



REPUBLIC OF NAMIBIA

MINISTRY OF JUSTICE

OFFICE OF THE MINISTER

ADDRESS AND PRESENTATION BY HON. YVONNE DAUSAB, MP

**DURING THE 24TH ANNUAL MEETING OF THE COUNCIL OF TRADITIONAL
LEADERS IN SWAKOPMUND, ERONGO REGION,**

13-17 NOVEMBER 2023

Honorable Chairperson of the Council of Traditional Leaders:

Honorable Traditional Leaders, Members of the Traditional Authorities Council.

Distinguished Invited Guests; ladies and Gentlemen.

1. I hail from the traditional communities of the Kai//khau and /Khomani //aera. I am a child that understands the importance of culture and tradition and how it shapes us as a nation collective. Having perused the program and the various topics covered under the tutelage of the traditional leadership I can affirm the importance of an annual platform like this. It provides an opportunity for deep reflection. To have been invited to be part in this manner is therefore a great honor because it also makes me think about the issues that we need to traverse as a community and nation collective. This is the 24th instalment of this flagship event and I can only imagine, the amount of stock taking that takes place and the lessons learned from previous annual meetings. It is my hope that there has been much opportunity for growth.

2. The relationship between the Ministry of Justice, as the administrator of the community courts and the traditional leaders and the communities they lead, in their various geographic locations, with their different customary practices and the different styles of leadership are inextricably link because we have a common goal. The goal is access to justice. The goal is making resolution of legal disputes among community members accessible and affordable. It is about restorative justice. It is to make customary law a living instrument of change for the benefit of the people we serve. Customary law and practice, whilst it is based on the common understanding of the people in that location and has been accepted to be the practice of that community and has consistently been practiced over a period, must also be adaptable, and dynamic. Moving with the times, should the community think it will be responsive to their needs and serve them better.
3. The obligations, role and powers of our Traditional leadership is aptly set out in section 3 of the Traditional Authorities Act, 2000(Act No. 25 of 2000). It more generally, expects traditional authorities to promote peace and welfare among its people. This means, our people must be safe, food secure and create opportunities for self-sufficiency and prosperity.
4. I can imagine that this can only happen if our people are united in their interaction with each other and are led by leaders who have their best interest at heart. More specifically, the expectation is that the traditional leadership will preserve cultural and customary practices and laws, consistent with the letter and spirit of the Namibian constitution. This requires that our leaders must be familiar with the rights and obligations set out in the Constitution and must harmonize their various customary practices with those national obligations.
5. For instance, article 19 of the Namibian Constitution, provides for the right of all our people to culture, language, tradition, and religion, but this right cannot impinge with the rights of others or the national interest, that's one.
6. Secondly, article 66 of the Namibian Constitution, recognizes customary law but does two things (1) it restricts customary practices to a particular geographic space and (2) it makes

it subservient to the provisions of the Constitution and statutory law. This means, any customary that violates the letter and spirit of the constitution cannot stand and if a customary law is against a statute(which is an Act of Parliament), that statutory law prevails. This is obviously problematic in some respects and the question should be how we address this. A platform like this, should be at liberty to traverse this question and make firm proposals for adjustment and reform in a manner that it does not dilute the intent of the makers of our constitution.

7. Any practice, custom or law that is harmful cannot be consistent with what we wanted to achieve with having a supreme law. The full range of obligations are set out in s 3(1) (a) – (h) and in 3(2) and 3(3) of the Traditional Authorities Act, but for our purposes “working with the Namibian Police section 3(2)(a)”, “to assist and cooperate with GRN”, hear and settle disputes and make customary laws” , see section 3(3) (b) and (c), as the key.
8. I have mentioned earlier that this platform is intended to be a place of deep reflection and it helps to sometimes repeat certain messages for emphasis so that we process that information and think through it with clarity.
9. **Back to why I am here.** I have been asked to share some policy, legal and institutional perspectives on issues that touch the very heart of our communities namely, (1) the challenges in the implementation of the Community Courts Act, (2) the harmonization (or what I call, tensions between) customary law and statutory law and how they relate to the supreme law, which is our constitution , and (3) some highlights of the challenges of inheritance law.
10. I can also confirm that luckily this is not the only platform of interaction the Ministry of Justice has with traditional communities and traditional authorities. Our key functionaries within the Ministry interact daily and regularly through the community courts, which are administratively backed up by our Community Courts Division in the Ministry.

11. As would become evident during this paper, I too have had an opportunity to visit traditional community leadership and the functionaries of the community courts around the country, where I had good insights on the challenges they face. If I have not yet visited your community court and authority, I pledge to do so in the early part of 2024.
12. I recognize that while many of the challenges are similar there are unique challenges and issues each traditional authority and its attendant community court faces and deals with. So, I do not take the individual engagements for granted.
13. It is common cause that not all the traditional authorities have community courts, but the majority do. Community Courts administer the traditional and customary law of the people who are under their jurisdiction as Traditional Authorities, and this is an obligation under the enabling statute of Traditional Authorities.
14. Although the Community Courts Act, 2003, (Act No.10 of 2003), has formally been in operation for 20 years, there were many initial challenges and the first courts were only established after 20 May 2009, which is about 14 years ago. ***Who can tell me, when their court was established and started serving the people in their community?***
15. Out of a potential of **42** community courts, there are 36 Community Courts active across the country, with 270 Justices and 219 Assessors engaged in the settlement of disputes and the application of the Customary law in their various jurisdictions. I am aware that many of you in the audience today are familiar with the operation of these courts, however, as I indicated earlier, there are some policy issues I want to share with you.
16. The first, is that we are in the final stages of preparing a discussion document which will pave the way for consultations with you, the Traditional Authorities, to review the

Community Courts Act of 2003 so that it can be improved and made responsive to the needs of all members of the human family.

17. I am also aware that on a previous instalment of the annual meeting in Gobabis that my predecessor engaged with you and explained that there were certain legal problems with the architecture of the current legislation and that it required some reform.
18. The Community Courts Act of 2003 is a landmark legislation designed to bring justice closer to our people. However, as we gather here today, it is crucial that we confront the challenges impeding its full implementation, particularly the pervasive delays in court cases. Delays not only undermine the effectiveness of the legal system but also erode the trust our communities have in these important traditional justice systems.
19. The Lack of resources, procedural bottlenecks, and a general awareness gap about the provisions of the Act contribute to these delays. To address this, we must advocate for increased funding, resource allocation, and robust capacity-building initiatives for our court personnel. Equally important is fostering awareness within our communities about the significance of the Community Courts Act.
20. The Community Courts Act has evidently increased the caseload at traditional community level. The number of cases per court have increased and in fact created a backlog of cases that are currently extending into 2025 in some Community Courts. This is in part more people are making use of the community courts. Its accessible, cheap and provide restorative justice.
21. To be clear, if a custom dictate that as soon as a young girl experiences the menstrual cycle she can be married off to a husband, the Child Care and Protection Act, 2015 (Act No. 3 of 2015) does not allow that. The general age of majority is 18. Child marriage is prohibited. Any person that wants to get married must be 21 years old and must still get parental consent. The prohibition of child marriage is both in respect of civil law or the customary law, this prohibition is provided for under section 10(10) of the Child Care and Protection

Act, 2015 and therefore overrides any harmful custom or practice that violates the letter and spirit of our constitution and statute law.

22. The second aspect is what the Namibian Constitution provides for in article 66. The common law and the customary law are on an equal standing, but they cannot contradict the provisions of the constitution and the statute. By way of illustrating that point is that currently, all appeals from that Community, goes to the Magistrates courts. This is problematic but that's how the law was designed.
23. Effectively, a court administering the Roman-Dutch law, foreign to our indigenous justice systems, is expected to hear, consider, and determine appeals from a court which administers Customary law. This creates various jurisprudential problems: the rules of evidence are different. The Magistrate's Courts is adversarial, whereas community courts are inquisitorial in nature. The way things are done in the MC, is totally different, because Community Courts are restorative and based their decisions on the customs and practices of that traditional community.
24. These issues are important. The Magistrates 'Court (MC) that people appeal to after not being happy with the decision of the Community Court has wide powers. The MC has the power to annul the proceedings of the Community Court and direct them to start afresh. This approach may present some challenges because the Magistrate will not be suited for the type of law practiced in our communities. Of course, the Community Courts Act, 2003 provides for Assessors but making use of them has not yet been tested. This should be explored. In other words, to have an assessor sit in the Magistrate's Court to advise the presiding judge.
25. You can imagine, Distinguished Members of the Traditional Authorities Council, that if a young inexperienced young man or woman, that is KKG speaking is posted as a magistrate to Katima Mulilo, Opuwo, Outapi, Nkurunkuru as an example, he or she would not understand the nuances of languages when translated by the interpreters. The language limitations alone could make that Magistrate's work harder. Mixing up the role of the

community courts and the Magistrate's Court is problematic, because of the language barrier and the cultural barriers the process may be seen as unjust. It must be reviewed.

26. For example, from the days when Magistrate Sakala presided in Katima Mulilo, you may recall that she understood the language and the customs of that area. While that was useful for her role in the relation to maintenance issues, she too demonstrated the awkwardness with the appeal process from Community Court to Magistrate's Court.

27. The fact is, our communities are rich tapestries of traditions and modernity, and at times, these two worlds collide. The harmonization of customary law and statutory laws is essential for creating a legal framework that respects our cultural heritage while embracing the principles of modern justice.

28. We must forge a collaborative platform for dialogue between traditional leaders, legal experts, and government representatives. A gradual and inclusive approach will pave the way for successful harmonization, ensuring a legal framework that resonates with the values of our communities.

29. Once we have completed the discussion document, it will be translated and circulated widely so that with the assistance of the Law Reform and Development Commission and the staff of the Community Courts from the Ministry of Justice, you can be consulted to make input.

Distinguished Traditional Leaders,

30. Lastly, the law of succession. This is the branch of law that regulates inheritance. You are all aware that Namibia inherited laws from the colonial dispensation which ended on March 21,1990. If I can use numerical figures to give you an idea of their lingering relevance, the

statutory laws in Namibia are roughly over 500, half of which are old laws, the other half new laws.

31. Three important statutes relate to inheritance in Namibia, the Intestate Succession Ordinance, 1946 (Ord. No 12 of the 1946), and the Administration of Estates Act, 1965 (Act No. 66 of 1965) and the Wills Act, 1953 (Act No. 7 of 1953). These are all pre-Independence legislations. They are still applicable.
32. They have been updated in some respects, with the Children's Status Act, 2006 (Act No. 6 of 2006) and subsequent amendments in respect of specific aspects such as the repeal that took away the distinctions between black and white estates and geographical reporting mechanism, which now allows everyone regardless of race to report estates to the Master of the High Court.
33. Pre- independence legislation does not reflect the constitutional values, are worded in archaic language and the amounts stated in those pieces of legislation are outdated and sometimes even denominated in pounds. Our communities are evolving, and our legal frameworks must evolve with them.
34. The further challenge of inheritance law based purely on custom is that it perpetuates some form of discrimination against women and children. Our communities are evolving, and our legal frameworks must evolve with them. To address gender disparities, we must advocate for gender-sensitive inheritance laws, embark on educational programs to raise awareness about equal inheritance rights, and collaborate with women's organizations to foster inclusivity. Simultaneously, we should explore alternative dispute resolution mechanisms, empower community leaders in mediating disputes, and pursue legal reforms to clarify and simplify inheritance laws.
35. Permit me to use another example. Assuming John lives in Swakopmund where he is married in community of property to his wife Jessica. They own a home in Swakopmund and another home at the village dully registered with the regional land board. That homestead is built in the traditional way and apparently John has taken another wife

according to custom and with the approval of Jessica. In this scenario the customary law wife is not protected. The point is to not mix the two systems of law. Until the issues are resolved the civil administration of the estate, focusses on the urban wife and the rural wife is left out. This discussion is ongoing at the law reform directorate must be directed to revive the discussion and prepare a report.

36. Questions such as who takes the residence, who determines the distribution of the customary assets, the role of the Headman etc. arise from my example to John and his polygamous life.

Program Director,

37. In conclusion, the issues we discuss today are not merely legal intricacies but touch the very soul of our communities. The decisions we make and the actions we take will shape the future of justice for generations to come. I implore each of us to approach these discussions with an open heart, a commitment to collaboration, and a shared vision of a more just and harmonious society. I look forward to the fruitful discussions and the collective wisdom that will undoubtedly emerge from this gathering.

I thank you!