

The ascertainment of customary law: What is *ascertainment of customary law* and what is it for? The experience of the Customary Law Ascertainment Project in Namibia

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Abstract

Traditional communities are no longer homogeneous. Before, basically everybody knew what the law of the community was. There is a growing understanding that the legal complexity experienced in urban settlements where various customary laws apply needs attention. There is also a growing acceptance that the verdict of the chief is not necessarily the last word: dissatisfied parties may take that verdict on appeal to a state court whose judges will not necessarily know what the customary law applied by the court a quo.

The Namibian approach to ascertaining customary law has become known as the *self-statement of customary law*. *Self-stating* customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained, namely the people and the traditional leaders as the custodians of customary law. The most important element in self-stating is that the end result will be a product created in the community that is required to follow and apply the law concerned.

The fact that the author of this paper - based on his experience with customary law in Namibia - had the opportunity to work for the then Ministry of Legal Affairs and Constitutional Development of the Government of Southern Sudan and the United Nations Development Programme in the development of a customary law strategy for Southern Sudan adds special value to the Namibian experience and its analysis.

Key words

African customary law; ascertainment of customary law; codification; restatement and self-statement of customary law.

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Resumen

Las comunidades tradicionales ya no son homogéneas. Antes todo el mundo conocía cuál era la ley de la comunidad. Sin embargo, cada vez se asume más que hay que prestar atención a la complejidad legal existente en asentamientos urbanos en los que se aplican diferentes derechos consuetudinarios. También hay una creciente aceptación de que el veredicto del jefe no es necesariamente la última palabra: las partes descontentas pueden recurrir el veredicto ante un tribunal estatal, cuyos jueces puede que no conozcan el derecho consuetudinario aplicado por el tribunal *a quo*.

El enfoque de Namibia para determinar el derecho consuetudinario se conoce como la *auto-afirmación del derecho consuetudinario*. Por auto-afirmación se entiende el proceso de establecer el derecho consuetudinario por los propietarios del derecho que se va a determinar, concretamente el pueblo y los líderes tradicionales, como conservadores del derecho consuetudinario. El elemento más importante en la auto-afirmación es que el resultado final será un producto creado dentro de la comunidad que está obligada a cumplir y aplicar la ley en cuestión.

El hecho de que el autor de este artículo –basado en su experiencia con el derecho consuetudinario en Namibia– tuviera la oportunidad de trabajar para el entonces Ministerio de Asuntos Jurídicos y Desarrollo Constitucional del Gobierno de Sudán del Sur y el Programa de las Naciones Unidas para el Desarrollo, en el desarrollo de una estrategia de derecho consuetudinario para Sudán del Sur, ofrece un valor añadido a la experiencia de Namibia y su análisis.

Palabras clave

Derecho consuetudinario en África; determinación del derecho consuetudinario; codificación; confirmación escrita y auto-afirmación del derecho consuetudinario.

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1. Introduction

This contribution focuses on a very special development that emerged in Namibia regarding the ascertainment of customary law, and which has subsequently led to an attempt to adopt the Namibian approach on ascertaining customary law in South Sudan.¹

The Namibian approach to ascertaining customary law has become known as the *self-statement of customary law*. What is the meaning of *self-stating customary law*? What is its practical relevance? This is the first aspect to which this paper is devoted. The second refers to the fact that the author of this paper –in view of his experience with the ascertaining of customary law in Namibia– had the opportunity to work for the then Ministry of Legal Affairs and Constitutional Development of the Government of Southern Sudan² and the United Nations Development Programme in the development of a customary law strategy for Southern Sudan (Hinz 2009c).³ The circulation of the said strategy resulted in questions that lie at the centre of the international discourse on legal pluralism (Leonardi *et al.* 2010).

2. Background

Legal comparisons inform us that different legal orders have different ways of manifesting law. While some keep law orally, others opt for law in writing. While some limit the writing of law to writing law incidentally, i.e. in the application of cases, others opt for writing law in an abstracted manner, eventually by way of selective statutory enactment or even comprehensive codification. Common law systems (English, American, Roman–Dutch) prefer the appearance of law through its application in cases. Civil law countries show a practice of codification dating back to the end of the 19th century.

It is important to recall these differences in order to underscore that it would not be appropriate to point at one way of manifesting legal rules as the only way to do so. If one goes into the history of given legal systems more deeply, one will detect that very concrete societal circumstances prompted the development of the various legal systems. A very enlightening current debate is that between proponents of common law, on the one side, and proponents of civil law on the other, who argue about the adequacy of the two approaches in respect of providing legal answers to societal challenges. Do we need more or fewer statutory interventions? Is common law able to provide the necessary certainty in a globalising world? Would statutory interventions not contribute more effectively to legal proactivity than common law, which would only be reactive?⁴

As African scholars hold, African customary laws have survived for thousands of years as orally transmitted systems of law (Okupa 2010). They do not, therefore, become 'more' legal when they are codified. Common law has survived throughout history and remained a highly valued system of law without being codified. Why then, the lawyers argue, should African customary law be codified? This argument has accompanied the discourse on African jurisprudence since the time that many

¹ The author has published several articles on the ascertainment of customary law with a focus on Namibia; see e.g. Hinz (1995b; 1997; 2009b; 2010c; 2010a; 2010d and 2011a). Hinz (1995b) is the predecessor of the publication entitled *Customary law ascertained, Volume I: The customary law of the Owambo, Kavango and Caprivi communities of Namibia* (Hinz 2010a). The second volume, with the laws of the central and southern traditional communities in Namibia, is expected to appear in 2012.

² As it then was. – Although the then Southern Sudan is now South Sudan (the Republic of South Sudan), the pre-secession terminology has been left in the following parts of this article, as the work in question was done before the political change in the Sudan.

³ The following text uses parts of a paper presented to the Conference on Customary Justice and Legal Pluralism in Post-conflict and Fragile Societies, organised by the United States Institute of Peace, the George Washington University, and the World Bank from 17 to 18 November 2009 in Washington, but it also relies on the author's publications listed in Footnote 1.

⁴ I refer here in particular to discussions in the framework of the Rule of Law Project, Nairobi, which aims to reform Namibian administrative law and is supported by the Konrad Adenauer Foundation (Hinz 2009a).

of the now independent African states achieved their political autonomy! (Hinz 2011b).

If one looks more closely, it becomes obvious that many Western-educated lawyers from Europe and Africa not only did not consider the practical and theoretical concerns behind the different avenues of law in the West, they also did not take it upon themselves to enquire about the *nature* of African law.⁵ For them, African customary law was very different from the law learned at their education institutions, which meant that customary law had to be changed in order to resemble the mainstream of law they had been taught. Indeed, African customary laws do differ from Western law: each is based on different concepts of *justice*, and each has its own procedural rules geared towards achieving those concepts. Against this background, and also in view of there having been no administration of justice in Africa that was comparable to the administration of common law that produced volumes of generally referable precedents, the call for codification appeared to be the easiest way to 'uplift' African customary laws to the so-called standard of real law. The fact that African customary laws would lose their flexibility to be applied by the communities concerned in the interests of restoring peace and harmony among themselves was of no concern to the proponents of codification, however.

Lawyers in French- or Portuguese-speaking African countries even employed more radical positions towards customary law, as their respective European systems of reference did not provide much space for customary law and traditional African legal systems (Camara 2010, pp. 73 ff, Guerra 2003, 155 ff). Thus, in former franco- or lusophone countries in Africa, still today we see that African customary law lacks recognition and has remained second-class law – if it is acknowledged as law at all.⁶

3. What does *ascertainment* mean and what is it good for?

In view of this, and in order to facilitate an understanding of the Namibian experience with regard to customary law and its ascertainment, the following sections will explore the meaning of *ascertaining* customary law, and discuss some methodological aspects related to ascertainment.⁷ For example, what do we refer to when we talk about the *ascertainment* of customary law? What do we expect when we suggest *ascertaining* customary law?

The Community Courts Act⁸ in Namibia, influenced by similar legislative practice in many former British colonies (Hinz 1995a), deals with the ascertainment of customary law in its section 13. The section prescribes the procedures to be applied by courts in case of doubt "as to the existence or content of a rule of customary law". In such cases, courts have the power to "ascertain" customary law by consulting "cases, text books and other sources" or by calling for "oral or written opinions". In other words, in a legal context, *ascertainment of customary law* means more than simply having customary law recorded in some way. From the said legal perspective, one can hold that the act of ascertainment legally qualifies the ascertained version of customary law.

Mere academic records of customary law based on questionnaires, court observations, analyses of casebooks of traditional courts,⁹ collections of cases and case-complementary information from parties thereto cannot be considered as an

⁵ In regard to this and the following, see Menski (2006b, pp. 380 ff).

⁶ The contributions by Camara (2010) and Guerra (2003) illustrate efforts to change the position in Angola and Senegal, respectively.

⁷ This paper, therefore, does not set out to give a detailed account of the discussion on the ascertainment of customary law in general terms or on its codification or restatement in particular, being the two common ways of ascertaining customary law.

⁸ No. 10 of 2003.

⁹ While we were conducting research into customary law in Namibia, my team and I found that many traditional communities kept case books in which they recorded information on cases they had heard.

ascertainment of customary law, however. As useful as records of this nature may be, and as much as they may potentially contribute to the ascertainment of customary law in the said legal sense as evidence on which a court may rely, at best they remain aids for possible subsequent ascertainment in the aforementioned legal sense.

Namibia's Traditional Authorities Act¹⁰ supports the above definition of *ascertainment*. According to the Act, *ascertainment* can be defined as any kind of authoritative transfer of orally transmitted customary law into a written form. According to section 3(1) of the Act, one of the duties vesting in Traditional Authorities is –

... to ascertain the customary law applicable in that traditional authority after consultations with the members of that community, and assist in its codification ...

From the language in the Traditional Authorities Act, it is clear that *ascertainment* is not identical to *codification*. Indeed, the Act implies that *codification* is a very specific form of ascertaining customary law: it transforms customary law into an Act of Parliament. With this, customary law ceases to be *owned* by the communities in which it developed, and can only be changed by an amending Act of Parliament.

Although the call for codification is still being heard today,¹¹ there is not much codification of customary law to which we could refer. Notably, in addition to what has been said above for Africa in general terms, the plea to codify Namibian customary law (UNIN 1986, p. 963)¹² has not been able to produce one piece of codification since Independence in 1990. To this author's best knowledge, and despite the calls for codification of customary law in Africa as a whole, it is only the law of the Zulu in South Africa and the law of some groups in Southern Sudan that have been codified.¹³

There are important lessons which legal anthropological research has developed over the years, and which have been acknowledged by courts of law. These lessons support those voices today who speak against the codification of customary law, because codification will destroy one of the most important qualities of such law: its openness to accommodate reconciliatory solutions to problems, instead of allowing the law to win over the parties. Customary law is particularly open to negotiations: not only those required to achieve solutions acceptable to all the parties to a case, but also those that *navigate* between the application of different laws (Menski 2006a).

South African courts support the vote against codification.¹⁴ These courts were faced with the situation where the law lived in communities had developed away from the law as it was offered in old records of customary law. It was found that the *living law* (Eugen Ehrlich) was the customary law to be accepted by courts, and not the so-called *official* laws of the books. This really challenging jurisprudential development accepts – as promoted by legal pluralism – that customary law as the

¹⁰ No. 25 of 2000.

¹¹ This refers to many discussions on various occasions in Namibia in which the author of this paper has participated over the years.

¹² Namibia's Law Reform and Development Commission Act, 1991 (No. 29 of 1991) does not specifically call for the codification of customary law. The Act only refers to codification in general terms as a possible means by which "any branch of the law" can be made more readily accessible. As regards customary law, in its section 6 the Act emphasises, as one of the Commission's objectives, the need to "integrate and harmonize customary law with common and statutory law".

¹³ For the Zulu Code, see Bennett (2004, pp. 46 f); for the codification of customary law in Southern Sudan, see my above-quoted report on customary law there (Hinz 2009c). A special case are the Laws of Lerotholi (the customary law of the Basotho in Lesotho), the first part of which was put into writing by the Basutoland Council in 1903. The legal status of the Laws of Lerotholi is still a matter of debate (Duncan 2006).

¹⁴ *Mthembu v Letsela* 1997 (2) SA 936 (T); *Hlohe v Mahlalela* 1998 (1) SA 449 (T); *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

local law of the people would lose its quality of being the people's law if it were to be codified into a statutory type of document.

Apart from codification, we can also speak of the *ascertainment* of customary law, which occurs when customary law is transferred into what has become known as the *restatement* of customary law. The reference is here to the restatement project conducted by the School of Oriental and African Studies (SOAS) of the University of London under Antony Allott. Allott defines the restatement approach – “borrowed”, as he admits, from the American Restatements – as follows: *Restatements* – (Allott 1996, p. 33).

... were authoritative, comprehensive, careful and systematic statements of common-law rules in such fields as torts, contracts and property. Necessarily cast in semi-codified form, they were still not codes, as they lacked the force of legislated law. Instead they were the most accurate and precise statements of what those producing them had concluded were the main principles and rules as evolved by the courts, and, as such, courts and practitioners alike could turn to them as guides.

Customary law restatements were achieved in several African countries in the 1970s. However, the restatement approach fell into disuse for various reasons, one being that the restatement of customary law made today will not necessarily reflect the customary of tomorrow.¹⁵

Finally, we can also speak of *ascertainment* of customary law when traditional communities produce their own versions of their customary law in writing: versions of customary law for which, in the Namibian context, the term *self-statement* of customary law has been accepted (Hinz 2010d).

Self-stating customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained, namely the people – or, rather, the community to which the people belong – and the traditional leaders as the custodians of customary law. *Self-stating* also refers to what the Traditional Authorities Act stipulates in section 3(3)(c), namely that a Traditional Authority, as part of the performance of its duties and functions under the Act, may –

... make customary law.

Although the procedures of self-stating may differ from community to community, the most important element in self-stating is that the end result will be a product created in the community that is required to follow and apply the law concerned. Moreover, instead of injecting into the communities what the law ought to be, it is left to the community to decide what part of their law is to be consolidated in writing, as the community and community stakeholders will know best what their law is, and where certainty through writing is needed.

The result of self-stating is binding to the community as part of their customary law. However, it is important to note that the binding quality of the self-stated laws is neither an implicit repeal of the orally transmitted full body of customary law, nor will it prevent the community from amending their law as the need arises.¹⁶ It is part of the philosophy behind the approach to leave the ascertainment of customary law to the communities themselves to decide what part of customary law they wish to have in writing, and how they wish the content of the self-

¹⁵ Bennett (2004, p. 48) notes the Law Commission of South Africa's response to the possible restatement of customary law in South Africa, namely that “the facilities for such a project were not available in South Africa, and that, unless regularly updated, the restatement would fall behind social practice to become yet another ‘official’ version” of customary law, i.e. a version that would not be in line with the law lived by the communities. – What was said about the codification of customary law applies to its restatement as well; however, this paper is not the place to give an account of the debate on restating customary law.

¹⁶ D'Engelbronner-Kolff (1997, pp. 149ff) shows how traditional courts of the Shambyu community navigate between the self-stated version of their law and the legal principles behind such statement – thus allowing decisions appropriate to the cases to be made.

statement be worded. This means that what we find in the self-statements are only aspects of the customary law concerned. The fact that certain rules of customary law have been ascertained in writing will not harm the practice that has prevailed to date of applying such ascertained rules, i.e. the relevant authorities will apply the ascertained principles in the manner they deem appropriate in accordance with their customary law in order to restore societal peace.¹⁷ As the self-stated law is owned by a specific community, only that community has the authority and power to amend its laws. Although self-statement may be regarded as resembling codification, the former is not codification by organs of the state, as is usually the case. Such community-effected codification leaves the law subject to amendment by the communities themselves, and does not replace their living law.

Strict proponents of customary law as a living entity in the respective society may ask, "Who needs customary law to be ascertained?", and "Do the traditional leaders who apply customary law need such law ascertained?" Before the many interventions by statutory law, and, more so, before the development of independent nation states, traditional leaders could state the following with good reason:¹⁸

Why ascertain customary law? We know our law; it is only you, coming from outside, who want to impose on us some kind of written versions of the law, which, anyway, will not be our law! This attitude to the ascertainment of customary law has changed. More and more traditional leaders understand the reasons for ascertaining customary law, accept ascertainment undertakings, even request to have the laws of their communities ascertained and take the lead in ascertainment projects.¹⁹

Traditional communities are no longer homogeneous. Before, basically everybody knew what the law of the community was, and where traditional means of communicating knowledge allowed young people to grow up with the community's value framework.

There is also a growing understanding that the legal complexity experienced in urban settlements where various customary laws apply needs attention, i.e. by ascertaining and even standardising customary law. There is a growing acceptance that the verdict of the chief is not necessarily the last word: dissatisfied parties may take that verdict on appeal to a state court.²⁰ The judges hearing such appeals will not necessarily know what the customary law applied by the court *a quo* is, and may fail to get the necessary knowledge on such law unless there is something in writing to inform them.

4. The Namibian Customary Law Ascertainment Project

Self-stating customary law has a long history in Namibia, going back to pre-Independence developments in some of the traditional communities. The efforts by some of these communities, undertaken more or less independently, eventually resulted in a nationwide Customary Law Ascertainment Project. Some years ago, the Council of Traditional Leaders²¹ adopted the Project and called on all traditional authorities to start ascertaining their customary law.

The Human Rights and Documentation Centre of the University of Namibia's Faculty of Law directed and coordinated the Project (Ruppel 2010). However, the demands and challenges of the assignment led to the decision to divide the Project into two phases. The first encompassed 17 of the 49 traditional communities recognised to

¹⁷ Indeed, this is the main objective in adjudicating cases under customary law (Hinz 2010c, p. 11 ff).

¹⁸ This is what I experienced while doing fieldwork in Namibia in the early 1990s.

¹⁹ This statement is based on evidence from Namibia and also from Southern Sudan. To the latter, see Hinz (2009c).

²⁰ As provided for e.g. in sections 26ff of the Namibian Community Courts Act, 2003 (No. 10 of 2003).

²¹ Cf. Article 102(V), Constitution of the Republic of Namibia, and the Council of Traditional Leaders Act, 1997 (No. 13 of 1997).

date in the north-central and north-eastern parts of the country, i.e. the Owambo, Kavango and Caprivi communities. Phase 2 will cover the communities in central and southern Namibia.

Phase 1 has now been completed in the sense that a publication (Hinz 2010a) has been produced which contains what was received by the various communities in accordance with agreements decided on in meetings with each of them. Most of the communities honoured the agreements, and delivered what was expected of them in terms of those agreements. Some, for various reasons, have not. Despite this non-delivery, that which has been assembled in the volume of ascertained customary law published is extraordinary: the volume assembles a collection of customary laws which had not existed before in Namibia. Moreover, one will not find a comparable volume in any other African country.

Clearly, what is presented in the publication is certainly not the last word on the customary law of the communities concerned. They will develop their laws further, so the written content will need to be changed over time. For example, the Owambo and Kavango communities meet regularly to decide on amendments to their laws. One particular aspect that receives ongoing attention relates to the amounts levied for fines with which will be made out by the courts to remedy wrongs committed, or the so-called official price for one head of cattle, which is, to some extent, subject to the changes of the market value of these animals.

Four of the five Kavango communities decided to unify their customary laws (Hinz 2010a, pp. 277ff). This unification is likely to influence other communities when they embark on a similar process as they may ask themselves whether they should not also opt for a unification of laws. In addition, statutory changes by the Namibian Parliament may provoke changes in customary law, and court decisions may have consequences for certain parts of customary law. In this regard, it was not within the Project's terms of reference as a coordinating function to scrutinise the various pieces of customary law against existing statutes, including the Constitution of the Republic of Namibia.²² Testing customary law against the Constitution – particularly in respect of the human rights protected in the Supreme Law and the fact that customary law is subject to it²³ – is a very demanding legal undertaking. Therefore, such tests have instead been left to the public discourse and, eventually, to Namibia's competent courts.

The publication of these self-stated customary laws will also generate revision processes by the communities themselves. The drafters and experts of customary law in the various communities will take note of the laws of other communities, compare them with their own laws, and probably suggest amendments that would improve matters. They will also pay attention to the wording of their laws, i.e. the texts in their indigenous languages and their translations into English.

In preparing the published versions of the self-stated customary laws, almost unsolvable language problems had to be met. These eventually prompted the Project to accept some of the documents in the indigenous languages of the community concerned, and have them translated. This was despite the fact that the Project Assistants, who spoke the relevant languages as mother tongues, had trouble understanding the idiomatic language used in the texts. The hope is that the English translations resemble the original texts as closely as possible, although, notably, certain legal concepts in indigenous languages did not always express the same as their English-translation equivalents. Only further discussion, interpretation, application, and cases brought to the state courts will assist in clarifying the processes involved.

²² The coordination did not intervene, for example, when self-stated customary laws dealt with the difficult question of ownership of communal land, and by approaching this topic did not always do this in line with sections 17, 21 and 24 of the Communal Land Reform Act, 2003 (No. 5 of 2003).

²³ See Article 66, Constitution of the Republic of Namibia.

It is important that all who will make use of this publication understand it as a work in progress, i.e. a further step along the path of improving and developing the customary law of the various Namibian communities. Looking back to developments in self-stating customary laws in Namibia, one sees very specific features that can be expected to influence further steps down the road in this process. Early versions of self-stated laws concentrated on fines for the usual catalogue of wrongs found in any textbook on criminal law or the law of delict.²⁴ Later versions have added wrongs specifically relating to environmental law. These later versions have also paid attention to constitutional matters relevant to traditional governance, meaning that there is a growing awareness to consider rule-of-law principles in the application of customary law. The profiles which introduce the laws of the various communities and were compiled by the members themselves illustrate a growing awareness of the community's foundation, including the philosophies on which their laws are built.

Some years ago, some of us working on the Project were criticised when we spoke at meetings with certain communities about the self-stated laws of other communities that we had already collected. We were said to have violated customary law by circulating documents which were somehow regarded as secret. We objected to this, and our objection has since been borne out: it is obvious that quite a number of communities took note of what others were doing, and even integrated rules developed by other communities into their own laws. Today, some drafts of self-stated documents even contain references to scholarly work. This is encouraging, although one also has to note that some of the drafts show the handwriting of knowledgeable local personalities, and this handwriting might not always be in agreement with the aspirations of the members of the community concerned.²⁵

As time passes, it will certainly be important to observe what the perception of the self-stated laws will be not only within the communities in question, but also among the wider legal and non-legal public, when more and more references to customary laws can be expected. References of this nature may even challenge communities to reconsider their approaches to certain laws.

5. The customary law strategy for Southern Sudan²⁶

"... to develop the customary law into the common law of the Sudan ..." in the title of the Southern Sudan customary law strategy was taken from the Introduction section to the publication *Customary law of the Dinka people* by John Wuol Makec, President (Chief Justice) of the Supreme Court of Southern Sudan (Makec 1988, p. 18). This quotation was chosen to refer to the political interest in Southern Sudan to have its legal order founded in the customary laws of the various communities in the country, as opposed to the imported Islamic law imposed by the Khartoum Government.

Customary law is a vibrant reality in all parts of Southern Sudan. Customary law basically affects all people: people of all communities (or *tribes*, as they are known in Southern Sudan). Customary law is applied by the courts in towns, including Juba, the capital of Southern Sudan. Customary law is also applied outside the city. In the cities and less remote parts of the territory under the jurisdiction of the Government of Southern Sudan, state and non-state courts complement each other. In many parts of the country, non-state courts are the only accessible judicial structures.

²⁴ That is, *tort* in English common law.

²⁵ An assessment of the processes involved in self-stating customary law would be very useful.

²⁶ The following summary refers to the strategy's Executive Summary, see Hinz (2009c, pp. 5ff).

The Interim Constitution of Southern Sudan of 2005 contains several articles of relevance to customary law and traditional authority. For example, Article 174 says the following:

- (1) The institution, status and role of traditional authority, according to customary law, are recognised under this Constitution.
- (2) Traditional authority shall function in accordance with this Constitution and the law.
- (3) The courts shall apply customary law subject to this Constitution and the law.

The terms of reference of the work that led to the customary law strategy for Southern Sudan emphasised as its main function – (Hinz 2009a, p. 22).

... to develop a customary law strategy to inform the linkages between customary and statutory systems for more effective, accessible, affordable, and equitable justice.

In its methodological approach, the report relies on the combination of legal anthropology and comparative law and is, thus, strongly related to the interpretation of law based on the concept of *legal pluralism*. Legal pluralism, unlike legal centralism, takes note of and respects that the law of the state, be it case law or statutory law, is only one side of a society's legal coin. The other side which complements the law of the state, albeit to a varying degree, is what Ehrlich, one of the leading promoters of legal pluralism, called the *living law*.

The evaluation of the state of affairs pertaining to customary law in Southern Sudan traverses several fields. I will deal with only two here. One deals with legislation that is relevant to customary law, while another covers the latter's ascertainment.

In respect of legislation that is relevant to customary law, the first evaluation analyses the law with respect to traditional authority and customary law under British colonial rule, regulations enacted by the Government of Sudan (the Government in Khartoum), Acts that became law during the war of liberation, and Acts that the Government of Southern Sudan enacted after the conclusion of the Comprehensive Peace Agreement in 2005. Traditional leaders, customary law, and how to deal with them have been on the political agenda since the process of reconstructing the civil administration began in the liberated areas of Southern Sudan. The reconstruction of a new local government system was guided by the desire to have a framework that could integrate local government and traditional authority.

The second evaluation of the state of affairs regarding customary law in Southern Sudan gives an account of three major attempts to ascertain such law: the Bahr El Ghazal Project, the Equatoria Project, and the Upper Nile Project: The Bahr El Ghazal Project ascertained the customary laws of three communities in Bahr El Ghazal, namely the Dinka, the Luo, and the Fertit. These efforts eventually led to an act of codification that was passed by the then Regional Legislative Assembly of Bahr El Ghazal in 1984.²⁷

The Equatoria Project resulted in a 'code' of the customary law of various communities in Equatoria. This code was completed in 1994 under the auspices of the Southern People's Liberation Movement in charge of this area. The very last section of the document provides for its amendment. The requirement for amendment is a two-thirds majority of all chiefs of the communities involved, or "judicial circular or subsequent national legislation". This is a remarkable provision: although it accepts the national competence to amend customary law, it also underlines that the code is seen to be owned by the communities involved in its making.

²⁷ Annexed to Makec (1988).

The Upper Nile Project produced an ascertainment of the law of the Upper Nile Dinka in 1998.²⁸

The suggested customary law strategy proposes action in five areas:

- (1) The ascertainment of customary law;
- (2) The ascertainment of customary law will not necessarily respond to the needs of change and development. It is therefore that the change and the development of customary law must be addressed;
- (3) The legal and social environment for the operation of customary law is essential for the function of both and urges to be addressed in respective enactments;
- (4) The need for research on the said legal and social environment has to be identified and implemented; and
- (5) Observations on co-ordinating are necessary.

As to the ascertainment of customary law, a ten-step model is proposed in the strategy, based on the Namibian experience. This is expected to encourage the various traditional communities to self-state (self-codify) their laws and, by doing so, to retain ownership of their legal traditions.

The ten-step model calls for –

- (1) identifying the target community
- (2) background legal research with respect to the community
- (3) the drafting of policy on the ascertainment of customary law
- (4) the development of a comprehensive enquiry guide
- (5) agreement among the community on the ascertainment process and structure
- (6) recruiting and training ascertainment assistants
- (7) conducting or supervising the ascertainment project
- (8) conducting complementary research in identified the community
- (9) promoting the compilation of the ascertainment texts, and
- (10) preparation of publications in at least two languages – the community's vernacular and English.

With respect to the amendment and development of customary law, the strategy opts for using the potential for change inherent in customary law systems.²⁹ Practice and legal anthropological research have shown that the customary law of today is not the customary law of yesterday. These have also shown that people do indeed change their customary law, and that they adapt it to changing circumstances. Basically all publications on customary law in Southern Sudan, particularly the more recent among them, report on changes in customary law.

For this change from within, the strategy refers to certain institutions which Southern Sudan's Local Government Act of 2009 anticipates, e.g. the Customary Law Councils,³⁰ as well as the Councils of Traditional Affairs Leaders to be established under separate laws (Hinz 2009a, pp. 46f). These can be used to challenge the stakeholders of customary law to amend such law in order to accommodate modern – including human rights – needs. However, experience from other African countries shows that statutory enactments with respect to customary

²⁸ The Equatoria and the Upper Nile documents are on file with MO Hinz.

²⁹ See here the list of contributions by the author on this topic in respect of Namibian customary law in Footnote 1 above.

³⁰ See sections 22 and 93ff of the Local Government Act of 2009.

law are not only common but necessary. The usual fields of statutory intervention are land,³¹ family and inheritance.

Under the legal and social environment for the operation and development of customary law, the report considers the need to –

- (1) regulate the traditional authority
- (2) regulate traditional courts
- (3) provide infrastructure for traditional authorities and courts, and
- (4) provide training and education with respect to traditional authority and traditional officers in traditional courts and customary law.

The assessment in the strategy of the state of affairs of customary law, including research on such law (Hinz 2009a, pp. 56ff), shows areas where further investigation is needed in support of the possible amendment and, more specifically, the implementation of the customary law strategy suggested herein. The report identifies the need of research with respect to the following:

- The legal dispensations in which traditional authority and traditional courts have operated in Southern Sudan, going back to the first enactments under the British administration of the territory
- The mapping of traditional courts
- The mapping of traditional communities
- The assessment of developments in customary law in areas where ascertainment projects have been completed
- The assessment of customary law through cases decided by traditional courts (extended case study approach)
- The application and interpretation of customary law by the courts (the state courts and the traditional courts, the latter through the systematic evaluation of case records completed by traditional courts), and
- the underlying principles of customary law as points of reference in inter-ethnic conflicts, but also as a basis for the development of customary law in line with its respective philosophical foundation.

The Ministry of Legal Affairs and Constitutional Development Act of 2008 provides for the establishment of a Customary Law Centre (CLC).³² The CLC would be the most appropriate body to lead the coordination of the various steps proposed in the strategy. The envisaged CLC will be a unique institution, solely devoted to matters of customary law and, thus, the main driving force for the promotion and implementation of the customary law strategy.³³

6. Local justice in Southern Sudan as seen by the United States Institute of Peace study of 2010

The United States Institute of Peace (USIP) published a study on local justice in Southern Sudan in 2010 (Leonardi *et al.* 2010). The authors of the study report considered some of the suggestions put forward by the above-summarised customary law strategy. On the basis of the empirical research conducted in Southern Sudan, the authors hold as follows (Leonardi *et al.* 2010, p. 73):

The findings of the project raise some questions in relation to the current focus of policy on ascertaining customary law, particularly in terms of whether such an exercise would actually improve access to justice. In the course of the research, positive expressions in favour of recording customary law were of two kinds: the desire of government judges to have a written customary law to use, and a popular belief in some areas that each ethnic group should record its own set of laws to

³¹ For example, Southern Sudan has a Land Act that applies to land under customary law.

³² See section 14(2)(c).

³³ The strategy report also contains a draft Customary Law Centre Act, see Hinz (2009a, pp. 138ff).

counterbalance the customary law of bigger or dominant groups. The research also revealed views and practices suggesting that ascertainment may have retrograde effects: It could limit court's (?sic? should be *the court's* or *courts'* - plural; please check source) flexibility in deciding cases, and litigants generally dislike rigid application of fixed laws and penalties.

The authors of the USIP note as justification for the ascertainment of customary law the "need for certainty, consistency and predictability" (Leonardi *et al.* 2010, p. 76). But, they say, "this is actually the reverse of what defines customary law as currently practiced in local courts" (Leonardi *et al.* 2010). The quoted arguments to justify the ascertainment of customary law are said to "come more from government and legal professionals than from litigants or the wider public" (Leonardi *et al.* 2010).

The authors have three specific concerns regarding the proposed customary law strategy. Firstly, they believe applying the proposed ten-step model to Southern Sudan would be a huge logistical exercise, and "superfluous given the fact that the system is working remarkably well as it is" (Leonardi *et al.* 2010, p. 79). Secondly, the authors fear that, although the strategy leaves the determining of the various customary law jurisdictions open to a process to be undertaken by the various communities themselves, the implementation of the proposed ascertainment might lead to the "exacerbation of perceptions of ethnic difference" (Leonardi *et al.* 2010). The third concern reflects on the use and effects of the written products of the ascertainment of customary law (Leonardi *et al.* 2010, pp. 80f):

The application of the latter will depend greatly on the extent of dissemination and supervision, again raising questions of capacity and resources. But we can make some general speculations on the basis of the research findings. First, there is ambivalence in Southern Sudan toward written law. On the one hand, the majority of people and chiefs interviewed for this project expressed a dislike of the government judges' use of written laws at the perceived expense of lengthy testimony, negotiations, and flexible outcomes. On the other hand, observations of the court suggest that chiefs and court members use any available written documents and legal codes selectively to add authority to their sentences. If written versions of customary law were available, it is highly probable that chiefs and perhaps judges would treat them as codes of law, even if that were not the intention.

Therefore, the ascertainment of customary law –

... in any of its forms ... would not meet the needs by litigants, justice providers, and local people regarding modifications to the system of local justice.

Are there alternatives to ascertainment? The USIP report answers as follows (Leonardi *et al.* 2010, p. 82):

A more feasible and targeted alternative to community-based ascertainment would be locally and annually negotiated agreements in particular localities, concerning variations in practices of compensation between ethnic groups and other fixed penalty and compensation scales. Such agreements were negotiated in large-scale chiefs' meetings in the colonial period

The authors of the report believe that the Councils of Traditional Leaders to be established in all the ten states of Southern Sudan could be the appropriate platforms for such negotiations (Leonardi *et al.* 2010).

7. Concluding remarks

This paper does not allow a comprehensive response to the position taken in the USIP report.³⁴ Only the following will be noted as a remark not only in conclusion, but also to stimulate further debate.³⁵

³⁴ Some of the statements in the USIP report refer to empirical data, which contradicts evidence conducted for the customary law strategy. This requires a more detailed response than can be offered in

The evidence we have from the application of the self-statement approach in Namibia is clearly that the traditional stakeholders that apply the law will not be prepared to sacrifice the flexibility and negotiability of customary law merely because customary law has been self-stated. As explained above, what is self-stated remains negotiable; it remains flexible; and it will eventually not be more than the wording of principles which are very open to interpretation in the negotiated adjudication of cases. This is because self-statements do not lead to the replacement of otherwise orally transmitted customary law (normative guides, principles); rather, they leave these parts of customary law as underlying codes from which the adjudicators can obtain help in resolving cases.

Communities in Namibia meet regularly to discuss their customary law. For example, some have decided to avoid concrete figures in their self-stated laws when it comes to fines such as ten head of cattle for a given wrong. They have developed rules that allow for fines to be adjusted in accordance with inflation, etc. They have also discussed how to deal with a person being killed by another's negligent driving.

In other words, this means that the self-stating approach leads to interaction and discussion in communities, and creates awareness in terms of human rights and rule-of-law expectations. Ascertainment by self-stating is a process. This statement is not a mere academic interpretation, but mirrors practice. What happens in processes to self-state these laws is in line with approaching democracy as being a system of communication.

One might say this is an idealistic, utopian view, unrelated to practice, but it is not. We are fully aware that power-hungry, old, conservative, or male persons might try their best to manipulate the self-statement processes. However, we have also learnt that people – only some at first, but many after some time – in the various communities are not prepared to accept what some 'would-be kings' try to do.

The traditional communities in Namibia and in Southern Sudan live in worlds of change and pressure, which also force them to think about their own values and cultures, and the laws built on those values and cultures. Change is inevitable – and this is obliged to include the imperative to question the underlying principles of customary law!

This last remark leads to a number of theoretical observations: not only observations related to the discourse on legal pluralism, but also general jurisprudential observations.³⁶ For example, what does it mean to refer to the *negotiation of law*? What is *negotiation of law* in a customary law discourse, and what is it in a 'modern' discourse? Are there limits to negotiating the law? Are there limits to navigating between various laws? What is law when negotiations about it are possible? Is there a difference in the scope of negotiations when law is written or 'only' orally transmitted? What is the *oral transmission* of law? Is orally transmitted law less institutionalised than written law? All of these questions reach beyond the scope of this paper, but deserve to be answered.³⁷

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this paper. The same applies to the first two concerns (see section 6), namely the logistical side of the self-statement project, and the fear about the exacerbation of ethnic differences (this would also require going into the right to culture and its practical implementation).

³⁵ The concluding remarks also take note of the review of *Customary law ascertained* by Horn (2011).

³⁶ In particular, see Menski (2006b, pp. 3ff, 380ff).

³⁷ The author will deal with these in a forthcoming publication provisionally entitled *Since time immemorial: Traditional governance and customary law. A southern African perspective*.

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Remarks and Comments on Manfred O. Hinz's paper³⁸
The ascertainment of customary law: What is *ascertainment* of customary law and what is it for? The experience of the Customary Law Ascertainment Project in Namibia"

MARKUS BÖCKENFÖRDE³⁹

1. Introductory note

The paper reports about the concept of *the ascertainment of customary law*, its establishment in Namibia and its migration to Southern Sudan where it received mixed views. Those three elements of the report are directly interlinked with the author's recent projects. Beside these documentary aspects on the recent practical work of one of the most knowledgeable German legal scholars on legal pluralism, the paper contributes to the ongoing general debate on whether and how to record / codify customary law on the one end without compromising its flexibility on the other.

In the first part, the author describes the meaning of *ascertainment* in the Namibian context. The relevant Namibian Act defines *ascertainment* as "any kind of authoritative transfer of orally transmitted customary law into a written form" (p. 6).

According to the author, this definition comprises various forms, including the codification of customary law (understood as "transform customary law into an Act of Parliament"), the restatement of customary law, and the self-statement of customary law, but excludes mere academic records like court observations, analyses of casebooks of traditional courts, collections of cases and case-complementary information from parties thereto (p. 6).

The concept of self-statement of customary law is the core of the "Namibian Customary Law Ascertainment Project" explained in the second part (Section 4) of the paper. Despite procedural differences, the end-product of self-stating is "created in the community that is required to follow and apply the law concerned" and "is binding to the community" (p. 7).

The migration of this concept of self-statement to Southern Sudan through a joint project of the author, UNDP, and the relevant department of the Ministry of Legal Affairs and Constitutional Development in Southern Sudan is presented at the beginning of part three (Section 5). This "customary law strategy" suggests actions in five areas (p. 12) and develops a ten step model reflecting the experiences of Namibia.

Part three then continues by referring to critical comments against this strategy brought forward in a recent publication. It doubts whether the strategy is an adequate tool to efficiently address the challenge of guaranteeing a fair access to justice.

2. Remarks & comments

The author provides a valuable insight into an ongoing debate that reads like trying to fit a square peg into a round hole: Writing down applicable customary law without depriving it of its unique character. The author does so in a unique manner by not theorizing about potential chances and pitfalls, but by presenting two

³⁸ Remarks and comments rely on my comments as discussant at the Oñati workshop in June 2011, but were revised for publication in June 2012.

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different projects at different ends of Africa that actually attempt to identify adequate solutions in practice. This perspective offers a broader view to the topic. Being left behind with even more questions after reading this paper reflects the richness of the topic that the author was able to unfold.

I want to offer two remarks and four comments/questions: The remarks are more general in nature and relate to the title of the paper and the overall question of the workshop. The comments address specific issues in the paper.

2.1. Remarks

(1) The second part of the question put forward in the title remains unanswered: What is the ascertainment of customary law good for? Or put it differently: Why and for what purpose is it needed? What are the identified short-comings of customary law that require its ascertainment?

The author addresses at length what ascertainment does (p. 5-8), but if it comes to its actual merits ("what it is good for"), only few points are offered. Considering that the concept of ascertainment is not practiced as an end in itself, but in order to overcome existing deficits and challenges, the reader wonders whether there had been relevant pre-assessments. The author mentions a couple of indicators of societal change to which the "ascertainment of customary law" may offer an adequate response: (p. 8): (a) fading knowledge of what the relevant customary law actually is due to lack of homogeneity; (b) growing legal complexity especially in urban areas requires to (even) standardise customary law; (c) growing acceptance that the verdict of the chief is not necessarily the last word, but may be subject to review by a state court.

Taking those indicators serious, the "ascertainment of customary law" seems to be a valuable tool to support a process of transformation and change: a tool to sensitively formalize customary law in order to meet societal change and to better integrate customary law into a constitutional context. But it is neither meant nor able to preserve traditional customary law. Or, as C. Leonardi *et al.* (2010, p. 76) put it: "If customary law is based on the flexible negotiation of laws and principles in the individual context of each case how can its essential nature be captured in written form?"

Thus, it might be more than a mere coincidence that it was the Ministry of Legal Affairs and Constitutional Development, but not local communities that asked the author to develop a customary law strategy based on the Namibian model. Serving the Ministry's commitment to implement the constitutional requirement that "traditional authority shall function in accordance with this constitution and the law"⁴⁰, the concept of ascertainment may bridge the different views on the future relation between customary law and formal law.

(2) Considering that the ascertainment of customary law (and here more specifically the self-statement of customary law) supports transitional processes from traditional customary law to a more formalized law rooted in traditional values, one wonders whether there are other approaches available that serve the same purpose in a better way. Taking the question of the workshop in Onati as a point of departure⁴¹, an assessment on the democratic impact of the concept of self-statement of customary law vis-à-vis other options would have been helpful. If the core element of *self-stating* is that it is left to the community to decide what the law ought to be and what part of their law is to be consolidated in writing (p. 7), one might wonder who actually represents the "community". Is it only the chief and the elders or also something like a "community assembly" (for example a Boma Council in Southern Sudan)? And wouldn't it be a prime example of local democracy

⁴⁰ Art. 174 (2) of the Interim Constitution of Southern Sudan of 2005.

⁴¹ "Legal pluralism and democracy: When does the legal pluralism enhance and when does it erode the legitimacy of and trust in democratic institutions?"

if representatives of the community are self-stating customary law and reviewing it periodically in order to assure that the change of customs is reflected? Do these dynamics already exist? The author briefly addresses this issue in his concluding remarks (Section 7), but it would have been exciting to learn more about it in detail.

2.2. Comments / questions

(1) It is not entirely clear how the author understands the term codification. On the one hand, he defines codification of customary law quite narrowly as transforming customary law into an Act of Parliament (p. 6). In the Namibian context, Acts of Parliament are exclusively acts of the national legislature. On p. 8, the author explains that "self-statement may be regarded as resembling codification, the former is not codification by organs of the state, as it is usually the case". Here, the term codification is understood broader, encompassing all organs of the state, including those at sub-national level. In this case, one wonders whether regulations made by local authorities (see Art. 111 of the Constitution of Namibia) do qualify as codification as well?

Again on p. 8 the author then elaborates that "such community-effected codification leaves the law subject to amendment by the community [...]". Thus, does this mean that codification also refers to laws of communities? Are therefore regulations at the local level that might authoritatively transform customary law into a statutory type of document are "codifications"? And at what stage institutions in Namibia are considered to be state institutions? Is it sufficient that they are mentioned in the Constitution? Do they need to be paid by the state? Some clarification in this respect would have helped to understand the arguments of the author against "codification" in a better way.

(2) The customary law strategy suggests action in five areas, beginning with the ascertainment of customary law, which itself is based on a ten-step model following the Namibian experience. What is missing is a pre-assessment whether the Namibian model fits in the Southern Sudanese context in general and with regard to the different regions. What had been the pre-conditions in Namibia to make the project a success?

The merits and challenges of importing foreign ideas and concepts into another legal setting are widely debated, especially in the area of constitution building. With regard to customary law, the issue is even more sensitive due to its higher dependency on specific contexts. Or, as M. Damaška (1997) put it: 'The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.' Thus, had there been any kind of pre-assessment whether and in how far relevant parameters that has been available in Namibia are also present in Southern Sudan? Are the needs the same? Considering the ascertainment of customary law as a means to support processes of transformation (see above), is the need for transformation similar? According to C. Leonardi *et al.* (2010, p. 81) "[w]ritten documents have an authority in themselves in Southern Sudan, making the distinction between code and statement largely irrelevant in practice". Did the project look into that issue as well? If yes, how did it influence the methodology of the project and the project of ascertainment?

(3) At p. 13 the author introduces some findings of a report in the frame of the project suggesting to, *i.a.*, regulate traditional courts and traditional authorities. Considering the flexibility of customary law, is it possible to regulate the institutional setting without undermining the concept as such?

(4) The flexibility and negotiability are considered the strength of customary law. It would be helpful for the reader to know what kind of flexibility / negotiability the author refers to. The adjustment of fines according to inflation and context (see page 15) is something very familiar to other legal systems as well. Also the

negotiability is not alien to other systems. For example most cases in German labour law disputes are reconciled in front of a judge instead of settled by a judgement. Thus, in order to better understand the uniqueness of customary law in this respect, some information would be helpful.

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