



Developing rights-based consumer protection advocacy strategies: Based on the legal frameworks in place in Botswana, Namibia and Zambia

Report

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About Consumers International

Established in 1960, CI is the world federation of consumer rights groups. Our goal is to ensure that consumer rights can never be ignored. With over 240 member organisations spanning 120 countries, we serve as the only independent and authoritative global voice for consumer rights. We are a registered UK charity.

A weapon which you don't have in your hand won't kill a snake.

African proverb
Provenance unknown

The only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over the government.

Franklin D. Roosevelt
32nd President of the USA

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Contents

Executive summary	3
I. The promise of a Constitution	5
II. Cornerstones of consumer protection law	
A. Generally applicable CPL	8 – 9
B. Competition law	10 – 11
C. Sectoral legislation (essential services, food, public health and financial services)	11 – 17
D. Redress mechanisms and access to Justice	17 – 20
III. Legislation related to consumer protection	20 – 23
IV. Traditional authorities and customary justice	23 – 25
V. Recommendations for building rights-based advocacy strategies with existing legal frameworks	25 - 28

Executive Summary

The primary objective of this research activity was to review the existing legislation relevant to protecting consumers in Botswana, Namibia and Zambia pursuant to a methodology established by Consumers International (CI) and published in *A Guide to Developing Consumer Protection Law*.¹

Because the advocacy process for the eventual passage of new legislation is quite long, and may result in a politicised process; obtaining a new consumer protection law, or modifications to existing law, could take years.

Further, few governments conduct regulatory impact studies which would allow them to adequately assess the needs of the public as compared to the regulatory options/tools available, and which also sufficiently considers implementation costs. Thus, new legislation is often passed without the necessary budget to implement the law, or to conduct market monitoring or supervision. As a result, legislation passed without a budget becomes a white elephant for which the public pays.²

Consumer advocates, therefore, face a multi-pronged challenge: they need to be well versed in the laws which are in effect on the books, and use the relevant pro-consumer principles contained therein to develop rights-based advocacy strategies. This includes devising methods to ensure that laws intended to protect consumers are being applied, or enforced.

Further, consumer advocates need to monitor legislative activities; watching for any opportunity to provide input on draft legislation which may impact consumers, and advocating for modification of existing legislation, or the creation of new legislation which fills consumer protection gaps.

Most proposed legislation does impact consumers or their pocket books. Thus, the consumer advocate's job is intrinsically linked to the law, and an effective consumer advocate must be very familiar with the nation's legal framework.

Further, it is also a good idea to develop an understanding of other countries' legal frameworks relevant to consumer protection in order to benchmark one's own legislation.

This may sound like a large, complex task for a consumer advocate or consumer organisation with a shoestring budget.

Admittedly, it probably will be an overwhelming task unless the consumer organisation forms effective partnerships with other organisations with overlapping human rights, environmental and consumer protection goals. That said, clearly rights-based consumer advocacy reflects medium and long term strategies.

To begin, CI conducted a review of existing laws in Botswana, Namibia and Zambia with a view to identifying *de jure* legislation which provides a measure of consumer protection if enforced as written. The review process includes a review of the State's Constitution (or proposed draft as is the case in Zambia), explicit consumer protection legislation, competition laws and sectoral legislation such as: public health and food/medicine safety standards legislation; financial services law; essential services (water/electricity/telecom); environmental protection; torts/negligence law and access to formal complaints and redress mechanisms, both within state agencies and through the courts' system.

¹ Published online at <http://www.consumersinternational.org/media/715456/a-guide-to-developing-consumer-protection-law.pdf>

² For the Wikipedia definition and etymology of the expression *white elephant*, see the following link: http://en.wikipedia.org/wiki/White_elephant

The research also noted the existence and jurisdictional competencies of traditional authorities. All three states reviewed have thriving traditional authorities and related courts.

Once a *de jure* review has been completed, consumer advocates can begin to identify 'low hanging fruit' which can be targeted for advocacy campaigns. Thus, after identifying legislation to test in order to determine whether it is *actually* enforced to the consumer's benefit, protection is essentially the first step in constructing a rights-based advocacy strategy. Then, related activities can be designed which are intended to reinforce the application of the law and to improve the consumers' knowledge of their rights.

For example, if a Financial Institutions Act states that the Central Bank has the authority to ban financial services which are likely to cause harm or pose a systemic risk to the nation's financial sector, then the consumer advocate may want to engage in dialogue with the Central Bank and financial institutions to determine:

- 1) What authority and tools the regulator has to monitor financial sector risk;
- 2) Whether the regulator has systems in place to monitor the financial services market for pyramid schemes and other fraudulent practices;
- 3) Whether it ever has banned risky products/practices and under what circumstances;
- 4) Whether it monitors the consumer loan market specifically (looking for high incidents of non performing loans and/or signs of market saturation and consumer over indebtedness); and
- 5) What measures the Central Bank (or other financial services regulators) can take to police the market and/or correct imbalances.

If the consumer advocate does not receive satisfactory or sufficient answers from the financial services regulator or other stakeholders, this could be the foundation of an advocacy campaign and/or a public-private partnership to enforce the law. Again, depending upon resources, the consumer advocate could also begin to gather information from consumers on financial services disputes, bringing the summarised information to the attention of regulators.

Additionally, a consumer financial literacy campaign can also be design-based on the consumers most frequently highlighted problems.

In reality, the consumer advocate is tasked with: 1) identifying what *pro consumer* legislation exists; 2) making a determination as to whether and how the law is being applied or enforced to the consumer's benefit; and 3) designing interventions to reinforce the efficacy of the law or to provide consumers with access to information and the means to protect themselves, ie, how to obtain redress.

And, the advocate needs to make a decision as to whether he or she is equipped to intervene in the event that the law is not being applied or effectively enforced. If not, what resources or partnerships would be necessary?

In general, in the author's experience, the lack of applicable legislation in a country is not the true problem. The problem tends to be the failure of the regulator to take appropriate action due to inability, incapacity and/or corruption. A secondary problem is the consumer advocate's lack of resources and/or inability to form effective partnerships to address the challenge.

Whatever the reason for the poor state of actual consumer protection in many countries (not just African, and not just developing countries³), the effective consumer advocate will need to develop a keen understanding of legislation in place, and develop creative advocacy strategies and partnerships to push for better law enforcement.

This research is an attempt to pave the way for further consumer advocacy in the SADC region by: 1) highlighting pro consumer areas in legislation; and 2) suggesting checks to determine whether the legislation on the books represents the actual status quo and the consumer's reality. If the legislation in effect is not being enforced or is ineffectively enforced, we will also make suggestions as to how consumer advocates might approach the problem of lack of implementation (all on relatively small budgets).

I. The Promise of a Constitution for Protection of Consumer Rights

Constitutions may provide valuable language for the consumer advocate to use in his or her rights-based advocacy strategies, but it does not always follow that actual legislation is developed on the subject matter.

The text, however, can still be used for public interest advocacy; including consumer mobilisation and even public interest litigation. An example of the use of the Constitution for advocacy campaigns comes from Namibia where the Legal Assistance Centre (LAC) once brought an action against the Government of Namibia for failure to provide water and sanitation to a particular area of the country, alleging that this failure to provide an essential commodity was a Constitutional violation.⁴

A. Namibia

The **Namibian Constitution** was passed after the country's independence from South Africa in 1990.⁵ The Constitution makes broad aspirational statements that human dignity shall be inviolable and no one shall be discriminated against due to race, ethnicity, religion, gender or economic status.⁶

Other useful language for consumer advocates stems from Article 13 of the Namibian Constitution which guarantees the individual's right to privacy. And, Article 66 gives full force and effect to customary law and common law in Namibia. The former is important as customary courts tend to be more accessible to the people; and the latter because it ensures that the law will be dynamic and influenced, even if not determined by precedent (thus, if a consumer organisation brings a successful pro consumer action, it can use the case as precedent for establishing a similar case in another sector).

For example, if the LAC wins its case based on the legal theory that the Government of Namibia is negligent for its failure to provide water/sanitation for a community, the same argument can be used to demand that the State must also provide housing or electricity for all per the Constitution.

³ As the global financial sector meltdown and related US mortgage foreclosure 'robo-signing,' of foreclosure documents clearly illustrate

⁴ LAC published a press release about the issue here: <http://www.lac.org.na/news/pressreleases/pressr-09otavi.html>

The Namibian Constitution does not explicitly reference the right to water, but this is implicit in other fundamental human rights per the LAC. Further, in 2002, Namibia adopted a National Water Policy that states that all Namibians have a right to access sufficient safe water for a healthy and productive life. Moreover, sections 2 and 3 of the **Water Resources Management Act** state that the state has an obligation to ensure that water resources are managed in ways consistent with fundamental principles so that to ensure equitable access to water resources by every citizen.

⁵ http://www.superiorcourts.org.na/supreme/nam_constitution.html

⁶ Articles 8 and 10 of the Constitution of the Republic of Namibia, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=222893

Further, one can look to existing case law for similar fact patterns which establish a precedent, or which can be cited as persuasive authority in a tribunal. And, there is established Namibian case law which indicates that the State must provide essential services to its citizens (related to the State's obligation to provide police protection).⁷

Another pro consumer feature of Namibia's Constitution is that it provides for the creation of a Constitutionally-mandated ombudsman which has significant authority to investigate claims of public malfeasance or human rights violations. Further, it has the duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, and the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia. It also has the duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under the Constitution have occurred.⁸

Therefore, in addition to allegations of public corruption (eg, allegations of misappropriation of the civil servants' pension funds), the office of Ombudsman can be engaged to fight against unsustainable mining and land development practices, including land grabbing by corporate interests.

B. Zambia: the promise of consumer rights as Constitutional rights

Conversely, Zambia is still engaged in its politicised Constitutional consultation process.

The technical committee is due to compile its final resolutions following consultations on the proposed Constitution and submit the final draft to the President and the public by June 30, 2013. Once in the President's hands, he should call for a referendum to adopt it. The time frame for adoption, however, is unclear, and therein lies the problem.

The aspirations as reflected in the Zambian draft Constitution are for a comprehensive, strong foundation for the protection of human rights. The draft contains novel protections for its citizens' socio-economic and political rights (eg, the right to a clean and healthy environment; right to health care; to be free from hunger; to have affordable housing; to have a clean water supply; and the right to employment).⁹

Further, the draft Zambian Constitution specifically mentions the following consumer rights:

- The right to goods and services of reasonable quality;
- The right to information necessary for consumers to gain full benefit of goods/services;
- The protection of their health, safety and economic interests;
- Compensation for loss/injury arising from defects in goods/services; and
- The right to fair, honest and decent advertising.

Further, the right to compensation for consumer damages has been elevated to a Constitutional right. Thus, the Government of Zambia would then be obliged to ensure that all consumers have access to redress mechanisms.

If the Constitution is passed *as is*, it is unlikely that the State will be able to achieve all of its ideals.

⁷ *Dresselhaus Transport Cc v. the Government of Namibia*, 2005 NR 214 provides that the Government had an obligation to protect private property and persons' fundamental rights.

⁸ Article 91 sections (c-d) of Namibian Constitution.

⁹ *First Draft Constitution of the Republic of Zambia*, The Secretariat of the Technical Committee on Drafting of the Constitution; Lusaka, April 30, 2012, Sec. Published online and last viewed on 15 March 2013 at <http://zambianconstitution.org/downloads/First%20Draft%20Constitution.pdf>

Many states simply lack the resources necessary to provide all their citizens with healthcare; just to give one example. That said, if the Constitution is passed *as is*, it can still be a powerful advocacy tool for consumer organisations and human rights advocates.

Any aspirational statement by the Government can now be used to illustrate the stark contrast between the consumers' status quo, and what the Constitution promises as *an inalienable right*.

For example, the Constitution reads that all should have access to adequate housing. However, a significant percentage of people are homeless or living in substandard conditions, and the wait lists for public housing could easily be longer than consumer life expectancies.¹⁰ Therefore, consumer organisations can use such goal statements by the Government to mobilise consumers (and voters) to push government for positive change.

Consumers too must appreciate that if they also have an obligation to push for their stated rights; they will never truly have them. Understandably, in cases of extreme poverty, this can be a Catch-22: it is hard to push for something when you have no tools or capacity or even energy to do so. Thus, consumer organisations in the least developed countries become even more integral to protect consumer and human rights.

C. Botswana

In neighboring Botswana there is also a strong human rights component in its Constitution,¹¹ but it does not contain any provisions therein which could be said to be specifically *on point* regarding consumer rights.

It has a very standard, blanket protection for the right to life, liberty, security of person and the protection of the law.

Perhaps this last statement could be used to build an advocacy campaign, but it is rather vague.

II. Cornerstones of Consumer Protection Law

A) Generally Applicable Consumer Protection Legislation

i) Botswana

Botswana's Consumer Protection Act (No. 21 of 1998) approved the establishment of a Consumer Protection Office under the then Ministry of Trade, Industry, Wildlife and Tourism, which is now the Ministry of Trade and Industry (MTI).

The Consumer Protection Office's principal mandate is to ensure that the rights of consumers are protected and that consumers themselves are adequately educated, so that they may make informed choices. The Office is one of the three divisions of the Department of Trade and Consumer Affairs (DTCA).

The Unit has not developed its own Strategic Plan detailing its own mission, but has adopted the Department of Trade's overall mission. The concern herein is that the urge to encourage economic development and investment in the country could be in conflict with the best interests of consumers. Ideally, consumer protection would get equal billing in a Ministry, but this is not always the case.

¹⁰ Per Homeless International (.org), a UK NGO which works in Zambia, 57% of the urban poor live in slums.

¹¹ http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf

ii) Namibia

Namibia does not yet have a Consumer Protection Act, but the Law Reform Commission and the Ministry of Trade are conducting a comparison study, including study tours to the UK and South Africa to speak with CI and various state entities about their respective legislation and consumer protection challenges.

The author of this report spoke with the Commission members at length in August of 2012, and their primary concern appeared to be whether the Consumer Protection office should be a stand alone entity, or a part of the Competition Authority.

That said, the Namibian government has been engaged in this study process for a significant period of time, and has not yet produced a draft act.

iii) Zambia

Conversely, Zambia has a fairly new and very comprehensive Competition and Consumer Protection Act (CCPA) of 2010 which created the Competition and Consumer Protection Commission (CCPC).

The Commission website and text of the legislation can be viewed here:

<http://www.ccpc.org.zm/index.php/legislation/competitiona-consumer-protection>

In addition to monitoring markets for anti-competitive behaviour and abuse of dominant position, the CCPC is charged with being vigilant in consumer protection and enforcement, providing consumers with information regarding their rights and conducting investigations of its own initiative or based on complaints, including those coming from foreign competition authorities.

Section VII of the act pertains directly to consumers and bans unfair trading practices such as acting in a way that misleads consumers or compromises the standard of good faith and honesty with which the enterprise should reasonably be held to meet.¹²

This language is fairly broad, but consumer advocates can use it to advocate for an interpretation which provides the most comprehensive consumer protection.

The Zambia CCPA also prescribes how products must be labeled, including ingredients and expiration as well as detailed contact information for the manufacturer. The legislation also cross references the Zambia Standards Bureau and prohibits sale of unsafe goods; giving the Commission the authority to ban their sale.

Interestingly, Section 53 of the Act provides a rather broad prohibition against unfair contract terms and defines unfair terms as: *if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*. Further, pursuant to Section 53(2) of the act, unfair contracts are not binding. And, the CCPC has included a helpful article entitled *How unfair is unfair?* which helps to clarify what types of terms or practices would be viewed unfavorably by the CCPC.¹³

This could be a particularly strong advocacy tool.

¹² *Competition and Consumer Protection Act of Zambia*; No. 24 of 2010; Sec. VII, no. 45(b) published online at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=714

¹³ Available on the CCPC website at <http://www.ccpc.org.zm/index.php/press-release/1-press-release/153-18th-march-2013-how-unfair-are-unfair-contract-terms>

An example of a possible advocacy campaign, applying this statute is in the financial services sector. When excessive, unfair interest rates and hidden fees are charged, or obligatory services are bundled with a consumer loan (like insurance), consumer advocates could file a complaint with the Commission advocating for the annulment of the consumer debt agreements based on unfair interest rates, costs and terms. Similarly, in other countries (eg, India, Nicaragua, Bolivia, and Morocco), mass popular movements have sprung up protesting high interest rates in the microlending sector.

The Zambian law would give such a consumer movement a legislative foundation.

B) Competition or Fair Trade legislation

i) Botswana

Botswana passed the Competition Act of 2009 to monitor, control and prohibit anti-competitive trade or business practices in the economy of Botswana. The Competition Authority is the primary enforcement agency for competition law and policy, and it is a parastatal also under the Ministry of Trade's jurisdiction. While its focus is on preventing restrictive trade agreements and mergers/acquisitions which create monopolies, it also has the authority to "make rules for, and publicise decisions that increase, fair and transparent business practices."

Thus, arguably the Competition Authority has overlapping jurisdiction with the Consumer Protection body and both are part of the Ministry of Trade. So, more information is necessary to determine how and whether these bodies work together to protect consumers.

Further, it is always interesting to see the types of investigations that government agencies conduct, and the results published online which provide concrete examples of agency priorities.

ii) Namibia

In Namibia, the Namibia Competition Act, (Act No. 2 of 2003) provides for the establishment of Namibia's Competition Authority to enhance the promotion and safeguarding of competition in the economy. The Act has jurisdiction over all economic sectors except "collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act".¹⁴

The purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia in order to:

- (a) Promote the efficiency, adaptability and development of the Namibian economy;
- (b) Provide consumers with competitive prices and product choices; and
- (c) Promote employment and advance the social and economic welfare of Namibians.

...

In terms of actual activities of the Namibian Competition Commission (NCC), it is difficult to establish this information because no annual reports or activities are published on the Commission website.

¹⁴ Additionally, per the NCT, unprocessed agricultural goods are also exempt from the Competition Act.

The site also states that in 2013 it will 'begin various market studies or sectoral inquiry and engage in work towards the establishment of a microeconomic database to enable the commission to be a repository of highly valuable and sensitive data on the economic industrial structure of the country.'¹⁵

Per the Namibian Consumers Trust, the NCC is, in effect, accessible, but it seems reluctant to make rulings or even to acknowledge complaints received. Further, it does not provide status information on investigations resulting from said complaints.

Also, in a contested case, the Commission granted permission for the State Telecom to acquire Leo as both are owned through majority shareholding by the government of Namibia. This is not ideal for fostering market competition.¹⁶

iii) Zambia

Zambia, which has followed an approach more like that of Botswana than Namibia, has a dual purpose Competition and Consumer Protection Act and again, as referenced above, it is a fairly new authority having been established in 2010. Therefore, time will tell regarding its efficacy and strength as a consumer protection entity.

From its website, and a recent call for proposals seeking input on the CCPC's draft administrative and procedural guidelines, it would seem that they are not yet fully operational.

That said, in January of 2013, they rejected a proposed Toyota acquisition, so the agency is engaged in competition related investigations.¹⁷ So, there has been recent activity, but only seven competition cases total are published online, and the annual reports were only been published in 2004, therefore, it is difficult to assess the consumer protection activities taken by this entity.

There is reference to 'spot checking' of vendors but the results are not mentioned on-line, so there is no way of knowing what they are being checked for nor how many are being checked.

C) Sectoral legislation (eg, water/power; food/public health; and financial services)

i. Botswana

a) Water/Power

In Botswana, the Water Utilities Corporation is a parastatal and, per Chpt. 74:02, it should do all such things as may be necessary to secure adequate supplies of water for the performance of functions.

Further, per Chpt 34:01, any person may use public water for watering stock, drinking, washing or use in a vehicle. And, per the Waste Management Act, Chpt. 65:06, the department should (f) institute appropriate sanitary measures for the promotion of public health and (g) make arrangements for special treatment of hazardous wastes and (h) restrict or prohibit waste management operations near rivers or waterways.

¹⁵ <http://www.nacc.com.na/economics-sector-research.php> (as viewed on 20 March 2013).

¹⁶ Emailed comments from Michael Gaweseb, Executive Director of Namibia Consumers Trust, on April 14, 2013. For more about the acquisition, a press release is available online here

<http://www.newera.com.na/articles/49477/Telecom-Namibia-takes-over-Leo>

¹⁷ <http://www.ccpc.org.zm/index.php/press-release/1-press-release/151-24th-january-2013-qccpc-rejects-the-toyota-ppr-cfao-mergerq>

These statutes combined should provide the consumer advocate with a substantive legal argument for a rights-based advocacy campaign if consumers do not have adequate or sanitary water supplies in Botswana.

The Water Corporation has contact info on its site for leak reportage and shortages, but no complaints procedure published (<http://www.wuc.bw/wuc-content.php?cid=148>). Thus, a consumer advocate could contact the Corporation to determine what the consumer complaint policy is and inquire about the volume and types of complaints received by the agency.

If there is no information collected by the regulator regarding the volume and type of complaints received, this is a possible area of intervention for a consumer organisation. It could survey consumers on their most common complaints about water services, inquire whether a complaint was filed with the Water Corporation and determine what the end result was.

Similarly, Botswana's electric company, the Botswana Power Corporation (BPC), per Chpt. 74:01, can fix prices per sec. 18 so as "to cover operating costs, including to allocate funds to expand services and improve services" per Sec. 17(a). The Corporation does produce annual reports and years 2007 through 2012 are available online at www.BPC.bw/pages/customer_services.aspx.

The BPC Annual Report of 2012 contains information very relevant to consumer protection advocates, including the following:¹⁸

-Currently, BPC services 49.13% of the population, but by 2016 it states, its goal is to serve 80% of the population.¹⁹ A consumer advocate could utilise this Corporate statement each year to inquire about progress towards the stated goal. Further, a consumer advocate might question why the BPC's goal is not universal access to electricity.

BPC appears to be focused on a strategy of prepaid services to expand into rural areas of Botswana.²⁰

In 2012, the BPC's revenue increased by 18.2% yet it is operating at a loss (of 1.12 bn in 2012 and 746m P in 2011) despite receiving direct grants from the government. Further, auditors Deloitte and Touche stated there is "material uncertainty about the Corporation's ability to continue as a going concern".²¹

A consumer advocate should be very concerned about the financial status and possible insolvency of the BPC and should ask for an inquiry as to what specifically is the operational problem, and how it is being addressed. A consumers' organisation can also inquire what portion of the budget was actually spent on improving services, what was spent on expansion into previously underserved areas and what portion was spent on executive salaries.

This situation presents a grave risk for the consumer in Botswana, and in the absence of an energy sector regulator, the role of the consumer organisation becomes extremely important.

The BPC issue demonstrates that annual reports from state-owned corporations are a very good source of information regarding the activities and efficacy of regulators, and can provide the basis for further advocacy by consumer organisations.

¹⁸ *Botswana Power Corporation Annual Report, 2012* as viewed online on April 22, 2013 at http://www.bpc.bw/Pages/annual_report.aspx

¹⁹ *Id.*, p. 6.

²⁰ *Id.*, p. 5.

²¹ *Id.*, p 30.

When no report is published, or reports have not been published for several years, a consumer advocate should be asking why in a public forum.

b) Food/Public Health

The Botswana Food Control Act 65:05 establishes a Food Board responsible for promotion and protection of public health and prevention of commercial fraud and unsafe/hazardous foods.

There's also a food labeling act of 1993 which encompasses expiration date, contents, and instructions for use. Further details can be found in the act itself: <http://faolex.fao.org/docs/pdf/bot66062.pdf>

A related segment of the Public Health Act states that it is the health officers duty to take all lawful, necessary and reasonably practical measures to "ensure the purity of any supply of water which the public has a right to use ... and to take all necessary measures against pollution". Under Sec. 58, health officers have the authority to seize tainted food and may inspect food and dairy production and storage facilities.

Similarly, the Ministry of Public Health recognises that it is obligated "to coordinate testing of locally and imported foods". No reports or notices of any product recalls are posted on the Ministry's site at present.²²

The Botswana Meat Commission Act 74:04 establishes a commission to buy and slaughter all meat produced in the country. This may have been necessary in the early years of the country, but perhaps now this practice is not helping consumers to obtain the best choice and/or prices in the market.

c) Financial Services

In Botswana, the Central Bank of Botswana regulates the commercial banks per the Banking Act of 1995 and the Non Bank Financial Institutions Regulatory Authority is the regulator of all non-banking financial entities, including pension funds, consumer/micro lenders, and insurance. Per Chapter 46 Sec. 8(e), the regulator has the authority "to set standards of business conduct". And, pursuant to Sec. 68., Unfair Practices, the regulator may, by notice in the Gazette, determine that a specified practice in relation to financial services is an unfair practice subject to fines for engaging in such activity.

Thus, it could be interesting to know how specifically, and whether the regulator has interpreted and acted on these two sections of the law. If these powers have not been used, and there are specific consumer protection related problems in the financial services sector with unfair practices or lack of contract transparency, then a consumer advocate may suggest in a public forum that the regulator begin to utilise its authority on a more pro active basis.

Similarly, with regard to the insurance industry specifically, Chpt. 46:01 states that the Insurance Registrar "can afford guidance to insurers on the standardization of contracts of compulsory insurance; the deletion or amendments of obscure or ambiguous or unfair or oppressive terms to policyholders or the simplification of terms/conditions of contracts of insurance".

Again, this legislation begs the question of whether insurance contracts are standardised and monitored by the regulator for fairness and understandability. A consumer advocate could find out this information fairly easily by talking to an insurance company executive.

²² The www.moh.gov.bw was last checked April 16, 2003. A Google search on 'contaminated food Botswana' did reveal that the Ministry recalled a particular brand of peanut butter in 2010. But, from the limited amount of data available online, a consumer advocate should have a dialogue with the Ministry directly about its protocol for monitoring the food supply.

Further, if insurance contracts can be standardised and monitored for fairness/understandability, the same advocacy campaign can be made to make all financial services agreements used by licensed financial institutions more transparent and fair.

ii. Namibia

a) Water/Power

In Namibia the issues of water and sanitation and the government's obligation to provide may have been recently tested, though we have been unable to determine the outcome of the issue.

The Namibia Legal Aid Center brought a test case against the government stating the Constitution and various international covenants to which Namibia is party require the State to provide access to clean water and sanitation facilities.

The Namibia Water Corporation Act of 1997 merely states in Art. 9 that there is a duty to supply "bulk water" to any applicant. The government could argue that this duty is subject to restrictions of availability of water and budget.

However, now that an immense reservoir of water has been discovered in Namibia, this issue may take on greater importance and the consumer advocate could use any positive result from the above mentioned case as part of any advocacy campaign that there exists a State obligation to provide clean water and sanitation for all. This issue could become contentious should the State decide to sell its supply of water to neighbouring countries (or allow a multinational to do the same) when its own citizens do not have sufficient supplies.

The Electricity Act 4 of 2007 provides for a government authority for regulation of electricity supply, transmission, licensing and setting tariffs. Per part II, Sec. 3, it establishes an electricity control board (2)(c)(i) which must settle disputes regarding right to supply of electricity. Again, from the consumer advocacy perspective, it could be interesting to inquire with the government about the type and volume of the complaints and how it resolves any disputes received.

The Namibia Communications Commissions Act of 1992 licenses broadcasting entities; and the Posts and Telecommunications Act of 1992 governs postal services and telephones. The Communications Regulatory Authority of Namibia (CRAN) has been established and tested by the recent Namibia Telecom acquisition of Leo. CRAN's Chairman publicly stated that the takeover would allow a monopoly. The takeover was allowed nonetheless.

This event negatively impacts consumer confidence in the institution, and the Namibian Consumer Trust publicly questioned CRAN's decision.

b) Food/Health

Namibia has a Standards Information and Quality Office. Veterinary Services under the Ministry of Agriculture does external auditing of food products. Although, the testing per NCT is not calibrated, nor detailed enough to detect genetic modifications or growth hormones.

The Ministry of Health and Social Services is responsible for implementing the Public Health Act, legislation that dates back to 1919, with regulations established in 1969. The Ministry of Trade and Industry mostly concerns itself with the inspection of fish and fisheries products.

It would seem there is room for revision, clarification of which entity should do what, and a consolidation of legislation with regard to food security and public health. Furthermore, there is certainly substance herein for a consumer advocacy campaign. And, the NCT is working on both public health and food safety, advocating for passage of a new food safety bill.

Further, there is currently an issue before the Agronomic Board regarding the sale of genetically modified maize meal which was labeled non-GM. Per the Agronomic Industry Act of 1992, the government can engage in activities to improve the market for controlled products, including fixing the prices. It may also grade, classify and mark controlled products.

It can require the labeling of GM food per the Trade Metrology Act of 1973 and/or the Agronomic Act.

Recently, the NCT in collaboration with a South African university, analysed maize meal and, despite the industry claims of no GMO use, GM material was found in the maize. NCT reported this information to the local media. Now, similar testing is being done with DNA in meat.

As a result of its advocacy, the NCT has been threatened with legal action by the agronomic industry and is seeking legal counsel on the same issue.

And, in the midst of the media storm, the Ministry of Education did take some positive steps to implement the Biosafety Act through hosting an awareness raising workshop on April 16, 2013 and appointing Biosafety Board members.

c) Financial Services

Namibian Banks, which are mostly South African in origin, are subject to the Banking Institutions Act of 1998.

Insurance is subject to legislation on Long and Short Term Insurance Sales of 1998 and promoters, including investment advisors, are also regulated by NAMFISA, the non bank financial services regulator.

There is an anti Usury Act no. 73 of 1968 pursuant to which microfinance institutions, friendly societies, building societies, pensions and insurance are all regulated by NAMFISA. Microlenders (registered with NAMFISA) may charge 1.6 times the prime rate of the average prime rate.

This too could be tested by a consumer advocate who is able to secret shop and compare the actual terms of microfinance institutional rates (including all fees, taxes and bundled products and then compare to the statutory obligations).

iii. Zambia

a) Water/Power

The Water Act (Chapter 198 of 1949) governs water usage in Zambia, and section 55 makes it an offence to foul public water supplies either willfully or through an act of negligence. The Water Officer and Board are responsible for ensuring that pollution is stopped once identified.

Thus, a consumer advocate could also monitor such offenses so as to report them to the water officer for his/her follow up.

The existing act does not guarantee universal access to water, but the draft Constitution provides for the right to water, sanitation and a safe environment in Sec. 70-71.

In Zambia, the energy regulator has a consumer affairs division (<http://www.erb.org.zm/cpaffairs.php>) charged with consumer advocacy, education and dispute resolution with a complaint submission form online: <http://www.erb.org.zm/content.php?viewpage=cmpl>. Again, it could be interesting for a consumer advocate to investigate how active the energy regulator has been, and to inquire about the volume and type of consumer disputes resolved.

b) Food/Health

In Zambia, the Public Health Act, No. 13 of 1994, Chpt. 295, bans the sale of unwholesome food per pt IV, Sec. 79 and in Sec. 82 states the minister can fix standards for animals intended for human consumption and dairy. Then, as amended, the Public Health Act, on meat, abattoirs and butcheries, states that per Sec. 28, meat inspectors must mark meat as fit for human consumption (when it is).

In addition to the Public Health Act, there is also a Food & Drug Act., Vol. 17, Chpt. 303; and a National Food and Nutrition Commission Act. It seems there may be room for consolidation of these acts as well.

Zambia also has a Standards Act, Chpt. 416, and a Weights and Measures Act, Chpt. 403, which establishes a Commission on which there should be one representative of a consumer association.

Thus, this begs the question of whether a consumer representative is actually on the Standards Commission.

c) Financial Services

There is the Banking and Financial Services Act, Chpt. 387 of 194 in Zambia which governs banks and non bank financial institutions (including mortgage, forex and leasing companies). Sec. 48 deals with consumer complaints and requires financial services providers to have and publish a complaints handling procedure and keep records on all complaints filed and how they are dealt with for a period of two years. The Central Bank is the sector's regulator.

Sec. 72 of the act guarantees confidentiality of client information. There is also a credit privacy code related to credit information sharing through the credit bureau which is available online.²³

The Bank of Zambia does not appear to have a complaints handling process, but there is a Bankers' Association with a voluntary code of conduct published online whereby consumers can submit complaints for mediation.²⁴

Voluntary codes of conduct are not legally enforceable, but still can be used in consumer protection advocacy campaigns if a signatory to the code is not adhering to the established standards.

The lack of financial services complaints handling mechanism is definitely a concern in Zambia; particularly when credit information sharing is due to begin. If consumers have a complaint or detect an error in their credit report which could potentially hinder their access to credit, which government entity will ensure consumers have a forum for redress?

The Insurance Act No. 27 of 1997 governs the industry and brokers must be licensed per this act. The Pension and Insurance Authority is charged with regulating the industries and enquiries can be submitted online but there is no specific reference to a complaints handling.²⁵

²³ http://www.boz.zm/Instruments/CreditData_PrivacyCode.pdf

²⁴ http://www.cavmont.com.zm/fileadmin/user_upload/Downloads/BAZ_Code_of_Banking.pdf

²⁵ <http://www.pia.org.zm/index.php/enquiries>

D) Redress mechanisms and Access to Justice for Consumers

Access to redress for consumers' disputes; particularly for poor consumers is a real challenge which is not adequately addressed by law and policy makers.

Even wealthy economies, such as the United States, report that only 29% of low income persons access the civil justice system to resolve legal issues.²⁶

In developing countries, particularly in Southern Africa, in addition to the high cost of a lawyer, there is a limited supply. The concept of pro bono work for the poor has not yet caught on amongst the African Bar Associations. Further, most African lawyers work in the urban areas, while the poor tend to reside in bulk in the rural areas of the country.

CI recognises that access to justice is fundamental if consumers are to be protected. And, it has drafted an addendum to its *Guide to Developing Consumer Protection Law* on alternative dispute resolution for this reason. CI has also begun focusing its energies on bringing this issue to the attention of law and policy makers globally.

The primary problem for the consumer is money. If the consumer is engaged in a dispute, it is probably because he or she purchased a poor quality good or service, and has thus already lost money.

Because most courts charge filing fees, and services of a lawyer may be required, consumers are at a huge disadvantage versus the seller of the shoddy good or service, who has presumably made a profit on the sale of the merchandise or service.

Further, if the consumer is poor and living in a rural area, access to justice may be even more of a challenge due to the physical location of the redress mechanism. Most standard courts including small claims courts and government regulatory complaint windows are located in large urban areas requiring substantial travel time, and perhaps a sacrificed work day for the already aggrieved consumer. This may be impossible if one is a trader in the market or a farmer or a day labourer.

Interestingly, the three countries subject to our review all have a slightly different situation and approach regarding redress mechanisms available to consumers.

i) Zambia

In addition to having an internet presence on Facebook, the Zambian small claims court has a physical presence in Lusaka and Ndola.

The small claims court Facebook page illustrates court personnel interacting with the public and lists instructions for how to use the small claims court. Posted inquiries by this author regarding the volume of cases went unanswered however, and the last agency posting appears to have been almost a year ago.²⁷

Zambia also has a consumer specific tribunal established by its Competition and Consumer Protection Act pursuant to Sec. 67 which states that the tribunal shall consist of a legal practitioner (with not less than 10 years of experience), a representative of the Attorney General's office and three other experts with not less than five years of experience in matters relevant to the Act.

²⁶ An ABA study surveyed members of 1,782 low income households and those who did not avail themselves of a tribunal indicated that costs were prohibitive. *Legal Needs & Civil Justice, a Survey of Americans*, The American Bar Association, 1994.

²⁷ <http://www.facebook.com/pages/Small-Claims-Court-Zambia/273144629362564?fref=ts>

The functions of the tribunal however are not available to first instance complaints, but rather to appeals made to it under the Competition and Consumer Protection Act.

Zambia also has regulatory complaints windows for consumers at the Competition and Consumer Protection Authority.²⁸

In addition, the Zambian Association of Consumer Advocacy (ZACA) publishes a brochure for consumers including the contact information of the following entities for purposes of filing complaints: the ICT authority, Zambia Bureau of Standards, Energy Regulation Board, and the Pharmaceutical Regulatory Authority.

The interesting question for the consumer advocate is always what types and volumes of complaints does the regulator receive and how are these complaints resolved, including whether the consumers are satisfied with how the issue is resolved.

This could be a very interesting area for consumer advocates to investigate further.

ii) Botswana

Botswana too has established small claims courts in Gaborone and Francistowne for claims valued at less than 10,000 Pula (approx. USD). The small claims courts however only handle claims of non-receipt of merchandise once the consumer has paid the supplier (not the quality of goods/services) and civil debt collection. This may be insufficient to address the consumer's real needs.

There is also a consumer complaints handling process with the Ministry of Trade with related instructions online, and which has offices in several large cities. It is unknown how many complaints and what type are handled by the Ministry.

Further, the office of banking adjudicator handles banking disputes (www.banking-adjudicator.org.bw). And the Botswana Telecommunications Authority does have a Compliance and Consumer Affairs Unit, but it is unclear whether they mediate consumer disputes.

iii) Namibia

Unlike Botswana and Zambia, Namibia does not have small claims courts per se, though we have been informed by a member of the Law Reform Commission that the Community Courts Act No. 10 of 2003 may be reformed to revive small claims courts. And, Namibia does have traditional courts in at least 49 traditional authority territories. CI has conducted a series of interviews with the traditional authorities and drafted a publication on their potential role in consumer protection.

Pursuant to our interviews with traditional authority justices and secretaries, their capacity and resources to address consumer issues are quite low. At present, the bulk of the claims brought before these courts

²⁸ The Director, Consumer and Education, Competition & Consumer Protection Commission, 4th Floor Main Post Office Building, P.O. Box 34919. Lusaka. Telephone: 222775/222787, Toll Free Line: 5678, Fax: 222789, e-mail: zcomp@ccpc.org.zm or P.O. Box 20158, Rooms 31A and 34B Ground Floor, ZRA Building (Nchanga House), cnr. Enos Chomba Rd and President Avenue, Kitwe, telephone number 02-221115, Fax: 02-221067, email ccpcKitwe@zamnet.zm; Website: www.ccpc.org.zm.

appears to be related to stock theft, discrimination and domestic disputes, including claims of alienation of affection (ie extra marital affairs) and property inheritance issues.

Other sectoral regulators accept consumer complaints in Namibia, such as the nonbank regulator, NAMFISA which has published a complaints submission protocol online at <http://www.namfisa.com.na/complaints.html>. Interestingly, the Central Bank of Namibia has published a Complaints Handling Guide online which directs consumers to complain to the financial institution itself, and if redress is not received from the institution, the guide advises that legal action may be taken in the courts.²⁹

Apparently, the Central Bank does not view consumer dispute resolution as within its mandate.

The Namibian Competition Commission does have a complaint form published online, but no information regarding the volume of complaints received.³⁰

The Namibian Water Corporation has a hotline, to which presumably one can report service problems: <http://www.namwater.com.na/data/hotline.htm>

III. Legislation in areas directly related to Consumer Protection

A) Environmental protection laws

As world renowned biologist and environmentalist Rachel Carson's book *Silent Spring* illustrated in the 1960s: "environmental issues are human rights issues".

Carson argued that the human body is permeable, and thus very susceptible to foreign bodies or toxins in the environment, in our water supply, in the air we breathe and in the food we consume. Human beings literally become what we consume. Toxins in food, air and water will be stored in our tissues, in some cases until we die (or are killed by them).³¹

Therefore, it is essential that consumer rights advocates develop a familiarity with international conventions as well as national legislation on the issue. Unfortunately, both the law and science are behind the industry practices which directly impact the environment and consumers.

This is certainly the case when we talk about GM foods, and the use of chemicals to enhance growing cycles, increase food production and to conserve it longer, to fight weeds and to treat live animals with growth hormones or excessive doses of antibiotics for human consumption.

Arguably, the 'precautionary principle' should apply to the aforementioned corporate practices: that the questionable practice is not allowed til proven safe by non-biased scientific minds.

Unfortunately for the consumer and the planet, the reverse is happening. All's allowed until proven harmful to the consumer and environment. By the time harm can be proven, it is often irreversible and life threatening.

Thus, this issue is critical for consumer advocates now, and for future generations of consumers.

²⁹ <https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/b0/b0032f66-542d-4f17-8b16-35857ac0ad70.pdf>

³⁰ <http://www.nacc.com.na/downloads/complaint-form.pdf>

³¹ Carson, Rachel, *Silent Spring*, Houghton Mifflin Company, New York, 1962.

On a positive, advocacy-related note, this is an issue of huge, international importance and all three countries at issue are signatories to international agreements on climate change, combatting desertification and protection of biodiversity. Thus, these could be useful documents for the consumer advocate to review and a list of all the nations which are signatories to these environmental treaties can be found on the World Intellectual Property Organization's WIPO Lex website at http://www.wipo.int/wipolex/en/results.jsp?countries=&cat_id=10.

i) Namibia

Interestingly, of the three countries surveyed, only Namibia has elected not to sign the treaty protecting intellectual property for new plant matter (whereas Botswana and Zambia are signatories). And, in this instance, not participating in this treaty may be to the consumer's benefit, as being a signatory would mean acceptance of the premise that GM foods are safe for human consumption, and thus should be protectable by patents issued by States.

WIPO Lex also has a list of all the countries who have ratified the protection of traditional knowledge agreement (none of the three countries at issue here have done so).

Then, generally speaking, at the national legislative level, the traditional authorities are given jurisdiction over the environment in the form of controlling the use of lands within their territories. Thus, these authorities should be consulted and mobilised as potential consumer allies for potentially damaging environmental issues, including unsustainable developments.

Also, when facing environmental challenges, the consumer advocate may want to revisit the national public health acts to determine if any language in that act provides the authority for that arm of government to engage on environmental issues. In issues of water contamination, the consumer advocate will probably find strong support in the public health act as well as when there is air/water/land pollution.

With GM food, however, the argument is going to be more difficult, but still valid.

ii) Zambia

For example, in Zambia, the reader may recall that the Public Health Act, No. 13 of 1994, Chpt. 295 bans the sale of unwholesome food per Pt. IV, Sec. 79 and in Sec. 82 states the minister can fix standards for animals intended for human consumption and dairy. Therefore, a consumer advocate could take the position that GM food is by definition 'unwholesome,' requesting standards for the sale of food and animals related to GM.

Finally, there should be a government agency monitoring the use of chemicals on the food supply.

iii) Botswana

In Botswana, for example, the Agrochemical Law, Chpt. 35, Sec. 9 establishes a registrar which should monitor the sale, use and test residues of agrochemicals and conduct public awareness campaigns.

Thus, a consumer advocacy organisation could seek access to reports and studies done by the agency to determine whether or not it is fulfilling its statutory obligations. Depending upon available resources, a consumer advocate could also engage in testing and furnish the results to the government for enforcement actions as relevant.

The NCT, in Namibia for example, is actively engaging on GM issues. It has had tests performed by a university on the constitution of maize meal which detected the presence of GM material despite corporate

labeling otherwise (and receiving fiscal incentives for not having GM present). Testing is also being conducted on meat DNA at a South African university.

Namibia and Zambian consumer advocates might also inquire about whether and how their governments are monitoring the agro-chemical sector.

If governments are not doing so, consumer advocates may want to identify potential allies in the environmental sphere and/or at their local universities. This could also be organised as a regional initiative and presented to donors interested in environmental protection issues, like the Scandinavian bi-lateral organisations for example.

B) Anti corruption, Parastatal laws and Ombudsman laws

i) Botswana

Botswana's anticorruption body has special powers of investigation, arrest, and search and seizure, and the body generally boasts a high conviction rate. Nevertheless, there are almost no restrictions on the private business activities of public servants, and there have been several high-profile corruption scandals in recent years and allegations of nepotism reaching the Presidential office.³²

Additionally, in Botswana, there is a Public Procurement and Asset Disposal Act which is concerned with the procurement of works, supplies and services for government as well as disposal of public assets. Sec. 66(1) of the act however allows the government to introduce "reserved and preferential procurement and disposal of assets when pursuant to economic and social objectives of a market oriented ... framework."

ii) Namibia

Namibia has a Constitutionally created ombudsman as referenced in Part C below. It also has the State Owned Enterprises Governance Act of 2005 which provides for monitoring and restructuring of state businesses. That said, the act and implementation are new and untested in terms of consumer protection. Once Board members' activity and productivity is measured, we will be better able to judge the impact on consumers and the cost/benefit ratios.

iii) Zambia

In Zambia, there is also the existing Anti-Corruption Act of 2010 and the National Anti Corruption Policy of 2009, which stipulates penalties for different offences, though per the CIA's World Fact Book notes that "legislation and stated policies on anti-corruption are adequate, implementation sometimes falls short". Zambia lacks adequate whistleblower protection, asset disclosure, evidence, and freedom of information laws. The Anti-Corruption Commission (ACC) is the agency mandated to spearhead the fight against corruption in Zambia.

C) Human rights legislation and committees

³² In 2010, for example, Minister of Justice, Defense and Security (and cousin of President Khama) Ramadeluka Sereste was charged with corruption and relinquished his post in August for failing to disclose his position as a shareholder in a company—owned by his wife—which won a massive defense contract in 2009. Seretse was acquitted of all charges in October 2011 and was reinstated in his post the next day by President Khama. *Seretse Walks Free*, MmegiOnline, 26 Oct. 2011; Khama Inc.: All the President's Family, Friends and Close Colleagues, *Mail and Guardian*, 2 Nov. 2012.

i) **Botswana** does not have a human rights commission, but the office of the President does state that one is needed and perhaps in the process of being created.³³

ii) **Namibia** does not have a human rights commission per se, but its office of Ombudsman does have authority to investigate claims of some human rights related violations:
<http://www.ombudsman.org.na/>. However, the NCT indicates that this body has yet to prove itself an ally of the consumer, its efficacy and actual independence from political pressures is suspect.³⁴

iii) **Zambia** has a human rights commission, though ZACA has opined that it is less than effective in its duties. Apparently other members of civil society feel similarly as complaints were voiced in a South African forum that the entity is less than effective.

Efficacy aside, the Commission accepts online complaints:

http://www.hrc.org.zm/complaint_form.php

D) Freedom of information Acts

Access to information provides consumers with the ability to demand transparency and accountability of their public officials. Therefore, lack of legislation which mandates that government information should be public, barring any national security exceptions can allow malfeasance to go undiscovered and unchecked.

None of the three states reviewed has a freedom of information act.

In **Botswana**, the ruling party states it first wants to pass a data privacy act.³⁵

Namibia does not have a Freedom of Information Act and civil society is advocating for an Access to Information law for citizens.

Zambia does not have a Freedom of Information Act and its government also appears to have law met with political foot dragging.³⁶

E) Case law on torts, negligence and malpractice where a duty of care is owed

This research is very difficult to perform online because not many cases are actually published on the internet from the SADC region (exclusive of South Africa).

Still, it is an area where consumer advocates should conduct further investigation particularly in areas of contract law and products liability. This research can be conducted in collaboration with a law faculty member or law students interested in consumer protection issues.

IV. Traditional Authorities and Customary Justice

In each of the three states assessed, there is not much research available regarding the efficacy and quality of justice of the traditional courts.

³³ <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Human-Rights-Commissions1/>

³⁴ E-mailed comments from Michael Gaweseb, Executive Director of NCT on April 13, 2013.

³⁵ <http://www.safpi.org/news/article/2012/botswana-editors-forum-supports-foi-bill>

³⁶ <http://www.freedominfo.org/2013/02/zambia-again-delays-introduction-of-foi-bill/>

Various statements appear in the local media from time to time about the local courts disregarding women's and human rights. But, no specific or detailed study has been found by this author on the issue of quality of justice of the local courts.

Therefore, research which samples a number of cases and findings as compared to how the Magistrates' Courts would determine the same issue, and a 'customer satisfaction' analysis of the traditional courts, would be pertinent to analysing whether and how these courts have a role to play in consumer protection issues.

i) Botswana

Further, in Botswana customary law receives statutory recognition in Sec. 2 of the Customary Courts Act, 1969 and Sec. 4 of Common law and Customary Act (Cap. 16:01) and Chieftainship Act. Parliament does however consult with the House of Chiefs on legislative issues. And, all bills affecting tribal organisation and property, customary law, and the administration of customary courts go through the House of Chiefs before being discussed in Parliament. This body must also be consulted when reviewing the Constitution. Chiefs must also be recognised by the Ministry per the Chieftainship Act.³⁷

Given that the House of Chiefs has a seemingly important role in law making, consumer advocates should try to bring consumer protection issues on their attention.

Pursuant to research done for the World Bank, the Customary Courts in Botswana handle 90% of the criminal cases and 80% of the civil matters and decisions are appealable, though statistics were not given on volume of cases, nor regarding the number of appeals.³⁸

ii) Namibia

Namibia has 49 traditional authorities (and the number is growing as the Ministry of Justice officially recognises more authorities) which are recognised by the State of Namibia and which receive an annual budget for traditional or community courts.

These courts address an array of socio-economic issues within their territories applying customary or traditional law which is based upon the principles of equity. The traditional authorities historically did not codify their laws, but have recently been undertaking a process of ascertaining customary law and publishing it.

CI conducted interviews with several traditional authorities which resulted in a publication solely on this issue.

The conclusion was basically that the traditional authorities do require significant resources and training before they will play a significant role in consumer protection issues, but they are very close to their constituents and could be an important partner of the government and consumer advocacy organisations; particularly as a means of getting information to consumers dwelling in their territories.

iii) Zambia

Zambia has some 73 ethnic groups which each have their customary laws; but unlike Namibia, these customary laws have not been ascertained or published in a unified, State-coordinated effort.

³⁷ Available online at <http://www.gov.bw/Global/MLG/Acts/Chieftainship.pdf>

³⁸ Sharma, Keshav, Role of Traditional Structures in Local Government for Local Development the Case of Botswana, World Bank, 2004. Available online at <http://info.worldbank.org/etools/docs/library/153055/BOTSWANA.pdf>

The proposed Zambian Constitution also legitimises the role of Chieftancy and customary law in Zambian society pursuant to Part XIII, Sec. 226 of the draft Constitution.³⁹

And, prior to that, the Local Courts Act of 1966 integrated the native courts, then renamed local courts into the formal judicial system by allowing appeals from the local courts to the magistrate level. However, research from the mid 1980s done by a British researcher showed that of the 119,000 cases heard by the 422 Zambian local courts in 1982 (105,000 of which were civil matters) only 202 appeals were made.⁴⁰

Because the Local Courts Act provides that a local court “shall administer the African customary law applicable to any matter before it so far as such law is not repugnant to natural justice or morality or incompatible with the premises of written law ...”, this small volume of appeals could indicate user satisfaction, or it could merely illustrate the poor lack of access to the more formal courts. Further research would be necessary to make this determination. In any case, the above mentioned research did show that the local courts are accessible to the people; of the 422 local courts existing in the 1980s, 30 of them were in urban areas and the remainder in rural communities.⁴¹

V. Recommendations for building rights-based advocacy strategies with existing legal frameworks

1) Consumer groups should review the existing legislation with an eye to identifying the thematic areas on which the consumer organisation is best equipped with the knowledge and existing budget to successfully intervene on the issue.

Because resources are always scarce, consumer groups should be quite selective about which issues they select and should also consider partnering with educational institutions, environmental activists, human rights advocates and other organisations with a complementary mission.⁴² While it is tempting to work on multiple subjects, and clearly there is a need, a consumer organisation may be more effective if it concentrates first on one issue, then, if it has the resources, on two issues.

In addition, success with one advocacy campaign breeds credibility with consumers, the industry, law and policy makers, and the media (which will then begin to ask for the advocate’s opinion on a regular basis knowing it will get a good story).

Thus, consumer groups should pay particular attention to all of the following: 1) selecting a thematic area where the law is clearly pro consumer (as opposed to a bit vague); 2) where their combined knowledge/ability is greatest; and 3) where allies are available to support the consumer advocacy position.

In each of the three countries surveyed, there are several thematic areas where the law solidly supports a consumer protection intervention.

³⁹ 226. (1) The institution of chieftancy together with its traditional councils as established by customary law and its usage is hereby guaranteed, subject to this Constitution. ...

(3) Subject to this Constitution, the institution of chieftancy shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.

⁴⁰ Coldham, Simon, *Customary Marriage and the Urban Local Courts in Zambia*, Journal of African Law, Vol. 34, No. 1 (Spring 1990), pgs. 67-75.

⁴¹ *Ibid.*

⁴² NGOs with a complementary mission may make better partners than NGOs with the same consumer protection mission, which might not be keen to collaborate due to a competition for resources.

It could also be interesting to determine a common ground upon which consumer organisations could join forces to conduct a regional campaign. And, the issue of GM food, and the use of chemicals/pesticides in growing food for consumption and raising animals, could make a fruitful regional advocacy campaign.

In Namibia, the NCT is currently approaching food safety as a labelling issue and it is testing what is actually in maize and meats, as opposed to how they are labeled. In Botswana, the law provides strong support for a similar safe food campaign. The government of Botswana is obligated by law to monitor and pre approve the use of all agrochemicals, and it must test the environment for residue from these chemicals. In Zambia, the issue could be approached as one of public health by law – campaigning that consumption of these GM foods and use of the chemicals and growth hormones should first be proven safe prior to being allowed.

2) Consumer advocates should also demand more accountability from regulators and government agencies charged with enforcing the law or monitoring and supervising industry. For example, as mentioned above, because the government of Botswana is obligated to monitor agrochemical use and test residuals per existing legislation, a consumer advocate should ask to see the actual annual test results (or quarterly tests). If none are forthcoming, then, the consumer advocate knows that the law is not being enforced and formulate a strategy to enforce the law. One possible strategy could be enlisting the biology faculty or graduate students at the university to conduct water, air and earth samples where there is known use of agrochemicals. The results could be shared with the media for dissemination.

3) Consumer advocates should utilise the data published in parastatals and government agencies' annual reports to provide a window into government procedures and efficiency.

For example, if the energy regulator states that it will provide universal access to water or electricity within the next five years, the consumer advocate now has a standard by which to hold government accountable.

4) The media should be used as both an informational device to educate consumers about existing law, and also as tool to hold regulators to account on performance.

The NCT in Namibia has been very effective in using the media to prod the regulator into action. It is using the media as a megaphone now on the issue of GM and mislabelling of same which inspired the government to form a commission on the subject, and hold awareness raising seminars.

In Zambia, because a new Constitution represents an important opportunity for consumer education and mobilisation, ZACA might consider a media partnership to inform consumers about their proposed Constitutional Rights, and then to pressure the Government of Zambia to set measurable goals, such as the Millenium Development Goals have done for the right to shelter, adequate food, clean water, etc.

5) Further, once a consumer advocate learns that a regulatory complaints mechanism exists, he or she can educate consumers about the appropriate procedures to file a complaint (as ZACA has done). And, the consumer advocate can use this same data on the volume and types of complaints to recommend new consumer friendly regulatory policies. For example, if there are many complaints about the lack of transparency of microfinance loan agreements, a standard form contract approved by the regulator could be proposed.

Or, if a significant number of consumers are complaining about pyramid and other investment schemes, a regulator could offer financial literacy and fraud awareness trainings for consumers, in partnership with a consumer organisation.

6) Consumer advocacy organisations need to collaborate regionally and share information on items of common interest where market abuses are similar. This is true in financial services markets and food safety, in particular with agrochemicals and GM food. If GM organisms are found in maize meal in Namibia and not labelled as such, chances are high that other SADC countries have a similar problem. Larger corporations

are selling throughout the region. And, just as corporations sell in multiple markets, their anti-competitive techniques usually travel with them.

7) Similarly, it could be a good idea to form a common fund both for the prosecution of transborder consumer protection and competition-related legal abuses, as well as for use in defending consumer organisations when they are sued as a result of their consumer advocacy campaigns (as is threatened in Namibia). Access to justice and legal aid is not just a problem for consumers, but also to consumer organisations.

8) Consumer organisations would appear to have a natural ally in the traditional authorities, particularly in cases of environmental protection, and the sustainable use of resources. Thus, it is suggested that advocates consider involving the traditional authorities in more consumer protection projects, including education and dissemination of information to consumers.

9) Consumer advocates should look for more than one way to skin a cat or enforce legislation. In other words, if the ministry charged with protecting the environment and enforcing the law is not helpful, a consumer advocate could try advocacy with the ministry of tourism, or ministry of agriculture or ministry of cooperatives. If none are helpful or efficient, try the ombudsman and enlist the help of the traditional authorities, or flood the small claims courts with individual actions on the same issue. Because the forces of corruption, nepotism and cronyism all may be at play, consumer organisations should seek to play one organisation against another, using politics to motivate civil servants and ministers to do their jobs. Further, in common law jurisdictions, if a public official refuses to do his job, a writ of mandamus can be requested from the court ordering the official to perform his or her obligations. This may result only in a piece of paper in the form of a judgment, however, that is still newsworthy for the media.

10) Finally, in conducting this research and working with the project partners, the author noted a certain lack of interest in national law as the foundation of a rights-based advocacy campaign; perhaps fueled by the perception that because the laws are not enforced, it is a waste of time studying them.

The issue, however, is that the laws represent a starting point for consumer advocacy, not the finish line.

It is the author's hope that the project partners will consider trying the rights-based advocacy method as outlined in this research – if just once, in order to see what can be achieved.

After all, as Einstein pointed out, the definition of insanity is to keep doing the same thing over and over again, expecting a different result.