

# 5 A written “customary law” among the Rwa in Tanzania

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## Introduction

“Customs” are usually considered to become “customary law” when they are codified, that is, put in writing. But evidence of how such a process occurs is generally lacking. As an anthropologist studying a small population in northern Tanzania, the Rwa of Mount Meru, I had the chance to come across such a case and to follow the way these people codified their customs, adding more rules, changing a few of them, and improving their “customary law” over the years. It ended, in 2008, in a document they call their “Constitution”, which they drafted for their own use. The mere fact that a local community should decide to put its own customary laws in writing is, by itself, totally exceptional in Africa; no other example was ever evidenced on this continent. Moreover, the numerous revisions of these customary legal texts, which clearly demonstrate the Rwa’s lasting concern for their legislation, are also unheard of. It illustrates a paramount concern of any customary law, the desire to keep up with social changes. In the Rwa case which will be presented here, in its historical process, we will check whether their customary law can be considered a truly legal system, that is, whether it includes secondary rules of recognition, change and adjudication that, according to Hart (1961), and Halperin (this volume), any proper legal system should entail. But we shall also see that, even if writing down the rules is a way to “crystallize” them (Durkheim 1888: 47), not all the Rwa customary rules are included in their constitution. Wide spans of their social life and rules are not mentioned in this document, a fact that has to be stressed and needs to be interpreted. Then the question of how this customary law is enforced also needs to be addressed. This specific African case thus offers especially interesting material for discussing the transition from custom to customary law, and for debating the nature of customary law.

I will trace back the historical circumstances (sections 5.1 and 5.2) that gave rise to this truly unique “constitution”; then I will present successive versions of this text (sections 5.3 and 5.4), highlighting its flexibility and the way it closely connects tradition and modernity. It reflects social change while also

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influencing it. Next, I will discuss this law’s application in the Tanzanian national context (section 5.5). Although they are based on diametrically opposite principles, Tanzanian State law and this customary law do not ignore one another. On the contrary, they collaborate to find solutions to the conflicts in need of resolution. On the basis of this example, I will conclude (section 5.6) by reflecting more generally upon the characteristics and elements that are at play in customary law.

### **5.1 The Rwa and their past**

The Rwa, numbering around 250,000, are known in Tanzania as the Meru (pl. Wameru).<sup>2</sup> Beginning in the 17<sup>th</sup> century, this population gradually formed from various migrants who settled on the south-east slopes of Mount Meru (4585 m), facing Mount Kilimanjaro (see Figure 5.1). In the former Tanganyika, they were subjected to colonization first by Germany (1886–1918) and then by the United Kingdom, until the country gained independence in 1961.<sup>3</sup> Subsequently, the “African socialism” of its first president Julius Nyerere imposed obligatory Swahili-language schooling on everyone, with the result that today, those mountain-dwellers all know how to read and write. Furthermore, most of them are devout Lutherans as a result of the German missionaries’ energetic evangelization.

Following the colonists’ example, the Rwa became coffee-growers (Baroin 1998). They combined coffee – a cash crop – with other local food-producing plants, mainly bananas. Selling coffee has enabled them to enrich and modernize themselves. Today the population is very dense, farms are contiguous as well as the administrative districts, called “villages”. Land is a male asset, and wives go to live in their husbands’ homes. Every family practices intensive mixed farming, often complemented by indoor dairy farming and small livestock breeding. The Rwa constitute a very patriarchal society, where women hardly have a voice.

The current social structures are very elaborate. A centralized chieftainship is headed by the supreme chief or “Great Chief” (*Nshili nmini*), assisted by a board (vice-president, secretary, treasurer). He presides over the supreme council, which assembles the chiefs of the 17 patrilineal clans of Rwa society. The clans themselves subdivide into lineages, and lineages into lines. This preponderant structure regulates family and property affairs. But complementing this vertical division is a horizontal social division that classifies individuals according to their age. This age system defines successive generational categories according to a model that is very common in East Africa. In this, “warriors” who were once responsible for defending the country are guided by their “fathers”, and this system continues to safeguard respect for good morals and maintain the authority of the older classes over the younger ones (Baroin 2015).

2 Here I use their ethnonym (*Nnwa* in the singular; *Varwa*, in the plural) to avoid all confusion with the Meru of Mount Kenya, with which they are unconnected.

3 Tanganyika, which gained independence in 1961, adopted the name Tanzania in 1964 after merging with Zanzibar.

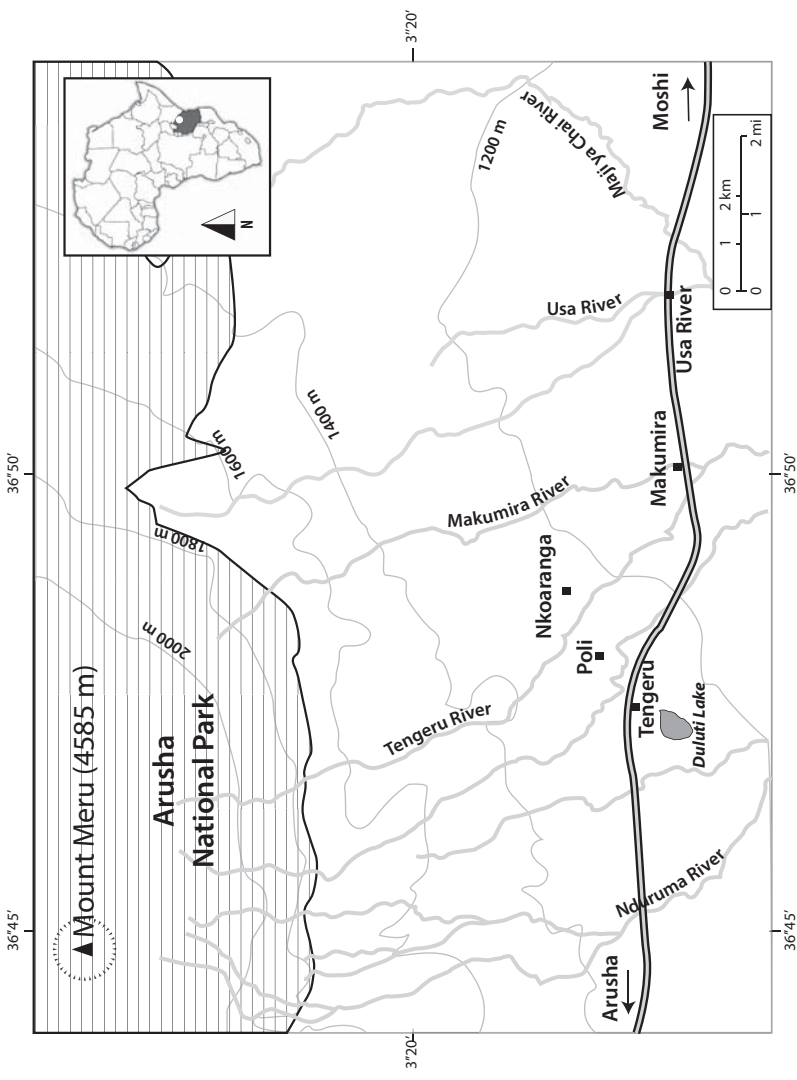


Figure 5.1 Map of Mount Meru region

## 5.2 The origins of the Rwa’s “Constitution”

The term “constitution” (*katiba* in Swahili) is directly borrowed from British colonial attempts to formalize indigenous law. These were dictated by a UN directive aiming to modernize and democratize “traditional” bodies throughout Tanganyika (Iliffe 1979, chap. 14), as the British had been managing that country since 1946 under the UN mandate. The idea was to replace the *Native Authorities* – chieftainships arising from indirect administration – with more modern *Local Governments*. The chiefs of each “tribe” would henceforth be democratically elected by the populations concerned, candidates having been first carefully chosen in agreement with the colonial administration. Each chief, legitimized by this vote, would be responsible for applying a written “tribal constitution”. The colonial authority helped each tribe to draft its own constitution, taking account of local practices as well as modern principles like the separation of powers between the executive and the judiciary (Hans Cory n.d., paper no. 71).

The idea of a “constitution” was thus implanted locally, but the negotiations undertaken with the Rwa in 1948 to define their new political-administrative bodies were jeopardized by a violent land conflict that postponed the project for several years. The Rwa rebelled against a colonial land-appropriation plan that provoked unanimous revolt. This plan was meant to resolve the problem of demographic and land pressure on Mount Meru, and to solve tense relationships between the Rwa and white colonists, whose coffee plantations surrounded Mount Meru and prevented access to water resources for the Rwa’s cattle (Luanda 1986). The plan drafted by a mandated expert in 1947 recommended the expropriation of a vast swathe of sparsely occupied pastures east of Mount Meru – where the Rwa drove their livestock – in order to reserve it for the colonists. In a large wave of solidarity, the Rwa opposed this project. They organized themselves, contacted other neighboring populations involved in similar struggles (the Chaga of Mount Kilimanjaro and the Kikuyu of Kenya, where the Mau-Mau revolt took place from 1952 to 1956). They hired a lawyer to bring legal action against the regulatory authority. Under the authority of the UN, the trial known as the *Meru Land Case* took place in New York in 1952. The Rwa lost the case, but it was the first time that an African population had defended its cause against colonists on the international stage, and they are still very proud of this episode.

Hostility against the colonial power was such that a first constitution proposed by the British was rejected by the Rwa in 1948. But after 1952, the situation calmed down with the end of the *Meru Land Case* and after the demand for the resignation of the supreme chief (the *Mangi*) was accepted.<sup>4</sup> The negotiations on the drafting of a constitution could therefore be resumed. A text was finally approved on May 27, 1953, without the Rwa becoming

4 Because the *Mangi* was an intermediary between his people and the colonial power, he could not oppose the expropriation plan, and this drew hostility from the whole Rwa community who demanded his resignation.

seriously involved in the project. And for a good reason: the previous year, they had set up another chieftainship running parallel to the *Mangi* institution. This new chieftainship, which was unofficial and independent of the colonial power, was headed not by a *Mangi* but rather by a “Great Chief”, *Nshili mmini*. The first one was elected on February 24, 1951. Others succeeded him, and this chieftainship is still in place today. But alongside it, the British-inspired constitution had an official character. It provided for the election of the *Mangi* by secret ballot, the separation of the executive and judiciary powers at all levels, and the establishment of commissions to manage specific services (Puritt 1970: 70). Since it was poorly adapted to local realities, it was never applied. However, the Rwa nevertheless recognized “the excellence of its underlying principles”, as a British administrator bitterly remarked. But despite this failure, the idea of an indigenous constitution stayed at the back of people’s minds, and this was the root of the constitution that the Rwa decided to adopt much later, in total independence. The first version that was sourced dates back to 1985.

What had happened in the meantime? Very little is known. In 1963, two years after independence, all of Tanganyika’s traditional chieftainships were abolished and the local colonial-era chief, the *Mangi*, thus lost both his post and his title. But because they were not official, the “Great Chief” and his council remained in place and continue to operate efficiently to this day, at the head of a political system operating on the margins of the Tanzanian administration. In 1965–1966, shortly after the abolition of all *Mangi*-ships, Canadian anthropologist Paul Puritt visited the Rwa. But his unpublished thesis (1970) indicates no subsequent developments after the 1953 constitution proposed by the British. Over twenty years later, in 1988 and 1991, American historian Thomas Spear conducted his own field research on both the Rwa and the neighboring Arusha, Maasai related farmers who occupy the western slopes of Mount Meru.<sup>5</sup> But his book (Spear 1997) ends at the *Meru Land Case* (1952), and the period that followed is not discussed. Personal investigations among the Rwa, between 1992 and 2014, provided the opportunity to collect from local chiefs four customary law texts, respectively dated 1985, 1986, 1995 and 2008.

From one version to the next, the document becomes better structured and more complete. This series of successive revised versions bears witness to the Rwa’s great concern with their own rules, to their desire to keep them up-to-date, in pace with their society’s economic and social evolution. Economic changes are reflected through the up-dating of payments and fines – a fact obviously linked to inflation in Tanzania – and through the monetary translation of payments that were originally made in livestock. The population increase on the mountain has forced out the livestock, with the exception of a few indoor animals, so the Rwa no longer have livestock to make these payments. On the other hand, the development of coffee cultivation in the 1950s strongly monetized the economy, to the extent that donations of monetary sums are more adapted to modern life. Social evolution, for its part, can be

5 The Maasai are pastoralists, widespread in East Africa.

traced through many changes not only in family law, but also in women’s rights and property rights. Moreover, keeping control of land issues is also a crucial concern for clan leaders, which led to new developments in later versions of these texts.

### **5.3 The first lists of “laws” (1985–1995)**

These texts are all written in Swahili, the Tanzanian national language, and not in the local Rwa language, *ki-rwa*. This is a political choice: it reflects the Rwa’s desire for their internal legislative texts to also be accessible outside their group.

#### **5.3.1 The 1985 text**

This six-page document is entitled “Decisions of the Assembly of Traditional Chiefs of the Meru People – phase 3–1985” (*Maazimio ya kikao cha washili wa mila za Wameru – Awamu ya tatu – 1985*). Despite its being the third version, the previous two are missing. The preamble of this version contains the names of the 14 members of the Supreme Council that passed the 66 “laws” it sets out (*sheria zilizowekwa*, “the laws that were changed”). It was signed by three people: Yesaya Lemera Kaaya, then the President of the Supreme Council<sup>6</sup>, his assistant Moses Isacki Nnko, and the Secretary of the Council.

It is a long and fairly confused list of rules mostly pertaining to payments, compensations or fines to be paid under various circumstances. In many cases, the amounts are expressed in livestock, with a precise list of animals (for example a bull, a heifer, a fat-tailed sheep), to which is added the provision of large (specified) quantities of banana beer. Banana beer once played a major role in Rwa society. Older men drank it in large quantities during their meetings, before and after colonization. Then its consumption sharply declined under the influence of the Lutheran church (Baroin 2001). Drinking beer together was indispensable for reconciling two disputing groups, particularly after physical injury. According to the 1985 text, the quantity required in such a case was 15 buckets of beer, that is to say around 300 liters.

This document’s first rules set out marriage payments (18 of them), the fines to be paid by a seducer in case of abduction and extramarital pregnancy, compensations for injuries (eight rules), those for fratricide, livestock theft, crop theft (seven rules), honeycomb theft, and the compensation to be paid to the clan in a case of incestuous marriage. Then come inheritance rules, land sale and rental conditions, provisions in case of spousal problems (fleeing the conjugal home, injuries by the husband, adultery by the wife). Girls’ property rights are asserted, which is something new since they had no land rights before. The clauses applicable in this regard are set out in three points: (1) no male relative can take this property back from the heiress; (2) the clan chiefs are required to witness the donation of one of the father’s plots of land to the

6 This is the *Nshili nmini* or “Great Chief” mentioned above.

daughter;<sup>7</sup> (3) the beneficiary makes an offering of one sacrificial sheep and two buckets of beer (these donations are made to the clan's members during a public ceremony establishing the borders of the field). The next article specifies the age of majority (18 years old), when men are required to start paying fines and attending clan meetings. The next clauses deal with livestock lending rules, fines for having impregnated, injured or deflowered a schoolgirl,<sup>8</sup> the fine to pay by an abortion accomplice (equal to the compensation for murder: 49 cattle).<sup>9</sup> The final two points concern the prohibition against a young, unmarried son receiving a share of an inheritance, and the nature of compensation for murder, henceforth payable not only in cattle, but also in cash.

### 5.3.2 *The 1986 text*

The following year a new, fourth version of the text was approved during a general assembly of all Rwa. It took place as usual in the central village of Poli, on a broad lawn beneath a majestic tree called *mringaringa* (*Cordia abyssinica*, Borag). Nearby, the former disused colonial court houses regular Council meetings. This impressive tree is thus emblematic of the Rwa's political power, so much so that the tree's name *mringaringa* also refers to the Council. One speaks of the *Mringaringa*, or the "Great Committee of the *Mringaringa*", *Kamati kuu ya mringaringa*.

This new official document, dated 1986, is more detailed, with eight more rules. The first rules again concern marriage payments. The first specifies the payment a young man must make in order to become engaged and earn the right to enter his future wife's home: the amount has increased from 300 to 1000 Tanzanian shillings (TSh). A similar augmentation is set out in the second rule, which concerns the first heifer donation that the fiancé has to make to his in-laws: its monetary equivalent has increased from 1500 to 6500 TSh. Similarly, the third rule readjusts (from 2000 to 7000 TSh) the monetary equivalent of the second heifer that the young man must give to his future father-in-law, and so on. These increases, however precise, are surprisingly incongruous with reality. When individuals are questioned about their own case, many Rwa readily admit having married without making the expected payments, or having only made some of them. An older man even said, not without satisfaction, that he had just made the final payments due for his own late father's marriage! So this document should not be seen as reflecting the state of ongoing practices. Rather, it is testament to a certain state of mind, and the desire not to forget old customs.

In the 1986 text, certain points are added and clarified in relation to the preceding one. This is the case for murder compensation. A murder is a clan's

7 Their presence gives official value to the donation.

8 The girl will be expelled from school, something that worsens the offence.

9 This clause is obviously inspired by religious convictions, the Lutheran church being very influential in Rwa country, and of course being very hostile to abortion, which it regards as murder.

concern. All members of the murderer's clan must contribute to the fixed compensation that must be paid to the victim's clan in order to cancel its obligation to take revenge. Everyone knows the standard amount for this compensation (49 cows), but it did not appear in the previous version. The new text also states that if the murder is avenged by killing the murderer, this second murder replaces the compensation that would otherwise be due by the murderer's clan to the first victim's clan.

At the end of the text, there are several new clauses concerning the political organization of the Rwa. They specify the election conditions for the supreme chief, his secretary and the supreme chiefs of the clans, and include a prohibition against concurrently holding different chieftainships in an age group, clan or church. Should this be seen as an incidence of the principle of the separation of powers, so important to British law? One might wonder. It is also stipulated that chiefs (of clans and age groups) will receive a chief's staff (that he will carry along with him as a symbol of power, when on duty), and that the cost of the inauguration ceremony is not to be paid by the chief, but by the group he is going to be heading. Furthermore, provisions are made for fines for disrespecting a chief.

Another clause appears, concerning the surreptitious displacement of field boundaries (a frequent offense).<sup>10</sup> Such a case, as well as any other type of offense, requires a meeting to take place between the groups involved (families or clans) in order to seek reconciliation. Long debates are often necessary to reach an agreement, but consensus and reconciliation are always considered better than sanctions. The text states that the cost of the reconciliation meeting (usually providing beer for the elders who discuss the case) must be paid by the culprit (in addition to the agreed compensation for the offense, or replacement of the field boundary in its proper place).

Another additional point specifies the conditions that must be fulfilled to change clans, something that cannot be done without solid reasons. The two clans concerned must agree to the change, and the man in question will offer a bull whose meat will be shared by the members of the clan being left, as well as 12 buckets of local beer, which both clans will drink together. This man will also be shaven, and will give up his clothes in order to wear a new outfit supplied by the new clan (so it is a rite of passage that is evoked). Finally, it is specified that this man's children will remain members of the original clan.

The text concludes by setting out the geographical boundaries of Rwa country, and imposes a prohibition against performing a very dangerous malediction ritual called "breaking the pot" without prior authorization from the Supreme Executive Council. This ritual launches a threat of death or total ruin against the undeclared perpetrator of an offence, as well as against his or her

10 Such offenses are extremely widespread in Africa and elsewhere. This is why the setting of a boundary has to be a public event, as also illustrated in southern France by Acovitsioti-Hameau and Hameau (this volume).



whole family and clan (Baroin 2013). The link between geographical boundaries, political power and supernatural punishment is thus clearly stated.

### 5.3.3 The 1995 text

After that 1986 text, a new document was drafted three years later in 1989, setting out a list of 81 “laws” (*sheria*) written by 16 members of the council. The next version appeared six years later on January 28, 1995 (Baroin 2003). That time, the text was approved by a 20-members council. On 25 typewritten pages, one finds a more detailed formulation of the various “laws” of the previous version. It demonstrates an obvious concern to avoid all interpretive ambiguity. The title itself is also more elaborate: “Laws of the Meru Traditions and Customs Passed During a General Assembly of All Chiefs (*mringaringa*) on January 28, 1995”.<sup>11</sup> At the bottom of the first page is written: “Formulation of the traditions and customs of the Meru people by the Supreme Council”.<sup>12</sup> The document begins with an explanatory preamble: “Because of changes in society and especially in the economy, it is necessary to make a few alterations to the previous laws, to stay as close as possible to reality. To this end, the General Committee of Meru Customs of the 4<sup>th</sup> Phase discussed various points, and has made the declarations that follow.”

This 1995 text was still in circulation ten years later, although new changes were made in the interim. On March 13, 2003, a large meeting was held in Poli, still in the shade of the emblematic *mringaringa* tree, where the amounts for matrimonial compensation and other payments were augmented. These changes were ratified by the Rwa a year later, on April 5, 2004. But in 2006, they were still waiting for this new version to be approved by the Tanzanian administration. In the Rwa’s view, it is imperative that their customary law should not contravene national laws. This timeframe reflects the bureaucratic sluggishness of all of the processes involved in each official update to the document. In 2008, after several revisions, they ended up with an official 46-page document, entitled for the first time “Constitution” (*katiba*).

## 5.4 The 2008 Constitution, a blend of tradition and modernity

The cover of this document (see Figure 5.2) bears the title “Constitution of the Customs and Traditions of the Meru” (*Katiba ya jadi na mila za Wameru*), with the date 2008. In A5-size typewritten pages, it sets out 89 articles. The cover page emblematically includes, in addition to the title and year, two photographs: above is a photo of Mount Meru (with the caption “Mount Meru”, *Mlima Meru*) and below a photo of the large tree that symbolizes the Rwa chieftainship, its name MRINGARINGA appearing in capital letters at the

11 Sheria za jadi na mila za Wameru kama zilivyopitishwa katika mkutano mkuu wa washili wote (*mringaringa*) uliofanyika tarehe 28.01.1995.

12 Zimetungwa na halmashauri kuu ya jadi na mila za Wameru.

**KATIBA YA JADI NA MILA ZA WAMERU  
KATIBA HII NI TOLEO LA**

**2008**

*Mlima Meru*



*Figure 5.2* Cover page of 2008 Constitution

bottom of the page. In the middle of this cover, drawn on the photo of Mount Meru, are the two intersecting emblems of the chieftainship: the chief's staff and the flyswatter. This title page therefore brings together all the symbols of Rwa identity and of its supreme chieftainship: Mount Meru, the chief's regalia and the *mringaringa* tree. On the final page are the stamp of the Attorney General's Chambers in Arusha, the Attorney General's signature, and the date February 13, 2009, proving that this document is known and approved by local Tanzanian authorities.

In addition to the care lavished on the cover, a summary on the first page lists the 89 points addressed, and provides references to the paragraphs and pages concerned. From a formal point of view, this Constitution is therefore more carefully presented and better structured than the previous texts. Its contents are also clearer and more detailed.

It begins with a preamble stating the aim of the text and the identity of its authors: "We, the Rwa, are preserving the customs of the Rwa in order to transmit them. Our office is located in the Arusha Region, Meru District, Poli Ward, village of Poli— MRINGARINGA. Our address is P.O. Box 112, Duluti, Arusha". Next it specifies that every chief is required by the Supreme Council (Mringaringa) to have a copy of this document and apply its rules, and that failure to do so will result in punishment. He must purchase his own copy of this Constitution approved by the Supreme Council and the Rwa General Assembly. Then it expresses the objectives of the Supreme Council that wrote the text: "to preserve the Rwa's ancestral customs and rules, including traditional dances and initiation rites, to ensure that widows and orphans are not mistreated, and that land is not sold without a legitimate reason. Also to look after the health situation". Thus, it briefly states the principal tasks and concerns of the supreme political body: to preserve the identity of the ethnic group, to protect the weak, and to combat property speculation<sup>13</sup> and health risks.<sup>14</sup>

The next paragraph defines community membership: "every Rwa, whether he lives here or elsewhere in the world, who recognizes his Rwa status and accepts its customs". This first introductory section concludes with a list of land plots that belong either to the Rwa population collectively or to one of its 17 clans. The largest is the central territory of Poli, where the Supreme Council office is located, as is the large *mringaringa* tree that symbolizes the chieftainship.

Then comes a complete description of the political system, taking up 15 out of 46 pages, that is, one-third of the document. It lists the various chief titles from the top to the bottom of the social hierarchy, along with the attributes and prerogatives of each of them, their duties, and the limits of their authority. It specifies the rules for the inaugurations of chiefs, the marks to inscribe on chiefs' staffs, the gifts they receive when they retire, the identity of the people who must attend various meetings. In relation to the 1986 text, which included

13 It is linked to sharp increases in the value of land, due to the economic boom around Arusha (see below).

14 Health risks implicitly refer to the wide spread of HIV.

the first information regarding the political system, this set of rules seems like a veritable treatise. It is striking because of the concern it shows for rigor and exhaustiveness.

The sections that follow, likewise, provide a more detailed restatement of all the points appearing in previous versions. But one also finds new interesting details. Such is the case for male and female circumcision, mentioned in order to follow state recommendations. Male circumcision, a general practice for the Rwa, is made mandatory,<sup>15</sup> whereas female circumcision is prohibited,<sup>16</sup> It thus demonstrates its will to combat this second very old custom, as it proves to be harmful. In this connection, it clearly specifies that female circumcision is prohibited by the Tanzanian government, and that the Rwa Council itself was won over to this point of view after noting the disastrous consequences of this practice. It should be noted in this respect that, in Rwa country, clan leaders, pastors and educated men in general are more sensitive to state campaigns than women, and they generally favor the abolition of female circumcision. Yet it is still covertly performed by old uneducated women, as a way, they believe, to ensure female fertility. No coordination groups for women to fight this belief have been organized, such as those which efficiently contributed to the ending of foot binding in China (Mackie 1996).

Another new rule is the establishment of a committee of land affairs, a crucial concern, but no indication is given about it except that a minimum level of schooling is required of its members: the successful completion of primary school. This sensitivity to the benefits of schooling is a resolutely modern attitude.

The points dealing with matrimonial payments are set out in more detail. They specify who must carry out the various steps of this complex process, to which ten paragraphs are dedicated. Family problems are also addressed with more precision. The regulations in case of conjugal conflicts are much more detailed than in previous versions. They specify that if a husband goes away for a long time, he is not authorized to divorce a wife who has a child born of adultery. However, he is free to decide whether or not to recognize this child, which the biological father can also recognize as his own. The wife is also protected if her husband throws her out of the house with her children: the husband's assets (land and other possessions) will then be distributed among his clan, with the largest share going to his wife and children. Special attention is also given to "troublemaker" (*mkorofi*) husbands. What this implicitly refers to is conjugal violence. If the wife flees (she hardly has any choice but to return to her parents' home), her children will stay behind, with the exception of her last-born if he or she is under three years of age, and after five years she loses all rights to her husband's assets.

15 In order to lower the risk of HIV contamination.

16 Female circumcision, which enlightened minds are combating, was still being practiced in 2014 in remote areas.

The case of widows is mentioned in the next paragraph, which first deals with the recurrent conflicts that bring them into opposition with the family of the deceased and must be arbitrated by the clan chief. The issue is always the same: access to the deceased's land, which is coveted by relatives within the patrilineage. The very old levirate rule is no longer an obligation for the widow's inheritance, and she gains her husband's assets, but without being allowed to sell the land. This is shared among the orphans when they reach adulthood. Unmarried girls, and married girls if in need, will have a right to a share of these assets. This clause therefore reinforces the women's rights that had already been expressed in the 1985 text, but they continue to run up against strong resistance because of the old tradition that marriage eliminated all of a woman's rights to any share in the paternal inheritance.

The next rule describes how assets are shared between couples. The woman owns the milk, bananas and furniture, while the man owns the house, the cattle, the land with its trees, as well as the coffee. This customary rule had previously remained oral. However, the final point in the text is a novel one, again promoting an improvement in women's rights. It specifies that the husband cannot sell his assets or those of his wife without her consent. This new legal point is an example of the expressive function of law (Sunstein 1996), an inducement which should be integrated into practice.

The same goes for other new points dealing with the rules of behavior. The consumption of drugs or unauthorized alcohol is prohibited. The Rwa are very much aware that alcoholism and drugs are two major modern scourges that especially affect young people, and they know that the wise men of the council are quite powerless to combat them.<sup>17</sup> All they can do is officially and morally condemn these practices, without having any illusions. Likewise, there are other moral injunctions concerning the behavior of chiefs. When they carry their chief's staff, that is to say when they are carrying out their duties, they are prohibited from visiting prostitutes or drinking in a bar. They must also report any offence or crime they might witness, and never give false testimony. Those who violate these rules are subject to heavy fines: one bull and two buckets of local beer.

The next paragraph proclaims every child's right to inheritance, whether boy or girl, and specifies that the youngest, who takes care of his or her parents at the end of their lives, receives the final undistributed assets, as well as the paternal house. This is another point that strengthens women's rights, since the old rule was that only boys received an inheritance and that only the youngest boy, not the youngest girl, could and should care for his elderly parents and inherit their house.

The problem of surreptitious displacement of field boundaries – marked by the *Dracaena sp.* plant (*isaale*, pl. *masaale*), which is a symbol of peace – is the main source of property disputes in Rwa country, and the constitution deals

17 Many are aimless. They lack economic prospects, as land is scarce and unemployment is high.

with this by punishing the offence with heavy fines. It also reasserts the customary land sale rule, namely that prior authorization from the clan chief is compulsory. This subject is a cause of serious concern for chiefs, because the rule is more and more often circumvented due to the rising prices of the property surrounding Mount Meru, linked to the economic boom in the region, which is close to the urban center Arusha (see Figure 5.1 above). The old custom in land sales was to give priority to a member of one’s own clan, under the supervision of the clan chief. But many people are now tempted to bypass this rule and sell their plot of land to someone outside the clan at a higher price, which involves making the sale without the clan’s knowledge. Some disguise this through a mortgage. This formula consists in borrowing money from someone outside the clan – a sum that they will be unable to repay – and mortgaging their land to guarantee the loan. Thus, the unpaid creditor can seize the mortgaged land, without any sale taking place. To curb these abuses, the constitution now prohibits the mortgaging of land, and stresses the essential role that clan chiefs play in land sales. It seems, however, that this is merely wishful thinking, as mortgage is a regular procedure under Tanzanian law.

Many other cases are provided for, such as the fine for making a baseless accusation of witchcraft, and the duration of mourning. Finally, it is worth noting that of the many cases of theft that are subsequently detailed in the text, banana and honeycomb thefts are subject to the heaviest fines. These are the only cases in which the culprit, in addition to returning the stolen goods, must pay one ewe (for banana theft) plus one bull “for the public”, that is to say for shared consumption. These fines, which already appeared in previous versions, reflect the high value placed on these products.

Without going further into the details of the many points addressed in this document, and before concluding on the comparison between these successive legal texts, let us see how this traditional justice relates to the State justice system.

## **5.5 The link with Tanzanian State law**

This indigenous constitution meant for internal use does not preclude the existence of close connections with Tanzanian State law. These links can be seen in the text of the constitution itself, as well as in the practice of law, that is to say in the resolution of disputes.

The text of the constitution itself testifies to the link with the State. After writing and finalizing their constitution in 2008, and before distributing this document to the local chiefs responsible for applying it, the members of the supreme council of the Rwa wanted to ensure it did not run against State law. In this spirit, they gave a copy of the document to the local jurisdictional authorities in order to get it stamped by Arusha’s attorney. This stamp, placed at the bottom of the text on February 13, 2009, shows that the State knows about and has approved the text. It was only after receiving the stamp that the

supreme council of the Rwa felt authorized to make the constitution official, distribute it, and task all of the clan chiefs with applying it.

In addition to the attorney's stamp, the wording of certain clauses clearly expresses this aim to conform to national law. This desire to be in harmony with State injunctions can be felt through the promotion of female rights, and it is expressly formulated in the obligation to circumcise boys, and in the prohibition against female circumcision.

But the care not to run against Tanzanian law is not only expressed in this text; harmony between the two jurisdictions also guides local legal practices. The Rwa are not turning their backs on their State justice system; they themselves resort to it on occasion. Conversely the State justice leaves the indigenous one free to arbitrate conflicts and does not interfere with its decisions, unless called upon. Most conflicts are solved by traditional leaders, on the basis of their constitution and according to local rules, while national law is dictated by the Tanzanian State. The processes and action resources of the two are diametrically different. The traditional justice system mobilizes whole groups and not merely individuals, and long debates are needed to reach general consensus. The weight of the community compels wrongdoers to pay the fines collectively decided upon, and when the wrongdoer is unknown, a malediction is launched on him, his clan and his family (Baroin 2013).

As for the State justice system, based on the Western model, it is aimed at individuals, without taking groups into consideration. Its objective is to identify and punish the guilty party. The Rwa see it as expensive and often corrupt, whereas they appreciate the uprightness of their local chiefs, chosen for their moral qualities. But the State justice can enforce particularly powerful coercive resources: imprisonment and land expropriation. Prison sentences are often shortened by a bribe to police, but land expropriation is very much feared. It threatens any individual in case of insolvency.

Quite clearly the Rwa, who are primarily farmers, feel a visceral attachment to their land, the quintessential asset, the most desirable of all, and often the only source of wealth and prosperity. They enter into conflict over the smallest square meter of land, and there are countless land conflicts. Clans are the usual arbiters of these, because it is their job to maintain harmony and defend land ownership. But it happens more and more often that individuals choose to resort to the State justice, especially if they are unsatisfied with their clan's verdict. One therefore observes that trials often go back and forth, as these two forms of justice willingly collaborate. When a particularly sensitive case is presented, it often happens that if an appeal is made to the State justice system, it requests an assessment from the customary justice system, and bases its verdict on the written report it receives (Baroin 2018).

## **5.6 Conclusion**

What led the Rwa first to write down and then reshuffle their traditional rules with so much care? Besides the historical reasons previously mentioned that

made them want to have it their own way (see section 5.2), other factors played a decisive role: a very strong political structure tying the community together, a long democratic tradition, rooted in ceaseless meetings seeking consensus to solve conflicts, and a fairly high level of schooling, necessary in such a process.

Comparing the successive versions of their legal text demonstrates that they are highly aware that socio-economic changes have a great impact on their community, and they wish to adapt their rules to it, in order not to stay back. They also want to keep up with the Tanzanian State laws and recommendations. All the customary law texts set forth above are the result of long discussions within the supreme council, which first has to reach an agreement before the text is produced to a wider public. All of them were approved by a general assembly or signed by the members of the supreme council. This, together with the preamble saying that these rules are meant for all members of the Rwa community, are clear rules of recognition, one of the secondary rules that are deemed mandatory in a legal system according to Hart (Halpérin, this volume).

The comparison of these successive legal texts shows both formal and substantial improvements from one to the next: they become better arranged, more explicit and more complete, by adding previously tacit clauses. Three main areas of concern receive increasing attention from one text to the next, namely the political system, women's rights, and land issues. And comparing these texts provides a picture of how this society has evolved.

The formalization of political rules reaches an apotheosis with the final version of the text dated 2008. Its preamble specifies the aim of the text, the identity and even the postal address of its authors, as well as the criteria for belonging to the ethnic group and a list of its collective land holdings. This preamble, together with the great care taken in describing the various levels of the political system, gives rules of recognition. These demonstrate an increasing concern for precision. They are a sign of the importance that the Rwa attribute to this official document, which is also a symbol of their whole community. It is linked to an increasingly strong ethnic consciousness, in reaction to threats of dilution brought by modern economic activities and ties outside Mount Meru.

As for the situation of women, the defense of widows and orphans declared in the preamble is in fact extended to a much broader defense of women's rights (single mothers, divorced women). Family problems are addressed in greater and greater detail from one text to the next. Marriage payments are given the most prominence, but the attention they receive can seem paradoxical, given that the Rwa themselves are the first to say that nowadays, these marriage payments are far from being made every time. Today many young couples get married without paying anything and there is no punishment if they don't (perhaps with the exception of supernatural punishments that are not mentioned). In this matter, there is no clause of adjudication (Halpérin, this volume) to enforce the recommended behavior. But the aim of setting out these payments is not really to make everyone respect them; the intention (mentioned by Rwa leaders) is rather to ensure that past customs are not forgotten.



On the contrary, many other rules are anchored in daily life, as they are designed to help resolve family disputes (violence, divorce, despoilment), along with a strengthening of women's rights, particularly those of widows, repudiated wives and single mothers. In a still recent past, single mothers used to be rejected by society (Haram 1999). As for the prohibition of female circumcision, recommended by the Tanzanian government, it also clearly demonstrates the Rwa's desire to adapt to modern times and State law.

The third main area of concern in these legal documents relates to property law, which is given an increasingly large and detailed attention. These rules specifically concern field boundaries, land sales and inheritance distribution, an area in which women are literally gaining ground. The inflation of these property rules should come as no surprise, since it is a major part of economic life, a source of many conflicts, and also an area in which clan authority is in decline. This is why various rules assert this authority in order to preserve it, and to deal with those who try to circumvent it through mortgaging, as mentioned earlier. The decrease in the authority of traditional chiefs is also perceptible in the to-ing and fro-ing between the traditional and State justice systems. Some individuals do not hesitate to appeal to the State justice system in order to get around their clan's decisions when unsatisfied with its verdict, though this does not guarantee they will win their case (Baroin 2018).

Nevertheless, not everything is written. The final text of the constitution remains silent on many aspects of the social organization, which are still confined to unwritten law. However, these are far from being negligible rules of social life, and they should be considered integral parts of local customary law. Such is the case of all the rules relating to the age system, on which the text of the constitution says almost nothing. Yet this system traditionally involves many social constraints, particularly in terms of behavior and matrimonial choices (Baroin 2015). But one often gets around these rules nowadays, without this being a major concern for the supreme council. The reason for it might be that the influence of age group leaders is slight, as there are but few of them in the supreme council (*nringaringa*) that drafted the text. Another reason might be that some rules are so well known that they do not need to be specified in writing. Such is the case, for example, of the compensation for murder: everybody knows its amount is 49 cattle. It is alluded to in the 1985 text, but only clearly specified, with added rules, in the 1986 one. Conversely the age of majority, which is mentioned in the first text, is no more referred to in the following ones. As a matter of fact, writing down all social rules would be an impossible task; which ones should be put in writing remains a matter of social and political choice.

To conclude, it should be noted that the text of the constitution of the Rwa assembles in one document objectives that are disparate and sometimes even contradictory. On the one hand, it serves as a preserver of memory, particularly with regard to obsolete marriage rules, and on the other hand it updates or introduces new rules in order to keep up with modern socio-economic trends (inheritance rules, female rights, etc.). They also provide a model of what

personal conducts should be (preventing female circumcision, fighting alcoholism, etc.) in a normative way that demonstrates the expressive function of law (Sunstein 1996). How these rules are applied remains to be seen, but the 2008 constitution does mention that each clan leader should have a copy of the document, and that it is his job to make sure these rules are applied within his own group. Therefore, this clause may be considered as a rule of adjudication.

Up to now, the text of the 2008 constitution has not been changed again, but Rwa leaders made it clear to me that this is not a definitive document. It is dated, and they will draft a new text in the future if they deem it necessary. The rule of change is thus only implied in this dated text. One might thus say that the Rwa constitution is only a pre-legal system since this last rule is missing.

Besides its legal aspect and its interest for research as it provides a broad picture of a social state of mind at a certain time, the value and unity of this text, for the Rwa themselves, reside in its moral and political character. But should there not be good grounds for asserting that all customary law (and probably every form of law in general) does rest on moral principles? Moreover, the social problems and political aims any customary law, such as this one, reflects also need to be elucidated if one wants to understand its profound nature.

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