

**UNIVERSITY OF NAMIBIA**

**FACULTY OF LAW**

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***THE JURISDICTION OF COMMUNITY COURTS IN NAMIBIA***

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF BACHELOR OF LAWS DEGREE**

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## **Abstract**

This study examines the jurisdiction of community courts particularly with regard to membership of a traditional authority in respect of which a community court has been established, and the geographical area within which a community court has been established. The core of this study is the in depth analysis of the Traditional Authorities Act, 25 of 2000 and the Community Courts Act, 10 of 2003. The author contends that a community court would have jurisdiction to try members of a traditional community in respect of which a community court has been established wherever those members found themselves. It is thus the author's contention that the jurisdiction of a community court is community bound rather than entirely restricted to a geographical area in which that particular community court has been established.

The study also makes comparative analyses between Community Courts in Namibia and Community Courts in Botswana and South Africa. In Namibia, unlike in Botswana and South Africa, there is no common law distinction between civil and criminal law jurisdiction with regard to community courts. The legislation, the Community Courts Act, 10 of 2003, states in general terms that community courts shall have jurisdiction to hear and determine any matter relating to compensation.

Finally the author addresses the question whether a party can opt out of the jurisdiction of a community court. It is the author's views that opting out of the jurisdiction of community courts would weaken the authority of community courts, and defeat the whole essence of community courts.

## **Acknowledgements**

I would like to express my heartfelt thanks and appreciation to my supervisor, Professor M.O. Hinz, for providing guidance necessary to conduct this study.

I also wish to register my deepest appreciation to my wife Justine for being a source of inspiration and support throughout my studies. This work is dedicated to you and our daughter, Ma Iyaloo Nameya.

**Declaration**

I declare that the dissertation “***THE JURISDICTION OF COMMUNITY COURTS IN NAMIBIA***” is my original work. All the sources that I have used or quoted have been indicated and acknowledged.

Signature:.....

02 November 2009

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## CHAPTER 1

### 1.1 Background

In Namibia, there are 49 recognised traditional authorities and it is believed that these traditional authorities have traditional courts. Community courts had been in existence in Namibia since time immemorial. The colonial administration of South Africa enacted laws that sought to regulate the operation of traditional courts<sup>1</sup>. One of the legislations passed to regulate the operations of traditional courts is the *Native Administration Proclamation*.<sup>2</sup> Section 9 of the Proclamation reads as follows:

“ (1) Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving questions of customs followed natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified : provided that such native laws shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *ovitunya or okuonda* or other similar custom is repugnant to such principles.

(2) Where the parties to a suit reside in areas where different native laws are in operation, the native law, if any to be applied by the court shall be that prevailing in the place of residence of the defendant”.

The question of who is a native was addressed in *Rex v Radebe*<sup>3</sup> in which it was stated that “native means and includes all members of the aboriginal races or

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<sup>1</sup> In this paper the traditional courts are used interchangeably with customary courts and community courts

<sup>2</sup> 15 of 1928.

<sup>3</sup> 1945 AD 590

tribes of Africa South of the Equator, the sole test is descent, other elements such as appearance and habits being on probative of descent”.

When the only evidence is that of appearance, such evidence, while not the best, is sufficient to justify an inference that the person in question is a native, but when there is evidence of descent the latter evidence is the best evidence and decisive.<sup>4</sup>

Another legislation that had a direct bearing on the administration of justice by customary courts in Namibia was *Proclamation R 348 of 1967*.<sup>5</sup> The Proclamation is titled *Civil and Criminal Jurisdiction* and section 2(1) (a) and (b) thereof allows for the authorization of chiefs, headmen and their deputies-

“to hear and determine civil claims arising out of native law and custom brought before them by natives against natives against natives resident within the area of jurisdiction.....”

The customary courts apply customary law of the communities in respect of which community courts are established. Customary law applied by community courts is related to social realities according to which traditional communities conduct their daily lives. For example in Ondonga traditional authority, the Laws of Ondonga (*Ooveta dhoshilongo shOndonga*) provide that impregnated girls shall be paid compensation of two (2) heads of cattle or N\$ 800.00.<sup>6</sup> This law applies to both Ondonga residents and non-Ondonga residents. If a man impregnates a girl in Ondonga, the community court can enforce that law against anybody responsible for that pregnancy regardless whether he is a resident of Ondonga.

The colonial authorities acknowledged customary laws and customary courts. Customary law and customary courts were first officially recognized by South African authorities in Namibia in 1928 through the *Native Administration*

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<sup>4</sup> Rex v Abed 1948 (1) SA 654

<sup>5</sup> See also Hinz 2003: 71

<sup>6</sup> Section 14 of the Laws of Ondonga

*Proclamation*<sup>7</sup>. The *Native Administration Proclamation* created what was known as commissioner's courts and permitted them to apply customary law.

At independence, customary law was legally recognized by the government. Article 66 of the *Namibian Constitution* puts customary law on equal footing with common law. However, there is repugnancy clause which casts doubts over the equal status customary law with other laws.<sup>8</sup>

To demonstrate the government's intention with regard to the upliftment of traditional authorities, various legislations were passed, among others the Traditional Authorities Act<sup>9</sup> which seeks to provide for the establishment of traditional authorities and define their powers, duties and function.

The Community Courts Act<sup>10</sup>, was also enacted which has as one of its preambles the provision for the jurisdiction of and procedure to be adopted by community courts. The Act also seeks to provide for the recognition of community courts where they are already in existence and the establishment of community courts in traditional communities where no courts are in existence.<sup>11</sup>

## **1.2 Problem statement**

The *Constitution of the Republic of Namibia*, the *Traditional Authorities Act, 25 of 2000* and the *Community Courts Act, 10 of 2003* recognise customary law and the existence of community courts.

Despite the fact that the recognition and establishment of community courts have been provided in the Act, they are yet to be formalized. The Community Courts Act which provides for the recognition and establishment of community courts is yet to be formally implemented.

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<sup>7</sup> Refer to foot note 5

<sup>8</sup> In terms of Article 66 customary law shall only be valid to the extent to which such customary law does not conflict with other statutory law.

<sup>9</sup> 25 of 2000

<sup>10</sup> 10 of 2003

<sup>11</sup> Section 4 of the Community Courts Act, 10 of 2003

However, even if *Community Courts Act* comes into operation, the administration of justice by community courts will not be without challenges. One of the issues that will pose as a challenge to the community courts is the jurisdiction of community courts. Both the *Traditional Authorities Act* and *Community Courts Act* fall short in spelling out in clear terms the jurisdiction of community courts. Customary courts unlike the Magistrate's Courts for example, will be facing a challenge of sorting out the issue of jurisdiction as one may find more than one traditional authorities occupying one geographical area. One may also find a number of subjects of one traditional authority in a geographical area predominantly occupied by another traditional community.

Recent media reports<sup>12</sup> regarding the interpretation of the provisions of the *Traditional Authorities Act* created an interest in this study. There are important aspects raised in the newspaper article, particularly whether the jurisdiction of any given traditional authority is restricted within its geographical boundaries, and whether its jurisdiction extends beyond its geographical boundaries where its members are residing.

Some people are of the opinion that appointing a chief in the jurisdiction of another chief without informing and obtaining his blessings and /or permission is against Traditional Authorities Act, 25 of 2000. This is apparently because all traditional people in any area resorts under the authority of any chief already duly recognized.<sup>13</sup> On the contrary, some people feel that any area any chief may preside over is purely for administrative purposes and that any chief may and can have authority over his people wherever they may find themselves.

Section 2(1) of the Traditional Authorities Act makes provision for every traditional community to establish for that community a traditional community.

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<sup>12</sup> New Era 13.03.2009, Interpreting Traditional Authorities Act, by Kae Matundu-Tjiparuro.

<sup>13</sup> *ibid*

This implies that a traditional authority is established for the traditional community, and not necessarily for the geographical area.

Section 2(2) of the same Act refers to a traditional authority having jurisdiction over the members of the traditional community in respect of which it has been established. The Act does not refer to an area of jurisdiction other than “jurisdiction over the members”

It may therefore be argued that as the Act does not refer to an area of jurisdiction other than jurisdiction over members, a particular traditional authority may have jurisdiction over a particular traditional community which may inhabit an area other than the area predominantly inhabited by that traditional community.

On the other hand Section 3(1) of the Community Courts Act states that:

“A traditional authority of a traditional community may apply in writing to the Minister for the establishment of a community court in respect of the area of that traditional community, but only if no court has been recognized or established under this Act for that area”.

This provision implies that a community court is established in respect of the area of a traditional community. Would that community court have jurisdiction over any person in that area regardless whether he/she is a member of that traditional community?

This study explores the extent to which community courts are exercising jurisdiction within traditional communities in Namibia. In particular, the research focuses on the jurisdiction of community courts with regard to connecting factors such as membership of the party or parties to a traditional authority in respect of which a community court has been established, as well as a geographical area within which a community court has been established.

### **1.3 The purpose of the study**

The purpose of this study is to provide an understanding of the jurisdiction of community courts particularly with regard to membership of a traditional authority in respect of which a community court has been established, and geographical area within which a community court has been established.

The study will explore whether the jurisdiction of any given community court is determined by membership to a traditional community or by territorial boundaries of a traditional authority.

The study aims at undertaking an analysis of provisions of the *Traditional Authorities Act* and *Community Courts Act* that deal with jurisdiction of community courts. Thus, the study aims at providing insight into whether the authority of a given traditional authority and jurisdiction of a community court is geographical area bound or community bound.

### **1.4 Significance of the study**

As a result of the Odendaal Commission's recommendations, ten (10) homelands for Namibia were created. The concept of separate development was introduced by establishing separate geo-political areas in which people were responsible for their own affairs, including traditional matters.<sup>14</sup> Homelands were created in such a way that they correspond in all respects to the traditional areas of the various ethnic groups.

While traditional communities in the north and north east of the country remained on their ancestral land and continued to practice their customs and traditions, the

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<sup>14</sup> D'Engelbronne-Kolff 1997: 63

same cannot be said with communities which lived in reserves south of the red line. In communities in the far north of the country, traditional structures remained intact as they were before colonialism<sup>15</sup>. Traditional communities in areas south of the red line were forcefully removed from their traditional geographical area and hence became scattered throughout Namibia. However, they continue to live their traditional way of life albeit outside what could be regarded as their ancestral land. It is the result of that state of affairs that one would find different traditional communities in different parts of the country in what could not be regarded as their traditional territories.

Despite these geo-political changes and economic developments as evident in different communities, traditional authorities still play a vital role in the administration of justice especially among rural communities. Customary courts deal with a number of cases to such an extent that they reduce a number of cases that would have otherwise been dealt with by Magistrate's Courts. Community courts cater for the majority of the traditional communities that live in rural areas and for urban dwellers that have trust in community courts.

Because community courts cater for a lot of people, a uniform legal mechanism in a form the *Community Courts Act*, which among others establish community courts and provide for their jurisdiction, deemed necessary. Consequently, community courts will be established within different traditional authorities and the existing community courts will be recognized as per *section 4* of the Act.

The problem that one foresees is the issue of the exercise of jurisdiction by different community courts. This study is significant because it will help resolve disputes that may arise between various traditional authorities and community courts regarding the exercise of jurisdiction. The study will provide an insight into issues relating to jurisdiction that would arise as a result of coming into operation

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<sup>15</sup> Hinz 2003a:151

of Community Courts Act and subsequent recognition and establishment of community courts.

A practical example would be a situation where a person who is not a member of a particular traditional authority (A) commits an offence in another traditional authority (B) of which he is not a member. The study will provide an understanding as to which court will have the power to hear and determine the matter in this case.

Another interesting scenario will be geographical areas where there are more than one recognized traditional authorities. For example in some areas in Omaheke region, such as Aminus, one may find more than one different traditional authorities (e.g. Tswana Traditional Authority, Herero Traditional Authority under Chief Riruako, different Herero Royal Houses and San Communities). In this case there would be more than one community courts because a community court is established for a traditional community. It would be difficult in this instance to determine which court will have jurisdiction as there are various courts within one geographical area.

This study intends to provide traditional authorities in Namibia with a guide as to how the jurisdiction of community courts can be determined.

## **1.5 Methodology**

The study was conducted using desk top research. The tools used in the study are reviewing of existing literature on the subject and laws that deal with traditional authorities in general and community courts in particular.

## **1.6 Study limitation**

The study is restricted to the analysis of jurisdiction of customary courts in Namibia. The study did not focus on any particular traditional authority or community court, but rather on the authority of traditional authority and jurisdiction of community courts in general. However, reference was made to specific traditional authorities, particularly to the Ondonga Traditional Authority.

## **CHAPTER 2**

### **Structure of the study**

Chapter 2 elaborates on the frame work in which this study has been constructed.

Chapter 3 gives an overview of literatures that were used by the writer in order to understand the subject matter of the study and to put it into perspective.

Chapter 4 deals with the administration of justice by traditional authorities prior to independence. This chapter gives the reader a picture of legal frame works that regulated the administration of traditional authorities prior to independence.

Chapter 5 constitutes the body of this study. In this chapter the concept of jurisdiction is discussed in general. The question of whether community courts have criminal and civil jurisdiction is addressed. This chapter also contains the analysis of statutes that deals with jurisdiction of community courts, namely, the Traditional Courts Act, 25 of 2000 and Community Courts, 10 of 2003. The comparative analysis of the jurisdiction of Community Courts and Magistrate Courts, Community Courts, 10 of 2003 and Traditional Courts Bill (2008) as well as comparison with Botswana round off Chapter 5.

Chapter 6 addresses the question whether a party can opt out of the jurisdiction of a community court. This question is particularly important in view of the fact that some people feel that they should be tried in a Magistrate's Court rather than in a Community Court.

Chapter 7 contains the conclusion, the bibliography, the list of statutes and the list of cases.

## CHAPTER 3

### Literature review

Customary law and the customary legal system have been in existence during pre-colonial era, during the period of German colonization and during South African colonial administration.

Libuto<sup>16</sup> states that traditional authorities have been, and are still administering justice in Namibia. Traditional leaders feel that customary courts are more effective than Magistrate's Courts in the sense that they ensure that fines are paid without delays. Customary courts also prevent the repetition of the same offences as the village head will make sure that similar offence will not be committed in his area of jurisdiction as this will bring his village into disrepute.<sup>17</sup>

Libuto also notes that some traditional authorities especially in the south of the country have become reluctant to perform judicial functions. The cause of this reluctance was said to have been caused by uncertainty with the laws that regulate traditional authorities. The issue of jurisdiction of these traditional authorities could be the cause of concern. In some areas traditional communities fragmented into different groups from the same traditional community and these groups are claiming their separate traditional authorities. This has resulted in the mushrooming and fragmentation of traditional communities which have to a certain extent caused problems in overlapping into the areas of jurisdiction of some communities. This problem is particularly common among the Witboois, Bondelswarts, Afrikaners and Rooinasie traditional community.

Magistrate's Courts in Namibia were introduced by the *Administration of Justice Proclamation 21 of 1919*.<sup>18</sup> With the common law crimes shifted from customary

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<sup>16</sup> Libuto 2002:46

<sup>17</sup> Libuto 2002:43

<sup>18</sup> Hinz 2002:56

courts to Magistrate's courts, the status of community courts were down graded.<sup>19</sup> In areas beyond what was previously known as police zone (former Owamboland, Kavango, Caprivi and Kaokoland) customary courts were not seriously affected. However, in areas south of the Police Zone the situation is quite different. For example in areas like Epukiro, Aminus, Gam and Kaoko, it is sometimes difficult to determine under whose jurisdiction is a certain community because some of these areas are inhabited by various traditional communities.

There is a state of uncertainty with regard to the exercise of jurisdiction in most cases as traditional leaders do not know which traditional authority has jurisdiction over which subjects. Some traditional leaders especially in Kunene and Omaheke regions, Lubito argues, feel that as a consequence of this vacuum and uncertainty in some parts of the country, matters have been drifting and cases of theft, especially stock theft, have increased.

The definition of area as it appears in the Community Courts Act poses problems when it comes to the determination of the jurisdiction of community courts.<sup>20</sup> There may be problems in some instances because some traditional communities still find themselves on the "Odendaal Plan Homelands" created for the native population by the colonial administration and enforced on them against their will. Through Odendaal Plan local people were forcefully removed from traditional geographical areas they habitually inhabited.<sup>21</sup> Consequently one may find sections of different ethnic groups in different parts of the country.

Some people including some lawmakers have problems relating to the area of jurisdiction of community courts<sup>22</sup>. Area is understood as the geographical area habitually and predominantly inhabited by a traditional community. Libuto also establishes that should the definition of an area be understood as provided

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<sup>19</sup> Libuto 2002:43

<sup>20</sup> Section 1 of the Community Courts Act defines "area", in relation to a traditional community, means the geographic area habitually and predominantly inhabited by that traditional community.

<sup>21</sup> Lawrie 1964:3

<sup>22</sup> Libuto 2002:46

above then some communities for example Sambyu community who habitually and predominantly inhabit parts of the Kavango Region will have a recognised community court through the Sambyu Traditional authority recognize in terms of the Traditional Authorities Act, 2000. Likewise San communities in some parts of the Ohangwena Region will establish a community court in Oukwanyama Traditional Authority.

The Community Courts Act provides that community courts are established for an area anyone who commits a crime in that area shall be tried by the community court of that particular area.

According to the customary law of the Sambyu, the jurisdiction of the customary court is determined with reference to persons as well as territory rather than the subject of litigation<sup>23</sup>. The Sambyu customary court has jurisdiction to hear disputes about any subject and between members as well as non-members of the community as long as they live in Sambyu or visit the Sambyu area and wish to be the subject of Sambyu customary law.

Regarding the requirements pertaining to membership, D'Engelbronner-Kolff<sup>24</sup> establishes that a person is regarded as a member if he/she has (a) Sambyu parent(s), has lived in the area for a certain period, is married to or adopted by a member of a Sambyu community or wishes to be a Sambyu. If a person has temporarily left the Sambyu area or lived permanently outside the area, but wishes to be the subject to the jurisdiction of the Sambyu traditional authorities, the customary court will accept the hearing of disputes in which such persons are involved. Moreover, if a place where an offence was committed lies outside the jurisdiction of Sambyu traditional authority, but involves at least one member of the Sambyu community, the Sambyu customary courts will have jurisdiction to hear such a dispute usually with permission of a traditional leader of the area in which the offence was committed.<sup>25</sup>

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<sup>23</sup> D'Engelbronner-Kolff 1997:130

<sup>24</sup> *ibid*

<sup>25</sup> *Ibid*

## **CHAPTER 4**

### **Administration of justice by traditional authorities prior to independence**

As stated earlier, customary law and customary legal system have been in existence before colonialism, and also during the period of German colonisation and South African administration. Customary courts have always been administered by traditional authorities.<sup>26</sup>

Customary law was officially recognized and applied in Namibia by the South African authorities in 1928 through the *Native Administration Proclamation 15 of 1928*<sup>27</sup>. Section 1 of the Proclamation provides for the recognition, appointment and removal of chiefs and headmen. Section 9(1) of the same Proclamation created Commissioner's Courts and gave them discretion to apply customary law with a repugnancy provision that customary law will only be applied provided that it is not contrary to natural justice or threatened social order<sup>28</sup>.

Another legislation that had an effect on the administration of justice by traditional authorities is *Proclamation R 348 of 1967, titled Civil and Criminal jurisdiction – Chiefs, Headman, Chiefs Deputies and Headmen's Deputies, Territory of South West Africa*. Section 2(1)(a) and (b) allows for the authorization of chiefs, headmen and their deputies to hear and determine civil claims arising out of native law and custom brought before them by native residents within the area of jurisdiction.<sup>29</sup> With regard to the execution of judgments, section 3(2) of the Proclamation stipulates that that native law and custom shall prevail as observed by the people, in the location or the native reserve in respect of which the chief or headman has been recognized or appointed.

*Proclamation R 348 of 1967* also dealt with jurisdiction or judicial powers of traditional authorities in the Kaokoveld, the Okavango, Owambo and Sesfontein. Section 4(1) reads as follows:

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<sup>26</sup> Hinz 2000:23

<sup>27</sup> Refer to foot note 10

<sup>28</sup> Refer to foot note 5

<sup>29</sup> See also Hinz 2000:71

“ Notwithstanding anything to the contrary in this Proclamation or in any other law contained, in the Kaokoveld, the Okavango, Ovamboland and ZesSfontein, a chief, tribal council of headmen, chief’s deputy, headmen, headman’s deputy, subheadman in Ovamboland who is the owner of a ward known as an omikunda, or the representative of a chief in the Okavango called a voorman or any other person duly authorized thereto by or under native law and custom shall-

- (a) have original and exclusive jurisdiction to hear and determine all civil causes and matters arising between natives, other than in which a decree or nullity, divorce or separation in respect of a marriage is sought;
- (b) have jurisdiction according to native law and custom in all criminal matters arising between natives other than those specified in schedule B<sup>30</sup> to this Proclamation”.

Similar legislations were passed to regulate the administration of justice by various traditional authorities in Namibia. For example, *Damara Community and Regional Authorities and Paramount Chief and Headmen Ordinance, 2 of 1986* was enacted to regulate the administration of justice by traditional authorities in Damaraland. Section 22 of the Ordinance reads as follows:

- (1) Any community council shall, subject to the provisions of this ordinance or any other law, be competent to try and to adjudicate all civil actions arising between Damaras in accordance with the traditional law and customs of the Damaras.
- (2) The jurisdiction of a community council as to persons and causes of action, the procedure at any hearing and the manner of execution of any decision, judgment, sentence or order by any messenger, shall be

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<sup>30</sup> Hinz 2000: 74, Schedule B list offences which may not be tried in terms of section 4: treason, murder, rape, culpable homicide

exercised in accordance with the traditional law and customs observed in the ward concerned”.

Similar legislations were enacted for other traditional authorities such as Tswana and Nama traditional authorities as well as traditional authorities in Caprivi. The wording of these legislations is practically similar. The headmen of these traditional authorities were empowered to hear and adjudicate in accordance with the traditional law and customs of the traditional authority, all matters arising in that area between members of the population group.

These pre-independent legislations remained in force until repealed by the Community Courts Act, 10 of 2003. The Act provides for the jurisdiction of community courts and procedures relevant to the running of community courts.

## **CHAPTER 5**

### **5.1 Jurisdiction in general**

Jurisdiction is the power or the competence of the court to hear and determine an issue between the parties.<sup>31</sup> Jurisdiction is exercised when an authority responds to a dispute between individuals or other legally recognized entities for the purpose of making a determination regarding the dispute between individuals involved in the dispute.<sup>32</sup> Such jurisdiction is exercised whenever action is taken in a judicial proceeding by an authority in the settlement of an individual controversy through the application of legal principles.<sup>33</sup>

When jurisdiction is granted to the courts by statute, the courts' task is simply to interpret the statute and to apply it to the facts of the case<sup>34</sup>. For example, customary courts' jurisdiction is granted by the statute, the Community Courts Act, 10 of 2003. In order to determine jurisdiction, a community court should interpret the provisions of the enabling Act to the facts of the case before it.

For a court to have jurisdiction there should be a nexus or contact between parties to a proceedings and the court. In some instances the court may be faced with a range of choices as to the appropriate law which should apply to the dispute in question. In attempting to determine what law governs the dispute before the court, the court seeks guidance from connecting factors, that is, factors which link an event or a person to a matter in dispute<sup>35</sup>. Examples of such factors are: the place where contract was concluded, the place of where contract is to be performed, the place where delict was committed and domicile of the parties.

In a jurisdictional context a cause of action is a connecting factor which will vest a specific court with jurisdiction. The cause of action is defined as the act of the defendant which gives the plaintiff his cause of complaint<sup>36</sup>. Cause of action

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<sup>31</sup> Graaf-Reinert Municipality v Van Rynevelds Pass Irrigation Board 1950 (2) SA 420(A)

<sup>32</sup> Weintraub 2001:114

<sup>33</sup> *ibid*

<sup>34</sup> Pistorius 1993:2

<sup>35</sup> Weintraub 2001:114

<sup>36</sup> Pistorius 1993:62

usually arise from contract or delict and a court will be vested with jurisdiction if a contract was entered into or was to be performed within its area of jurisdiction or a delict was committed within its area of jurisdiction.

Connecting factors have no independent significance, but they only provide the means to choose the appropriate law, but cannot determine the choice. The process of identifying the connecting factors is the same regardless of the nature of the dispute. The weight attached to a particular connecting factor varies according to a nature of a dispute, for example in succession; *lex domicilli* is given much more weight than in a question of contract<sup>37</sup>.

## **5.2 Do community courts in Namibia have criminal and civil jurisdiction?**

While criminal and civil jurisdictions have been clearly outlined in the Magistrate's Court Act of 1944, the same cannot be said with the Community Courts Act, 10 of 2003. The Act does not make reference to criminal or civil jurisdiction. Section 12 of the Act reads:

“A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law.....”

Reference should also be made to Traditional Authorities Act, 25 of 2000 which refers to the authorities of traditional authorities. Section 3 (3) (b) states that:

“A traditional authority is authorized to hear and settle disputes between members of the traditional community in accordance with the customary law of that community.”

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<sup>37</sup> Mayss 1997 :2

These provisions seem to refer to civil matters but may include criminal matters known to customary law of a particular traditional authority. If one looks at section 12 of the Community Courts Act, the most important word is compensation and there seems not to be a distinction between civil and criminal matters. As Hinz<sup>38</sup> puts it “customary law compensation was seen to be the principle remedy for most cases, cases that common law would not treat as cases that could finally be settled between private parties, but had to be attended to by the state under its monopoly to prosecute and punish on behalf of the society as a whole.”<sup>39</sup>

Customary law compensation is said to be different from compensation under common law in the sense that customary law compensation balances the economic side of the loss, but also has a punitive element<sup>40</sup>. That is why it is difficult to say with certainty that the community courts in Namibia do not have criminal jurisdiction.

### **5.3 Analysis of statutory provisions relating to the jurisdiction of community courts**

#### **5.3.1 Traditional authorities Act, 25 of 2000**

The Traditional Authorities Act, 25 of 2000 was enacted to regulate the affairs of traditional authorities in Namibia. The Act also provides for the requirements that

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<sup>38</sup> Hinz 2008b: 159

<sup>39</sup> Hinz. 2008a:71.

<sup>40</sup> *ibid*

should be fulfilled and the procedure to be followed for the traditional authority to be established. Section 2(1) of the Act states that:

“Every traditional community may establish for such a community a traditional authority”.

This section may imply that a traditional authority is established for the traditional community and not necessarily for the geographical area which is occupied by that particular community.

Section 2(2) deals with the powers, duties and functions of traditional authority as having “jurisdiction over the members of the traditional community in respect of which it has been established”. The powers, duties and functions of a traditional authority may be interpreted to include the administration of justice. Thus, in the execution of its duties and functions including adjudication of matters before it, the traditional authority would have jurisdiction over its members. The emphasis here is “jurisdiction over members” and this particularly implies that a traditional authority has jurisdiction over its members wherever they find themselves. This underscores the notion that customary law courts’ jurisdiction over persons is based on tribal affiliation regardless of where the litigants happen to live or work.<sup>41</sup>

Another provision of the Act that deals with the jurisdiction of the traditional authority is section 14 (b) which reads as follows:

“Customary law of a traditional community shall only apply to the members of that traditional community and to any person who is not a member of that community but who by his or her conduct or consent submits himself or herself to the customary law of that traditional community”.

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<sup>41</sup> Bennett 1991:68

Judging from the provisions of the said section, one could argue that first and foremost customary law shall apply to members of the respective traditional community, and secondly to non-members who by conduct or consent, submit themselves to the customary law of a given community.<sup>42</sup> A person who voluntarily submits to the jurisdiction of the court of which he would not have otherwise be subject, may by doing so confer jurisdiction on such court and cannot afterward claim that the court had not jurisdiction over him/her.<sup>43</sup> It goes without saying that a defendant who submits to the jurisdiction of a community court surrenders his right to be brought before a court which would have jurisdiction. Moreover, as stated in *S v Haulolyamba*<sup>44</sup>, any person can submit to the jurisdiction of a tribal chief and agree to be bound by the judgment of a tribal court.

Regarding the membership of a given traditional authority, section 1 of the Traditional Authorities Act defines a member as a person whose parents belong to the traditional community. A member is also a person who, by marriage, adoption or any other circumstance, has assimilated the culture and traditions of the community and the community has accepted the person as a member. In Sambyu traditional authority a person is regarded as a member if he/she has (a) Sambyu parent(s), has lived in the area for a certain period, is married to or adopted by a member of a Sambyu community or wishes to be a Sambyu<sup>45</sup>.

However, Bennet<sup>46</sup> notes that the test for membership of a traditional authority may be subjective or objective. A community court may rely on the declaration of the party regarding his ethnic affiliation (subjective test) or it may infer his

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<sup>42</sup> Also refer to Hinz, M.O. 2003. Application of customary law. Presentation prepared for the 6<sup>th</sup> annual meeting of the Council of Traditional Leaders. Windhoek. (Unpublished)

<sup>43</sup> Pistorius 1993:7

<sup>44</sup> 1993 NR 103

<sup>45</sup> D'Engelbronner-Kolff 1997:130

<sup>46</sup> Bennet 199:64

membership from external factors such as lifestyle and place of permanent habitation (objective test).

Regarding people who have lost or given up their connection to the said community, but would otherwise have fulfilled the criteria of membership in a traditional authority, customary law of that traditional authority might not apply to them. This is the case with people who, although members of a particular traditional authority, live in urban areas and live different life style that cannot be said to be traditional.

### **5.3.2 Community Courts Act, 10 of 2003**

The Community Courts Act was enacted to, among others, provide for the recognition and establishment of community courts, and to provide for the jurisdiction of and procedure to be adopted by community courts.

Section 3(1) of the Community Courts Act states that:

“A traditional authority of a traditional community may apply in writing to the Minister for the establishment of a community court in respect of the area of that traditional community, but only if no court has been recognized or established under this Act for that area”.

Judging from the provision of this section, the community court is established in respect of the area. Area, in relation to a traditional community, is defined in section 1 of the Act as “the geographic area habitually and predominantly inhabited by that traditional community”. If section 3(1) is to be interpreted strictly in relation to a traditional community, then one could conclude that the San community who habitually inhabit some parts of the Ohangwena Region will have community court in Oukwanyama Traditional Authority. However, since a

community court is established in respect of an area, it follows that anyone who commits a crime in that area shall be tried by the community court of that particular area.

In accordance with section 12 of the Act,

“Community Courts shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law, but only if-

- (a) the cause of action of such matters or any element thereof arose within the area of jurisdiction of that community court; or
- (b) the person or persons to whom the matter relates are in the opinion of that court closely connected with the customary law”.

The aforementioned section, as stated earlier, does not make distinction between civil and criminal jurisdiction. However, the community courts shall have jurisdiction with regard to the course of action and persons. The concept “course of action” has been explained in case law.

In *Evins v Shield Insurance Co Ltd*<sup>47</sup> it was stated that “the proper meaning of the expression “cause of action” is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action”.

The expression cause of action also refers to every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court.<sup>48</sup>

Examples of most common causes of action are contract and delict. In certain circumstances a person may be involved in a contract or caused damage in a traditional authority other than that in which he resides. To meet the convenience of the plaintiff and witnesses, this section provides that a defendant may be sued

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<sup>47</sup> 1980 (2) SA 814

<sup>48</sup> McKenzie v Farmer’s Co-operative meat Industries Ltd 1922 AD 16

in a community court that has been established in respect of that traditional authority.

Another factor that will determine the jurisdiction of community courts is the close connection between the persons to whom the matter relates and the customary law which is applied by a particular community court. There should be a link between a person who is party to a particular cause of action, for example a contract, and customary law that is applied by a particular community court in order for that court to claim jurisdiction over that person.

Examples of connecting factors are the place where a contract was concluded, the place where the contract is to be executed, the place where damage or delict was committed and the place of residence of the defendant. The place of residence of the defendant is regarded as an important connecting factor because in traditional governance a community court may only adjudicate upon a matter if the defendant is resident in the area of jurisdiction in respect of which a community court has been established.<sup>49</sup>

## **5.4 Comparative analysis**

### **5.4.1 Jurisdiction of Community Courts and Magistrate's Courts**

Article 78(1) of the Namibian Constitution stipulates that the judicial power shall be vested in the Courts of Namibia which shall consist of a Supreme Court of Namibia, a High Court of Namibia and Lower Courts of Namibia.

In terms of article 83(1) of the Constitution Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.

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<sup>49</sup> Bekker, Labuschagne and Voster 2002:32

The question whether community courts should be regarded as part of lower courts is not yet fully addressed. Some authors<sup>50</sup> consider traditional courts as part of lower courts. The community courts would then be placed below magistrate's courts in terms of hierarchical structure or perhaps put community courts on par with magistrate's courts considering the fact that community courts have their own structural hierarchy within a traditional authority set up. For example in Ondonga Traditional Authority, community courts are comprised of the village courts presided by village headmen, as the lowest level of the judiciary and the high court which sit at the Ondonga Traditional Authority headquarters as the highest judiciary body in the Ondonga Traditional Authority<sup>51</sup>.

The comparative analysis of the community courts and the magistrate's courts will be restricted entirely on the issue of jurisdiction. Both courts are creatures of statutes as they are established by Acts of parliament. The community courts, as stated earlier, are established by the Community Courts Act, 10 of 2003, while the magistrate's courts are established in terms of the Magistrate's Court Act, 32 of 1944. The jurisdictions of both the community courts and magistrate's courts are restricted to what is provided in enabling legislations. That is, the two sets of courts cannot extent their jurisdictions beyond that granted by their respective enabling Acts. As it was stated earlier, when jurisdiction is granted to the courts by statute, the courts' task is simply to interpret the statute and apply it to the facts of the case<sup>52</sup>.

Both community courts and magistrate's courts have jurisdiction in respect of persons. Section 12(b) of the Community Courts Act provides that a community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation or any other claim provided that the person or persons to whom the matter relates are in the opinion of that community court closely

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<sup>50</sup> Hinz, M.O. 2008b: 167

<sup>51</sup> Zenda, S. 2008:5

<sup>52</sup> Refer to foot note 31

connected with the customary law. This section emphasizes a close connection that should exist between a person and a community court for that court to claim jurisdiction. However, this section does not spell out what the expression “closely connected” implies. One has to rely on literatures and case law to find out the exact meaning of “closely connected”.

On the other hand Magistrate’s Court Act points out clearly the category of persons in respect of whom the Magistrate’s Court shall have jurisdiction. Section 28 (1) of the Act provides that:

Saving any other jurisdiction assigned to a court by this Act or any other law, the persons in respect of whom the court shall have jurisdiction shall be the following and not other-

- (a) any person who resides, carries on business or is employed within the district;
- (b) any partnership which has business premises situated or any member whereof resides within the district;
- (c) any person whatever, in respect of any proceedings, incidental to any action or proceeding instituted in the court by such person himself;
- (d) any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within within the district;
- (e) .....
- (f) any defendant who appears and take no objection to the jurisdiction of the court.

Unlike the Magistrate’s Court Act, the Community Court Act does not mention that for a community court to have jurisdiction over a person, that person should resides within the geographical area in respect of which a community court has been established. However, one would assume that residence is one of the

connecting factors that determine the jurisdiction of a community court. While the Magistrate's Court Act provides that a "person" includes juristic persons, and therefore the Magistrate's Court have jurisdiction over juristic persons, the community courts appear only to have jurisdiction over natural persons. This is possibly due to the fact that community courts do not have a clear cut civil jurisdiction as it refers only in general to "any matter relating to claim for compensation, restitution or any other claim recognized by the customary law".<sup>53</sup>

The Magistrate's Court and Community Courts shall have jurisdiction on the basis of cause of action arising within the area of jurisdiction of the court.

Section 12(a) of the Community Courts Act provides that a community court shall jurisdiction to hear and determine the matter provided that the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court. Similar provision of the Magistrate's Court Act, section 28(1) (d), states that the court shall have jurisdiction over any person if the cause of action arose wholly within the district. The expression "the cause of action arising wholly within the district was explained in *McKenzie v Farmer's Co-operative Meat Industries Ltd*<sup>54</sup> as "every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence, which is necessary to prove each fact, but every fact, which is necessary to be proved".

The difference between the two provisions is that the Magistrate Court shall only have jurisdiction if the subject matter of court proceedings arose wholly within the district. The Community Courts Act on the other hand is silent on the degree of origin of the cause of action, whether the cause of action should arise wholly or otherwise within the area of jurisdiction of that community court. The requirement that the court shall have jurisdiction if the cause of action arose wholly within the district is meant to meet the convenience of the plaintiff in such a case and also

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<sup>53</sup> Section 12 (b) of the Community Courts Act, 10 of 2003.

<sup>54</sup> 1922 AD 16

the convenience of witnesses.<sup>55</sup> For instance if a person (a defendant) is involved in an event which occurs in a district other than that in which he resides, he may be sued in that district where the cause of action arose. However, as mentioned earlier, with regard to the jurisdiction of community courts, these courts may only adjudicate upon a matter if the defendant is resident within their areas of jurisdiction.

Another distinct difference between Community Courts and Magistrate's Court is that the Community Courts Act does not list causes of action in respect of which Community Courts shall have jurisdiction. On the other hand, section 29 (1) of the Magistrate's Court Act spells out causes of action in respect of which a court shall have jurisdiction.

The Magistrate's Court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto.<sup>56</sup> Similarly, by virtue of section 14(b) of the Traditional Authorities Act, customary law of a traditional community shall apply to any person who is not a member of that traditional community but who by his/her conduct or consent submits herself or himself to the customary law of that traditional community. Although this section applies to the application of customary law to non-members of a traditional community by consent, it can also be extended to apply to the jurisdiction of community courts to persons over whom a community court would not have otherwise had jurisdiction<sup>57</sup>.

However, there is a difference between jurisdiction by consent in the Magistrate's Court and Community Court in the sense that in the Magistrate's Courts a person is required to consent in writing, while in the Community Courts a person can

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<sup>55</sup> Paterson 2005:23

<sup>56</sup> Section 45(1) of the Magistrate's Court Act, 32 of 1944.

<sup>57</sup> Refer to D'Engelbronner-Kolff 1997:132. D'Engelbronner-Kolff referred to *Regina v Hailya*, 19/8/1995, in which a complainant was a Nyemba from Angola and the defendant an Ovambo. Both lived in Sambyu area and thus consented by conduct to the jurisdiction of Sambyu Community Court.

submit to the jurisdiction of the court by consent, be it orally or otherwise, or by conduct.

#### **5.4.2 Community Courts Act, 10 of 2003 and Traditional Courts Bill (2008) of South Africa**

In South Africa, just like in Namibia, the administration of justice is carried out by community courts which administer justice on the basis of customary law. In South Africa, the operation of traditional courts was governed by different statutes such as the Black Administration Act, 38 of 1927, the Bophuthatswana Traditional Courts Act 29 of 1979 and the Chiefs Courts Act 6 of 1990, depending on the geographical area in which the court is located.<sup>58</sup>

Jurisdiction of traditional courts under these laws is only over Blacks or Africans in areas where these Acts apply. The basis of jurisdiction was changed to jurisdiction over persons to reflect the values of the non-racial society<sup>59</sup>.

The same state of affairs applied in Namibia before the enactment of the Community Courts Act. Different laws regulated the administration of justice by traditional communities such as Jurisdiction of Traditional Authorities in Hereroland in respect of Civil and Criminal Amendment Proclamation, 1980.

The need to have a single legislation regulation traditional or community courts arose and hence the Community Courts Act, 10 of 2003) and Traditional Courts Bill (2008) were enacted.

The Traditional Court Bill (B – 15) of South Africa provides for civil and criminal jurisdictions of traditional courts. Section 5(1) of the Bill provides that:

“A traditional court may, subject to subsection (2), hear and determine civil disputes arising out of customary law and custom brought before the court where the act or omission which gave rise to the civil dispute

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<sup>58</sup> South African Law Commission. 21 January 2003. Report on Traditional Courts and the judicial function of traditional leaders. P.1.

<sup>59</sup> *ibid*

occurred within the area of jurisdiction of the traditional court in question”.

Issues relating to the dissolution of marriage (whether customary or civil), custody and guardianship of minors, or maintenance are excluded from the jurisdiction of traditional courts<sup>60</sup>. The reasons for the exclusion of jurisdiction over these matters are that these are controversial issues on which there are conflicting views.<sup>61</sup> Moreover, women groups felt strongly that customary courts should not have jurisdiction over matters relating to status or maintenance on the basis that these courts are biased against women.<sup>62</sup> This perception might have originated from the fact that community courts are presided over by men as chairpersons or traditional judges.

Regarding criminal jurisdiction section 6 of the Traditional Courts Bill provides that:

A traditional court may hear and determine offences brought before the court if the offence occurred within the area of jurisdiction of the traditional court in question and if such offence is listed in the Schedule

<sup>63</sup>.

On the other hand the *Community Courts Act, 10 of 2003* does not explicitly refer to the usual common law distinction between civil and criminal matters to determine jurisdiction of community courts.<sup>64</sup> As stated earlier, section 12 of the Act states in general that Community Courts shall have jurisdiction to hear “any matter relating to claim for compensation, restitution or any other claim

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<sup>60</sup> Section 5(2) of the

<sup>61</sup> South African Law Commission. 2003. Report on Traditional Courts and the judicial function of traditional leaders. Pretoria: South African Law Commission. P.10

<sup>62</sup> *ibid*

<sup>63</sup> The Schedule lists offences which may be tried by a traditional court. These are theft, malicious damage to property, assault, where grievous bodily harm has not been inflicted; and *crimen injuria*.

<sup>64</sup> Hinz, M.O. 2003b:2.

recognized by the customary law”<sup>65</sup>. It appears that the emphasis of Community Courts Act is on compensation coupled with punitive measures in the sense that a person can pay more as compensation irrespective of economic value of the loss.<sup>66</sup>

Both legislations provide for solutions should the conflict of laws arises in cases where two or more different systems of customary law may be applicable. Section 13 of the *Community Courts Act*, stipulates that:

A community court shall apply the customary law of the traditional community residing in its area of jurisdiction: Provided that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter.

Similar provision is provided for in the *Traditional Courts Bill* of South Africa. Section 9(4) (a) of the Bill states that:

“Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the court must apply the system of customary law that the parties expressly agreed should apply”.

Should the parties to a dispute fail to agree on the system of customary law that should apply to a dispute before a traditional court, then the system of customary law applicable in the area of jurisdiction of the traditional court shall apply, or the traditional court may apply the system of customary law with which the parties or the issues in dispute have their closest connection<sup>67</sup>.

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<sup>65</sup> Refer to foot note 46.

<sup>66</sup> Hinz, M.O. 2008a:72.

<sup>67</sup> The expression “closely connected” was discussed under Comparative analysis: Jurisdiction of Community Courts and Magistrate’s Court.

### 5.4.3 Comparison with Botswana

There are similarities with regard to the administration of justice by traditional leaders prior to independence in Botswana and Namibia. In Botswana and Namibia, the administration of justice by traditional leaders was regulated by the *Native Administration Proclamation, 74 of 1934*<sup>68</sup> and *Native Administration Proclamation, 15 of 1928* respectively. These and some other legislations defined jurisdiction of traditional courts. However, for the purpose of this comparative analysis, only legislations passed after independence will be considered.

In Botswana customary law is regulated by *Customary Law Act (Application and Ascertainment) 51 of 1969*. Section 2 of the Act defines customary law as follows:

”Customary law means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as is it is not incompatible with the provision of any written law or contrary to morality, humanity and natural justice”.

Just like the definition of customary law in section 1 of the *Traditional Authorities Act*<sup>69</sup>, the definition of customary law as provided in the *Customary Law Act* of Botswana does not offer a clear insight into the meaning of customary law as it repeats the words “customary law” in its definition, the same words it was suppose to define.

The application of customary law in Botswana is provided in section 4 of the Act which reads as follows:

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<sup>68</sup> Hinz 2003a:145

<sup>69</sup> Section 1 of the Traditional Authorities Act defines customary law as follows: Customary law means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law in Namibia.

“Customary law shall be applicable in all civil cases and proceedings where the parties there are tribesmen unless:

- (a) it shall either appear from express agreement or from all relevant circumstances that each intended the matter to be regulated according to the common law, or
- (b) the transaction out of which the case or proceedings arose is unknown to customary law,
- (c) the parties express to the court their consent to common law being applicable and such consent shall be recorded in writing and attached to the court record of the case and shall be irrevocable”.

“Tribesmen” is defined as a member of a tribe or tribal community of Botswana or a member of a tribe or similar group of any other country in Africa.<sup>70</sup> If this definition of tribesmen is anything to go by then Tswana ethnic groups in Namibia, South Africa and elsewhere in Africa are covered *by Customary Law Act* of Botswana.

In sharp contrast with the *Customary Court Act* of Botswana, the Community Courts Act of Namibia does not refer to tribesmen or similar concept in its application of customary law. Instead, section 12(b) of the Act provides that a community court shall have jurisdiction if the persons to whom the matter relates are closely connected with customary law.

In case of conflict of laws and if the question arises which system of customary law is applicable, the Customary Law of Botswana provides guiding principles that should be followed to determine which system of customary law should be applied<sup>71</sup>. For example in matters related to land, the customary law that should be applied is the law of the place where the land is situated. In matters related to succession, the customary law of the deceased’s tribe or tribal community will

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<sup>70</sup> Khumalo 1977:3

<sup>71</sup> Khumalo 1977:77

apply. Should there be an agreement, the court shall apply the customary law which the parties intended to regulate their obligations in the matter.

In the absence of such agreement, the court shall apply the law which is operation at a place where the defendant or respondent resides or if two or more systems of law are in operation at that place, the court shall not apply any such system unless it is the law of the tribe to which the defendant or respondent belongs<sup>72</sup>. This view is supported by Schapera<sup>73</sup> when he states that in Tswana customary law, a defendant is tried by his own headmen and at his own court, except when the case has been transferred to some higher authority.

In Namibia, the Act does not provide guiding principles that should be followed should there be different systems of customary law. Section 13 of the Community Courts Act provides that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter.

Customary courts in Botswana have both criminal and civil jurisdiction. Criminal jurisdiction of customary courts in Botswana is provided in section 11(1) of the Customary Courts Act which reads as follows:

“Customary courts will have jurisdiction where:

- (a) the accused is a tribesmen or consents in writing to the jurisdiction of the court.
- (b) The charge related to the commission of an offence committed either wholly or partly within the area of jurisdiction of such court”.

Customary courts in Botswana have jurisdiction not only to hear disputes between members of the traditional authority, but also disputes with outsiders in

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<sup>72</sup> Bekker, Labuschagne and Voster 2002:31

<sup>73</sup> Schapera 1994: 281

which one of the parties is a member of traditional community in which a court is established.<sup>74</sup>

Civil jurisdiction of customary in Botswana is provided in section 10 of the Customary Courts Act and the requirements for the court to exercise jurisdiction in respect of persons read:

- (a) all parties shall be tribes men, or
- (b) The defendant must have consented in writing to the jurisdiction of the court or
- (c) The defendant must be ordinarily resident within the area of jurisdiction of the court or
- (d) The course of action arose wholly in such area”.

As stated earlier, the Community Court Act, 10 of 2003 does not provide for a distinction between civil and criminal jurisdiction. Nor does it require a defendant to be a resident within the area of jurisdiction of the court or the defendant to consent in writing to the jurisdiction of the court. It rather requires that the persons to whom the matter relates should have close connection with the customary law applied by the community court.<sup>75</sup> Like in Botswana, for the community court in Namibia to exercise jurisdiction the cause of action of a matter under consideration by the court should arise within the area of jurisdiction of the community court<sup>76</sup>.

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<sup>74</sup> Schapera 1994:281

<sup>75</sup> Section 12 of the Community Courts Act, 10 of 2003.

<sup>76</sup> *ibid*

## **CHAPTER 6**

### **Can a party opt out of the jurisdiction of a community court?**

The Community Court Act does not address clearly the issue of opting out of the jurisdiction of community court by a party to a proceeding before that court. However, the Act deals with referrals of matters to the magistrate's court. Section 21 (1) of the Act reads:

“In any proceedings before a community court, the community court may-

- (a) if it is of the opinion that such community court does not have jurisdiction to hear the matter; or
- (b) for any other good cause,

at any stage before any order is made, either of its own accord or on application by any interested party, refer the matter to the magistrate's court for directions as to the transfer of that matter to any other court".

It appears that although does not clearly provides for opting out of the jurisdiction of the community court, any interested party including a party to the proceedings may apply to the community court for his matter to be transferred to the magistrate's court. A party to proceedings in a community court cannot just out of his own volition opt out of the jurisdiction of a community court simply because he does not want to be tried by a community court. There should be a good reason for a case to be transferred to a magistrate's court.

On the contrary, the issue of opting out is clearly dealt with in clause 28(5) of the draft Traditional Courts Bill which provides for opting out of the jurisdiction of a customary court in favour of another court of competent jurisdiction<sup>77</sup>.

However, on the question whether a party can opt out of the jurisdiction of customary courts, the South African Law Commission report reveals that some traditional leaders felt strongly against opting out.<sup>78</sup> They argued that opting out will degrade customary courts and undermine their status.

In Namibia, the issue of opting out was never raised. However, the writer does not support the idea of opting out of the jurisdiction of community court for a reason that it would defeat the whole essence of customary courts in that it would weaken the authority of community courts. If there is a good reason for a person to apply for a matter to be transferred to a magistrate's court in terms of section 21 of the Community Courts Act, then the matter can be transferred to that court.

The Community Courts Act provides mechanisms for appeal to the magistrate's court by a person who is aggrieved by a decision of that community court<sup>79</sup>. Any

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<sup>77</sup> South African Law Commission. 2003. Report on Traditional Courts and the judicial function of traditional leaders. Pretoria: South African Law Commission. P.32

<sup>78</sup> *ibid*

<sup>79</sup> Section 26(1) of the Community Courts Act, 10 of 2003

person who would like to opt out of the jurisdiction of a community court out of concerns that justice would not prevail in a community court or that a community court would not deliver an unbiased judgment will rely on that provision to seek justice. Opting out of the jurisdiction of a community court is not a necessity as the Community Courts Act provides sufficient mechanisms to ensure that justice prevails.

## **CHAPTER 7**

### **Conclusion**

The study has revealed that traditional courts are established for traditional communities. A community court would have jurisdiction to try members of a traditional community in respect of which a community court has been established wherever those members found themselves. The study thus established that the jurisdiction of a community court is community bound rather than entirely restricted to a geographical area in which that particular community court has been established.

The study has also shown that unlike in other jurisdictions notably in Botswana, the jurisdiction of community courts in Namibia is not restricted between members of a traditional community in respected of which a community court has been established. The community court would have jurisdiction over persons who

are not members of a traditional community provided that a cause of action which led to the subject matter of the proceedings arose within the jurisdiction of that particular court.

Another requirement for a community court to have jurisdiction, the study revealed, is that the parties to the proceedings before a community court should be closely connected to customary law applicable to within the area of jurisdiction of a community court. It is not a requirement that parties should be residents within the area of jurisdiction of the community court.

The study has also established that in Namibia, unlike in Botswana and South Africa, there is no common law distinction between civil and criminal law. Thus, the Community Courts Act does not make a distinction between civil and criminal jurisdiction with regard to community courts. The Act rather states in general terms that community courts shall have jurisdiction to hear and determine any matter relating to compensation. However, compensation with regard to customary law has some punitive elements in the sense that a person may be required to pay compensation which is not proportionate to the damaged caused. Thus, it is not entirely correct to conclude that since criminal jurisdiction is not expressly stated in the Community Courts Act, community courts in Namibia do not have criminal jurisdiction.

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## **List of cases**

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