

BOOK REVIEW***The Future of African Customary Law*
by Fenrich J, Galizzi P and Higgins TE (eds)*****N Moosa****

In the abstract of "The Future of African Customary Law" the editors state that it

...is intended to promote discussion and understanding of customary law and to explore its continued relevance in sub-Saharan Africa...[It] considers the characteristics of customary law and efforts to ascertain and codify customary law, and how this body of law differs in content, form, and status from legislation and common law. It also addresses a number of substantive areas of customary law including the role and power of traditional authorities; customary criminal law; customary land tenure, property rights and intestate succession; and the relationship between customary law, human rights and gender equality.¹

This book is very timely and succeeds admirably in its aim to be a valuable contribution to and lens through which to view African customary law. The authors of the various chapters, and especially the editors, are to be commended for compiling an academic work that will serve as an overdue and essential text for graduate and post-graduate students, lecturers and persons generally interested in understanding African customary law. Indeed, it encourages the offering of an advanced course in comparative African law and is comprehensive enough to serve as a primary handbook for such a course.

The book provides rich insights into legal pluralism and customary law and contains several historical, contemporary and, as alluded to in its title, possible future scenarios relevant to sub-Saharan Africa in general. It also focuses on at least ten

* Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (Cambridge University Press New York 2011).

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1 This excerpt, although mentioned under the label 'editorial' reviews but taken directly from the abstract of the book, can also be found on two websites, namely *Amazon.com* at www.amazon.com/Future-African-Customary-Law/dp/0521118530 (date of use 14 Feb 2012) and *Cambridge Catalogue* at www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9780521118538 (date of use 14 Feb 2012).

countries, including South Africa, Botswana, Lesotho, Namibia, Ghana, Kenya, Sierra Leone, Liberia, Rwanda and Tanzania, and even in the final chapter extends its scope to ancient Egypt. Of a total of 21 chapters, four focus on Ghana. At least another four chapters are written from a South African perspective, and there is a chapter on each of three neighbouring countries, namely Botswana, Lesotho and Namibia.

The headings under which the topics unfold in the book, and as listed in the quotation above, are dealt with in six parts. Part One of the book presents a comprehensive and objective discussion, with useful insights, of the nature and future of African customary law. In the first chapter Goodman's 'Survey of Customary Laws in Africa in Search of Lessons for the Future' introduces the relevant topic well, and with a fresh perspective reaffirms the opinion that customary laws in Africa are still relevant in the modern nation-state. The topics are also well dealt with in some of the more general contributions in other parts of the book, such as those of Higgins and Fenrich in Part Six (dealing with the tension between the operation of traditional legal systems and the gender equality commitment among African states, eg Tanzania, Ghana and South Africa), of Bond in Part Six (dealing with the Women's Convention CEDAW and the African Charter on Human and People's Rights), of Oba in Part One (engaging in a grounded discussion on the nature of African customary law in the colonial and post-colonial eras) and of Joireman in Part Four (who addresses the land question in Africa and considers how land has sustained the authority of customary leaders), to mention a few.

Interactions between modernity, as represented by constitutions, statutes and other 'common laws', and what remains of or has become of traditional African customary law obviously dominate the book. Some chapters also deal with international and regional instruments, especially from a gender perspective. The concluding chapter in Part Six ventures into the academically controversial world of beliefs about the 'ancient past'. The chapter focuses on ancient Egyptian laws and practices which the author (Camara) compares with customary laws in West African countries.

As is also evident from its comprehensive index, among the traditional beliefs and (human rights) values discussed in the book are *ubuntu* (which is roughly translated

as 'showing one another humanity') and reconciliation, 'indigenous "reasonable man" tests' and 'ethnic vicarious liability', various types of female genital mutilation, and magic, witchcraft and cleansing rituals. Used in at least three of the chapters, the 'repugnancy standard' is a useful descriptor to capture some of colonial and post-colonial Africa's legal history. South Africa's current Constitution and its Bill of Rights² is to some extent continuing in the same vein.

Ubink's chapter lays the foundation for Part Two. Focusing on Ghana, it deals with the application of customary law in African state courts. The two other contributions on Ghana deal with the following topics: the rule of customary law in the administration of justice and the ascertainment of customary law (Akamba and Tufuor); and, concluding the discussion in Part Three on the role and power of traditional authorities, Abotsi and Galizzi engage in an exciting discussion on the co-existence of traditional leadership and constitutionally established authorities and their roles. Chapter Nineteen examines the relationship between customary law and women's human rights in Uganda. The author, Twinomugisha, presents a contemporary understanding of the relationship between customary law and women's human rights in Uganda. While he challenges the traditional view that women's human rights and customary law are irreconcilable, he is cognisant of the fact that certain customary norms affecting women do not conform to the Constitution of Uganda and therefore qualifies his initial opinion.

The fact that no general answer is readily available to the question of whether more or less African customary law (including its Traditional Authorities) has been recognised since 'decolonisation' is apparent from some of the contributions, for example, Morapedi's discussion of the resurgence of the institution of chieftaincy in Botswana (where the institution remains relevant). That predictions about the future of African customary law also depend upon many variables which make it difficult to offer recommendations is also evident from some contributions, such as Banda's chapter in Part Four 'Romancing Customary Tenure', which examines contemporary developments affecting customary tenure in sub-Saharan Africa. Although the author

² Chapter 2, *Constitution of the Republic of South Africa*, 1996.

presents some suggestions for reform, these are not however discussed in sufficient detail.

Moving away from the land and tenure debate, in the last chapter of Part Four the authors Rautenbach and Du Plessis deal with another important aspect of customary law, namely intestate succession. A lot of attention is given in this chapter to recent South African legislation and case law. Relying on the South African example, the authors provide good examples of how a constitution and the courts can protect and promote customary law.

While Higgins and Fenrich in Chapter Eighteen conclude that the *Recognition of Customary Marriages Act*, 1998 'falls short of providing protections that are sufficiently robust to satisfy constitutional and treaty-based commitments to gender equality', in Chapter Two, at the other extreme, Himonga pleads for 'living customary law' to be 'the major area to which African customary law scholarship should be directed'. Concentrating on living customary law in a South African context, she maintains the argument that customary laws remain relevant in modern African society and African legal systems and that living customary law can be an important tool for the protection of human rights in Africa. The author does not, however, supplement her arguments with a discussion of the practical solutions that African states can implement to overcome the challenges of integrating living customary law into national legal systems.

One of the two further South African contributions that are most timely is that of Bennett (in Part Five), in his coverage of 'Customary Criminal Law', wherein he discusses the *Traditional Courts Bill* (B15-2008) of South Africa and the noted absence of customary criminal law therein. The chapter is very relevant, especially in view of the fact that the 2012 version of the Traditional Courts Bill is currently being discussed at public hearings and also presents new avenues for developing a comprehensive framework to curb the rising crime rate in South Africa. The other contribution (in Part Three) is Koyana's critical discussion of traditional courts and the major role that they play in the South African justice system, in which he echoes the South African Law Reform Commission's view of the 'advantages' and 'disadvantages' of traditional courts.

Juma's discussion in Chapter Six focuses on Lesotho's customary *Code of the Lerotholi*. He concludes that the Code has been somewhat of 'a wasted effort'. This is in stark contrast to Hinz's coverage in Chapter Seven of the process of 'self-stating customary law' efforts by a number of Namibian traditional authorities. The author bases his discussion on the *Traditional Authorities Act 25 of 2000*, which authorises traditional authorities to make and to ascertain customary law applied in the communities. He also points out the potential conflict between the Act and the Namibian Constitution.

Other interesting contributions include those by Mgbako and Baehr on 'Paralegal Organizations and Customary Law in Sierra Leone and Liberia' (Chapter Eight), who, while acknowledging the problems presented by the dualist system of formal and customary law, advocate for the harmonious application of both systems. While their position provides a learning experience for paralegal organisations in Africa, due regard must also be paid to the diverse legal, political and socio-economic conditions prevailing in different African states. In Chapter Seventeen, Haveman writes passionately on the *Gacaca* court system in Rwanda and critically assesses whether the *Gacaca* today has retained the characteristics that defined it before the genocide. The chapter undoubtedly enhances understanding of customary criminal law and of a system which possibly can be considered a landmark of customary criminal law in Africa. Chapter Five by Ochich provides a detailed analysis of the position and application of customary law in Kenya. The author points out that while customary law in Kenya was gradually eliminated, the post-colonial governments have not been proactive in changing the *status quo*, and also challenges the legislature to direct the future development of customary law in Kenya. In so doing the author opens the door to the generation of further debate in the area, especially on the role that the different players, including the executive and judiciary, have in the development of this body of law.

Last but not least, the book undoubtedly abounds with useful examples of the interaction between modernity's historical challenges to African customary legal systems, together with some views about the future, which are to be seriously

considered. The book is indeed a great contribution to customary law studies and legal scholarship generally.