

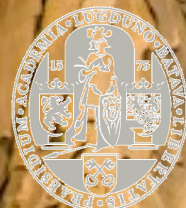
Towards Customary Legal Empowerment in Namibia

Enhancing gender equality in customary justice systems

Janine Ubink



International Development Law Organization
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Van Vollenhoven Institute
for Law, Governance, and Development

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ABOUT THE PROGRAM

This program has aimed to expand the knowledge base regarding the relationship between the operation of customary justice systems and the legal empowerment of poor and marginalized populations, and has identified entry points and tools of engagement for working with customary justice systems to strengthen legal empowerment. Such knowledge has been generated through a number of individual research projects based in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. These research projects have sought to evaluate programmatic interventions designed to enhance legal empowerment through improved operation of customary justice systems with a view to collecting empirical data on the effectiveness of such approaches, lessons learned and best practices. The results have been brought together in two publications that are being disseminated among international and national legal practitioners, country specialists and development actors working in the areas of customary justice and/or legal empowerment.

PARTNERSHIPS

This program is being implemented by IDLO in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University (<http://law.leiden.edu/organization/metajuridica/vvi/>) and the United Nations Development Programme (UNDP), Somalia.

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DONOR SUPPORT

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Towards Customary Legal Empowerment in Namibia: Enhancing Gender Equality in Customary Justice Systems

Janine Ubink

I. Background and Problem Analysis

Over the last decade or more, customary justice systems have become an increasing priority for international organizations working on legal development cooperation ((Commission on Legal Empowerment of the Poor 2008); (DFID 2004); (UNDP 2005); (Wojkowska 2006)). Traditionally, donor-led legal reform projects have emphasized formal institutions, such as the judiciary, legislators, the police, and prisons, and paid less attention to customary justice systems. The prominence of customary justice systems has often been regarded as incompatible with the modern nation-state and therefore as something to be discouraged or ignored rather than strengthened or engaged with ((Chirayath, Sage, and Woolcock 2005)). However, a growing body of evidence suggests that poor people in developing countries have limited access to the formal legal system and that their lives are largely governed by customary norms and institutions ((UNDP 2005)).¹ This can be explained on the one hand by choice, in cases where local people select customary legal institutions over state institutions for their positive attributes, such as knowledge of local affairs, accessibility and affordability. On the other hand, it can be explained by necessity, in localities and cases where limited penetration of state institutions or lack of access to these institutions is combined with strong or at least stronger local presence of customary institutions.

The limited effect of reforms in the state justice sector on the majority of the poor, coupled with increased recognition of the wide reach and accessibility of customary justice systems has led to a changing attitude among donors towards customary justice systems, and an interest to build on their positive elements for the benefit of the poor. Such an approach is consistent with the rise of so-called bottom-up legal development cooperation approaches ((Van Rooij 2009)), which seek to directly reach the poor or marginalized groups instead of hoping that state law reform projects 'trickle down' to benefit those at the bottom of developing societies.

This new donor engagement does not only focus on enhancing the positive aspects of customary justice systems, but also tries to overcome a number of negative aspects of such systems, including elite capture, violation of human rights standards and constitutional provisions, and that customary systems are deemed of limited effect in stimulating

¹ Figures collected by development cooperation departments in Britain and Denmark indicate that in some countries up to 80 percent of the population lives under customary justice systems and has little to no contact with state law, see (Golub 2006). These figures are corroborated by findings from academics studying African law, showing that customary law 'governs the daily lives of more than three quarters of the populations of most African countries', see (Sage and Woolcock 2006). According to one author 'up to 90 percent of cases in Nigeria are settled by customary courts', see (Odinkalu 2006). Poor people's use of customary justice systems may reflect the limited access to and weakness of the formal justice systems rather than an active choice for customary systems based on their satisfaction with these systems (cf. (SDC 2008):3).

economic development (De Soto 2001). Thus, while there is growing recognition of the importance of customary justice systems, there are a number of issues regarding their operation that need to be addressed, including elite capture, human rights protection, and – in certain legal reform projects – the integration of non-state arrangements in wider capital markets. It is on these issues that legal reform projects could possibly play a role.

II. The Research Project: Towards Customary Legal Empowerment in Namibia

The International Development Law Organization (IDLO) and the Van Vollenhoven Institute for Law, Governance and Development (VVI) have undertaken a research project entitled 'Towards Customary Legal Empowerment in Namibia' (the research project). In Namibia, national authorities have made various interventions aimed at enhancing the functioning of customary law and traditional leadership. These efforts include both the creation of institutional linkages as well as community-based activities. Further important initiatives have been undertaken by traditional authorities to change the institutional set-up and functioning of customary justice systems. Research into these governmental interventions and local initiatives has provided broad insights into the notion of and potential for customary legal empowerment. This has helped fill the knowledge gaps that exist with regard to change processes in customary law, particularly those stemming from initiatives undertaken by traditional communities themselves. The research has furthermore helped to verify whether they can serve as 'best practices' for customary legal empowerment of marginalized groups in other countries and situations.

Namibia

Namibia gained independence in 1990 following a lengthy and bitter liberation struggle. It was the result of an internally and externally negotiated settlement that guaranteed a controlled change of system, but left intact the extremely skewed land distribution created during the colonial period ((Hunter 2004):2). Today, approximately 44 percent of the land in Namibia is classified as freehold land composed of fenced ranches. These farms are the private property of – predominantly white – farmers. Approximately 43 percent of the land is classified as communal. This land, which lies mainly in the northern and eastern parts of the country, is inhabited by the majority of the black population ((Melber 2005): 136).² Land in these so-called communal areas remains largely regulated by customary law.

The uneven development that occurred during almost a century of colonial rule, first by Germany and later by South Africa, left Namibia with an inheritance of both inequality in the division of land and a highly skewed distribution of national wealth. With an average per capita income of more than US\$2,000 per annum Namibia is defined as a lower-middle-income country, ranking number 125 on the Human Development Index of 2007/8 (out of 177 countries). With regard to inequality, however, it scores the highest of all countries where sufficient data is available.

² According to Hunter, at independence 52 percent of Namibia's agricultural land was in the hands of white commercial farmers, who made up only six per cent of the population ((Hunter 2004):1). Subramanian comes with even more staggering figures, claiming that some 74 per cent of all potentially arable land was at independence owned by white commercial farmers, who comprised less than two per cent of the population ((Subramanian 1998):247). Breytenbach ((2004):54-5) claims that about 50 per cent of all land went to white farmers and less than 43 per cent to black farmers. Despite the huge area of land expropriated by white settlers, only approximately ten per cent of the Namibian population was directly affected by colonial land-grabbing ((Hunter 2004):3).

Owambo Kingdoms

The Owambo people constitute the largest population group in Namibia.³ Their home was called Owamboland during the colonial period, but today is divided into the Omusati, Ohangwena, Oshana and Oshikoto regions. Almost half of the total population lives here on less than seven percent of the Namibian territory.⁴ With the exception of the Uukolonkadhi, the Owambo societies were politically organized as kingdoms.⁵ Colonial rule seriously affected the indigenous Owambo polities. During the last decade of German occupation, the Germans started to conclude treaties with traditional leaders in the areas north of the Police Zone⁶ for the recruitment of contract labor for German-owned mines and commercial farms.⁷ This changed the relationship between traditional leaders and their people as “(t)he chiefs soon realized the potential material benefits of this for them personally and they employed their absolute authority to maximize their rewards.”⁸ In addition, when contract laborers returned home, influenced by the European way of life, they increasingly came to question the local political, social and economic order, which induced a gradual but irreversible process of breaking down the traditional norms and authority.⁹

South Africa, succeeding Germany after the First World War under the mandate system of the League of Nations, continued and elaborated the German system of indirect rule for the northern Namibian territories including Owamboland.¹⁰ In both Uukwambi and Uukwanyama, the South African administration forcibly removed the King and replaced him with a Headmen’s Council.¹¹ The main tasks of these Councils were maintaining law and order and ensuring a steady supply of contract migrant works to the Police Zone.¹² Indirect rule, characterized by the extensive use of indigenous political institutions, closely aligned most of the Owambo chiefs with the South African colonial regime. This “transformed the indigenous polities into local administrative organs dependent on the colonial state”.¹³ This collaboration with the colonial regime cost the traditional leaders in the north much of the

³ Owambo is a collective name for 12 tribal groups that live in northern Namibia and southern Angola. Seven of these linguistically and culturally closely-related societies live in present-day Namibia: the Ondonga, Uukwanyama, Ongandjera, Uukwambi, Ombalantu, Uukwaluudhi and Uukolonkadhi (C H L Hahn, ‘The Ovambo’ in C H L Hahn, H Vedder and L Fourie, *The Native Tribes of South West Africa* (1966); G Tötemeijer, *Namibia Old and New: Traditional and Modern Leaders in Ovamboland* (1978); F Williams, *Precolonial Communities of Southwestern Africa: A History of Owambo Kingdoms 1600–1920*, National Archives of Namibia (1991)).

⁴ According to the 2001 Population and Housing Census, 780,000 people, or 43 percent of the country’s population were living in Owambo.

⁵ In early times, the King was the highest authority and ruled with his Council. The King’s Council acted as the chief executive, judicial and legislative body. Usually, the kingdom was divided into districts or wards, headed by district heads or under-councillors (C Keulder, ‘Traditional Leaders’ in C Keulder (ed), *State, Society and Democracy: A Reader in Namibian Politics* (2000) 150, 155-6).

⁶ The Police Zone spanned the southern two-thirds of the territory of South West Africa/Namibia, in which the Germans established effective police control in the early 20th century. In this area, most tribal land was expropriated for white settlers, and the indigenous communities were forcibly resettled in “native reserves”. Indigenous groups living north of the line were prohibited from entering the Police Zone except for contract labor.

⁷ The Germans decided to turn to the north to recruit migrant labor after the Herero and Nama revolts in the south had almost decimated the Herero and Nama populations (Keulder, above n 7, 39–40).

⁸ Ibid 40. He gives the example of King Negumbo of Uukwambi who “compelled all young unmarried men to serve as contract workers in the south before he would give them permission to wed. He furthermore demanded that they present him with gifts of cattle upon conclusion of their contracts.” Ibid 84. See also Siiskonen, who mentions that in addition to gifts from returning workers, kings were also presented with valuable gifts from labor recruiters (H Siiskonen, *Trade and Socioeconomic Change in Ovamboland, 1850-1906* (1990) 229–236).

⁹ I Soiri, *The Radical Motherhood: Namibian women’s independence struggle* (1996) 40-42; Tötemeyer, above n 20, 42.

¹⁰ Keulder, above n 7, 42; Becker, above n 5, 33.

¹¹ King Mandume of Uukwanyama was killed by colonial troops in 1917 (Keulder, above n 7, 156). In 1932, heavy military equipment was used to capture and deport King Iipumbu of Uukwambi.

¹² Berat and Gordon, 637, 641.

¹³ Becker, above n 5, 33.

respect of the population.¹⁴ From the 1960s, Ovamboland became the centre of Namibia's independence struggle and the scene of severe fighting between the South West African People's Organisation (SWAPO) and the South African army, during which thousands of lives were lost. From the 1970s until independence, SWAPO and the churches¹⁵ were seen as the main sources of authority by the population, rather than the chiefs or the Owambo (homeland) authorities.¹⁶

Notwithstanding the loss of influence suffered during the colonial period, traditional leaders play an important role in present-day rural Namibia. In 1991, the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities (the Kozonguizi Commission) concluded that despite regional differences and individual dissatisfaction, traditional leadership was a necessary and viable institution, and recommended its retention "within the context of the provisions of the Constitution of the Republic of Namibia and having regards to the integrity and oneness of the Namibian nation as a priority".¹⁷ Two empirical studies in the mid-1990s showed a positive attitude towards traditional authority among respondents in both the north¹⁸ and south¹⁹ of Namibia. The first study, by Hinz and Katjaerua, included the Ondonga and the Oukwanyama communities in Owambo. In these communities, 25 out of the 27 respondents felt positive or very positive about the institution of traditional leadership. Similar figures were found in other northern communities and in six Nama communities in the south. Keulder emphasized, however, that people's support for the institution of traditional leadership did not preclude negative feelings toward the incumbent traditional leaders.²⁰ In line with these

¹⁴ Ibid 33. Not all traditional leaders were on the side of colonial government. Certain influential traditional leaders – mostly living in the Police Zone – were heavily involved in the struggle against colonialism. The two main nationalist movements, SWAPO and the South West Africa National Union (SWANU), aligned themselves with these and other progressive leaders (Keulder, above n 7, 47).

¹⁵ White missionaries are seen as another important modernizing force that undermined the authority of traditional structures (Keulder, above n 7, 84, note 16 SAME).

¹⁶ Becker, above n 5, 33; Tötemeyer, above n 20, 104–105; Soiri above n 26, 50. In the 1970s, the South African Government had to introduce several proclamations to "protect the Ovambo tribal authority and its traditional leaders against the growing discontent of the nationalist movement". These proclamations made it an offence to *inter alia*: undermine the authority of the Owambo Government, chiefs and headmen; fail to obey any lawful order given by a chief or headman; and treat them with disrespect. In addition, any political opponents who were arrested by the colonial government were handed over to the tribal authorities to be dealt with, often through severe flogging. The chiefs' already diminished popularity and legitimacy further waned due to their involvement with reconnaissance work, the reporting of strangers to the colonial authorities, and with the drafting of people for the South West African Territorial Forces, which was formed in 1977 in response to the military successes of SWAPO. The results were serious, as Keulder describes: "Chiefs and headmen were often identified as soft targets to be eliminated (by both sides) in order to strike back at the enemy. Many chiefs and headmen accordingly lost their lives" (Keulder, above n 7, 49, 52).

¹⁷ Commission of Inquiry, 'Report by the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders', Windhoek: Government of the Republic of Namibia (1991) 73; S Düsing, *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia and South Africa* (2002) 188; M O Hinz, above n 10, 70.

¹⁸ M O Hinz and Katjaerua, *To Promote Peace and Welfare: The political and economic sustainability of traditional authority* (1998).

¹⁹ C Keulder, *Traditional Authorities and Regional Councils in Southern Namibia* (1997).

²⁰ Keulder, above n 7, 22. The author names several tentative reasons for which most people in Nama communities felt positively about the institution of traditional leadership, including: a) the institution forms an integrated part of the communities' social memories; b) the traditional leaders were elected at popular and open meetings; c) traditional leaders were not incorporated into illegitimate colonial structures; and d) they have done much for the well-being of their communities. He specifically emphasizes a fifth reason, "that support for the institution of traditional leadership is strong because there is no effective institutional rival present or active in the local communities". Whereas the second and third reasons mentioned by Keulder do not apply to the situation in Owambo and the fourth can be considered questionable, the fifth could be an important argument to be applied in Owambo as well. This is also indicated by Hinz and Katjaerua. Although they do not analyze the reasons for people's positive feelings about traditional leaders, Hinz and Katjaerua contend that nine of the 13 traditional leaders interviewed believed that traditional courts should be strengthened because "it is the only dispute settling organ in rural areas" (Hinz and Katjaerua, above n 35, 79).

data, Becker concludes in 2006 that “while during the colonial era the Owambo chiefs were poised against the local population and SWAPO, they appear to have been remarkably resilient and to have redeemed popular support.”²¹

Customary law and traditional authorities

Article 66(1) of the Constitution of the Republic of Namibia stipulates the validity of customary law after independence ‘to the extent to which (it) does not conflict with this Constitution or any other statutory law’. Article 19 of the Constitution, guaranteeing the right to culture and tradition, is understood to include the right to live according to one’s customary law.²² Customary law and traditional authorities are salient features of Namibia’s communal areas. These areas correspond to the former native reserves under South African rule. The colonizers expropriated large tracts of land from the indigenous inhabitants, for the benefit of white settlers.²³ The indigenous inhabitants were only allowed to live in the ‘native reserves’ and above the ‘red line’²⁴, areas administered by traditional authorities, under supervision of colonial administrators.

The Namibian Constitution mentions neither traditional authorities nor traditional courts; their recognition can only be deduced from Articles 66(1) and 102(5) of the Namibian Constitution. The first Article stipulates the validity of the customary law and common law in force on the date of independence, subject to the condition that they do not conflict with the Constitution or any other statute law.²⁵ The latter Article calls for the establishment of a Council of Traditional Leaders whose function is to advise on communal land management and on other matters referred to it by the President.²⁶

Despite the limited debate regarding traditional administration while drafting the first Constitution – which, according to Hinz, indicates that “the political minds behind the Constitution did not envisage much of a role for traditional authorities”²⁷ – only a year later, President Sam Nujoma established the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities (the Kozonguizi Commission), chaired by Dr Fanuel Jariretundu Kozonguizi, then Ombudsman of the Republic of Namibia. The Kozonguizi Commission was tasked to inquire into rules and

²¹ Becker, above n 5, 47.

²² Article 19 reads as follows: ‘Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest’.

²³ Namibia is a country of extreme ecological constraints, with only eight per cent of the territory suitable for dry land cropping. Two-thirds of the country is classified as semi-arid and a quarter as arid. ((Melber 2005): 137).

²⁴ The red line is a disease control fence that separates northern Namibia from the central and southern parts of the country. Cattle is prohibited to cross this line and cattle from the area north of this line cannot be sold overseas, due to EU conditions for food safety. Since the landscape south of the red line is dominated by white-owned commercial farms as opposed to communal farmland of black communities in the north, the red line has become highly controversial since independence, particularly amidst the current meat market boom. The line coincides with the northern boundary of the Police Zone during the colonial period.

²⁵ In addition, Article 19 of the *Constitution of Namibia 1992*, guaranteeing the right to culture and tradition, is understood to include the right to live according to one’s customary law.

²⁶ The lack of reference to traditional authorities is a reflection of their omission in the “Blue Bible” – a bulky blue-covered report entitled *Namibia: Perspectives for National Reconstruction and Development*, published in 1986 by the United Nations Institute for Namibia, located in Lusaka. This publication, which was crafted as a blueprint for an independent Namibia, does not once mention Traditional Authorities (M O Hinz, ‘Traditional Governance and African Customary Law: Comparative Observations from a Namibian perspective’, in Horn and Bösl (eds), *Human Rights and The Rule of Law in Namibia* (2009) 59, 68-69). This policy document included a short note on customary law and customary courts, including the following statement, referenced on page 69: “In order to uplift the status of customary law, a proper structure of the court hierarchy should be considered and appropriate legislation allowing its application should be provided”).

²⁷ Ibid 69.

practices relating to the appointment and recognition of traditional leaders, their powers, duties and functions, and in particular, the identity of traditional leaders and the degree of acceptance by the population.²⁸

The Kozonguizi Commission's proposals guided the development of the *Traditional Authorities Act 1995* (Act 17 of 1995), which were largely reproduced in the *Traditional Authorities Act 2000* (Act 25 of 2000), which currently regulates traditional leadership. It provides for the establishment of traditional authorities in traditional communities. Each traditional authority comprises a chief or head, senior traditional councilors and traditional councilors.²⁹ It confirms that the designation and tenure of the office of chief shall be regulated by customary law,³⁰ and defines the powers, duties and functions of traditional authorities. Their main functions, according to the Act, relate to the promotion of peace and welfare in the community, the administration and development of customary law and the supervision of its observance, and the preservation of local culture.³¹ This includes the ascertainment of customary law in their traditional areas and their assistance in its codification (sec 3(1)(a)). The Act also states that traditional authorities are obliged to assist and cooperate with the Namibian police and law enforcement agencies as well as the Government, regional councils and local authority councils (sec 3(2)(a) and (b)). Section 16 adds that traditional authorities have to give support to the policies of (local) government and have to refrain from acts that undermine the authority of these institutions. The Act furthermore regulates that funds raised on behalf of the traditional community shall be paid into the Community Trust fund of that community (sec 3(3) and 18).

Section 14(a) of the *Traditional Authorities Act 2000* states that "any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law" shall cease to apply.³² Article 10 of the Constitution, which prohibits discrimination on the grounds of, *inter alia*, sex, therefore renders redundant any customary law that violates norms of gender equality.³³ In line with these provisions, section 3(1)(g) of the *Traditional Authorities Act 2000* requires traditional authorities to promote affirmative action "in particular by promoting gender equality with regard to positions of leadership".³⁴ This provision is worded as an obligation of best intents, rather than as a duty to achieve a given result, and no quotas or sanctions of any kind are stipulated. According to officials of the Ministry of Local and Regional Government and Housing, the government agency responsible for the regulation of traditional authorities:

"This legislation was based on the assumption that the Ministry would not interfere with the internal policies of Traditional Authorities; rather, educational measures were expected to promote the appointment of women to positions of traditional leadership."³⁵

²⁸ Ibid 69–70; Keulder, above n 7 65–66.

²⁹ *Traditional Authorities Act 2000* s 2(1). The number of councilors is to be determined by the chief or head, but allowances will be paid to a maximum of six senior traditional councilors and six traditional councilors, in addition to the chief or head and a secretary (*Traditional Authorities Act 2000* s 17).

³⁰ The *Traditional Authorities Act 2000* first mentions that the designation and recognition of chiefs are regulated by the Act itself (section 2(1)(a)), but then repeats the text from the *Traditional Authorities Act 1995*, confirming customary law as the regulating order (s 4).

³¹ *Traditional Authorities Act 2000* s 3(1).

³² Cf. *Traditional Authorities Act 1995* s 11(1)(a).

³³ In some other African countries, customary law is exempted from the constitutional obligation for gender equality. See, for instance, Article 27 (4)(e) of the *Constitution of Sierra Leone 1991*, which stipulates that the protection from discrimination does not apply in the case of administration of customary law.

³⁴ Cf. *Traditional Authorities Act 1995* s 10(1)(g).

³⁵ Becker, above n 5, 33.

Recognized traditional authorities receive remuneration from the government for its head, six senior traditional councilors and six traditional councilors. A number of statutory laws confer rights on recognized traditional authorities only. For instance, the Communal Land Reform Act defines Traditional Authority as 'a Traditional Authority of which the traditional leaders have been recognized under the Traditional Authorities Act, 2000' (sec 1). As a result, only recognized traditional authorities can nominate a representative for the Communal Land Board of their area, and the Communal Land Boards can only ratify lands that have been allocated by recognized traditional authorities.

Conflicts over customary law are almost exclusively dealt with in traditional courts presided over by traditional authorities. The Community Courts Act, 10 of 2003 aims to reshape these traditional courts into community courts. Community courts are to be courts of record whereby proceedings are recorded in writing by the clerk of the court (sec. 18(1) and (2)). Proceedings in community courts are to follow customary law, but 'all proceedings shall (also) be in accordance with the principles of fairness and natural justice' (sec. 19(1)). And all orders shall be 'fair and reasonable and not be in conflict with the Namibian Constitution or any other statutory law' (sec. 22(2)(a)). Parties to proceedings in a Community Court can appeal against any order of decision of the Community Court to the Magistrate's Court (sec. 26(1)). The Act allows for further regulations by the minister, among others, in relation to the procedure in community courts. In recent years, the Minister of Justice has convened training sessions for traditional authorities in anticipation of the community courts, which covered in particular the following topics: principles of fairness and justice in customary law; constitutional principles and the Community Courts Act; the Traditional Authorities Act and the Community Courts Act; and traditional authorities and customary law. The first batch of 34 Community Courts came into operation in 2010.

The Community Courts Act will thus increase the transparency of traditional courts by requiring record-keeping and by incorporating them into the state legal framework through a system of appeal. This opens up the possibility of verifying whether Community Courts uphold constitutional provisions, particularly gender equality. Furthermore, the new momentum created by the promulgation of the Act and later by the operation of Community Courts, provides a legitimate opening for the government to arrange training for traditional authorities to raise their awareness and operational standards.

Location

The Research Project focuses on Owambo in Northern Namibia, where the position of customary law as well as of traditional leaders is very strong. Owambo plays an important role in Namibian politics. First, it is the most densely populated district with approximately half of Namibia's two million people residing there. Second, the most prominent members of the SWAPO-government have their base in this area. At independence, the SWAPO liberation movement transformed itself into a political party which has been in power ever since. Although there still does not seem to be any serious threat to SWAPO's power, dissatisfaction is growing among parts of the population and this has fueled support for SWAPO split-off RDP and other opposition parties. Within Owambo, the research project focuses on the Uukwambi Traditional Authority, due to its progressive stance with regard to the promotion of women within traditional authority structures. For comparative purposes, it has also studied three villages in Ondonga, as in Ondonga Traditional Authority female leadership is still a rare phenomenon. Uukwambi is divided into five³⁶ districts (*oshikandjo*), four of which are headed by a senior headman and one by a senior headwoman (*mwene gwoshikandjo*). Each district contains a substantial number of

³⁶ In February 2010, when the author departed the field, the Uukwambi Traditional Authority was about to announce the reorganization of the districts and the creation of a sixth district, led by a man.

villages, up to 70, headed by their own headman/headwoman (*mwene gwomikunda*). At each level, leaders are supported by their councils. Chief Iipumbu is the Chairman of the Uukwambi Traditional Council, which comprises the senior headmen/headwoman as well as several other traditional councilors.

Position of women in Namibia and Owambo

Gender is a field where inequality clearly manifests itself. Despite the standard of equality in international, regional and domestic legal instruments,³⁷ 'the position of women in Namibian society remains a challenge' ((Namiseb 2008):107). Due to the existing social and economic disparities between men and women, a mere reliance on equal treatment will not overcome the imbalance. This has led to calls for a more proactive approach with regard to the protection and enhancement of women's rights ((Namiseb 2008):107-8). To respond to these challenges, the Namibian government transformed its Department of Women Affairs in the Office of the President into a full-fledged ministry (the Ministry of Gender Equality and Child Welfare) and several important pieces of legislation have been passed that deal with the position of women ((Namiseb 2008):108).³⁸ The Law Reform and Development Commission has undertaken a number of research projects in fields of law that have a bearing on women's rights, including succession, divorce and customary marriage.

The reality of customary law often deviates from the promise of gender equality.³⁹ A prime example relates to land management: it is claimed that '(i)nstitutionalized discrimination against women in the allocation of land reflects ... their weaker bargaining position within the patriarchal institutions of traditional leadership. ... Land allocations are made very much on the basis of ethnicity, seniority, and gender' (Republic of Namibia 1995:54)' ((Devereux 1996):22-3). This gives rise to particular concern given that women play a major role in food production and natural resource management in most developing countries. The question therefore remains how to reconcile the basic human rights of individuals, especially women, with the administration of customary law ((Niekerk 2008):116).

The role of women in pre-colonial Owambo is not easily ascertained. According to Becker, "the general assumption of women's traditionally inferior position is highly disputable".⁴⁰ She points out that, in many communities, women had access to property; the matrilineal system tempered the control of men over women and especially of husbands over wives; women played important roles as healers and ritual leaders; and there were also women traditional leaders, although they were a minority.⁴¹ She concludes that in the pre-colonial era, "[w]omen and men were ... conceived of as inhabitants of different spheres in a complementary social duality rather than as beings ranked hierarchically according to gender".⁴²

Gender relations changed fundamentally during the colonial period. The colonial rulers' gender ideology was not in consonance with the existence of powerful women. Further, they perceived a strong need to maintain the authority of male elders over women and young people to ensure social order and stability. This extended to the colonial governments'

³⁷ Article 10 of the Namibian Constitution provides that all persons shall be equal before the law, and that no one may be discriminated on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. With this article, the Namibian Constitution follows article 1 of the Universal Declaration of Human Rights as well as article 2 of the African Charter on Human and Peoples' Rights.

³⁸ Notable examples are the Affirmative Action (Employment) Act, 1998 (No. 19 of 1998), the Combating of Rape Act, 2000 (No. 8 of 2000), and the Married Persons Equality Act, 1996 (No. 1 of 1996).

³⁹ See for various essays dealing with the topic of gender equality and customary law in Namibia (Ruppel 2008).

⁴⁰ Becker, above n 7, 177.

⁴¹ Ibid 177.

⁴² Ibid 177-178.

dealing with traditional leaders: women leaders were all but purged from the local traditional arena; women were largely excluded from participation in traditional courts; the emerging structures of colonial tribal authority “evolved into all-male domains”.⁴³ Simultaneously, the emergence of male contract labor and the resulting introduction of a male-controlled cash economy weakened the financial position of women vis-à-vis men and increased their burden as all work traditionally assigned to men was added to women’s workload when men were away on contract.⁴⁴ The influence of Western missionaries and Christianity also contributed to and deepened the subordinate position of women in society. It is these combined factors that determined gender relations in the colonial period and created a widespread belief in Namibia that traditional rule cannot and will not accommodate women’s rights.

In Uukwambi, the presence of women traditional leaders was low during the colonial period. In the current research, interviews revealed that many people believed there had not been any women traditional leaders at all in that period. Others, however, were aware of the existence of a particular headwoman or female traditional councilor. According to Chief Iipumbu,⁴⁵ at the level of the Traditional Council, there have been women leaders since the reign of his grandfather, King Iipumbu Ya Tshilongo (1907–1932). When he succeeded his father as Chief in 1985, there were also women in the Traditional Council, although they were not official councilors. “At that time the men all worked under the red line,⁴⁶ so the women were taking care of the houses and the villages. Women were acting on behalf of their husbands, also on the Traditional Council”.⁴⁷ Women were also largely excluded from active participation in the traditional courts before independence. In some villages, although women could come and attend court meetings, they were not allowed to speak. In other villages, even their presence was prohibited, unless they were involved in a dispute or crime. Not surprisingly, the traditional system dominated by male leadership and dispute settlement included norms that were detrimental to women’s rights. A salient example is the customary inheritance norm that states that upon a man’s death, his estate is inherited by his matrilineal family, often leaving his widow destitute. Despite a customary obligation of the husband’s family to support needy widows and children, this often resulted in the widow and her children being chased out of the house, back to her own matrilineal family (a practice referred to as “widow chasing” or “property grabbing”).

In the last decades, the Uukwambi Traditional Authority has undergone change in three key areas: the participation of women in leadership, the participation of women in traditional court processes, and substantive change in customary rules that better protect women’s rights. These achievements in Uukwambi were inextricably intertwined with change processes occurring in Namibia at large. When Namibia gained its independence in 1990,

⁴³ Ibid 178. Becker describes this process in the Owambo kingdom of Ongandjera, which had a strong tradition of female rulers (Becker, above n 5).

⁴⁴ B Hango-Rummukainen, *Gender and Migration: Social and Economic Effects on Women in Owambo (1890-1940)* (2000) 79.

⁴⁵ Unlike Uukwanyama, where a king was reinstalled in 1998, the Uukwambi kingdom has not been restored. After the deportation of King Iipumbu, his son was selected to chair the Council of Senior Headmen. In 1986, he was succeeded again by his son, the current leader Herman Iipumbu, who is commonly referred to as Chief Iipumbu. Since the Uukwambi practise matrilineal succession, the latter is not and can never become King of Uukwambi – which can logically be regarded as one of the factors explaining the limited enthusiasm for the restoration of the Kingdom by the Uukwambi Traditional Authority.

⁴⁶ The red line is a disease control fence that separates northern Namibia from the central and southern parts of the country. Cattle is prohibited to cross this line and cattle from the area north of this line cannot be sold overseas, due to EU conditions for food safety. Since the landscape south of the red line is dominated by white-owned commercial farms as opposed to communal farmland of black communities in the north, the red line has become highly controversial since independence, particularly amidst the current meat market boom. The line coincides with the northern boundary of the Police Zone during the colonial period (see footnote 6).

⁴⁷ Interview 55 with Chief and Former Secretary (19 January 2010).

the country experienced a tremendous momentum for change; one of the domains in which it was advocated was gender relations. Women had played a prominent role in the period before independence, both as freedom fighters and in the functioning of the rural localities when men were away fighting in the war of independence or working on labor contracts at white-owned farms and companies. The notion of “women’s rights” entered Namibian politics when women freedom fighters not only expressed their opposition to colonial occupation, but also to contrived custom and tradition.⁴⁸ The collaboration of traditional leaders in indirect rule of the apartheid government, which cost them the respect of the population, was a determining factor in this articulation. The *Constitution of the Republic of Namibia*, adopted in February 1990, reflected the demand for gender parity in guaranteeing equality and freedom from discrimination on a number of grounds including sex (section 10(2)).⁴⁹

Two initiatives

This research is concerned with two initiatives undertaken in Namibia to enhance the functioning of customary law and traditional leadership.

a. Enhancing the participation of women in traditional political and judicial administration

Before independence, women in Uukwambi were largely excluded from active participation in political and judicial decision-making and from leadership positions. At a 1993 workshop of traditional authorities in Ongwediva it was unanimously decided that women should be allowed to participate fully in the work of community courts. Uukwambi Traditional Authority has taken these resolutions seriously. Following the 1993 workshop, the Uukwambi Traditional Authority called a meeting of all Uukwambi headmen where they were told that a female representative and advisor had to be selected in each locality. These new female advisors were expected to actively participate in hearings of customary courts and generally act as a deputy to the headman ((Becker 1998):271). It was also communicated that women were encouraged to actively participate in traditional court meetings. In addition, the Traditional Authority, and the chief in particular, have actively promoted female leadership, both in public speeches and by appointing women at various levels of traditional leadership. As a result, Uukwambi has seen a significant rise in female traditional leaders. Currently, one of the five district senior councilors is female, and in one of those districts, Ogongo, 13 of the 67 villages were headed by a woman. Although still heavily outnumbered by headmen, this represents a significant change from traditional rule of 10 years ago. It is now even becoming quite common for a wife to take over the position of village leader on the death of her husband.

b. Self-statement of customary law by Traditional Authorities

In 1993, leaders of six Owambo traditional communities came together at a Customary Law Workshop of Owambo Traditional Leaders in Ongwediva to make recommendations for the various councils with the aim of harmonizing customary laws. According to Hinz, these documents should not be seen as full codifications, but as a written statement of those parts of the customary law that were felt to be of particular importance ((Hinz 1997):72). Hinz calls them ‘self-statements’ of customary law, because traditional authorities themselves create these legal documents that contain aspects of their community’s customary law in

⁴⁸ Becker, above n 5, 47.

⁴⁹ Article 10 of the *Constitution of the Republic of Namibia 1990* provides that all persons shall be equal before the law, and that no one may be discriminated on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. With this Article, the Constitution follows Article 1 of the *Universal Declaration of Human Rights 1948* as well as Article 2 of the *African Charter on Human and Peoples’ Rights 1981*.

their own words ((Hinz 1997)). One of the topics of discussion was the position of widows. Two issues were at stake. The first concerned the practice whereby the matrilinear family of the husband chased the widow back to her own matrilinear family. The second was the fact that when women remained on the land they had occupied with their husbands, they were required to make a payment to the traditional leaders for the land in question. At the workshop, the traditional leaders present unanimously decided that widows should not be chased from their lands or out of their homes and that they should not be asked to pay again for the land.⁵⁰

Recently, the Council of Traditional Leaders resolved that all traditional communities embark on such a self-stating process.⁵¹ According to Hinz ((2009): 85), the self-statements address two kinds of groups. The first consists of the community members 'who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardized in view of needs that flow from the growing interaction of members of different communities'. The second group constitutes all outsiders who have to deal with the customary law. This explanation ignores the effects of those parts of the self-statements that are regarded as recording existing practices. Even within traditional authorities, local customary practices were far from uniform. Limited knowledge among village leaders of the norms as defined by the highest level of traditional leadership, discretionary powers of traditional leaders to include circumstantial issues such as the behavior of the parties in the traditional court, and abuse of power by traditional leaders, all led to high variation in customary practices. Due to their written character, self-statements have the potential to bring change in this regard, to reduce the flexibility and negotiability of norms and thereby to enhance the certainty and equity of traditional dispute settlement. For villagers, they also provide a simple way to gain knowledge about customary laws.

Research questions

This research has explored to what extent these two initiatives have led to increased representation of women in the judicial and political administration; strengthened voice of women in the customary system; increases in the certainty and fairness of traditional dispute settlement; and compliance with the changed norms. For all these aspects, the research has looked at awareness, behavior and perceptions among community members.

The research has asked the following research questions:

1. How and to what extent did the three initiatives (addressing the participation of women in traditional political and judicial administration, self-statements, and provisions concerning widows in the CLRA) impact on the functioning of customary justice systems and traditional leadership in terms of enhanced representation, participation, and rights protection of women, and improved fairness and equity?
2. What lessons can we draw from these initiatives regarding the possibilities and limitations of customary legal empowerment processes aimed at enhancing the alignment of customary justice systems with constitutional provisions and human rights standards of gender equality?
3. What lessons can be learned from these initiatives for induced customary legal empowerment processes in other contexts?

⁵⁰ For instance in Ondonga Traditional Authority, it was already decided and put down in the laws of Ondonga in 1989 that widows were to be allowed to remain on the land they had occupied with their husbands (Hinz 1997:73).

⁵¹ Most communities have honored the resolution of the Council. Many have completed their self-statements; others are debating drafts.

Methodology

The research has combined qualitative and quantitative research methods, including:

a. Semi-structured interviews

At the commencement, middle, and at the end of the project, semi-structured interviews have been held with key stakeholders in Windhoek during three one-week visits. This includes stakeholders from academia, government, donors, NGOs, as well as consultants. This has helped to provide accurate and up-to date knowledge regarding customary law and traditional authorities in Owambo, and with regard to the two change processes analyzed. During a four month field mission to northern Namibia, semi-structured interviews have been held with informants and respondents in nine villages in Uukwambi Traditional Authority and in three villages in Ondonga Traditional Authority. The villages have been selected on the basis of the presence or absence of female traditional leaders. Contacts were made through the Traditional Authority offices and through the Community Voice Members of Women's Action for Development (WAD). In each of these villages interviews have been held with the headman or headwoman. In some villages, additional interviews have been held with women representatives.

Interviews have also been conducted with the chief of Uukwambi, his former secretary, the senior headmen and the senior headwoman presiding over the nine Uukwambi villages; the relevant senior traditional councilor and the relevant head of the cluster in Ondonga Traditional Authority, the Community Voice Members of WAD; staff of the Legal Assistance Centre in Ongewdiva; Communal Land Board members, an international expert on implementation of the Communal Land Reform Act.

b. Focus-group discussions

During the project, approximately five focus group discussions have been held, involving (i) the Oshana Community Voice Members of WAD and (ii) four random groupings of four-nine female community members in Uukwambi Traditional Authority and Ondonga Traditional Authority for comparison and (iii) one random grouping of male community members in an Uukwambi village.

c. Participatory observation

To complement the above methods, the researcher has been present at two traditional court meetings in Uukwambi Traditional Authority, one at the level of the district, one at the level of the Traditional Authority. Furthermore, the researcher has participated in a four-day course for Communal Land Board members of Oshana and Omusati Regions.

d. Survey

A research team in Namibia, consisting of one supervisor and three interviewers, has administered a survey designed to explore issues associated with access to, participation in and satisfaction with the customary justice system. A draft survey has been developed by the researcher for which the qualitative data have served as a knowledge base. The questionnaire has been translated into Oshivambo by the research supervisor and tested with five respondents who met the participant criteria. The research supervisor has provided the researcher with recommendations for changes to the draft survey. The researcher and the research supervisor have together trained the three interviewers who have administered the survey. On the basis of the final survey, structured interviews have been held with 18

individuals in 12 villages (for a total of 216 people). Interviewees all were above 20 years of age, and the aim was to include approximately 50 percent women and 50 percent men. Nine villages have been selected in Uukwambi Traditional Authority and three villages in Ondonga Traditional Authority. The sampling methodology has been randomized within each community and within each household (besides the 50 percent male and 50 percent female requirement) to ensure a representative sampling of families and the demographics of surveyed respondents. The data have been analyzed using SPSS, a computer program for statistical analysis.

Partner organizations

The Legal Assistance Centre (LAC) is the main NGO working in the field of legal empowerment in Namibia. The LAC carries out activities in the combined areas of legal information and advice, education and training, law reform and advocacy, research, and public interest litigation. LAC contains four units: the AIDS Law Unit, the Human Rights & Constitutional Unit, the Gender, Research & Advocacy Unit, and the Land, Environment and Development Project (LEAD). LEAD often deals with aspects and challenges of rural communities' rights to land and the ways these rights are institutionalized. Apart from providing litigation services and legal advice to mainly marginalized rural communities, LEAD conducts training workshops on land and property rights to traditional authorities, conservancies, staff of government departments such as Communal Land Boards as well as NGOs. The LAC has also operated a Community Volunteer Paralegal Training Program in the last years, through which they trained 280 paralegal volunteers in laws pertaining to, *inter alia*, traditional leadership, the Communal Land Reform Act, and testate and intestate succession (annual report 2007). The LAC is funded by national and international donor organizations as well as individuals. International donors in the fiscal year of 2007 included the embassies of the Netherlands, Denmark, Finland, Sweden, USA, HIVOS, GTZ, US-AID, and the Ford Foundation. The LAC has supported the VVI-IDLO research on customary legal empowerment in Namibia and has an interest in the research findings. The researcher has operated from their northern office in Ongwediva. LAC files describing cases, staff's knowledge regarding customary legal issues in the villages, as well as their contacts in the rural areas have provided a vital input for the research. LAC has furthermore provided research assistance for local interviews.

Women's Action for development (WAD) is Namibia's leading NGO in the field of women's empowerment. They have country-wide coverage through a system of Community Voice Members (CVM). In each constituency the Regional Councilor (the representative from the constituency in the regional council, local government at regional level) and WAD together select a CVM. The regional councilor and the CVM then team up to determine women's challenges and evaluate their training needs. The CVMs are trained by the WAD office in Windhoek to act as (co-)trainers in a number of these training sessions. WAD's executive director has instructed all CVMs to assist and facilitate the research. They have proven valuable contacts and informants in this research.

III. Findings and Analysis

Increasing the number of women traditional leaders

The Uukwambi Traditional Authority, and Chief Iipumbu in particular, have actively promoted women's leadership, both in public speeches and by appointing women at various levels of traditional leadership. This included the appointment of a woman deputy, Lahya Shivolo, in the Traditional Council to preside over its meetings in the absence of the Chief. She recounted the active role of Chief Iipumbu in promoting women's leadership:

"The chief went to tell the people that women can also be leaders. He referred to Queen Elizabeth. The chief called the senior headmen to tell their people that this is what it should be now. He also organized meetings from one village to the other, trying to make people understand. He was everywhere in Uukwambi, up to the most remote villages. The chief was really working hard, trying to bring women at the same level as men. The chief is very hardworking. He brought men and women together, united them."⁵²

As a result, Uukwambi has seen a significant rise in women traditional leaders. Currently, one of the five district senior councilors is a woman, and in the three districts where interviews were conducted, the proportion of women ranged from approximately one out of four (in Onamega District) and one out of five (in Ogongo District), to a mere one out of 19 (in Otuwala District). According to one headman in Onamega District: "the senior headman tells people around him that if they see a woman capable of leading, she must be the first choice."⁵³ Although still heavily outnumbered by headmen, this represents a significant change from traditional rule of ten years ago.

a. Increased flexibility of traditional leadership positions

A number of forces facilitated the introduction and acceptance of women's traditional leadership, including the general relaxation of the rules regarding selection of traditional leaders in the Uukwambi Traditional Authority, at least at the lower levels of the traditional hierarchy. Traditionally, a successor was selected from the family of the last leader. Originally, there was a preference for a member of the former headman's matrilineal family, but it was not uncommon for the son of a traditional leader to succeed his father if no matrilineal family members were deemed eligible. Over time, it became common for a headman to nominate one of his sons or grandsons. Today, the criterion of belonging to the same family is no longer decisive (although it is still often preferred if a suitable candidate is available). One elder explained the village's preference for someone unrelated to the former headman as related to the likelihood that a family member will take over the preferences and hostilities of the former headman.⁵⁴

The new flexibility of traditional leadership positions is combined with an increased space for female leadership, for various reasons and in different ways. First, it increased the eligibility of a headman's widow, because they "have been around their husbands and have witnessed him as headman, therefore they are very suitable."⁵⁵ In other situations, headwomen were

⁵² Interview (16 November 2009). I have deleted 'with survey participant' because I use the word survey for the quantitative part of the study. I have not added any other qualification here, because the main text makes clear who the interview is with.

⁵³ Interview 47 with headman (18 December 2009). I do not want to give information on the locality as I want to protect (some of my) sources. The numbers to the interviews make that my sources can be checked..

⁵⁴ Interview 44 with elder (17 December 2009).

⁵⁵ Interview 47 above n 51.

not appointed because they were related to the former headman, but because their personal commitment and accomplishments made them popular candidates for the position of village leader. A third situation was where there was a lack of men with the necessary leadership qualities.

Another interconnected gradual change observed in Uukwambi is that villagers are demanding more influence on the selection of a new headman/woman, which was traditionally a privilege of the chief and the senior headmen.⁵⁶ For instance, in Oshandumbala, a process of election was being negotiated after the death of an unpopular headman. In another village, the fact that the headman was not selected by the people was offered as explanation for his unpopularity.⁵⁷ The survey showed that these feelings were widely shared among the population: 93 percent of 161 Uukwambi respondents agreed or strongly agreed with the statement: "It would be a good idea if headmen and headwomen would be elected by the people".

b. Acceptance of women traditional leaders

Women who were appointed to leadership positions around the time of independence recall a difficult start: men were reluctant to accept their new role and largely excluded them from traditional court and village meetings. This seems to have changed over time: headwomen and the senior headwoman who took up their positions more recently have not reported overt resistance. During interviews, such women stated that people were happy when they became the new leader and that many came to congratulate them.

A number of respondents opined, however, that women had a restricted scope of operation compared to their male counterparts. For instance, while a new headman can select his own council, a new headwoman must select her councilors in consultation with elder men. In addition, men still find it difficult to agree to a decision made by women only, whereas women do accept all-male decisions. To be able to operate effectively, it is therefore strategically important for a headwoman to include men in her committee and ensure that headmen from neighboring villages attend her court meetings.

It is to be expected, and was often suggested in interviews, that the acceptance of women traditional leaders is linked to their performance. In the survey, therefore, several questions were asked regarding the performance of men and women leaders. These data indicate that a large majority believed their headwoman was doing her job well, with no significant difference between male and female respondents. There was a slight, but insignificant difference in how the performance of headmen was regarded (Table 1). In the same vein, respondents in villages with women leaders described the relationship with their village leader almost identically to respondents in villages with men leaders (Table 2). Here also, the gender of the respondents did not account for a substantial deviation in opinion. The statistical data regarding the senior headmen/woman reveal similar opinions: leaders of both sexes are assessed almost similarly,⁵⁸ and receive strong support from men as well as women (Table 3).

⁵⁶ The trend to allow non-family members of a headman/woman to become the new village leader is also found in other traditional authorities, such as Ondonga Traditional Authority. Here, however, the power to select is shifted from the headman/woman to the senior headman/woman rather than to the community. Community influence regarding the selection of new headmen/women is still very much in its infancy in this Traditional Authority (Interviews 31 group discussion with women (11 November 2009); Interview 51 with headman (5 January 2010); Interview 52 with headman (8 January 2010); Interview 53 with senior traditional councilor, Ondonga Traditional Authority (8 January 2010).

⁵⁷ Interview 49: Group discussion with women (29 December 2009).

⁵⁸ When the answers are given based on a five-point scale from 1 (strongly agree) to 5 (strongly disagree), the means per district are: 1.94 (Otuwala District – senior headman); 1.91 (Onamega District – senior headman); 1.94 (Ogongo District – senior headwoman). These differences are not significant.

Table 1 “My headman/headwoman does his/her job well”

	The village leader is a woman (n=51)	The village leader is a man (n= 101)
Strongly agree	23.5%	28.7%
Agree	56.9%	53.5%
Neutral	7.8%	7.9%
Disagree	11.8%	9.9%
Strongly disagree	0%	0%

Table 2 “Relationship between you and your headman/woman”

	The village leader is a woman (n=54)	The village leader is a man (n=108)
Very good	33.3%	34.3%
Good	40.7%	40.7%
Neutral	11.1%	10.2%
Bad	13.0%	13.0%
Very bad	1.9%	1.9%

Table 3 “Senior headman/headwoman does his/her job well”

	Ogongo (SHW) Women (n=15)	Ogongo (SHW) Men (n=17)	Onamega (SHM) Women (n=21)	Onamega (SHM) Men (n=11)	Otuwala (SHM) Women (n=41)	Otuwala (SHM) Men (n=35)
Strongly Agree	26.7%	17.6%	28.6%	36.4%	31.2%	34.3%
Agree	66.7%	76.5%	57.1%	54.5%	56.2%	57.1%
Neutral	0%	0%	4.8%	0%	3.1%	5.7%
Disagree	0%	5.9%	9.5%	9.1%	9.4%	2.9%
Strongly Disagree	6.7%	0%	0%	0%	0%	0%

SHW = senior headwoman; SHM = senior headman

One interesting finding from the survey data is that, while men and women assess headwomen more or less similarly, and that assessment does not substantially differ from women’s assessments of headmen, these same headmen are assessed significantly more positively by male respondents (Table 4).⁵⁹ With regard to senior traditional leaders, the senior headwoman and the senior headman of Onamega District are assessed almost identically by male and female respondents. Only Otuwala District displays a significant difference between male and female respondents, again indicating that men assess their male leader more positively than do women (Table 5).

⁵⁹ Villages with headmen display a significant albeit small relationship between the sex of the respondent and the performance assessment of the village leader ($r = .181$, p [one-tailed] $< .05$). Such a correlation is not found in villages with a woman leader.

Table 4 “My headman/headwoman does his/her job well”

	Villages with headwomen (mean)	Villages with headmen (mean)
Men	2.05	1.78
Women	2.10	2.11
Total	2.08	1.99

Table 5 “My headman/headwoman does his/her job well”

	Otuwala district (SHM) (mean)	Onamega district (SHM) (mean)	Ogongo district (SHW) (mean)
Men	1.77	1.82	1.94
Women	2.07	1.95	1.93
Total	1.94	1.91	1.94

c. An incomplete change in mentality

The performance, and relatedly the acceptance, of specific women traditional leaders should be distinguished from people’s opinions on male and female leadership *in abstracto*. In the research, therefore, several questions dealt with people’s opinion on the suitability of men and women as leaders, and people’s gender preference.

The interviews brought to the fore that the shift in mindset required for women to occupy a fully equal role in traditional leadership functions is not nearly complete. Many headmen still see their sons as the preferred candidate, and their daughters as substitutes if sons are absent or unsuitable. They often refer to tradition as the reason for their opinion. Others also favored a male leader, either pointing to tradition or to what they consider to be character traits of men and women. The latter provides an insight into the characteristics deemed important for traditional leaders, and in the interviews, these centered on the dichotomies patient/impatient, forgiving/resentful, active/lazy, powerful/weak. In the survey, the respondents listed the following character traits of a good headman/woman: he/she needs to be fair and honest (mentioned by 80 respondents); listen to and solve problems (49); treat people equally (41); be strong and powerful (39); and be educated and intelligent (33).

When respondents were then asked whether men and women have these above character traits in equal measure, a large minority of females and more than half of males answered that men possess these qualities in larger measure than women (Table 6). This is consistent with the recorded preferences for male or female leadership. Headmen are still preferred over headwomen by a majority of the male respondents as well as a large minority of the female respondents (Table 7). In a similar vein, only 21 percent of male respondents and 43 percent of female respondents support the statement that more traditional leaders should be women (Table 8). The answers to the statement “Men generally make better leaders than women” similarly show that men are still regarded as the most suitable leaders (Table 9).

Table 6 "Do women and men have the necessary qualities for leadership in equal measure?"

	Women (n=89)	Men (n=66)	Total (n=155)
Yes	41.6%	36.4%	39.4%
No, men more	40.4%	53.0%	45.8%
No, women more	15.7%	9.1%	12.9%
Do not know	2.2%	1.5%	1.9%

Table 7 "If you could vote for a new traditional leader in your village, would you prefer a headman or a headwoman?"

	Women (n=92)	Men (n=66)	Total (n=158)
Headman	37.0%	57.6%	45.6%
Headwoman	26.1%	7.6%	18.4%
No preference	37.0%	34.8%	36.1%

Table 8 "It would be good if more traditional leaders were women"

	Women (n=90)	Men (n=67)
Strongly agree	12.2%	3.0%
Agree	31.1%	20.9%
Neutral	7.8%	16.4%
Disagree	47.8%	44.8%
Strongly disagree	1.1%	14.9%
Mean	2.94	3.48

Table 9 "Men generally make better leaders than women"

	Women (n=92)	Men (n=67)	Total (n=159)
Strongly agree (1)	27.2%	41.8%	33.3%
Agree (2)	17.4%	20.9%	18.9%
Neutral (3)	3.3%	1.5%	2.5%
Disagree (4)	42.4%	25.4%	35.2%
Strongly disagree (5)	9.8%	10.4%	10.1%
Mean	2.90	2.42	2.68

With regard to the latter two statements – "It would be good if more traditional leaders were women" and "Men generally make better leaders than women" – the gender of the respondents accounts for a substantial deviation in opinion.⁶⁰ When the gender of the village leader is also taken into account, the data show that male respondents living in villages led by a headman are significantly more negative towards increased women's leadership than female respondents in the same villages⁶¹ and also than male respondents in villages headed by women⁶² (Table 10). Similarly, with regard to the statement that men generally make better leaders than women, both male and female respondents in villages headed by women scored significantly higher (indicating a lower agreement with the statement) than

⁶⁰ $r = .222$, p (one-tailed), $< .01$ for the statement "It would be good if more traditional leaders were women"; $r = .156$, p (one-tailed) $< .05$ for the statement "Men generally make better leaders than women".

⁶¹ $r = .274$, p (one-tailed) $< .01$. There is also a small but non-significant effect ($r = .148$) between the gender of the respondent and their opinion in villages with headwomen.

⁶² $r = .214$, p (one-tailed) $< .05$.

respondents in villages headed by men,⁶³ with significantly lower scores from male respondents⁶⁴ (Table 11).

Table 10 "It would be good if more traditional leaders were women"

	Villages with headwomen (mean)	Villages with headmen (mean)
Men	3.21	3.63
Women	2.83	3.00

Table 11 "Men generally make better leaders than women"

	Villages with headwomen (mean)	Villages with headmen (mean)
Men	3.00	2.09
Women	3.03	2.84

When aggregating the data discussed above, two patterns become visible. First, in villages led by a headman, male respondents display a significantly more negative view of female leadership than female respondents,⁶⁵ and this difference cannot be found or is much smaller in villages with headwomen. Second, male respondents display a more positive general attitude towards female leadership *in abstracto* when they live in a village led by a woman compared to males living in a village led by a man.⁶⁶ The latter indicates that men's opinions about gendered leadership – whether based on traditional values or preconceived opinions regarding character traits of men and women – undergo significant change as a result of exposure to successful female leadership.

Participation of women in traditional courts

Customary courts in Uukwambi, as elsewhere in Owambo, play a major role in the resolution of local disputes. Dispute settlement is by far the most time-consuming task of traditional leaders in Namibia. During the colonial period, women were largely excluded from active participation in the traditional judicial arena. Today, both men and women are free to participate, and women do so to a large extent. How was this change brought about, and to what extent have the opening up of traditional dispute settlement proceedings to women combined with the introduction of women traditional leaders led to women's empowerment? Do women feel they can speak up and actively participate? Do they have an influence on the proceedings? Are they satisfied with the performance of the courts?

a. Stimulating women's participation

An important event in the gender mainstreaming of participation in traditional courts took place at a Customary Law Workshop of Owambo Traditional Authorities in Ongwediva in 1993. At this meeting, it was unanimously decided that women should be allowed to

⁶³ $r = .152$, p (one-tailed) $< .05$.

⁶⁴ Male respondents living in villages with male leaders agreed significantly more with the statement "Men generally make better leaders than women" than male respondents in villages headed by a female leader ($r = .254$, p (one-tailed) $< .05$).

⁶⁵ In villages led by a headman, the gender of the respondent was significantly related to the respondents' view on female leadership ($r = .242$, p (one-tailed) $< .01$).

⁶⁶ There is a significant relationship between the answer of male respondents to the statement "Men generally make better leaders than women" and the gender of the village leader, $r = .254$, p (one-tailed) $< .05$. A similar relationship exists with regard to the question "Do women generally make better leaders than men", $r = .204$, p (one-tailed) $< .05$.

participate fully in the work of community courts. According to Becker,⁶⁷ this resolution — which was subsequently incorporated into Uukwambi's written customary laws — gave momentum to the process to involve women more actively in political and judicial decision-making. Following the 1993 workshop, the Uukwambi Traditional Authority called a meeting of all Uukwambi headmen, where they were told that a women representative and advisor had to be selected in each village. It was also communicated that women were to be encouraged to actively participate in traditional court meetings. Further, the new women representatives were expected to actively participate in hearings of customary courts and generally act as a deputy to the headman, so as to enhance the equal representation and treatment of women in the customary arena.⁶⁸

As noted above, the resolution of the Owambo Traditional Authorities regarding women's participation in traditional courts and the installation of women representatives in Uukwambi⁶⁹ need to be placed within their temporal context, including the prominence of women's rights in Namibian politics and the inclusion of gender equality provisions in the Namibia Constitution. As one headwoman recounts:

"The idea to install women representatives came after independence. The news of the law [the Constitutional provision on gender equality] was spread all over the country. It was passed on to the kings and chiefs, and from them to the senior headmen, the headmen and the villagers. Then the chief [of Uukwambi] decided that every village was to have a women representative."⁷⁰

Another initiative undertaken in Uukwambi with the aim of improving women's involvement in judicial decision-making was initiated by the Centre for Applied Social Sciences (CASS) Legal Department. Research⁷¹ carried out in 1992/1993 in the three northern areas of Uukwambi, Ombalantu and Oukwanyama Traditional Authorities had revealed that women had limited knowledge of and lacked access to the customary justice system. Many women perceived customary law and the customary judicial system as neglecting their concerns. They particularly complained that they were excluded from active participation in customary courts. As the research project showed a clear need for community-based legal education, it was followed by a training program for Community Legal Activators (CLA) with a strong emphasis on gender relations.⁷² The aim was that CLAs would: (i) assist traditional leaders and customary courts; (ii) provide information about and advice on law to community members; and (iii) help solve disputes between community members without going to the traditional court.⁷³ Uukwambi was chosen as the area for the CLA program, on the basis of logistical considerations as well as 'political' considerations, including the fact that the Uukwambi Traditional Authority had made significant progress promoting "indigenous reform of customary law and the status of women" and showed an overt interest in cooperating in a project to improve the administration of justice in customary courts and the legal status of women.⁷⁴ The Chief of Uukwambi and the Secretary of the Traditional Authority were among the participants in the course and still have their certificates nailed to

⁶⁷ H Becker, *Community Legal Activator Programme*, Evaluation Report, CASS Papers No. 35 (1995) 7.

⁶⁸ *Ibid*, 271.

⁶⁹ A similar increase in women's participation in traditional court meetings has been described for Botswana, by Chief Linchwe II (quoted in Keulder, above n 7, 9).

⁷⁰ Interview 36 with headwoman (20 November 2009).

⁷¹ Namibia Development Trust (with assistance from SIAPAC Namibia and CASS), *Improving the Legal and Social-Economic Situation of Women in Namibia: Uukwambi, Ombalantu and Uutwanyama*, (1994) ES 9.

⁷² This program was carried out between July 1994 and May 1995 by the Centre for Applied Social Sciences (CASS).

⁷³ Becker, above n 65, 15.

⁷⁴ *Ibid* 6-7.

their office walls. A number of the women who participated in the CLA course were some of the first women representatives, elected at the village as well as the district levels.

There was a mixed response from village headmen to this changed situation. A number of them welcomed the idea and encouraged the women to discuss their problems with the women representative. Other headmen, however, felt insecure and threatened. As one traditional councilor explained: "In some villages the headmen think the women representatives want to take over the village. Those old men, it is not easy to make them understand something".⁷⁵ But it was not only headmen that resisted the new role of women. Critique and gossip came from many sides, including from other women. Sometimes women representatives dropped out or became inactive because of the criticism encountered in the village, or because they did not know what to do due to a lack of training and education. Those who persevered currently play an active role in traditional court and other village meetings, and appear to serve as important role models, encouraging other women to participate in village affairs. At the level of the district court and chief's court, women also play a prominent role.

b. Women in traditional courts today

The scene of the traditional justice domain in Uukwambi has changed dramatically since independence in 1990. An increasing number of women traditional leaders and representatives are present at court cases at the village, regional and traditional authority levels. Such women are active participants in the representation and discussion of cases, in questioning parties and witnesses, and in deliberating the actions and decisions of the court. Ordinary women are also present in large numbers and even outnumber the men in many villages. This should be understood, however, within the specific context of the high out-migration which characterizes the rural areas of northern Namibia. This phenomenon, caused by the poor economic situation in rural Namibia, has resulted in a high percentage of women-headed households.⁷⁶ A concomitant of this out-migration is that, of the men who do remain in the villages, the majority are either very young or very old. And with regard to the remainder it was felt that they were not of the most enterprising character. The adult men are to a large extent regarded as "good-for-nothings", often addicted to alcohol and spending large parts of their day in the local bars (*shebeens*). Despite their limited presence at the traditional court meetings, men do seem to accept the decisions taken by these traditional courts. According to a traditional councilor, "they can't resist. When we tell the men 'the law says...', they will comply. There is nothing else they can do. The law is clear."⁷⁷

At many court meetings, women are expressly encouraged to actively participate in the proceedings. At one of the senior traditional councils, the chairman always addresses the women at the beginning of every traditional court session: "You women have been neglected. Now it is time for change. So if you see something you don't like, speak up. Everyone now, watch carefully. Stand up and speak if you think something is not right, or if you don't understand something".⁷⁸ In addition, observations during court meetings indicate that many women in fact do so: women as parties and as witnesses speak plainly, seemingly unafraid to vent their anger and irritation with the opposing party, and occasionally sternly refused to cooperate to an amicable settlement that involves a compromise. There does not seem to be an easily discernable difference of style in behavior

⁷⁵ Interview 32 with traditional councilor (16 November 2009).

⁷⁶ A 1994 study shows that, of the women married to out-migrants, 85.6 percent see their husband 0-3 times per year (Namibia Development Trust, above n 69).

⁷⁷ Interview 32 with traditional councilor (16 November 2009).

⁷⁸ Interview 47, above n 51.

and speech between men and women as parties and as witnesses.⁷⁹ Many claim, however, that this is not the case for all women. Older women in particular still believe that only men can make sound decisions and therefore remain quiet during court proceedings.

At higher levels of the court hierarchy, men continue to make up the majority due to the still skewed number of men compared to women traditional leaders. Nevertheless, change is also profound at this level. As Chief Iipumbu states: "There has been a big improvement for women since the mid-1990s. Now at every traditional court proceeding, you see many women. Also in higher positions. See this court. It was not like this before."⁸⁰ At these higher court levels, women are said to be more active than men. A woman's representative describes the present-day practice at the senior headman's court: "The headwomen come. Many headmen fail to come. Men don't do their job properly. Men don't care. Only women are prepared to take responsibilities. In fact, the senior headman encourages women to take over as village leader."⁸¹

c. Women's empowerment

Has the opening up of traditional courts resulted in a positive perception of them and women's role in them, among women respondents? And are such perceptions influenced by the gender of the traditional leader in the respondent's village?

When discussing perceptions of the traditional courts, it is important to highlight that approximately two-thirds of respondents had never attended a traditional court meeting in their village. 31.6 percent of the respondents had participated in court meetings, but only 8.2 reported to have attended 'many times' or 'almost always'. Traditional court meetings therefore do not engage the majority of the adult population of a village. The 51 respondents that answered that they had attended court meetings show high satisfaction with traditional court performance: only 17.6 percent reported a need to improve the performance of traditional courts.⁸² Male respondents reported a slightly higher need to improve the performance of traditional courts led by headwomen, compared to those led by headmen. Female respondents, on the other hand, were more negative about the performance of traditional courts led by headmen than by headwomen.

When these same respondents were asked whether they felt they could actively participate in proceedings, 72 percent of female respondents and 92 percent of male respondents answered positively; and 28 percent of female respondents felt that they could not actively participate. Women were more positive about participation in villages led by headwomen than by headmen (Table 12).

When confronted with the question of whether men or women are more influential in the traditional court in their village, 56 percent of female respondents and 60 percent of male respondents believed that power was equally divided, with most of the others claiming that men enjoyed more power than women. Opinions of male respondents do not differ with the gender of the village leader; however, female respondents believed there to be more equal power-sharing in villages with headwomen (Table 13).

When all respondents – including those who had never attended a traditional court meeting – were asked their opinion about the statement "Men and women are treated equally in traditional courts", only 8.6 percent did not agree. Both male and female respondents were

⁷⁹ Personal observation during court meetings.

⁸⁰ Interview 23 with Chief Iipumbu and Former Secretary (21 October 2009).

⁸¹ Interview 29 with women representative (6 November 2009).

⁸² 74.5 percent stated that there was no need to improve the performance of traditional courts as they are operating very well; 7.8 percent answered that they did not know.

slightly more positive about this statement where the traditional courts were headed by women as opposed to men. Similarly, only 6 percent of respondents disagreed/strongly disagreed with the statement “In the traditional court, women and men have an equal chance to get a fair decision or settlement”.

Almost half of all respondents stated that they found it difficult to speak up and give their opinion at a traditional court meeting. These data showed a significant difference between men and women: women reported more difficulty than men.⁸³ When disaggregated by court attendance, the data indicated that respondents who had never attended a traditional court meeting felt that it was much more difficult to speak up in court than did respondents with actual court experience⁸⁴ (Table 14). Of those respondents who had attended traditional courts, 80 percent of the male respondents and 68 percent of the female respondents disagreed or strongly disagreed with the statement; 28 percent of the female respondents strongly agreed, compared to 4 percent of the male respondents (Table 15). Further, the data indicated that male respondents found it easier to speak up in traditional courts in villages led by women compared to those led by men.

Table 12 “Do you feel that you can actively participate in traditional court proceedings?”

	Women (n=25)	Men (n=25)
Villages with headwomen		
Yes	5 (83.3%)	10 (100%)
No	1 (16.7%)	0
Don't know	0	0
Villages with headmen		
Yes	13 (68.4%)	13 (87.7%)
No	6 (31.6%)	0
Don't know	0	2 (13.3%)

N=51, missing=1

Table 13 “In the traditional court in your village, who do you think are more influential, men or women?”

	Villages with headwomen	Villages with headmen
Women		
Men	1 (16.7%)	7 (36.8%)
Women	0	0
Equal	5 (83.3%)	9 (47.4%)
Don't know	0	3 (15.8%)
Men		
Men	3 (30%)	4 (26.7%)
Women	1 (10%)	1 (6.7%)
Equal	6 (60%)	9 (60%)
Don't know	0	1 (6.7%)

N=51, missing=1

⁸³ $r = .057$, p (one-tailed) $< .05$.

⁸⁴ When the respondents are divided into two groups, those who have attended traditional court and those who have not, there is a significant relationship between court attendance and perceived difficulty to speak up, $r = .397$, p (one-tailed) $< .01$.

Table 14 "I find it difficult to speak up and give my opinion at a traditional court meeting"

	Never attended court (n=99)	Sometimes (n=37)	Many times (n=13)
Strongly agree	31.3%	18.9%	7.7%
Agree	32.3%	8.1%	7.7%
Neutral	11.1%	2.7%	0%
Disagree	20.2%	51.4%	46.2%
Strongly disagree	5.1%	18.9%	38.5%

Table 15 "I find it difficult to speak up and give my opinion at a traditional court meeting"

	Women who have attended court (n=25)	Men who have attended court (n=25)
Strongly agree	28%	4%
Agree	4%	12%
Neutral	0%	4%
Disagree	48%	52%
Strongly disagree	20%	28%

In summary, respondents generally perceived as equal the treatment of men and women by the traditional courts as well as their chances in receiving a fair decision. At the same time, whereas a majority of respondents felt that women and men were equally influential in decision-making, there was a substantial minority that believed men to be more influential than women. Respondents who had never attended a traditional court meeting felt that they would find it difficult to speak up and give their opinion in court. Respondents with actual experience in traditional court meetings, however, were much more positive about their ability to speak up and participate. There was a marked difference between respondents in villages with a headwoman and those with a headman. Female respondents were significantly more positive about the traditional court proceedings in female-headed villages, in terms of overall satisfaction, ability to participate in the proceedings, and the equal division of power among the sexes. Male respondents were slightly more positive about traditional courts in men-headed villages, but indicated that they spoke up more easily in courts in female-headed villages.

Enhancing the quality of customary law through self-recording

In May 1993, leaders of six Owambo traditional communities assembled for a Customary Law Workshop.⁸⁵ According to the minutes of the meeting, the purpose was:

"[t]o start a process of consultation between the Owambo Traditional Authorities in order to harmonize certain aspects of their traditional law, to adjust it to the new social and legal environment and to improve the legal status of women in line with the requirements of the Constitution of Namibia."⁸⁶

⁸⁵ Similar workshops were held in 1994 and 1995 by the Kavango and Nama Traditional Authorities (M O Hinz and S Joas, *Customary Law in Namibia: Development and perspective*, Centre for Applied Social Sciences (CASS) (1996) 207-237).

⁸⁶ Minutes of the Customary Law Workshop of Owambo Traditional Leaders (ibid 193-206). The Traditional Authority of Uukwaluudhi was not represented, but their king later expressed his full consent to all the decisions made at the workshop.

Each of the Owambo Traditional Authorities was to include the agreed-upon norms in a written document containing its own recorded customary law.⁸⁷ According to Hinz,⁸⁸ the self-statements address two kinds of groups. The first consists of all outsiders who have to deal with the customary law. The second group consists of the community members “who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardized in view of needs that flow from the growing interaction of members of different communities”. Even within traditional authorities, local customary practices were far from uniform. Limited knowledge among village leaders of the norms as defined by the highest level of traditional leadership, discretionary powers of traditional leaders to include circumstantial issues such as the behavior of the parties in the traditional court, and abuse of power by traditional leaders all led to high variation in customary practices. Due to their written character, self-statements have the potential to bring change in this regard, to reduce the flexibility and negotiability of norms and thereby to enhance the certainty and equity of traditional dispute settlement. They also provide a simple way for villagers to gain knowledge about customary laws.

a. Process, timing and change agents

The efforts to harmonize Owambo customary laws built on earlier self-statements by the participating traditional authorities, such as Ondonga (1989), Uukwaludhi (1984), Ongandjera (1982).⁸⁹ In the other Owambo Traditional Authorities, a first official draft of the laws was made in the process leading up to the harmonization workshop.⁹⁰ Interviews in the Uukwambi Traditional Authority revealed, however, that lists of rules and principles had been in the possession of senior traditional leaders for a number of decades, but these were not unified, nor widely known or distributed.⁹¹

The timing of the unification is intricately connected to events at the national political level. With independence finally arriving in 1990, the 1990s were characterized by a strong identification with the new Namibia and with a sense of urgency to make the concomitant changes to transform the remnants of the divisive apartheid government into a more inclusive, modern form of government. The Owambo Traditional Authorities were struggling to remain relevant in the new constellation of independent Namibia. In the run-up to independence “the political minds behind the Constitution did not envisage much of a role for traditional authorities”.⁹² Nevertheless, the “Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities” (“Kozonguizi Commission”) concluded that, despite regional differences and individual dissatisfaction, traditional leadership was a necessary and viable institution, and recommended its retention, “within the context of the provisions of the *Constitution of the Republic of Namibia 1990* and having regard to the integrity and oneness of the Namibian Nation as a

⁸⁷ Recently, the Council of Traditional Leaders resolved that all traditional communities of Namibia embark on such a self-recording process (M O Hinz, 'Traditional governance and African customary law: Comparative observations from a Namibian perspective' in N Horn and A Bösl (eds), *Human Rights and The Rule of Law in Namibia* (2009) 85).

⁸⁸ Ibid 85.

⁸⁹ Hinz and Joas, above n 63; See also for Ondonga: Hinz, above n 4, 72. Gordon cites efforts by the Ongandjera to develop a legal written code in the early 1960s (R J Gordon, 'Widow 'dipossession' in northern Namibian inheritance' (2008) 31(1-2) *Anthropology Southern Africa*, 5).

⁹⁰ Hinz and Joas, above n 63.

⁹¹ Interview 40, senior headman (3 December 2009); Interview 44 woman traditional councilor (4 December 2009); Interview 57, woman traditional councilor (27 January 2010). Chief Iipumbu reported that his earliest copy of written laws dates from 1956. The author has not seen this copy (Interview 55, Chief and Former Secretary (19 January 2010)).

⁹² Ibid 69.

priority”.⁹³ This ushered in a new dawn for traditional leaders, who were eagerly seeking to redeem the popular support they had lost due to their close alignment with the South African colonial regime.⁹⁴

These push and pull forces combined to form a strong internal drive for the recording, harmonization and transformation of customary norms by traditional authorities, in order to adjust them to the legal and social environment of the new Namibia. In addition, government plans – albeit still vague – to engage in a codification of customary law,⁹⁵ brought a certain amount of urgency to the whole undertaking, in a bid to stave off undue governmental interference.

b. Gender issues

One of the domains in which change was advocated was gender relations. Women had played a prominent role in the period before independence, both as freedom fighters and in the functioning of the rural localities when men were away fighting in the war of independence or working on labor contracts at white-owned farms and companies. The notion of ‘women’s rights’ entered Namibian politics when women freedom fighters not only expressed their opposition to colonial occupation, but also to contrived custom and tradition.⁹⁶ The collaboration of traditional leaders in indirect rule of the apartheid government was a determining factor in this articulation. The *Constitution of the Republic of Namibia 1990*, reflected the demand for gender parity in guaranteeing equality and freedom from discrimination on a number of grounds including sex (section 10(2)).⁹⁷

The aims of the customary law workshop specifically included the improvement of the legal status of women in line with the requirements of the Constitution. The minutes of the workshop show that both Advocate F J Kozonguizi, the Chairman of the Kozonguizi Commission referred to above and the then Ombudsman of Namibia, and Ms Nashilongo Shivute, a representative of the President’s Office in the Department of Women’s Affairs, were present during the workshop and explicitly brought up the issue of gender equality:

⁹³ Commission of Inquiry, above n 74, 73; S Düsing, *Traditional Leadership and Democratisation in Southern Africa: A comparative study of Botswana, Namibia and South Africa* (2002) 188; Hinz, above n 65, 69-70.

⁹⁴ H Becker, ‘New things after independence’: Gender and Traditional Authorities in postcolonial Namibia’ (2006) 32(1) *Journal of Southern African Studies*, 33. South Africa’s indirect rule, characterized by the extensive use of indigenous political institutions, had “transformed the indigenous polities into local administrative organs dependent on the colonial state.” (Becker, above n 76, 33). From the 1960s, Ovamboland became the centre of Namibia’s independence struggle and the scene of severe fighting between the South West African People’s Organisation (SWAPO) and the South African army, in which thousands of lives were lost. From the 1970s until independence, SWAPO and the churches were seen as the main sources of authority by the population, rather than the chiefs or the Owambo (homeland) authorities (Becker, above n 76, 33; Keulder, above n 74, 84; Tötemeyer, above n 62, 104-5; I Soiri, *The Radical Motherhood: Namibian women’s independence struggle* (1996) 50. The chiefs’ already diminished popularity and legitimacy further waned due to their involvement with reconnaissance work and the reporting of strangers to the colonial authorities and with the drafting of people for the South West African Territorial Forces – formed in 1977 in response to SWAPO’s military successes. The results were serious, as Keulder describes: “Chiefs and headmen were often identified as soft targets to be eliminated (by both sides) in order to strike back at the enemy. Many chiefs and headmen accordingly lost their lives” (Keulder, above n 74, 49, 52).

⁹⁵ The 1986 report of the United Nations Institute for Namibia (*Namibia: Perspectives for national reconstruction and development* (1986) as well as the *Law Reform and Development Act 1991*, art 29, s 6, mention codification.

⁹⁶ Becker, above n 76, 47.

⁹⁷ Article 10 of the *Namibian Constitution 1990*, provides that all persons shall be equal before the law, and that no one may be discriminated on the grounds of sex, race, color, ethnic origin, religion, creed or social or economic status. With this Article, the Namibian Constitution follows Article 1 of the *Universal Declaration of Human Rights 1948* as well as Article 2 of the African Charter on Human and Peoples’ Rights.

"In the past, the conditions of women were not as good as they should be, but today the government is trying [to] uplift the women's situation in Namibia."⁹⁸

"We, the women, have come to hear and see what is being done, so that if there is anything that may suppress the women [it] be done away with. Traditional laws and general laws should be equalized. Traditional laws must be adjusted properly. We do not say should be abolished. Widows must also be protected."⁹⁹

Ms Shivute's reference to widows highlights the customary inheritance norm that when a man dies, his estate is inherited by his matrilineal family. This leaves the widow dependent on her husband's family, unless she chooses to return to her own matrilineal family. Despite a customary obligation of the husband's family to support needy widows and children, this often resulted in the widow and her children being chased out of the house. A related customary norm in Owambo is that when women remained on the land they had occupied with their husbands, they were required to make a payment to their traditional leaders for the land in question. At the workshop, the traditional leaders present unanimously decided that widows should not be chased from their lands or out of their homes and that they should not be asked to pay again for the land.¹⁰⁰ President Sam Nujomo was another high-profile proponent of such a change. Shortly after independence, he made a public appeal that widow dispossession should be stopped, and not long after that the National Assembly unanimously passed a motion demanding fair treatment for widows.¹⁰¹ During the workshop, Adv. Kozonguizi conveyed the President's strong feelings regarding the topic to the traditional leaders assembled.¹⁰²

This normative change reflects a widely felt need in society to enhance the position of widows, both at local and national level. By the early 1970s, Tötemeyer already found that a large proportion of interviewees in Owambo stated that the widow/widower and children of the deceased should inherit all (60.9 percent of interviewees) or part (21.2 percent of interviewees) of the estate.¹⁰³ Research carried out in 1992/1993 in Uukwambi showed that when asked the attitudinal question whether they agreed or disagreed with the statement, "The husband's family should inherit all the property when the husband dies", 95.7 percent of respondents disagreed.¹⁰⁴ The statement, "Women should be allowed to inherit land without having to pay" yielded 96.7 percent positive responses. This research thus clearly showed that the respondents believed women should inherit their husband's land, rather than his family, and that this land should not be charged for through the headman.¹⁰⁵ Consequently, in 1993, more than 100 women demonstrated against discriminatory inheritance laws at the highest court of Oukwanyama Traditional Authority.¹⁰⁶

Gordon shows the deep historical roots of widow dispossession, which has been a subject of contention in Owambo for over a century.¹⁰⁷ He elaborately describes earlier attempts by

⁹⁸ Advocate F J Kozonguizi, quoted in the Minutes of the Customary Law Workshop of Owambo Traditional Leaders, above n 86, para 5.

⁹⁹ Ms Nashilongo Shivute, quoted in the Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 63, para 5.

¹⁰⁰ Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 63, para 10. In addition, it was unanimously decided that women should be allowed full participation in community courts (para 12).

¹⁰¹ Gordon, above n 67, 8.

¹⁰² Interview 43, female traditional councilor (4 December 2009).

¹⁰³ Tötemeyer, above n 62, 146.

¹⁰⁴ Namibia Development Trust, *Improving the Legal and Socio-Economic Situation of Women in Namibia: Uukwambi*, Final Report, Namibia Development Trust, with assistance from SIAPAC-Namibia (1993) 63.

¹⁰⁵ *Ibid* 63.

¹⁰⁶ *The Namibian*, 11 and 13 August 2003, referred to in Becker, above n 76, 48.

¹⁰⁷ Gordon, above n 67.

traditional authorities, colonial administrators, as well as missionaries to improve the inheritance situation for widows.¹⁰⁸ According to Gordon, these attempts were largely unsuccessful, which leads him to question the “much-vaunted power of ‘Traditional Authorities’ who have shown themselves to be aware, sometimes keenly, of inheritance issues and yet their own ‘traditional laws’ appear to be frequently ignored or side-stepped.”¹⁰⁹ This poses the questions to what extent the Owambo Traditional Authorities’ latest efforts to enhance the position of widows will be more effective, or will the new customary laws again be ignored?

c. The written laws of Uukwambi

The Customary Law Workshop was not a law-making body. As such, the meeting’s decisions were to be recommendations for the councils of the various traditional communities, who could translate them into law for their respective communities.¹¹⁰ The resulting ‘self-recording documents’ are not comprehensive codifications. They contain reference to a number of substantive and procedural norms that were felt to be of particular importance.

The written *Laws of Uukwambi (1950–1995)* consist of two sections. The first section consists of 11 pages describing the legal system of Uukwambi. It starts with a number of procedural rules, stipulating the procedure for lawmaking, the hierarchy of traditional courts, the obligation of obedience to traditional courts, and the right to bring witnesses. It then deals with substantive law, both of a criminal and a civil character.¹¹¹ It mentions a number of felonies – including murder, illegal abortion, abandonment of a baby, rape, adultery, impregnation of an unmarried woman, assault and intimidation -- and their required penalty. It then turns to issues involving property and natural resources, such as land distribution, traditional inheritance, stolen properties, cattle (transportation, slaughter, loss), and protection of water, trees, wild animals, crops and grazing grass. The section ends with a number of rules regarding what may be loosely termed as “moral behavior”, including the sale of alcohol, the prosecution of witch doctors, the traditional upbringing of children, and the obligation to care for the elderly. The second part of the document contains 13 “law articles”. The first 12 of them merely state the penalty for certain felonies. The last law article consists of sub-sections ‘a’ to ‘r’ that repeat some of the issues mentioned earlier in the document, such as: “a. Nobody must transport cattle without a permit”.

The unanimous decision regarding widows’ inheritance made by the traditional leaders present at the Owambo workshop resulted in the following provision in the written *Laws of Uukwambi (1950–1995)*: “Traditional law give[s] provision that, if one spouse dies the living spouse shall be the owner of the house” (section 9.2). Section 9.4 adds: “Any widow [who] feel[s] treated unfairly during the inheritance process has the right to open up a case against those with the headmen/women or senior headmen/women or to the women and child abuse center.”

The Uukwambi Traditional Authority is currently in the process of updating its written laws. According to the *Laws of Uukwambi (1950–1995)* the traditional laws are reviewed every five years, but until now they have only changed the fines to adjust to the rising price of

¹⁰⁸ According to the former Secretary of Chief Iipumbu, Maria Angungu, some districts in Uukwambi were already taking steps towards protecting widows before the new norm was stipulated in the written *Laws of Uukwambi (1950–1995)* (Interview, 4 December 2009).

¹⁰⁹ Gordon, above n 67, 9.

¹¹⁰ Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 63, para 8.

¹¹¹ Customary law does not make a clear distinction between criminal and civil law issues.

cattle. In the current process, they are explicitly checking whether their provisions do not contravene the Constitution. The draft¹¹² version of *The Laws of Uukwambi Traditional Authority (1950–2008)* repeats the right of the widow¹¹³ and explicitly acknowledges that this right does not require any payment: “In the amendment of the traditional law of 1993, it was agreed that widows will no longer be chased out of their land and/or asked to pay for the land/field after their husbands’ death as it was before.”¹¹⁴

The following section analyzes the local impact of the recording of Uukwambi customary law on the functioning of the Uukwambi justice system. To what extent are villagers familiar with the existence and the content of the written laws? Do they regard the recording as having an influence on the administration of justice, and if so, in what way? How do traditional leaders perceive the impact of the new document? How and to what extent does it change the relationship between people and their traditional leaders?

d. Knowledge of the written laws

When 162 respondents of the survey were asked whether the Uukwambi Traditional Authority had written customary laws, only 40.7 percent responded yes; 10.5 percent responded no; and 48.8 percent did not know. When aggregated by age and by gender, it becomes clear that knowledge of written customary law is most prevalent among people between 40 and 70 years old (Table 16) and more among men than women (Table 17). When disaggregated by level of education, the data displayed no substantial differences.

Table 16. Does the Uukwambi Traditional Authority have written customary laws?

	Age group 20-29 (%)	Age group 30-39 (%)	Age group 40-49 (%)	Age group 50-59 (%)	Age group 60-69 (%)	Age group >70 (%)
Yes	17	29.2	51.6	61.9	63.3	47.1
No	14.9	16.7	3.2	0	9.1	17.6
I don't know	68.1	54.2	45.2	38.1	27.3	35.3

N=162

Table 17. Does the Uukwambi Traditional Authority have written customary laws?

	Men (%)	Women (%)
Yes	56.7	29.3
No	7.5	13.0
I don't know	35.8	57.6

N=162

When respondents were asked how well they were acquainted with the content of the laws of Uukwambi (whether written or unwritten), a similar pattern emerged: age and gender accounted for substantial variation – with men and age groups 40 to 70 scoring above average – whereas education did not.

¹¹² This draft was still being discussed by the Traditional Council when the author left the field in February 2010.

¹¹³ Clause 9.2: “The law states that (the/a) house belongs to the husband and wife and if the husband dies, then the house will belong to the wife.”

¹¹⁴ Clause 9.1.

When discussing knowledge of customary laws, it is important to highlight that approximately two-thirds of respondents (71.7 percent of female respondents and 62.7 percent of male respondents) had never attended a traditional court meeting in their village. Whereas 31.6 percent of the respondents had participated in court meetings, only 8.2 percent reported having attended “many times” or “almost always”. Traditional court meetings therefore do not engage the majority of the adult population of a village. Here also, the age groups 40 to 70, as well as men were overrepresented.

e. Positive change

Of the 66 respondents who acknowledged the existence of written customary laws, a large majority claimed to feel positive or very positive about them (95.5 percent). In addition, almost all of these respondents agreed or strongly agreed that the headman or headwoman decides cases on the basis of the written laws (98.4), that they find it easier to accept a decision when it is based on written law (98,7 percent), and that written laws have made traditional court decisions fairer (98.4 percent).

These positive views are largely corroborated by participant observation at traditional court sessions as well as interviews with men and women who regularly attend them. When the subject of the written customary laws of Uukwambi was broached with these interviewees, they almost all agreed that the written laws are actually being used in court. They explained that after the recording, the Uukwambi Traditional Authority gave all headmen and headwomen copies of the laws, which members of the traditional court bring to court meetings.¹¹⁵ After the cases are called, the chairman or secretary usually starts by reading the appropriate parts of the laws to the public. Later in the proceedings, the written laws are often referred to in discussions, both by members of the court and by attending villagers.

Not all interviewees were convinced of the importance of the recording of Uukwambi laws; a small minority questioned its impact. Some referred to the fact that not in all villages has the traditional leader told the people about the new laws. Others doubted whether a written document could make many inroads into the largely illiterate rural society. Yet others pointed out that the written source of the law might have increased legal awareness, but has not enhanced respect for and enforcement of decisions.

Most villagers, however, said that the written laws have brought positive change, especially through the recording of fixed fines. They stated that the recording of laws has enhanced the certainty and predictability of customary law for its subjects, has brought forward the harmonization of decisions of different Uukwambi courts, and has increased the equality of decision-making.

An additional effect of the recording of customary laws and the inclusion of fixed fines is found in the significantly enhanced legal knowledge of local villagers, at least of those who attend traditional court meetings. People are much less dependent on local information, as the rules are the same everywhere in Uukwambi and even, at least with regard to most fines, in the other Owambo Traditional Authorities. The combination of fixed fines and increasing legal awareness among the people fosters the accountability of court members and limits their discretion. Consequently, the recorded laws act as a check on corrupt

¹¹⁵ Many people who have a copy of the written laws of Uukwambi also own copies of the *Traditional Authorities Act 2001* (in Oshiwambo) and the Oshiwambo version of J Malan, *A Guide to the Communal Land Reform Act, Act No. 5 of 2002*, Legal Assistance Centre and Namibia National Farmers Union (2003).

practices by traditional leaders in the realm of dispute settlement. The following statements refer to the discretion of traditional leaders in deciding on cases and especially penalties:

"Because the law is now clearly set out, and traditional leaders are guided by the same document, there are no longer any differences between one village leader and another. For a long time it was quite different because there was no single document to guide them; any headman could decide how they wanted their people to behave."¹¹⁶

"Previously, traditional leaders could determine the severity of a fine, depending on how you behaved. When they thought someone was not respectful, they would be fined four cows instead of two."¹¹⁷

When traditional courts fine someone for an amount higher or lower than is stated by the law, the villagers now question the traditional leaders about it. Such cases can and are brought to the court of the senior headman or headwoman, for him/her to rectify the fine in accordance with the law.¹¹⁸

f. Traditional leaders' perceptions

The supremacy of the written laws seems generally accepted by the traditional leaders. As one headman puts it, "We cannot make a decision from thin air. We have to refer to the laws."¹¹⁹ Even those few traditional leaders that do not often refer to the written laws in their decision-making acknowledge their general validity and applicability, and claim in interviews that they are well aware of their contents and judge accordingly.

Most traditional leaders expressed a marked appreciation of the changes that the recorded laws brought to the Uukwambi justice system. They state that the laws have helped them to make the right decisions. In addition, the written laws have enhanced the legitimacy and acceptability of their decisions by the parties and the general public. They feel that people respect the law more, now that it cannot easily be applied discriminatorily. Two headmen explain:

"The written laws have made my job easier. It is no longer me who is saying this or that; instead it is now the law. Everyone in the gathering will support a binding legal fine. So there will be no more revenge."¹²⁰

"Now that we have written laws, the decisions we make are no longer subjective; but rather based in law, which explicitly outlines to the people what penalties are incurred as a result of specific actions. Previously, when someone was fined, the headman would often just accept the fine. Now that people know penalties are written in the laws, they cooperate with us much more. When we hold court meetings, we were told to explain the law relevant to the actions they have committed, so that each individual understands the legal reasoning behind the consequences of their actions."¹²¹

¹¹⁶ Interview 32, woman traditional councilor (16 November 2009).

¹¹⁷ Interview 51, headman (5 January 2010).

¹¹⁸ This occurred in the village of Omaandi, where the senior headwoman, at the request of villagers, wrote a letter to the headman ordering him to adjust the fine (interview 49, women's group discussion (29 December 2009)).

¹¹⁹ Interview 48, headman (21 December 2009).

¹²⁰ Interview 50, headman (29 December 2009).

¹²¹ Interview 52, headman (8 January 2010).

g. Protecting the inheritance of widows

As seen above, the written laws of Uukwambi included new provisions to protect the land of women on the death of their husbands. This section will discuss the effectiveness of these norms. To what extent are traditional leaders and common people aware of the new norms? Are the norms enforced by the traditional leaders? And has this led to effective behavioral change?

In the research carried out in 1992/1993 600 female Owambo respondents were asked about property and inheritance in a customary marriage. Of the 63 respondents from the Uukwambi Traditional Authority, 58 percent answered that they were convinced that, on the death of their husbands, they would not inherit anything.¹²² These figures are striking when compared with data from the current study. Survey results showed that of the 162 respondents in Uukwambi, 81.4 percent were aware of the norm prohibiting land grabbing and 80.8 percent were aware of the norm prohibiting payment to the headman/woman. Of the 132 respondents who were aware of the first norm, 92 percent answered they did not know of any case of land grabbing in their village in the last three years, compared to 8 percent who had heard of such a case. Interviews similarly indicated that the changed norms have become well known and enforced in Uukwambi. Many people were familiar with the norm and it was generally stated that cases of land grabbing had severely reduced over the last years, both in traditional courts¹²³ and at the Communal Land Boards.¹²⁴

Land grabbing and payment of widows to the headman to retain the land were first outlawed in the written laws of Uukwambi and other Owambo Traditional Authorities, but later also by statutory law, in the *Communal Land Reform Act 2002*.¹²⁵ In interviews, both customary law and statutory law are referred to as sources of the new norm, and both institutions – traditional authority and government – are seen as enforcing agencies. It is difficult to clearly deduce which regulatory system has contributed most to the awareness of the norm. On the one hand, the data of the Communal Land Boards show that these institutions still received many land grabbing cases in the 2003–2006 period and then saw a gradual decline to almost none at present. This coincides with the introduction of the *Communal Land Reform Act 2002*, rather than with the abolishment of the customary norm by the Owambo Traditional Authorities in 1993. On the other hand, the quantitative data show that 21.2 percent of the people who are aware of the norm attribute its basis to statutory law, with 5.3 percent specifically referring to the *Communal Land Reform Act 2002* compared to 64.4 percent who mention customary law as the source, and 14.4 percent who say they do not know. In addition, people quoting the norm for widows regularly add that when both parents die and a child takes over, this child is not exempted from making a payment to the headman to retain the land. The fact that this practice contravenes the

¹²² Namibia Development Trust, above n 86, 62. The study revealed that even when men write wills, their wishes are not taken into consideration upon their death (Namibia Development Trust, above n 86, 72).

¹²³ At the court of one of the senior headmen of Uukwambi traditional authority, they received only one case regarding land grabbing in 2009.

¹²⁴ The Communal Land Boards (CLBs) are institutions established in 2003 in line with the *Communal Land Reform Act 2002* and tasked among others with dispute resolution regarding certain land matters. At the Omusati CLB, one of its members recounted that they had received many cases in the first three-year term [2003-2006] dealing with land grabbing. In the second three-year term, the number of these case was severely reduced, and now, in the third term, they no longer receive them (interview 35 (CLB member Omusati Region), 18 November 2009). A member of the Oshana CLB confirmed this trend. They also did not receive any cases regarding land grabbing in the third term of this CLB (interview 48, headman/CLB member (21 December 2009)).

¹²⁵ Section 26 of the *Communal Land Reform Act 2002* provides that upon the death of a holder of a customary land right, the right will be re-allocated to the surviving spouse. Section 42 adds that no compensation may be demanded or provided for this reallocation.

*Communal Land Reform Act 2002*¹²⁶ but not the written laws of Uukwambi¹²⁷ indicates that knowledge of the content of the *Communal Land Reform Act 2002* is at best incomplete¹²⁸ and that awareness of statutory norms is greater when they reflect customary norms.

The awareness and acceptance of traditional leaders and common villagers of the changed norms and the resulting near eradication of land grabbing¹²⁹ is especially remarkable when compared with the experiences of other African countries. For instance, Malawi,¹³⁰ Zimbabwe,¹³¹ Zambia,¹³² Liberia¹³³ and Rwanda¹³⁴ all have statutes that protect the property of widows after the death of their husband. Application at the local level is, however, considered minimal, due partly to problems internal to the statutes such as vague wording and being based on assumptions that are largely urban-based and therefore insufficiently adapted to rural structures of kinship, marriage and co-habitation.¹³⁵ However, the main issues hampering effectiveness of the statutes are the limited awareness most people have of their statutory rights, the pervasiveness of cultural norms and beliefs surrounding property ownership and gender relations, problems of widows in accessing police and state

¹²⁶ Section 42 of the *Communal Land Reform Act 2002* prohibits the payment of any consideration for the allocation of any customary land right – save for the costs involved in registration.

¹²⁷ Section 9 of the written laws of Uukwambi mentions only the surviving spouse.

¹²⁸ Limited public awareness of the *Communal Land Reform Act 2002* is reported by Lotta Ambunda and S De Klerk, 'Women and Custom in Namibia: A research overview' in O C Ruppel (ed), *Women and Custom in Namibia: Cultural practice versus gender equality?* (2008) 80.

¹²⁹ Grabbing of movable property, especially livestock, although diminishing, is still a problem in Owambo, see W Werner, *Protection for Women in Namibia's Communal Land Reform Act: Is it working?* (2008) 28-9.

¹³⁰ In Malawi, the *Wills and Inheritance Act No. 25 of 1967*, mandates the following division of the estate: in patrilineal societies, 50 percent to the wife, children and dependents, and 50 percent to the customary family; in matrilineal societies, 40 percent to the wife, children and dependents, and 60 percent to the customary family (S V R White, D K Kamanga, T Kachika, A L Chiweza and F G Chidyaonga, *Dispossessing the Widow. Gender based violence in Malawi* (2002) 36). A new Bill, Bill no. 8 of 2010, Deceased Estates (Wills, Inheritance and Protection) is currently debated by Parliament. This Bill no longer includes customary heirs as beneficiaries of the intestate estate (D Mmana, 'Bill removes hardships on deceased estates' *The Nation*, (Malawi) 19 November 2010, The Nation <http://www.mwnation.com/index.php?option=com_content&view=article&id=9727:bill-removes-hardships-on-deceased-estates&catid=62:national-news&Itemid=59> at 19 April 2011).

¹³¹ Zimbabwe's Administration of Estates Amendment Act number 6 of 1997 determines the distribution of the estate in case of dispute: one third to the surviving wife or wives, and two thirds to the surviving child or children (J Pfumrodze, 'Protection of widows and surviving children under the intestate succession laws of Zimbabwe: The case of estates of persons subject to customary law' (2010) 25(1) *Journal of Social Development in Africa*, 47-8).

¹³² Zambia's *Intestate Succession Act 1989* entitles the widow to receive 20 percent of the deceased's estate; his children are entitled to equally share 50 percent; his parents, 20 percent; and other relatives, 10 percent. The Act only applies to land held under statutory law. Of all land in Zambia, 80 percent is held under customary tenure. This land and homesteads built thereon are excluded from the Act (CLEP, *Property Rights in Zambia* issue paper prepared for the Commission on Legal Empowerment of the Poor (DATE) United Nations Development Programme <<http://www.undp.org/legalempowerment/reports/concept2action.html>> at 19 April 2011).

¹³³ An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages (7 October 2003). Published by the Ministry of Foreign Affairs (Monrovia, Liberia, 1 December 2003). See B Allen, 'Liberia: Paper Rights Flimsy Protection', *Women's Net*, 13 January 2010, Women's Net <<http://www.womensnet.org.za/news/liberia-paper-rights-flimsy-protection>> at 5 May 2011; E Mooney, *Liberia and the Implications of Women's Inheritance Rights for IDP Return and Reintegration: Findings and Recommendations from Mission in April-May 2004* (2004), Internal Displacement Monitoring Centre (IDMC) <[http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/D30786EFC327074D802570B700599D40/\\$file/Mooney+Liberia+paper.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D30786EFC327074D802570B700599D40/$file/Mooney+Liberia+paper.pdf)> at 28 April 2011; R Murray, 'Liberia's Land Just for Some' IPS, 9 June 2009 <<http://ipsnews.net/africa/nota.asp?idnews=47147>> at 26 January 2011.

¹³⁴ Government of Rwanda, *Law No 22/99 of 12/11/1999 to Supplement Book One of the Civil Code and to Institute Part Five Regarding Matrimonial Regimes, Liberalities and Successions*. This law stipulates 'community property' as default marriage property regimes and thereby "firmly established gender equality in land inheritance and in property ownership within the majority of marriages" (E Daley, R Dore-Weeks, and C Umuhzoza, 'Ahead of the game: land tenure reform in Rwanda and the process of securing women's land rights' (2010) 4(1) *Journal of Eastern African Studies*, 132, 134).

¹³⁵ See for instance Mensa-Bonsu, above n 113, 108; Pfumrodze, above n 17, 48-54.

justice structures, and the limited extent to which traditional justice structures are aware of, and are willing to apply, the statutory norms.¹³⁶

IV. Conclusions and recommendations

Assessing impact

Male dominance in customary justice systems is visible in three interconnected domains: leadership, dispute settlement and normative content. All three domains need to be transformed if the ideal of gender equality, as guaranteed under Namibia's Constitution, is to be realized. The measures adopted by the Uukwambi Traditional Authority prompted certain positive changes in customary practice. The number of women traditional leaders has risen slowly but steadily since independence. These women are generally assessed as good leaders, and resistance by the population to their leadership role has decreased. Although *in abstracto* both men and women still regard men as most qualified for traditional leadership – either due to tradition or to the possession of certain character traits – the data of this research demonstrate that current women traditional leaders are assessed positively and that men living in villages led by a woman leader are significantly more positive about female leadership than are men living in villages led by a male traditional leader. This is important for legal development activities aimed at heightening gender equality because it suggests that exposure to relatively successful female traditional leadership may modify men's opinions about female leadership more generally.

The scene of traditional court meetings has changed enormously since independence. Women traditional leaders, women representatives and ordinary women are present in large numbers, often outnumbering men. These women are encouraged to play an active role in the proceedings and many of them do. The transformation is not complete; some women still feel inhibited and perceive the traditional court as a male arena. Only approximately one-third of respondents stated that they attend traditional court meetings in their village. The majority of these people were positive about the performance of the court and their ability to participate in court meetings. A large majority of total respondents felt that men and women are treated equally and have an equal chance to obtain a fair decision or settlement. However, there was a marked difference between villages with headwomen and with headmen. Female respondents were significantly more positive about proceedings in villages led by women, in terms of their ability to participate and the equal division of influence between sexes. Male respondents did not make a distinction between the gender of their leader with regard to participation and influence, but they did indicate that they found it easier to speak up in villages led by women.¹³⁷

A new norm prohibiting "property grabbing" by a deceased male's family has been promulgated in the written customary laws of the Uukwambi Traditional Authority as well as in the Communal Land Reform Act (2002). Its content is widely known among Uukwambi village members, commoners and traditional leaders alike. Both at traditional courts and at the CLBs, the number of disputes dealing with "property grabbing" has steadily diminished

¹³⁶ For Malawi, see B Ligomeka, 'Property grabbing impoverishes widows' (2003), IPS News <<http://ipsnews.net/news.asp?idnews=20520>> at 28 April 2011; White et al, above n 116, 38, 101, 105. For Liberia: Allen, above n 119; Zambia: R Maumbu, 'Women organising for change in Zambia: Constituting the law on inheritance 1970-1991' (paper presented at the conference *Southern Africa: Women's Perspectives and the Dutch Connection*, Utrecht, 1-3 December 1993); Zimbabwe: Pfumrodze, above n 17, 54-5; and for Rwanda: Daley, Dore-Weeks, and Umuhiza, above n 120, 137-140; and RCN Justice & Démocratie and Haguruka Association for Defense of Women and Children's Rights.

¹³⁷ Female respondents found it equally easy/difficult to speak up in villages led by women and by men.

over the last decade. This case study thus presents a successful example of normative change, with far-reaching impact on women's lives in rural areas.

The inclusion of this new norm was effectuated through a process of self-recording. This process created both deliberate and unintentional alterations to the justice system of the Uukwambi Traditional Authority. Most notably, besides the inclusion of norms for the protection of widows which constituted a change in Uukwambi's substantive customary law, the unification of penalties reduced the discretion of traditional leaders in dispute settlement processes. Despite these alterations, the written laws of Uukwambi seem to enjoy a large measure of local legitimacy, at least among the people that participate in traditional court meetings. These people almost unanimously agreed that traditional court cases are decided on the basis of the "written laws of Uukwambi", and a large majority stated that they find decisions based on the written laws easier to accept and more fair. In particular, the recording of fixed, unified fines is mentioned as a significant contribution to the certainty, predictability and equality of traditional court cases, through a diminution of the discretion and options for abuse by traditional leaders. The combination of fixed fines and the increased legal knowledge among the people resulting from a more unified application of customary norms further limits traditional leaders' room for maneuver and fosters a sphere of accountability. Traditional leaders themselves also generally accepted the supremacy of the written laws and welcomed them as a positive change to the Uukwambi justice system, one that has enhanced the legitimacy and acceptability of their decisions. One might thus conclude that the local legitimacy of Uukwambi's customary justice system, among traditional leaders and common villagers alike, is strengthened rather than weakened by the process of self-recording.

As said, the new norms protecting widows have generally become well-known and enforced in Uukwambi. The number of disputes concerning allegations of land grabbing has significantly reduced over the last 15 years to almost none at present. These figures are witness to a real behavioral change regarding inheritance rights of widows. It seems safe to conclude, therefore, that the two main changes that the self-statement propagated – increased protection for widows and unified fixed fines – have both led to real changes in the application of Uukwambi customary law. They have therefore not led to a schism between a written version of customary law and a 'living' version of customary law, and thereby avoided the main pitfall of many historical attempts at recording customary law.

Can Uukwambi's success be replicated elsewhere?

In comparison with other attempts in Africa to enhance the position of women regulated by customary law, three important factors can be identified in the Uukwambi case study that set it apart. The first is the simultaneous change undertaken in all three domains of traditional rule, *viz.* leadership, dispute settlement and normative content. These three domains are interconnected in such a way as to suggest that any effort to promote normative change needs to be holistic. Progress in one field stimulates progress in another, and lack of development in one field may inhibit positive change in others. The second factor is the complementarity of local and national efforts. The changes in traditional rule in Uukwambi neither resulted from direct state intervention, nor did they form an isolated local initiative of the Traditional Authority or its chief. The change processes in Uukwambi formed part of a broader effort in Owambo to harmonize customary laws and align them with the new national Constitution. This harmonization process was encouraged, legitimated and, at least in part, provoked by the Namibian Government. Whereas officials were careful not to impose direct normative change, they made their ideas and normative views on some topics well known. The Owambo Traditional Authorities, in a bid to assert their relevance in independent Namibia, took heed of these "suggestions". The decisions made by the

Owambo Traditional Authorities in turn legitimized change processes in Uukwambi. The active engagement of the Uukwambi Traditional Authority and the personal involvement of Chief Iipumbu greatly influenced the success and vigor of the reforms. It was therefore the concerted efforts at the national, regional (Owambo Traditional Authorities) and local levels that enabled the changes. The third factor was the momentum for change in Namibia following its independence. In particular in Owambo, where the high involvement in the liberation struggle created an intense identification with the new independent Namibia, the inclusion of women in national and regional government as well as the gender equality discourse in nationalist politics opened up possibilities for women in traditional rule.

This study demonstrates that the increased representation and participation of women can be connected to specific actions taken in Uukwambi. Although greater representation and participation per se do not automatically lead to more gender-sensitive administration of justice and politics,¹³⁸ this study suggests that both men and women assessed several aspects of traditional dispute settlement more positively in villages led by headwomen than by headmen, but also that both groups believe that the measures taken have resulted in increased rights protection of women. Overall, the actions taken to introduce gender equality seem to have enhanced the fairness and equity of traditional rule and customary dispute settlement in Uukwambi, and thus present a successful attempt at women's legal empowerment. Of special importance is the finding that living under female leadership has led to more positive feelings in Uukwambi men towards female traditional leadership in general. The three factors mentioned above as having had a decisive impact on the nature and success of change processes initiated by the Uukwambi Traditional Authority – simultaneous efforts in all three domains of traditional rule; concerted efforts at the local, regional and national levels, and the momentum for change in the new independent Namibia – should be taken into account when replication is contemplated in other areas of Namibia or other countries that are similarly struggling to overcome gender biases in customary norms and practices.

With regard to the self-statement, three main factors can be identified in the Uukwambi self-statement that distinguish it from other attempts to record customary laws. The first is that the Uukwambi self-statement is not comprehensive and focuses on a small number of substantive norms in addition to the documentation of fixed fines. Since law and order issues make up the bulk of traditional court cases, the latter has a profound impact in northern Namibia. Documenting fixed fines – and applying those uniformly in traditional courts – is obviously much simpler than recording and applying the intricate rules surrounding, for instance, marriages, divorce, and other family matters. In such cases, traditional dispute settlement normally allows for flexibility and negotiation, taking into consideration circumstantial factors and the proper or improper conduct of the parties. Recording these subtleties is complicated. Uukwambi traditional courts do not seem to deal with many family law disputes, which is reflected in the self-statement: in addition to short sections on adultery and pregnancy of unmarried women, and the new norms on traditional inheritance, the written Laws of Uukwambi 1950-1995 do not include any family law provisions.

The second factor setting Uukwambi's self-recording apart from other recording experiences is that traditional leadership does not offer many lucrative opportunities to most of the traditional leaders in northern Namibia. In fact, many traditional leaders stated that they

¹³⁸ Cf. Keulder, above n 7, 7; Cf. D LeBeau and E M Lipinge (eds), 'Beyond Inequalities 2005: Women in Namibia', in *Beyond Inequalities 2005: Women in South Africa* Windhoek, Harare: UNAM/SARDC, 2005, 30-31. This study, regarding governmental power, states that women's increased political representation in Namibia has not seen a corresponding increase in levels of political influence and in the quality of life for women.

used their own money to do their job well, for instance, for transportation costs to meetings or police stations, or for telephone costs. Traditionally, these leaders made some money from the allocation of land, but this source has largely dried up, with almost no unused land in the villages and the new provision that widows do not have to pay to retain their land.¹³⁹ Other small amounts of money might come from traditional court fees, cattle permit fees, and hut taxes, but these incomes are neither regular nor substantial. The lack of financial incentive to become a traditional leader or to execute this function in a particular way influences processes of self-recording. It is easier to reach agreement on the rules of the game when the stakes are not very high for its players. In addition, the lack of substantial monetary gains by traditional leaders of recorded norms will not obstruct popular acceptance and legitimacy of these norms.

A third factor also relates to the willingness of traditional leaders to record norms that are beneficial to the general welfare of their people. In Namibia, this willingness should be seen in the light of the involvement of traditional authorities in the administrative structures of the apartheid government. When the Kozonguizi Commission recommended the retention of traditional leadership, traditional leaders were eager to seize the opportunity and sought ways to redeem the popular support they had lost due to their close alignment with the South African colonial regime. This drive has presumably facilitated the inclusion of fixed fines and widow protection norms. The latter reflected a widely felt local need as well as a national priority, and the measure to document fixed fines has been applauded by both common villagers and traditional leaders. In its turn, the inclusion in the self-statement of norms that are regarded as legitimate in society likely increased the acceptability and legitimacy of the entire self-statement.

What the above factors have in common is their demonstration that power matters. A self-statement, as well as any other form of recording customary law, is not a mere technical exercise. It addresses the definition and crystallization of certain rights and interests as well as the articulation of desired changes in them, and thus invariably involves a power struggle. The particularities of the local power constellation, as well as the role and function of traditional leaders and courts, will determine whether the positive example of self-recording in Uukwambi can be replicated in other areas of Africa and the developing world.

¹³⁹ The going price for piece of residential land and the surrounding mahangu fields was widely set at 800 Namibian dollars, which, at the time of research, amounted to approximately US\$80. In comparison, in 2003, a much smaller piece of residential land in the surroundings of Kumasi, the second biggest town in Ghana, was worth an equivalent of US\$1,500.