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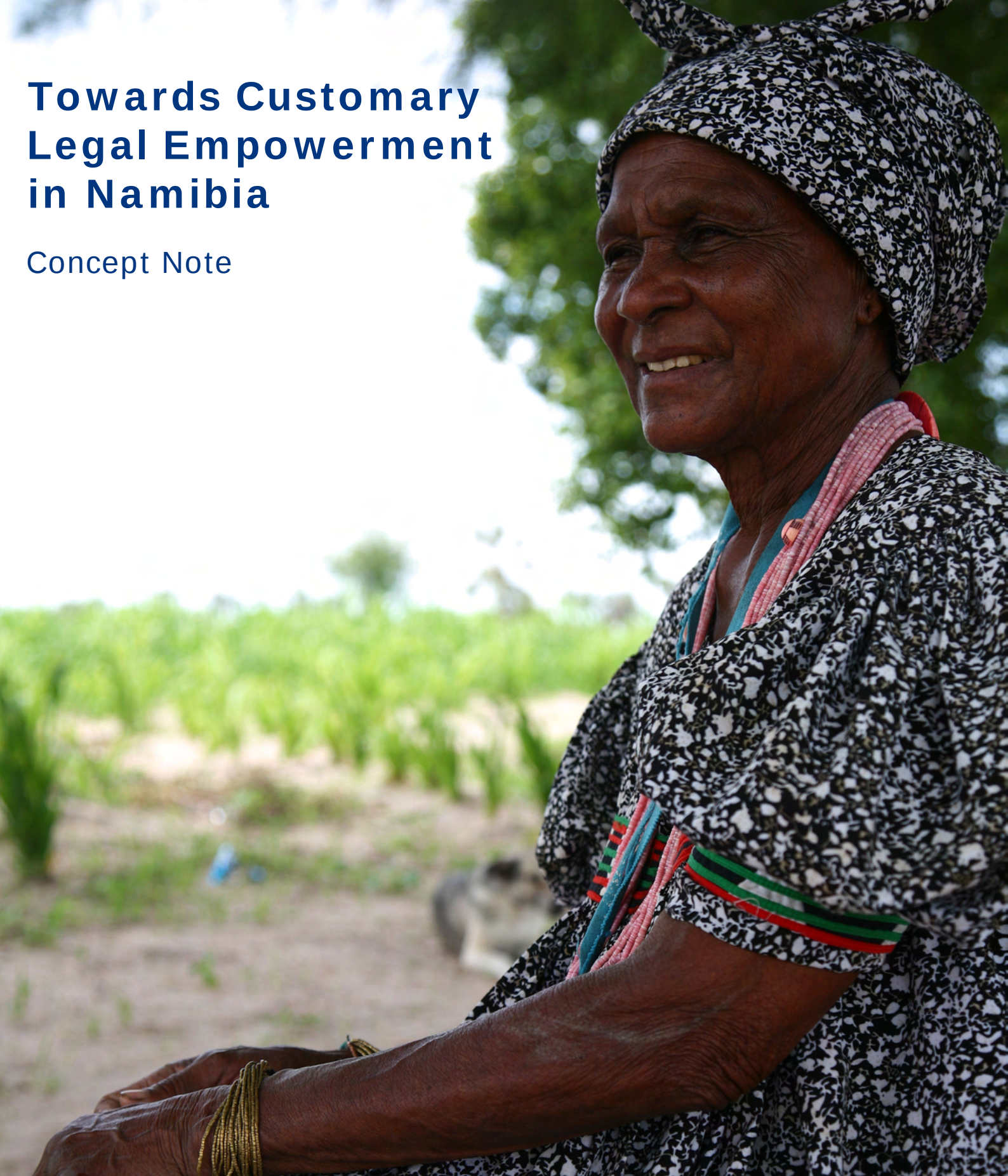
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Towards Customary Legal Empowerment in Namibia

Concept Note



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TOWARDS CUSTOMARY LEGAL EMPOWERMENT IN NAMIBIA – CONCEPT NOTE

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ABOUT THE PROGRAM

This program aims 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 identify entry points and tools of engagement for working with customary justice systems to strengthen legal empowerment. Such knowledge will be generated through a number of individual research projects based in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. These research projects seek 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 will be brought together in two publications that will be 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 the IDLO Research, Policy and Strategic Initiatives Unit in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University (<http://law.leiden.edu/organisatie/metajuridica/vvi/>).

The Van Vollenhoven Institute collects, produces, stores, and disseminates knowledge on the processes of and relationships between law, governance and development, particularly in Asia, Africa, and the Islamic Middle East. Through research and teaching, the Van Vollenhoven Institute seeks to contribute to a better understanding of the formation and functioning of legal systems in developing countries and their effectiveness in contributing to good governance and development. Our research employs a socio-legal approach to develop insights into the workings of national legal systems in their historical, social and political contexts. It includes both state law and legal institutions, as well as customary and religious normative systems, with a special focus on access to justice. In our research projects the processes of law-making, administrative implementation, enforcement and dispute resolution have a prominent place. Local case studies help us to find out how law functions in society.

DONOR SUPPORT

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TOWARDS CUSTOMARY LEGAL EMPOWERMENT IN NAMIBIA

CONCEPT NOTE

1. Background and Problem analysis

1.1 Introduction

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. Customary justice systems can be susceptible to elite capture and may 'serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups' (UNDP 2005:101); cf. (Asian Development Bank 2001:66); (World Bank 2004). Elite capture impacts

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 their 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).

customary dispute settlement² as well as customary administration³, and is especially problematic when checks and balances (such as procedures to depose malfunctioning chiefs) have eroded. Customary justice systems, like state justice systems therefore, need to be harnessed against elite capture, incorporating proper safe-guards, effective participation in norm formation, and guarantees for impartiality of adjudicators.

A second issue is that customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions. A typical example is where customary justice systems lack gender equality and violate rights of non-discrimination. Customary systems are widely regarded as patriarchal, and therefore 'systematically deny women's rights to assets or opportunities' (Chirayath, Sage, and Woolcock 2005:4). This critique is levelled both against processes of customary dispute settlement and customary administration. Dispute settlement issues include that courts may lack female judges, women face cultural impediments to participate in court debates, and in some cases are even required to have their interests represented by their husbands or male relatives. Customary administration issues include that most leadership positions are held by men and that land ownership is often vested in men, while women exercise only derived rights. Such norms and practices operate to create a gender bias in, for instance, cases of inheritance and divorce. Some studies see the gender bias of customary law as an incorrigible trait, and advocate for a complete disengagement with customary law (Khadiagala 2001); (Whitehead and Tsikata 2003). Others reason that customary systems will not disappear in the near future, and therefore the issue of reform should be taken seriously (cf. Nyamu-Musembi 2003:27). The latter view is well received by legal reformers.

A third problem is that customary systems are deemed of limited effect in stimulating economic development. This view has been debated since the colonial period, but is now commonly linked to the Peruvian economist Hernando de Soto. He argues that most property and businesses of the poor are regulated in informal (non-state) normative systems and are not formally recognized by state law. This excludes them from participation in larger markets and hampers their access to formal loans (De Soto 2001). De Soto thus propounds the idea of finding bridges between informal non-state property arrangements and an accessible system of formal state law (ibid).

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.

1.2 The nature of customary justice systems

If interventions aimed at improving the operation of customary justice systems are to be effective, donors must understand and address the complex nature of these systems. Central to this complexity is the difficulty in identifying the appropriate norm that applies to certain behavior or to a dispute at hand. Importantly, living customary law differs from written customary law such as that

² According to Nader, in a setting of mediated or negotiated dispute settlement domination by existing power holders can be detrimental to the poor and weak, see (Nader 2001).

³ The danger of elite capture has been widely recognized for instance in studies dealing with customary land management. See a.o. (Amanor 2001); (Amanor 1999); (Berry 2001); (Carney and Watts 1990); (Daley and Hobley 2005); (Juul and Lund 2002); (Oomen 2005); (Peters 2002); (Ribot 2001); (Whitehead and Tsikata 2003); (Woodhouse 2003).

found in codified texts, judicial case law, or textbooks written by anthropologists. While written versions provide legal certainty and accessibility to customary law, they have a tendency to unify, simplify and freeze such law, often in formal language quite different from that used in communities. This can significantly change the nature of customary norms, which are inherently dynamic. This complexity is compounded by the fact that there can be competing versions of customary norms both between and within communities. This is especially so in contexts where economic or social transformations have altered the social fabric and economic structures of the community, giving rise to competing values about, for instance, the position of women or how to distribute the proceeds of newly available lucrative land deals (Ubink 2008).

Apart from the different types and versions of customary laws, customary justice systems are particular for their flexibility and negotiability, even where norms are clear. It can be generally said that customary justice systems do not aim to resolve disputes through adjudication, deciding who wins and loses, but through mediation, seeking to facilitate a settlement that is acceptable to the parties. In this process customary norms do not serve to produce direct outcomes but are starting points for discussions leading towards settlements. Some see such negotiability and the aims towards settlement and mediation as opening up access to justice even for marginalized community members; others, however, point out that in practice not everything is negotiable and that some are in a better bargaining position than others.

Legal development donors, the state and non-state organizations often lack knowledge about the different versions of living customary norms, the negotiable nature of customary justice, and the implications this has for engagement with customary justice systems. Time and resource constraints easily result in quick studies accepting elite representations of customary law. Such accounts can overlook the fact that there are different versions of such law or that the elite version is contested. Projects that adopt such norms as their starting point may actually be strengthening the position of elites in the community while weakening the marginalized group they seek to empower. Likewise, power differentials may be strengthened where the negotiable nature of customary law is not taken into account and efforts subsequently fail to focus on harnessing weaker parties in negotiated settlement processes.

1.3 Institutional linkages and community based activities

It is possible to distinguish two important methods to improve the functioning of customary justice systems. A first approach is the development of institutional linkages between state and customary justice systems. There are three types of linkages: linkages between state and customary norms, linkages between state and customary dispute resolution mechanisms, and linkages between state and customary administration. Such linkages have the potential to incorporate human rights into customary norms, dispute resolution and administration, and to create additional checks and balances against elite capture. Linking customary and state justice systems is also seen as a means of assisting the poor to capitalize on their informally owned assets and help stimulate economic growth in customary settings.

A second approach is to target activities directly at marginalized community members. Such activities include, for example, the deployment of paralegals, legal literacy training, community mapping of local land rights, and rights education campaigns (Wojkowska 2006). Such interventions can stimulate a demand for rights within the community, as proposed by Ignatieff (2001), which can then translate into pressure on customary justice systems to better protect

human rights. They can also empower marginalized community members and reduce power imbalances and elite capture.

Community-based approaches often utilize national or international state norms and institutions. They seek to contrast the functioning of customary justice to norms of state justice by, for example, raising awareness of state justice norms, organizing debates amongst customary authorities about international human rights standards, or providing legal aid to pursue litigation of customary abuses in state courts. Such strategies thus try to improve the functioning of customary justice systems by invoking the authority and power of justice institutions external to the local community. Community-based approaches can also work within the customary justice system without recourse to the state, for example through local activists who work to improve customary dispute procedures and administrative checks and balances.

Improving the functioning of customary law is difficult. The main challenge for institutional linkage approaches is to find a balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while at the same time making sufficient change to improve its functioning. Such balance is not easily found, especially in situations where elites who dominate the customary system are able to resist or even co-opt linkages to state institutions. Community-based activities are less prone to upset this balance as they are unlikely to fundamentally alter the set-up of the customary justice system. Instead, they change its functioning by involving state norms and institutions or by inducing change from within the customary system. It should be noted that donors may find it difficult to make institutional linkages an object of project-type intervention, as these are often bound up in larger historical transformations occurring within national politics and their reform is most often a national affair where international donors play only a limited role. Linkages remain important, however, because they impact on the functioning of customary justice systems and can serve as entry points for inducing change. International donors should hence be aware of existing linkages as well as of what room there is within the national or local polity to alter them as a means of affecting the functioning of customary settings. Community-based activities, by contrast, can more easily form part of donor-led reforms. Such interventions, however, cannot be seen as separate from institutional linkages as they occur within the context of established linkages between state and customary justice institutions, and often require such linkages when strengthening the functioning of customary justice through involving state justice. Community-based activities also help to improve the functioning of institutional linkages, improving the awareness of state norms and the invocation of state rights and related state dispute and administrative procedures in customary settings. Working within the customary system is equally important, therefore, as it may contribute to preventing resistance against state norms and institutions, and as opportunities for effective changes may be derived from the flexible and negotiable nature of customary justice systems.

1.4 Towards customary legal empowerment

The distribution of power plays a vital role in the functioning of customary justice systems. Bottom-up legal development approaches stress the importance of dealing with the fact that law and power are intrinsically linked, expressing this most clearly through the concept of 'legal empowerment'. This concept, which is employed (albeit with slightly different meanings) by international organizations including the Commission for Legal Empowerment of the Poor (CLEP), the United Nations Development Programme (UNDP), the World Bank (WB), the United States Agency for International Development (USAID), and the Food and

Agricultural Organisation of the UN (FAO), captures the possibility that legal tools can be used to empower marginalized citizens and attain greater control over the decisions and processes that affect their lives (cf. Asian Development Bank 2001); (Commission on Legal Empowerment of the Poor 2008); (Cotula 2007); (Golub 2005); (USAID 2007). Legal empowerment could also refer to activities undertaken to tackle power asymmetries that undermine the effective functioning of legal tools for marginalized citizens, preventing access to justice and ultimately their development (Cotula 2007); (Tuori 1997).

Addressing problems in customary justice systems involves a form of legal empowerment. Organizations working on community-based activities have experimented with borrowing from state law attempts at legal empowerment, employing a combination of education and action through enhancing awareness, improving legal aid, and advocating for better rights (Asian Development Bank 2001). It is important to recognize, however, that rights awareness, legal aid and rights advocacy may require rethinking when undertaken in a context of customary justice systems. Often such activities refer to state law: awareness about human rights or national legislation, legal aid to pursue action in state courts or advocacy to obtain better legal protection under national legislation. However, it is possible to envisage customary legal awareness, customary legal aid or customary rights advocacy that focuses on the norms and institutions in the customary system to press for favourable change from within.

Improving the functioning of customary law hence requires a particular kind of legal empowerment. This could be captured under the concept of 'Customary Legal Empowerment', defined as processes that 1) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members and integrating safeguards aimed at protecting the rights and security of marginalized community members and/or 2) improve the ability of marginalized community members to make use of customary justice systems to uphold their rights and obtain outcomes that are fair and equitable.

2. 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) are undertaking 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 will provide broad insights into the notion of and potential for customary legal empowerment. This will help 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 will help to verify whether they can serve as 'best practices' for customary legal empowerment of marginalized groups in other countries and situations.

2.1 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).⁴ 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.

2.2 Customary law

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.⁵ 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.⁶ The indigenous inhabitants were only allowed to live in the ‘native reserves’, administered by traditional authorities, under supervision of colonial administrators.

The recognition of traditional authorities is regulated under the Traditional Authorities Act, 25 of 2000. 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,

⁴ 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 percent of the population (Hunter 2004:1). Subramanian claims that some 74 percent of all potentially arable land was, at independence, owned by white commercial farmers, who comprised less than two percent of the population (Subramanian 1998:247). Breytenbach (2004:54-5) claims that about 50 percent of all land went to white farmers and less than 43 percent went to black farmers. Despite the huge area of land expropriated by white settlers, only approximately ten percent of the Namibian population was directly affected by colonial land-grabbing (Hunter 2004:3).

⁵ Article 19: *Every person shall be entitled to enjoy, practise, 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.*

⁶ Namibia is a country of extreme ecological constraints, with only eight percent 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).

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.

The Traditional Authorities Act outlines the 'powers, duties and functions of traditional authorities and members thereof'. These include 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). With regard to the position of women, the Act considers it a duty of traditional authority members to 'promote affirmative action (...) as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership' (sec 3(1)(g)).

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 is expected to come into operation soon.

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.

2.3 Position of women

Gender is another field where inequality clearly manifests itself. Despite the standard of equality in international, regional and domestic legal instruments,⁷

⁷ 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

'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).⁸ 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.⁹ 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).

3. Changing the landscape of customary law

This research is concerned with three initiatives undertaken in Namibia to enhance the functioning of customary law and traditional leadership. As described below, the first two reforms can be understood as aiming for internal changes in customary law and administration, while the latter creates a new linkage between the state and the customary realm.

3.1 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, one of the traditional communities in Owambo, 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

Declaration of Human Rights (1948) as well as article 2 of the African Charter on Human and Peoples' Rights (1981).

⁸ 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).

⁹ For various essays dealing with the topic of gender equality and customary law in Namibia see (Ruppel 2008).

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.

3.2 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 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.¹⁰

Recently, the Council of Traditional Leaders resolved that all traditional communities embark on such a self-stating process.¹¹ 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.

¹⁰ 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).

¹¹ Most communities have honored the resolution of the Council and many have completed their self-statements; others are debating drafts.

3.3 The Communal Land Reform Act, 5 of 2002

In 2002 the Communal Land Reform Act was promulgated.¹² This Act provides for the establishment of Communal Land Boards,¹³ whose functions are (1) to exercise control over the allocation of customary land rights by traditional leaders; (2) to decide on applications for rights of leaseholds; and (3) to register customary land rights as well as rights of leasehold.¹⁴ This research focuses on two of the Act's provisions dealing with the position of widows. Section 26 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 for this reallocation no compensation may be demanded or provided. These provisions are meant to counteract the traditional practice whereby family members of the husband chase the widow out of the house and off the land she used to live on with her husband. It also prohibits the practice whereby a widow had to repay the headman to be allowed to remain on the land. They confirm similar provisions in the self-statements of Owambo.

4. Research design and strategy

This research project analyzes three customary legal empowerment initiatives that have been undertaken in Namibia to improve the functioning of customary law and traditional leadership:

1. the initiative to enhance the participation of women in traditional political and judicial administration in Uukwambi Traditional Authority;
2. the self-statements undertaken in Owambo in general, and in Uukwambi in particular;
3. the provisions in the Communal Land Reform Act regarding widows' rights to land.

¹² The Act came into effect on 1 March 2003.

¹³ Twelve Communal Land Boards have been established in the regional capitals. Namibia consists of thirteen regions, but one region contains no communal areas. The Communal Land Boards consist of one representative from each of the Traditional Authorities in the board's area, one from the farming community, one or two regional officers, two women farmers, two other women with "expertise relevant to the functions of a board", four staff members in the Public Service, and if applicable, one person nominated by the conservancy (sec. 4).

¹⁴ The CLRA tries to regulate the large-scale fencing off of commonage grazing land, which negatively affects the livelihoods of poor households. Registration of land areas larger than 20 hectares needs the written approval of the Minister of Lands, Resettlement and Rehabilitation. Many of these areas are fenced off, a practice that is prohibited under the CLRA (section 18 and 44). Customary law traditionally allowed households to exert exclusive claims only over residential land and cropland around the homestead (Devereux 1996:19), and in some areas also over smaller plots of grazing land near the homestead. The rest of the land is regarded as commonage grazing land. Despite this regulatory structure, "Namibia has seen a *de facto* privatization of its communal rangelands on an unprecedented scale since independence" (Devereux 1996:18, cf. (Melber 2005:136). This privatization is done through the erection of 'illegal fences', which allow rich farmers to retreat into their 'privatized' enclosures when the commonage grazing area becomes depleted (Devereux 1996:18). This strategy should be understood in the context of increasing competition over grazing and water supplies. The fencing off of large portions of the commonage for grazing of private life stock is an important factor contributing to the marginality of poor households. The fencing is being done by people with alternative income generating activities, either off-farm or on freehold farms. It is common knowledge in Namibia that many higher-level politicians are involved in fencing activities (Melber 2005:137; cf. (Subramanian 1998:251); (Werner 2003:19). The role of traditional leaders is ambivalent. In some areas, they consent to the fencing off, in exchange for a handsome profit and / or because they do not deem it wise to refuse these 'big men'. In other areas traditional leaders are trying to prevent the erection of fences or to remove existing fences, with varying success. According to Devereux (1996:20) fencing is undermining the political legitimacy of traditional leaders.

It will study to what extent these 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 will look at awareness, behavior and perceptions among community members.

4.1 Research goal

To improve the functioning of customary justice systems so as to empower users and better protect the rights of vulnerable and marginalized groups.

4.2 Outcome

To generate new knowledge and data concerning the possibilities and limitations of induced customary legal empowerment processes aimed at enhancing the alignment of customary justice systems with constitutional provisions and human rights standards of gender equality.

4.3 Central research questions

1. a) 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?
b) Can these three initiatives be classified as Customary Legal Empowerment processes?
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?

4.4 Outputs

1. The creation of useful qualitative and quantitative data, knowledge, and insights relating to processes of customary legal empowerment;
2. Publications that accurately reflect data collected and the experience of rural villagers with customary justice systems and customary legal empowerment processes: a) research paper for web publication; b) paper for edited volume on the links between legal empowerment and customary justice systems; c) one or two articles submitted to academic journals;
3. Presentation and dissemination of field results at a media briefing in Windhoek;
4. Presentation and dissemination of publications at international conferences for academics, policy makers and practitioners.

4.5 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 with traditional authority structures. For comparative purposes, it will also look at three villages in Ondonga Traditional Authority where female leadership is still a rare phenomenon.

4.6 Research design and methodology

The researcher will combine qualitative and quantitative research methods, including:

4.6.1 *Semi-structured interviews*

At the commencement, middle, and possibly at the end of the project, semi-structured interviews will be held with key stakeholders in Windhoek during three one-week visits. This will include stakeholders from academia, government, donors, NGOs, as well as consultants. This will help to provide accurate and up-to date knowledge regarding customary law and traditional authorities in Owambo, and with regard to the three change processes to be analyzed.

During a four month field mission to northern Namibia, semi-structured interviews will be held with informants and respondents in nine villages in Uukwambi Traditional Authority and in three villages in Ondonga Traditional Authority. The villages will be selected on the basis of the presence or absence of female traditional leaders. Contacts are 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 will be held with the headman or headwoman. In some villages, additional, interviews will be held with women representatives.

Interviews will also be 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.

4.6.2 *Focus-group discussions*

During the project, approximately six focus group discussions will be held, involving (i) the Oshana Community Voice Members of WAD (ii) four random grouping 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 a Uukwambi village.

4.6.3 Participatory observation

To complement the above methods, the researcher will be 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 will participate in a four-day course for Communal Land Board members of Oshana and Omusati Regions.

4.6.4 Survey

A research team in Namibia, consisting of one supervisor and three interviewers, will administer a survey designed to explore issues associated with access to, participation in and satisfaction with the customary justice system. A draft survey will be developed by the researcher for which the qualitative data will serve as a knowledge base. The questionnaire will be translated into Oshivambo by the research supervisor and tested with approximately five respondents who meet the participant criteria. The research supervisor will provide the researcher with recommendations for changes to the draft survey. The researcher and the research supervisor will together undertake to train the three interviewers who will administer the survey. On the basis of the final survey, structured interviews will be held with 18 individuals in 12 villages (for a total of 216 people). Interviewees must be above 20 years of age, and the aim is to include approximately 50 percent women and 50 percent men. Nine villages will be selected in Uukwambi Traditional Authority and three villages in Ondonga Traditional Authority. The sampling methodology will be 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 will be analyzed using SPSS, a computer program for statistical analysis.

4.7 Management Arrangements

The project will be managed by a Project Manager (based in Namibia) with oversight from the Senior Research Officer (Geneva), Junior Research Officer (Rome) and the Director of Research and Policy (Rome). Research activities will be carried out by the senior researcher, in cooperation with local partners.

4.8 Project management team

Janine Ubink (Van Vollenhoven Institute, Leiden University)

Dr. Janine Ubink is a Senior Lecturer at the Van Vollenhoven Institute. She holds a Bachelor of Law together with a Master of international Law from Leiden University, the Netherlands. She wrote her PhD about customary land management in Ghana. Her areas of specialization include customary law; traditional leadership; land tenure; legal anthropology; and legal empowerment. Her regional focus is on Africa, but she has also been involved in comparative research in Africa, Asia and Latin America. From 2010 she has held the position of a Hauser Global Faculty Professor at New York University, School of Law.

Erica Harper (IDLO)

Dr. Erica Harper is a Senior Research Officer for IDLO, with a Bachelor of Commerce and Bachelor of Laws (Hons) (Macquarie University, Australia) and a Ph.D (University of Melbourne, Australia). Her areas of specialization include post-conflict judicial

rehabilitation; international criminal law and transitional justice; and alternative and customary dispute resolution. Prior to joining IDLO, Dr Harper was the Director of the Institute for Post-Conflict and Development Law (Geneva) and a protection officer at the United Nations High Commissioner for Refugees (Geneva, Timor Leste and the Philippines). Her working languages include English, French and Bahasa Indonesia.

Chris Morris (IDLO)

Chris Morris is a Legal Research Officer with IDLO. An Australian-qualified lawyer, he holds a Bachelor of Laws (Hons) and Bachelor of Arts (Hons) from Monash University in Melbourne, together with a Master of Laws in International Legal Studies from New York University. He has substantial experience working on community access to justice in Indonesia with the United Nations Development Programme, and has also practiced as a solicitor with a large Australian commercial law firm. His working languages are English and Indonesian.

4.9 Partner organization

Legal Assistance Centre

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).¹⁵ 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 supports the VVI-IDLO research on customary legal empowerment in Namibia and has an interest in the research findings. The researcher will be operating 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 will provide a vital input for the research. LAC will furthermore provide research assistance for local interviews.

Women's Action for Development

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

¹⁵ The coordinator of LEAD is Willem Odendaal, who has recently started a PhD-project under supervision of prof Otto (Van Vollenhoven Institute, Leiden university (VVI)), prof Mirjam de Bruijn (African Study Centre, Leiden), and Dr Ubink (VVI).

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.

5. Monitoring and evaluation

IDLO will oversee progress of the research performed by the Project Manager. To assist with this monitoring, the Project Manager will:

- Submit a detailed work-plan;
- Provide quarterly updates summarizing progress against the workplan, identifying any issues affecting progress, and a recommended course of action for addressing those issues;
- Following the completion of the fieldwork, provide an end-term fieldwork report, with a first analysis of the research data. This report will be shared with IDLO, LAC's head office (Willem Odendaal, coordinator LEAD, and Dianne Hubbard, coordinator Gender, Research & Advocacy Project); WAD head office (Veronica de Klerk, executive director, and Helena Nashilongo, contact person for the Community Voice Members), VVI (prof Jan Michiel Otto (director), senior researchers Adriaan Bedner and Jacqueline Vel, both involved in access to justice for the poor project in Indonesia) and IDLO for input. It will additionally be shared with at least three researchers knowledgeable in the fields of customary legal empowerment, women, and land, for peer review. Researchers that will be approached to provide their comments and suggestions include:
 - > Professor Manfred Hinz, University of Namibia, expert in customary law and traditional authorities, personal involvement in the self-statements of customary law by traditional authorities, and many other issues involving traditional authorities.
 - > Dr Deborah Isser, Senior rule of law advisor at the United States Institute of Peace, Washington, expert in non-state justice systems
 - > Dr Heike Becker, University of Western Cape, expert in gender and traditional authorities in Namibia
 - > Aninka Claassens, independent researcher on customary land rights and women in South Africa.
 - > Wolfgang Werner, independent consultant, expert on land, and author of 'Protection for women in Namibia's Communal Land Reform Act: Is it working?'

Research papers resulting from the project will be peer reviewed by external experts.

6. Risk analysis and management

The following potential obstacles and strategies for their implementation have been identified.

6.1 Political instability due to the elections

Although Namibia is a politically stable country, the national elections in November 2009 brought some unrest due to a new opposition party and their use of door-to-door campaigning. This is particularly the case in the areas of Omusati

and Oshana where this research takes place. The researcher will remain apprised of the security situation and communicate any developments with IDLO project managers immediately. On a day-to-day basis, the in-field project officers will actively emphasize the non-political nature of the research.

6.2 Research assistance

The successful delivery of the project is contingent upon the principal researcher identifying suitable research assistance for the qualitative research as well as for administration of the survey. In this regard, the researcher will make use of LAC's network of research assistants. Furthermore, she will make use of the contacts of Survey Warehouse, a commercial research firm based in Windhoek.

6.3 Access to Uukwambi Traditional Authority

One way to gain access to village leaders is through the Traditional Authority of Uukwambi. If the Traditional Authority is unwilling to cooperate, this could seriously hamper the viability of the research. Interviews during the reconnaissance visit have shown that the chief of Uukwambi is a relatively progressive leader who has shown himself open to research on earlier occasions. Nevertheless, the project manager will use a careful non-threatening approach, making it clear from the beginning that she hopes that Uukwambi Traditional Authority can serve as a positive example of change. In addition, other sources of access will be explored such as the Community Voice members of WAD. Although the issue of access to the Traditional Authority of Ondonga represents similar challenges, the situation is less problematic than in Ondonga. The Traditional Authority in this area is only meant to provide comparative data, which could also come from another Traditional Authority such as the Uukwanyama Traditional Authority.

6.4 Local variation

There is a broad variation between different traditional leaders with respect to style and effectiveness of administration. In order to avoid outcomes that only apply to one or a few villages, the project manager will include a sufficient number of villages to overcome the peculiarities of individual leaders.

6.5 Flooding during the rainy season

The north of Namibia is prone to flooding during the rainy season. This has the potential to cut off entry to villages identified in the research study. To avoid the worse rains, field research will be finalized by the end of January and a 4x4 vehicle will be utilized.

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