

# **COMMUNITY COURTS IN NAMIBIA: A POLICY CHALLENGE**

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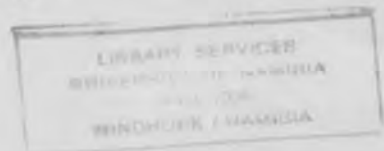
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**ABSTRACT:**

For generations, Customary/Community Courts have played a vital role in the resolution and settlement of disputes among community members. Traditional leaders have been instrumental both as law-makers and as enforcing judges of the customary law observed by the majority of the population of the area under their jurisdiction. Usually chiefs and specific headmen are empowered to hear and determine law and custom brought before them by the residents within their respective areas of jurisdiction. Customary Courts at present also do have jurisdiction to try criminal offences from contravention of the common law or of customary law and custom. In most cases such offences are limited to theft, common assault, neglect of children, offences arising from inheritance, customary Unions and delicts like adultery, seduction and failing to pay lobola (dowry) among others.

Nowadays, offenders may not be sentenced to imprisonment or subjected to corporal punishment as it has become unlawful, but to fines payable as compensation traditionally calculated in cattle or an equivalent of ten small stock to one cattle. An equivalent in monetary terms may also be accepted.

After the enactment of the independence constitution where all Bantustan laws were repealed, there seem to have been no proper direction nor enabling legislation to guide traditional authorities in their administration of Justice. Thus the necessity of an enabling legislation (Community Courts Bill) to address the situation.



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**THANK YOU.**

DECLARATION

**DEDICATION**

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**TO MY MOTHER, LATE FATHER, BROTHERS AND IN LAWS  
(MR & MRS LIBUTO, MR ABEL & MR MOSES LIBUTO, MR. & MRS.  
VINCUMBO)**

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## CHAPTER 1: INTRODUCTION

### 1. Customary law before colonialism

The law was geared to the needs of the people it served. Communities during these days were basically organized on tribal, ethnic or language lines. They depended on a subsistence economy. Small groups produced only for their own basic needs. They tended to live and work in isolation from the influence or control of others. The law that serviced these early societies was very informal and tended to flow from the tribal chiefs and leaders as an adjunct to their personal structure and political power. It was not written, and it rarely required reference to broad generations or abstractions or to carefully constructed analogies from the past or from other societies. It is commonly known for its flexibility and its pluralism. It differed from place to place and tribe to tribe, and even from time to time within the same community/area as leaders changed. Every traditional leader who came to power could change the laws if he/she so wished. There was lack of consistency in some areas.

Most importantly, customary law was a great oral tradition respected by the majority of the people and it was passed on from generation to generation. That is how customs that were used many years ago are still being practiced by today's generation. Where there was doubt about the application of the law to specific instances or it was ambiguous, it was smoothly if not arbitrarily resolved by the prestige and power of the traditional leader. Traditional leaders were highly respected. What ever they said was carried out.

Customary law can be said to have been very effective, considering the harsh colonial environment it survived. It flourished nearly everywhere (especially in rural areas) through the colonial period, when it was referred to as native law. It is flourishing still and highly practiced throughout rural Africa. It is now known as customary law. This law is very important in many peoples' lives, especially in rural areas. There is no doubt about the significance and the direct impact that customary law has on many African people. However, it is sad to note that it is not a subject of intensive study in Law institutions. It is rather relegated to lower level or ignored by national governments. There are several reasons given for

this. There are arguments that, customary Law is plural. In a country like Namibia with a population of 1.8 million people, there are more than thirty eight tribes and thus many different customary Laws. The argument then is, since one may not master them all, the natural inclination is to turn one's attention to uniform national laws. Customary Law is understood to be not knowable. It is considered as a shifting, cloudy/unwritten oral tradition. For sure once customary law is put in legal writing for study purpose and for posterity, it will definitely take its rightful position and become something different than it is now. This may partly explain why little has been done to codify customary law.

Another argument, attributed to the elite urban Africa is that as some cultures, traditions and subsistence way of life, for which customary law is designed are changing, customary law must be modified to meet the demands of modern urban African. Customary law's source of authority is partly depleted by the migration to new cities where new conditions prevail. Thus to harmonize customary law and provide it with a significant playing ground in the national agenda, it is not only essential to recognize it, but put it on the same level as the other lower courts - magistrates courts. Judicial officers should be paid accordingly and receive the necessary training intended for a legal officer. This will help in imparting fair Justice.

The other argument is that, customary law may not adequately serve an economically, socially and politically thought nation-state. It is considered to be too ambiguous to play a constructive role in promoting economic development.

The fact is, customary Law was deliberately marginalised and was never developed. Customary courts were creations of the colonial authority. Their main purpose was to provide a medium for resolving disputes common to the African population. Customary Law applied exclusively to Africans and nothing was seriously done to incorporate some valid aspects of customary law to common law as it was done in many Arab States. This is the challenge Namibia is now facing.

## 1.1 **Background:**

The paper is not intending to analyze all aspects of traditional authorities or customary laws. However, it will attempt to look at some customary laws that are in force and those which were in use that are considered to have been done-away with, or changed, as evidence to the practical theory that customary laws are not static but can be changed to suit the environment into which they operate. The paper will also attempt to look at the current judges' role and how it will fit in the proposed new structure of community courts. The participation and the right to legal representation, the rights of the accused and complainant as enshrined in the constitution of Namibia, will also form part of the study.

Community/customary courts had been in existence in Namibia even before the German colony. Distinct proclamations were enacted to regulate customary laws.

However Proclamation R348 of 1967<sup>1</sup>, titled: "civil and criminal jurisdiction-chiefs, headmen, chiefs' deputies and headmen's deputies, territory of South West Africa" is the first legislation to set out rules for the administration of Justice by customary courts. 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 natives against natives resident within the area of jurisdiction.

There is no known existence of an established system of customary case law nor restatements or codification in Namibia. What exists is a number of self-stated legal texts by various traditional authorities which are more a reflection of the internal developments of traditional communities and the people's own views on what their law should be like <sup>2</sup>. Every community do have their own laws which may differ in one way or another and thus the proposed community courts Act authorizes the minister of Justice to make regulations to ensure proper dispatch and conduct of proceedings of community courts and provides that different regulations be made in respect of the different community courts.

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<sup>1</sup> See regulation Gazette No. 884, vol. 30 dated 22 December 1967

<sup>2</sup> Hinz, 2000 - Customary Law in Namibia: Development and perspective, CASS paper No. 44.

The laws of Ondonga (Ooveta dhoshilongo shondonga) for example are not a codification of the laws of Ondonga in the sense that they substitute the orally transmitted laws and the laws established through the practice of Ondonga courts.

Hinz (2000) observes that the "Ooveta" only contain those aspects of the laws of Ondonga which the King's council deems to be important.

The Ooveta outlines the way a court case is initiated, the procedure for appeal and the transference to high courts, culminating in the hearing before the "Ongonga" (court).

Community courts are proposed to re-structure the customary court system and assist traditional authorities enforce their judgements in line with the constitution.

In many traditional authorities in various regions in Namibia and Southern Africa where research has been conducted, it has been observed that the chief is at once the ruler, judge, maker and guardian of law- all powers are in one person: legislative, executive and judiciary powers. Engelbronner-Kolff<sup>3</sup> observes that traditionally, the powers and functions of traditional authorities are not functionally differentiated. He further observes that the chief is constrained by accountability, custom, tradition and the need to maintain a following. A system of checks and balances is said to be visible in these constraints. According to Engelbronner, principles of good governance, democracy, the rule of law and justice for all, laid down in the Namibian constitution can be traced in the traditional structures as well. However, this needs further investigation.

In some traditional authorities in Namibia (Oshivambo speaking communities), trials in civil and criminal cases are usually conducted before the chief and his councilors. It is up to the complainant to summon the respondent and witnesses<sup>4</sup>. According to Rautanen<sup>5</sup>, in cases of murder, feud was practiced and payment of compensation which the family of the deceased normally accepted was possible. The price was often eight to ten head of cattle,

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<sup>3</sup> Engelbronner - Kolff: Traditional Authority and Democracy in Southern Africa

<sup>4</sup> Hinz (200) - Customary Law in Namibia: Development and perspective

<sup>5</sup> Rautanen - Die Ondangwa, in S.R. Steinmetz Die Rechtsverhältnisse von eigeborenen vorkern in Africa und Ozeanien, Berlin

ostrich egg decoration, other valuable items and tobacco, depending on the wealth of the parties involved. Rautanen further observed that to start the negotiations, the party which caused the death sends an ox to the chief and reports the case to him. After the successful completion of the negotiation and the delivery of the agreed upon price, an ox is slaughtered. The blood is seen to wash the murderer and the family clean. If blindness is caused, continuous payment has to be made to the person who has lost his/her eyesight. Adultery is sentenced with one or two head of cattle. The thief has to restitute the stolen goods, and sometimes, in addition pays the multiple value of the goods. In the Oshiwambo speaking communities, the office of "mwene gwomukunda" (headman) is the office of the person who decides on smaller claims. People who are not satisfied with his decision could approach the foreman of the chief or the chief himself. Killing by negligence or in self-defense has also to be compensated, although the chief has the power to order payment to be waived. In Herero communities adultery was fined one to four head of cattle. However, the husband very often took revenge by raping the wife of the person who committed adultery.

A murderer could be sentenced to death; for other offences, corporal punishment was practiced, burning of hands could be imposed on thieves. Many of these laws seem not to exist anymore as they are in conflict with the constitution. However further research is needed in this area to determine which laws are still in force.

There are examples that can refute the notion that customary laws are static and cannot be developed. In the Namibian context there had been some movements towards the direction of change and development.

The 1989 Ooveta (law) was amended on 20 August 1993 and the amendments were officially announced to the Ondonga community by King Immanuel Eliphaz Kauluma.

There were many changes made under section 13 of the Ooveta (Ondonga law):

- ▶ Where the owner's power to determine the price for one head of cattle under certain circumstances has been limited to N\$ 800-00 sec.23.1 has been added to allow the king's council to adjust the official price of one head of cattle from time to time;
- ▶ New offences have been inserted and some existing offences reinforced by precisely stated fines: entering public bars or other public places with a weapon has been prohibited during the marula wine season. Contraventions are punished with a fine of N\$50. A fine of N\$50 is also imposed for the cutting of trees in contravention of sec. 24. The same fine is due for the illegal firing of guns according to sec.26.
- ▶ The changes to improve the gender balance and the protection of widows could be considered as the most important amendments to the Ondonga customary law and a constructive break through to the adaptability of customary law to the changing world.

Sec.9.2 granted the widow the right to stay on the land she occupied with her husband, which was not the case in the previous version of Ooveta (customary laws) where the widow according to sec.9.3,9.4 and 9.5 was required to pay between N\$300 to N\$600 ( according to the size of the land) when she decided to stay on the land or face eviction. These sections were removed from the Ooveta (Ondonga laws) (with effect from 20 August 1993).

The 1993 changes to Ooveta (Ondonga laws) could be considered as a good attempt by some traditional authorities in Namibia to cope with the requirements contained in the constitution as far as their administration of Justice is concerned.

The Ooveta (Ondonga laws), however is not unique in the legal history of customary law in Namibia. Loeb (1991) observes: when King Mandume ya Ndemufayo of the Kwanyama tribe came to power in 1897, he changed some laws he found and established his own laws. The seven sections quoted by Loeb contain the demand for peace with the tribes of the south, the termination of robbing of cattle by nobles within the Kwanyama community, the payment of fines in cases of assault where blood was drawn, the prevention of killing a person because he was accused of witchcraft, and the prevention of abortion in the case of a girl becoming pregnant before her "efundula"(wedding ). Mandume changed the law of the land by adjusting it to the new environment. Taking into account the aforesaid, it appears that certain indigenous values /customs have been adapted to the new needs of the communities. This is an indication that customary law may not be such a rigid system of law as it is often perceived to be. It is also adaptable to prevailing circumstances. However there are still many challenges customary Law has to overcome before it takes its rightful place in the Namibian Legal system.

The study will attempt to look at the policy challenges of community courts and customary law in a general context. Aspects concerning community/customary courts structure, composition, common sentences, procedures followed, payments, appeals, how decisions are taken, among other things will be discussed in this paper.

## 1.2 **Research Problem**

Though the constitution and relevant legislation enacted address traditional and customary law matters and fully recognize the existence of community courts and customary law in general, they fall short in defining in clear terms the law-making function of Traditional Authorities.

Customary law is facing a wide range of challenges that this institution has to overcome to survive. Some of the commonly practiced customs and court sentences like corporal punishment, illegal detention and hard labour among others have been declared unconstitutional. Customary law therefore has to change gear and adapt to the changing environment.

The legislative power of Traditional Authorities emanates from article 66(1) of the constitution of the Republic of Namibia. It states among other things that “all customary laws in force on the date of independence shall remain in force ...” Hinz<sup>6</sup> observes, “a consequence could be to hold that customary law in force on the date of independence included the power of traditional authorities to function as customary law-makers”. Questions may be raised as to whether or not such a power meets the compatibility test when set against the constitution. Under the Constitution of Namibia, Chapter 7 (article 44) parliament is the only law-maker.

However, despite this recognition by the country’s supreme law (constitution), customary/community courts in Namibia have been neglected to a large extent.

There is no legislation in place to regulate the operations of community courts, neither do they receive adequate state funding. The study among other things examines the current structures and law making process of traditional authorities and its possible compatibility with the Namibian constitution.

### 1.3 Objectives of the research paper

- To assess the role of community/customary courts as lawmakers/ compatibility and adaptability of customary Law to changing situations and the challenges facing customary Law
- To undertake a situational analysis of traditional courts in Namibia and a comprehensive analysis of the envisaged community courts Act.
- To recommend viable policy instruments in the implementation of the proposed community courts.

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<sup>6</sup> Hinz (2000) - Customary Law in Namibia: Development and Perspective (fifth edition)  
See also Hinz (1992) - Conflict Management in the Interference between customary law and the Constitution state.

#### 1.4 **Research questions**

Traditional Authorities in Namibia seem to be ready to embrace the proposed Community Courts Act and embark on progressive changes to their system. However, not all-traditional authorities are ready to confront the new challenges. There are a few who claim that their laws were or are unchangeable and that God made them. Thus the dissertation examines, among other things, how the current Traditional Courts set up may fit in the envisaged Community Courts Act, the policy and constitutional challenges facing customary law in Namibia .

Therefore the main research question is:

What are the policy/Legal challenges facing customary Law in Namibia?

The paper further investigates the following sub-research questions among others:-

- ▶ How the current traditional courts structure set-up fits in the envisaged Community Courts Act.
- ▶ How do the principles of good governance, democracy, the rule of law and Justice fit into the Traditional authorities' Legal structure?
- ▶ Is customary law such a rigid system of law that it can not adapt to prevailing circumstances as it is often perceived?
- ▶ Should all rules of conduct which people regard as obligatory (socially enforceable or tolerable), and which are observed, be seen as law?
- ▶ Is there a capacity - building programme to train community judges to a common level of understanding; who provides/should provide such training?

#### 1.5 **Justification of the study**

Despite life-style changes and new modern developments in Namibian communities and their surroundings, the role of the traditional authority and its judiciary service are still alive. Traditional leaders seem to be still practical in the creation, observance and protection of customary law. Customary courts and

traditional leaders are relied upon in settling family or neighborhood disputes, administration of land, conservation of the environment and some local development projects among others.

Research conducted in customary law matters however indicate that not much has been done so far in terms of research in the area of legal and policy challenges customary law has to adapt to.

The study therefore intends to provide traditional authorities in Namibia with a tool to cope with the provisions of the constitution and enforce their judgment/sentences in line with the said constitution and other legal instruments.

The Ministry of Justice, policy makers, local authorities and other interested persons or institutions will hopefully make use of the results of this study in addressing the weaknesses of the assumed customary law, especially those areas in which customary law is still incompatible with the Namibian constitution and other laws, and help strengthen the capacity of traditional authorities in their administration of justice at local authority level.

A conference on community courts and customary law held in Tanzania in 1963 re-emphasized the fact that customary law was the law under which most of the population regulate their marriages, divorce, inheritance and land tenure amongst other things. Studies conducted in Namibia in this regard confirm the aforesaid. Many Namibians living in rural areas would prefer to approach a traditional court rather than a Magistrate's Court to solve a land or a family dispute. In some circles, this is partly attributed to long distances between some communities and Magistrate's Courts, or due to ignorance and mistrust of these courts.

Therefore, taking justice nearer to the people is assumed to succeed if traditional courts were brought within the mainstream of the system of the administration of justice because these courts cater for the majority of the citizens living in rural areas and those in urban areas who have held trust in Traditional Courts for many years. The other reason observed during this study is the compensation system of the victim. Unlike Modern Courts, those who approach Traditional Courts with their grievances may be compensated in kind or in monetary terms for the damage caused to any member of their family, animals (s), property, themselves, etc.

In terms of article 78 (1) of the Namibian Constitution, judiciary power is vested in the system of courts, which consist of a Supreme Court and Lower Courts.

Lower Courts are divided into two branches:

1. Magistrates' Courts and
2. Traditional Courts.

It is the traditional court system which has to be restructured to bring it within the ambit of the main stream of the administration of justice and thus the necessity of a legal instrument, as the envisaged Community Courts Act, that will help regulate traditional courts and bring them in line with the Constitution and other existing laws. This is the main purpose of recognizing and establishing Community Courts as courts presided over by traditional leaders will formally become part of the Namibian judiciary system. This will enable the Justice Ministry to provide guidance and supervision to community courts in carrying out their functions in line with the Namibian constitution.

## 1.6 **Research methodology**

Rob Barnes (1995) advises that “all research, takes place within models, patterns or paradigms for ‘truth’ that are acceptable within the field you wish to research. Depending on what you believe, you will choose an appropriate tool for the research task”.

Taking into account the afore-quoted, the study uses the desk research and field research methodology. The tools used are qualitative:-

1. Review of existing literature on the subject
2. Laws/policies/documents
3. Parliamentary hansard, reports, newspaper/journal articles
4. Interviews

## 1.7 **Source of data**

### a) Literature

The study draws upon published/unpublished works on the subject in Namibia, Africa and Southern Africa in particular for further analysis.

### b) Documents

- ▶ The Constitution of the Republic of Namibia
- ▶ Traditional Authority Act 25, 2000.
- ▶ Community Courts Bill, 2001
- ▶ Parliamentary Hansards on the subject
- ▶ Other official documents, reports, newspapers/journal articles on the subject, etc.

c) *Others*

- ▶ Interviews and visits to relevant government officials, ministries and agencies who have played a role in the subject (Ministry of Justice, Ministry of Regional and Local Government and Housing, Academic and Research institutions, UN-agencies, Community Based Organizations/individuals and other Non-governmental Organizations).
- ▶ Internet, magazine and newspaper articles on the subject.

1.8 **Limitations of the study**

The study was initially intended to use both qualitative and quantitative methods of research, but due to time and financial constraints it only applied the qualitative method. The impact of colonialism on customary law and details related to gender is not fully discussed in this paper as they are broad topics that require separate studies. The paper then confined and limited its analysis and focus on legal and policy issues in regard to the envisaged Community Courts Act and constitutional challenges facing customary law. The research further took into consideration the time factor and strictly confined its study to prescribed time period.

## CHAPTER 2 : CONCEPTUAL AND THEORETICAL FRAMEWORK

### 2. INTRODUCTION

The study of customary law and customary courts in particular raises conceptual matters that need to be defined and clarified. It is against this background that concepts such as traditional authority, traditional community, community court, customary law, traditional leader, custom and communal area will be defined and clarified in this chapter. The Chapter will also look at some legal challenges to customary law that will be used as yardsticks to analyse the comparability of customary law.

#### 2.1 The Concept of Traditional Authority:

According to the Community Courts Bill, the concept Traditional Authority means a tribal or community authority functioning within an area in accordance with the customary law observed by that tribe or community. Traditional Authority could be equated to government. It is a Traditional Government. A Traditional Authority in Caprivi, for example, comprises a Chief, Ngambela (usually translated as the Prime Minister), representatives of Districts (Manduna ba lilalo). Manduna 'Ba Kuta' (Councilors) live at the place of the traditional authority ('khuta') and hold like ministers' portfolios for certain special tasks. Khuta ya mulena (chief's court) is the highest court of the Traditional Authorities in the Caprivi communities.

Traditional Authority therefore may be defined as the traditional authority established in respect of a traditional community that comprises the following traditional leaders:

- a chief
- senior traditional councilors
- traditional councilors

In accordance with the provisions of the Traditional Authority Act, Act 17 of 1995 as amended by section ----- of Act 8 of 1997, every traditional community is entitled to have a traditional authority. Such traditional authority has jurisdiction over the members of that particular community. In case where a traditional community does not have a Chief, they can designate a Senior traditional councilor as their traditional leader.

The Council of Traditional leaders Act, 1997 (Act 13 of 1997) also defines Traditional Authority as the traditional authority of a traditional community comprising the traditional leaders of that community who have been designated and recognized as such, in accordance with the provisions of the Traditional Authorities Act, 1995 (Act 17 of 1995 )<sup>7</sup>.

## 2.2. **Traditional Leader:**

According to the Traditional Authorities Act, traditional leader means a chief, senior traditional councilor or traditional councilor designated and recognized as such in accordance with the provisions of the Traditional Authorities Act, regardless of what traditional title he or she is called by.

There are at present moment about forty traditional leaders in Namibia who are not yet recognized but regarded and respected as traditional leaders by their communities.

The concept, traditional leader, is not a new concept. Throughout history every community, tribe or traditional group had a leader. This person commanded great respect in his/her communities. Some communities could even make sacrifices for their traditional leader. He/she was and meant everything to his/her community. Some religious sect leaders in some African and south Asian countries also use the title traditional leader.

Traditional leaders have been instrumental in the creation of customary laws and the protection of culture and customs.

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<sup>7</sup> See section 1 of Act No. 13 of 1997

The institution of the traditional leader by designation in terms of the Traditional Authority Act includes appointment, election or hereditary succession to office and any other method of instituting a traditional leader recognized and accepted under customary law.

### 2.3 Chief

A chief under customary law is the chief justice and law maker. She/he is the sole political figure. He is the head of the traditional authority<sup>8</sup>.

According to the Traditional Authorities Act, Chief is referred to as the supreme leader of a traditional community designated in accordance with section three (3) of that Act and recognized as such under section 6.

Some scholars argue that communities do not have any law apart from the rules, which are a product of organized force or have been codified, whereas others are of the opinion that the term 'law' applies to all rules of conduct. The focus now could be on how to distinguish between customary law and custom to understand better customary law.

2.4 **The concept of customary law and community court:** Customary law is the law lived out by the populace as Engelbronner-Kolff<sup>9</sup> observes is linked to the lawmaking abilities and functions of not only the traditional authority, but also the community at large. This assumption is based on the assumption that law-creating function, in accordance with Moore's ideas, is an aspect of a community as a semi-autonomous field<sup>10</sup>.

Van Whelpton<sup>11</sup> observes that no legal system can be separated from the society and the social circumstances in that society. It is thus suggested, a balance should be found between the emphasis on culture and tradition on the

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<sup>8</sup> Section 1 of Act No. 17, 1995

<sup>9</sup> Engelbronner - Kloff (1995) - *The people as Law-makers: The Juridical foundation of the legislative power of Namibian Traditional Communities*

<sup>10</sup> Moore (1978) - *Law as process; an autropoligical approach*, London.

<sup>11</sup> Van Wheopton (1994) - *Inheemse reg en mense reg en menseregte in Suid Africa*, Pretoria.

one hand and the encroachment of principles such as equality on the other. There are so many definitions of customary law. The Traditional Authorities Act of 2000 and Community Courts Bill of 2001, define customary law as the norms, rules of procedure, traditions and usage of a traditional community in so far as they do not conflict with the provisions of the Namibian Constitution or any other statutory law applicable in Namibia. The latter defines Community Court “as a community court recognized under section 2 or established under section 4 of the proposed Community Courts Act.

- 2.5 **Traditional community:** section ----- of the Community Courts Bill defines traditional community as an indigenous, homogenous, endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognizes a common traditional authority and inhabits a common communal area; and includes the members of that community residing outside the common communal area.
- 2.6 **Culture:** Tylor (1871) defines culture as that complex whole which includes knowledge, belief, art, morals, law, custom and other capabilities and habits acquired by man as a member of society.

Bennett<sup>12</sup> observes that culture, which is the cornerstone of customary law, has been used as the basis for the segregation policies of the colonizers. The paper, applies the analytical framework in its study.

## 2.7 LEGAL CHALLENGES TO CUSTOMARY LAW

### 2.7.1 Formal Attributes

- a) **Certainty** - It is almost widely accepted that a successful legal system must make the law relatively certain. It is accepted and understood that certainty is a desirable attribute of law. Customary law is required to walk this path to be successful. For certainty to be practical, it should be accompanied by several other formal

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<sup>12</sup> Bennett (1991) - The compatibility of African customary law and human rights, Acta Juridical.

attributes generally regarded necessary in a legal system. The law should be written, comprehensive, simple, understandable, accessible and should be inexpensive.

i. **Written:** -customary law which is generally unwritten is in most cases difficult and uncertain. Oral rules change from one place to another and from one time to another(from generation to generation). However, some authors had argued that there is little to be achieved by way of legal certainty to reduce laws to writing for a population that is assumed not to be widely literate and has become accustomed to a reliance upon oral traditions over several generations. The fact still remains that , it is better to have a written law than oral rules.

ii. **Comprehensiveness of the law:**

Legal systems strive to ensure that all potential problems and disputes are covered by the law. This is essential for the law to obtain a high degree of certainty.

iii, **Simplicity** - Many legal systems in their search for certainty through exhaustive written coverage of every possible contingency have made laws so complex that a few people can really understand or assimilate them. In some cases sheer volumes of the law may involve various shadings of meaning and even some self-contradiction and inconsistency making it not really very certain at all. However , the need for simple law may directly conflict with other felt needs of a legal system. Customary law has to fit in such circumstances. It has to be made as simple as possible to be clear by the rural majority who are in most cases less educated.

iv. **Understandable** - Law should be relatively understandable to most of the people it is intended to guide and regulate. In the attempt to modernize customary law, it is not enough to have it written, comprehensive and simple. It should also be made clear to the community it is supposed to serve.

Thus, in this attempt alien language and style should be avoided to a certain extent or else many rural people, who rely on customary courts may not benefit from such laws.

- v. **Accessibility** - The law should also be made available at all times and be easily accessible to the people. This will need a trained group of customary law counselors in different customs to be made available to different population groups.
  
- vi, **Inexpensiveness** - A good legal system should also be cheap to maintain. Once community courts are functioning, they will require more state funding. This funding will have to be used/allocated efficiently. Continual constraints on both the development of a suitable customary law and on the methods and processes of law within the customary law system will have to be part of the Local governments development programmes. This should take into account each community's input. The example of other African countries like Zambia where community Courts infrastructure has been neglected by government should be avoided at all cost. Government should allocate sufficient funds to sustain these courts if they are intended to last long and serve communities efficiently.

b) **Thorough Procedures**

To ensure that a dispute is rationally and fairly resolved, it is important that the procedures devised for adjudication be thorough and efficient. Much of law involves a review of procedures adopted to ensure that pertinent facts in each case are clearly established. All issues and sources of law need to be brought to bear in each case.

This is such a highly complicated and expensive exercise that customary law may find difficult to go through. However it is a test customary Law cannot escape from. If community courts are to be credible, they will have to adjust their modus operandi.

c) **Rapid Adjudication**

Thorough procedures and financial constraints may delay the completion of disputes, especially in common law. However some authors opine that the need for rapid as well as inexpensive resolution of disputes may operate as a significant restriction on the ability of a legal system to provide for clarity and for accessible, comprehensive sources of law<sup>13</sup>. Customary courts are highly praised for the rapid resolution of disputes. However this will be tested when community courts are fully established and are functioning according to the formal legal attributes of a successful legal system where established procedures will be followed.

d) **Flexibility**

A successful legal system should be adaptable to accommodate new kinds of problems, and it should be flexible enough to adjust to changes in the needs and desires of those it serves. Customary law in many parts of the world is known to be so rigid in this respect. There are examples in history of laws and legal systems which became so rigid and sterile that they lost contact with the realities in which they operated.

Flexibility means, the law must be capable of changing its course from the past when ever present conditions suggest the change. The law should be in par with the changing environment in which it operates or else it will serve no purpose.

Corporal punishment for example is permissible in customary law as a form of punishment, but the Namibian constitution sees it as a form of degrading a human being and thus it is outlawed. Customary

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<sup>13</sup> Church (1974): An introduction to the law of Zambia, University of Zambia - School of Law, Lusaka

law in this regard should not be static, rather flexible and adapt a new human form of punishment rather than corporal punishment.

## 2.7.2

### **Accountability of a Legal System**

- i) **Moral values** - A legal system should strive to conform approximately to the moral values of society which it serves to be fully accepted by the people for the laws to be obeyed and respected. However, it is of vital importance to bear in mind that moral values differ widely in most societies/communities and are in most cases subject to unpredictable changes. It is therefore worth saying that there is no uniformity in this regard. If the laws are made to conform to moral beliefs, they may satisfy some but profoundly antagonize others and they may be rendered rather uncertain in their application.

In Namibia for instance, there are communities that practice Lobola (Dowry), if one wants to marry someone's daughter or has impregnated someone. You are required to pay Lobola before getting married or claiming fatherhood. But in other communities, this practice is non-existent. However it is important to note that moral beliefs are an important factor in any law. It is therefore also important to take into consideration this factor when dealing with customary Law legislation.

ii) **Behavioral patterns**

Apart from conforming approximately to the moral convictions of the people it serves, successful law needs also on a lower level to conform to their ordinary patterns of behavior. Church observes, "A customary mode of behavior may not rise to the status of a moral ideal; people may follow it merely because they are used to it, because it is their way of life, right or wrong"<sup>14</sup>. Some people within some communities are such die hard conservatives, that if the law disregards their normal behavior patterns, they may tend to resent it and lose respect for it, even disobeying it. When the aforesaid occurs, it may result in the impediment or delay in the successful application of the law. Thus most legal systems try not to deviate too strongly from traditional customs. Many countries in Africa, Namibia included, are trying to harmonize customary law and common law. This is what Namibia is busy doing now. However this still presents difficulties because of the clash of customary laws and the foreign influenced and centralized legal systems. The latter often do not correspond to African traditional patterns of behavior. The former usually do, but is often considered unacceptable, because it is said to be so diverse, ambiguous and accused of retarding economic and other development. Article 66 of the Namibian Constitution is quite clear in this regard. Among others, it stipulates that "customary law will remain valid in Namibia provided it does not conflict with the constitution or any other statutory law".

- iii) **Ideological/theological values** - There are two schools of thought in this regard. Some have urged that law should strive to be completely independent from ideology.

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<sup>14</sup> W.L. Church, University of Zambia, School of Law, Lusaka, 1974.

Others think the contrary and urge that Law should take into consideration the ideological or religious doctrines of a society. Customary Law seems not to follow neither extreme. Customary Law is more inclined to the role of the traditional leader who can influence court decisions and even change laws.

- iv) **Political Realities** - It is important to know what the law is or ought to be. There are different arguments over the degree to which the law should be subject to political control. Institutions of Law are not completely free from political influence. In some societies, political control of the law is honestly desired. On the other hand there are instances where the law has freed itself from political influence, and where it has been used as a weapon by other strong forces to limit and control the formal political powers.

In Namibia, there is a clear separation of powers between the executive, legislature and judiciary. Article 78(2) of the Namibian Constitution states among other things that the courts shall be independent and subject only to this Constitution. Article 78(3) re-emphasizes article 78 (2) by stating the following: "no member of the cabinet or the Legislature or any other person shall interfere with judges or judicial officers in the exercise of their Judicial functions, and all organs of the state are required to accord such assistance as the courts may need to protect their independence, dignity and effectiveness". It is interesting to see how traditional leaders accept this challenge as they are currently the Supreme Judges who can influence the whole outcome of a case. Traditional leaders (Kings/Chiefs) in Namibia are currently the legislatures, executive and judiciary. This is a challenge customary law has to overcome to be compatible with the constitution.

The argument is, if politicians are set above the law, arbitrary and overcentralized governmental power may result. If the law is set above politicians, the people may lose control over their destiny, for the latter may often be more amenable to public pressure than the former.

- v. **Fair and equal treatment** - Equal treatment under the law is a constitutional requirement in many countries including Namibia. Article 10(1) of the Namibian constitution states that all persons shall be equal before the law. This means, no one should be discriminated against, and no one is above the law.

Article 12 of the Namibian Constitution deals with - Fair Trial. Article 12 (1)(d) stipulates the following: ' All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them'.

The aforesaid among other constitutional provisions are challenges community Courts in Namibia will have to deal with. The perception of being innocent until proven guilty is something strange to customary courts because in some of these courts, someone can be sentenced even without calling witnesses and without a proper investigation having been conducted. The king/ chief can decide in either way.

If a legal system ignores the goal of fairness and equality before the law, like the other legal goals discussed, the system is highly likely to lose the respect and cooperation of the society it serves. As a result, such a system may not be very successful, because it will always be considered biased by some section of the population.

There should be a general acceptance of law by society/community if the law is to be a viable institution. Customary law will have to stand a test to include fairness and equal treatment. Members of the royal family are often treated differently and in most cases do not stand trial in customary courts. This is a sign of the unfairness of the system that needs to be rectified.

## CHAPTER 3: TRADITIONAL/COMMUNITY COURTS IN NAMIBIA: THE PRESENT SITUATION

### 3. Introduction

According to the findings of a survey on traditional administration of justice by the Centre for Applied Social Sciences (CASS) of the University of Namibia and research conducted for this study it was confirmed that Traditional authorities in Namibia have been and are still administering justice. It was also observed that some traditional authorities especially in the south of the country (Namas) have become reluctant to perform judicial functions as they had done before March 21<sup>st</sup> 1990 when Namibia attained independence. The cause of this reluctance is mainly attributed to the uncertainty with the laws that determine their traditional communities, as some of those laws became unconstitutional. However, the aforesaid did not affect the existence of tradition and culture, neither did it affect the traditional administration of Justice in Namibia. Of interest to note is the similarity in the composition of some Traditional/community Courts as we would see in this chapter.

In some cases where a community is headed by a paramount traditional leader, there is a fourth level which is distinct from the paramount leader's council. In Ongandjera community, for example, cases may be transferred to the Kings' Palace for the final decision where a defendant does not agree with the King's council courts decision.

In the Herero speaking communities, the courts structures differ. However in all communities under the paramount leadership of King Riruako, there are senior chiefs, chiefs and sub-chiefs, and thus the court structure will appear as follows: sub-chief → chief → senior chief → paramount chief.

Depending on the area under observation, courts may exist at the level of councillors, headmen, chiefs, senior chiefs. An appeal court under senior chief Hoveka as chairman assisted by a team of Judges and assessors also does exist. However, certain cases relating to the governmental structure of the Herero community is heard at the King's level. There is no uniformity in the naming of Courts. In some areas, for example Ovitoto, they are referred to as the village courts that are in some villages presided over by councillors and in others by Headmen.

The Ovahimba of Kaokoland refer to their leaders as headmen or voormanne. There are over thirty Headmen in Kaokoland who are each assisted by two councillors. Each Headman and his councillors form a court. Small cases are heard and finalised by the Councillors.

The Mbanderu community is headed by a chief who is assisted by six Headmen. The chief is based at Ezonrowagondo and his Headmen are found in Epukiro, Aminius, Rietfontein, Oshinene, Gam and Kaoko. Courts do exist at the Headman's and the chief's level. It is sometimes difficult to determine under whose jurisdiction is a certain community in some areas - either under King Riruako or under chief Munjuku Nguvauva - especially for an outsider.

### 3.1 **Communities in the Caprivi Region**

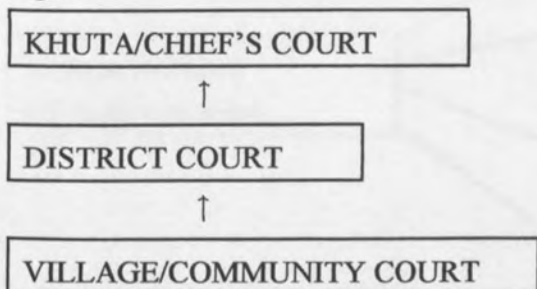
The Subia, Mafwe and Yeyi traditional authorities are each composed of a chief, known as Mulena who is the head, assisted by a Ngambela (equivalent to Prime Minister in modern government set-ups)<sup>15</sup>, Indunas (councillors) with defined job-descriptions/positions), senior headmen and headmen. Both traditional authorities in the Caprivi region have a three level court structure:

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<sup>15</sup> Ngambela is the second in charge of the Traditional Authority equated to Prime Minister.

- The Village or Community court is the lowest;
- The District Court; and
- The Khuta which is the highest court.

Fig.1



### 3.2 Nama Communities

Currently, there are no proper functioning courts in the Nama communities. However, they have the following:

- ▶ The Witbooi have a “Stamraad”<sup>16</sup> (!Khabe-ma-!nans) consisting of thirty two (32) members. The highest traditional authority is the Chief’s council, consisting of a Kaptein and five or six members appointed by the Kaptein from the members of the Stamraad.
- ▶ The Red Nation also has a Stamraad consisting of sixteen (16) members. The Kaptein’s council consisting of a Kaptein, Deputy-Kaptein and a chief councillor (chairperson on the Stamraad) is the highest traditional authority,

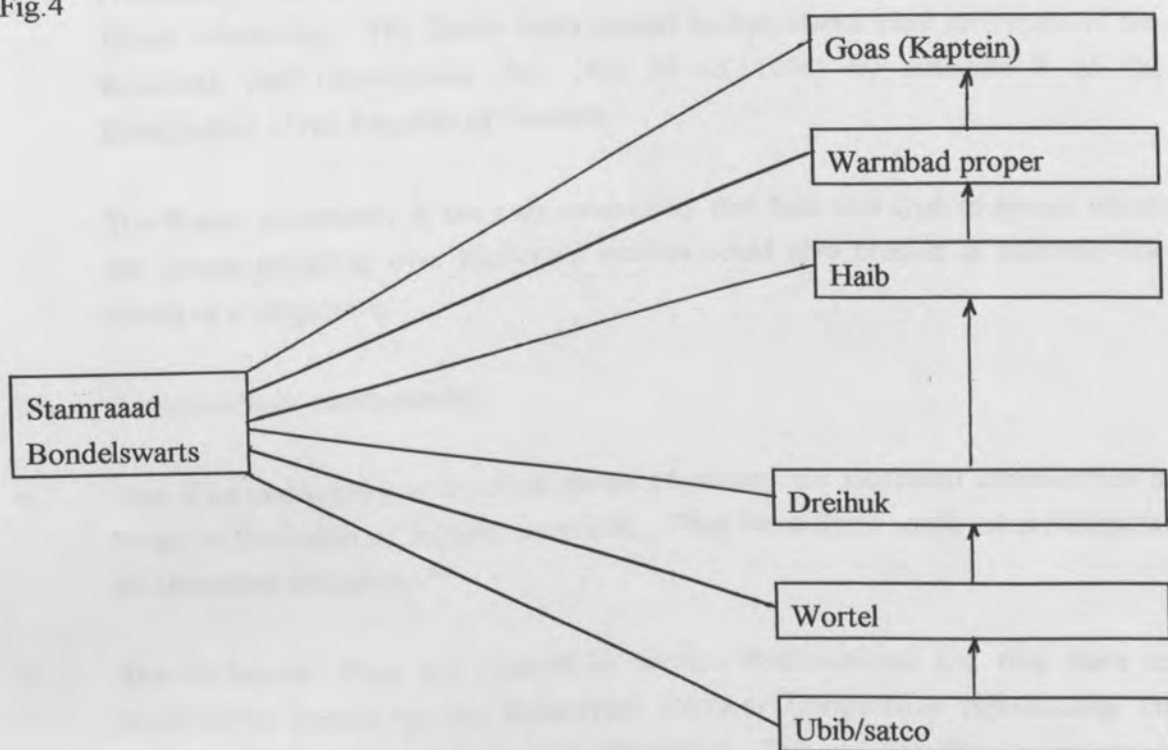
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<sup>16</sup> !Khabe-ma - !nans: Advisory Council

is Ms Anna Katrina Christiaan, one of the only two women heading traditional authorities in Namibia.

### BONDELSWARTS STRUCTURE

Fig.4



- ▶ The Berseba: The Bersebers are divided into two clans: the “Isaak clan and the Goliath clan”. Each of the clans is headed by a chief and a stamraad. They co-exist within one community.
- ▶ History has it that since the 19<sup>th</sup> century, there has been a dispute over the chieftainship of the Berseba between the Isaak clan and the Goliath clan.
- ▶ The Kuiseb Topnaar: Their traditional council which is headed by a chief (hoofman) consists of five people and it is known as #aonin/awe-mas.<sup>19</sup>

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<sup>19</sup> #aonin/awe-mas: Topnaar Advisory Council  
Topnaar is a tribe in the east of Walvis Bay, Erongo Region.

### 3.3 **The Rehoboth Basters**

Before independence on March 21<sup>st</sup>, 1990, the Baster community in Rehoboth had only one traditional court known as the Baster Hof. The same person who presided over the state court/magistrate's court in Rehoboth also presided over the community/traditional court assisted by two members appointed from within the Baster community. The Baster court ceased its operations after the repeal of the Rehoboth Self Government Act, (Act 56 of 1976) by schedule 8 of the Constitution of the Republic of Namibia.

The Baster community is the only community that had this type of set-up where the person presiding over traditional matters could also preside at common law courts as a magistrate.

### 3.4 **Bushmen/San communities**

- ▶ **The Kwe** community is the most advanced among the Bushmen communities in terms of formation of explicit structures. They have three levels where disputes are discussed and settled <sup>20</sup>.
- ▶ **The Ju/hoans**: They are located in Eastern Bushmanland and they have an organization known as the Nyae-Nyae Farmers Cooperative representing the majority of the people of Eastern Bushmanland. This organization has become a forum for dispute settlements. Its composition consists of representatives of the villages.
- ▶ **The Naron of the Corridor**: They are situated in Western Bushmanland. Their leader is Axorob Doneka Jakob. His leadership position however is not based on election neither does it follow inheritance pattern. It may be considered rather a defacto recognition of leadership.

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<sup>20</sup> Hinz 2000 - Customary law in Namibia : Development and perspectives, Windhoek (CASS)

### 3.5 Customary Courts: Common sentences

The most common sentence imposed by traditional courts in Namibia is the imposition of compensation orders, restitution included in some cases. Corporal punishment was another favoured sentence.

Even though it has been declared unconstitutional, there may be some traditional courts still applying corporal punishment. This research has not come across a specific current case. However, in 1991 the *stamraad* of the Red Nation at Hoachanas sentenced a person found guilty in a case of seduction to eight (8) strokes. The sentence was carried out. The sentenced person instituted charges against the *stamraad* and eleven members of the *stamraad* had to stand trial in which they were convicted by a court of law for assault, and fined N\$120.00 or one month imprisonment suspended for three years (State V Samuel Howaseb, DERN CR 7/5/91).

#### 3.5.1 Caprivi Region

Both communities' courts in this Region impose compensation. Theft and assault without blood<sup>21</sup> are left to village courts. Assault with blood<sup>22</sup>, rape and stock-theft are cases tried by district courts. Land issues, witchcraft, treason and murder are under the jurisdiction of the *Khuta*<sup>23</sup>. In murder cases both communities demand compensation which is awarded by the *Khuta*. As previously said, the "Khuta" is the supreme court in both the Mafwe, Subia and Yeyi communities in the Caprivi Region. The administration of justice by traditional authorities in this Region is not far from what exists in other traditional communities in Namibia. However, research conducted in this regard indicates that the traditional government and its judiciary in the Caprivi are more functional than in the Kavango Region.

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<sup>21</sup> Assault without blood: Common Assault

<sup>22</sup> Assault with blood: Assault Grievous Bodily Harm

<sup>23</sup> *Khuta*: Chief's Court (the highest customary court)

### 3.5.2 Kavango Region

Traditional/community courts in this Region attend to all sorts of cases. However there are little differences in cases handled by each tribal court in Kavango.

- ▶ **The Mbukushu** Courts hear all cases except for murder and rape which are directly sent to State Courts. However, murder is still tried in traditional courts after the state trial in order to award a compensation order. Rape is also fined with the same compensation as murder.
- ▶ The Gciricu Courts attend to all cases except for murder, rape, arson, offences relating to witchcraft, abortion and illegal carrying of weapons which are directly sent to State Courts.
- ▶ In stock-theft cases, which is common in Gciricu areas the fine is twice as many head of cattle as were stolen. This is paid to the owner. Sometimes the fine may be paid in cash or kind depending on the victim if she/he agrees to such arrangement.
- ▶ Adultery is fined with four head of cattle which is paid to the husband and fifty Namibian Dollars to the trial court.

### 3.5.3 Sambyu Courts

All cases are basically tried by these courts:

- ▶ The fine for assault with blood is four head of cattle
- ▶ Rape is fined with five head of cattle
- ▶ A thief when found guilty has to give back the stolen good/item and one in addition depending on the quantity of the stolen items.

The Sambyu traditional court in Rundu tries people from different tribes and communities. The Sambyu Traditional Authority has a court in Rundu (Commercial and Administrative Centre of Kavango Region) because they claim jurisdiction to a large part of Rundu.

#### 3.5.4 Mbunza Courts

These courts hear adultery, beatings, personal and other conflicts between neighbours, rape, stock-theft and some minor cases of assault. Rape is regarded equivalent to murder, thus it is fined between ten and fifteen head of cattle.

The traditional set-up in Kavango does not differ much from others, especially Caprivi and Owambo. However unlike in other communities, tribal police are still visible and active in communities in Kavango. Rape is in general equated to murder and the compensation fine is between ten and fifteen head of cattle.

Murder cases are usual sent to State Courts but the community courts will still award compensation to the family of the deceased.

#### 3.5.5 Owambo Courts

These courts usually hear stock-theft, theft and housebreaking cases. In most instances murder cases are tried by State Courts. There is no uniformity in rape cases. Some Owambo Courts hear such cases and some refer them to State Courts.

Traditional courts in Owambo claim jurisdiction over murder cases in order to award compensation to the deceased's family. This form of compensation is seen as "Okukokota Omahodhi"<sup>24</sup>, literally translated as "wiping the tears". It is considered necessary to comfort the bereaved family. The other reason attributed to such compensation is to help ease relations between the families involved and to secure peace and mutual acceptance.

Unlike the Kavango courts where compensation trials are normally heard after a State Court has imposed its sentence, in Owambo it may happen

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<sup>24</sup> "Okukokota Omahodhi" wiping the tears.

before or after the accused has been sentenced by a State Court. It even happens after the accused has served his/her prison term. There is no uniformity in the fine to be imposed. The compensation fine varies from community to community and is in most cases between ten to fifteen head of cattle. Offences committed in areas of other traditional authorities' jurisdiction are normally tried by such community courts despite the origin of the offender.

- ▶ In Uukwaluudhi Courts: cases of rape and stabbing are tried in the King's court
- ▶ In Uukolonkadhi-Eunda, rape cases not sent to the police are often charged the same amount as for murder (15 head of cattle)
- ▶ In Ngandjera Courts: the fine for murder amounts to fifteen head of cattle five of which are given to the King as his personal property and the rest to the deceased's family.

In conclusion, in Owambo courts, all cases may be heard by the lower courts but serious cases are often transferred to a higher court.

### 3.5.6 Herero Courts

In most of these courts, cases started at the lowest level may be forwarded to higher courts as the case may require. There is an appeal court under Chief Hoveka. Cases dealt with by various Herero courts differ from area to area.

The Ovahimba courts deal with all kinds of cases at the councillors and headmen levels. Stock-theft is regarded as the most serious offence in these communities and is heavily punished, usually with six head of cattle for each one stolen. If two or more persons are involved in the cattle theft, each will have to pay the fine as mentioned above.

### 3.5.7 **Mbanderu Courts**

They often hear cases of theft, stock-theft, minor cases of assault and inheritance cases.

Murder, rape, public violence and abortion cases are usually directed to State Courts.

In stock-theft cases, the stolen cattle is returned to the rightful owner and the thief has to pay an additional cattle. A fine to the court is also sometimes imposed on a thief.

### 3.5.8 **Bushmen/San Courts**

The common offences in these communities are adultery, stabbing, fighting, theft and rape cases. However these courts often deal only with minor offences and other cases are referred to State Courts.

### 3.5.9 **Bakgalagadi**

These courts deal with minor offences only. Murder and rape cases are directly referred to State Courts.

### 3.5.10 **Nama Courts**

These courts mostly function as dispute settlement bodies. They also assist the Namibian Police in investigations.

- ▶ The Nama Traditional Authorities often mediate in disputes over land, grazing and water.
- ▶ Minor cases, misunderstandings between family members or neighbours, minor fights are all solved by members of the stamraad.

- ▶ In Berseba, cases that involve members from the Isaak and the Goliath clans are often dealt with jointly by both traditional authorities.

All serious and some other less serious criminal cases are often referred to State Courts. The above said explains the fact that Nama Courts have at a high degree stopped functioning as judicial entities for their communities.

### 3.5.11 Damara Courts

Cases of theft, stock-theft, adultery, assault and witchcraft are commonly dealt with by these courts. Serious cases like murder, rape etc, are referred to State Courts.

## 3.6 PROCEDURE FOLLOWED IN NAMIBIAN TRADITIONAL/COMMUNITY COURTS

### 3.6.1 Caprivi Communities

The hearings are in most cases public. However at the "Subia Khuta" which can be equated to the modern Supreme Court, the hearing is not totally public. After the trial, it is only the Khuta members who are allowed to remain in the court room. Everyone else has to leave. However, when a judgement is reached, the parties and the audience are called in again. At Mafwe Courts, the public is allowed to be present at all three (3) court levels.

Statements, judgements and decisions are in most cases recorded.

### 3.6.2 Owambo Courts

In Owambo communities, all court hearings are public and anyone in attendance is allowed to speak..

In Ondonga, Kwanyama, Mbalantu, Kwaluudhi and Kwambi courts, all hearings are recorded. In Nkolonkadhi-Eunda, it is only the highest court that keeps records.

In the Ngandjera courts, records are taken and destroyed at the end of the case.

With regard to the procedure in all Owambo courts, like elsewhere, the plaintiff normally approaches the headman who sets up a date for the case to be heard and asks the defendant to appear.

### 3.6.3 Herero Court

Councillors are entrusted with the responsibility of issuing written notices to all parties involved in the case. The plaintiff is usually given the opportunity first to state his/her case before the defendant may state his/her position. Witnesses come in after the defendant has put his/her side of the story. Witnesses are questioned by the headman and the councillors. Individual persons present are also allowed to ask questions or say something. Herero courts are expected to keep records.

### 3.6.4 Damara Courts

The procedure normally followed in Damara communities is that, the plaintiff approaches the headman or ward councillor in whose jurisdiction the incident occurred. The plaintiff, the defendant and their witnesses are then requested to be present at the hearing after a date has been set. Even though hearings at these courts are public, not everyone present may be allowed to speak. The "Stam oudstes"<sup>25</sup> are entrusted with the right to speak as they are regarded to have the knowledge of similar cases previously decided. The courts do not keep any other records apart from decisions.

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<sup>25</sup> 'Stam oudstes' : Oldest tribal men considered to be highly knowledgeable in customary law matters.

The procedure in general is that, it often happens that it is the plaintiff who approaches the lowest court in his/her village/community to initiate a case. The headman or councillor usually informs all parties involved about the date and time of the hearing. All those who have to appear at the hearing are also summoned by the headman/councillor who is at the same time the presiding officer.

Court proceedings are in most cases public. Most communities allow everyone present in court to speak if she/he wishes so. The plaintiff and the defendant are usually first and second respectively to state their positions. Witnesses are thereafter called upon to testify and answer questions. Other people present may then be given the opportunity to express their views before a decision is reached.

Some customary courts do record the whole proceeding of the case while others do not record anything at all.

### **3.7 DECISION TAKING**

#### **3.7.1 Herero Courts**

Consultations are often done in camera but this is dependent on the merit of the case.

#### **3.7.2 Mbanderu Courts**

Consultations for the decisions are done in camera between the headmen and the councillors.

#### **3.7.3 Owambo**

In the Kwambi, Nkolonkadhi-Eunda, Ngandjera and Mbalantu courts, consultations for decisions are normally held in public. A majority vote decides cases at all court levels.

In the Kwaluudhi lower court, it is the headman who usually decides on a case, basing his decision on the different views expressed during the deliberations. However in the King's court, the decision comes from the majority of those sitting in the court but the King has the final say.

#### 3.7.4 **Kavango**

In all tribal courts in the Kavango Region with the exception of the Mbunza and the Sambyu court in Rundu, consultations for decisions are usually held in public.

The Mbunza courts' decisions are held in camera between the presiding officer and his/her assistants.

#### 3.7.5 **Bushman/San**

In Kwe courts decisions are reached after public consultations. Everyone attending the proceedings may vote and by a majority vote a decision is agreed upon.

#### 3.7.6 **Damara**

In Damara Courts, decision taking also depends on the merit of the case. Decisions are often reached at after public consultations.

In conclusion, as we have seen, there are differences on how a decision can be reached at. In some customary courts, the debate to arrive at a suitable decision is held in camera whereas in others the whole process is held in public.

It is interesting to note that, even though consultations are embarked upon, it is usually the opinion of the presiding officer (in most cases headman, senior headman, chief or king) that will have a really impact on the decision. No one often opposes the afore-mentioned' s view on the case.

Many people knowledgeable about traditional courts see these courts' main role as that of achieving peace between the plaintiff and the defendant rather than imposing heavy punishment.

### 3.8 **PAYMENTS**

With regard to offences where blood has been lost, the court often demands from the convicted person a certain number of cattle to be paid to the court. In some instances court fees are not a daily regular fixed aspect in these courts.

### 3.9 **APPEALS**

The general common procedure in customary courts with several court levels is that, a case is usually first heard at the lowest court if this court has jurisdiction over the matter. If the parties are not satisfied with the outcome of the case, then it is moved to a higher level. The higher court may uphold the decision(s) of the previous court or may set aside the previous decision and come up with its own decision.

As we have seen in this chapter, not all communities have a formal court of appeal. In some communities (Mbanderu communities) as previously stated, people are only allowed to appeal against fines they regard to be too high.

It often happens that if people are not satisfied with any judgement, they will take the matter to a court of higher level.

### 3.10 **CUSTOMARY COURTS AND WOMEN**

As far as customary law is concerned, women have always been regarded as second class subjects. Traditionally they were not allowed to participate in customary courts' activities, let alone hold positions. Their role within the traditional government and its judiciary system was quite insignificant. But this unfortunate situation seems to be changing. There are so far two

powerful communities which are headed by women-chiefs. The Sambyu community in the Kavango Region and the Bondelswarts community in the Karas Region. In some Owambo communities, women now occupy positions as headmen. Unlike in the past, women are now allowed to institute cases. They can now attend court sessions and speak like anyone else. Some of the women as the above mentioned chiefs and headwomen preside over cases in their respective courts and their decisions are highly respected.

In cases where there are still no women in traditional leadership structures there are awareness campaigns to involve women in such structures. In the Uukwambi communities, female committees have been established to represent various Omukunda (villages) and to have more influence on the Kwambi Traditional Authority.

However, it is worthy mentioning that these developments, even though encouraging, there is still a long way in the struggle for women to be accepted to positions of traditional leadership. In 95 % of traditional authorities in Namibia men still dominate. There are still communities that do not accept women as their traditional leaders. The belief that only a male person can be a traditional leader is not only in the minds of men. Even women are still in this traditional customary old hangover, especially in rural areas.

### 3.11 **Work Relationship between Customary Courts and State Courts**

The magistrates' courts are supposed to function as the first courts of appeal in traditional matters in accordance with the provisions of the new legislation on community/customary courts<sup>26</sup>. However, the relationship between the two courts seems to be not that good. Traditional leaders consider magistrates' courts as courts for the elite. They regard the procedures in magistrates' courts to be complicated. They say magistrates' courts do not address the demand for compensation to the victim adequately and their cases are considered to take too long to arrive at a decision. On the other hand, Magistrates and other State Courts Judges are not trained in

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<sup>26</sup> See clause 26 of the Community Courts Bill.

customary law, and therefore they do not understand the proceedings in customary courts.

With regard to the Police, there are complaints of lack of Police response when called upon to assist traditional courts in the administration of justice. It is only in the Kavango Region where there is a good working relationship between the Police and Traditional Authorities. The Police in this Region often hand over certain cases to the customary courts.

The work-relationship between magistrates' courts and community/customary courts has never worked in the past. The previously mentioned proclamation R348 of 1967 also had the magistrates' courts as the court of appeal. However, this study could not come across a specific known case that was transferred to a magistrate's court for appeal and finalized.

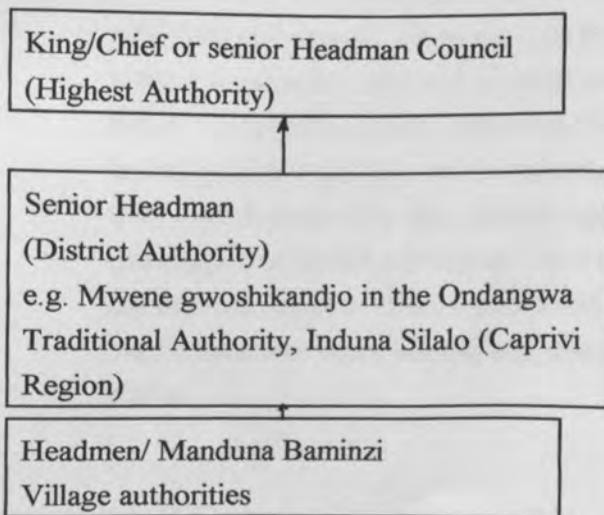
### CUSTOMARY COURTS STRUCTURE

The customary/community court structure will also reflect the below hierarchy.

This hierarchy mostly applies to communities in Owambo, Kavango, Caprivi, Damara, Kgalagadi and Tswana.

Fig.5

Three level Traditional Government:



## CHAPTER 4: ANALYSIS OF THE COMMUNITY COURTS BILL

### 4.1 Introduction

Traditional leaders are observed as the principal interested parties or stakeholders in this case - representatives of the communities. The bill has endeavoured to be inclusive of the sacred values upon which traditional courts are based.

Traditional leaders interviewed feel that customary courts are more effective than magistrate's courts. Their reasoning is that the village/kraal head is summoned together with the offender from his village/kraal.

This is seen as an effective system that ensures that fines are paid without any delays and also to prevent the repetition of the same offence as the village head will make sure that his village/kraal is not put to disrepute. These courts, especially the chief/king's courts which are the highest customary courts also serve a useful purpose in that they ensure swift justice in petty matters. In most cases, no records are usually kept of the proceedings and the appeal in both civil and criminal matters lies with the chief or the king.

When Namibia was divided into magisterial districts and the establishment of magistrate's courts with both civil and criminal jurisdiction by the two successive colonial regimes (Germany and South Africa), most common law crimes were shifted from the jurisdiction of customary courts to the jurisdiction of such constitutional courts, while the jurisdiction of the chief's and headmen's courts were not seriously affected in areas beyond the previously known as the "Police Zone" (Kaokoland (now Kunene), Owambo, Kavango and Caprivi) with only limited punitive powers. It is not only the status of customary courts in Namibia that were degraded by the colonial regimes for political reasons but also the pride and dignity of traditional leaders were affected as many of them became stooges of the colonial regime. Those traditional leaders who could not dance to the tune of the Government were sacked and manageable traditional leaders were put in their places.

The aforesaid resulted in some communities losing respect for these hand-picked traditional leaders. When certain areas were proclaimed as native reserves and later on converted into "Homelands", a degree of jurisdiction on land and traditional practices including customary courts were restored with strictly very limited punitive powers. In most cases the original ancestral land of traditional communities were confiscated, and thus discontent and resentment to the newly allocated land began to develop systematically while some of those traditional leaders on such land were dubbed as political appointees. Even during these difficult trying times, traditional values were still being honoured by communities. Customary courts still managed to keep all petty cases away from the rolls of magistrate's courts.

Immediately after the independence of Namibia in 1990, there seem to have been no clear direction in the role of traditional authorities in their administration of justice. Some traditional authorities are reportedly said to have diminished this role. The aforesaid is partly attributed to the following:

- Lack of an enabling legislation as the previously applicable laws were repealed by the new constitution;
- Lack of official recognition of some traditional leaders;
- Some of the traditional leaders who served the colonial regime thought that they were to be prosecuted for their roles in some atrocities committed by their colonial masters, and thus they back-tracked somehow in their administration of justice. These imposed traditional administrations were not fully supported by the majority of the community members.

#### 4.2 **The Community Courts Bill in its current form**

Even though the Traditional Authorities Act 1995 as amended and the subsequent Traditional Authorities Act, 2000 (Act 25 of 2000) are in place,

the pending official recognition of certain traditional authorities and the lack of a Communal Land Act and a proper legal instrument on customary courts create a vacuum for the administration of justice by traditional authorities. Thus the necessity of such legislation (Community Courts Bill).

This study has established that the Community Courts Bill's objective is to take the government to the people in the remotest areas of Namibia and to develop responsibility and accountability measures which are currently non-existent. The Ministry of Justice is trying to fill the existing vacuum with this bill. It is a general feeling that because of this vacuum there are no government directives in the regions on the administration of justice by traditional authorities. There is a state of uncertainty in most cases as traditional authorities do not know what to do.

Some traditional leaders especially in Kunene and Omaheke regions feel that as a consequence of this vacuum and the existing uncertainty in some parts of the country, matters have been drifting and cases of theft of government property and livestock among others have increased.

It is a known fact that well established and functioning community/customary courts are capable of helping government reduce the current situation of overcrowded cells and rolls of lower courts clustered with petty cases and the delay in the completion of cases.

The bill tends to modernize the legal practices of the past so as to stand the test of today's needs and demands. It seems to be laying a sound foundation for the restoration of what was considered noble and dignified in customary law.

Clause 8 of the bill outlines that, - the minister shall appoint community court justices from the list of names supplied by the relevant traditional authorities. It may sound unfair and contradicting that some existing traditional communities will by implication not have community courts due to the fact that their traditional authorities are not yet recognized in terms of the Traditional Authorities Act, 2000 (Act 25 of 2000).

If the definition of the term “area” as defined in clause 1 of the Bill<sup>27</sup> is to stand as it is, then there may be a problem in some instances because some traditional communities still find themselves on the “Ondendal Plan Home-Lands” created for the native population by the colonial regime and enforced on them against their will. With this plan, people were forcefully removed from the traditional geographic area they habitually and predominantly inhabited. These forceful removals have resulted in the fragmentation of some traditional communities into different groups.

Each of these fragmented groups from the same traditional community are now claiming their own separate traditional authorities on the separate locations. 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 especially in the south of the country (Witboois, Bondels, Topnaars, Afrikaners and the Hoachanas groups).

Clause 3 of the Bill refers to application for establishment of communal courts by stating among other things that “the traditional authorities may apply only if no court has been recognised or established under this Act for that area”. It is important to look at the demarcation of the possible disputed areas before implementing this section. If the Bill is implemented in its current form, the administration of justice will be highly costly due to the fact that a number of community courts will be established as provided by the bill. To cut on such costs, a rotation system of justices and/or assessors conversant with customary laws of the areas under communities with the same customs could be considered. Such rotational system may as well serve those areas of the traditional communities that overlap and also serve to unify the traditional communities whose customary laws are closely related. The aforesaid may help bring divided communities together and unite them.

Some people including parliamentarians have problems relating to the “area of jurisdiction” of community courts. The term ‘area’ in Clause 1 of the Bill, as previously stated, is understood as the geographic area habitually and

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<sup>27</sup> Clause 1 of the community courts bill defines ‘area’ as the geographic area habitually and Predominantly inhabited by that traditional community.

predominantly inhabited by a traditional community. For example the Sambyu community who habitually and predominantly inhabit parts of the Kavango Region will have a recognized community court through the Sambyu Traditional Authority recognized in terms of the Traditional Authorities Act, 2000.

Some researchers in customary law matters have argued that African customary laws if correctly applied can unify people instead of dividing them because they are friendly, human, and not hostile. Customary law systems are considered straight forward and less complicated.

It seems that the end result of the Bill is to serve the best interest of the Namibian communities based on African culture adapted to modern practices. This study has also found that the Bill is intended to address some confusions and ambiguities with regard to current practices in customary courts in Namibia<sup>28</sup>. It is intended to bring respect, accountability, responsibility and order in the traditional authority's legal system.

The Bill is seeking legal recognition of community courts where they exist and for the establishment of new ones in areas they do not exist. In addition to the decentralization policy of the government and other related legislation, community courts could be seen in the light of taking government to the people. It is a form of decentralizing the legal system.

Another aspect of the jurisdiction of the court that the Bill seeks to address is that unlike the current situation where it often happens that one is only tried by his tribal court, the bill clearly stipulates that community courts are established for an area and anyone who commits a crime in that area shall be tried by the community court of that particular area. Thus when this legislation starts operating, it will not be expected of a Subia-speaking Namibian residing in Ohangwena to be tried in a community court in Caprivi.

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<sup>28</sup> Currently each traditional authority handles customary court matters differently and customary courts indifferent communities deal with offences brought before them differently despite similarities in some offences/

Likewise an Oshiwambo-speaking Namibian originally from Ohangwena residing in Kavango shall be subjected to a community court in the Kavango Region if she/he commits an offence in Kavango.

Clause 13 of the bill states among others that customary law of that community where the offence has been committed shall apply provided that if the parties are connected with different systems of customary law, the court shall apply customary law which it considers just and fair to apply in the determination of the matter. For example, a child born out of wedlock: in the Caprivi Region, the father is obliged by customary law to maintain the child regardless of whether the father is married to the mother of the child or not.

Should it happen that a teacher in Okakarara who hails from the Kavango Region happens to meet a female friend from the Caprivi Region who becomes a mother of his child and he is taken to a community court in Okakarara for the maintenance of the child, the court will have two choices: either to apply the customary law of the Hereros (Okakarara is under the Herero Traditional Authority) or to apply the customary law of the Caprivi or Kavango Region depending on what the court considers just and fair to apply.

It is important to note that in Herero customary law, which adopts a matrilineal line, the father is not obliged to maintain a child born out of wedlock.; now if the justice of the case demands that customary law which adopts a patrilineal line should be applied, the community court will apply it and order the teacher to pay child maintenance.

If an outsider who does not recognize the jurisdiction of a community court in a given area commits an offence s/he will be dealt with in terms of Clause 30 of the bill.

In a situation where there are three different traditional authorities in one area (e.g Tswana Traditional Authority, Herero Traditional Authority and San Traditional Authority), there would be three community courts for each of those communities. In this regard there may be one court building housing three gazetted courts. However if these three or more traditional communities were represented by one recognized traditional authority, there would be one community court only. It

would be expected that such traditional authority has representatives from all the traditional communities within its area of jurisdiction.

Such representatives should be included in the appointment of justices so that they can apply the customary law of that traditional community notwithstanding the fact that such traditional communities are represented by one traditional authority.

According to the Justice Ministry, this bill is the first phase in regard to addressing customary courts matters. Their next phase is to harmonize community courts once enough research has been done. The ministry wants to avoid the situation of the colonial past where there were courts for specific tribal communities with no jurisdiction over other communities.

Clause 2(2)(d) deals with the appointment of justices and/or assessors - It is necessary to spell out the criteria for appointing justices or assessors. What may qualify a person for such appointment?

As previously stated in this paper, it is a known fact that customary courts functioned well in the past in resolving community issues and in maintaining law and order. This function is still continuing in many communities. During the struggle for independence, community courts were derailed by the political situation and got affected in the process. Some chiefs and headmen who presided over customary courts became victims of recruitment as puppets by the colonial government. Customary courts were thus transformed into instruments of unfairly punishing people because of their different political views. These courts became highly politicized. As a result the community lost confidence in and respect for some chiefs and headmen. The courts presided by these chiefs and headmen became unpopular due to their dubious and biased decisions.

Up to this moment in time, some judgement/sentence imposed by some chiefs and headmen are being ignored by their subjects. At times chiefs and headmen are taken to common law courts and the legality of their decisions being challenged.

Due to fear of being challenged in common law courts and the ignorance of the provisions of the constitution and other laws, some traditional leaders become afraid and sometimes do not take proper decisions when presiding over cases.

Thus training of would - be community judges and assessors should be a priority among priorities. It is therefore important to spell out the criteria and requirements for appointing justices or assessors as the bill intends to restore respect and trust among traditional leaders and their subjects and to strengthen their control over their communities and to deter and prevent criminal activities in their areas.

Customary courts in the past relied more on what one could recall even if it happened after a long period of time. The bill under study provides for records to be kept in writing for any case that is heard in the envisaged Community Courts. Record keeping requires proper training. It is therefore essential that traditional authorities, presiding officers and those who will be dealing with community courts be provided with sufficient training to handle the component of record and book keeping efficiently. This is another form of empowering locals. Clerks and messengers of courts have been part of customary courts in the past but in an informal and disorganized manner. Their remuneration, if ever remunerated was so low. The envisaged legislation addresses this issue and will formalize appointment of clerks and messengers of community courts. There are also proposals for standard allowances and remuneration for these positions. This is an empowerment exercise as many local people will benefit from employment created.

Justice is one of the cornerstone and pillar of democracy and thus the envisaged community courts legislation has a significant role to play in bringing justice nearer to the people. In Namibia like elsewhere in Africa, civil law was promoted in the expense of customary law which was neglected and shunned as primitive. The community courts bill intends to facilitate customary law a harmonious entry into the Namibian legal system in order to build a solid and effective legal system that will serve the whole population. The inherited western civil law on its own is assumed not to reflect the shared moral values of the majority of the rural African population. Its expensiveness makes it ineffective to address problems in rural communal areas. The civil law system in Namibia has become a multibillion business which cannot be afforded by ordinary Namibians. Many people do not understand the intricacies and procedures involved in the application of civil law and still consider it as imposed foreign law. Community courts legislation has thus come at the right time to save those who cannot afford to take their cases to civil law courts.

Community courts are there to implement and promote customary law. The implementation of customary law provides a choice to the individual either to take a case to be heard at a civil court or at a customary court. The advantages the study has established about implementing customary law among others are:

- It will effectively serve the majority of the population, especially those living in rural areas as they understand it better than civil law;
- Adjudication in customary law is less expensive and speedy;
- Adjudication in customary law is less expensive and speedy;
- It is a living law that takes into account local circumstances and is close to the heart of the majority of rural people;
- Customary law is viable while civil law is not viable in the rural oriented communities which have established norms favouring human kindness, generosity, neighbourliness, brotherhood, sociability and fellowship, co-operation and mutual aid;
- Litigation in customary law is based on arbitration and thus serves the purpose for the promotion of unity and reconciliation;
- The introduction of community courts will greatly reduce the pressure on magistrate's courts as some of the minor cases will directly be dealt with by the community courts;
- There will be a choice where to go - either to a civil court or a customary court.

According to the Deputy Minister of Justice the bill is a product of wider consultations for a period of about three years. He added on by saying that it was a product of consensus among traditional authorities<sup>29</sup>.

Eventhough some consultations were embarked on to a certain extent, the feeling remains that more need to be done to make sure the document reaches its

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<sup>29</sup> Reply speech in parliament on 13<sup>th</sup> November 2001: Parliamentary Hansard.

audience: the people living in rural areas. This does not mean that the other section of the population is excluded. It is rather a question of including everyone but special attention and emphasis should be directed to the rural communities who are the direct beneficiaries of the new legislation. The bill is politically sensitive. It deals with the rights of communities and their traditional authorities. Some chiefs and headmen may feel threatened by the Bill in the sense that some of their powers are being taken away, which is not the case. Even during the colonial period, as previously mentioned, customary courts were regulated by eleven proclamations and ordinances but their powers were highly restricted. All recognized traditional authorities regardless of their political affiliation participated in the above mentioned consultations. This can be regarded as a policy of participatory democracy and government has to be commended in this regard.

The Bill also distinguishes between a political institution and a judicial institution. If we look at Okakarara in the Otjozondjupa Region for example, it is a geographic area habitually and predominantly inhabited by the Herero traditional community. A recognized traditional authority in that area may in terms of Clause 2 of the Bill, if there is a customary court in existence, apply to the Minister of Justice for recognition of such court as a community court. If there is no functioning customary court, the recognized traditional authority in the area may apply in terms of Clause 3 of the Bill for the establishment of a community court.

In the case where an additional authority be subsequently recognized in the same area, the minister may upon application add to the list of justices only. He may not recognize or establish a second community court for the same traditional community who share the same custom and tradition due to the fact that a community court is established for the traditional community (i.e. the Herero community, the Mafwe community, the Masubia community the Damara community, the Kwangali community etc). Thus, if a community court is established for a particular traditional community, there is no need to establish a second community court in respect of that traditional community in the event of a second traditional authority being recognized in respect of the same community. The exception comes in when the area of jurisdiction in respect of the second traditional authority is different from that of the first traditional authority.

It is interesting to note that it is the customary law of a given traditional community that is taken into consideration rather than the number of traditional authorities that have been recognized within such traditional community.

However, it is also interesting to note that there are unique situations among some Namibian communities whereby people were scattered into a number of reserves by the colonial regime. As a result government had no other way out than to recognize more than one traditional authority in respect of one traditional community.

In such cases the Bill allows more than one community courts which could be recognized or established in respect of different areas of jurisdiction but not in respect of the same area of jurisdiction.

The Bill intends to unite people and not to divide them into entities where even villages may claim their own traditional authorities. The bill in its current form does not clearly prescribe competence levels of presiding justice as the clerks will be required to keep a summary of proceedings. The only competence required is adequate knowledge of customary law integrity.

The argument of trying not to disturb traditional knowledge with requirements seems not to hold water. It is essential that the "God-given knowledge" of chiefs, headmen and other presiding officers on traditional matters be enriched with adequate training in constitutional, human rights, economic and social matters not forgetting other laws including the Community Courts Act. Such capacity building programmes should not be considered as disturbing customary law but should rather be seen as enriching, developing and solidifying customary law.

On remuneration, allowances and other assistance, it seems the envisaged legislation has followed in the old procedures where village headmen were regarded as mere arbitrators. They did not receive allowances for the functions they performed. It was only the District Courts and the chief's courts which had enforcement powers where presiding justices were entitled to allowances. This situation seems to have been borrowed by the new proposed legislation as it will not be changed where it is operating. On the issue of harmonizing penalties, there is no indication whether the minister will legislate on the matter.

The issue of compensation of victims of crime during the criminal trial will necessitate the amendment of the current Criminal Procedure Act of 1977. However, the Ministry of Justice has indicated that they want to table in parliament a completely new Criminal Procedure Bill which hopefully will address the issue of compensation.

The requirements for appointment in terms of Clause 8 is conversance with customary law of the area in question, integrity; such person should not be a member of parliament, regional or local authority, and should not be a leader of a political party in terms of Section 39 of the Electoral Act, 1992.

The requirements seem to be addressing the issue of possible bias and conflict of interest. However, the issue of capacity building in the form of in-service training is not catered for. The bill in its current form is silent on the issue and on cases to be heard by community courts.

Some concerned parties had asked as to which of the two systems: Civil law system and Customary law system of procedure after the coming into force of this bill will survive. This concern was answered by the Deputy Minister of Justice, Honourable Dr Kawana by stating that both systems will survive because they are independent of each other. The choice where to go will be determined by the complainant. She/he will have a choice where to go. The only exception in this case is where a complainant in any proceedings in a court other than a community court accepts compensation, in such case she/he cannot approach a community court on the same facts to claim compensation again. It has become prohibited by Clause 24 of the Bill.

Research conducted in many African customs suggest that customary law does not make a distinction between criminal law and civil law. The prime objective of customary law is to compensate the victim. It is this aspect that is accommodated in the Bill without specifying if community courts will directly handle murder cases or not. In modern law, murder may give rise to two different legal approaches: criminal proceedings whose main aim is to punish. Even if there is an element of fine in the criminal proceedings, it is still punishment. The victim is still left with a choice of taking a civil action with a view to claiming compensation. This cannot be classified as double jeopardy.

It is permissible under modern law. It is also permissible under this bill. However, the practice of ordering compensation to a victim more than once on the same facts of the case is not permissible.

In accordance with the provisions of this Bill<sup>28</sup>, the Ministry of Justice will not recognize or establish community courts in respect of applications made by unrecognized traditional authorities as they do not have the capacity to determine the criteria as to what group of people constitute a tribal community with legitimacy to a tribal authority.

This function in terms of current legislation is a statutory function of the Ministry of Regional, Local Government and Housing to be exercised in terms of the Traditional Authorities Act, 2000.

According to the Ministry of Justice, the bill's main objective is to harmonize customary laws and traditions with the Namibian constitution and the demands of the modern world.

The Community Courts Bill provides for records to be kept in writing for all cases heard in traditional/community courts. Keeping of records deals with 'certainty' which is one of the principles of a successful legal system<sup>30</sup>.

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<sup>30</sup> See page 17, 2.7.1 formal attributes of a successful legal system.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

The study has established that, community/customary courts have not received much support from the government. The proposed legal frame is partly inherited from the colonial era. It was also observed that there had been no clear definition of customary law that has been developed by the courts nor has there been any systematic development of this subject. It is further noted that there has been a conflict between the demands of customary law on the one hand and the imperatives of human rights and constitutional provisions on the other hand. It also came to light in the study that customary law tends to be insensitive to gender equity. Some traditional authorities seem to have taken this issue seriously and are busy trying to reverse the unfortunate situation. However, the stigma is still present and it seems it has a long way to go before it is completely outdone. The Namibian constitution and other international law instruments emphasize the rights and equality of all persons irrespective of gender. Hopefully, community courts will understand this aspect and handle it accordingly. The study also noted the lack of separation of powers. The traditional authority has executive, judiciary and legislative powers. The chief seems to be everything. Eventhough the envisaged legislation does not confront the matter directly, there are indications that it is intending to separate the judiciary from the political atmosphere, and thus community courts will fall under the Ministry of Justice while traditional authorities remain under the Ministry of Regional, Local Government and Housing.

The study revealed that the most important role of customary courts is the settlement of domestic disputes arising from marital relations, neighbourhood, land issue, stock-theft and compensation among others. The study also observed that customary courts became creatures of the colonial authority during the struggle for independence. They were used against those who were vocal against the authorities even though their main purpose was to provide a medium for resolving disputes common to the African population. The emphasis was on African customary law applied exclusively to Africans. Customary courts are today among the busiest courts in rural Namibia. However the working environment is not conducive as some of the courts do not have proper infrastructure. Some court rooms are worn out. As democracy is about

empowering the people, local control based on law and social trust, it is important that government takes into consideration the needs of the local authorities and community courts in particular before they are left on their own. Care should be taken to avoid the colonial approach to customary/community courts when they were treated as appendages to the judiciary but not wholly part of the judiciary system. The study further noted with concern that the bill in its current form does not clearly address the issue of what offences should be dealt with by customary courts and which ones should be sent to common law courts. The matter seems to have been left to their discretion.

It is a good sign to note that the Bill addresses some principles of justice as highlighted in Chapter 2 page 17 such as :

- ▶ Keeping of records which deals with ‘certainty’;
- ▶ The proposal to codify, formalise and ensure that problems and disputes are covered in customary law, deals with ‘certainty and comprehensiveness of the law’;
- ▶ The Bill also accepts moral values and behavioural patterns of any community to be applied by the community court of that area, if they are not in conflict with the Namibian Constitution or any other statutory law - this deals with the ‘accountability of a legal system’;
- ▶ ‘Fair and equal treatment’ - this is another principle of a legal system that the envisaged Community Courts Act addresses, as everyone shall be equal before the law.
- ▶

## 5.2 RECOMMENDATIONS

- To economize on the running costs of community courts, it is recommended to consider the rotation system of justices and/or assessors who are conversant with the customary laws of the areas with similar related customs. The fragmentation and mushrooming of traditional communities and the possible duplication of traditional authorities may be prevented by an old traditional practice of accepting a member of another traditional community into the host traditional community under the host-traditional authority with same rights, privileges and responsibilities as the members of the community. This will also help do away with the unnecessary duplication of the funding of traditional councils.

It is thus recommended that the council of traditional leaders under the auspices and guidance of the Ministry of Regional, Local Government and Housing be tasked to investigate this old practice of incorporating voluntarily those members into their host traditional community without creating another traditional community with its own traditional council and additional spending of state monies on such communities.

- Human resources capacity building should be a priority among priorities.
- The issue of two or more traditional authorities in one area/community should be carefully studied and gradually be eliminated.
- There is a need to at least codify customary law to make it accessible to all.
- Magistrates should also have some training in customary laws to help them understand these laws and not depend entirely on assessors .
- Institutions of higher learning and researchers should be encouraged to get involved in the research of customary law to advise parliament and the Ministry of Justice accordingly to avoid possible inadequacies and help enrich customary law.
- Customary law should be considered as a course/subject at tertiary institutions.
- The population need to be sensitized on the importance of customary law.
- Politics should not be allowed at all cost to play a dominant role in the introduction of community courts.
- The introduction of community courts should form part of the decentralization process and be seen as empowering traditional authorities and their communities to administer customary law effectively.
- The penalties/sentences imposed by community courts should be clearly defined and regulated to be in line with Namibian laws, and offences to be heard by community courts should be clearly outlined in the Act.

- Village/community headmen should also be included in the allowance/remuneration scheme for presiding officers as they also handle and resolve disputes. To enhance the independence of the judiciary, community court justices should be paid salaries consistent with their roles as adjudicators.
- People should be allowed to have legal representation of their choice. Every person has a right to be represented. The denial of legal representation in community courts violates the constitution and other international treaties and covenants.
- Affirmative action be adopted to reverse the gender imbalance on community courts bench.
- All dehumanizing and unconstitutional traditional practices should be totally abolished. There is a need for workshops and seminars with village communities, headmen, chiefs and all concerned parties to sensitize them on unconstitutional customary practices with emphasis on human rights, tolerance and economic development .
- Experience from other African countries has shown that the customary court justices' understanding of the law of evidence is superficial. When trying a case, the justices rely completely on the clerk of the court to record the proceedings, and it has come to light that in some cases the clerks's narrative is not consistent with the proceedings. Taking into account the above said, it is recommended that apart from the inherited customary law knowledge, it is imperative that minimum educational qualifications and training in some basic laws should be considered. Training in the basic principles of customary law, sociology, the constitution, law of evidence and some basic elementary sociology and anthropology will be helpful due to the fact that the exercise of judicial discretion requires training in substantive procedural law.
- Community courts should not be centralized. They should be decentralized to do away with the long bureaucratic channels.
- Need for proper infrastructure.

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