

Book Review

Himonga, C., Nhlapo, T., eds. 2015. *African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives*. Cape Town: Oxford University Press Southern Africa.

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The continued prevalence of customary law in many African countries is the ‘inconvenient’ truth of modern African society. It is inconvenient because many Western development professionals and academics perceive customary law as archaic and repressive, particularly of women, and the traditional institutions with which customary law is associated, as corrupt and unrepresentative. There is a widely held view that customary law is incompatible with the functioning of a modern democratic state which requires a body of statutory and common law. This book brings a different perspective to the theory and practice of customary law. Recommending an undergraduate textbook for reading by a wider audience is unusual, but those who work on institutions that play a role in common-pool resource (CPR) management in sub-Saharan Africa may benefit from the insights this book provides. Customary law and traditional institutions are integrated into the South African legal system, which is based on one of the most progressive constitutions in the world. This integration is not easy, but wishing it away ignores the increasing popularity of traditional institutions in South Africa and other African countries and their role in local governance (Oomen 2005; Ainslie and Kepe 2016).

Part I introduces the historical, theoretical and structural overview of South African customary law. Chapters 1 and 2 provide a detailed introduction to customary law that will both challenge and inform anyone new to the subject. There is valuable insight into how colonial and apartheid legal practice changed and codified customary law and how that in turn influences modern interpretations. Chapter 3 introduces the important concept of ‘legal pluralism’ which recognises

that multiple legal systems exist within a single legal order. Those who question the role of customary law in Africa may take note of the quote which is included from Griffiths (1986): “Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion.” The *de facto* situation in South Africa, and many other African countries, is that governments practice a system of legal pluralism that ranges from weak to strong. Throughout the book there is reference to the communitarian philosophy which also informs other African political and social institutions in addition to South Africa. This has been criticised as unworkable (Crook 1986) but the authors give an example of how the customary law principle of “ubuntu” (which embodies the concept of communitarianism) has influenced the writing of the South African constitution, and continues to be a guiding concept in modern South African jurisprudence.

Chapters in Part II are themed around personal law and personal rights in African customary law. These chapters may be less relevant to readers interested in property and commons resources. Nevertheless, the ambiguity that exists around personal law and personal rights under a system of legal pluralism, contains a lesson for those who are involved in structuring institutions to manage the use of CPRs. Legal pluralism inevitably involves some ambiguity. Abolishing traditional institutions in favour of institutions that are more democratic may not be possible or desirable, but this does not mean that both cannot exist in dynamic tension to be resolved at some undetermined future date.

The most difficult parts of the book address laws of succession, law of delict (the civil law equivalent of tort in common law systems) and criminal law (Chapters 9–12) but again the authors illustrate how customary law places more emphasis on group rights, duties and obligations than on individuals. Since customary law is not the same for different cultural groups there is considerable variation in how the law is applied in cases of death, adultery or theft. The lack of resources for studying the “living law” for a diverse range of groups is a real impediment in circumstances where courts are required to take customary law into account when passing judgement. The same difficulties apply in programmes aimed at building institutions around CPR management. Ideally, there should be several years of anthropological fieldwork to gain an understanding of customary laws and how they affect CPR management.

Section III concludes with two short chapters on the political and civic aspects of African customary law. Chapter 13 looks at traditional leadership institutions. The legal arguments that underpin the legitimacy of these institutions in the South African context may have wider relevance in other African countries where traditional leadership is increasingly popular (Ainslie and Kepe 2016). Those who claim traditional institutions have no legitimacy because they do not follow a Western democratic mode of representation are advised to read this chapter closely. The structure of traditional courts and their legal jurisdiction is the subject of the final Chapter 14 and is another area where regulation is bringing an end to widespread abuse. It is impossible to prohibit traditional courts, and even undesirable to do so where they deliver a low cost form of justice that is respected

by the community. It is difficult to think of an institution that is more effective in CPR management than a well-regulated traditional court. Several of Elinor Ostrom's design principles could be realised if development practitioners in rural Africa acquired an understanding of the functioning of traditional courts, rather than insisting on the establishment of institutions that require Western modes of representation.

This book is well laid out, thoughtful, insightful and highly recommend reading if you are interested in understanding how customary law is playing a role in modern South African society.

Literature cited

- Ainslie, A. and T. Kepe. 2016. Understanding the Resurgence of Traditional Authorities in Post-Apartheid South Africa. *Journal of Southern African Studies* 42(1):19–33. DOI: <http://dx.doi.org/10.1080/03057070.2016.1121714>.
- Crook, R. C. 1986. Decolonization, the colonial state, and chieftaincy in the Gold Coast. *African Affairs* 85(338):75–105.
- Griffiths, J. 1986. What is Legal Pluralism? *The Journal of Legal Pluralism and Unofficial Law* 18(24):1–55.
- Oomen, B. M. 2005. *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid era*. Oxford, UK: James Currey Ltd.