. 211(2) of the Constitution of 1996. The task of these houses is to deal matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law. See also secs. 16 – 18 of the Traditional Leadership and Governance Framework Amendment Act, 41 of 2003.

109 Art 66(1) of the Constitution of Namibia reads:
Both the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution and any other statutory law.

110 See Local Authorities Act, 23 of 1992, and Regional Councils Act, 17 of 1995, both as amended. The latter act provides for the proclamation of settlement areas, a status of expected transformation into local authority under the Local Authorities Act. Cf. here Hinz, M.O. (2000).

111 See Schedule to the Act.

112 I will revert to this below in part 3 of the paper.

traditional authorities, the Traditional Authorities Act, 25 of 2000, recognises explicitly the power of traditional authorities to make law.¹¹³

The quoted confirmation of customary law in art 66 of the Constitution of Namibia is found in similar words in the Constitution of South Africa.¹¹⁴ However, the clear subjection of customary to the Constitution in both legal systems weakens the dualism. This means that all African legal systems that subscribe to what we call the *new African Constitutionalism*¹¹⁵ and have not abolished or integrated legally relevant elements of their traditions cannot but implement models of dualism that have tendencies towards a strong regulation of weak dualism. This is also the case for Namibia and South Africa although it can be held from what has been said above about the Namibian situation that the Namibian dualism is less regulated than the dualism in South Africa.

Nevertheless, the orientation towards strongly regulated weak dualism and in particular the subjection of customary law to the principles of a given constitution (including in particular to the human rights and freedoms as enshrined in the constitution) is easier decreed than implemented.¹¹⁶ In particular South African case law shows that a lot can be argued when interpretations are open to jurisprudential approaches that recognise African values as we find them increasingly debated by scholars of African philosophy.¹¹⁷

Is opting for one of the described models a political decision in the sense that decision-makers are free to choose whatever model they like more? There are legal and practical reasons that inform decision-making processes that it will not be enough to prefer one of the models over the others. Why?

Cultural diversity within states is increasingly considered as something that ought to be legally reflected. There is more and more talk about the right to culture¹¹⁸

113 Sec 3(3)(c) of the Act.

114 See sec 211(3) of the Constitution of 1996.

115 See Hinz, M.O. (2006a) The project of “tradition”: Constitutionalism in Africa. In Hinz, M.O., Gatter, F.T., (Eds.), *Global responsibility – Local agenda. The legitimacy of modern self-determination and African traditional authority*. Münster: Lit Verlag, pp. 17-28.

116 One of my students just completed his LL.B dissertation about the interpretation of art. 66 of the Constitution of Namibia; see Munsu, D.C. (2007) *Problems in the interpretation of article 66 with respect to the validity of customary law: A comparative analysis*. Windhoek: University of Namibia (unpublished LL.B dissertation).

117 See here, eg., *Bhe and others v the Magistrate of Khayelitsha and others* in 2005 (1) BCLR (Butterworths Constitutional Law Reports) 1 (CC) and my article, Hinz, M.O. (2006c) *Bhe v the Magistrate of Khayelitsha, or: African customary law before the Constitution*.

118 As a constitutional right, cf. art. 19 of the Constitution of Namibia and sec. 31 of the

and even the right to one's own law.¹¹⁹ Cultural diversity is increasingly being accepted as a societal asset that is worthwhile to recognise in legal terms.¹²⁰ Legal pluralism has developed from a mere empirical tool of anthropologists and sociologists into a normative concept according to which legal plurality ought to be interpreted in legal terms.¹²¹

One reason for this is supported by experience about the power of resistance, which traditions (including customary rules) have demonstrated. There are enough examples from the history of Africa which illustrate the power of this resistance. Colonial impacts produced in many instances alternative (and very often hidden) structures.¹²² The decision of the government of Zimbabwe to exclude traditional authorities from adjudicating cases had to be revised because of the *pressure of the ancestors*, as Ladley showed.¹²³ Whatever collaboration with the colonial (respectively the pre-democratic) administration traditional structures accepted in Namibia and South Africa, traditional authority preserved its African legitimacy and raised its voice after the political change.¹²⁴ The years of colonialism and civil war in Angola, did not bring traditional authority to an end in this country.¹²⁵

The re-appropriation of tradition in the case of Namibia

The long way to the independence of Namibia coincided with almost equally long efforts to prepare for the independence of the country. The United Nations Institute for Namibia (UNIN) that operated from one of the frontline states, Zambia, was not only an institution to train young Namibians who were forced to leave the colony of apartheid South Africa, but also to develop blueprints for the future independent

Constitution of South Africa of 1996. For a broader discussion see UNDP (2004) *Human development report 2004. Cultural diversity in today's diverse world*. New York: UNDP.

119 See here: Hinz, M.O. (2006d) Legal pluralism in jurisprudential perspective. In Hinz, M.O. (2006b) (Ed – in collaboration with HK Patemann) *The shade of new leaves. Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag, pp. 29-45, 35ff.

120 Cf. the quoted UNDP Human development report of 2004.

121 As elaborated on in Hinz (2006d) 31ff.

122 Cf. here Bohannan, P. (1968) *Justice and judgment among the Tiv*. London: Oxford University Press, pp. 7ff.

123 See Ladley, A. (1991) *Just spirits? In search of tradition in the customary law courts in Zimbabwe*. In *Commission of Folk Law and Legal Pluralism*. (Proceedings of the VIth International Symposium Ottawa Canada. Vol 2.) Ottawa: Commission of Folk Law and Legal Pluralism, pp. 584-605.

124 As will be explained in the following part of the paper.

125 The findings in MAD (2003) are proof of this.

Namibia. The efforts to draft policies for the various societal sectors culminated in the publication of a major book with the title *Perspectives for National Reconstruction and Development*.¹²⁶ It is interesting to note that this important policy document did not have one word to say about traditional authorities, it only has a short note on customary law. In this, the emphasis is on the fact that customary law was neglected during colonial times and needed to be developed.¹²⁷

Customary law is an important source of law which could be used to dispose of disputes easily and with expediency as it does not have difficult procedural technicalities. However, in Namibia customary law has been suppressed and sometimes used for the divisive purposes by the South African regime. The courts which administer customary law in Namibia have also been given inferior status

In order to uplift the status of customary law, a proper structure of the court hierarchy should be considered and appropriate legislation allowing its application should be provided.

It was already mentioned above that the Constitution of Namibia basically followed the *Perspectives* by more or less ignoring traditional authority¹²⁸ and in similar terms only allowing space for customary law in the overall legal structure of the country, but under the roof of the Constitution.¹²⁹ In other words, the political minds behind the Constitution did not envisage much of a role for traditional authorities. They were rather sceptical about this sector of governance, mainly because of the sometimes ambivalent position of some traditional leaders during the times of colonialism. However, the more the political leaders who returned from exile re-integrated themselves into the mainstream society, the more they were made to understand that there was a traditional reality which could not be ignored.

Traditional authorities as such were seen to be under the Ministry of Local and Regional Government. A presidential commission of enquiry was established in 1991, the task of which was to inform the political leadership of the country about the de facto roles and functions of traditional authority and in particular

126 UNIN (1986) *Namibia: Perspectives for national reconstruction and development*. Lusaka: UNIN.

127 UNIN (1986), p. 963.

128 The only instance the Constitution refers to traditional leaders is art. 102(5), which provides for the establishment of the Council of Traditional Leaders. Interestingly, art. 102(5) is placed in an article with the title *Structures of Regional and Local Government*.

129 See above-quoted art. 66 of the Constitution of Namibia.

also the degree of acceptance of traditional authority by the people. The members of the commission travelled the whole of Namibia and held discussions in many areas of the country. The picture, which the commission recorded, reflects the traditional landscape of Namibia as it basically stands up to today. The northern territories, ie. Kaoko and Owambo (as these areas were formerly referred to),¹³⁰ Kavango and Caprivi, the latter three the areas where the majority of the Namibian population is living represent the areas where traditional authority have a broadly accepted and firm stand in the society. The Otjiherero-speaking communities (including the Ovambanderu),¹³¹ the Damara and quite a number of Nama groups who occupy areas in the central and southern part of the country do not show the same degree of organisation. The same applies to the various San groups. While all other communities enjoyed some type of recognition in the apartheid-bound constitution of so-called separate development,¹³² a representative authority was never established in Bushmanland,¹³³ the home of some San groups and earmarked for the whole Namibian San population by the apartheid administration.

Despite differences of this nature and individual dissatisfaction with the status quo, the overall result of the commission was that traditional authority was a reality which policy making had to take note of. Or in the words of the report:¹³⁴

The Commission, having found that the traditional system is not only necessary but also viable, recommends that it be retained within the context of the provisions of the Constitution of the Republic of Namibia and having regards to the integrity and oneness of the Namibian nation as a priority.

In line with above-quoted pre-independence observations on customary law, the Minister of Justice at that time took the lead in investigating the role and function of customary law. A national meeting to discuss the traditional administration of

130 The former Kaokoland is now part of the Kunene Region; Owamboland was divided into four regions: the Oshikoto Region, the Omusati Region, the Oshana Region, and the Oshana Region.

131 A group of people in the eastern part of central Namibia who speak Otjiherero, but see themselves distinct from the Ovaherero.

132 According to which the country was divided along ethnic lines into 11 homelands with separate governmental structures.

133 Now called Tsumkwe East and West in the Otjozondjupa Region.

134 Generally referred to as *Kozonguizi Report* after the name of the chairperson of the Commission: Adv FJ Kozonguizi; see Commission of Inquiry (1991) *Report by the Commission of Inquiry into Matters relating to Chiefs, Hadmen and other Traditional or Tribal Leaders*. Windhoek: Republic of Namibia, p. 73.

justice was held in 1992. Representatives from all branches of the legal system were invited together with traditional leaders from all corners of the country. This historic meeting was a challenge for all who thought that traditional administration of justice was something of the past. It became the starting point of a long process to investigate the administration of justice under customary law, the inherited legal framework of this and to set out principles for the drafting of a new uniform piece of legislation that would provide for the operation of traditional courts in line with constitutional requirements.¹³⁵

The author of this paper was made part of the ministerial team that was given the task to prepare the foundation for the expected new law. While first drafts were produced and discussed, fieldwork was done in all parts of the country with the aim to get a concise picture about the operation of customary law. The fieldwork was completed by 1994 and accompanied by several draft bills.¹³⁶ The most controversial point in the debate was the scope of jurisdiction of traditional courts. Some government officials held that traditional courts should not have jurisdiction in criminal matters. Procedural guarantees as enshrined in the Constitution were referred to with the opinion that traditional courts would not be able or willing to observe these guarantees. Others, like the author of this paper, argued that the conventional distinction between civil and criminal matters did not necessarily apply to perceptions under customary law. Differently from the perception under common law, customary law compensation was seen to be the principle remedy for most cases, cases that common law would not treat as cases that could finally be settled between private parties, but had to be attended to by the state under its monopoly to prosecute and punish on behalf of the society as a whole.¹³⁷ The findings from the fieldwork assisted this position. With respect to the most controversial crime for which compensation was considered to be the last word: murder, evidence could be produced that compensation paid by the murderer or his family to the aggrieved family was a powerful tool to resolve the issue and to restore peace in the community. Paying compensation was defined as *wiping the tears*.

135 See Hinz, M.O., Sichilongo, M.F. (1992) Report of the seminar on the administration of justice for judicial officers, police officers, regional commissioners and traditional leaders, 4-5 April 1992. Windhoek: Ministry of Justice (unpublished paper).

136 The fieldwork led to a publication which I have used for years as a text book for Customary Law in the law curriculum of the Namibian Faculty of Law. See Hinz, M.O. (2003a) *Customary law in Namibia: Development and perspective*. 8th edition. Windhoek: Centre for Applied Social Sciences.

137 See Hinz (2003a), p. 175ff.

Customary law compensation is different from compensation under common law. While the claim for compensation under common law has to substantiate the loss in economic terms, compensation under customary law consists of a standardised amount of cattle (or the equivalent in money as determined by customary law) irrespective of the economic weight of the loss, thus weighing out the loss in a broader sense. In other words, customary law compensation balances the economic side of the loss, but also has, in terms of the conventional civil / criminal matter dichotomy, a punitive element. It was based on this argument that a new formula for the jurisdiction of traditional courts was developed. This new formula leaves the common law distinction between criminal and civil matters aside and gives respect to the perception of compensation under customary law. The formula was eventually accepted by the law-maker in the Community Courts Act, 10 of 2003. Sec 12 of the Act reads in its main part:¹³⁸

A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim by the customary law...

Two research groups of the University of Namibia undertook more systematic empirical research on the acceptance of traditional authority by the people in selected areas of Namibia in the mid-nineties.¹³⁹ One of the two research groups targeted a number of Nama groups in southern Namibia; the other group concentrated on the North (Owambo, Kavango, Caprivi). The interest was to find out whether there was a significant difference between the southern groups that have a long history of exposure to colonialism and severe colonial interventions and the northern groups which were, apart from the interventions during the war for liberation, more subject to colonialism through indirect rule. The interest was also to establish whether age, gender, and the degree of state-run education were significant factors for acceptance of or resistance to traditional authority.

The results of the research were a surprise to all involved in it. Despite differences in the perception of traditional authority – unavoidable in view of the already mentioned different exposures to colonialism – the general picture about the

138 It will be important to observe how the courts will deal with this provision of the Community Courts Act, in particular in view of customary law that, eg., allows the courts to order payments to the court as a measure of punishment.

139 Keulder, C. (1997) Traditional authorities and regional councils in Southern Namibia. Windhoek: Friedrich-Ebert-Stiftung; Hinz, M.O., Katjaerua, B. (assisted by M Kalondo) (1998) 'To promote peace and welfare': The political and economic sustainability of traditional authority. Windhoek: Centre for Applied Social Sciences.

acceptance of traditional authority was very close. And more surprisingly: age, gender, and the scope of education did not play a significant factor with respect to acceptance.¹⁴⁰

The research also revealed very interesting perceptions in the acceptance of traditional authority vis-à-vis the acceptance of stakeholders in local or better: regional government. Although the research was done in the first years after independence and a lot was still on the agenda of the implementation of the new regional government scheme in Namibia, people knew very well to distinguish between the responsibilities of stakeholders of the regions and traditional authorities. Traditional authorities were the authorities “at home” and responsible for what they were responsible for *since time immemorial*. The stakeholders of the region or in a wider sense: stakeholders of the state had to provide *modern goods*, such as electricity, sewage etc.

Several acts of parliament and some more draft bills have resulted from the growing awareness that the re-appropriation of tradition was a fact that also needed legislative attention. The Traditional Authorities Act, 17 of 1995, was the first act that saw the light of the day. It was, indeed, logical to look first at the custodians and principal administrators of customary law: the traditional authorities and only thereafter at the traditional administration of justice.

The Traditional Authorities Act represents the constitutional framework for the traditional authorities operating in the country. The establishment of traditional authority; the recognition of traditional leaders; their powers, duties and functions and the limits thereof; the incompatibility with respect to the holding of traditional and state offices; the relationship of traditional authorities with government organs; the payment of traditional leaders; and other financial matters relating to traditional authorities are the most important areas regulated by the act. The act was later amended and, with additional changes, re-promulgated in 2000.¹⁴¹ The changes reflect deficits that became apparent in the implementation of the original act. However, the main concepts and principles remained as they were enacted in 1995.

Some 42 traditional authorities have been so far officially recognised on the basis of the Traditional Authorities Act. The bigger part of the recognised authorities

¹⁴⁰ It is regrettable that no follow-up research to the two research initiatives was done. Such follow-up research could have pursued opinions over time and along regional and local developments.

¹⁴¹ Act 25 of 2000.

held already recognised positions before independence. In some cases, the government accepted movements of groups out of bigger groups and accepted their standing on their own as a traditional community. Three San groups were added to the recognised communities. The biggest still unsolved problems are the problems of the Ovaherero and the Damara, to which I will revert in the next part of this paper.

The Council of Traditional Leaders Act, 13 of 1997, followed the Traditional Authorities and allowed for the operation of the constitutionally required Council of Traditional Leaders. The Council consists of two representatives from each recognised community. Although the main function of the Council is to advising the president of Namibia on the control and utilisation of communal land,¹⁴² the work of the Council is concerned with all sorts of matters of interest to traditional authorities. To a large extent, the Council has spent energy in assisting the government in the handling of applications for recognition under the Traditional Authorities Act.¹⁴³ The power to advise about applications for the recognition as traditional authority was added to the functions of the Council in an amendment to the original Traditional Authorities Act, 17 of 1995. This amendment proved to be extremely helpful as it created a very suitable platform for the discussion of applications, namely at the level of tradition and by members of the traditional set-up before, in particular, controversial applications go or decision to the administration of the relevant ministry and the political office of the head of state.¹⁴⁴

A further important legislative progress was made with the Communal Land Reform Act, 5 of 2002. *A chief without land is not a chief*, is a saying that clearly shows the importance of land in traditional governance. Land under customary law is not individually owned, it is communal in the sense that individuals have

142 See art. 102(5) of the Constitution.

143 As one can see in the agenda of the annually sitting Council of Traditional Leaders.

144 Patemann, H. (2002) Traditional authorities in process. Traditional authorities in process. Tradition, colonial distortion and re-appropriation within the secular, democratic and unitary state of Namibia. Windhoek: Centre for Applied Social Sciences, offers a good summary of the involvement of the Council in assisting in controversial cases of application. – Sec 5(5) of the Traditional Authorities Act, 25 of 2000, gives the president of Namibia the last word in deciding whether a traditional applicant will succeed with an application for recognition. The jurisprudential justification of this rule is certainly debatable: its origin lies most probably in the colonial construction according to which the highest representation of sovereignty can be more sovereign than the original traditional sovereigns. Or in other words: the president of the state is the chief of the chiefs.

various rights to use the land. These land use rights are usually allocated by traditional leaders. As a member of the community, one has a right to communal land rights. Colonial inroads have made many changes to these principles. The most severe changes occurred in situations where colonialism had a direct interest in land, ie. an interest in land for settler colonialists. Settler colonialism was interested in individual ownership. This is why one finds in Namibia, South Africa, and also Angola large areas of land, which was expropriated under the rule of colonialism and turned into free-hold land, ie. land that could be individually bought, sold and also mortgaged when need arose.

In Namibia, this type of colonial expropriation took place in the central and the southern part of the country after the defeat of the Ovaherero, Nama and Damara in the genocidal war of 1904. The territories in the North remained communal despite certain legislative interventions during the years of colonialism.¹⁴⁵

With independence, questions about the future position of communal land arose. Should land reform investigate the loss of land under colonialism? Would claims for ancestral rights force to changes in the land tenure system in so far as common law land right holders would be taken off the land and the land returned to the communities who lost that land? Should the state be the owner of communal land? If so, who would be the authority to allocate rights on communal land? What role would be left to traditional authority? What scheme would be appropriate to respond to needed changes in the inherited land tenure system?

The first set of questions was addressed in the National Land Conference in 1991 which clearly voted for land reform that would respect the status quo. Land acquisition for land reform purposes would primarily be achieved in the application of the first option of land reform: the principle of willing seller, willing buyer. Who ever was decided to sell his / her land, would be forced to offer the land to government which would be able to buy under market conditions. Only in exceptional circumstances would land be acquired by way of expropriation.¹⁴⁶

Some answers to the second set of questions were of the opinion that the state should be the owner of communal land with the consequence that communal

145 Cf here Hinz, M.O. (1998) *Communal land, natural resources and traditional authority*. In D'Engelbronner, M., Hinz, M.O., Sindano, J.L. (1998), pp. 183-203.

146 The proceedings of the conference have been published in Republic of Namibia (1991) *National conference on land reform and land question*. Vols 1 and 2. Windhoek: Office of the Prime Minister.

land should be to the disposal of the state. Land boards were to replace traditional leaders and their power to allocate customary land rights. Others, and in particular traditional leaders, were in clear support of the inherited system according to which the administration of communal land would remain the prerogative of traditional authority.

In 1996 a second nation-wide land conference took place in Windhoek: this time a conference that concentrated on the role of traditional leaders in the administration of communal land and in the allocation of rights on communal land.¹⁴⁷ The two described positions were put on the table. The traditional leaders maintained their position and won the case as the envisaged communal land act confirmed the rights of traditional leaders to allocate land rights under customary law. This is now clearly stated in sec 20 of the Communal Land Reform Act, 5 of 2002. However, allocations of customary land rights need the ratification by Land Boards as established by the Act. The ratification can only be refused under circumstances described in the Act, which are basically of a technical nature.¹⁴⁸

As to the ownership of communal land, sec 17 of the Act avoids the use of the term ownership, but stipulates that communal land vests in the state, however in trust for the benefit of the communities that occupy it. In other words, the authority of the state over communal land is not to be confused with the ownership of state land. The ownership of the latter is full ownership, while the ownership of communal land is limited. This ownership is subject to the trusteeship the state holds for the various communities.

In order to be able to meet the need for changes in the customary land tenure system, the Act provides for a procedure to alter the status of the land from land under customary law to lease-hold land.¹⁴⁹ Authority for this lies with the Minister responsible for land and the Land Boards. However, the relevant traditional authorities have to be consulted and must consent to the envisaged change, the latter when granting of the right to leasehold is effected by the Land Board.¹⁵⁰

147 Cf the conference report, Malan, J., Hinz, M.O. (1997) (Eds) *Communal land administration. Second national traditional authority conference. 26-28 September 1996*. Windhoek: Centre for Applied Social Sciences.

148 Sec. 24 of the Act.

149 Secs. 30ff of the Act.

150 Sec. 30 of the Act.

An interesting addition to the land tenure system under customary law as modified by the Communal Land Reform Act was effected by two other acts which took note of special needs in the area of the management of natural resources: The Nature Conservation Amendment Act, 5 of 1996, and the Forest Act, 12 of 2001.

The Nature Conservation Amendment Act introduced the concept of *conservancies* into the management of natural resources. According to this, *any group of persons residing on communal land*¹⁵¹ was given the right to apply for a conservancy in which the applying *group of persons* would receive rights over game in that conservancy. Although the act did not make any reference to traditional authority or customary law, the overwhelming majority of conservancies in communal areas are in one way or the other bound to a traditional authority and do apply rules and norms based in the traditions of the various communities.¹⁵²

The Forest Act provides for the establishment of *community forests*.¹⁵³ Like in the case of the conservancies, the philosophy behind this is to give the inhabitants of a given area authority over natural resources in the area. Differently from the Nature Conservation Amendment Act, the establishment of community forests is bound to the jurisdiction of traditional authorities.¹⁵⁴

It was already referred to above that the Namibian parliament adopted an act to regulate traditional courts, the Community Courts Act, 10 of 2003. Apart from the also mentioned novelty in the provision on the jurisdiction of traditional courts, the Act deals basically with all procedural matters relevant to the running of a court. While a lot is left to customary law by way *summary references*¹⁵⁵ in the act, state influence becomes prominent in the rules of appointment and

151 Sec. 24A of the Act.

152 See here my research in Hinz, M.O. (2003b) *Without chiefs, there would be no game. Customary law and nature conservation*. Windhoek: Out of Africa, pp. 33ff.

153 See secs. 15 and 31 of the Act.

154 Sec. 15(1) of the Act.

155 Sec 19 of the Community Courts Act illustrates what is meant by *summary reference*. Sec 19(1) reads:

Subject to this Act, the practice and procedure in accordance with which 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 all proceedings shall be in accordance with the principles of fairness and natural justice. (Italics by the author of this paper).

dismissal of traditional justices.¹⁵⁶ Legal representation is also guaranteed in the Act,¹⁵⁷ an issue very much questioned by many traditional leaders. Decisions of traditional courts will enjoy the same enforcement mechanisms as state courts.¹⁵⁸ Appeals will be possible to the magistrates' courts and on to the High and Supreme Court.¹⁵⁹

Although the Community Courts Act is an act in force, it has not been fully implemented yet. Presumably all traditional communities have handed in the required forms, but have not been approved and gazetted yet. One reason given for this was that the Ministry was not really happy with the appeal system applied in the Act. Instead of leaving for appeal to the magistrates' courts, a change of the Act was considered that would opt for the Botswana system according to which appeals against traditional courts' decisions lay with a special customary court of appeal.¹⁶⁰

Two areas normally associated with tradition have not been translated into law yet: customary marriages and inheritance under customary law. As to the first, the Namibian Law Reform and Development Commission completed its draft of a Customary Marriage Bill; this draft bill has not been tabled to parliament.¹⁶¹ The draft confirms the existence of customary marriages in legal terms leaving it basically to customary law to determine the validity of such marriages. Only with respect to constitutional (or international human rights) requirements, the draft decrees changes in customary law. Traditional authorities will play a role in the registration of customary marriages, but also in the dissolution of these marriages. An unexpected inroad into customary law, however, can be found where the draft bill considers polygynous marriages. These marriages will not be allowed any more. Violations will even qualify as a crime of bigamy.

The Law Reform and Development Commission project on customary inheritance is more in an infant stage. This project has become rather silent after the last

156 Sec. 8 of the Act.

157 Sec. 16 of the Act.

158 Sec. 23 of the Act.

159 Secs. 26-29 of the Act.

160 This situation has created difficulties for the traditional administration of justice. After the repeal of the inherited legislation, the basis of the administration of traditional justice is customary law, which differs from community to community. The traditional justice system is also in urgent need of the enforcement mechanisms provided for in the act.

161 Law Reform and Development Commission (2004) *Report on customary law marriages*. Windhoek: Republic of Namibia.

suggestions for a draft bill did not abolish customary inheritance although there were strong voices to do so. What the said suggestion contains are rules of conflict that will allow to make an informed decision on the application of either customary or common law.¹⁶²

Three special topics: The Namibian attempt to structure traditional authorities, the rule on the relationship of traditional authority with government organs and the nation-wide traditional project to self-state customary law

The first topic

The first of the three special topics that will be commented on in this part of the paper is a problem that flows from sec 2 of the Traditional Authorities Act, 25 of 2000. Sec 2(1) reads:

Subject to this Act, every traditional community may establish for such community a traditional authority consisting of –

- (a) the chief or head of that traditional community, designated and recognised in accordance with this Act; and*
- (b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.*

The legislative intention behind this rule was to standardise traditional authority throughout the country and by doing so also to facilitate the work of the administration. Did this intention materialise?¹⁶³

Read together with sec 17 of the Act, which limits payments of allowances to traditional councillors to 6 senior councillors and to 6 councillors, some communities requested only for the gazetting of the chief and the number of paid 12 councillors of even less. Other communities, eg. communities in Owambo submitted several hundred names as councillors for gazetting. It is understood that at least many of these councillors were *mwene gwomikunda* (Oshiwambo: leaders of wards) and, thus, in the strict sense of the word not councillors, but executive leaders in their respective areas. Given the fact that some communities have a four-

162 According to internal documents distributed to members of the then *Women and Law Committee* of the Law Reform and Development Commission.

163 The following is based on the chapter ‘The traditional landscape of Namibia’ in my forthcoming book *Since time immemorial. African ways of governance and law*.

layer governmental structure, meaning that below the chief and his/her council, one finds district leaders, leaders of wards or village and sub-village-leaders, the gazetted councillors may also include leaders of this lowest level of traditional governance. At the higher level of community governance, many communities have a complex leadership structure with office bearers of different responsibility and rank. An extraordinary example of this are the Caprivian communities, which all have next to the chief as the highest authority of traditional governance one person, who is called *nghambela* and one person who is the *natamoyo*. *Nghambela* is usually translated as prime minister to mean that the *nghambela* is the chief-executive officer, who runs the day-to-day business of the community with the various traditional stakeholders. The *natamoyo* represents the royal family and is the first advisor to the chief. In the language of the act and the government gazette, the *nghambela* and the *natamoyo* are senior councillors like all the other senior leaders under the chief and this in disrespect of the traditional functions they hold.

With this in mind, I hold the opinion that the attempt of the Act to standardise the composition of traditional authority has not born the expected fruits, but confusion. This has recently been supported by a decision of the High Court of Namibia.¹⁶⁴ The Ovambanderu community knows, apart from its highest authority (the chief in terms of the Traditional Authorities Act; *ombara* or king in Otjiherero) the position of *senior chief*, being some kind of sub-chief under the main chief. When the Ovambanderu drafted the constitution of their community, they did not provide for the position of *senior chief*, as, indeed, the Traditional Authorities Act does not have this position. The matter was taken to court and the court decided that it was to the community to decide on their traditional structure and this irrespective of the standardised approach implemented for the process of gazetting.¹⁶⁵ What is then the purpose of standardisation if it faces such limitation?

The attempt to standardising the composition of traditional authorities has created even more difficulties when one looks at the still unsolved problem of the Ovaherero and Damara communities. Both communities are scattered over wide areas of Namibia, a situation that was caused by colonialism. Both communities occupied vast areas in central and southern Namibia when colonialism started expanding into the then Southwest Africa. As a result both communities were marginalised and eventually confined to reserves of varying sizes.

164 Unreported Namibian High Court case of Mbanderu traditional leaders versus the Mbanderu Traditional Authority.

165 I again refer to the just mentioned forthcoming publication.

Neither the Ovaherero nor the Damara had structures of centralised authority as we find them, eg., in the Oshiwambo-speaking communities. The royal houses that rule most of these communities can be traced back to the early available ethnographical account. Centralised authority emerged only very late in the Ovaherero and Damara communities and, even then, did not overtake the ruling positions of rulers of sub-groups. The supreme leaders of the Ovaherero and the Damara held the position of *primus inter pares* with respect to the leaders of the various sub-groups of the two communities at large. Indeed, members of both communities question the legitimacy of the two positions. The structures submitted for recognition to government by the Ovaherero Paramount Chief and the Damara King provided for the position of chief and under the paramount chief or King for additional chiefs have not been considered by the government of Namibia because the Traditional Authorities Act has no space for such a constellation.¹⁶⁶

What happened instead is that Ovaherero sub-groups were recognised as communities in their own rights under the Traditional Authorities Act. Several attempts by the Ovaherero Paramount Chief to seek for remedy of the situation and receive recognition were not successful.¹⁶⁷ A very unhealthy situation, as the Communal Land Reform Act and the Community Courts Act only apply to recognised communities. This means in particular that a very substantial part of the Ovaherero are not part of the procedures before Land Boards that finalise the allocation of land under customary law.

The Damara community opted for a more pragmatic approach by seeking recognition for the sub-groups and by doing so tolerating the non-recognition of the King.

What is the lesson to learn from this? We know since Fortes' and Evans-Pritchard's *African political systems*¹⁶⁸ that traditional governance has not

166 The case of the non-recognised groups within the Ovaherero community appears almost regularly on the agenda of the Council of Traditional Leaders. Paramount Chief K Riruako and other pursued the issue of non-recognition in a court case against the Government of Namibia, which was only on procedural ground successful for the complainants, but did not solve the substantial issue of recognition. Cf *Kuaima Riruako v Minister of Regional and Local Government and Housing*. Case No 336/2001 (unreported, High Court of Namibia).

167 According to a report in the *New Era* of 13 March 2008, the group of unrecognised Ovaherero leaders has now decided to involve the United Nations in their case.

168 Fortes, M., Evans-Pritchard, E.E. (1940) *African political systems*. London: Oxford University Press.

only one face that can be summarised as pre-statal, but holds a broad variety of forms. The confrontation with colonialism, Western law and jurisprudence (including the post-independence jurisprudence associated with the new African constitutionalism) have not simplified what earlier anthropologists recorded. To the contrary: the various inroads into the already complex traditional systems have led to more complexity. The introduction of the self-clearing mechanisms in Namibia by mandating the Council of Traditional Leaders to achieve the basis for informed recommendations to government is certainly an option worthwhile to consider in comparable situations where there is a need for a legal response to a diverse traditional landscape. The attempt to standardise the establishment of traditional authorities as done in sec 2 of the Traditional Authorities Act requests reconsideration.¹⁶⁹

The second topic

The second of the three special topics that will be commented on here is the problem of regulating the relationship of traditional authorities with state organs.¹⁷⁰

Sec 12 of the original Traditional Authorities Act, 17 of 1995, had this to say:¹⁷¹

- (1) *In the performance of its duties and functions and exercise of its powers under this Act, a traditional authority shall give support to the policies of the Government, regional councils or local authority councils and refrain from any act which undermines the authority of those institutions.*
- (2) *Where the powers of a traditional authority or traditional leader conflict with the powers of the Government, regional councils or local authority councils, the powers of the Government, regional council or local authority council, as the case may be, shall prevail.*

When the Traditional Act was re-promulgated in 2000, the equivalent section to sec 12: sec 16 in the 2000 Act, was shortened to one section and read basically as it was stipulated in sec 12(1) of the original Act. It was obviously found that

169 Drafting policy in this respect will be of utmost importance for a country, such as Angola where many historically centralised communities lost their highest levels of authorities during the time of the Portuguese colonialism. Traditions that refer to the old kingdoms are still alive, however new structures have evolved or were created and claim now for recognition. Cf here Hinz, M.O. (2006f).

170 To the following, see Hinz, M.O. (2000).

171 Italics in the following are by the author.

the straightforward and unconditioned *prevailing* of state organs over traditional authorities would not stand a test in court where traditional authority could claim not to be part of an all-encompassing state hierarchy and, thus, not to be part of the civil servant structures in accordance with which civil servants had, in principle, to execute orders from their superiors. Traditional authorities would, indeed, be entitled to revert to their guaranteed rights, which would allow them to have their own opinions, to formulate their own community policies and to get these policies implemented – all this as long as they act within their functions and duties and not violate constitutional requirements.

But what about the remaining part of the old sec 12(1) of the Traditional Authorities Act? Would the obligation to *refraining from any act undermining state organs* hold constitutional water? In answering these questions, more questions have to be raised. What is *undermining*? Who is to determine what undermining is? Is undermining a term certain enough? Certain for government officials, but also for traditional authorities? Is openly criticising already undermining? Would it be undermining when a traditional authority would say *no* to a hydro-electrical power plant in the implementation of which vast grazing areas and also places of religious importance would be flooded by water?¹⁷²

It is, indeed, difficult to interpret sec 16 of the Traditional Authorities Act in such a way that the interpretation would recognise, on the one hand, the interest of government in the loyalty of traditional authorities to the state structures in which and with which they are expected to operate as sub-central public agents.¹⁷³ In other words, sec 16 of the Act would most probably not stand a test in court!

What could be a language that would suit the interest of both sides and avoid problems as we see them in sec 16? An alternative wording could be:

Subject to powers and functions vested in a traditional authority under customary law, a traditional authority shall, in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act, give support to the policies of the Government, regional councils or local authority councils.

In order to make sure that obligations of this nature are not a one-way obligation of traditional authorities, the law on regional and local councils should contain a similar rule, reading:

172 Problems that arose in the debate about the plans of the Namibian and Angolan governments to erect a hydroelectric power plant in the area of the Kunene Epupa falls.

173 But public agents *sui generis*; cf Hinz (2000).

Subject to powers and functions stipulated in the Regional Councils Act and the Local Authorities Act, regional councils, local authority councils and members of such councils shall support traditional authorities in the exercise of their powers and the performance of their duties and functions under customary law or as specified in any other statute.

In other words, while the law in place is an unsuccessful attempt against regulated dualism and in favour of integration, the proposed alternative would meet the expectation that flows from the constitutional principle according to which Namibia is a unitary state, but at the same time be a feasible implementation of regulated dualism. In regulating the dual system, the alternative would place the burden to respect the other side on both sides.

The third topic: The nation-wide traditional project to self-state customary law

This article cannot be the place to discuss why the proposal to codify customary law is unworkable and, in actual fact, nothing but an unrealistic dream of lawyers that are bound to the philosophy of legal centralism and, at the same time, ignore the dynamics of law, here: customary law in legally pluralistic systems.¹⁷⁴ This article is also not the place to discuss the pros and cons of the customary law restatement project, as it was developed and implemented in a number of African countries by the team of Antony Allott of the School of Oriental and African Studies of the University of London.

We are talking here of *self-stating* customary law¹⁷⁵ and refer with this term to law-making or *law-ascertaining* processes which are documented, eg. in the history the Ovakwanyama in Namibia, where the new king used to announce his new laws after ascending to the throne. Reports about the famous Oukwanyama King Mandume ya Ndemufayo have it that when King Mandume declared his

174 Although the Namibia Law Reform and Development Commission ct, 29 of 1991, refers also to codification as one of the objects of the Commission, codification was not pursued in Namibia with the exception of an obviously short-lived attempt to codify criminal law.

175 Cf Hinz, M.O., Kauluma, P. (1994) *The laws of Ondonga – Introductory remarks*. In *Traditional Authority of Ondonga, The laws of Ondonga*. Oniipa: Evangelical Lutheran Church in Namibia, pp. 9-43; Hinz, M.O. (assisted by Santos Joas) (1995) *Developing customary law: Self-stated laws of Namibian communities and customary law consultative meetings with traditional leaders*. Windhoek: Centre for Applied Social Sciences; Hinz, M.O. (1997b) 'Law reform from within. Improving the legal status of women in Northern Namibia.' *Journal of Legal Pluralism and Unofficial Law* No. 39, pp. 69-79.

laws after becoming king quite a number of new rules were pronounced by him. One of the rules reported was of special inter-community (so to say international) importance as this rule declared cattle raiding with respect to the communities in the neighbourhood of Oukwanyama illegal.¹⁷⁶ Apart from this traditional proclamations of customary law by the communities themselves, we find many recent attempts to write up parts of customary law in the history of customary law of Namibia. One example of self-stated laws that belong to this group of more recent attempts to note customary law on paper that can be mentioned here is the example of Ongandjera.¹⁷⁷

What is self-stated customary law in this sense? We refer with this term to legal documents that contain aspects of the customary law of communities produced by the communities themselves in their own words. The self-statements of customary law as we know them are not exercises of codification in the sense of a code that replaces the unwritten customary law. It can be assumed that the communities self-state what it appears to them important to have in writing. Addressees of the written message are all who have to deal with the customary law outside the community. Addressees are also the own people who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardised in view of needs that flow from the growing interaction of members of different communities.

The trend to self-stating customary law has meanwhile been endorsed by the Council of Traditional Leaders which resolved that all traditional communities embark on a process of self-stating. Most of the communities have honoured the resolution of the Council. Many have completed their self-statements; others are debating drafts.¹⁷⁸

What the communities have produced so far varies from community to community and is still awaiting detailed analysis. However, what has been achieved up to

176 Cf Loeb, E.M. (1962) *In feudal Africa*. Bloomington: Indiana University, pp. 33f, but also Williams, F.-N. (1991) *Precolonial communities of Southwestern Africa*. Windhoek: National Archives of Namibia, pp. 187f.

177 Cf Louw, W. (1967) *Die socio-politieke stelsel van die Ngandjera van Ovamboland*. Port Elisabeth: University of Port Elisabeth (MA dissertation), pp. 131ff – The Aangandjera are another Oshiwambo-speaking group in northern Namibia.

178 Personal knowledge as member of the team that assist traditional authorities in their attempts to self-state customary law.

now reflects an extraordinary process in the re-appropriation of tradition.¹⁷⁹ The communities in Owambo, Kavango, Caprivi are very much straightforward with rules on wrongs. Some are innovative in the sense that they have added to earlier versions of their self-stated customary law rules, eg., on matters of environmental concern.¹⁸⁰ The communities in central and southern Namibia are more concerned with defining their place in the traditional landscape of the country. Some have chapters on history and language, many have long parts on the constitution of their traditional governance.

The Namibian Faculty of Law, through its associated Centre for Applied Social Sciences and the Human Rights and Documentation Centre, has been privileged to assist the process of self-stating customary law. We were able to conduct workshops with individual communities, groups of communities, and the communities at the national level. The expectation is that a first set of self-stated laws will be published in 2008.¹⁸¹

Concluding remarks

The comparative study could demonstrate that the process of the re-appropriation of traditional governance and African customary law has entered a new phase with the adoption of the constitution that implemented the spirit of the new African constitutionalism as the order of independence for the country. The new African constitutionalism is, on the one side, characterised by the notion of constitutional supremacy and the binding force of human rights and freedoms and, on the other side, by the confirmation of traditional governance and African customary law. This new phase is still in progress, even in countries, such as Namibia, in which the constitutional expectation to give customary law and, through it, traditional governance a firm stand has, by now, a history of almost 20 years.

However, societal movements indicate that a next phase in re-appropriating tradition is already on the agenda of some communities. The old generation of traditional leaders is questioned by its children who return home with university degrees. Some traditional authorities of the old generation have recruited retired

179 See here at least Hinz, M.O., Kwenani, J.W. (2006) *The ascertainment of customary law*. In Hinz, M.O. (2006b), pp. 203-214.

180 See eg., *Ooveta dhOshlilongo shUukwambi, the Laws of Uukwambi in Owambo*. The laws of Uukwambi are part of the files in the office of the author of this paper.

181 For practical reasons, it was decided that the laws of the communities in the far North of the country will be put together in a first volume, while the other laws of the other communities will follow in second volume.

government officials to be councillors to their authorities. A new generation of traditional leaders is to come; a generation of leaders that has gone through formal education and that is thus conversant with the language of modern political bargaining. All this will change the face of traditional governance and African customary law.

It is hard to anticipate what type of changes will occur under the leadership of the new generation of traditional leaders. It is also hard to anticipate how traditional governance and customary law will be accommodated in urban areas where more and more people settle. There are already communities that have special traditional officials in their leadership whose task is to observe urban developments. Whether this will be a trend that will reduce the long distance to the traditional structures *at home* or whether urban settlements will create quasi-independent structures has to be seen. It has to be seen whether the stronger authorities, such as the ones in the far North of Namibia, will remain the model authorities for the other authorities or whether these authorities will develop new models that are more appropriate.

Despite colonialism and its policy of restricting and limiting the power of traditional authority and despite the attempts made by some post-colonial modernists to declare traditional governance and customary law as something of the past that has to go, both, traditional governance and customary law have resisted and surprisingly survived. This is at least an indication that traditional governance and customary law will also resist some of the new challenges and create another form of alternative modernity.