

Traditional Justice: Practitioners' Perspectives

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Stating the Customary:
An Innovative Approach to the Locally
Legitimate Recording of Customary
Justice in Namibia

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Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia

Janine Ubink¹

INTRODUCTION

For the majority of poor people living in developing countries, customary law provides the most accessible justice system. Their disputes are dealt with in a plethora of local dispute settlement institutions from family elders to the more formalized chief's courts. Ever since the colonial period, governments have been forced to recognize the pervasive nature of customary justice systems and their importance for the people. This has led to policy questions regarding recognition of customary law and institutions, possibilities to supervise the application of substantive and procedural customary norms, and attempts to modernize or prohibit certain customary practices. More recently, agents in the field of legal development cooperation have increasingly begun to realize the pervasiveness of customary justice systems and their importance to the poor. Combined with new insights regarding the limited impact of reforms in the state justice sector on the majority of the poor, this has led to a marked increase in access to justice and legal empowerment programs that aim to build on the positive elements of customary justice systems for their benefit.

A common problem that both governments and legal development agencies encounter is the unwritten nature of customary law. Due to its oral nature, customary law is flexible and thus offers a high level of discretion to dispute settlers. This character trait of customary law is hailed for its ability to respond to rapidly changing social conditions and to take into account the specific circumstances of a case and reach a settlement acceptable to all parties. Notwithstanding these positive aspects, high levels of flexibility may also result in uncertainty and create a susceptibility to elite capture. Since the colonial period, a number of governments – often supported by national or international researchers – have attempted to put parts of customary law into writing with a dual aim: to end the uncertainty and discretion caused by its flexibility; and also, equally important, to come to grips with the content and nature of customary law for their own understanding. Such moves have drawn severe criticism from development theorists stressing the dangers of codification.²

This article starts with a discussion of the different historical mechanisms that have been developed for recording customary law: codifications, restatements and case law systems. It will analyze and compare their goals and rationales, their methodological requirements, and their possible advantages and shortcomings. Furthermore, the article

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² See section 2 for an elaborate discussion of these critiques.

will provide insight into the real effects on the functioning of customary law in countries or areas where such mechanisms have been introduced. It will show that each of these mechanisms has its own dynamics and opportunities, as well as serious drawbacks. The most important weaknesses of the recording attempts are the loss of adaptive capacity as well as the resulting gap between the recorded version and the living customary law.

Recently, an innovative approach to recording customary law can be witnessed in certain areas through self-recording by customary groups or their traditional leaders, which has, for instance, been taken in Namibia.³ To generate new knowledge on the advantages and obstacles of self-recording substantive customary law, this article will explore the remarkable activities undertaken from the beginning of the 1990s by the Owambo Traditional Authorities in northern Namibia to arrive at a self-statement⁴ of the most important substantive and procedural customary norms, while simultaneously adapting some norms to conform to Namibia's Constitution. How and why did this process take place? Who were the change agents? And which norms ended up on paper? The article then presents the impact of this process in one of the Owambo Traditional Authorities, the Uukwambi Traditional Authority. It studies to what extent the new laws are actively propagated, are known by traditional leaders and common villagers, and are seen as customary law. Furthermore, it analyzes how and to what extent the recording of the most important customary norms has had an impact on the functioning of the customary legal system in the Uukwambi Traditional Authority: Have the new norms effectuated behavioral change, and are they enforced by traditional authorities?

Through research data collected in 2009 and 2010 – more than 15 years after the initiation of the process – it becomes clear that the self-statement of customary law prompted certain positive changes in Uukwambi's customary justice system. First, it had a profound impact on the functioning of customary law. Although the self-statement was not comprehensive and only covered the main rules of customary law, it did increase the certainty of the justice system by reducing the level of discretion of traditional courts, especially with regard to sentencing. This aspect was regarded positively by common villagers as well as by traditional leaders. Second, the research data show that the adaptations made were well known and highly effective. The new norm prohibiting "land grabbing" or "widow dispossession"⁵ was well-known and implemented. The latter is especially striking when compared with statutory interventions in other African countries to outlaw land grabbing, which have been only marginally successful.

The arguments presented in this article draw on field research conducted in the Uukwambi Traditional Authority between September 2009 and February 2010. Data were collected principally through qualitative data collection methods, comprising semi-structured interviews – with women, women leaders, traditional leaders, farmers, governmental authorities, academics, staff of non-governmental organizations (NGOs) – focus group discussions with women and NGO staff, and participant observation of traditional court meetings. In addition, structured interviews on the basis of a survey

³ Some initial movements towards community dialogue processes and self-ascertainments of customary law can also be witnessed in southern Sudan: T Mennen, 'Putting theory into practice. Improving customary justice' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 140); Rwanda: (RCN Justice & Démocratie and Haguruka Association for Defense of Women and Children's Rights, *Beyond raising awareness: Shifting the social power balance to enable women to access land. Project document* (2010); and Indonesia: S Clark and M Stephens, *Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia*, IDLO (2011)

⁴ This terminology is borrowed from M O Hinz, 'Law reform from within: Improving the legal status of women in northern Namibia' (1997) 39 *Journal of Legal Pluralism* 69.

⁵ Land grabbing refers to the customary practice that, upon the death of a husband, his land is inherited by his matrilineal family, and the widow is no longer allowed to live on it. Land grabbing is part of a wider practice of property grabbing, involving the taking of both movable and immovable property. The changes in Owambo mainly target non-movable property, the land, although this also has some effect on the distribution of movable property. The term widow dispossession is also used to describe land and property grabbing.

were conducted in 216 rural households to explore issues associated with legal awareness, perceptions of customary proceedings and the role of traditional leaders in dispute settlement.

1. Historical attempts to record substantive customary law

Over the years, several mechanisms have been developed that allow for a recording of customary law, with the aim of enhancing clarity and certainty, and reducing the scope of discretion for judges, dispute settlers and administrators. This also reduces the susceptibility to elite co-optation. These mechanisms include codifications, restatements and the gradual recording of customary law through the development of case law. They show various methods and differ in comprehensiveness of their recording efforts. This section will discuss each of these methods' merits and drawbacks, in terms of process and methodology as well as impact on customary justice systems and its users. To this end, it will discuss both theoretical literature and, where available, case studies of the development and use of the recordings in specific countries and areas.

1.1 Codification

A code is a most comprehensive and exhaustive binding statement of the applicable law on a particular topic for a particular jurisdiction. Some claim that codification is "the most obvious solution to the problems of ascertainment ... of customary laws",⁶ as it "substitutes order, precision, authority and uniformity for what had previously been confusion, imprecision, doubtful authority and diversity".⁷

The main objective of codification is to stem uncertainty,⁸ which has two sources. First, customary laws, being unwritten, depend for their survival and preservation on human memory, which is often unreliable. When adding to this unreliability, the deliberate distortions of the laws by interested litigants or by traditional elites, the result is uncertainty.⁹ Second, the uncertainty of customary law is created by the discretion of judges in cases where customary law is contested and in their use of the repugnancy doctrine¹⁰ and other general tests of validity.¹¹ The uncertainty within customary law is exacerbated by power, wealth and other asymmetries between the parties.

Other aims of codification include unification, simplification and modernization.¹² Although the process suggests nothing more than the reduction of the whole *corpus juris* to the form of enacted law, considerable reforms may be affected as part of this process.¹³ When customary rules are discriminatory or biased, for instance, against women, immigrants or youth, codifying them can consolidate or bring a level of authority that is deemed undesirable, which makes a natural evolution towards equality less likely. Thus, in the codification of customary law, modification "would obviously be required where the question arose of reconciling conflicting rules of customary law, of attempting to amalgamate customary and civil law or of abolishing what might be felt to be

⁶ Y Osinbajo, 'Proof of Customary Law in Non-Customary Courts' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 264.

⁷ A N Allott (ed), *The Limits of Law* (1980) 61.

⁸ E C J Azinge, 'Codification of Customary Law: A Mission Impossible?' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 285-6; D Narebo, 'Codification of Customary Law' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 301-2.

⁹ Osinbajo, above n 6.

¹⁰ Many colonial and post-colonial African statutes and constitutions contain a clause that allows judges not to apply customary law where it seems to them to be in conflict with the principles of natural justice.

¹¹ Azinge, above n 8, 287; Narebo, above n 8, 301-2; M I Ojo, 'Codification of Customary Law in Nigeria' in Y Osinbajo and A U Kalu (eds) *Towards a Restatement of Customary Law in Nigeria* (1991) 313.

¹² Azinge, above n 8, 285-6; Ojo, above n 11, 316; Osinbajo, above n 6, 264.

¹³ T W Bennett and T Vermeulen, 'Codification of customary law' (1980) 24(2) *Journal of African Law*, 207.

undesirable or outdated rules".¹⁴ In effect, the process of codification would suggest an evolution from the original customary law to a new system, which, while founded in tradition, is adapted to the needs of a modern state.¹⁵ Bearing this in mind, the development of a codification involves painstaking research, sifting and recording. It involves legal drafting and definite and positive overruling of contrary customary laws.¹⁶

Many colonial administrators were preoccupied with the codification of native customs, in the hope that it would permit a better understanding of native societies and a better means of controlling them.¹⁷ This was not true for every country, as Shadle shows for Kenya, where colonial administrators themselves resisted codification of customary law because they saw it as a threat to administrative power. They believed that:

[a] crystallized, unalterable customary law would allow them little room to adjust the law in order to control local African courts and, by extension, African societies. In the same way, a non-codified customary law meant that only those who 'knew the African', that is, district officers, could preside over intra-African legal matters. African courts and African life could thus be kept isolated from the overly-technical and arcane judiciary, thought to be illogical to the African minds and thus encourage flouting of the law.¹⁸

Codifications have met with various objections. The first criticism is the large variation among the different customary laws within the same country that it would be almost impossible to record them all and highly difficult to harmonize and codify them into a single customary law that all communities would have to follow. This process would entail the exclusion of many observed customary laws. As a result, the codification is faced with grave problems of credibility and acceptability, and might be completely ignored by many people as not reflecting their rules of customary law.¹⁹ In fact, this is exactly what occurred with Tanzania's experiment with codification of customary laws in the 1960s. This was generally the adoption of one set of customary laws to the exclusion of others. The excluded groups by and large continued to quietly apply their own customary laws in their dealings with each other.²⁰ According to Bennett and Vermeulen, however, almost any codification will suffer from problems of credibility and acceptability, "because [customary law] is a system of law evolved by the people themselves, [and] any code will quite possibly seem to be an imposition by outsiders".²¹

The second objection is that customary law is in a fluid state, and thus constantly changing; codifying it, it is argued, would mean freezing it and hindering its future developments. Although a code can be kept up to date by amendment, experience shows that changes that have to be introduced by legislative processes often face long delays.²² Osinbajo warns, however, that a code need not be seen as a complete statement of a particular set of laws, incapable of being added to without the intervention of the

¹⁴ Ibid 208.

¹⁵ Ibid.

¹⁶ K Eso, 'Towards Certainty in Our Laws' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 58.

¹⁷ J-H Jezequel (ed), *'Collecting Customary Law': Educated Africans, Ethnographic Writings, and Colonial Justice in French West Africa, Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa* (2006) 139.

¹⁸ B L Shadle, 'Changing traditions to meet current altering conditions': Customary law, African courts and the rejection of codification in Kenya, 1930-60' (1999) 40 *Journal of African History*, 413.

¹⁹ M Odje, 'The Repugnancy Doctrine and the Proper Development of Customary Law in Nigeria' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 36; Bennett and Vermeulen, above n 13, 209.

²⁰ E Cotran, 'Some recent developments in the Tanganyika judicial system' (1962) 6(1) *Journal of African Law*; Osinbajo, above n 6, 265; Azinge, above n 8, 287.

²¹ Bennett and Vermeulen, above n 13, 219.

²² A J Kerr, 'The reception and codification of systems of law in Southern Africa' (1958) 2(2) *Journal of African Law*, 96.

legislature. A code may contain inclusionary provisions that may allow for greater flexibility in its use.²³

A third criticism of codifications is that there is no way of ensuring that the local experts of customary law are reliable. Many authors question the reliability of expert statements about customary law on the grounds that when asked to engage in such an exercise, people are invariably led to invent rules or to make inaccurate statements or subjective interpretations.²⁴ The difficulty of the process is enhanced by the challenge to find able drafters who will carry out their drafting duties without errors and omissions in an unbiased, professional manner, with an open and positive attitude to customary law.²⁵ Narebo sees a serious danger of those assigned with the task of codification coloring their findings with their preconceived ideas about a particular customary law.²⁶

A number of authors discuss the timing of codification and the issue whether the formulation of law is appropriate in a rapidly developing society.²⁷ Codification of customary law at such a time may be "too early"²⁸ or "premature"²⁹ and "may easily result in extensive discrepancies between law and practice, and in the creation of the undesirable situation of the law becoming obsolescent in comparison with the evolution of legal concepts among a society subject to social and economic change".³⁰ Perhaps it would be "wiser to let it evolve its own way, adapting spontaneously to its new socio-economic context, and coming eventually to maturity in the new society it is called upon to reflect and serve".³¹ Some authors are slightly ambivalent, however, such as Pogucki, who questions the appropriateness of codification in a time of rapid change, but at the same time contends that "whenever there is a progress in social and economic conditions legislation becomes imperative".³² The fact that the 'not now' argument has been made by scholars and administrators ever since independence led Azinge to conclude that the phase of maturity might never come: "it is wrong to create the impression that codification of customary law may become a practical reality at a later date".³³

1.2 Restatement

Restatement of customary laws refers to the exercise of making an authoritative but non-binding re-presentation of customary law on a particular topic by bringing together and rearranging previous expressions of customary law in a more logical and comprehensive way.³⁴ Some well-known restatements were undertaken by the *Restatement of African Law* project initiated by the London School of Oriental and African Studies in 1959. The restatements involved bodies of experts on the customary law in the relevant territory, which usually included African court judges, chiefs, elders, young

²³ Osinbajo, above n 6, 265.

²⁴ A N Allott, 'The judicial ascertainment of customary law in Africa' (1957) 20 *Modern Law Review*, 248; T Verhelst, *Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration*, UCLA International Institute, James C. Coleman African studies Center, Occasional Papers Series (1970) 42, University of California <<http://repositories.cdlib.org/international/asc/opc/verhelst>> at 19 April 2011.

²⁵ Kerr, above n 22, 97; R E S Tanner, 'The codification of customary law in Tanzania' (1966) 2(2) *East African Law Journal*, 106-7.

²⁶ Narebo, above n 8, 305.

²⁷ Odje, above n 19, 36-7; R J H Pogucki, 'A note on the codification of customary law on the Gold Coast' (1954) 8(4) *Journal of African Administration*, 193; Shadle, above n 18, 412,416,421-2; Verhelst, above n 24, 41.

²⁸ Shadle, above n 18, 421.

²⁹ Odje, above n 19, 36.

³⁰ Pogucki, above n 27, 193.

³¹ Verhelst, above n 24, 41.

³² Pogucki, above n 27, 194.

³³ Azinge, above n 8, 286.

³⁴ A N Allott and E Cotran, 'A Background Paper on Restatement of Laws in Africa: The need, value and value of such restatement' in A N Allott (ed), *Integration of Customary and Modern Legal systems in Africa: A conference held at Ibadan on 24th-29th August 1964* (1971) 18-20. See also W Twining, 'The restatement of African customary law: A comment' (1963) 1(2) *The Journal of Modern African Studies*.

educated community members, and, where possible, women.³⁵ Detailed restatements were widely circulated and discussed with all those concerned with the administration of law, such as African court judges who did not sit on the expert panel, local administrators, District Councilors, etc.

According to Allott and Cotran, two of the researchers involved in the London restatement project, this work was explicitly undertaken with the purpose to “put into the hands of users a more precise and comprehensive statement of the applicable law, upon which they can rely in their execution of their daily tasks”.³⁶ It was their contention that administrators of customary law needed to know precisely what it was. Further, those wishing to change it, especially for its unification, harmonization or integration, needed to know the particular customary law that they wanted changed.³⁷ Thus, a restatement was regarded as a highly desirable means to bring certainty and make the customary law generally known, not so much to the ‘subjects’ of the law – who, according to Bennett and Vermeulen,³⁸ were relatively cognizant of their customary laws – but rather, to users such as judges and legislators. This should prevent judges from disregarding customary law in cases where they would otherwise have difficulty ascertaining its content. It should also diminish the discretion of judges through the use of the repugnancy clause and other general tests of validity. Furthermore, it should protect the population against often-unscrupulous individual interpretations by traditional authorities or other locally powerful people.

Restatements have faced various objections, largely comparable to the critique on codifications.³⁹ First, the many variations of customary law within one ethnic group means that it could take a lifetime to complete the recording of the law of one group; not to mention that of all ethnic groups in a country. There is also the risk of freezing an evolving system with a restatement, which could create “a road block to modernity”.⁴⁰ In Uganda, Cotran⁴¹ notes, it was thought unwise to record the customary law since that would “tend to freeze it and hinder its eventual disappearance.” The question of how to select reliable informants is as relevant for restatement as for codification. Shadle⁴² shows that in colonial Kenya information provided by elders on customary law in expert panels led to the institution of rules that permanently favored elders to the disadvantage of women and junior men. He furthermore shows that what African court elders who served as law panel members represented as customary law in the panel minutes differed from the customary law they used in actual court cases. In these courts, presiding elders remained committed to a fluid and situational customary law, rather than the more fixed rules in the law panels.⁴³

In their 1971 paper, Allott and Cotran attempt to refute the above criticisms.⁴⁴ First, they argue that in customary law the variations are more apparent than real, and that there are more similarities than dissimilarities. This response does not, however, deal with the cases where there are variations or contestations of customary law. With regard to the risk of freezing, they state that this would only materialize if the restatement were used as a code instead of as a guide with provisions made for its regular revision. According to Allot:

³⁵ Allott and Cotran, above n 34.

³⁶ Ibid 18-19.

³⁷ Ibid 25.

³⁸ Bennett and Vermeulen, above n , 209-10.

³⁹ Odje, above n 19, 36-7; Tanner above n 25.

⁴⁰ Shadle, above n 18, 416.

⁴¹ E Cotran, 'The integration and codification of law in East Africa: The differing approaches of Kenya, Tanzania & Uganda' in *Colloque de l'Association Internationale de Droit Africaine* (1972) 7.

⁴² Shadle, above n 18, 413.

⁴³ Ibid 424.

⁴⁴ Allot and Cotran, above n 34, 32-3.

[j]udges are shown as constantly turning to the Restatement as a guide to the applicable law: at the same time judges show themselves ready to accept supplementary expert evidence which may displace the Restatement account or to rule that social circumstances have changed since the Restatements were originally complemented, or that there are overreaching policy reasons why the Restatement rule should not be applied in a particular case.⁴⁵

This response ignores the fact that the whole reason for the project is the difficulty judges have in knowing the local customary rule. As a consequence of this difficulty, they might not be easily persuaded that customary law has changed. The restatements might thus not be a code *de jure*, but might in time become one *de facto*, which Shadle⁴⁶ states has occurred with the restatement of civil customary laws in Kenya. In their response, Allott and Cotran furthermore gloss over the more general fact that where a rule of customary law is written down in a restatement, codification or statute, its contents assume a different character. In disputes located outside state courts, this norm is negotiable and is worked out on a case-by-case basis through a process of bargaining and dispute settlement. Once written down, it becomes rigid and precise, and its application in state courts will be relatively strict.⁴⁷ Allott's and Cotran's response to the issue of reliable informants is this: the members of the panel are carefully selected; the restatements are subjected to the independent eyes of persons who do not sit on the panel; the panel meetings are not question-and-answer sessions, but detailed examinations of hypothetical or real trouble cases; and the researcher who leads the restatement process is highly knowledgeable of the subject matter and can therefore not be easily manipulated. According to Verhelst,⁴⁸ however, even the lawyers on the restatement project agree with anthropologists that a more anthropological approach of studying customary law would be sound, but consider this technically impossible.

Other authors have criticized the restatements for different reasons, for instance, since the use of language, legal categories and terminology are alien to customary law – most restatements were made in English – the nature of customary law is inevitably altered.]⁴⁹ Furthermore, anthropologists claim that it is both a mistaken and unrealistic objective to try and mold customary law into a set of legal rules, since they have little meaning outside of the social context that explains and supports them.⁵⁰ According to Verhelst, these differing views can be explained by the goals of the authors of the restatements. Their concern is neither the preservation of customary law nor the instant acceptance of the restatements by the population. As stressed above, their emphasis is on the effective administration of law.⁵¹ If the anthropologists' directions were to be followed, the results would be too slow to come and likely difficult for administrators to use.

1.3 The development of case law

In a common law system, the doctrine of *stare decisis* will lead to a case-by-case recording of customary rules, as applied in specific court cases. In the absence of systematic records of customary law in the form of codes or restatements, judges will heavily depend on earlier decisions as a source of customary law. But even when systematic records do exist, case law will be relied on for interpretations and specifications of written customary laws.

⁴⁵ Quoted in Eso, above n 16, 58.

⁴⁶ Shadle, above n 18, 430.

⁴⁷ G R Woodman, 'Customary law, state courts, and the notion of institutionalisation of norms in Ghana and Nigeria' in A Allott and G R Woodman (eds), *People's law and state law: the Bellagio Papers* (1985). Allott himself has pointed out in one of his articles that, although a restatement is only a guide, writing customary law down will change its character (A N Allott, 'The judicial ascertainment of customary law in British Africa' (1957) 20(3) *The Modern Law Review*, 258).

⁴⁸ Verhelst, above n 24, 42.

⁴⁹ *Ibid* 39.

⁵⁰ *Ibid* 39.

⁵¹ *Ibid* 40.

Such development of a case-by-case record of customary rules has met with various criticisms. The first again deals with the danger of crystallization of customary law. When rules of customary law established by previous decision(s) are the basis of judicial notice in subsequent decisions, this might lead in some cases to “a sacrifice of future development on the altar of history”.⁵² Furthermore, a reliance on case law may result in the perpetuation of errors of interpretation.⁵³ This criticism seems to ignore the fact that even where a custom has been judicially recognized, it is open to a party to show that it is no longer supported by established usage. Courts will allow evidence in support of changes in judicially noticed custom. However, although this is officially so, in reality such a change is hard to prove, and most judges prefer to simply rely on earlier decisions. This is nicely illustrated by a remark from Ghanaian Judge Baffoe Bonny who, during a conversation about the gap between local and judicial customary law, opined that “what is in the courts is the customary law. Local practice differs from customary law because of ignorance and opportunity”.⁵⁴ As a result, even when he knows local practice differs from judicial customary law, he considers himself bound to follow case law. A final criticism is that the reporting and publishing of decided cases, an obvious condition for a well-functioning case law system, is generally inadequate in many African countries. This makes it almost impossible for judges to know of and follow earlier decisions. Objections against the development of case law are in fact objections against the application of customary law by state courts in general, since all modern state legal systems have some degree of recording and reliance on case law. Many courts will in principal also follow earlier decisions of certain higher courts as well as their own earlier decisions, not only in common law systems, but also in civil law systems.

Claassens, describing legal developments in South Africa, provides an example of the power of ‘official’ written versions of customary law.⁵⁵ She explains that the South African Constitution is unusual in that it focuses explicitly on the need for change. It sets out to deal with the past and to address inequality. Constitutional Court judgments have rejected the ‘official’ codified version of customary law in favor of ‘living law’ interpretations based on the consideration of actual practice in changing contexts.⁵⁶ This can be explained by the legacy of colonial codifications that privileged chiefly versions of custom and silenced all contrary versions, thereby sanctioning an authoritarian version of custom as law. However, the potential benefits of the ‘living law’ interpretation remain vulnerable to deeply ingrained formalist assumptions about the operations of law.⁵⁷ Practice shows that it is difficult for ordinary people to challenge “chiefly versions” of customary law in state courts that are precedent-driven and rely on past judgments that upheld colonial and apartheid versions of customary law. In particular, “in the context of widespread regional variety and competing versions within particular localities”,⁵⁸ establishing the content of ‘living customary law’ requires research that is often time-consuming and expensive. In spite of the well-known and widely acknowledged failures of the official versions of customary law, mere availability of information on these versions has had the effect of creating a de facto presumption in its favor.

As an example, Claassens describes a recent case challenging a woman’s appointment as traditional leader.

⁵² F A Ajayi, ‘The Judicial Development of Customary Law in Nigeria’ in A N Allott (ed), *Integration of Customary and Modern Legal systems in Africa: A conference held at Ibadan on 24th-29th August 1964* (1971) 124; Osinbajo, above n 6, 261.

⁵³ Ajayi, above n 52, 124.

⁵⁴ Personal communication, 5 September 2003.

⁵⁵ A Claassens, ‘Customary law and zones of chiefly sovereignty: The impact of government policy on whose voices prevail in the making and changing of customary law’, in A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (2008).

⁵⁶ *Ibid* 360.

⁵⁷ *Ibid* 363.

⁵⁸ *Ibid* 360.

Phillia Shilubana is the daughter of a Tsonga traditional leader. When her father died in 1968, her uncle was appointed to act in his place because she had no brothers. At that time, both Phillia and the Nwamtiwa clan accepted the appointment of a male chief as inevitable. However, by 2001 the political and constitutional environment had changed and a consensus emerged that Phillia was the most appropriate person to succeed her uncle when he died. This decision was extensively discussed in various forums and ultimately recommended by the royal family, the tribal council and a large consultative community meeting.⁵⁹

In 2002, when Phillia Shilubana was officially installed as traditional leader, her uncle's son decided to challenge her appointment on the basis that it was in conflict with customary law. The Pretoria High Court ruled in his favor, and the decision was upheld by the Supreme Court of Appeal. This latter Court held that "according to customary law, succession follows particular customary rules and allows no leeway for choice whether by the royal family, tribal council or community." The discussions at the Pretoria High Court and the Supreme Court of Appeal illustrate the danger of ossified rule-based versions of customary law – whether laid down in codes, textbooks, or case law – closing down processes of locally negotiated transformative change.⁶⁰ This was recognized by the Constitutional Court, which in a further appeal passed judgment in favor of Phillia Shilubana.

[C]ustomary law is by its nature a constantly evolving system. ... the content of customary law must be determined with reference to both the history and the usage of the community concerned. ... To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognize and give effect to that development, to the extent consistent with adequately upholding the protection of rights.⁶¹

2. Self-recording customary law in northern Namibia

The above shows that the three main historical mechanisms for recording customary law – codification, restatements and the development of a system of case law – all have similar drawbacks. Most importantly, the deliberate as well as the undeliberate alterations to customary law created in the process of recording, combined with the limited level of success in gaining local legitimacy for these new recorded versions, resulted in a large gap between the recorded version and the locally observed versions of 'living' customary law.

In May 1993, leaders of six Owambo⁶² traditional communities assembled for a Customary Law Workshop.⁶³ According to the minutes of the meeting, the purpose was:

⁵⁹ Ibid 363.

⁶⁰ Ibid 364.

⁶¹ *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC); (4 June 2008), para 45-49.

⁶² Owambo is a collective name for 12 tribal groups that live in northern Namibia and southern Angola. Seven of these closely-related societies, linguistically and culturally, live in present-day Namibia: the Ondonga, Oukwanyama, Ongandjera, Uukwambi, Ombalantu, Uukwaluudhi and Uukolonkadhi (C H L Hahn, 'The Owambo' in C H L Hahn, H Vedder and L Fourie (eds), *The Native Tribes of South West Africa* (1966); G Töttemeyer, *Namibia Old and New: Traditional and modern leaders in Ovamboland* (1978)). The Owambo people constitute the largest population group in Namibia. 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 entire population of Namibia lives here on less than 7 percent of the Namibian territory (National Planning Commission, *Population and Housing Census* (2001) National Planning Commission (NPC) <<http://www.npc.gov.na/census/index.htm>> at 5 May 2011).

⁶³ 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).

[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.⁶⁴

Each of the Owambo Traditional Authorities was to include the agreed-upon norms in a written document containing its own recorded customary law.⁶⁵ According to Hinz,⁶⁶ 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.

This chapter poses the question to what extent the ‘homegrown’ recording process in northern Namibia runs into similar difficulties as the other devices for recording, or whether it can be seen as a recipe for creating a genuinely legitimate recording of customary law. This section will analyze the process, the timing and the main change agents behind this transformation of customary law. It will give special consideration to the changes advocated with regard to gender equality. In addition, it will discuss the resulting written laws in one of the Owambo Traditional Authorities, i.e. the Uukwambi Traditional Authority. Section 4 will study what the impact has been of the recording of the main customary laws on the functioning of the Uukwambi justice system. Section 5 will focus on the attempt to change the position of widows in inheritance cases, and will study the awareness and implementation of the new norms. Section 6 will conclude with an evaluation of the success of Uukwambi’s self-statements. Furthermore, it will analyze whether this process can be replicated elsewhere, or whether external factors such as political momentum created a unique point in time with preconditions that cannot easily be manufactured elsewhere.

2.1 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).⁶⁷ In the other Owambo Traditional Authorities, a first official draft of the laws was made in the process leading up to the harmonization workshop.⁶⁸ Interviews in the Uukwambi Traditional Authority revealed, however, that lists of rules

⁶⁴ Minutes of the Customary Law Workshop of Owambo Traditional Leaders (ibid 193-206). The Traditional Authority of Uukwaludhi was not represented, but their king later expressed his full consent to all the decisions made at the workshop.

⁶⁵ 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).

⁶⁶ Ibid 85.

⁶⁷ 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).

⁶⁸ Hinz and Joas, above n 63.

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.⁶⁹

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, neither the report of the United Nations Institute for Namibia,⁷⁰ which was crafted as a blueprint for an independent Namibia, nor the Namibian Constitution⁷¹ mentioned traditional authorities.⁷² This can be interpreted as an indication that “the political minds behind the Constitution did not envisage much of a role for traditional authorities”.⁷³ One year after the adoption of the first Constitution, President Sam Nujoma established a “Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities”. This “Kozonguizi Commission” had the task, *inter alia*, of inquiring into the degree of acceptance of traditional leaders by the people.⁷⁴ The 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 priority”.⁷⁵ 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.⁷⁶

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

⁶⁹ 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)).

⁷⁰ United Nations Institute for Namibia, *Namibia, Perspectives for national reconstruction and development* (1986).

⁷¹ Their recognition can only be deduced from Articles 66(1) and 102(5) of the *Constitution of The Republic of Namibia 1990*. 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. The latter Article calls for the establishment of a Council of Traditional Leaders whose function it is to advise on communal land management and on other matters referred to it by the President. In addition, 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.

⁷² Hinz, above n 65, 68-69.

⁷³ *Ibid* 69.

⁷⁴ Commission of Inquiry, *Report by the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders* (1991); Hinz, above n 65, 69-70; C Keulder, *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (1998) 65-66.

⁷⁵ 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.

⁷⁶ 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; Töttemeyer, 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).

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,⁷⁷ brought a certain amount of urgency to the whole undertaking, in a bid to stave off undue governmental interference.

2.2 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.⁷⁸ 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)).⁷⁹

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:

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.⁸⁰

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.⁸¹

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.⁸² President Sam Nujomo was another high-profile proponent of such a change. Shortly after

⁷⁷ 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.

⁷⁸ Becker, above n 76, 47.

⁷⁹ 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.

⁸⁰ Advocate F J Kozonguizi, quoted in the Minutes of the Customary Law Workshop of Owambo Traditional Leaders, above n 64, para 5.

⁸¹ 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.

⁸² 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).

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.⁸³ During the workshop, Adv. Kozonguizi conveyed the President's strong feelings regarding the topic to the traditional leaders assembled.⁸⁴

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, Töttemeyer 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.⁸⁵ 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.⁸⁶ 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.⁸⁷ Consequently, in 1993, more than 100 women demonstrated against discriminatory inheritance laws at the highest court of Oukwanyama Traditional Authority.⁸⁸

Gordon shows the deep historical roots of widow dispossession, which has been a subject of contention in Owambo for over a century.⁸⁹ He elaborately describes earlier attempts by traditional authorities, colonial administrators, as well as missionaries to improve the inheritance situation for widows.⁹⁰ 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."⁹¹ This poses the questions to what extent will the Owambo Traditional Authorities' latest efforts to enhance the position of widows be more effective or will the new customary laws again be ignored?

2.3 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.⁹² 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.

⁸³ Gordon, above n 67, 8.

⁸⁴ Interview 43, female traditional councilor (4 December 2009).

⁸⁵ Töttemeyer, above n 62, 146.

⁸⁶ 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.

⁸⁷ *Ibid* 63.

⁸⁸ *The Namibian*, 11 and 13 August 2003, referred to in Becker, above n 76, 48.

⁸⁹ Gordon, above n 67.

⁹⁰ 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).

⁹¹ Gordon, above n 67, 9.

⁹² Minutes of the Customary Law Workshop of Owambo Traditional Leaders, see Hinz and Joas, above n 63, para 8.

It then deals with substantive law, both of a criminal and a civil character.⁹³ 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 cattle. In the current process, they are explicitly checking whether their provisions do not contravene the Constitution. The draft⁹⁴ version of *The Laws of Uukwambi Traditional Authority (1950–2008)* repeats the right of the widow⁹⁵ 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.”⁹⁶

3. The impact of written laws on the Uukwambi customary justice system

Following the discussion of the process of recording in Owambo and the resulting document in the Uukwambi Traditional Authority, this 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?

3.1 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

⁹³ Customary law does not make a clear distinction between criminal and civil law issues.

⁹⁴ This draft was still being discussed by the Traditional Council when the author left the field in February 2010.

⁹⁵ 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.”

⁹⁶ Clause 9.1.

people between 40 and 70 years old (Table 1) and more among men than women (Table 2). When disaggregated by level of education, the data displayed no substantial differences.

Table 1. 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 2. 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.

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.

3.2 A change for the better?

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.⁹⁷ 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.

⁹⁷ 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).

Not all interviewees are convinced of the importance of the recording of Uukwambi laws; a small minority questions its impact. Some refer to the fact that not in all villages has the traditional leader told the people about the new laws. Others doubt whether a written document can make many inroads into the largely illiterate rural society. Yet others point 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, say that the written laws have brought positive change, especially through the recording of fixed fines. They state 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 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.⁹⁸

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.⁹⁹

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.¹⁰⁰

3.3 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."¹⁰¹ 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

⁹⁸ Interview 32, woman traditional councilor (16 November 2009).

⁹⁹ Interview 51, headman (5 January 2010).

¹⁰⁰ 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)).

¹⁰¹ Interview 48, headman (21 December 2009).

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.¹⁰²

Now that we have written laws, the decisions we make are no longer subjective; but rather based in law. During traditional court meetings we read the law to the people and show them: this is what the law says. Previously, when someone was fined, they felt the headman had personally punished them. 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.¹⁰³

5. 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?

5.1 Legal awareness and 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.¹⁰⁴ 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 courts¹⁰⁵ and at the Communal Land Boards.¹⁰⁶

¹⁰² Interview 50, headman (29 December 2009).

¹⁰³ Interview 52, headman (8 January 2010).

¹⁰⁴ 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).

¹⁰⁵ At the court of one of the senior headmen of Uukwambi traditional authority, they received only one case regarding land grabbing in 2009.

¹⁰⁶ 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 cases 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)).

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*.¹⁰⁷ 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 *Communal Land Reform Act 2002*¹⁰⁸ but not the written laws of Uukwambi¹⁰⁹ indicates that knowledge of the content of the *Communal Land Reform Act 2002* is at best incomplete¹¹⁰ and that awareness of statutory norms is greater when they reflect customary norms.

4.2 Comparative experiences

The awareness and acceptance of traditional leaders and common villagers of the changed norms and the resulting near eradication of land grabbing¹¹¹ is especially remarkable when compared with the experiences of other African countries. For example, in Ghana, the national outcry over widows' plight under customary law led to the enactment of the *Intestate Succession Law 1985* (Provisional National Defense Council (PNDC) Law 111). This law provides that the spouse and/or children are entitled to the self-acquired house of the deceased and the household chattels of the intestate. The chattels include jewelry, clothes, furniture, kitchen and laundry equipment, simple hunting and agricultural equipment, books, motor vehicles and household livestock.¹¹² The remainder of the estate – when it exceeds a certain minimum amount – is divided among the surviving spouse, children, parents and the extended family, with the widow and children together entitled to seven-eighths of the residue of the estate, and in cases where there are no children, the surviving spouse is entitled to three-fourths.¹¹³

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ Section 9 of the written laws of Uukwambi mentions only the surviving spouse.

¹¹⁰ 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.

¹¹¹ 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.

¹¹² *Intestate Succession Law 1985* (PNDC Law 111) sections 3, 4, 18.

¹¹³ See for discussions of the *PNDC Law 111* of Ghana: G R Woodman, 'Ghana reforms the law of intestate succession' (1985) 29(2) *Journal of African Law*; K Y Yeboa, 'Ghana's intestate succession law 1985 PNDC Law 111: A requiem to Islamic law of succession for Ghanaian domiciliaries?' (1992) 4 *African Society of International and Comparative Law*; D M Dzidzornu, 'Human rights and the widow's material security: The case of the 'Intestate Ghanaian widow'' (1995) 28(4) *Verfassung und Recht in Übersee*; E V O Dankwa, 'The application of *PNDC Law 111* and its social and economic impact' (1998) 2 *Recht in Afrika*; H J A N Mensa-Bonsu, 'The intestate succession law of Ghana: practical problems in application' (1994) 8 *Jahrbuch für Afrikanisches Recht*; K Awusabo-Asare, 'Matriliny and the new intestate succession law of Ghana' (1990) 24(1) *Canadian Journal of African Studies*.

A 1998 empirical study in four areas of Ghana revealed high levels of awareness of the existence of the law – although not necessarily of its exact contents– but limited application of its provisions at the local level.¹¹⁴ Where the author found an “increasing recognition of the necessity to let children partake of the enjoyment of their deceased fathers’ intestate estate”, the widow was still generally marginalized despite a small improvement over the original customary position.¹¹⁵

Several other African countries provide similar case studies. For instance, Malawi,¹¹⁶ Zimbabwe,¹¹⁷ Zambia,¹¹⁸ Liberia¹¹⁹ and Rwanda¹²⁰ 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.¹²¹ 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 justice structures, and the limited extent to which traditional justice structures are aware of, and are willing to apply, the statutory norms.¹²²

¹¹⁴ Dankwa, above n 113.

¹¹⁵ Ibid 243.

¹¹⁶ 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).

¹¹⁷ 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 Pfumorodze, '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).

¹¹⁸ 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).

¹¹⁹ 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.

¹²⁰ 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 Umuhoza, '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).

¹²¹ See for instance Mensa-Bonsu, above n 113, 108; Pfumorodze, above n 17, 48-54.

¹²² For Malawi: 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: Pfumorodze, above n 17, 54-5; and for Rwanda:

Proposals to expand inheritance rights of women are currently debated in a number of African countries, sometimes drawing heavy criticism from certain segments of society. For instance, in Mali, a new family code that was to ameliorate women's rights of inheritance met with such extreme popular opposition – headed by Islamic organizations and leaders – that “at the last minute before it was approved, the President sent the bill back to the National Assembly to be reconsidered”.¹²³ An amended version was then tabled, which altered the previous version's enhancement of women's inheritance rights.¹²⁴ This version is endorsed by the High Islamic Council, but opposed by the rights groups who were behind the 2009 bill.¹²⁵ Until now, no new family code has been approved in Mali.

5. Conclusion

5.1 Self-recording evaluated

This chapter has discussed the three main historical mechanisms that have been developed for recording customary law, viz. codification, restatements and case law systems. In addition, it has examined the genesis and the wording of the self-statement in Uukwambi, and analyzed its impact on the functioning of the Uukwambi justice system. This analysis allows us to answer the question whether the self-recording process in northern Namibia runs into similar difficulties as the historical devices for recording or whether it provides a recipe for creating a locally legitimate written statement of customary law.

Just as with the historical recording mechanisms, the process of self-recording created both deliberate and unintentional alterations to the justice system of the Uukwambi Traditional Authority. Most notably, the inclusion of norms for the protection of widows constituted a change in Uukwambi's substantive customary law, and 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

Daley, Dore-Weeks, and Umuhoza, above n 120, 137-140; and RCN Justice & Démocratie and Haguruka Association for Defense of Women and Children's Rights.

¹²³ R Stewart, *The Family Code* (a film by Rebecca Stewart, aired on Al Jazeera from 14 October 2010), Al Jazeera <<http://english.aljazeera.net/programmes/witness/2010/09/201095141841631119.html>> at 26 January 2011. See also C Debrabandère, 'Women's rights languish in Mali' Deutsche Welle, 8 March 2010, Deutsche Welle <<http://www.dw-world.de/dw/article/0,,5323121,00.html>> at 5 May 2011; Integrated Regional Information Networks (IRIN), *Mali: New family law faces opposition from Muslim organisations*, 2 May 2008, <<http://www.unhcr.org/refworld/docid/4820057d1f.html>> at 5 May 2011; D E Schulz, 'Political factions, ideological fictions: The controversy over family law reform in democratic Mali' (2003) 10(1) *Islamic Law and Society*.

¹²⁴ Radio France International (RFI), *Mali's parliament continues family law debate* (6 October 2010), Radio France International <<http://www.english.rfi.fr/africa/20101006-malis-parliament-continues-family-law-debate>> at 19 April 2011..

¹²⁵ Library of Congress, *Mali: Bill Seeking to Modernize Family Law Regime Defeated* (12 October 2010) Library of Congress <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402305_text> at 19 April 2011.

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.

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 the historical devices for recording customary law.

5.2 Can Uukwambi's success be replicated elsewhere?

Three important factors can be identified in the Uukwambi self-statement that set it apart 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 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.¹²⁶ 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

¹²⁶ 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.

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.