

LAW REFORM FROM WITHIN IMPROVING THE LEGAL STATUS OF WOMEN IN NORTHERN NAMIBIA¹

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Introduction: The Self-Styled Laws of Namibian Communities

The administration of justice by traditional authorities in Namibia has awaited the reforming hand of the government since independence. Article 66 of the Constitution of Namibia (Namibia 1990) recognizes customary law as part of the law of Namibia subject to its compatibility with the Constitution and any other statutory enactments. The legal dimension of this constitutional repugnancy clause has become a subject of academic discourse (Hinz 1995a, 1996a, 1996b; Bennett 1995) and law reform activities. However, it only was in 1995 that the Traditional Authorities Act, 17 of 1995, came into force. Debate on and the enactment of the Draft Customary Law and Community Courts Act (the product of a two-year project conducted by the author for the Ministry of Justice) has not retained the priority it had three years ago. Despite the steadily growing pressure from the traditional authorities, it is not known when this act will replace the outdated legislation inherited from the South African administration.

At a conference on the administration of justice by magistrates and traditional authorities, organized by the Ministry of Justice in April 1992, one of the traditional communities, the Kwangali (who live in the western part of the Okavango Region) presented a document, 'The Laws of Ukwangali'. It is divided into 11 sections, dealing with different wrongs or offences and the legal consequences a traditional court may impose in a case of conviction (Hinz 1995b: 119ff). The Laws of

¹ I wish to thank my co-author Elenga Enene (Senior Councillor) of King Immanuel Kauluma Eliphas of Ondonga, Peter Kauluma, for his permission to rely on and to reproduce parts of our joint introduction to 'The Laws of Ondonga' (Hinz and Kauluma 1994) in this paper.

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Ukwangali were the first 'self-stated laws' of a Namibian community to receive the attention of the legal profession.

More than 15 portions of community laws were collected during research, conducted all over Namibia from 1992 until the present time (Hinz: 1995b: 81ff). Consultations with the communities were used to inform them about the laws collected; regional meetings followed at which communities received assistance in improving and refining their laws. For example, the fines for offenses were harmonized; in some instances, substantial reforms were achieved. The various consultations also motivated other communities to write down parts of their customary law.

The term 'self-stated laws' was introduced to qualify the documents, but also to indicate that the respective laws were the results neither of ordinary codifications nor of restatements (Hinz 1995a: 91). Little can be established about the processes which led originally to the self-stating of customary law. In some instances, individuals who functioned as the scribes of the documents could be identified. But the content of the documents was always the product of intensive discussions by the relevant bodies of the various communities.

The possibility of tracing the influence by the former administration on the traditional authorities and their courts is very limited, since no proper records of the responsible colonial department exist. However, some interesting information was found with regard to the process of stating customary law in what was formerly known as Kavango. In the library of the Magistrates' Court at Rundu, an undated document, *Stamreëls* (Afrikaans: tribal rules) was found which gives an overview of the administration of justice by the five Kavango communities (Kwangali, Mbunza, Sambyu, Gciriku and Mbukushu). The *Stamreëls* clearly were collected to inform the magistrate about customary law applied under the *Civil and Criminal Jurisdiction. Chiefs, Headmen, Chiefs' Deputies and Headmen's Deputies, Territory of South West Africa Proclamation, R348 of 1967*. Another undated report also deals with certain aspects of the laws of the Kavango communities:

in order to avoid uncertainties and mistakes in judgments, but also to achieve uniformity in dealing with different offences. (Fisch n.d., translated from Afrikaans, MOH)

In addition to the obviously longstanding practice of recording and self-stating customary laws, it was observed that quite a number of communities recorded their court proceedings. The quality of records differs according to the varying capacity of the 'tribal' secretaries.

Purists may ask what all this has to do with customary law. Are the so-called self-stated laws and the practice of recording not, once again, proof of the

well-known invention of tradition (cf Bennett 1991: 46ff)? However, it appears that the recording of laws (be it in writing, be it orally in a ritualized manner) is not new to certain communities in Namibia. Williams reports on 'Traditional Laws and Social Norms of Owambo Kingdoms' which date back to the end of last century (Williams 1991: 187). Loeb reports laws enacted by King Mandume ya Ndemufayo of Oukwanyama when he came to power in 1917 (Loeb 1962: 33).

The laws of Mandume are of particular importance. Loeb calls them Mandume's "new laws" (Loeb 1962: 33). The seven sections quoted by Loeb contain the demand for peace with the "tribes of the south", provide for the termination of cattle theft by nobles within the Oukwanyama territory, and the payment of fines in cases of assault "where blood was drawn", and prohibit the killing a person because "he was accused of witchcraft", and abortion in the instance of a girl becoming pregnant before her *efundula* (initiation). All these provisions were considered to be necessary deviations from the order in existence. Mandume changed the law by adjusting it to the new environment.

However, it goes without saying that interventions by the colonial administrations were ubiquitous. What is the practical value of scientific proof of these interventions? There is practical value in knowing how the law developed and was applied in traditional communities, since this helps us to understand its current context, and so provides tools for necessary changes. Furthermore it may be said against the view which dismisses all tradition as invented that, whatever the degree of invention, the legally crucial fact is the societal acceptance that even totally invented traditions may enjoy.

A very surprising example can be reported from the still ongoing public debate of the *Married Persons Equality Act*, 1 of 1996. The Act does no more than repeal certain provisions of the common law, not customary law, which violate the fundamental right to equality in the Namibian constitution. However, certain traditional circles have argued against the removal of the Roman-Dutch concept of marital power as if it were part of customary laws.

Another example can be given with regard to the use of the self-stated laws of Ondonga, an Oshiwambo-speaking community in northern Namibia, the area formerly known as Owamboland. Not many people could be found in Owambo who knew about the above mentioned Proclamation R348 of 1967. Many found this piece of legislation too difficult to read and threw it away. But the booklet 'Ooveta dhoshilongo shOndonga - The Laws of Ondongo' (Elelo 1989) they carried along whenever a legal issue had to be settled. Therefore, it was printed in a format which allowed the people to have it in their shirt pockets.

The Ooveta dhoshilongo shOndonga - The Laws of Ondonga

The laws of Ondonga (Elelo 1989, 1994) were first enacted in January 1989. They are not, as already indicated, a codification which replaces the orally transmitted laws and the laws established through the practice of the Ondonga courts. The *Ooveta* contain only those parts of the laws of Ondonga which the King's Council felt to be of particular importance, such as the provisions which outline the procedure for initiating a court case, for appeal, and for the transfer of a case to higher courts culminating in a hearing before the King's Council.

Some of the provisions of the *Ooveta* can only be understood in relation to the law which applied before the *Ooveta* came into force. For example, under the law prior to the *Ooveta*, a person who was guilty of causing the loss of another's eye or permanent injury to another, was obliged to compensate the victim for the duration of his or her life. The *Ooveta* changed this obligation into a single payment of four head of cattle.

Section 9 introduced into the laws of Ondonga a significant protection for widows with respect to property belonging to the household of the widow and her deceased husband. Distribution of property is allowed to take place only after a period determined by the amount of time needed to conduct the funeral as requested by custom. Under the law in force before the *Ooveta*, the widow was restricted during this period to her hut or the kitchen of the homestead (*elugo lyoshigumbo*), and thus the relatives were given ample opportunity to search the homestead and carry away whatever they liked. She now has the right to move freely in and around the homestead and hence to secure its integrity until the end of the mourning period.

Amendments to the 1989 *Ooveta* came into force on 20 August 1993. The amendments were officially announced to the Ondonga community by King Kauluma Eliphas. One can distinguish three types of changes in the amendments of 1993. Firstly, there were merely formal changes, mostly to clarify the wording. Secondly, new offences were inserted and existing offenses reinforced by defined fines. A fine of N\$50.00 is due for the cutting of trees. The same fine has to be paid for the illegal firing of guns.

Thirdly and most importantly, changes were enacted in 1993 to improve the gender balance and the protection of widows. The 1989 version of the *Ooveta* had already deviated substantially from the land inheritance concept linked to the matrilineal kinship system governing all Owambo communities. Widows were to be allowed to remain on the land they had occupied with their husbands. However, they were required to pay for their continued occupation according to the size of the land. The 1993 amendments removed the requirement of payment from the *Ooveta*.

The pre-1993 version of the *Ooveta* provided for a split payment for impregnating a girl. From the N\$600.00 to be paid as compensation, N\$400.00 was to be given to the girl, and N\$200.00 to the Fund of the Traditional Authority. After the 1993 amendments, the whole amount is to be paid to the girl.

For cases of adultery, the 1989 version of the *Ooveta* justified the obligation of the woman involved to pay one head of cattle to the Fund of the Traditional Authority by referring to her as the person who "caused conflict between men by this crime". The 1993 amendment deleted these words.

The really revolutionary change in matters of land inheritance requires some further explanation. Complaints about the hardship and injustice arising from the matrilineal inheritance system of the Owambo communities date far back. They originate in the substantial economic changes which drastically affected traditional societies and, in particular, matrilineal societies. The latter are based on an economically balanced, extended family structure for which cattle raising and small scale agricultural subsistence production was essential. In societies where the individual accumulation of wealth was not a prominent feature, the fact that wife and children were not the legal kin to the husband and the biological father was not seen as a problem. In the case of the children their relationship to the family of their mother was acceptable compensation. The changes in the balanced, extended family structure affected women, in particular widows, and also children.

A case has been reported in which a father, after the death of his wife, invited his son to stay on his land in order to look after him. The son acceded to the father's wish, and, with the permission of the father, erected a brick-house on his father's land. After the death of the father, the son was forced to leave the land. The headman with jurisdiction over this land claimed it back. The father's property was claimed by the father's matrilineal family, of which the son was not a member. He was, however, given permission to move whatever he could from the house.

The author had a meeting with the Ondonga King's Council on 16 November 1992 to discuss the translation of the *Ooveta* prepared by the author and another member of his research team. While going through the original and the translation, the author was unexpectedly asked to give an opinion on land inheritance. The opinion was given with reluctance. Nevertheless the point was made that it was difficult to accept that a widow who had spent most of her life cultivating the land on which she lived with her husband and children, and whose power and strength had gone into the soil, should be required to pay for that land. After a lengthy and intensive discussion, the decision was reached to delete the requirement of payment from the *Ooveta*. After this amendment it stated that widows should not only be allowed to reside on the land; they should be allowed to remain there without payment.

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The Women and Law Committee of the Law Reform and Development Commission (of which the author is a member) decided to seek a special audience with the Ondonga King's Council to confirm the decision of 16 November 1992. This meeting took place on 19 May 1993. The comprehensive minutes of this meeting (WLC 1993) provide a very interesting illustration of the difficulties that followed from the decision of the King's Council.

The first councillor who spoke after the King questioned the correctness of the report of the King's Council's decision.

He said that his recollection was that the payment made by the widows would be retained as it was one of the sources of income both for senior headmen as well as headmen. What has been agreed upon, to his understanding was that this payment would only be reduced. (WLC 1993: 3-4)

In responding to this, the author referred to his first meeting with the King's Council on this issue in November 1992 and a subsequent meeting in January 1993, both of which had taken a clear stand against the widow's obligation to pay for her continued occupation of the land. The next Councillor who took the floor confirmed

that indeed there had been such a proposal for the abolition of the said payment and that the proposal for the abolition of the said payment had indeed been endorsed by the majority of the Council although a handful had expressed reservations. (WLC 1993: 4)

Other councillors followed and expressed the same view.

After this clarification, the Women and Law Committee used the opportunity of this discussion to raise the issue of the extension of the protection of widows to matters other than land. The question was put to the Council whether an act of parliament should be proposed to regulate inheritance matters:

In reply to the question about the plight of widows one councillor prefaced his answer with a historical perspective of the Ndonga laws. He noted that their laws and tradition was worth praise. He said that the laws in question had existed for centuries but they have always been subjected to change whenever need arose. He said the Ndonga Council has changed many things in favour of widows. He recounted that years back widows were seen as slaves without any rights. But even before independence the Council had decided that widows should enjoy the same rights as they had while the husbands were alive. It was decided that property belongs to

the two people in marriage. Therefore the idea of evicting widows and grabbing their property is not part of the Ndonga tradition anymore. The problem worth mention only arises when the deceased was indebted to others. Only in those circumstances would the possibility of using his property to settle the debts arise. (WLC 1993: 5)

The inheritance of cattle led to special consideration. It was said that the question of cattle was an issue that

has not yet been fully clarified. This is so because much depends on the clan relationships. Most of the cattle under the custody of a deceased person would have come into the possession through traditional clan relationships. Most of the cattle under the custody of a deceased person would have come into the possession through traditional clan inheritance rules and would essentially remain clan property. If therefore one tried to pass such cattle to a widow this would be contrary to the clan rules as that widow would not ordinarily be considered to be a member of the clan. (WLC 1993: 5-6)

The same councillor reconfirmed the principle stated above, that the widow enjoys the right to oversee the estate of her deceased husband:

Whatever produce is left behind by the deceased would not be touched by anyone until the widow decided what to do as it was jointly owned by her and her husband in terms of labour. (WLC 1993: 6)

The King also joined the discussion and commented on the issue of cattle:

When there are cattle in a family people always associate them with the husband even though the couple may have bought and bred the animals jointly. With the changing circumstances where people want to provide for their families the clever men would make prearrangements under which a clear division is made between animals belonging to the clan and those acquired by the family. Very convincing arrangements and evidence have to be provided because in the absence of such evidence the relatives of the deceased would never believe that such an arrangement existed. (WLC 1993: 6)

These quotations suggest a number of relevant observations. The arguments of the

first councillor for retaining the requirement of payment by widows for the land they occupied before the death of their husbands must be seen as a last attempt to stop the envisaged change in the law. The reference to the income needed by senior headmen and headmen was relevant. According to Ondonga law, rights over areas of land (wards, *omikunda*) are allocated by senior headmen to headmen for a certain number of cattle. The headmen in turn sub-allocate land-use rights to the inhabitants of the area, again for a certain number of cattle. The land reverts to the headman after the death of the person to whom the headman allocated it. With the death of the headman, the land reverts to the senior headman.

The second point which is worth noting is the concept of law which apparently prevails in the King's Council. The fact that the laws are rooted in tradition is one aspect. The second is that the laws of Ondonga have been amended periodically since time immemorial (to use the formula usually quoted to strengthen the legitimacy of customary law) in order to meet the demands of the time. It is interesting to note that some expressions used when explaining changes in the law to the members of the Women and Law Committee (for example, when it was mentioned that the widow had to oversee the estate, or when *ownership* was related to *labour*) seem to reflect structural changes in the matrilineal kinship system itself.

Although the Council did not give a straightforward answer to the question whether an act of parliament on inheritance was needed, the way the members of Council explained the Ondonga procedure applicable to the administration of estates clearly showed that they had a firm belief in their capacity to handle the matter.

The events at the King's Council of Ondonga were followed by the *Customary Law Consultative Meeting of Owambo Traditional Leaders* which took place from 25 to 26 May. All the Traditional Authorities of Owambo consented to enact the position of the Ondonga King's Council on the rights of widows to remain on the land in their respective communities. This was, in particular, important for the Oukwanyama community, which had issued its laws not long before. The Laws of Oukwanyama (Hinz 1995b: 89ff) contained provisions which reflected the legal position of widows and land in the laws of Ondonga before the change.

The King of Ondonga addressed the issue of widows and land on an invitation of the Woman and Law Committee on the national television programme on 22 July 1993.

Law Reform from Within: an Underestimated Tool of Legal Development

An observation on the legal status of the self-stated laws is first necessary. It is obvious that the lawmaking power of traditional communities within a modern

constitution-based nation-state leads to questions about the fundamental principles in the theory of the state (the Kelsenian concept of *Grundnorm*) and with this to the debate on the concept of legal pluralism (Griffiths 1986). This is not the place to elaborate in-depth on this, nor to develop the theory of legal pluralism (of which the author is a supporter: Hinz 1990) substantially beyond the stage reached by its promoters. Only some remarks need to be added.

Little has been written on the law-making function of traditional authorities since this function is overshadowed by the standard definition of African (or traditional, black, native, indigenous, as the case may be) customary law, derived from the definition of customary law under general law. That general definition refers, as do most of the definitions of customary law, to the longstanding practice required before a custom qualifies as customary law (*Van Breda v Jacobs* 1921). This definition is well established in general law, but overlooks the changes which take place in the day-to-day practice of traditional customary law. Only a few authors note the law-making power of traditional authorities. One such writer is Prinsloo who mentions *wetgewing* as one of the sources from which customary law can flow (Prinsloo 1983: 17ff).

In respect of the Namibian legal order, one has to ask whether the constitutional guarantee which says that

[b]oth the customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary law does not conflict with this Constitution or any other statutory law. (Namibia 1990: art. 66 (1))

also guarantees the law-making function of traditional authorities. It is obvious that historically law-making was part of the functions of traditional authorities. It also cannot be established that this function was abolished prior to the constitution. The question is whether the constitution abolished it through the quoted 'extent' reservation. The author (Hinz 1995a: 96), d'Engelbronner-Kloff (n.d.), and Bennett (1996: 8ff) write in favour of the legal quality of the self-stated laws. There are two lines of argument. The first claims that according to legal doctrine in Namibia, even if the lawmaking function of traditional authorities were unconstitutional, it would remain in force until such time that it was repealed by parliament (Namibia 1990: art. 66 (2) and art. 140). The second argues that those provisions of the constitution which deal with law-making do not concern the law-making function of traditional authorities, since they do not affect the supremacy of parliament, which has in any case the power to repeal or amend customary law as stated in art. 66 (2) of the Constitution.

Law reform from within is an underestimated tool of law reform. The example given

above has shown that reform from within is possible. The fact that it is done by way of consultation does not speak against its operation 'from within'. It is obvious from the quoted minutes of the meeting between the Woman and Law Committee and the King's Council, that the people are proud of their traditions and laws. They are proud of their capacity to change according to new demands. The resistance to the proposal by some of the leaders is but normal in a process of change.

Such law reform from within is a much better guarantee for the acceptance of new laws than enactment by parliament even with consultations. Law reform from within produces laws which are understood as law made by the people. Experience shows how long official law reform takes. This is even more true in matters of family and inheritance law. The fruits of law reform from within grow more quickly, and thus bring more effective solutions. Lastly, law reform from within is at the same time an exercise in legal education, as the issues which it is to address come from within. How many laws passed by parliament after years of deliberation had to undergo amendments soon after they came into effect? Law reform from within allows the problem of amendments to be immediately addressed.

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