



# **The traditional courts of Namibia: *A forum for consumer protection, if not actual redress?***

*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.



*Maize cannot get justice in a chicken's court.*

African proverb (origin unknown)

*In the state of nature, indeed, all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws.*

Charles de Montesquieu  
*The Spirit of Laws*

*The traditional communities in Namibia live in worlds of change and pressure, which also force them to think about their own values and cultures, and the laws built on those values and cultures. Change is inevitable.*

Prof. Manfred O. Hinz  
Univ. Of Namibia - Windhoek  
*The Ascertainment of  
Customary Law*

## I. Objectives of the Research

Consumers International (CI) has conducted a comparison of dispute resolution mechanisms available to consumers throughout the Southern African region in order to inform advocacy campaigns, as well as to promote strategies to legally empower consumers in the region.

Access to justice is a challenge for the poor in almost every country in the world; be it a developing economy or a developed nation.

Throughout Africa, and with South Africa as the possible exception, the number of lawyers serving the population is quite low. In Namibia, where there is a population of two million people, of whom more than half live in rural areas, there are only 400 lawyers.<sup>1</sup> Further, most of the lawyers tend to practice in urban, and not rural areas.

Further, just because there are lawyers in a community does not mean that the poor have actual access to them, as the concept of pro bono services for the poor does not really exist in Namibia and many other developing countries.

Thus, even a modest filing fee of \$20 for a small claims court action can be cost prohibitive if one is unemployed or struggling to make ends meet in a depressed economy.

Further, consumer disputes represent a unique access to justice challenge because of the diversity of potential issues, in addition to the low value of the claims. It is unlikely, for example, that a consumer would take the time and pay applicable court filing fees when he or she has purchased a bag of expired, mouldy rice not fit for consumption. Similarly, it is unrealistic to think that a consumer would pursue a legal action because she took a microloan and subsequently discovered the fees and interests rates were much higher than initially stated by the loan officer. The totality of the circumstances in most consumer disputes are such that a disreputable and predatory business can easily act with impunity (should regulators fail to adequately monitor and supervise the marketplace).

Unfortunately, this is the status quo in most developing countries. And, businesses are well aware that consumers do not really have the justice system as a final line of defense.

However, in this respect, developing countries may have an advantage over the developed nations because there tends to be more traditional courts that remain operational and accessible to large portions of the population.

Namibia presents a particularly interesting situation in the SADC region. It, like several other African and other developing nations, has a rich history of customary law where communities continue to rely on traditional courts to resolve a variety of disputes (domestic disputes, land ownership issues, goat/cattle theft, and even accusations of witchcraft and claims of discrimination against community members based on HIV status).

A new Constitution and legislation were passed in the post colonial period in Namibia, after independence from South Africa, both of which recognise the authority of traditional authorities 1) to make laws for the people living within their territories, as well as 2) to adjudicate issues of customary law when brought to the traditional and community courts.<sup>2</sup>

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<sup>1</sup> *Access to Legal Aid in Criminal Justice Systems in Africa*; Survey Report, United Nations Office on Drugs and Crime, Vienna, 2011.

<sup>2</sup> The Community Courts Act of 2003 recognises the authority of the traditional courts when they meet certain conditions and formally register with the Ministry of Justice. There are now 49

In recent years, traditional authorities have also been engaging in a process of 'ascertaining' what customary law actually is following a consultative process.<sup>3</sup>

Traditional authorities tend to be 'closer to the people' both in geographical terms, as well as in understanding the socio-economic, cultural norms and languages of the people they serve. In fact, an estimated half of the Namibian population of 2.1 million reside in the Central North (where Oshiwambo speakers live) and North East (where Rukavango and Silosi speakers live) rural areas of the country, which is the jurisdiction of the Owambo traditional authorities.<sup>4</sup>

Recognised traditional authorities also receive an annual budget from the Ministry of Justice for traditional court operations. This amount is estimated to be 120,00 NAD per year which is equivalent to +/- 15,000 USD and while modest considering the sum it must cover office space, salaries and supplies. The traditional courts we visited do not appear to have large space requirements, or large staff.

In addition to being located far from rural areas, the *formal* judicial courts of the Namibian judiciary are also economically out of reach for the poor, who generally cannot afford court filing fees or a lawyer, which is often necessary in the adversarial system. By contrast, traditional courts generally do not charge a filing fee, and a lawyer is not necessary (and could even be a hindrance as the system is *inquisitorial* versus adversarial in nature).<sup>5</sup>

Thus, the primary objective is to define the limits of the jurisdiction of the traditional courts as well as assess their capacity and interest vis-à-vis consumer complaints resolution, and consumer protection issues specifically.

## II. Research Methodology

As a starting point, CI conducted a desk review of existing literature on traditional authorities and customary law in Namibia, and noted that Professor Manfred Hinz<sup>6</sup> and his team of researchers conducted a multi-year *Namibian Ascertainment of Customary Law Project*, subsequently publishing several in depth articles on customary law and the traditional courts.

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traditional authorities existing, but possibly thousands of traditional courts operating; not all of which have been formally recognised by the Ministry of Justice. Once registered, they are able to receive an annual budget and trainings from the Ministry of Justice.

<sup>3</sup> Ascertainment is defined by statute to be an *authoritative transfer of orally transmitted customary law into a written form*. In Namibia, traditional authorities engaged in self-stating the law and the end result is the creation of law by the community that is binding upon the community members (and per one tribe on others who commit unlawful actions within the traditional territory: this would include 'white people').

<sup>4</sup> Per the preliminary results of the Namibian census, some 58% of Namibians live in rural areas. *Namibia's population hits 2,1 million*. The Namibian, 12/04/12, published online at [http://www.namibian.com.na/index.php?id=28&tx\\_ttnews%5Btt\\_news%5D=95806&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=95806&no_cache=1)

<sup>5</sup> Though one traditional authority interviewed stated that issues filed in the traditional court as opposed to the community court required a nominal fee, because its traditional court did not have a budget whereas the Ministry of Justice provides an annual budget for the community courts.

<sup>6</sup> Professor Hinz has played a very influential role in Namibian history post independence working with the Ministry of Justice, and starting up the law faculty at the University of Namibia and eventually acting as Dean. Prof. Hinz's curriculum can be viewed online at <http://www.unam.na/faculties/law/law%20tables/Hinz-Manfred.html>

Professor Hinz has likewise researched traditional legal systems and the concept of legal pluralism in other African nations, such as Sudan, and is a recognised authority on the subject. He was also instrumental in the establishment of the first law faculty at the University of Namibia.

Another legal scholar who has focused on Namibian customary law in recent years is Dr. Janine Ubink who is part of the Lieden University law faculty. Dr. Ubink has written about customary and traditional law as a tool of legal empowerment, looking primarily at issues of women's rights. Thus, her research is interesting, though not exactly on the issue of consumer protection.

CI also benefited from the knowledge and assistance of its member, the Namibia Consumers Trust, whose Executive Director, Michael Gaweseb is a newly sworn in traditional court judge for the Damara people in the Khomas region.

Through Mr. Gaweseb's involvement, CI was able to better understand the traditional court procedure as well as to conduct interviews in person with traditional justices, senior counsellors and court secretaries from four additional traditional authorities:

The **Tsoaxaudaman Traditional Authority** in Otjimbingwe (the political region is called Erongo); the **Kwanyama Traditional Authority** in Eenhana (political region is called Ohangwena); the **Hai//om Traditional Authority** in Outjo and the **#Aodaman Traditional Authority** in Khorixas (political region is called Kunene).

The attached **annex** illustrates the geographic location of the traditional authorities interviewed.

There are a total of 49 traditional authorities spread across the nation (and more may be duly created). However, because the authorities are separated by hundreds of kilometers, it was not possible for the researchers to meet with more than one authority per day. Unfortunately, the time frame and budget allocated for this research did not allow for additional days in the field. However, and as the recommendations reflect, traditional authorities could certainly be approached one by one, or invited as a group to come to Windhoek (perhaps in tranches and according to language skills) to discuss consumer protection issues in the future; and this is a particularly timely issue because the State is proposing new legislation on consumer protection at present.

Each of the traditional authorities may have jurisdiction over hundreds of villages and families, although none of the authorities had an exact figure as to how large a population was living within its jurisdiction.

Interviews were also conducted with representatives from various government authorities, such as NAMFISA (which handles non bank financial sector consumer protection), the Law Reform Commission (tasked with drafting the new Namibian Consumer Protection Law), a representative of the Namibian Bar Association, and the executive of the legal aid clinic in Namibia (LAC).

An interview was also conducted with Professor Manfred O. Hinz at University of Namibia at Windhoek via email. Additionally, Dr. Ubink, a Dutch customary legal scholar was interviewed via email regarding her research on Namibian traditional courts.

### III. Background and History of Traditional Authorities and Customary Law

#### A) Legal system in Namibia

The Namibian legal system is an amalgam of Roman-Dutch common law and customary law. It also draws from the international corpus of law, including from South Africa, of which Namibia was part until winning independence in 1989. In fact, decisions from the Appellate Court of South Africa from before 1990 when the Namibian Constitution was adopted remain the law of the land in Namibia.<sup>7</sup>

Namibia uses an adversarial system of litigation. The Namibian Constitution, however *does not* guarantee the accused a right to legal representation by an advocate,<sup>8</sup> Although, the Ministry of Justice does have a Legal Aid Directorate, which during the 2011 fiscal year provided representation for 4,666 indigent defendants in criminal cases; a figure representing 66% of the requests actually received.<sup>9</sup>

Further, an experienced commercial lawyer, just like a consumer, would need to obtain legal redress in Namibia and could charge anywhere from 450 NAD per hour to 750 NAD per hour for an initial consultation with the client.<sup>10</sup> Pro bono legal services for civil law matters are difficult to obtain in Namibia, and it is not common for lawyers to provide pro bono services to the poor.

There is one existing legal aid clinic in Windhoek, called the LAC which concentrates its services on advocacy campaigns for human rights issues, such as prisoners' rights; legal empowerment and *know your rights* campaigns.<sup>11</sup>

Thus, for a member of a poor community earning less than 500 NAD per month, it is difficult to imagine where he or she would find the extra funds to even have a consultation with a lawyer, much less pay a lawyer for the duration of a civil case.<sup>12</sup>

Namibia has several lower courts; including the magistrate courts, labour courts and the customary courts (which are also known as traditional courts). Magistrate courts typically require a filing fee while the customary courts are generally free to the plaintiff (and thus

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<sup>7</sup> Mwana Geraldo, Geraldine and I. Skeffers, *Researching Namibian Law and the Namibian Legal System*, Dec. 2007, [www.nyulawglobal.org/globalex/namibia.htm](http://www.nyulawglobal.org/globalex/namibia.htm)

<sup>8</sup> Republic of Namibia Constitution, Articles 11-12 published online at <http://www.orusovo.com/namcon/>

<sup>9</sup> *Namibia: Legal Aid Not Depleted Says Vero Mbahuurua*, The Namibian, 17 August 2012 available online at <http://allafrica.com/stories/201208170899.html>

<sup>10</sup> Namibia has a split bar with attorneys being the equivalent of general practitioners and advocates being specialised and/or litigators (the latter cost more). Information on pricing for attorneys is published on the Law Society of Namibia website: [http://www.lawsocietynamibia.org/index.php?option=com\\_content&view=article&id=75%3AAnon-litigious-tariffs-2010-2011-1&catid=5&Itemid=126](http://www.lawsocietynamibia.org/index.php?option=com_content&view=article&id=75%3AAnon-litigious-tariffs-2010-2011-1&catid=5&Itemid=126) . A (junior) litigation specialist could charge from 950 to 10,000 NAD per day in court with a more senior advocate billing 17,000 NAD per day. Email from attorney Uda Nakamhela 21 August 2012.

<sup>11</sup> <http://www.lac.org.na/>

<sup>12</sup> Namibia is considered a middle income country with a GDP per capita of 6,206 NAD per the UNDP, but this hides a very high discrepancy between the rich and the poor as illustrated by the country's very high GINI coefficient of 70.71 from CIA World Factbook available online at <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>

they receive funding from the Ministry of Justice). The Magistrates' courts deal with most cases in the legal system and were created pursuant to the Magistrates Court Act of 1944.

As previously mentioned, Namibia formally recognises the traditional authorities and customary law.

The traditional authorities have their own courts, which in most cases have conducted the process of ascertaining their customary laws, and then drafting them for submission to the Ministry of Justice for publication (gazetting). Once published, the Ministry of Justice then swears in the traditional authorities' selection of justices, and trains the authorities on court administration procedures, such as budgeting and recording decisions.

Given that a significant majority of the Namibian population lives in rural areas controlled by the traditional authorities; and the traditional courts generally do not require a filing fee, these courts may be more accessible to the poor than the magistrates' courts.

Further, the Ministry of Trade and the Law Reform Commission are currently studying a new consumer protection régime, and considering the issue of a redress mechanism available for consumer complaints.

Therefore, this is a live issue in the country, and CI's research is particularly timely.

CI has consulted with members of the Ministry of Trade and the Law Reform Commission and will share its research findings to them as well, in the hopes that it may provide relevant considerations for lawmakers.

## **B) Relevant Namibian legislation**

**i) Traditional Authorities Act** was passed in 2000 (Act 25 of 2000).

**ii)** Although ***the Community Courts Act of 2003*** was passed nearly a decade ago, it has taken much of this time to enact the actual legislation. The Government of Namibia did not take action regarding the actual recognition of the traditional courts until recently. In part, the delay could stem from the lengthy time frame for the ascertainment of customary law (ie years) and the documentation of same by the traditional authorities.

The legislation states that the traditional authorities may apply in writing to the Ministry of Justice for recognition of the area's community court. In the application for recognition, one or more justices should be named who are *conversant in customary law and by virtue of their integrity are fit and proper persons for the office*.

The only other restriction or qualification regarding who can be a justice per the legislation is that the justice cannot be a political leader, a member of Parliament, or a regional or local authority council member. Further should there be a conflict of interest in a matter, the affected justice is banned from participating in that action.

Once recognised by the Ministry of Justice, the community court has jurisdiction within its own territory and in all matters in the opinion of the court which are closely connected to customary law.

Procedurally, community courts appear to operate much like the national court systems, whereby court filings initiate an action, and witnesses may be subpoenaed. However, the

system is not adversarial and the rigid rules of evidence and hearsay, as you may find in a common law court do not apply.

The traditional courts follow principles of *fairness and natural justice* per Professor Hinz.

### iii) **Types and volume of cases adjudicated by the traditional courts**

The traditional courts deal with land and property disputes (often arising when a deceased person has had multiple families); domestic issues such as infidelity (including claims of alienation of affection against third parties); theft of livestock; complaints of defamation and discrimination (including cases where one has accused another of witchcraft, and incidences of discrimination based on HIV-Aids).

More serious cases of bodily harm, such as rape and murder, appear to be systematically referred to the Magistrate's court and the police; though some traditional courts and laws do indicate that the victim and victim's family may also bring an action for compensation before the traditional court as a civil matter.

When prompted, the traditional authorities noted that they were aware of existing consumer protection challenges in their jurisdictions, although they did not readily understand the concept of consumer protection.

Several traditional authorities mentioned problems with food being sold after the expiration date; and the Owambo representative recalled a case of two children drinking tainted bottled water and dying as a result not long ago.

The Khorixas authority highlighted abuses by financial services providers; specific to the hire-purchase act (described in detail below), and the same authority also indicated that discrimination based on HIV status is such a problem that the afflicted are ashamed to go to the pharmacy to pick up their medications, thus the traditional authority routinely collect medicines in place of those who are ill (risking the same discrimination because villagers assume they are the ones ill with HIV-Aids).

For the most part, the traditional courts do appear to take notes on cases; and the #Aodaman in particular showed us their case notebooks, although records did not appear detailed regarding the facts of each case, nor decision taken. Further, only one traditional authority was able to indicate the volumes of cases heard.

The #Aodaman, for example, indicated that they heard 45 cases in the previous one month period; others indicated that the volume of cases varied due to a screening process at the village level, and headmen were often able to resolve disputes at this level before they rose to the level of the traditional authority.

## IV. **Capacity of the Traditional Courts**

A. **The statutory qualifications for traditional court judges** are minimal; generally the ability to speak the native language is sufficient; combined with a familiarity with customary law (knowledge of which is in itself hard to assess as this is known only by the traditional authority itself and is not tested by the Ministry of Justice). Further, in practice judges are nominated by Headman or Headwomn of the zone. Thus, this has the potential to be a politicised process.

Mr. Gaweseb indicated that skill sets of judges vary and few in his traditional authority are civil servants, but are not necessarily highly qualified or educated on issues relevant to jurisprudence or consumer protection issues.

And, while the Ministry of Justice has done some trainings in the past with various traditional authorities, the trainings appeared to be only administrative in nature, as related to expense reporting, and the use of grant money. All the traditional authorities interviewed expressed interest in participating in substantive law trainings as well as trainings on computers, etc.

The study of Namibian law and/or training specifically on consumer protection legal issues would be a necessary prerequisite, particularly when dealing with financial services or complex issues.

However, the general principles of equity, fairness and finding compromise resolutions as espoused in customary law are in conformity with the rights due to consumers.

Further, consumer protection law is still evolving in Namibia, thus now would be an ideal time to engage new actors as well as resources to disseminate knowledge of the law to the people.

B. Customary laws are gazetted and published in English. If they can also be published in native languages and distributed to people within the traditional authorities' jurisdiction, this would enable people to better understand their rights and how to access justice.

C. Ministry of Justice provides an annual budget of 120,000 NAD to each of the recognised traditional courts, which is intended as a contribution to operating costs. Various traditional authorities noted that it was not sufficient to cover all their needs, nor the additional time of the justices spent in considering the cases at hand (it only covered only the time spent hearing cases, not any time discussing with other judges or considering the facts after the hearing).

D. Traditional authorities mentioned the desire to have computer skills training (most keep records manually in notebooks, and record keeping is obligatory per the Community Courts Act) and on other substantive topics. In only one traditional authority in Khorixas did we see a computer; though it was not being used to its full capacity as the court secretary admitted he did not know how to connect it to the printer, nor turn the printer on. He was, however, eager to learn particularly when hearing that with Skype and VOIP one could have conversations just as with the telephone, but without the equivalent charges.

E. Traditional authorities act as a social point of reference and educator of the people who live in their territories, often intervening on social problems such as alcoholism, drug abuse, HIV/Aids, spousal infidelity and teenage prostitution.

#### **V. Interest level of Traditional Authorities to Engage on Consumer Protection Issues**

A. High: several of those interviewed referenced problems with expired food (and the authorities indicated that they are able to contact the Ministry of Health to come and inspect the stores at issue). Another consumer issue mentioned by at least two of the traditional authorities is that some vendors of Chinese-made goods known as 'China shops' have low quality goods, and refuse to replace defective items or goods not fit for the purpose for which they are sold.

Another problem cited by the authorities was the 'cash lenders' and those who sell furniture or other goods on instalment plans, and there is often an issue of inappropriate and/or abusive collection practices by vendors.

One traditional authority had to intervene in a contractual relationship, acting as a guarantor on behalf of a widow whose husband purchased furniture in this manner. The widow was apparently unaware of the agreement and as a result missed payments upon her spouse's death, and the seller repossessed the furniture. The widow appealed to the traditional authorities which were able to intervene and resolve the issue.

Again, documentation is not detailed, nor are cases categorised by the courts, thus it is difficult to determine how many cases heard by traditional courts involve consumer protection related issues.

#### B. School visits to educate children

One of the traditional authorities mentioned that it makes school visits to talk with children about social problems like drug and alcohol abuse and prostitution.

This could be a good opportunity to engage youth in discussions about a variety of issues like consumer education, (eg financial literacy) as well as access to justice and consumer rights in general.

C. The Government of Namibia does not seem keen to involve the Traditional Authorities in consultations regarding law making (one traditional authority mentioned that its input had not been solicited on the Community Courts Act which directly impacts the Traditional Authorities).

The Community Courts Act is also up for review, thus now could be an ideal moment to survey the traditional authorities on the functionality and need for reform of the act currently in place.

## **VI. Conclusions and Recommendations**

Due to the time constraints and budget limitations involved in this project, as well as the vastness of the Namibian terrain, CI and NCT were only able to meet with four of the traditional authorities' courts personnel, out of an existing 59.

These four traditional courts demonstrated a limited capacity in terms of resources, as well as knowledge of consumer protection issues. They did, however, express an interest in learning more about consumer protection issues, and even being trained on substantive legal issues related to same.

It is difficult to make a general statement regarding all of the authorities' capacity based on interviews with only four (and other figures who have knowledge of them), however we can infer that there is an interest on the part of the authorities to become more engaged on consumer protection issues. (In addition to the four authorities visited, several others were interested and willing to meet, but again time was too short, and the distances too great.)

Thus, our recommendation at this time is that CI and NCT (as well as other CI members in the SADC region) should continue to engage in dialogue with traditional authorities about

consumer protection issues, educating them about current consumer threats and challenges so that they can disseminate that information directly to consumers living in their jurisdiction.

Traditional authorities have a strong link with the rural communities and are currently not being used either by consumer advocacy organisations, nor by the State to convey important consumer protection information to the people.

Through participation in this research, project partner NCT saw the value of developing closer relations with the traditional authorities, in particular their value as a consumer educational medium.

Further, as the traditional authorities become more cognizant of consumer protection issues and educated on consumer rights, they could eventually take on more of a pro active role in dispute resolution, possibly through providing mediation services.

Again, as traditional authorities' capacity increases on consumer protection related issues, they can not only be used to disseminate information to consumers, but they could also be a source of data on consumer complaints.

This data can then be used in consumer advocacy campaigns, as well as presented to law and policy makers to assist them to make informed decisions on law enforcement and new consumer protection legislation.

Thus the answer to CI's research question which is also the title of this paper is 'Yes.' Traditional authorities can play an educational role on a variety of consumer protection issues, particularly those related to food safety and financial services literacy.

At present, however, the traditional courts we met do not appear to have the requisite capacity to function as a redress mechanism for consumer disputes.

That said, given their coverage of the Namibian State and closeness to rural people living in their jurisdictions, the traditional authorities could still be a powerful consumer protection ally.

And, now is a very critical time for the Namibian consumer because Namibia is currently engaging in law-making on both consumer protection as well as community courts legislation. Further, there are numerous consumer protection challenges currently in the news in Namibia; from the discovery by NCT of GM organisms in maize meal (and suspicions about the appropriate labeling of meat) to the competition-related challenge to the State's purchase of a telecom services provider.

Thus, CI and NCT strongly recommend that a dialogue or series of them be facilitated between the Law Reform Committee and Traditional Authorities, and that the leading consumer protection challenges for rural populations be on the discussion agenda.

Further, it is our recommendation that CI/NCT conduct trainings on consumer rights for interested traditional authorities, and instruct on resources of redress actually available to the consumer (per the recently conducted legislative review that CI/NCT have done).