

Customary Law Ascertained Volume 3 is the third of a three-volume series in which traditional authorities in Namibia present the customary laws of their communities. It contains the laws of the Nama, Ovaherero, Ovambanderu, and San communities. Volume 1 contained the customary laws of the Owambo, Kavango and Caprivi communities. Volume 2 contained the customary laws of the Bakgalagari, the Batswana ba Namibia and the Damara communities.

Recognised traditional authorities in Namibia are expected to ascertain the customary law applicable in their respective communities after consultation with the members of that community, and to note the most important aspect of such law in written form. This series is the result of that process. It has been facilitated by the Human Rights and Documentation Centre of the University of Namibia, through the former Dean of the Law Faculty, Professor Manfred Hinz.



CUSTOMARY LAW ASCERTAINED
VOLUME 3

Edited by Manfred O. Hinz
Assisted by Alex Gairiseb



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The Customary Law of the Nama, Ovaherero,
Ovambanderu, and San Communities of Namibia



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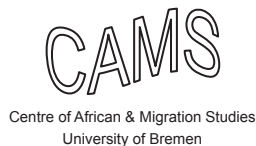
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THE EDITORS

Prof. Manfred O Hinz studied law and philosophy at the University of Mainz, Germany, where he graduated in law. He took his legal practitioner examination in 1964, the year in which he also obtained his PhD from the University of Mainz. After studying anthropology, sociology and African and Oriental languages at the same University, he became assistant lecturer, teaching anthropology and public law. In 1971, he was appointed full professor at the University of Bremen.

In 1989, he went to Namibia where, after its independence, he assisted the Ministry of Justice in its projects to restructure the traditional administration of justice and to make an inventory of customary law. He was later seconded to the office of the first Vice-Chancellor of the University of Namibia (UNAM) to help build the first institution for legal education on Namibian soil: UNAM'S Faculty of Law. He joined the Faculty upon its inception. He has served as Deputy Dean and Dean of the Faculty.

Prof. Hinz held the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair: Human Rights and Democracy in the Law Faculty's Human Rights and Documentation Centre from 2000 to 2009. In 2009, Prof. Hinz retired from his full-time position at the University of Namibia. In 2010 he returned to Germany, but remains related to UNAM as research professor. Apart from holding the position of professor at the University of Bremen, he is Adjunct Professor of Law and African Studies at the Jacobs University in Bremen since 2014.

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PREFACE

The Namibian legal system is premised on the principle of legality. One of the essential elements of the principle of legality is that the law must be specific and clear. This presupposes that the law must be drafted clearly and in such a way that a person may ascertain the legality of a particular course of conduct. Implicit therein is also the requirement that the law should be accessible and foreseeable. These requirements, needless to say, equally apply to customary law given the pluralistic nature of our legal system.

The Customary Law Ascertainment Project, as mentioned elsewhere, is not aimed at codifying customary law in Namibia. That task is the preserve and prerogative of the Executive. The global objective of this Project seeks to assist in giving meaning and effect to the principle of specificity as it relates to the customary laws applicable in Namibia.

The principle of legality in all its facets is inextricably linked to human rights. The major international and regional human rights instruments all expressly and implicitly guarantee and protect this principle. For instance, the International Covenant on Civil and Political Rights (ICCPR), African Charter on Human and Peoples' Rights (ACHPR), and the European Convention for the Protection of Human Rights and Fundamental Freedoms all guarantee and protect this important legal principle.

During the workshops on good governance with Traditional Authorities in 2001 and 2002, sponsored by the Office of High Commission for Human Rights, Geneva, the traditional leaders strongly recommended that the Human Rights and Documentation Centre at the University of Namibia, assist in documenting their customary laws to enable current and future generations to become aware of their customary laws. It is against this backdrop that the Human Rights and Documentation Centre of the Law Faculty of the University of Namibia takes particular pride and joy in being associated with this epoch-making project. With this work we are not only seeking to contribute towards ascertaining and making customary law accessible to its users; through this project we are also trying to ensure that traditional and informal justice systems in our country evolve towards serving justice in full respect of international human rights standards.

In celebrating this work, a few names deserve special mention. In this regard, Professor Manfred Hinz, former Dean of the Faculty of Law (2000–2004) and a long-standing friend of the Faculty, the University itself and the Namibian nation, stands out. Prof. Hinz took the lead and started consultations with traditional leaders to verify the need. Prof. Hinz is a “Guru” of customary law in Namibia. His love, passion and commitment for Namibian customary law are beyond dispute. This project serves as a prime example. We therefore take this opportunity to acknowledge and give credit to his active involvement and guidance for the successful completion of this project.

Special thanks go to Professor Nico Horn, Professor Oliver Ruppel, Mr John Nakuta and Ivone Tjilale, all from the Human Rights and Documentation Centre, for their contribution to the success of this project.

Alexander Gairiseb was the senior student assistant for *Customary Law Ascertained volumes 2 and 3*. Mr Gairiseb had the difficult task of coordinating the work of the other student assistants, liaising with Prof. Hinz, and meeting and negotiating with the relevant traditional authorities. The sterling work done by Mr Gairiseb in performing these tasks is hereby acknowledged and sincerely appreciated.

All the student assistants and informants, especially Lotta Ambunda, Erastus Arnold, Andreas Haikera, Ritta Hengari, Susan Hinda, Sandosca Jimmy-Naruses, Verinao Kamahene, Moses Ikhumb, Ilga Rheent and Willem Swartbooi are also acknowledged and appreciated. They have been the proverbial foot soldiers for this project and the successful completion thereof would not have been possible without their dedication and hard work.

Professor Jekura Kavari, Levi Namaseb, Andreas Haikera, Moses Ikhumb, Charlie Nqisji and Lochna Meeser gave invaluable support editing and checking indigenous language texts. Sandie Fitchat has to be thanked for editing some of the documents contained in this volume.

A special word of thanks is due to UNAM Press and its staff, Jane Katjavivi, Jill Kinahan and Fredrika Motinga. Jane and Jill did a wonderful job in ensuring the successful completion of this epoch-making project. Indeed, both were fully committed to the book and contributed to it in a way far beyond the borders of a publisher.

We are extremely indebted to the Finnish Embassy which generously funded this project and graciously extended the time-span for the usage of their funds to ensure the finalisation of the project and the publication of the book. Our thanks also go to the Department of Development Cooperation of the Free Hanseatic State of Bremen which generously supported our work on customary law over the years. We are particularly grateful for the special financial contribution they made in 2012.

Dr Chiku Mnubi-Mchombu

Acting Director: Human Rights and Documentation Centre (HRDC)
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FOREWORD

The societal entities that today we call traditional authorities were the more-or-less autonomous communities that governed the day-to-day life of their members for many years, before colonial powers came into our country and subjected them to their rule.

Many historical records contain evidence about the laws enacted by traditional rulers and their advisors in colonial times. These records also show that the law was not static, i.e. set for all time. It changed and was changed as need arose. In some cases it was also expected that a new ascendant to a chieftaincy could use the occasion of taking office to announce new laws.

There were many interventions into the laws and governing practices of the various traditional communities of Namibia during the colonial period, to transform them in the interests of the colonisers. The implementation of the policy of separate development and apartheid, under South African rule, is a good example of this. These interventions distorted customary laws and the rule of traditional leaders but did not destroy them. Indeed, the continued existence of customary law was recognised in the drafting of the Constitution of Namibia in 1989–90. Article 66 of the Constitution establishes customary law at the same level as the Roman–Dutch law introduced under colonial rule. This constitutional confirmation of customary law also included the confirmation of the custodians of this law – the traditional authorities.

The Presidential Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders established in 1991,¹ under the able leadership of the late Advocate F. J. Kozonguizi, submitted its report (commonly referred to as the Kozonguizi Report) to government in the same year.² The report left no doubt that, despite many deformations resulting from colonial interventions, traditional authority and customary law were widely appreciated in Namibia and should be retained.

The Kozonguizi Report also submitted a draft bill for a Chieftainship Act,³ which opened the debate about how to deal with chiefs and customary law in independent Namibia, and led to what became the Traditional Authorities Act of 1995,⁴ later revised in 2000.⁵ It is noteworthy that the revised version of the Traditional Authorities (2000) took note of the law-making capacity of traditional authorities. Section 3(3)(c) states that a traditional authority may ‘in the performance of its duties and functions under this Act ... make customary law’.

1 See GN 32 of 1991.

2 Republic of Namibia (1991): Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional and Tribal Leaders. Windhoek: Republic of Namibia.

3 At 111ff.

4 Act 17 of 1995, amended by Act 8 of 1997.

5 Act 25 of 2000.

The Namibian Parliament – the National Assembly and the National Council – and the other organs of state, are well-advised to take note of what the traditional authorities do, in particular in terms of the above-mentioned capacity of making law.

Customary Law Ascertained Volume 3. The customary laws of the Nama, Ovaherero, Ovambanderu, and San communities of Namibia is the third volume from the Customary Law Ascertainment Project of the Human Rights and Documentation Centre of the University of Namibia. It completes the self-statement of laws of the recognised traditional authorities who participated in the project, all of which have been signed by the traditional leaders concerned. Although some traditional authorities did not participate, the customary laws of most recognised traditional authorities have now been stated by the communities themselves.

All three volumes are an invaluable collection of customary law in current practice. They give us an insight into what our traditional authorities have been doing in the years since Independence in making laws, streamlining the law, changing it, and applying it when deciding on cases brought before them.

A good example is that of widows who were deprived of their houses and the land they had worked on during many years of marriage, after the death of their husbands. This practice was much discussed in the country in the early 1990s, and also occupied the attention of Parliament. It was debated in meetings of the traditional authorities concerned and eventually resolved by changes in the customary law of all the Oshiwambo-speaking communities.⁶ In this way, the custodians of customary law were able to offer new laws, even before the Namibian Parliament addressed the problem in the Communal Land Reform Act.⁷

What this shows is that, as much as traditional authorities need to learn about the work of Parliament, Parliament can also learn from the traditional authorities and customary law. When enacting laws that have a bearing on matters deemed to be in the realm of traditional authorities, consultations with those authorities could assist Parliament in finding rules that are in line with local perceptions and aspirations. This would enhance the general acceptance of new legislation, and compliance.

This collection of ascertained customary law reflects what the various traditional communities perceive to be their law, or rather, the parts of their law that are worthy of noting in written form. This is a resource we have not had before and that is also not found in most African countries where traditional authorities work and administer justice. It is a most commendable achievement. We are now in the position where we can listen in an informed manner when people say that such and such a provision is or is not ‘our’ law, and we have a benchmark against which to discuss such matters. Similarly, the

6 See Customary law workshop of Owambo traditional leaders – Ongwediva, 25 – 26 May 1993, in: Traditional Authority of Ondonga (1994): Ooveta (Oompango) dhOshilongo shOndonga – The laws of Ondonga. Oniipa: ELCIN: 85ff.

7 Act 5 of 2002, see Sec 26 of the Act.

self-statement of these laws allows us to see whether any of these provisions may need reconsideration in view of our constitutional principles or statutory law, and where to suggest specific amendments. It will now be up to the Namibian public in general and to the competent organs of state, i.e. the legislature, judiciary and executive, to effect any changes deemed necessary.

What we have in the three *Customary Law Ascertained* volumes is a collection with definite authority, but we must also understand that customary law ascertainment and law-making is a process that goes on, as does law making in any democratic society.

Professor Peter H. Katjavivi
Speaker, National Assembly of Namibia

Part I:

Introductory remarks

THE ASCERTAINMENT OF CUSTOMARY LAW: WHAT IS ASCERTAINMENT OF CUSTOMARY LAW, WHAT IS IT FOR AND WHAT IS THE WORK AHEAD?

Manfred O Hinz¹

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 choose for writing law in an abstract manner, by way of selective statutory enactment or even

1 The following is an amended version of my introductory remarks to the first and second volumes of *Customary law ascertained*. (Cf. MO Hinz, ed., assisted by NE Namwoonde (2010) *Customary law ascertained. Vol. 1. The customary law of the Owambo, Kavango and Caprivi communities*. Windhoek: Namibia Scientific Society, p 3ff. and MO Hinz, ed., assisted by A Gairiseb (2013) *Customary law ascertained. Vol. 2. The customary law of the Bakgalagari, Batswana ba Namibia and Damara communities of Namibia*. Windhoek: UNAM Press, p 13ff.) The amendments reflect, in particular, comments received after the publication of the second volume of *Customary law ascertained*. As a former member of the Faculty of Law of the University of Namibia, I was responsible for the *Customary Law Ascertainment Project* of the Human Rights and Documentation Centre of the Faculty. In this but also in my personal capacity, I wish to express my sincere gratitude to the Council of Traditional Leaders of Namibia and all the traditional leaders with whom I could work since the independence of Namibia for the years of trust and result-oriented cooperation. A word of special appreciation is due to *Elenga Enene* Ndilimani Herman Iipumbu, the supreme leader of the Uukwambi Traditional Authority and *Elenga Enene* Peter Kauluma from the Ondonga Traditional Authority, with whom I was able to work on matters of customary law for almost 20 years. With Peter Kauluma, I co-authored the introduction to the second edition of the *OoVeta dhOshilonga shOndonga – The laws of Ondonga* (Elelo lyOpashigwana lyOshilongo shOndonga – Traditional Authority of Ondonga, eds, 1994. Oniipa: Evangelical Lutheran Church in Namibia, pp 27-57). I have published several articles on the ascertainment of customary law; cf. e.g. (1997) Law reform from within. Improving the legal status of women in Northern Namibia. *Journal of Legal Pluralism and Unofficial Law* (39): 69-79, (2009) Part 1 of the Namibian Ascertainment of Customary Law project to be completed soon. *Namibia Law Journal* (2): 109-119, and (2009) “... to develop the customary law into the common law of the Sudan ...” Customary law in Southern Sudan: A strategy to strengthen Southern Sudanese law as a source of law in an autonomous legal system, Juba/ Windhoek: United Nations Development Programme (UNDP) and Ministry of Legal Affairs and Constitutional Development (MoLACD). The following text uses parts of a paper contributed to the conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, organized by the United States Institute of Peace, the George Washington University and the World Bank in Washington from 17 to 18 November 2009. My publication titled *Developing customary law: Self-stated laws of Namibian communities and customary law consultative meetings with traditional leaders* (MO Hinz, assisted by S Joas (1995) Windhoek: Centre for Applied Social Sciences) is a predecessor of the three volumes of the customary law of the various Namibian traditional communities.

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, going back to 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 acceptable way of doing so. If one goes deeper into the history of given legal orders, one will detect that very concrete societal circumstances prompted the developments of the various legal orders.

Why then ascertaining African customary law? Who needs ascertained customary law and how should ascertainment be done? Do traditional leaders applying customary law need it to be ascertained? Before the many interventions by statutory law, and, more so, before the development of independent nation states, traditional leaders could state with good reasons: “Why ascertain customary law? We know our law. It is only you, the outsiders, who want to impose on us some kind of written version of the law, which will not be our law anyway!” 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.

Traditional communities are not homogeneous communities as they used to be, when basically everybody knew what the law of the community was, and where traditional ways of communicating knowledge provided young people with the necessary education to grow within the value framework of the community. There is also a growing understanding that the legal complexity experienced in urban settlements where various customary laws apply forces attending to ascertaining and even to standardising customary law. There is a growing acceptance that the verdict of the chief is no longer necessarily the last word; dissatisfied parties may take the verdict of a chief to appeal. The judges sitting on appeals will not necessarily know the customary law applied by the court a quo and fail to get knowledge unless there is something in writing to inform them.

The *Customary Law Ascertainment Project* responds to this development. However, it does not respond by offering codified customary law. It responds by grounding an environment that opens space to traditional communities and their authorities for what we call the *self-stating* of customary law.² *Self-stating* customary law has a history in Namibia, going back to pre-independence developments in some of the traditional communities. The more or less independently undertaken efforts by some traditional communities eventually resulted in the nation-wide *Customary Law Ascertainment Project*. The Council of Traditional Leaders took it as its project and called on all traditional authorities to start their own projects to ascertain their customary law.

2 For the term *self-stating*, see below.

The very demanding challenge to the Human Rights and Documentation Centre of the Faculty of Law of the University of Namibia to direct and co-ordinate the project led to the decision to divide the project, first into two parts and, as the project developed, eventually into three parts: Part one encompasses the communities of the central and north-eastern area of the country, parts two and three cover the communities in north-western, central and southern Namibia.³

Based on the background of the project, the following will start by discussing the widely propagated call for the codification of customary law and, after this, attend to the meaning of ascertainment. Although these introductory remarks will not allow for a comprehensive reflection of the laws contained in the three volumes of *Customary law ascertained*, some arguments will be submitted to understand basic differences between the laws of volume 1 and the two subsequent volumes of *Customary law ascertained*. Suggestions on the way forward will conclude the introductory remarks.

African customary law and the call for codification

African customary law systems have, as African scholars hold, survived thousands of years as orally transmitted systems of law. They will not become ‘more’ law or law-like by being codified. Common law has survived history and remained a highly valued system of law without being codified. Why then argue, as lawyers do, that African customary law must be codified? This argument has accompanied the discourse in African jurisprudence since the days when many of the now independent African states achieved their independence!

Looking closer, it becomes obvious that many Western-educated lawyers from Europe and Africa never took it on themselves to enquire about the nature of African law. For them, African customary law was very different from the law learned in school and, therefore, had to be changed to become similar to the mainstream of law taught at school. Indeed, African customary laws show differences to Western law because both forms of law are based on different concepts of justice and maintain procedural rules geared towards achieving their concepts of justice. In view of this, and since there was no administration of justice in Africa comparable to the administration of common law that would produce reliable precedents, the call for codification appeared to be the easiest way to ‘uplift’ African customary laws to the so-called standard of real law. That African customary laws would lose their flexibility to be applied by the communities in the interest of restoration of peace and harmony among themselves was of no concern to the proponents of codification!

There are important lessons which legal anthropological research has developed over the years and which have also been acknowledged by courts of law. These lessons support the voices today that speak against the codification of customary law, because codification will destroy one of the most important qualities of customary law, namely its

³ See the reference to the two published volumes of the *Customary Law Ascertainment Project* in fn. 1.

openness to accommodate reconciliatory solutions to problems instead of allowing the law to win the parties over. It is worthwhile to mention that South African courts support the vote against codification.⁴ South African courts were faced with the situation where the law, as 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 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 local law of the people would lose its quality of being people’s law if it were codified into a statutory type of document.

It is interesting to note that some self-stated customary laws refer to their respective laws as codification. In editing the laws, we were tempted to suggest the removal of the word *codification* to the community which used the term. We eventually left *codification* in the submitted text. We did this in line with the general policy of the *Customary Law Ascertainment Project* to leave the submitted text as it is wherever possible. The rules in the self-stated laws may be challenged in court when decisions of the community courts go on appeal to state courts. Customary law may also be challenged through public debates to which traditional authorities may respond. In other words, it is left to the respective traditional authority or to the interpretation of a competent court to decide whether the qualification of the self-stated law as codification is a mere folk qualification. Whatever the result, one needs to bear in mind that it is up to the discretion of the traditional community to change the contents of their self-stated law in exercising their authority in terms of section 3(3)(c) of the Traditional Authorities Act, according to which they have the power “to make customary law”.⁵

Article 66 Sub-article (1) of the Constitution of Namibia recognises that the legal order of Namibia is pluralistic: there is, on the one hand, the system of general law (the Roman-Dutch common law and the statutory enactments) and, on the other, a plurality of customary laws. Both spheres do not only co-exist, they are interlinked. A number of rules have also been explicitly set by the state to regulate the relationship between the general law and the customary laws. This regulation starts with the constitutional rule just quoted, which subjects customary law to the constitution and other statutory law, and extends to such statutory enactments that deal with matters under customary law.⁶ There are also many rules of common law that offer themselves for application to customary law.

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

5 See here also *Hikumwah v Nelumbu*, unreported judgment of the High Court of Namibia of 13 May 2015, in which the question arose as to whether customary law of the Oukwanyama Traditional Community as contained in an unspecified publication of 2007 would mean that the customary law of the Oukwanyama Community was codified. For procedural reasons, the court opted for the view that the customary law of the Oukwanyama Community was not codified, but oral.

6 Such as the Traditional Authorities Act, 25 of 2000, and the Community Courts Act, 10 of 2003.

However, statutory law in place leaves us without answers to many questions.⁷ Before we accept offers of common law for the application of customary law, we have to question the rationale behind those offers, and we have to consider whether or not the rationale behind is reasonable to justify the application to customary law.⁸ Filling statutory gaps and applying rules of common law to customary law, however, require the jurisprudential understanding of legal pluralism. Accepting legal pluralism means accepting the differences in the operating and functioning of the plural legal strata. As much as the ascertainment of customary law by way of various traditional communities self-stating their laws may be welcomed as a contribution to legal certainty and the rule of law, the fact that customary law has been ascertained in the manner described does not automatically imply that the concepts and rules in operating the general law should similarly be applied to customary law – at least as long as the operation of customary law remains within the framework provided for by the general confirmation and recognition of customary law in Article 66 of the Constitution.

Conventionally-arguing legal minds may have difficulties with what is called the flexibility of customary law and may plead for one straightforward legal system without such flexibility, but legal anthropology has dismantled this centralist understanding of law as an illusion. What this leaves us with are the jurisprudential challenges of legal pluralism. *Customary law ascertained* can only open the debate on the said challenges, a debate to which all concerned must contribute. The coexistence of the various strata of law will only lead to a functioning legal system – a system that provides justice and, with this, the enjoyment of human rights as they are guaranteed in the Namibian Constitution and international instruments to which Namibia is a signatory – if research, legal education, the legal profession and the public at large take note of these challenges.⁹

What is the meaning of ascertaining customary law?

What do we refer to when talking about the ascertainment of customary law? What do we expect when suggesting the ascertainment of customary law?

The Community Courts Act¹⁰ deals with the ascertainment of customary law in its Section 13. This section prescribes the procedures to be applied by courts in case of

7 The jurisdiction in murder or rape cases is one of those questions: The law of the state and some customary laws require jurisdiction. What is to happen when a person has spent time in prison after conviction of murder and is thereafter called by a community court to pay compensation? Horn ends his review of the first volume of *Customary law ascertained* by stating: “If one consults *Customary law ascertained* one thing is clear: the line between the jurisdictions of common law and customary law still needs to be drawn.” N Horn (2011) *Customary law ascertained. Volume 1. The customary law of the Owambo, Kavango and Caprivi communities of Namibia*. In *Namibia Law Journal* 3(1): 133ff., 140.

8 The common law doctrine of *stare decisis* according to which certain statements of higher state courts have the quality of binding law is an example of this. Whether and if so to what extent *stare decisis* will apply in matters of customary law is, indeed, debatable.

9 Cf here MO Hinz (2011) African customary law – Its place in law and legal education. *Namibia Scientific Society Journal* 59: 83ff.

10 Act No. 10 of 2003.

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, from a legal point of view, ascertainment of customary law means more than having customary law recorded in one way or another: The act of ascertainment also awards the ascertained version of customary law a legal qualification.

Mere academic records of customary law based on questionnaires, court observations, analyses of traditional courts' case books, collections of cases and cases-complementary information from parties to cases, cannot be considered as an ascertainment of customary law. As useful as records of this nature may be, and as much as they may potentially contribute to the ascertainment as evidence a court may or may not rely on, they remain aids to a possible subsequent ascertainment in the above-stated legal sense.

The Traditional Authorities Act¹¹ supports this view. 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, it is one of the tasks of traditional authorities:

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

From this language, it is clear that *ascertainment* is not synonymous with *codification*. *Codification* is just one form – and a very specific one at that – of consolidating customary law. Codification 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 up to today, there is not much codification of customary law to which we could refer. To my knowledge and despite the calls for codification of customary law, as far as Africa goes, only the law of the Zulu in South Africa and the law of some groups in Southern Sudan have been codified to date.¹²

Apart from codification, we can also speak of the *ascertainment* of customary law when customary law is transferred into what has become known as the *restatement* of customary law. I refer 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

¹¹ Act No. 25 of 2000.

¹² Cf. the Zulu code: TW Bennett (2004) *Customary law in South Africa*. Cape Town: Juta, p 46f; for the codification of customary law in Southern Sudan, see my above quoted report on customary law in Southern Sudan. A special case are the Laws of Leretholi (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 Leretholi is still a matter of debate. See P Duncan (2006) *Sotho laws and customs*. Morija: Morija Museum and Archives (Reprint of the 1960 edition).

the restatement approach, borrowed, as he says, from the American Restatements, as follows: Restatements

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.¹³

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 law of tomorrow.¹⁴

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. *Self-stating* customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained: the people, the community, the traditional leaders as the custodians of customary law. The procedures of self-stating may differ from community to community. Nonetheless, the most important element in self-stating is that the end result will be a product created in the community which is to follow and apply the law. 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, since 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 on the community as part of their customary law. It is, however, important to note that the binding quality of the self-stated laws is neither an implicit repeal of the orally transmitted customary law or even only parts of it, nor does it imply a change in the nature of customary law as a set of flexible principles and

13 International development in customary law: The restatement of African law project and thereafter. In TW Bennett & M Rünger, eds (1996) *The ascertainment of customary law and the methodological aspects of research into customary law: Proceedings of workshop, February/March 1995*. Windhoek: Law Reform and Development Commission, p 33.

14 Bennett (2004, fn 11: 48) notes what the Law Commission of South Africa said on the possible restatement of customary law in South Africa. According to Bennett the Commission held 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.”

rules, nor will it prevent the community to amend their law as need arises.¹⁵ It is part of the philosophy behind the approach to leave the ascertainment of customary law to the communities that the communities decide what part of customary law they want to have in writing and how they want the content of the self-statement to be worded. Therefore, what we find in the self-statements are only aspects of the respective customary law. The fact that certain rules of customary law have been ascertained in writing will keep untouched the application of the now ascertained rules practised so far. That is, the applying authorities will still handle the ascertained rules in the manner that appears appropriate to them in view of the interest in achieving the restoration of societal peace.¹⁶

Legislative drafting has developed to a very specialized art in many modern jurisdictions. However, the reader of the self-stated laws should not expect that these laws follow the sophisticated techniques of modern legislative drafting. In many instances, the self-stated customary laws give educative explanations or even state rather general societal aspirations – a fact which will be a challenge to interpretation!

Traditional authority and customary law: a complex reality¹⁷

When looking at the traditional landscape as it was inherited from the time before independence, the *Commission of Inquiry into Matters Relating to Chiefs, Headmen and Other Traditional and Tribal Leaders* established in 1991¹⁸ found two different types of traditional authority: territorially-based traditional authorities, i.e. traditional authorities “settled in a particular area of jurisdiction” and traditional authorities the chief of which is a “Chief of the tribe and not of a particular area”.¹⁹ The Ovaherero and the Damara and their “paramount chiefs at large” were the obvious examples for the latter. The draft bill on traditional authority submitted by the Commission, therefore, recognised both: the position of chief and the position of paramount chief being the “principal Chief or an overall traditional leader of a Community”.²⁰ The main point of reference for chieftaincy is the “recognized area of jurisdiction ... for a Community”. Whether a chief will be the chief of a community at large will depend on the wishes of the community.²¹ An area or

15 FM d’Engelbronner-Kolff (1997) *Dispute resolution processes amongst the Sambyu of Northern Namibia*. Maastricht: Shaker Publications, p 149ff shows how traditional courts of the Shambyu community navigate between the self-stated version of their law and the legal principles behind the statement – thus allowing decisions appropriate to the cases to be decided.

16 Which is the main objective in adjudicating cases under customary law! Cf. MO Hinz, Justice for justice and justice for peace. In MO Hinz & C Mapaire, eds (2010) *In search of justice and peace. Traditional and informal justice systems in Africa*. Windhoek: Namibia Scientific Society, p 11ff).

17 The following paragraphs rely on MO Hinz (forthcoming, 2015) The Traditional Authorities Act and the “mushrooming” of traditional authorities. *Namibia Law Journal*.

18 Cf. GN 32 of 1991 by which the commission was appointed and also (1991) Report of the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders. Windhoek: Republic of Namibia. The commission was chaired by Adv. FJ Kozonguizi and is commonly referred to as the Kozonguizi Commission and the report as the Kozonguizi Report.

19 Ibid. 3.9.

20 See the definitions in Sec 1 of the draft bill, see: Report (1991): 111.

21 Sec 2(1) of the draft bill.

territory of jurisdiction is “such [an] area or territory set aside by the laws of the Republic for the settlement and occupation on a communal basis by a group or Community for the purpose and under the terms defined by the law governing the usage of land”.²² Each community in such a recognized area of jurisdiction “shall” have an office of the chief.²³

What is a community? A community is “a group of people whose common interests are determined by origin and settlement and who may be linked but not exclusively through culture, tradition and language and recognized by law as such”.²⁴ It is the right of any group of persons “who represents a substantial number of persons” to apply for recognition “on grounds of common culture, common origin, tradition or language”.

As much as the general result of the Commission of Inquiry – the recommendation that the “traditional system” should be retained – was appreciated in the public debate and the subsequent enactment of law, the concept of “area or territory of jurisdiction” to be “set aside by the laws of the Republic” as the entry point for the establishment of an office of chief was not.²⁵ Instead, the legislative focus moved to the communities and their wishes to organize themselves as traditional community with a chief, or, in the language of the Traditional Authorities Act in force, a “chief” or “head” meaning the “supreme traditional leader of a traditional community”.²⁶ The position of paramount chief was not confirmed in the subsequently enacted Traditional Authorities Act: the act knows only one supreme leader for each community and traditional councillors under the supreme leader.²⁷

A sophisticated definition of “traditional community” came into the act, the act of 1995, the act of 2000, and was also repeated in another piece of legislation relevant for traditional authorities: the Community Courts Act²⁸. According to this a “traditional community”

means an indigenous homogeneous, endogamous social grouping of persons comprising families from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognizes

22 Sec 1.

23 Sec 2(1).

24 Sec 1.

25 See the Technical Committee on Traditional Leaders Act which worked to advise the Ministry of Regional and Local Government and Housing while, at the same time, the Ministry of Justice was occupied preparing an act on the administration of justice by traditional courts (later named: community courts). See e.g. Minutes of 25 June 1993, on file with the author. See further the Traditional Authorities Bill, Republic of Namibia, National Assembly, B.33-94 and the minutes of the debates in the National Assembly and the National Council.

26 The Traditional Authorities Act, 25 of 2000, defines “chief” and “head” in two subsections identically. The definition of “head” was introduced to cater for traditional communities which do not have “royal families”. The original act (Act 17 of 1995) defined “chief” as “chief” designed in accordance with the act. The amendment to this act (Act 8 of 1997), replaced “chief” in the definition with “supreme traditional leader”.

27 See Sec 2 of Act 17 of 1995; 8 of 1997; and 25 of 2000.

28 No. 10 of 2003.

a common traditional authority and inhabits a common communal area; and includes the members of that community residing outside the common communal area.

This is not the place to investigate to what extent this definition and the anthropological language used in it ever reflected the social reality of traditional communities. It is enough to state that the definition certainly does not correspond to the reality of today.²⁹ There is hardly a traditional community with people who have their own line of ancestors, who have joined the community for whatever reason years ago or recently, and by joining it have either accepted the prevailing tradition or created new traditions on the basis of the ones in place, adding new elements to them from their traditions.

Further, since Meyer Fortes and Evans-Pritchard,³⁰ we basically distinguish between three types of political systems in African anthropology: Firstly, there are “very small societies” the members of which are kinship-related and in which the political organisation and the organisation of kinship are, following Fortes and Evans-Pritchard, “completely fused”.³¹ Secondly, we find societies in which “the lineage structure is the framework of the political system”. However, although the two structures are well-coordinated, “each remains distinct and autonomous in its own sphere”.³² In the third type of political system, “an administrative organization is the framework of the political structure”.³³

The typology of political organisation introduced by Fortes and Evans-Pritchard has remained influential in the analyses of political formations in Africa and other parts of the world until today although it does not reflect colonial interventions into the various forms of traditional government. The socio-political developments under colonialism and by the post-colonial orders resulted in structural changes of all the societies that represented political formations of the quoted typology. They were all made part of so-called modern political organisations, i.e. the states that claimed sovereignty over traditional governments, be they kingdoms or differently organised political formations. Colonial rule deprived the previously sovereign traditional political entities of their sovereignty. Indirect rule rendered or, at least had the intention to render, independent kingdoms and non-centralised political entities the task of administering their territories in the interest of the coloniser.

Although the degree of change following colonial interventions depended on the respective circumstances, it is fact that tradition is still very much part of the post-colonial reality, as proved by the above-quoted Kozonguizi report in the case of Namibia.³⁴ The traditional foundation of the various communities survived colonial transformations and

29 See E Shamena (1998) The concept of ‘traditional community’. In: FM d’ Engelbronner, MO Hinz & JL Sindano eds *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books, pp 323-327.

30 M Fortes & EE Evans-Pritchard (1940) Introduction. In: M Fortes & EE Evans-Pritchard eds. *African political systems*. London, New York, Toronto: Oxford University Press, p 1ff.

31 Ibid.: 8f.

32 Ibid: 9.

33 Ibid.

34 See fn 17.

subsequent inroads into the political, cultural and social set-up of the communities in many cases.

The reconstitutionalisations that followed colonialism did not lead to the abolition of the traditional political formations. Countries such as Namibia are democracies with political institutions that are expected to exist in democracies, but, nevertheless, accommodate traditional political formations. Looking at the Traditional Authorities Act, all these formations appear now to be formations with centralised authorities in so far as they all are to have a “supreme leader” in terms of the said act.³⁵ Nevertheless, the shape and format of authority differ depending on the political history of the respective community.

Most of the Oshiwambo communities and the communities of the Kavango and Zambezi Regions have a widely undisturbed history of succeeding members of their respective royal families.³⁶ They have a history of succeeding traditional leaders within a structure of leadership, either affiliated to royal families or, where such a family does not exist, consolidated on an ancestrally determined territory.

As far as the political structure of the Ovaherero is concerned, Malan suggests that these communities were historically *non-centralised* societies.³⁷ This is not the place to argue this. What is indeed true, is that the position of paramount chief emerged late and to some extent as response to colonial policy. It has, nevertheless, been maintained in the tradition of the Ovaherero, although it does not enjoy acceptance under the Traditional Authorities Act³⁸ and is also not appreciated by all Ovaherero. The attempts of the late Paramount Chief Kuaima Riruako to be recognised failed for many years.³⁹ Eventually, Riruako was accepted as chief of the Ovaherero Traditional Authority. Despite this name that could be read as meaning the traditional authority of all Ovaherero, the Ovaherero Traditional authority is just one community next to others recognised under the Traditional Authorities Act.

Budack holds that the political organisation of the Nama belongs to the centralised forms of government.⁴⁰ Various Nama communities developed permanent centres of authority with an organised structure of officials with special functions for governing the communities. However, there are differences if one compares the governments of the Nama communities, for example, with the governments of the Oshiwambo-speaking

35 Cf. Section 1 of the Act (No. 25 of 2000) defining “chief”.

36 This paragraph and the following rely on MO Hinz, A Schmidt & C Mapaire (forthcoming, 2015) *The Constitution of Namibia: Part 1*.

37 J S Malan (1995): *Peoples of Namibia*. Pretoria: Rhino Publishers:78

38 The Traditional Authorities Act recognizes only the positions of chief and senior councillor. See Section 2 of the Act, No. 25 of 2000.

39 The application for recognition was subject to an unsuccessful court case, cf.: *Kuaima Riruako v Minister of Regional, Local Government and Housing*, Case No (P) 336/2001 (unreported case in the High Court of Namibia).

40 K F R H Budack (1972): *Die traditionelle politische Struktur der Khoe-khoen in Südwestafrika. Stamm und Stammesregierung auf historischer Grundlage*. Pretoria: PhD thesis of the University of Pretoria:13f.

groups. The Nama communities are smaller in size and were under much more pressure in colonial times which did not allow their traditional structures to function as was possible in the northern parts of the country. With respect to the law of the Nama community, one detail requires special attention. The self-stated laws of the Soromas community refer to a document titled *Ryksboek* which was written in 1847. The *Ryksboek* is the oldest statement of customary law in Namibia and so far has not been taken note of in the work on Namibian customary law.⁴¹

The traditional life of the San as hunters and gatherers did not support the establishment of centralised governmental structures. The San used to live in small groups without a centralised authority. There were people who led the group because they were respected as skilled hunters or because of other personal qualities from which the community profited. Under the Traditional Authorities Act several San groups received recognition. They all have now opted for having one “supreme traditional leader”.

The legal texts and profiles submitted by the various communities reflect this difficult socio-political history: Quite a number of the communities of the central and southern part of the country offer very elaborated community profiles for the *Customary Law Ascertainment Project*. The complex history of communities, indeed, requires special efforts to set the framework of the respective group identity. Their laws have many sections on the constitutional structure of the communities, including provisions on succession to the position of their supreme leader.⁴² Some of the laws are very detailed: the result of the need to establish the administration of law in a way which has not been practised so far. The socio-political history of most of the communities in central and southern Namibia is a history of territorial expropriation, forced removal and concentration in reserves and of political degradation in the interest of colonial expansion and settlement. All these inroads into the traditional structures of the communities resulted in substantial changes in their political organisation, their understanding of the law, and the administration of it. Mechanisms closer to indirect rule were implemented in central and southern Namibia by the South African government only with the introduction of the apartheid-based separate development that culminated in the establishment of second tier governments in 1980,⁴³ although the implementation of second tier governments applied country-wide. However, the different exposure to colonialism created special problems for the efforts

41 The full title of the *Ryksboek* is *Ryksboek bevattende alle wette en regten van het Kapiteinschap te Bethanië* and can be inspected in the archives of the Evangelical Lutheran Church in the Republic of Namibia, Windhoek, under elcrnx5-21. I thank the former head of the National Archives, Mr Werner Hillebrecht, for giving me access to the *Ryksboek*.

42 The many consultations conducted by the *Customary Law Ascertainment Project* with the communities of central and southern Namibia allow us to predict that the laws of these communities will be subject to many changes as time passes and the various community courts of these communities operate in full.

43 Cf. Representative Authority Proclamation, AG 8 of 1980 and the various subsequent proclamations establishing representative authorities for 11 population groups. AG 8 of 1980 and the subsequent proclamations were repealed by the Constitution of Namibia of 1990 (see Article 148 of the Constitution and its Schedule 8).

of the central and southern traditional communities to re-appropriate their traditional foundation and apply it to changed times.⁴⁴

The work ahead

The publication of the laws of the Nama, the Ovaherero, Ovambanderu and the San communities marks the end of the *Customary Law Ascertainment Project*. The project has been completed in the sense that the three volumes with the customary laws of Namibian traditional communities contain what was received from the various communities in accordance with agreements decided upon in the various meetings the Human Rights and Documentation Centre was able to organise over the past years. Most of the communities honoured the agreements and delivered what was expected from them. Some, for different reasons, have not. Nevertheless, and despite the gaps, what has been assembled in the three volumes of *Customary law ascertained* is extraordinary. It is extraordinary as the three volumes assemble a portfolio of customary law that Namibia has never seen before, and which has no match yet in any other African country.

However, what is being presented by *Customary law ascertained* is certainly not the last word about customary law in Namibia. The communities will, of course, continue to develop their laws. Some communities meet regularly to decide on amendments to their laws. In particular, they meet to consult on changes to the value of the fines to be levied 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 changes in the market value of cattle.

The unification of customary law by some of the Kavango communities⁴⁵ may influence other clusters of communities to embark upon a similar process. Statutory changes by the Namibian parliament may provoke changes in customary law. Court decisions may have consequences for certain parts of customary law, as it was not the task of *Customary Law Ascertainment Project* to scrutinise the various pieces of customary law against existing statutes, including the Constitution of Namibia. Testing customary law against the Constitution and, in particular, the human rights in the Constitution to which customary law is subject is a very demanding undertaking which is left to the public discourse and, ultimately, to the competent courts.

The publication of the laws as they were submitted to the *Customary Law Ascertainment Project* will also generate revision processes by the communities themselves. The drafters and experts of customary law of the various communities will take note of the laws of other communities, compare them with their own laws, and most probably suggest amendments for improvement. They will also pay attention to the wording of their laws, the texts in their indigenous languages and the translations of which quite a number were done by the Project. We realised that there were some almost unsolvable language problems in certain instances. We hope that the English translations are as true

44 Cf. MO Hinz assisted by S. Joas (2003) *Customary law in Namibia: Development and perspective*. 8th edn Windhoek: Centre for Applied Social Sciences, pp 31ff.; 101ff.

45 See the first volume of *Customary law ascertained* (fn 1): 369ff.

as possible to the original texts, although it has to be noted that the indigenous language terms for certain legal concepts do not always express the same as the English concepts used.⁴⁶ Only further discussions, interpretations, applications and cases brought to the state courts will help to clarify any complexities. We were also very reluctant to make changes in the texts submitted to us. We changed, for example, the use of *tribal* into *traditional* and *tribe* into *traditional community* or just *community*. We did not alter references to headmen or senior headmen although these terms have not been kept in the language of the law-maker, i.e the language of the Traditional Authorities Act. Our reason for doing so was that both terms are very much still in use and reflect social reality, which is not necessarily identically reflected in the terms of the Act, which talks of *traditional* and *senior traditional councillors*. We also did not intervene when self-stated customary laws dealt with the question of ownership of communal land, and this not always in line with sections 17, 21 and 24 of the Communal Land Reform Act.⁴⁷

It is, therefore, important that all who will make use of this publication understand it as a work in progress, progress in the service to improve and further develop the customary law of the various Namibian communities. Looking back to developments in self-stating customary laws in Namibia, one sees features which can be expected to influence further steps in this work in progress. Earlier versions of self-stated laws concentrated very much on fines for the usual catalogue of wrongs, which we find in any textbook on criminal law or the law of delict. Later versions have added wrongs from environmental law in particular. 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 and the administration under this law. Community participation has been noted in many of the more recently drafted self-statements. The community profiles which introduce the laws of the various communities illustrate a growing awareness of the foundation of the community, including the philosophical foundations on which their laws are built.

Some years ago, some of us working with traditional communities on their customary laws were criticised when we communicated the self-stated laws of some communities, which we had collected at the time, in meetings with other communities. We were said to have violated customary law by circulating documents which were seen to be secret of some kind. We objected to this and see now that many communities have obviously taken note of what others were doing and even integrated rules developed by other communities into their own laws. Today, in some drafts of self-stated documents, we even see references to scholarly work (such as work done by me or by the Legal Assistance Centre). This is very encouraging although we also note that some of the drafts show the authorship of knowledgeable local personalities, which might not always be in agreement with the aspirations of the members of the community.

46 *Ownership* is an example to illustrate this. Under common law, ownership of land means having all rights over the land, including the right to sell. Under customary law, there is no ownership of land in this sense; if the concept of *ownership* is referred to, it expresses the existence of a certain authority over the land, but bound to obligations towards the community.

47 Act No. 5 of 2003.

We will certainly observe as time goes on what happens to the self-stated laws when more and more references to them can be expected within the communities and from outside. These references may challenge communities to reconsider not only their approaches to their laws, but also to their profiles. What Advocate B Gawanas wrote in her foreword to the second volume of *Customary Law Ascertained* summarises this challenge in the following clear words:⁴⁸

Taking what we have now in front of us ... we will look more closely at the laws applied by our communities. We will be able to raise questions with community leaders; we will be able to have informed discussions with the members of the communities; and we will be able to suggest changes for the better – particularly as regards the lives of women and children – in terms of what we have in our Constitution and its fundamental rights and freedoms.

In one of the scholarly comments on the first volume of *Customary law ascertained*, it was held that the translation of orally transmitted customary law into writing may carry the danger of changing the attitude towards customary law by regarding the written version of it as inflexible – as is the case with acts of parliament.⁴⁹ It was argued that, although the *writing down* of customary law was not meant as its *codification*, it would gain this quality in practice and, thus, replace other, particularly oral, sources of customary law. State courts are also expected to contribute to this development, as they may take the self-stated versions of customary law as the last word on the respective law. Whether or not this will happen will become evident when the community courts become fully operational, and decisions will be taken on appeal to the state courts. What happens then will depend on how the traditional communities and their courts will apply their laws, but also on how they make use of the power “to make customary law” as spelled out in the Traditional Authorities Act. The legal outcomes will also depend on the general development of the jurisprudential reflections on the operation of customary law.

When compiling the documents received from the traditional authorities for the publication, the *Customary Law Ascertainment Project* was approached by some concerned members of certain communities who even requested to stop the publication. “I was not consulted,” was the reason for that request. The reader will see when going through the self-stated customary laws of the various communities that, indeed, some of the communities have rules on how to make customary law. Responding to such requests, we explained that we did not see it to be our task to control whether or not the communities followed their rules when ascertaining their laws and making customary law. All that we expected was a certificate of consent to publish the documents to be submitted to us, duly signed and stamped by the respective traditional authorities. Incidents of this nature will certainly contribute to improvements in the process of traditional law-making. Another point submitted to us was whether the self-stated laws were ‘old’ or ‘new’ customary law, that is, the law stated as the law of the olden days and, therefore, not

⁴⁸ See volume 2 of *Customary law ascertained* (fn 1): XIII.

⁴⁹ See Horn (2011), fn 6: 137ff.

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of relevance today, or the law assembled in *Customary law ascertained*, i.e. the law as applied today. The reader will find that some documents in *Customary law ascertained* recall a time of the ancestors. However, this appears to be only a point of reference on which statements for today are built. The many consultations conducted during the Ascertainment of Customary Law Project left no doubt that *Customary law ascertained* was not meant to be a contribution to the history of customary law, but a reflection of the customary law as it is currently being applied. To what extent the communities met the expectation to self-state the presently applicable law must be left to the further process on the various customary laws.

EDITORS' GENERAL NOTE

This note repeats some of the statements made in the introductory remarks to assist the user of the laws contained in this publication.

It was up to the communities to decide what aspect of customary law they wanted to have ascertained in writing. The self-statements do not intend to repeal orally transmitted customary law, nor parts of it: the orally transmitted customary law remains valid, and will assist in interpreting the stated rules. This means that the self-stated laws of the various communities are not codifications of customary law.

Legislative drafting has developed into a very specialised art in many modern jurisdictions. However, the reader of the self-stated laws should not expect that these laws follow the sophisticated techniques of modern legislative drafting. In many instances, the self-stated customary laws give educative explanations or even state rather general societal aspirations – a fact which will be a challenge to interpretation!

As the communities are the lawmakers, they also have the authority to amend their laws, subject to the applicable customary and statutory law, including the Namibian Constitution. The fact that the communities have accepted to write down parts of their customary law does not affect the generally employed flexibility of customary law, according to which the restoration of peace is the primary objective.

Many of the laws contained in this volume were originally written in indigenous languages and, thereafter, translated into English. This created many problems as the English legal terms are not necessarily always a proper reflection of what the source languages wanted to express. This means that, in cases of doubt, the text in the source language has to be consulted for clarification.

Although the editors and translators have made every attempt to ensure that the materials are accurate in their formal presentation, omissions, inadequacies or errors that remain as regards the content of such materials are the responsibility of the various Traditional Authorities that submitted them. The editors have deleted obvious repetitions and corrected language errors. When the editors had difficulty in understanding the meaning in a submitted text, they consulted the relevant Traditional Authority to receive clarification. It was not the task of the Customary Law Ascertainment Project to check the submitted laws with respect to their compatibility with the law of the state, including the constitutional law of Namibia. Checking this and, where necessary, working on amendments to customary law, must be left to the established procedures of the Namibian Parliament, the courts and the public debate at large.

In cases where the supreme leader of a Traditional Authority had passed away and no new leader had been gazetted, the picture of the deceased leader was kept in front of the respective community profile.

During the editorial process, the editor has received comments by members of some traditional communities who complained that they were “not consulted” in the drafting of the self-stated customary law of their community. The editors’ response was that it was not the task of the Customary Law Ascertainment Project to intervene in the process of the self-stating by the communities. The Project conducted consultations with all the recognised traditional communities in Namibia, during which the communities were advised to do the self-stating in accordance with their respective rules. The Project recommended to the Traditional Authorities – in accordance with the gender policies of Namibia – to involve the voices of women, but again stated in clear terms that it would be up to the Traditional Authorities and communities to proceed with the drafting, as it was requested by their rules and customs. For the Project and the edition of the customary laws, it was eventually important to have the certificate of consent to publish the customary laws signed by the Traditional Authority. Whoever in a given traditional community is not satisfied with what has been submitted to the Project for publication is of course free to pursue his/her concern within the community and the public at large. Concerns of this nature will also remain qualified as arguments before Community Courts and a state court in the adjudication of cases.

Finally, the reader should be aware that the official price for animals or the money to be paid as compensation for wrongs committed may have changed in accordance with the development of the respective market price since the laws were submitted to the editors for publication.