

# Working with Customary Justice Systems: Post-Conflict and Fragile States

Erica Harper, Editor



International Development Law Organization  
Organisation Internationale de Droit du Développement

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*Senior Rule of Law Advisor*

## **International Development Law Organization (IDLO)**

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## Foreword by Jordan Ryan

Poor access to justice is a defining characteristic of many fragile and developing countries, especially those that are also recovering from conflict. For vulnerable groups — women, children, minorities, older persons, persons with disabilities, persons infected with HIV/AIDs and displaced populations — obtaining remedies and protection of their rights can be an impossible undertaking. Obstacles include prohibitive costs, language barriers, physical isolation, cultural impediments, or simply, the absence of formal justice bodies and representation services. Where individuals succeed in accessing a courtroom, they frequently find that lawyers, courts and police services lack the capacity and incentives to resolve their case fairly and equitably. Corruption and impunity may also have eroded the population's confidence in the state's willingness to ensure the speedy and fair administration of justice and to provide basic legal guarantees in line with human rights norms and standards.

In such environments, communities and individuals often rely on customary justice systems as their principal route to a remedy. These systems, which constantly evolve as values change over time, are part of the social, cultural and political fabric of community life. As a result, they can provide timely and effective resolutions to disputes, facilitate expeditious reconciliation between parties, and also provide a framework for community-level law and order. However, some customary justice mechanisms can also be discriminatory and exclusionary, and can contribute to human rights violations. It is therefore vital that the capacity of customary institutions — just like their formal counterparts — are strengthened in order to extend protection and deliver justice.

While mindful of the sensitivities of engaging with the informal or non-state justice systems, there is a growing international consensus on the importance of engaging both formal and informal or customary systems to strengthen the rule of law in a way that is contextually relevant, accessible and equitable.

6 Against this background, the case studies in this volume offer a valuable addition to global research and knowledge in this area. They provide practical insight into maximizing programming impact and using rights-based approaches to deliver better justice outcomes in customary and pluralist contexts. The lessons learned and best practices should assist readers in overcoming new problems and protection risks in a variety of fragile and conflict contexts. The volume deliberately avoids specific or prescriptive programming guidance, but underscores that each informal justice system and its respective environment are unique and that context-specific responses must be developed. Most importantly, in line with the approach of the United Nations Development Programme, it addresses how customary justice can strengthen the rule of law and therefore support conflict prevention initiatives. This can foster a transition from crisis to sustainable peace and development.

On a practical note, in Somaliland, IDLO and UNDP have worked together to analyse the opportunities and challenges posed by harmonization, especially to advance women's rights. The result of this collaboration is innovative programming that focuses on strengthening the capacities of ordinary community members and groups to understand and influence the values and procedures being used to judge them and their peers in customary settings. UNDP Somalia's

emerging findings indicate that this legal empowerment approach avoids both entrenching negative customary norms in formal law and the certain potential negative aspects of formal justice, such as excessive delays.

I am very pleased to welcome this publication, which advances prior research and current efforts in this critical area of rule of law assistance. This IDLO publication will serve as an important tool in assisting development actors to engage in advancing justice, both formal and informal.



**Jordan Ryan**  
Assistant Administrator and Director  
Bureau for Crisis Prevention and Recovery



## Message from the Director of Research, Policy & Strategic Initiatives, IDLO

Rule of law practitioners from around the world are keenly aware that customary justice systems are a potentially important means of improving access to justice. Whether by choice or because they have no alternative options, the world's poor overwhelmingly favor customary justice systems over their formal counterparts. While the quality and equity of the outcomes delivered may vary, the sheer volume of outcomes suggests that there is significant opportunity to enhance legal empowerment by improving the quality of the justice processes that disadvantaged individuals and communities already use. At the same time, it is clear that customary justice systems can also restrict access to justice, particularly for marginalized and vulnerable groups. These processes can reinforce power imbalances, and outcomes can contravene human rights and justice standards. A central conundrum of engaging with customary justice systems is therefore how to support their many important positive aspects and enhance their capacity to protect the human rights of the most vulnerable members of society, notably women, minorities, indigenous peoples, disabled people and children. Despite these obvious linkages, the question of the role that customary justice systems should play in rule of law development programming remains poorly understood. In particular, there is scant knowledge on the extent to which assistance has translated into behavioral change among actors involved or on methodologies for evaluating impact and drawing lessons for future activities.

It was with these questions in mind that the IDLO Legal Empowerment and Customary Law Research Grants Program was developed: this volume showcases research conducted under this program. It features chapters on initiatives implemented in Namibia, Rwanda, Somalia, United Republic of Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. The collection aims to assist readers develop a better understanding of the relationship between customary justice and the legal empowerment of individuals using such systems while identifying possible entry points for engaging with customary justice systems in other countries. A key lesson learned is that more effort and resources need to be invested in similar evaluative studies — geared towards a critical analysis of what went right or wrong, and why — at all times focusing on the key question of 'how have justice outcomes changed'? Not only are the perspectives and experiences of poor and vulnerable populations important tools by which to guide effective interventions, but based on the results of such assessments, international agencies and donors may find better ways of supporting existing initiatives without compromising internal momentum for reform. Based on such information and insights, it is expected that the rule of law community of practice will be better placed to develop empowerment tools to enable people living in poverty to improve the justice outcomes available to them, and hence become agents of change who bring about improvements in their own lives.

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I wish to thank the IDLO staff who have dedicated their time and energy to this project over the past two years, particularly Erica Harper (Senior Rule of Law Advisor), Ilaria Bottigliero (Senior Researcher), Christopher Morris (Program Officer), Francesca Pispisa (Communications Officer), and Georgina Penman (Publications Consultant).



**Thomas F. McInerney**

*International Development Law Organization*

## List of acronyms

Alternative Dispute Resolution	ADR
Association for Women in Legal Careers	AMMCJ
Association of Women, Law and Development	MULEIDE
Bougainville Interim Government	BIG
Center for Research in Economic Development (University of Namur)	CRED
Centre for Applied Social Sciences	CASS
Centre for Legal and Judicial Training	CFJJ
Centre for the Study of African Economies	CSAE
Commission on Legal Empowerment of the Poor	CLEP
Committee on the Elimination of Discrimination Against Women	CEDAW
Communal Land Boards	CLBs
Community Legal Activators	CLA
Community-Based Natural Resource Management	CBNRM
<i>Convention on the Elimination of All Forms of Discrimination against Women 1979</i>	CEDAW
Food and Agriculture Organization of the United Nations	FAO
Government of the Republic of Rwanda	GoR
Gross Domestic Product	GDP
Human Rights Focus	HURIFO
Improving Institutions for Growth	iiG
Intergovernmental Agency on Development	IGAD
Internally Displaced Persons	IDPs
International Council on Human Rights Policy	ICHR
International Crisis Group	ICG
International Development Law Organization	IDLO
International Fund for Agricultural Development	IFAD
International Fund for Agricultural Development	IFAD
International Institute for Environment and Development	IIED
International Legal Assistance Consortium	ILAC
Judicature and Application of Laws Act 1961	JALA
Justice of the Peace	JP
Justice, Law and Order Sector	JLOS
Land and Equity Movement in Uganda	LEMU
<i>Land Marriage Act 1971</i>	LMA
Law and Human Rights Centre	LHRC
Lord's Resistance Army	LRA
Micro Level Analysis of Violence Conflict	MICROCON
Ministry of Environment and Lands, Rwanda	MINELA
Ministry of Finance and Economic Planning, Rwanda	Minecofin
Ministry of Lands, Housing and Urban Development, Uganda	MLHD
National Institute for Statistics of Rwanda	NISR
National Women's Council	NWC

Non-governmental Organizations	NGO
PEACE Foundation Melanesia (now the Bougainville Centre for Peace and Reconciliation)	PFM
People and Community Empowerment	PEACE
Poverty and Social Impact Analysis	PSIA
Rural Association for Mutual Assistance	ORAM
Sexual Assault Referral Centre	SARC
South West Africa National Union	SWANU
South West African People's Organisation	SWAPO
Sustainable Development Institute	SDI
Tanzanian Women Lawyer's Association	TAWLA
Uganda Land Alliance	ULA
United Kingdom Department for International Development	DFID
United Nations Conference Centre	UNCC
United Nations Development Fund for Women	UNIFEM
United Nations Development Programme	UNDP
United Nations High Commissioner for Refugees	UNHCR
United States Institute of Peace	USIP
Women Advancement Trust	WAT
Women's Legal Aid Centre	WLAC

## Introduction

IDLO's engagement in legal empowerment programming spans over 15 years; like many organizations, such activities were not labeled 'empowerment' until quite recently, but instead fell under the rubric of access to justice or rule of law reform. IDLO has also been engaged, from a research perspective, in the discourse on legal pluralism and, from a program perspective, in the customary law sector. It was during the Organization's work in post-tsunami Aceh, Indonesia, that the programmatic linkages between advancing legal empowerment and engaging with customary justice systems were fully explored, and that the ideas underpinning this volume started to evolve.

Following the 2004 Indian Ocean tsunami, Aceh's legal context was at a complex crossroads of an emerging set of Islamic laws and legal institutions, an unprecedented natural disaster, a fledgling peace process, and a regional government with new and increased autonomy. Although it was clear that Aceh's legal institutions needed to play a key role in the post-tsunami and post-conflict rehabilitation process, they were far from fully developed. Thirty years of separatist conflict had led to court closures and the departure of court personnel, both of which had contributed to a widespread lack of confidence in and chronic under-utilization of the legal system.

In developing a program to support the resolution of tsunami-related disputes, most of which concerned land, inheritance and guardianship, it came as somewhat of a surprise when the *shari'a* court, the beneficiaries of the proposed assistance program, counseled against a court-focused approach and lobbied instead for a strengthening of customary dispute resolution mechanisms. Staff explained that the courts lacked the capacity, and the judges the knowledge, to process a large number of cases. Further, consistent with Acehnese culture, disputes were being resolved at the community level, and it was unlikely that improvements to the formal sector would alter this. It was proposed that IDLO could most usefully assist by ensuring that disputes mediated through customary law were resolved equitably and in accordance with due process standards. If this occurred, disputes would less likely be appealed to the courts, and a flood of tsunami-related cases could be avoided. IDLO's field research supported this assessment. It became clear that, for the poor and marginalized, customary structures were the operative framework for protecting legal rights and adjudicating disputes. Empowerment had to occur at this level if it was to have a substantive and lasting impact. The lesson learned from this initiative was the criticality of engaging in a manner that responds to the legal needs of a beneficiary group within the context that is most relevant to them. First, in environments where a rule of law culture is weak or emerging, developing ideas about justice at the grassroots level can promote access to justice and assist in the rehabilitation of the formal justice system, and can also form an integral part of a broader strategy supporting group security, peace building and community development. Second, where the objective is to assist the groups that are most vulnerable to exploitation and least likely to be able to secure just outcomes — the poor and marginalized — interventions must occur at the level where justice is actually being dispensed.

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At the same time that IDLO's program in Aceh was being rolled out, a burgeoning discourse on legal empowerment was rapidly evolving. It was unclear, however, where and how customary justice fitted into this debate. The Commission on Legal Empowerment of the Poor advocated a deregulation of legal

services through, for example, customary justice systems.<sup>1</sup> Similarly, the United Nations Secretary-General's Report to the General Assembly on Legal Empowerment noted that "[m]easures to improve access to justice should focus on developing low-cost justice delivery models, taking into account ... the efficacy of informal and alternative dispute resolution mechanisms."<sup>2</sup> However, this discussion proffered little practical guidance on how to engage at the customary level. Moreover, the approaches put forward failed to address critical questions such as how issues of political economy in the context of customary justice were to be dealt with, how customary legal systems could be strengthened while ensuring that this did not formalize or solidify inequitable or rights-abrogating practices, and what might be the appropriate role for development actors to play, given the importance of empowerment programming being a locally owned and managed process.

A review of the lessons learned from programming efforts does little to fill such gaps. Engagement with customary legal systems is a rapidly emerging field, and there have been few comprehensive or empirically-driven efforts that reflect on or evaluate its impact. Further, a review of the policy and programmatic landscape reveals that interventions have concentrated more on technocratic activities such as reforming customary laws to strengthen procedural or substantive protections, or modifying the state-customary interface with a view to regulating or harmonizing the two frameworks. Programs have thus tended to reflect orthodox theories of reform rather than be grounded in empowerment-based approaches.

In response to these and other questions, in 2009, IDLO commenced an ambitious work program examining the impact effectiveness of legal empowerment and access to justice programming. A key focus area was customary justice systems. The objective was to obtain insight into what programming at the customary level looks like and to better understand the linkages and causalities between empowerment programming and the customary legal framework: where might synergies and opportunities be identified and what lessons can be learned about the effectiveness of programming undertaken to date? With such knowledge, IDLO hoped to contribute to the development of an evidence base on which program decision-making might be guided, to provoke critical analysis on the objectives of efforts to engage with customary justice systems, and to gain a better insight into the conditions that might enable more effective interventions.

One facet of this program was the "Legal Empowerment and Customary Law Research Grants"; seven bursaries were awarded to scholar-practitioners to develop and conduct empirically-grounded and evidence-based research programs to evaluate the impact of an empowerment-based initiative involving customary justice. In each case, an outcome mapping methodology using quantitative and qualitative data collection methods was employed to answer the basic question: "How have justice outcomes changed as a result of the intervention?" This approach reflects a move away from traditional evaluation methodologies that focus on relatively easy-to-measure data such as numbers of persons trained or numbers of information resources disseminated, and then extrapolating conclusions about whether access to justice has improved, towards a direct examination of behavioral changes and outcomes.

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The research projects were not selected according to thematic or geographic criteria, although each deals with a post-conflict or fragile state. Instead, priority was given to interventions that tested innovative ideas on how to advance legal empowerment at the customary level and to solicit a mix of state, international and locally-driven reforms. Not all of the interventions evaluated can be classified as employing a strict empowerment approach: the Somalia case study, for example, explores efforts by local leaders to reform customary law and to bring it into alignment with *shari'a* and international human rights standards. This was a 'bottom-up' initiative in that it evolved from and was driven, almost exclusively, by community leaders with very little external influence or control by either the central government or the international community. The evaluation, however, found a close causal connection between the intervention's impact and its failure to engage or galvanize the intended beneficiaries of the reforms — the users of the customary system, raising important questions about how far down the formal-grassroots hierarchy must an intervention descend before it can be classified as 'legal

empowerment'. Other interventions clearly employed a bottom-up methodology, but implemented by an external party; in Mozambique and the United Republic of Tanzania, Amrita Kapur assesses the work of grassroots legal aid organizations towards empowering women to leave the customary sphere and have their disputes resolved by the courts. This case study demonstrates the scope for promoting more equitable outcomes for users of customary systems, and sparks an important discussion on the conditions that need to be present for legal empowerment initiatives to take root and the extent to which, if at all, such conditions can be externally generated.

The basic message that can be gleaned from the case studies in this volume is that there are no easy answers when it comes to advancing empowerment objectives in the context of customary justice. Such systems are, by their nature, messy, unpredictable and political. Further, that what types of interventions will yield impact is contingent on a range of situation-specific factors including those not limited to justice indicators. The Namibia and Somalia case studies analyze interventions with similar objectives and methodologies, but with markedly differing levels of impact. The relatively modest achievements in Somalia can be connected to some extent to decisions that could have been made differently with the benefit of hindsight: the intervention failed to address shortcomings in the customary legal system's relationship with the courts, as well as issues concerning dissemination and physical security. The reforms in Namibia, by contrast, had a high level of sustained impact. But this was not necessarily because the interveners stumbled upon the 'correct' model, whose application in Somalia would have resulted in a different outcome. As the analysis demonstrates, what occurred in Namibia had more to do with a coincidence of context-specific enabling factors including post-independence political momentum, regional authorities carving out their relevance through a discourse of gender equality, and individual, charismatic change agents. Similarly, the Papua New Guinea study concludes that the achievements made in terms of women being brought into the ranks of customary leadership were not just the result of a soundly executed reform program, but congenitally related to the weakened and uncertain state of traditional power structures, which in turn was due to the impacts of colonization, extractive industry and a long-running civil conflict. Clearly, these types of enabling conditions cannot be manufactured, which leaves questions about the criteria on which intervention decisions should be based.

The purpose of this volume is not to offer prescriptive advice on how interventions should be structured nor on what types of interventions are most likely to yield sustainable impact. The case studies illustrate that what is effective is situation-specific and contingent upon a variety of factors including, among others, social norms, the presence and strength of a rule of law culture, socio-economic realities and national and geo-politics. The ability of development practitioners to make strategic decisions on what is likely to be effective requires that they possess an in-depth knowledge of the target country, its people, the customary legal systems, as well as the theories and practicalities pertaining to legal empowerment and customary justice programming. This volume constitutes a tool in this process by exploring and evaluating a range of interventions that might be tweaked to suit a given situation. Such an approach is labor-intensive, makes little use of economies of scale, and is therefore unlikely to sit easily with donor expectations and the programming approaches of many agencies. Limited budgets and pressure to implement quickly leaves little time for landscape research and encourages programmatic replication of 'best practices'. It may be that a middle ground between the programming approaches that are most desirable and what is realistically achievable needs to be found. Empirical evaluations and analyses of past efforts need to be included in toolbox of knowledge resources that reformers draw upon as they design, pilot, adjust and implement more effective interventions; it is hoped that the narratives contained in this volume can be a valuable contribution.

## footnotes

<sup>1</sup> Commission on the Legal Empowerment of the Poor and the United Nations Development Programme, *Making the Law*

*Work for Everyone: Volume 1 Report of the Commission on the Legal Empowerment of the Poor* (2008) 63-64.

<sup>2</sup> United Nations General Assembly, *Report*

*of the Secretary General: Legal Empowerment of the Poor and Eradication of Poverty* (2009) A/64/133 [24].



# Bush Justice in Bougainville: Mediating Change by Challenging the Custodianship of Custom

Naomi Johnstone

## Executive summary

Since 1994, the Papua New Guinean non-governmental organization, People and Community Empowerment Foundation Melanesia, has delivered dispute resolution training aimed at strengthening customary justice systems in Bougainville. Research was conducted in 2010 to assess whether and to what extent such training has been successful in enhancing the legal empowerment of marginalized groups such as women. The research focused on six access to justice indicators: participation and satisfaction in dispute resolution; protection of legal rights; mitigation of power asymmetries; operation of neutrality and bias in decision-making; balance of individual and community rights; and the influence of women in dispute resolution decision-making. The research found that the training increased the participation and satisfaction of both men and women users of the dispute resolution system. However, by neglecting to address issues of substantive legal rights and power asymmetries, the intervention failed to enhance legal empowerment to the extent it might otherwise have done. Further, while the intervention improved the justice experience of women disputants in almost every area, it had a neutral effect on the satisfaction gap between men and women. The intervention was most successful where it transferred dispute resolution skills to women and created opportunities for them to become mediators. This enabled them to engage more effectively in internal dialogue processes and challenge the interpretation and application of discriminatory customary norms.



# 1. Custodians of custom and change: customary justice systems in Melanesia

## 1.1 Introduction

Customary justice systems are the cornerstone of dispute resolution for the poor and disadvantaged in developing countries, with some studies estimating that 80 percent of conflicts are resolved through such fora.<sup>2</sup> This is particularly the case in conflict and post-conflict environments, where the formal justice system is often inoperative or inaccessible. In the Melanesian context, customary justice systems have many advantages: they are locally controlled and operated, which makes them geographically and economically accessible, and they enjoy strong local legitimacy, making them a natural partner for disputants in settings isolated from the state system. Moreover, the value placed on restoring community harmony and consensus-based decision-making responds to the needs of tightly knit communities whose members share close bonds of social and economic dependency and who are experiencing conflict-related distrust and trauma. Customary justice systems in Melanesia, however, also share several disadvantages with customary systems elsewhere. They are largely unregulated and often lack procedural safeguards and accountability. As a result, they are more susceptible to bias and elite capture, as well as to producing inconsistent results and to perpetuating power asymmetries. This exposes marginalized community members to coercive solutions that can be violent, discriminatory and/or exclusionary.

These challenges and strengths, combined with the centrality of customary dispute resolution for poor and marginalized populations, make efforts to engage with them critical to any access to justice or legal empowerment strategy. A key challenge is how to advance these goals in a way that is locally legitimate and preserves the positive aspects of the customary justice system. It is argued that the contested, dynamic and flexible nature of culture and custom is a critical factor in legal empowerment efforts. These characteristics make it possible for users to re-examine customary norms and distinguish between discriminatory and non-discriminatory aspects of custom.<sup>3</sup>

In recent years, various actors have trialled different techniques for reforming customary justice systems. One strategy has been the provision of conflict resolution and mediation training based on local cultural philosophies but delivered in a manner that facilitates local discourse on principles of gender equality and human rights. This approach was adopted by PEACE (People and Community Empowerment) Foundation Melanesia (now the Bougainville Centre for Peace and Reconciliation, henceforth, PFM) a Papua New Guinean non-government organization (NGO), which operated during and following the civil conflict in Bougainville.<sup>4</sup> While PFM's work is broadly accepted as having enhanced grassroots peace building, no assessment has been carried out on the extent to which these activities have contributed to legal empowerment outcomes, particularly for marginalized user groups.

16 This chapter begins by discussing the nature of customary justice systems in Melanesia and how they uphold or infringe upon the rights of vulnerable groups such as women. It then theorizes about how legal empowerment might be promoted in the context of customary justice. The work conducted by PFM in Bougainville is described, followed by the results of impact evaluation research undertaken in May 2010. Finally, lessons learned and conclusions are outlined.

## 1.2 Customary law, a Melanesian *mélange*

While customary justice systems operate with significant variety, three essential characteristics can be identified in the Melanesian context: dynamism, flexibility and an emphasis on social harmony.

First, customary law, while often derived from tradition, is dynamic and constantly developing in response to changing social, economic, political and security conditions.<sup>5</sup> It has adapted over centuries; the most influential forces of change have been colonial contact and Christianity.<sup>6</sup> More recent influences, such as decolonization, civil conflict, emigration and globalization, have all affected, and continue to affect how customary legal systems operate. These internal and external factors have modified the content of customary law as well as its application and standing within

society. If it was once a discrete and coherent system, this is no longer the case in the Pacific. Customary leaders must now deal with a variety of complex social issues, such as commercial sexual exploitation and criminality linked to alcohol and drug abuse. At the same time, as a result of urbanization and trends toward individual enterprise, in some areas, the authority and strength of customary dispute resolution have been eroded and leaders have lost customary knowledge and dispute resolution skills that were common to earlier generations.<sup>7</sup>

A closely related feature of customary law is its inherent flexibility. In areas where customary law is strong, there are a multitude of norms that are applied contextually and with qualifications.<sup>8</sup> This flexibility allows leaders to craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute. However it also means that customary systems may lack consistency and predictability. Also, rules may be applied differently to separate groups, resulting in arbitrary or discriminatory solutions. Moreover, such flexibility and negotiability, without recognition of essential legal rights, opens entry points for bias or conflicts of interest, as well as other natural justice issues concerning a fair hearing and proportionality.<sup>9</sup>

A third feature of Melanesian customary law is the centrality of social harmony to dispute resolution. Most Pacific peoples identify with a philosophy that focuses on restoring relationships and maintaining community balance. Conflict threatens this balance, and the customary justice system responds by restoring relationships between parties and offering a framework for reintegration.<sup>10</sup> One of the consequences of this is that dispute outcomes are usually compromises based on consensus and negotiation. Further, decision-making is often based less on rules and legal rights and more on local perceptions of fairness and equity, and subjective notions of a sound outcome given the specific circumstances. In such negotiation processes, the preservation of social harmony may be accorded greater importance than an individual's right to justice.<sup>11</sup> Further, power asymmetries between parties to a dispute can expose vulnerable groups to discriminatory or inequitable solutions.

These three central characteristics — dynamism, flexibility and emphasis on social harmony — can combine to become complex obstacles for individuals accessing justice through customary legal fora. The emphasis on social harmony and negotiability often contributes to a failure of the customary justice system to provide sufficient protection to vulnerable groups, particularly women. However, the dynamic and flexible nature of the customary system also offers potential for legal empowerment and reform, as exemplified in the case of gender-based violence.

In Melanesia, gender-based violence is a severe and widespread problem.<sup>12</sup> Some customary norms tolerate it: for example, in most communities, domestic violence against women is not seen as a serious issue worthy of community-level adjudication; rape is conceptualized more in terms of damage to the victim's reputation, potential marriage prospects and dowry implications than as a violation of basic human rights. Where customary systems are open to dealing with such complaints, there are few opportunities for women to participate in the hearing or resolution of their grievance, and the penalties are normally mild and unduly exonerate perpetrators.<sup>13</sup>

Flexible rules and the lack of procedural safeguards pose particular risks for women disputants in contexts of generalized gender discrimination. Outcomes are rarely consistent or predictable. Further, as a result of the emphasis on social harmony, the perspective and needs of the victim are often regarded as secondary or even overlooked. Even if victims are given the opportunity to participate in a dispute resolution process, since they can be under significant pressure to agree to solutions broadly understood to be fair and equitable,<sup>14</sup> they are vulnerable to being coerced by more powerful parties into accepting decisions that they find unsatisfactory.<sup>15</sup> This is illustrated when crimes of rape are 'resolved' by the victim being married to the perpetrator. As Wojkowska explains, while this solution may ostensibly be to protect the victim's honour and ensure the payment of a dowry, it also takes into account that marriage bonds families and communities, thus stemming the possibility of subsequent retributive violence.<sup>16</sup>

The difficulty in modifying norms and processes that discriminate against marginalized groups is related to the fact that they often operate to reinforce the power hierarchy that controls and administers customary law. As recognized by An-Na'im, powerful individuals and groups dominate the interpretation and application of customary and cultural norms, applying and manipulating them to their advantage.<sup>17</sup> Similarly, custom may be used by traditional chiefs to maintain positions of relative power; when under threat, they "assert their position as the custodians of a custom presented as unchanging and unchallengeable".<sup>18</sup> This is a reminder that such seemingly impene- trable assertions of the content or processes of custom should be seen as the exercise of contem- porary politics rather than descriptions of 'tradition'.<sup>19</sup>

On the one hand, this can be viewed as encouraging; it is not necessarily customary law or culture *per se* that is to blame for practices and outcomes that are inimical to the interests of women, but rather individuals within the system who apply, interpret and assert custom in a way that disadvan- tages them. On the other hand, any moves to displace chiefly domination of custom's interpretation, adaptation and application are likely to threaten vested interests and be strongly resisted.<sup>20</sup>

### 1.3 Calling for re-examination, not rejection

Despite the challenges faced by marginalized groups such as women in accessing justice through customary fora, research in Melanesia has shown that they largely support localized systems, even if they feel that some aspects should change to become fairer towards them.<sup>21</sup> For them, empower- ment does not require a rejection of custom, but a re-examination of norms and processes so that they "support rather than victimize women".<sup>22</sup> This would not only be the ideologically preferred solution, but also the most practicable one. In situations where the formal justice sector is inopera- tive, inaccessible or does not respond to users' needs, the only way forward may be to develop customary norms that would allow for the greater protection of vulnerable groups.

Here, the dynamic and flexible nature of customary legal systems can come into play for legal empowerment. While it is often argued that fluidity leads to discrimination and abuse, it also renders customary systems capable of change and reform. It is not clear how such change can be best facili- tated. An-Na'im asserts that powerful groups' monopoly over cultural norms should be challenged through internal cultural discourse that allows for alternative interpretations.<sup>23</sup> Others believe that allowing customary systems to evolve naturally will not necessarily bring about the changes that marginalized groups such as women require.<sup>24</sup> Nuanced interventions can initiate or accelerate this process through the injection of new ideas, skills and knowledge.<sup>25</sup> Taking again the example of gender-based violence, women may be unaware of their rights relating to due process, and to legal protection against domestic violence and rape. Since the gatekeepers of legal knowledge are often those who would benefit the least from a wide knowledge and understanding of such rights, they cannot always be relied on to disseminate such information. This underscores the risk of power inequalities being perpetuated if a purely internal process is used. Thus, while empowerment cannot be undertaken by outsiders, a carefully crafted intervention can strengthen the process.<sup>26</sup>

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Given these insights, what form should empowerment-oriented interventions take? It is well established that grafting ideas and processes borrowed from foreign legal cultures onto customary frameworks is unlikely to result in sustainable normative change.<sup>27</sup> Rather, if customary legal systems are to uphold rights, and users empowered to assert them, processes must be locally driven and owned: the 'local' will be the most powerful in influencing the interpretation and applica- tion of law, as well as in moulding attitudes.<sup>28</sup> This is particularly important when discussing efforts to advance rights notions in the Pacific, where there is considerable resistance to human rights, which are regarded by many as foreign and imposed concepts.<sup>29</sup>

One approach to such interventions is to look within customary law and draw on internal values to develop cultural legitimacy for the idea of women's rights and more broadly, individual rights.<sup>30</sup> Many argue that the failure of Pacific customary legal systems to protect women from violence marks a significant departure from the past.<sup>31</sup> They state that protective norms have been eroded,

possibly through processes of colonization and civil conflict, both of which contributed to a breakdown of customary governance mechanisms.<sup>32</sup> They advocate challenging the dominant male interpretations of custom by evoking traditional practices where women had equal status, their own ceremonies and leadership roles.<sup>33</sup> A related approach is to encourage a review of customary practices in light of underlying customary *values*. This is based on an argument, supported by many Pacific writers and leaders, that although practices may vary over time, customary values remain constant.<sup>34</sup> Where such values align with substantive or procedural human rights, they may be weaved into the cultural and customary law fabric, and hence “introduced in ways that are relevant to Pacific peoples and legitimate in terms of the peoples’ own norms”.<sup>35</sup>

In sum, each of these approaches has potential for legal empowerment and access to justice programming. Due to the contested, dynamic and flexible nature of culture and custom, in certain circumstances, actors can re-examine customary justice systems and distinguish between discriminatory and non-discriminatory aspects of custom. Appropriating processes of reinterpretation that are already recognized and approved by society is arguably a less contentious path to reform.<sup>36</sup> Nuanced and pragmatic interventions can strengthen this process in ways that empower marginalized groups such as women.

## 2. The crisis, conciliation and custom: Bougainville and the PEACE Foundation Melanesia intervention

Bougainville consists of two main islands and several atolls, which, due to colonial partitioning, are geographically, and ethnically part of the Solomon Islands but politically part of Papua New Guinea. Following World War II, Bougainville was passed to Australian colonial administration, which annexed the island to its New Guinea territories. Soon after, an agreement was entered into with the Australian mining company Conzinc Riotinto, setting into motion a chain of events that led to the establishment of the world’s then largest open cut mine. This venture led to an influx of thousands of international and mainland Papua New Guinean employees and dramatically changed the social and economic landscape of Bougainville.

The social, economic and environmental impact of the mine was a key factor precipitating the civil conflict — known locally as ‘the crisis’ — that engulfed Bougainville between 1989 and 1998. During this period, government administrative and justice sector personnel were withdrawn, and the formal justice system was essentially inoperative, leaving the population with few tools to manage conflicts and stem escalating violence. Since the new Bougainville Constitution and Autonomous Government was created in 2005, central authorities have been slowly building their capacity and legitimacy, but continue to rely heavily on civil society and customary institutions to maintain peace, order and security.<sup>37</sup> It was in this context that PFM started to conduct grassroots training on non-violent dispute resolution.

### 2.1 To the manner born: Custom and PFM mediation

In 1989, Papua New Guinea’s Attorney-General and Minister for Justice, Bernard Narokobi, established PFM based on his assessment that the formal court-based system was not adequately responsive to the needs of the Papua New Guinean people and did not empower communities to resolve their disputes as was the case before colonization. In 1994, in an effort to address some of the social consequences of the Bougainville conflict, the Bougainville Interim Government (BIG) invited PFM to conduct a conflict resolution training session focused on mediation. Participants immediately recognized the commonalities between PFM dispute resolution techniques and customary approaches to conflict resolution that emphasized values such as the preservation of community relationships and consensus-based decision-making.<sup>37</sup> Participants and local actors requested additional training, which led to the development, in cooperation with local chiefs, of a training methodology considered congruent with Bougainville customary principles and processes.

The PFM training course targeted a cross-section of community members including chiefs, women, youth, civil society leaders and church leaders of different denominations. The main objective was to build conflict resolution skills in local communities, and thus promote intra- and inter-community social harmony and local ownership over justice processes.<sup>39</sup> The “empowerment of women as equal partners” was an important and recurrent message in many of the training modules. The training aimed to equip women with the information and skills necessary to assert themselves and speak up among men and chiefs, while promoting a community-wide appreciation of women’s rights and contributions. A related goal was to facilitate greater participation in decision-making, including by women and vulnerable groups, so that outcomes would represent the perspectives, needs and expectations of the wider community, as opposed to only those of the chiefs and their followers. The modalities of the training were structured accordingly. By bringing men and women together in small working groups — a situation that pushed cultural boundaries — women were given a forum to try out their skills as mediators and decision-makers, while chiefs and other men were compelled to observe them in these roles. This facilitative space was tightly controlled through established guidelines on issues such as mutual respect, which were communicated at the beginning of the training and monitored by the facilitator.

In each village where the training was conducted, participants who demonstrated particular interest and aptitude were invited to undertake further training to become PFM training facilitators. PFM found that community members preferred trainers who understood local variations in culture, custom and language, and who could build on relationships as they put their new skills into practice. The course included components, albeit brief, on the Papua New Guinea Constitution and the formal justice system with a view to empowering facilitators to work cooperatively with the police, the community police and village court magistrates.<sup>40</sup>

It is generally agreed by both scholars and beneficiaries that PFM’s efforts had a positive impact in terms of reconciliation and peace building in Bougainville.<sup>41</sup> It has yet to be analyzed, however, whether and to what extent the intervention enhanced the legal empowerment of customary users. With a view to providing insight into this question, the following section presents the results of field research conducted by the author in nine rural villages and one urban location in Bougainville.

### 3. Taking stock: Empirical results

20 In May 2010, field research was conducted in Bougainville in order to understand the impact of the PFM intervention; specifically, whether and to what extent the intervention was able to advance legal empowerment in a way that was locally perceived to be legitimate and that preserved the positive aspects of the customary justice process. Using a subject-centric methodology, a survey was developed that included indicators designed to: i) measure users’ perceptions of the quality of justice in terms of process and outcome;<sup>42</sup> ii) test the impact of the intervention on perceived positive aspects of the customary system such as the restoration of relationships and community harmony; and iii) test whether the intervention resulted in attitudinal changes toward women and power-sharing in dispute resolution. The survey was administered to 394 people in Bougainville communities where PFM training had taken place. The responses of individuals who had resolved a dispute through a customary mediator<sup>43</sup> and who had participated in PFM training were compared to responses from individuals whose disputes were resolved by a customary mediator who had not participated in PFM training.<sup>44</sup>

The research was directed towards gauging the impact of the intervention for women’s legal empowerment. Accordingly, each area of quantitative investigation was statistically tested for gender differences. This was supplemented by qualitative data from 25 interviews with disputants, women members of civil society, mediators, and trained and untrained chiefs.

The survey results are divided into tables found below: satisfaction and participation in the dispute resolution process; perceptions of objectivity, power and rights in the dispute resolution process;

incidence of a resolution or outcome to the dispute; outcome satisfaction; and attitudinal change resulting from the community training program.

### 3.1 Taking part and taking to it to heart: Participation and satisfaction

**Table 1. Survey findings on users' experience of the dispute resolution process**

Survey Statement	Dispute was handled by		Respondent	
	Trained 3 <sup>rd</sup> Party ( <i>n</i> = 146)	Untrained Chief ( <i>n</i> = 85)	Men ( <i>n</i> = 103)	Women ( <i>n</i> = 128)
	Percentage of participants who agreed with the statement			
I was encouraged to express my views	98**	65**		
I was satisfied with the mediator/chief	91**	54**		
I participated fully in the process	94**	55**	81*	66*
I was satisfied with the process	97**	61**	89*	79*
My views were considered during the process	89**	55**		
I experienced healing through the process	85**	58**		
The process had a positive impact on my relationships	86*	78*		

\* Statistically significant difference at  $p < .05$

\*\* Statistically significant difference at  $p < .01$

Total sample size:  $n = 231$

An examination of the survey and interview data suggests that PFM training made a statistically significant (henceforth, significant) positive difference to the satisfaction of disputants, and led to increased participation by disputants.<sup>45</sup> Table 1 illustrates that over 84 percent of the 146 respondents whose disputes were mediated by a party with PFM training agreed that:

- they were encouraged to express their views;
- they were satisfied with the dispute resolution process;
- they participated fully in the dispute resolution process;
- they were satisfied with the mediator or chief;
- their views were considered during the dispute resolution process; and
- they experienced healing through the dispute resolution process.

Respondents whose mediator did not participate in PFM training agreed with these statements only 50 to 70 percent of the time (a significant difference at 1 percent;  $p > .01$ ).<sup>46</sup> There was also a significant difference when these data were disaggregated and analyzed by gender; male respondents were more likely than female respondents to have been satisfied with and participated in the dispute resolution process. An additional finding was the positive effect that training appeared to have on the disputants' relationships. However, the significant difference between the two groups was less than other findings ( $p > .05$  rather than  $p > .01$ ); 78 percent of those whose dispute was resolved by an untrained chief also agreed that the process improved their relationships.

### 3.2 Taking over: Power, bias and rights

**Table 2. Survey findings for users' perceptions of the dispute resolution process**

Survey Statement	Dispute was handled by		Respondent	
	Trained 3 <sup>rd</sup> Party (n = 146)	Untrained Chief (n = 85)	Men (n = 103)	Women (n = 128)
	Percentage who agreed with statement			
My legal rights were explained to me	75**	52**	72*	62*
I was confused about what my legal rights were	25	21		
The process was objective and unbiased	90**	42**	80*	66*
It was hard to express my perspective because I was not as powerful as the other parties involved	32	39	28*	39*

\*Statistically significant difference at  $p < .05$

\*\* Statistically significant difference at  $p < .01$

Total sample size:  $n = 231$

Table 2 illustrates that 75 percent of respondents whose mediator received PFM training and 52 percent of respondents whose mediator did not receive PFM training had their legal rights explained to them.<sup>47</sup> The gender of the disputants also seemed to have an impact on whether their rights would be communicated to them; men were more likely (regardless of whether their mediator was trained or untrained) to have their legal rights explained to them than women (72 percent and 62 percent, respectively).

Anecdotal evidence suggests that, although statutory legal rights relating to gender equality were not part of the PFM training, participants retained some knowledge of women's rights as articulated in the Constitution, as well as women's decision-making rights in relation to land and land-related resources:<sup>48</sup> "I learned that women have rights too, for example, to take part in decision-making and in government."<sup>49</sup>

Table 2 shows that 90 percent of respondents whose mediator received PFM training agreed that the dispute resolution process was objective and unbiased. Only 42 percent of respondents whose mediator did not receive PFM training agreed. Again, perceptions of bias were affected by gender: 80 percent of men (regardless of whether their mediator was trained or untrained) agreed with the statement compared to 66 percent of women.

A further topic examined in the survey was how power dynamics impacted on the resolution of disputes. Approximately 35 percent of all disputants found it difficult to express their perspective because they felt that they were not as powerful as the other party involved. Whether the third party had received training or not made no significant difference. However, female disputants overall were significantly more likely than male disputants to find it hard to express their view because of power asymmetries between the parties involved (39 and 28 percent, respectively). This finding was supported by interviews with trained mediators and untrained chiefs, most of whom had very little awareness or understanding of how power asymmetries impact dispute resolution, nor practical techniques to ameliorate such imbalances within the context of a dispute.

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For all of the process-related survey statements, no statistical correlation was found between training and gender, that is, the intervention did not improve, or make worse the gap between men's and women's perceptions of the dispute resolution process.<sup>50</sup> Indeed, the PFM training improved the satisfaction levels of both women and men, but in those areas where there were differences in men's and women's responses, the impact of training on this gender *gap* was neutral.

### 3.3 Take it or leave it: Incidence of outcomes

The second part of the survey focused on the *result* of the dispute resolution process, namely whether an outcome was reached or the dispute remained unresolved (Figure 1) and user satisfaction and perceptions relating to the outcome (Table 3).

**Figure 1. Survey findings on the effect of training and gender on whether an outcome was reached**

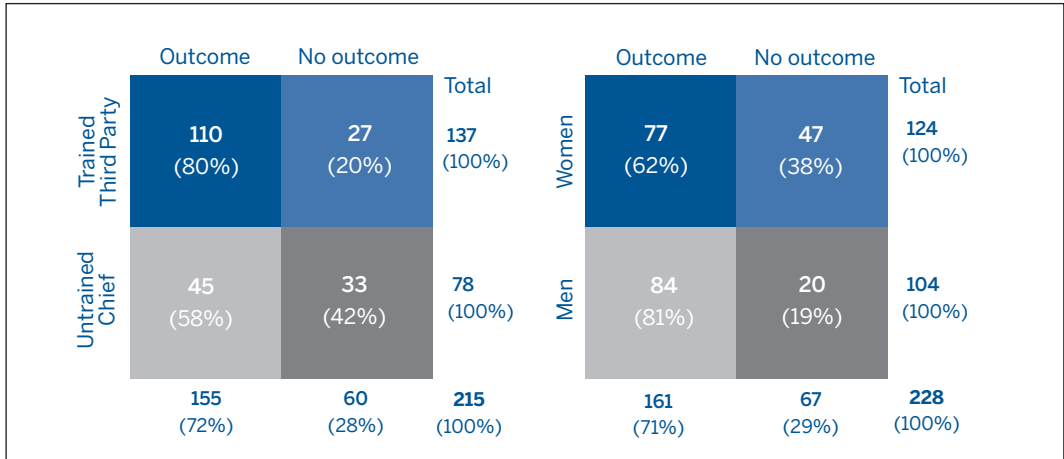


Figure 1 demonstrates that disputants whose mediator participated in PFM training were more likely to obtain an outcome than those whose mediator did not (80 percent and 58 percent respectively). Once again, overall, men fared better than women (whether their mediator received training or not); 81 percent of men obtained an outcome to their dispute compared to only 62 percent of women. The next section deals with how satisfactory these outcomes were, the impact of the outcome and what factors were taken into consideration.

### 3.4 Take what you can get: Outcome satisfaction

**Table 3. Survey findings on users' perception of the dispute resolution outcome**

Survey Statement	Dispute was handled by		Respondent	
	Trained Chief or Mediator (n = 146)	Untrained Chief (n = 85)	Men (n = 103)	Women (n = 128)
	Percentage who agreed with the statement			
The outcome restored community harmony	86**	76**		
The needs of the community were considered in the outcome	75*	67*		
My individual needs were considered in the outcome	69**	49**		
The outcome enabled me to move forward with my life	88**	64**	86*	73*
The outcome restored my emotional harmony	88**	59**	85**	70**
I received an explanation for the outcome	84**	52**	82**	64**
I was satisfied with the outcome	85**	60**	86**	68**

\*Statistically significant difference at  $p < .05$

\*\* Statistically significant difference at  $p < .01$

Total sample size:  $n = 231$



As shown in Table 3, 86 percent of respondents whose mediator had received PFM training agreed with the statement “the outcome restored community harmony”, compared to 76 percent of respondents whose mediator did not receive PFM training.<sup>51</sup> Interestingly, however, PFM training seemed to make it significantly more likely ( $p < .05$ ) that community needs were considered in obtaining an outcome to a dispute: 75 percent of disputants whose mediator received PFM training agreed with the statement, “the needs of the community were considered in the outcome”, compared to 67 percent of respondents whose mediator did not receive PFM training. The lowest levels of agreement were in relation to whether individual needs were a material consideration in the outcome; respondents whose mediator was PFM trained were more likely to feel that their individual needs were considered in the dispute resolution (69 percent), compared to 49 percent of respondents whose mediator was not PFM trained.

With respect to overall satisfaction with the outcome and its restorative aspects, PFM training seemed to have significant positive impact ( $p > 0.01$ ). Between 84 and 89 percent of disputants whose mediator was PFM trained agreed that:

- the outcome restored their emotional harm;
- they received an explanation for the outcome;
- the outcome enabled them to move forward with their lives; and
- they were generally satisfied with the outcome.

For disputants whose mediator was not PFM-trained, the results for these four statements were all between 52 and 64 percent; for those with a trained mediator, the results were significantly higher (between 84 and 88 percent). Women were significantly less likely than men ( $p > 0.01$ ) to agree with these statements, showing that they were less satisfied with the outcome and its impact. As with the process-related results, the intervention was found to have a neutral affect on the gap between how men and women perceived the outcome of the dispute resolution process.<sup>52</sup>

### 3.5 Taking root: Community training and attitudinal change

The final element of the survey sought to compare the attitudes of respondents who had participated in the PFM community training on dispute resolution ( $n = 178$ ), compared to respondents who had not participated ( $n = 216$ ).

**Table 4. Community training and attitudes**

Survey Statement	Community training ( $n = 178$ )	No community training ( $n = 216$ )	Total ( $n = 394$ )
	Percentage who agreed with statement		
24 Men and women should have equal opportunities to participate in dispute resolution	98**	76**	85
It is important for women to participate in dispute resolution	92**	73**	81
The role of dispute resolution is reserved for the village chiefs	18**	32**	25
Domestic violence is a private issue	22**	53**	39

\*Statistically significant difference at  $p < .05$

\*\* Statistically significant difference at  $p < 0.01$

Respondents who had participated in the PFM training demonstrated extremely high levels of agreement with the statements, “men and women should have equal opportunities to participate in dispute resolution” and “it is important for women to participate in dispute resolution” (98 and 92 percent, respectively), compared to respondents who did not benefit from the PFM training (76 and 72 percent, respectively).

Anecdotal evidence collected through interviews revealed that the community training had dramatically changed the way that some men thought about women. One community chief stated that the training had helped him realize that women play a major role in the household and community, that they also have rights and are important, and that they are capable of accomplishing things.<sup>53</sup> Others came to realize that they should listen more to women's perspectives and opinions and that men often quash women's rights.<sup>54</sup>

Fifty-three percent of respondents who did not participate in the PFM training ( $n = 114$ ) felt that domestic violence was a private issue, compared to 22 percent of trained respondents. Similarly, while only 18 percent of trained respondents believed that dispute resolution was the exclusive domain of community chiefs, one-third of untrained respondents believed this to be true.

## 4. Mediating change: Discussion and analysis

Three key findings from the research presented above provide insight into strategies for engagement with customary justice systems in Melanesia, the Asia-Pacific region, and possibly more broadly. First, two fundamental components of legal empowerment are participation and substantive legal rights. By focusing on the former while largely neglecting the latter, PFM's contribution to legal empowerment might be viewed as a missed opportunity. This failure was increased by a lack of understanding or willingness to address power asymmetries by mediators and misunderstandings about neutrality. Second, PFM's approach succeeded in retaining strong local legitimacy and ownership, partly through maintaining positive elements of the system such as cultural, economic and geographic accessibility. The intervention also successfully maintained user satisfaction with the system's capacity to restore community harmony, while at the same time advancing considerations of individual rights in mediated outcomes. This is an important finding because it suggests that decision-making guided by individual rights is not always irreconcilable with decision-making guided by community needs. Third, while the intervention was unable to close the gender gap between women and men disputants' experience of dispute resolution, real gains were made in the training of women mediators who addressed issues such as domestic violence and rape in other and more empowering ways than their male counterparts.

### 4.1 Sending the 'rights' message: Participation alone is not enough

To advance legal empowerment for users of customary justice systems, two elements are essential: meaningful participation and the capacity to assert or uphold substantive legal rights. The former relates to procedure and process, while the latter relates to the outcome of the dispute.

Empirical research has shown that fairness is often perceived in terms of procedure and participation, rather than outcome.<sup>55</sup> Meaningful participation is critical because sharing perspectives, views and experiences prevents exclusion, which somewhat determines marginalization. Further it significantly contributes to overall satisfaction with dispute resolution. The survey results indicate that PFM training greatly improved user participation: respondents felt that they were encouraged to express their views and believed that their views were taken into consideration. Together, these factors likely contributed to the significantly higher levels of satisfaction of disputants with a PFM trained third party. This finding was supported by interviews with trained chiefs and mediators, most of who stated that they consulted all concerned parties to the dispute, encouraged them to provide their own version of events and elaborate on how they had been affected.<sup>56</sup>

Increased participation, however, proved insufficient to fully promote legal empowerment in the absence of a sound understanding of substantive rights and the capacity to uphold them. Three key issues can be highlighted: i) PFM focussed on the process rather than substantive rights; ii) they did not address power asymmetries; and iii) their training on neutrality in decision-making was interpreted in a way that resulted in minimal normative boundaries being imposed.

First, PFM explicitly focused on the improvement of dispute resolution processes through better mediation techniques rather than the application of substantive rights. In their view, conflict was to be dealt with by mediators and chiefs “not in the way of a judge but as a person who assists the two conflicting parties to come to a decision that suits them both”.<sup>57</sup> The survey results reflected that substantive rights were only minimally addressed. Although they showed that PFM-trained mediators were more likely to explain legal rights to disputants, the incidence of this was still relatively low compared to other topics covered in the survey. Moreover, trained mediators were likely to discuss procedural rights only and not substantive rights, for example, the rights of both men and women to participate in public meetings, raise grievances, and express their views on community issues.<sup>58</sup> In a context of generalized gender discrimination, negotiated settlements and minimal recognition of legal rights present particular risks for female disputants. This risk is increased by various kinds of power asymmetries within a dispute.

The second key issue to highlight is that PFM did not adequately address how these power asymmetries affected the capacity of disputants to assert their opinions or legal rights. Despite some training on different types of power, only a handful of male mediators or chiefs appeared to be aware of possible power imbalances in their disputes, whether between victims of violence and offenders, men and women, the community and individuals, or chiefs and individuals of perceived inferior status.<sup>59</sup> This was again reflected in the survey results: over one-third of all disputants agreed that they found it difficult to express their perspective because they were not as powerful as the other party or parties involved. For women, this rose to 40 percent. Thus, although it was more likely that a disputant with a PFM-trained mediator would participate more fully, disputants were often under significant pressure to agree to outcomes that reflected certain notions of fairness.<sup>60</sup> Such understanding often favoured more powerful parties, leaving less powerful parties vulnerable to having their legitimate grievances ignored or being pressured into accepting solutions they found unsatisfactory.<sup>61</sup> This was most apparent when numerous power asymmetries were in play, for instance, in cases of gender-based violence.

The third consideration in this discussion on participation and rights is neutrality. In an effort to militate against bias and prejudice in decision-making, PFM training strongly emphasized the importance of neutrality and objectivity. This is reflected positively in the survey results: trained mediators were significantly more likely to be perceived as objective and fair.<sup>62</sup> This finding was also supported by interviews with trained mediators and chiefs who emphasized that this was a feature of their decision-making.<sup>63</sup> While at first glance this appears positive, interviews revealed that there was widespread misunderstanding among mediators about the meaning of neutrality.<sup>64</sup> Many interpreted this as not requiring the application of any legal or normative boundary in the resolution of the dispute, but instead to aim primarily for a mutually acceptable solution. For example, cases were found where a mediator ‘resolving’ a rape case did not feel able to condemn a decision where the victim was forced to marry the perpetrator, provided that both parties were (at least ostensibly) in agreement.<sup>65</sup>

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In sum, increased participation in dispute resolution and strengthened procedural rights are critical elements in enhancing access to justice in contexts where there are widespread inequalities and power asymmetries — most notably with respect to gender. These efforts, however, must be complemented by awareness of and capacity to assert substantive legal rights. This might have been addressed had the PFM training focused more on substantive legal rights, complemented by the introduction of some form of accountability mechanism such as legal rights awareness-raising for the broader community. Interviews revealed that community-level awareness of legal rights was very low, but that the desire for increased knowledge about rights was strong.<sup>66</sup>

#### **4.2 ‘The Bougainville way’**

The challenge identified earlier is the advancement of legal empowerment and reform in a way that is locally legitimate and preserves the strengths of the customary justice system. This section focuses on the latter half of this challenge.

The PFM intervention was clearly regarded as locally owned and compatible with customary values. It was also seen to have helped to strengthen ‘the Bougainville way’ of resolving disputes.<sup>67</sup> This can be credited to three main factors. First, rather than the initiative being imposed as part of a national or foreign development assistance program, the NGO was invited by the interim Bougainville Government to undertake the training. Second, the presence of people who were not from Bougainville was minimal. Local staff were employed without delay to be trainers-of-trainers and then district and regional coordinators. Finally, the training methodology drew on sources that were locally recognizable and accepted, including customary values and context-specific examples. This facilitated local debate on challenging concepts such as gender equity, power sharing and human rights, but in a way that would allow them to be woven into the existing fabric of culture and customary law.

The intervention was also able to preserve other strengths of the customary system such as geographic and economic accessibility which are crucial for poor people’s access to justice. A further important characteristic of the customary justice system in Melanesia is its emphasis on restoring community harmony and relationships. This philosophical underpinning is critical for closely-knit and highly interdependent societies, as well as in environments recovering from civil conflict. However, as noted, it can result in overlooking the rights, perspectives and needs of victims. This presents a quandary: on the one hand, the customary system’s capacity to restore community harmony is essential to its internal coherency, effectiveness and popularity; on the other hand, the centrality of ‘the community’ appears largely irreconcilable with a doctrine of individual rights. The findings of this research question the zero-sum nature of this assessment. The survey results suggest that users were more likely to perceive that trained mediators and chiefs took into consideration individual needs in relation to outcomes. At the same time, the training did not have a negative impact on user perceptions regarding the positive, reconciliatory effect of the dispute resolution process, or on considerations of community harmony (Tables 1 and 3). This suggests that reforms aimed at increasing access to justice for marginalized groups can be facilitated in a way that holds local legitimacy and without dislodging important elements of the customary process.

### 4.3 Women in mediation and as mediators

Despite the challenges faced by marginalized groups in accessing justice through customary justice systems, research in Melanesia has shown that they largely support and have a preference for these fora over the courts.<sup>68</sup> This is consistent with the view, voiced by many women in Bougainville, that empowerment does not require a rejection of the customary justice system or its processes. Indeed, most of them are proud of *kastom*.<sup>69</sup> However, they also maintain that a re-examination of norms and processes is necessary to address the problems they face when trying to obtain equitable solutions.<sup>70</sup>

The PFM intervention was moderately successful in terms of its contribution to certain gender advancements. Gains were made in women’s satisfaction with their dispute resolution experience, even though the gap between men’s and women’s experiences remained unchanged. Similarly, while gains were made in modifying attitudes to women’s involvement in dispute resolution, mediators’ practice was found to be inconsistent. The most empowering aspect of the intervention was that it provided women with the skills and opportunities to become mediators.<sup>71</sup> Each of these conclusions is discussed below.

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The training led to improved responses by both men and women disputants on almost every indicator regarding access to justice. There were several areas, however, where women responded significantly less positively than men (regardless of whether their mediator or chief had been trained), indicating a gender gap in their satisfaction with customary dispute resolution processes. This gap was most pronounced in relation to the outcome of the dispute. For example, women were significantly less likely to obtain an outcome to their dispute than men, and to be satisfied with the outcome or to receive an explanation. They were also significantly less likely to believe that the outcome restored their emotional harm or helped them to move forward with their lives. The training did not have any impact on reducing this gender gap.

The PFM intervention also appeared to have a positive impact on individual attitudes relating to gender. The survey found that respondents who had benefited from PFM training were significantly more likely (regardless of gender) to agree that men and women should have equal opportunities to participate in dispute resolution and that gender violence was an issue to be dealt with in the customary system (as opposed to within and between families). But interviews illustrated that, despite these changed attitudes, mediators' approaches to resolving gender crimes were inconsistent. There was some evidence of positive normative change, for example, an increased reporting of cases of rape to the formal system and the involvement of the community police. But there were also anecdotal reports of mediators pressuring victims of domestic violence to return to their husbands or allowing the parents of rape victims to be the sole arbiters of an outcome. This indicates that, despite some normative advancement, change in practice is slow and inconsistent, and women remain at risk of protection violations. It must be acknowledged that these problems are not prone to quick or consistent fixes; the nature of such change is incremental, contested, and likely to be resisted.

The most significant change was in the establishment of women mediators. Both men and women participated in the PFM training. While there were not as many women trained as originally hoped, a number went on to become community mediators.<sup>72</sup> The establishment of women in decision-making roles is a legal empowerment outcome in itself; it has contributed to enhanced access to justice for women disputants. Interviews revealed that women mediators dealt with issues relating to gender, particularly gender-based violence, in different and more empowering ways than most male mediators and chiefs.

Women mediators interviewed seemed more likely to recognize substantive legal rights, especially in relation to violence against women, and had little hesitation drawing normative and legal boundaries in regard to acceptable decision-making by the parties involved.<sup>73</sup> They were also more inclined to refer cases to the formal justice system where they believed that they could not guarantee an equitable outcome for the victim and, almost exclusively, would prohibit a solution that involved a victim marrying her rapist.

Similarly, in cases of domestic violence, the approach of female mediators differed from male mediators and untrained chiefs. Women mediators would threaten the perpetrator with action at the state court if the violence did not stop and simultaneously inform the victim of her right to refer the case to court and explain how to do so. They would also counsel women victims of domestic violence on their options should they decide to change their situation, including by providing referrals to NGOs that offered support to them and arranging for trauma counselling.

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Women mediators also tended to have a greater awareness of gender-based power imbalances and to use tools to address them. Where such disparities threatened a fair and equitable outcome, they were more likely to refer a case to the formal justice system and to obtain the consent of the victim before arranging a meeting where both parties would have to meet face-to-face.

Together, these results indicate that female mediators were slowly but successfully challenging the interpretation and application of customary legal norms so as to offer greater protection to women. These mediators appeared to be largely accepted and supported by trained male mediators and chiefs, who both expressed a desire for more female mediators.<sup>74</sup> This is surprising given the experiences of other countries where moves to displace traditional power-holders, and more generally to challenge men's interpretations and application of custom, have been strongly resisted. Two factors are tentatively posited as an explanation for the lack of resistance in the Bougainville context. First, the PFM training engaged a broad range of stakeholders, including men, women, youth, religious actors and chiefs. This approach may have facilitated attitudinal changes towards the contribution and roles of women. Second, due to the specific circumstances of Bougainville — the impact of colonization, copper mining and the civil conflict — traditional power structures were already in upheaval. When PFM commenced their training program, chiefs had lost their previously

strong power base, which likely contributed to them being supportive, or at least open, to women and other community members becoming decision-makers.<sup>75</sup> This state of uncertain power dynamics may be present elsewhere during transitional periods, providing opportunities and space for legal empowerment outcomes.

## 5. Conclusion

The contested, dynamic and flexible nature of many customary justice systems, including those in Melanesia, presents access to justice challenges for marginalized populations, but also offers inroads and opportunities for legal empowerment and reform. Such potential can be harnessed through nuanced and pragmatic interventions that are locally driven and owned, and reflective of the local context. One approach is to facilitate dialogue between all sectors of society, stimulated by new information while drawing on recognized values and other accepted legal sources. The aim is to develop cultural legitimacy for ideas of inclusive process, gender equality and individual rights. A common strategy for achieving this is to provide conflict resolution training and leadership opportunities — not only to recognized customary authorities, but also to marginalized groups, empowering them to challenge dominant interpretations and applications of customary norms. The PFM intervention discussed here provided a platform to evaluate the extent that legal empowerment might result from this type of engagement.

A pivotal challenge raised at the beginning of this chapter was how to advance legal empowerment through customary justice systems in a way that preserves their legitimacy and strengths. The analysis of this question in relation to the PFM intervention brought a number of tensions to the fore. One was how to balance the customary system's emphasis on outcomes that maintain community harmony with individual rights. As stated, rather than the expected trade-off between the two, the PFM intervention increased user satisfaction levels both with respect to how customary dispute resolution restored community harmony, and how notions of individual rights were factored into the outcome. The conditions that allowed these two seemingly incongruent goals to advance, and how they might be replicated, require further analysis and investigation.

A second tension relates to how to protect the rights of marginalized groups when the customary norms and processes that facilitate discriminatory outcomes operate to reinforce the power hierarchy that controls and administers customary law. PFM neither dealt solely with recognized chiefs, nor alienated or ignored them. Rather its training methodology meant that women and youth were brought together to discuss and practice dispute resolution alongside chiefs. The women who were established as mediators have been slowly, but successfully challenging the dominant interpretation and application of customary norms in ways that facilitate the better protection of women's rights. It may be that such advancements were only possible due to the specific conditions created in Bougainville following colonization and the civil conflict. Even so, however, it represents a potential opportunity for reform in various other contexts.

In summary, the PFM intervention highlights some of the key challenges and opportunities associated with this type of approach to advancing empowerment through customary justice systems. It suggests that interventions that encourage local discourse on challenging ideas and that are structured around locally legitimate change processes can have progressive results. Such change is usually incremental and inconsistent; therefore it is important to remain mindful that the kinds of broad and deep issues that legal empowerment efforts seek to address are not prone to quick or simple fixes. But by learning from each attempt and remaining flexible and reflexive, any change that does occur is more likely to be sustainable.

## footnotes

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- 2 United Kingdom Department for International Development (DFID), *Non-State Justice and Security Systems*, 2004, 3.
- 3 C. Charters, 'Universalism and Cultural Relativism in the Context of Indigenous Women's Rights' in P. Morris and H. Greatrex (eds), *Human Rights Research* (2003).
- 4 In 2005, the Bougainville branch of PEACE Foundation Melanesia separated from the Papua New Guinea NGO and is now called the Bougainville Centre for Peace and Reconciliation. However, it largely conducts the same work and will be referred to throughout this chapter as PFM.
- 5 New Zealand Law Commission (NZLC), *Custom and Human Rights in the Pacific* (2006) 46.
- 6 Together, these forces make it almost impossible to determine the content or application of pre-contact customary law in the Pacific. The few available accounts of pre-contact customary law have been discredited to some degree in academia because the perspective of European male anthropologists, colonists and missionaries writing about cultural practices and norms is now recognized to have frequently ignored women's perspectives or roles. G.J. Zorn, *Women, Custom and International Law in the Pacific* (2000) 11-12.
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- 8 *Ibid* 54-55.
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- 10 Penal Reform International, *Access to Justice in sub-Saharan Africa: The role of traditional and informal justice systems* (2000) 24,33.
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- 22 Pacific Regional Workshop 'Outcome Statement' in *Strengthening Pacific Partnerships for Eliminating Violence against Women: A Pacific Regional Workshop Report Suva, Fiji Islands, 17-19 February 2003* (2003), 8.
- 23 A.A. An-Na'im, 'Toward a cross-cultural approach to defining international standards of human rights: the meaning of cruel, inhuman, or degrading treatment or punishment' in A.A. An-Na'im (ed) *Human Rights in Cross Cultural Perspective: A Quest for Consensus* (1992) 19, 27-28.
- 24 See, for example, C. Nyamu, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries' (2000) 41(2) *Harvard International Law Journal* 381, 393.
- 25 S. Batliwala, 'The meaning of women's empowerment: new concepts from action' in G. Sen, A. Germain and L.C. Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (1994) 127, 132.
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- 27 S. Khair, 'Evaluating legal empowerment: problems of analysis and measurement' (2009) 1(1) *Hague Journal on the Rule of Law* 33, 35.
- 28 *Ibid*.
- 29 NZLC, above n 5, 84.
- 30 An-Na'im, above n 17, 331.
- 31 P. Martin, 'Implementing women's and children's rights: the case of domestic violence in Samoa' (2002) 27 *Alternative Law Journal* 230; L. Behrendt, 'Human Rights Trump Customary Law Every Time' (2006) *National Indigenous Times*.
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- 35 *Ibid* 79.
- 36 An-Na'im, above n 17, 331, 339; C. Graydon, 'Local justice systems in Timor Leste: washed up, or watch this space?' (2005) 28 *Development Bulletin* 66, 70.
- 37 V. Boege, 'A promising liaison: kastom and state in Bougainville' (2008) *Occasional Paper Series [Online]* 16.
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- 39 The information in this section is drawn from PFM information brochures, pamphlets, annual reports and interviews with PFM current and former directors of the Bougainville operation.
- 40 PFM Information Brochure, 2002; PFM Mission Statement, 2004.
- 41 Interview with H. Hakena, Executive Director, L. Nehan Women's Development Agency (Buka, 3 May 2010); V. Boege, 'A promising liaison: kastom and state in Bougainville' (2008) *Occasional Paper Series*.
- 42 Many of the indicators used for this research were taken from the recently developed Hague Model of Measuring Access to Justice Project; see M. Gramatikov et al, *A Handbook for Measuring the Costs and Quality of Access to Justice* (2010).
- 43 "Mediator" in this sense does not refer to a professional or trained mediator other than as trained by PFM, and possibly paid a very small amount by the parties.
- 44 For indicators in the third section (c), the results of participants in PFM training were compared to those of non-participants.
- 45 Most of the survey statements in the section relating to process showed statistically significant (either  $p < .05$ , or  $p < .01$ ) differences between the experience and perceptions of those whose disputes were handled by a third party trained by PFM, and those where the third party was not trained. In sum, statistical significance at less than 5 percent ( $p < .05$ ) means that the chance of this result occurring as a coincidence was less than 5 percent. Significance at less than 1 percent ( $p < .01$ ) means that there was less than a one in a hundred chance that this occurred by

- coincidence. Statistical significance was tested using an independent sample T-test through the PASW (formerly, SPSS) software program. Frequency tables were then used to work out the percentages of those who agreed (combining those who strongly agreed and those who agreed). The means relating to the 5-point response scale are available from the author.
- 46 Ibid.
- 47 When the issue was framed negatively to check for positivity bias — “I was confused about what my legal rights were”, — around a quarter of all disputants agreed, with no significant difference between trained and untrained mediators.
- 48 Interview with D. Bebeus, trained chief (Atamo, 8 May 2010).
- 49 Interview with L. Tamoi, mediator and youth leader (Atamo, 8 May 2010).
- 50 This conclusion was reached by conducting a One-Way ANOVA (analysis of variants) test for each of the results where there was a significant gender difference to test whether there was any correlation with third party training. No statistically significant correlation was found for any of the statements.
- 51 Overall, for those with trained third parties, the satisfaction levels with respect to outcome (Table 2) were somewhat lower than those previously canvassed with respect to the process (Table 1). The average for the positively worded questions in Table 1 is 89 percent for those with trained third parties; in Table 2, it is 79 percent. For those with an untrained chief, levels hold steady at 58 percent for both process and outcome-related statements.
- 52 See footnote 51 for an explanation of how this conclusion was reached.
- 53 Interview with D. Bebeus, trained chief (Atamo, 8 May 2010).
- 54 Interview with B. Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010). One youth leader said that he learned about “gender balance; that women and men should work together to try to restore this life in Bougainville”. Interview with L. Tono, mediator and youth leader (Atamo, 8 May 2010).
- 55 L. Klaming and I. Giesen, *Access to Justice: The Quality of the Procedure*, TISCO Working Paper Series on Civil Law and Conflict Resolution Systems (2008).
- 56 Interview with D. Bebeus, a trained chief (Atamo, 8 May 2010); Interview with J. Loloala, mediator (Polamato, 10 May 2010); Interview with A. Sapur, mediator and village court magistrate (Hako, 19 May 2010).
- 57 PFM Information Pamphlet (2005) 2.
- 58 Interview with D. Bebeus, trained chief (Atamo, 8 May 2010); Interview with J. Loloala, mediator (Polamato, 10 May 2010); Interview with L. Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with B. Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010).
- 59 Interview with L. Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with B. Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010).
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- 61 World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 44.
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- 63 Interview with M Lusman, PFM trainer and mediator (Wakunai, 7 May 2010); Interview with B. Harekin, PFM trainer and mediator (Bovo Valley, 6 May 2010).
- 64 Interview with L. Tamoi, mediator and youth leader (Atamo, 8 May 2010).
- 65 Interview with three mediators from Siwai (Atamo, 8 May 2010).
- 66 Interview with D. Bebeus, trained chief (Atamo, 8 May 2010); Interview with A. Sapur, mediator and village court magistrate (Hako, 19 May 2010).
- 67 Interview with B. Kova, women’s leader (Arawa, 12 May 2010).
- 68 M. Forsyth, *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (2009); for the Solomon Islands, see S.E. Merry, ‘Changing Rights, Changing Culture’ in J.K. Cowan, M. Dembour and R.A. Wilson (eds), *Culture and Rights* (2001). See also, Interview with J. Kauona, President, Bougainville Women for Peace and Freedom (Arawa, 12 May 2010).
- 69 The Melanesian pidgin word for customary law.
- 70 Interview with H. Hakena, Executive Director, Leitana Nehan Women’s Development Agency (Buka, 3 May 2010); Interview with J. Kauona, Director, Bougainville Women for Peace and Freedom (Arawa, 12 May 2010); T. Havini, Hako Women’s Collective (Buka, 3 May 2010).
- 71 Many women also noted, however, that this is part of a larger empowerment project involving wider social, economic and political change.
- 72 While PFM did not reach their target of 50 percent women participants, estimates are that around one-third were women. Interview with P. Howley, former Director of Bougainville Peace Foundation Melanesia (telephone interview, 10 February 2010).
- 73 Interviews with A. Sapur, mediator and village court magistrate (Hako, 19 May 2010); T. Mano, mediator (Arawa, 12 May 2010); Interview with B. Kovo, mediator (Arawa, 12 May 2010); Interview with survey participant, disputant (Hako, 19 May 2010).
- 74 Interview with B. Kovo, women’s leader (Arawa, 12 May 2010); Interview with T. Mano, mediator (Arawa, 12 May 2010); Interview with A. Sapur, mediator and village court magistrate (Hako, 19 May 2010); Interview with Bruno, Bovo Valley (trainer and mediator); Interview with L. Tamoi, mediator and youth leader (Atamo, 8 May 2010); Interview with J. Kolala, mediator (Polamato, 10 May 2010); Interview with C. Vave, mediator (Wakunai, 7 May 2010); Interview with M. Lusman, mediator (Wakunai, 7 May 2010).
- 75 A third contextual factor may be that most of Bougainville is matrilineal. However, due to the lack of research on this issue, it is unclear to what extent and how this may have influenced the dynamic.





## Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia

Maria Vargas Simojoki

### Executive summary

In recent years, the idea of promoting legal empowerment as a means of increasing access to justice has sparked growing interest in donor circles. At the same time, recognition that non-state justice is the reality for many of the world's poor has led to greater acceptance of the need to include customary justice systems within the scope of legal reform and development efforts. Indeed, the question is now becoming how, rather than if, efforts should be made to promote greater access to justice through engagement with customary justice systems. However, a second dilemma arises once the decision to engage is made: how to do so in a way that has local legitimacy, that maintains the positive aspects of customary law that make it popular with justice seekers, and that also promotes the modification of the rules and practices that do not comply with international human rights standards or that disadvantage vulnerable sections of the community.

To shed light on the issue, this chapter examines the short- and medium-term impact of attempts by traditional elders in Somaliland and Puntland to revise elements of Somali customary law with the aim of bringing it into greater alignment with both Islamic law and international human rights standards. Supported by the Danish Refugee Council, the elders initiated a process of dialogue culminating in Regional and National Declarations in the two *de facto* autonomous regions, which contain revisions to *xeer* in a number of key areas. Six years after the first dialogues commenced, the research on which this chapter is based indicates that the Declarations can be linked to certain positive changes in customary justice, including the abolition of harmful practices such as 'widow inheritance', advancements in women's inheritance rights, and a shift towards individual and away from collective responsibility for serious crimes. Other objectives, however, particularly in relation to enhancing access to justice for vulnerable groups such as displaced populations, minorities and victims of gender crimes, do not seem to have met with the same level of success.

## 1. Introduction

In 2003, a small group of traditional elders from the region of Toghdeer in Somaliland approached the Danish Refugee Council (DRC) for support in revising their customary law (*xeer*) and bringing it into greater alignment with Islamic law (*shari'a*) and international human rights standards. Following a series of dialogues, a Regional Declaration was signed, which committed elders to curbing the main causes of inter-clan conflicts, expanding access to justice, and enhancing the security and protection of vulnerable groups. In particular, the Declaration aimed to promote a transition from communal to individual criminal responsibility by encouraging the payment of compensation directly to the family of a victim (as opposed to it being shared by the larger clan) and by the elders ceding their jurisdiction over serious crimes, including rape and murder, to the formal justice system. The Declaration also sought to promote the protection of widows' rights to inherit according to *shari'a* principles and to marry men of their choice, as well as to establish stronger legal protections for internally displaced persons (IDPs) and minority groups.

Interest in the intervention led to parallel dialogue processes in other regions of Somaliland including Awdal, Maroodi Jeex, Sahel, Sool and Sanag. Once all regions had their own Declarations on *xeer*, it was decided that it would be desirable to unite them under a single National Declaration, which was made in 2006.<sup>1</sup> The success of the program in Somaliland led to its expansion into Puntland, where similar Regional Declarations were produced, and subsequently a National Declaration on *xeer* was made in early 2009. In both Somaliland and Puntland, the elders are still seeking ratification of their National Declarations by the government.

These interventions are of particular relevance to the growing focus on legal empowerment programming because of their attempts to enhance access to justice by reforming customary law from within, in contrast to orthodox, top-down approaches that centre on reforming state legal institutions. The underlying hypothesis was that an approach focusing on the locus of conflict resolution for the majority of the rural poor was more likely to yield an impact than an approach focusing on remote state justice institutions. In fact, the early results of the intervention have been mixed. Initial evaluations of the project conducted by the DRC revealed a significant reduction in the number of murder cases, as well as anecdotal evidence of widows permitted to re-marry according to their wishes, and suspected murderers handed to state authorities for investigation. However, other evaluations indicated that there had been negligible improvements in access to justice for vulnerable groups as customary leaders continued to mediate serious cases such as rape rather than referring them to the formal justice system.

34 In order to examine the medium-term impact of this initiative, field research was conducted in Garowe and Hargeisa between February and March 2010, six years after the commencement of the intervention in Somaliland and one year after the signing of the National Declaration in Puntland. The aim of the research was to generate new knowledge concerning both the possibilities and limitations of using legal empowerment techniques as a means of facilitating reform in customary systems and bringing them into greater alignment with international human rights standards. The approach was predominantly qualitative and was structured around a mix of 40 semi-structured interviews and eight focus group discussions. Twenty interviews were conducted with implementing partners, ten with government authorities, and ten with law associations and legal aid clinics, divided evenly between Garowe and Hargeisa. Focus group discussions targeted four separate groups in each location, namely women, minorities, IDPs and the elders.

This chapter is based on the research described above, and begins with a brief overview of social structures in Somalia, Somalia's pluralistic legal framework, and the principal obstacles to accessing justice, particularly through customary legal fora. It then describes the DRC intervention and presents an analysis of the research findings in three key areas: general community awareness of the provisions of the Regional and National Declarations; the referral of serious criminal cases to the formal justice system; and whether access to justice and legal protections for vulnerable groups

have improved as a result of the interventions. In light of this analysis, consideration is given to the effectiveness of the interventions and the lessons that can be learned from their implementation, some of which can be linked to their genesis and others from the structural limitations of the poorly functioning formal justice system. Finally, the chapter addresses the question of whether the interventions should be classified as falling within the scope of “legal empowerment”, and if so, their relevance for both continuing efforts to reform the Somali justice sector and as a legal empowerment approach that might be suitable for adaptation in other locations.

### 1.1 The Somali context

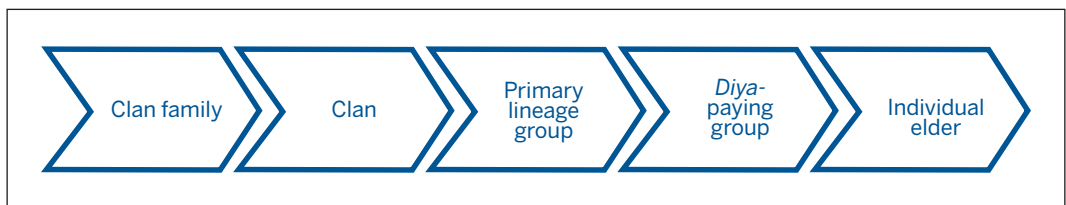
In 1991, Somalia descended into civil war and began to fragment along regional and clan-based lines. In May 1991, clans in the north-west of the country declared independence and formed the Republic of Somaliland, and in 1998, the north-eastern state of Puntland became semi-autonomous and self-governing.<sup>2</sup> Despite the formation of a Transitional Federal Government in October 2004, the formal justice system in Somalia remains weak and dysfunctional, and most people rely on local modes of conflict resolution including *xeer*, *shari'a* and ad hoc mechanisms established by militia factions. Of these, *xeer* is the most widely used and influential; it functions in parallel to state law, making the legal framework in Somalia pluralistic.<sup>3</sup>

#### 1.1.1 The clan structure and its impact on daily life

Despite differences in modalities of governance, Somalis share a common language, religion and ancestry. The population is grouped into clans that follow agnatic (patrilineal) descent, with all Somalis claiming relation to the state’s founding fathers.<sup>4</sup> While there is some disagreement within the literature regarding the influence of the clan structure on modern daily life, particularly with respect to the growth of new social networks, the clan remains the principal ordering structure and source of collective protection and security.<sup>5</sup>

In each geographic area, clans are divided into “majority” and “minority” units based on their size and social status.<sup>6</sup> Minority clans can also be labeled as such due to the dominant trade practiced by their members. The Gaboye clan, for example, is classified as a minority clan not only due to its size, but also because its members are mainly leatherworkers and blacksmiths.<sup>7</sup> Clan families are then sub-divided into smaller groups as depicted in the diagram below:<sup>8</sup>

**Figure 1. Subdivisions of the clan family**



The basic functional unit of social organization is the “*diya*-paying” or blood compensation group. This group is composed of several lineages that share a common ancestor and may vary in size from a few hundred to a few thousand men. The *raison d’être* uniting the *diya*-paying group is collective security and social insurance.<sup>9</sup> Group members are obliged to support each other in their political and juridical responsibilities, including through compensation payments for illegal acts committed by other members. In this regard, *diya*-paying groups need to be a specific size in order to be capable of paying (or exacting) compensation payments and defending themselves in the event of conflict. According to Gundel, “the most overriding rule for the unity of [*diya*-paying] groups is that all other conditions usually are subordinate to the need to maintain solidarity in the face of an external threat.”<sup>10</sup> Within a *diya*-paying group, the importance of the

role played by the elders (*aqil*) in inter-clan governance cannot be overstated; elders simultaneously act as legislators, executive officers and judges of their clan units. Moreover, these traditional authorities are seen as the creators and guarantors of relative peace in a context of political instability, communal insecurity and lawlessness.<sup>11</sup>

### 1.1.2 Somali customary law: *xeer*

*Xeer* is comprised of unwritten agreements or contracts, entered into bilaterally between clans, sub-clans and *diya*-paying groups that denote specifically agreed upon rights, obligations and duties (*xeer dhiig*).<sup>12</sup> *Xeer* can regulate issues ranging from inter-clan relations, to levels of compensation for different illegal acts, to the management of disputes.<sup>13</sup> Each *diya*-paying group has its own body of law embodied in an unwritten *xeer* code, formalized and entered into by the assembly of clan elders (*shir*).<sup>14</sup> *Xeer* is dynamic, flexibly applied in accordance to changing needs and circumstances, and varies considerably between different lineage groups.

More generally, *xeer* also serves as basic prescriptions for behavior that apply to all Somalis (*xeer dhagan*). These principles include: the collective payment of blood compensation (*diya*) for certain crimes such as murder, assault, theft and rape; the promotion of inter-clan harmony through the protection of certain social groups including women, children, the elderly and guests; and the payment of dowry obligations.<sup>15</sup>

It is important to highlight that *xeer* is not a moral code in the same manner as certain aspects of religious laws, such as the *shari'a*. Its norms do, however, impact on elements of social structuring such as whom widows are permitted to marry, how cases of rape should be resolved, and other prescriptions that set out boundaries for acceptable behavior. Importantly, *xeer* is a collective system that places responsibility for actions on the group rather than the individual. This allocation of responsibility operates to protect the group and its collective strength — in harsh and unstable environments it is deemed more beneficial for the group to collectively assume responsibility for compensation payments rather than lose one of its members. In this way, *xeer* has functioned as an effective tool for promoting social cohesion and for the regulation of inter-clan affairs.<sup>16</sup>

The importance of *xeer* is widely recognized: it represents an integral component of the Somali way of life and continues to be the preferred and most used legal system in all Somali regions, applied in up to 80-90 percent of disputes and criminal cases.<sup>17</sup> *Xeer* is also regarded as fundamental to maintaining social relations within clans. During the conflict and its aftermath, traditional structures (*xeer* and the elders who regulate it) gained elevated importance due to their ability to provide some level of security.<sup>18</sup> Today, the elders are regarded as the guarantors of peace and stability, and *xeer* “the glue that prevents a collapse into anarchy”.<sup>19</sup>

### 36 1.1.3 *Xeer* in practice

*Xeer* cases are adjudicated at the lowest appropriate genealogical level of the clan, commencing with the nuclear family, followed by the extended family, through to the sub-clan and clan levels.<sup>20</sup> Outcomes are determined by a jury of elders (*xeer beegti*) in reference to *xeer* rules and driven by what is deemed to be in the best interests of the group as opposed to the best interests of the individuals involved. It is important to highlight, however, that while *xeer* plays a pivotal role in decision-making, a clan, sub-clan or *diya*-paying group's size and military strength are always factors in reaching an enforceable consensus. If one party is dissatisfied with an outcome, the dispute can be referred to a higher level of the clan structure for adjudication.<sup>21</sup>

*Xeer* adjudication is generally open to the public, and participation is open to all with the exception of women, relations of the disputants, persons with a personal grievance against either disputant, and persons who have previously sat in judgment over the case. Neither party is represented by a lawyer; however, other trial techniques, such as the use of witnesses and cross-examination, are commonly employed.<sup>22</sup>

The *xeer* system is compensation-based, with penalties ranging from an apology to monetized assessments of damages payable in livestock or, more commonly, cash. The only exception to this is homicide, where the family of the victim is able to choose between compensation and the execution of the perpetrator.<sup>23</sup> It is important to highlight that the rationale of compensation is to provide a social and financial safety net for the victim or the victim's family, by replacing the earning value of a deceased or injured member or, in cases of rape, allowing the family to recover some funds that would have otherwise been received if the victim had received a dowry.<sup>24</sup> It is the responsibility of the elders of the *diya*-paying group to ensure that the terms of *xeer* agreements are abided by.<sup>25</sup>

## 2. Access to justice in Somalia

The justice options in Somalia comprise the state justice system, *shari'a* and customary law. While legislation recognizes the supremacy of the state justice system and there has been significant effort in strengthening the capacity of courts at the national, regional and district levels, such fora are physically inaccessible to the majority of the rural poor. *Shari'a* deals principally with family issues such as divorce and inheritance, and again, courts do not exist in most rural areas.<sup>26</sup> In practice, *xeer* is the most accessible, used and preferred system for resolving disputes.<sup>27</sup>

This primacy of *xeer* is accepted, and in some ways perpetuated by the state justice system, with courts routinely registering or confirming decisions made by traditional leaders.<sup>28</sup> However, while *xeer* is an efficient mechanism for regulating inter-clan affairs and maintaining stability, it fails to provide adequate protection for vulnerable groups such as women and children, and tolerates harmful customary practices in abrogation of both international human rights standards and *shari'a*. This places limitations on the ability of marginalized groups to access justice both in physical and procedural terms.<sup>29</sup> Moreover, because the level of protection enjoyed by individuals under *xeer* depends on the strength and alliances of one's clan, vulnerable groups such as minorities and IDPs are at great disadvantage when accessing remedies.

### 2.1 A plural legal framework

As noted above, the legal framework of Somaliland and Puntland is pluralist, comprising state law (a *melange* of inherited British and Italian common law), *shari'a* and *xeer*.<sup>30</sup> In practice, this pluralism has given rise to a state of lawlessness due to a lack of parameters for determining when and where a particular system of law applies.<sup>31</sup>

Multiple, overlapping and often contradictory sources of law have led to determination of jurisdiction being a highly confusing and contentious process. This is compounded by the lack of formal training of many judges and lawyers, widespread public ignorance and distrust of the state justice system (particularly in rural areas), and efforts by some Islamic court leaders to impose fundamentalist beliefs through *shari'a*. Amidst this confusion, the choice of applicable law in a given case is largely driven by two factors: first, where the self-interest of the stronger party to the dispute is served; and second, how a decision that will preserve security and peaceful inter-clan relations can be reached. These factors have limited the equality of all Somalia citizens before the law, as well as the degree of protection that the legal system can offer on a personal basis, particularly when powerful clans, politicians or businessmen exercise direct influence over how cases are decided.<sup>32</sup>

In contrast, the current system of legal pluralism restricts access to justice for vulnerable groups who are less informed about their rights and less able to negotiate the different options. Women are in a particularly vulnerable position since, although their rights are, in many cases, better protected under statutory law and *shari'a*, their capacity to access the courts is highly restricted.<sup>33</sup> Elders place pressure on women to settle crimes committed against them through *xeer* and, as will be

explained below, where women do commence litigation, elders routinely petition judges to have such cases withdrawn and returned to the customary level.<sup>34</sup>

The strength of *xeer* (and the elders) *vis-à-vis* the courts (and judges) is closely linked to the role played by the customary system during the civil conflict. Throughout this period, in both Somaliland and Puntland, *xeer* was seen as a mechanism that promoted stability and facilitated initial peace negotiations. Its strength and durability elevated its status within a wider judicial framework, with the result that when the elders seek to assert their jurisdiction over a matter, judges generally facilitate this in the belief that the elders best understand how to maintain peace and avoid further inter-clan conflict.<sup>35</sup>

## 2.2 Collective responsibility

Since *xeer* is based on a doctrine of collective responsibility, there are no provisions for the punishment of individual perpetrators. Instead, when a crime is committed, *xeer* holds the entire *diya*-paying group collectively responsible.<sup>36</sup> The rationale for collective responsibility is that:

[n]omadic individuals have too few personal resources to pay for a given obligation. Hence, if *mag* is not paid, the aggrieved clan may opt to kill the criminal, or members of that person's clan. The unfortunate result is that the clan will lose a valued (economically and militarily) member, setting off a cycle of revenge killings and persistent insecurity. Moreover ... the number of men must be protected and sustained because the perceived strength and wealth of the clan depends on the size of the clan. Hence the very notion of private property has to be subordinate to the clan interests, and becomes part of the "collective property" of the clan ...<sup>37</sup>

However, the practice of not allocating individual responsibility for crimes removes guilt from the individual and furthers contributes to a culture of impunity, with the result that the rights of individual clan members are secondary to the interests of maintaining clan strength and unity.<sup>38</sup> Moreover, the compensatory nature of the system denies the rights to justice and equality before the law because outcomes are determined, not based on the nature of the crime, but on the gender and status of the victim. For example, for identical crimes, the level of compensation payable is highest where the victim is a married woman, followed by a single woman, and then a widow. Similarly, the compensation payable when the victim is a man will always be higher than that for a woman.<sup>39</sup> Compensation-based systems also give rise to impunity in cases such as honor killings and intra-family crimes, where the compensation-paying group and the compensation-receiving group are one and the same.<sup>40</sup>

## 2.3 Representation and participation in *xeer*

*Xeer* and the rulings of *xeer* are not based on an equal representation of all groups. Traditionally, *xeer* is entered into by the elders of the *diya*-paying group.<sup>41</sup> Although in theory, all men can participate in negotiations and mediation, access is generally restricted to adult men from majority clans, and no access is provided to women. Women can only be represented by male relatives as participants, decision-makers, witnesses or victims.<sup>42</sup> Minorities, due to their status in the Somali clan lineage system, are similarly denied representation or inclusion in *xeer* negotiations.

Until quite recently, access to justice for minority groups through customary fora was preconditioned by their being sponsored or 'adopted' by the elders of majority groups. This situation has now been marginally improved, and minorities can also gain access to customary processes through their own elders, although their level of protection and the quality of justice meted out remains limited. This is because minority elders do not enjoy the same status as majority elders, violations committed against minority individuals are rarely viewed as priorities, and the enforcement of decisions can be problematic.<sup>43</sup>

The situation of IDPs is even more troubling, especially in Somaliland and Puntland where conflict- and drought-displaced populations are growing rapidly. IDPs have little access to land or employ-

ment, and are exposed to high levels of criminality. They cannot, however, enter into *xeer* agreements with host communities either because they have been separated from their elders, or because their elders are not respected by — or do not have strong ties to — the majority clan.<sup>44</sup> Without such clan representation, their opportunities for accessing justice are severely limited.

#### 2.4 The protection of women and children under *xeer*

A number of *xeer* practices contravene basic human rights and standards of gender equality, including *dumaal* (where a widow is forced to marry a male relative of her deceased husband), *higsiiian* (where a widower is given the right to marry his deceased wife's sister) and *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement). Crimes of rape are commonly resolved through the marriage of the victim and the perpetrator. Although the *xeer* of many groups protects the right of a victim to refuse marriage in a case of rape, the victims face enormous societal pressure to do so; marriage is widely deemed the best option in such situations to protect the victim from a life of shame and as a means of stemming future retaliatory violence.<sup>45</sup> *Xeer* also tolerates revenge and honor killings, denies women inheritance rights, and views domestic violence as a personal rather than a legal matter.<sup>46</sup> Children, in addition to their vulnerability to the above-mentioned rights violations, are also denied basic legal protections under *xeer*, in large part because it protects parents' right to raise them without interference and because the age of majority is set at 15 years.<sup>47</sup>

### 3. The National Declarations: Working with elders to revise and reform *xeer*

In 2003, a small group of elders from the Somaliland region of Toghdeer approached the DRC seeking support for their attempts to gain better insight into how *xeer* might be revised to align it more closely with both *shari'a* and human rights standards. In the ensuing discussions, weaknesses were identified within the operation of the *xeer* system, in particular the phenomenon of revenge killing, which was deemed a threat to inter-clan peace and stability. Recognizing the importance of *xeer* as the dominant method of conflict resolution, the DRC decided to support a pilot project aimed at strengthening the customary *xeer* system in order to enhance the security and protection of vulnerable groups.<sup>48</sup>

The first step was to facilitate a series of dialogues that brought together over 100 elders from five clans in Toghdeer. This resulted in the Declaration of the Togdheer House of Aquils, which the elders signed in September 2003, committing themselves to curbing the main causes of inter-clan conflicts and addressing specific aspects of *xeer* that violated *shari'a* and human rights. An awareness campaign followed, led by 54 elders and reaching over 100 villages in Toghdeer.<sup>49</sup> A further conference, attended by 92 elders, was held in Burao, Toghdeer Province, from 28 December 2003 to 1 January 2004. This conference produced a final resolution, the key feature of which was to limit communal responsibility in cases of intentional and revenge killings. Specifically, in the event of a revenge or intentional killing, the clan membership committed to refrain from immediate execution of the alleged perpetrator and instead to hand him or her over to the state authorities. In such cases, the compensation payment would be limited to 100 camels and would be paid directly to the family of the deceased, as opposed to being shared by the membership of the clan. Other points of agreement included, *inter alia*:

- the protection of the right of widows to inherit according to *shari'a* principles;
- the protection of the right of widows to marry men of their choice (eliminating the practice of *dumaal*);
- increased protection for vulnerable groups such as orphans, street-children, persons with disabilities and IDPs; and
- the formation of committees to resolve conflicts that were deemed threats to ongoing peace and security.<sup>50</sup>



Interest in the intervention led to parallel dialogue processes in other regions of Somaliland including Awdal, Maroodi Jeex, Sahel, Sool and Sanag. With support from the DRC, the United Nations Development Programme (UNDP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), a further conference was held in 2006, where a National Declaration (a composite of smaller Regional Declarations) was signed, followed by a dissemination process that continued into 2009.<sup>51</sup> At the conference, specific elders were tasked with lobbying the Parliament to ratify the National Declaration, however, this is still pending.

The success of the project in Somaliland generated interest in extending its scope of operation to include Puntland. Accordingly, traditional leaders there followed a similar process and came together in regional meetings to discuss revisions of *xeer*. This culminated in the signing of a National Declaration in February 2009, followed by a process of dissemination and awareness-raising.<sup>52</sup> Importantly, the National Declarations in both Somaliland and Puntland contain the key points from the final Declaration of the Togdheer House of Aquils set out above.

The process of revising *xeer* through National Declarations prompted thinking about how customary law might be used to promote enhanced access to justice for marginalized and vulnerable groups. Attention focused on the problems associated with legal pluralism and the need to harmonize the different legal systems operating in the Somali regions. One initiative focused on the elders' commitment in the National Declarations to relinquish their customary jurisdiction over serious crimes to the formal legal system, specifically those involving intentional/revenge killings and rape. Interventions included providing the elders with a visiting lawyer to advise on legal matters, supporting the creation of "Elder Houses" across Somaliland, and creating an Elders Network in Puntland. It was reasoned that linking the elders through a network and facilitating inter-clan contact would be critical to successfully implementing the revised *xeer*.

#### 4. Assessing the impact of the National Declarations

Five months after the signing and dissemination of the Declaration of the Togdheer House of Aquils, the DRC conducted a monitoring study comprising 560 interviews covering 16 villages. The evaluation revealed a 90 percent reduction in murder cases, and in the two murder cases that did take place, the perpetrators were quickly turned over to authorities.<sup>53</sup> The Mayor of Burao reported that 250 inter-clan land conflicts had been resolved, and five cases where widows had freely married men of their choice were identified. According to a DRC report, community members stated that they had received clear messages from the elders regarding the National Declaration and expressed their "full support in the *aquils'* drive for keeping peace, stopping revenge, upholding women's rights, [and] protecting their grazing land and environment."<sup>54</sup> Data from monitoring visits conducted by the DRC during 2009 showed that within the IDP settlements of Hargeisa, 91 percent of respondents were supportive of the changes to *xeer*.<sup>55</sup>

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Other evaluations, however, indicate that while there has been a decrease in revenge killings, the vulnerable still have difficulty accessing justice as traditional leaders continue to mediate serious cases such as rape rather than referring them to the formal justice system.

In order to provide further insight into the medium-term impact of the intervention, the remainder of this chapter presents the results of field research conducted in Garowe and Hargeisa in February and March 2010. The critical areas of investigation were: general awareness of the provisions of the National Declarations; the extent of referral of serious criminal cases to the formal justice system; and whether there had been any improvement in access to justice and the legal protection of vulnerable groups.

##### 4.1 Community awareness of the National Declarations

In Somaliland and Puntland, four years and one year respectively after the commencement of dissemination activities, awareness of the National Declarations among the general population was

found to be minimal. Out of eight focus group discussions (with approximately 12 participants each), the only group that expressed knowledge of the Declaration was minority women in the settlement of Daami in Hargeisa. This is consistent with other interviews conducted during the course of the research, which revealed that only the elders and direct implementing partners, such as NGO Horn Peace and UNDP, were aware of the Declaration. It is also consistent with research conducted by the DRC in 2009, which found that only 21 percent of residents in Hargeisa were aware of the Declaration.<sup>56</sup>

The greater awareness of the National Declaration in Hargeisa compared to Garowe can be at least partially explained by the fact that dissemination activities began earlier (in 2004 in Hargeisa and in 2009 in Garowe). Yet, even in Hargeisa, only respondents who had been directly targeted in the dissemination campaign in the IDP settlements had retained knowledge of the provisions of the National Declarations; focus group discussions with other community members suggested that awareness among targeted groups had not been carried over to the broader population. Some respondents noted that while they were aware that the elders had met, they had not been informed as to the outcome of the meeting. As one stated, “we heard that the elders were meeting in the Ambassador Hotel but we never heard what it was that they met about ...”<sup>57</sup>

The ten elders interviewed during this research stated that they had disseminated the Declarations and were trying to apply their provisions in dispute resolution. However, they noted that a key constraint was the length of time required before the population would accept such changes in practice. Moreover, the research revealed widespread confusion, among both the elders and the users of the *xeer* system, regarding the functioning of the state justice system. In many cases, parties taking cases to the courts were not sure which law would be applied (*shari'a* or statutory law) or what the outcome might be. As noted by the Chief Justice of Puntland, “it depends on the judge and whether he knows *shari'a* or the formal laws; a judge trained in *shari'a* will only apply *shari'a*, as he doesn't feel comfortable judging with formal laws.”<sup>58</sup>

#### 4.2 Referral of serious crimes to the state justice system

Under the National Declarations, the elders committed to refer serious criminal cases, including murder and rape, to the formal legal system for resolution. Encouragingly, there has been a notable increase in the number of cases being processed by the courts since the Declaration in Somaliland was made. According to UNDP, in 2006 the caseload across Somaliland was 1,852 cases; in 2007, this had increased to 3,293, and in 2008, to 3,833.<sup>59</sup> Given that overall levels of criminality over the period decreased rather than increased, there is reason to believe that this change may be at least partially linked to the National Declaration.

In this regard, the data collected indicates that elders are referring cases to the courts, particularly those involving murder. In Somaliland, there has also been a significant decrease in the practice of clans shielding alleged perpetrators from the courts.<sup>60</sup> Representatives from the Ministries of the Interior and of Justice reported that such shielding is no longer common practice, and that even the elders now regard this as improper.<sup>61</sup> Improvements were also observed in Puntland, although to a lesser extent.

The same improvements were not observed in the handling of rape cases, but for different reasons. The research found that while the elders are prepared in principle to refer such cases to court, and are no longer likely to petition judges to discontinue proceedings, victims remain under significant social pressure to resolve these cases through *xeer*. In most situations therefore, rape cases will either not be reported to the state justice system in the first instance (and leaders will not actively encourage a referral), or victims will elect to discontinue proceedings.

It is important to highlight that although there is some evidence of change in the willingness of the elders to refer serious criminal cases to the formal justice system, security concerns continue to dictate the modality of conflict resolution in Somaliland, and even more so in Puntland. Both the

elders and the Chief Justice of Puntland noted that the maintenance of peace and stability are the chief factors influencing the resolution of criminal cases. As such, conflicts that might lead to inter-clan clashes will be resolved according to *xeer* because this is perceived to be the most effective means of preventing armed conflict.<sup>62</sup> Moreover, the research revealed a high level of confusion on the part of the elders as to whether they should refer cases to the courts or report cases to the police. In Somaliland, the elders argued that they were strictly reporting all serious cases to the police, but understood that once this had occurred, they were under no further obligation to ensure that cases were adjudicated by the courts.<sup>63</sup>

In contrast, minority clan members and IDPs routinely refer serious cases (both murder and rape) to the state justice system. Once referred, the elders rarely petition courts for the cases to be returned to the *xeer* level or take action to have perpetrators released from prison. However, this trend appeared to be independent from the existence of the National Declarations. For example, although minority clans now have representation through their elders, the latter do not have sufficient power to negotiate fair *xeer* with majority clans or to exact compensation in the event of a dispute.

Moreover, discriminatory practices within *xeer* serve to prevent equitable solutions for minority clan members and IDPs. In the case of rape, for example, minority victims may have no access to customary justice because, when the perpetrator is from a majority clan, the traditional *xeer* resolution (whereby the victim is married to the perpetrator) is not permitted. In the case of IDPs, access is even more problematic since they find it difficult to enter into *xeer* with neighboring clans. IDPs often have no other option, therefore, than to refer matters to the state justice system. It is also important to highlight that although these groups show a preference for the formal justice system (perhaps largely through necessity), once at court, they still feel discriminated against and believe that their cases are not taken seriously.

### 4.3 Heightened protection for vulnerable groups

Under the National Declarations, elders committed to the better protection and enhanced access to justice of certain marginalized groups including women, IDPs, minorities and children. However, the elders did not articulate or set specific benchmarks for how this would be achieved. Research conducted on the effectiveness of this aspect of the National Declarations was therefore anecdotal to some extent.

#### 4.3.1 Victims of gender crimes

As discussed above, with the exception of cases involving IDPs and minorities, rape cases are likely to be resolved according to *xeer*. In most cases, victims are reportedly pressured by families to settle their complaint outside the courts. In other cases, lack of evidence prevents judges from delivering a verdict and the matter is referred back for resolution under *xeer*. Both the Chief Justice of Puntland and regional court judges in Somaliland reiterated that in Somali culture, such cases cannot be left unresolved, and that a *xeer* resolution was preferable to no resolution at all.<sup>64</sup>

Under *xeer*, the outcome of rape cases is determined by the victim's male relatives and/or the elders through negotiation on the level of compensation payable, the amount of which is a function of the relative size of the clans, the relationship between the clans, and the age and status of the victim. Such compensation is typically distributed among the members of the *d'iya*-paying group, and rarely delivered to the family of the victim as required under the National Declarations. The women interviewed considered their non-receipt of compensation to be highly unjust.<sup>65</sup> Moreover, the traditional practice of marrying the victim to the perpetrator continues to be seen as a legitimate means of resolving gender crimes because marriage offers both economic and social protection to the victim.<sup>66</sup>

#### 4.3.2 Children

*Xeer* continues to offer little protection to minors. *Xeer* protects a parent's right of absolute authority over their children within the home, and as the following extract from the National Declaration in

Somaliland confirms, the resolution of crimes involving children should occur at the customary level:

The traditional leaders see that the traditional system is best suited to deal with juvenile justices. They call the police and all concerned parties to settle all cases that involve children through the customary law before passing them to the police stations and public prisons.<sup>67</sup>

As a result, where the family of the minor victim decides not to take a case to court or withdraws a case from the court (a common occurrence), the state justice system is unable to provide adequate protection to the victim.<sup>68</sup>

#### 4.3.3 Minority and IDP groups

The legal protection afforded to IDP and minority victims of gender-based crimes remains extremely limited. As set out above, for crimes of rape perpetrated by majority clan members on minority or IDP victims, there is often no access to justice. If referred to court, cases will often be withdrawn by the majority clan elder; however, the solutions offered at *xeer* are unattractive because marriage between a majority and minority member is not permitted, and the power of a minority clan to exact fair compensation from a majority clan is weak. Respondents stated that victims in such situations, unable to marry and socially 'tainted', often commit suicide or leave (or are forced to leave) their communities.<sup>69</sup>

Where cases do reach court, outcomes are inconsistent. If trials are completed, acquittals on the basis of lack of evidence are common, although where the evidentiary requirements are fulfilled, sentences of between 10–15 years (as provided for in statute) are imposed.<sup>70</sup> According to a Regional Court judge in Hargeisa, 44 cases of rape were prosecuted in court in 2009. Of these, only eight convictions were obtained, while the other cases were either dismissed due to lack of evidence or withdrawn from court.<sup>71</sup>

#### 4.4 Evaluation of impact

The research indicates that the impact of the National Declarations has already reached its peak in terms of enhanced access to justice and the legal protection of vulnerable groups. It also seems unlikely that the goodwill of the elders alone will facilitate any further progress under the current conditions. However, this is not to say that no improvements have occurred. There is now increased and more consistent referral of intentional and revenge killings to the state justice system, harmful practices such as *dumaal* have been abolished, and women's access to inheritance has been increased. There have also been improvements in how criminal behavior is perceived and how to deal with criminals; the elders are more aware that the clan should not protect them and that serious criminal offences should be referred to the courts.

On the other hand, there has been more limited progress in resolving gender-based crimes through the courts, or in achieving enhanced protection of vulnerable groups (for example, by paying compensation directly to victims and stemming the practice of marrying the perpetrator of a rape to the victim). In terms of the protection offered to minority clans and IDPs, their situation remains grave, with little notable change as a result of the intervention. Although their access to the state justice system has improved marginally, it appears that this is less the result of the National Declarations than other civil society activities.

In terms of associated or spinoff effects, the goodwill on which the interventions were premised remains, and members of the judiciary and the elders are slowly working towards better collaboration and linkages. For example, the elders and the Chief Justice in Garowe are in discussions on the introduction of a mobile court targeting rural areas. Similarly, in an attempt to respond to the sparse law enforcement presence in rural areas, the judiciary has asked the elders to assist with apprehending suspects, maintaining the peace during trials, and collaborating with the courts to ensure that sentences are enforced.<sup>72</sup>

## 5. Lessons learned from evaluating the impact of the Declarations

The interventions described above represent an innovative approach to enhancing access to justice by reforming customary law from within its leadership. The DRC project was neither established under an orthodox rule of law framework nor with a strict legal empowerment focus. It was deemed that in the context of strong customary law and emerging but nonetheless weak state judicial structures, a creative middle-ground approach was required. Given all that was 'right' about the project's genesis, understanding the limitations of the intervention and what might have been done to promote enhanced impact deserves further examination. This is true both in light of continuing efforts to reform the Somali justice sector, and from the perspective that this is an approach to legal empowerment that might be suitable for adaptation in other country contexts.

### 5.1 Ineffective dissemination

Widespread lack of awareness regarding the National Declarations was a key limiting factor in enhancing the legal protection of vulnerable groups, since ignorance of one's rights restricts one's ability to assert them, or to hold duty-bearers accountable for guaranteeing them. This low level of awareness raises concerns about the effectiveness of dissemination activities carried out in both locations. In Somaliland, in particular, this is surprising given that the outreach component of the project appeared to have been carefully implemented and monitored by the donor partner. A possible explanation is that when the project expanded beyond its pilot phase (and beyond the initial group of elders who spearheaded the initiative), it did not integrate accountability mechanisms or tools to ensure that the elders disseminated the National Declaration effectively. Further, assigning responsibility to the elders alone may have been overly optimistic given their lack of experience in advocacy, their limited skills in managing the logistics of such an ambitious exercise, and their lack of resources to facilitate dissemination.

### 5.2 Accountability

The intervention relied strongly on the goodwill of the elders to deliver on their commitments under the National Declarations without establishing any accountability mechanisms or systems to support implementation. A key issue is that the elders did not bind themselves to any tangible goals at the National Summit where the Declarations were signed. In some cases, the revised *xeer* contained vague language that committed the elders to an improved situation for vulnerable groups more generally without articulating how this would occur or addressing any specific rights. For example, on the rights of minorities, the National Declaration of Somaliland states:

The traditional leaders acknowledge that little progress has been made so far on the free inter-marriage with the minority groups. They call for the social reintegration of the minority groups in all aspects of their daily life.<sup>73</sup>

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One factor here may have been the challenges inherent in attempting to bring *xeer* into alignment with statutory law, *shari'a*, and international criminal justice standards. *Xeer* is an oral, flexible and dynamic system that applies differently to different groups, whereas the other sources of law are based on static, written codes that are universally applicable. Not only was it problematic to standardize *xeer* in a way that applied to all groups, but there was no governing authority to oversee or enforce these changes. It is thus likely that, irrespective of intent, the elders did not understand how, or were not equipped, to implement increased protection by designating specific rights and practices.

While accountability mechanisms and more specificity in the rights afforded may have aided effectiveness, it must be highlighted that the strength of this initiative was that it was conceived and developed by the elders themselves. Imposing external pressure in terms of targets and accountability controls may have irrevocably tainted an otherwise genuinely bottom-up movement for reform. The question is therefore how to encourage a level of accountability that facilitates action, but in such a way that preserves local ownership.

One such form of 'soft' accountability might have been the greater involvement of civil society. The unilateral focus on the elders as agents of change in their communities, and consequent lack of engagement with the users of *xeer*, might be seen as a missed opportunity in terms of bottom-up accountability. Even if Somali civil society lacked the strength to hold their elders accountable, their involvement might have manifested itself in some level of upward pressure for the elders to abide by the agreements, or served as a reference point in the deliberation of certain disputes.

### 5.3 Broader problems of discrimination

The program rested on the assumption that the goodwill of the elders would be sufficient to overcome broader issues of gender and social discrimination deeply entrenched in Somali norms and culture. Intention alone, it turned out, was not sufficient to modify such belief patterns, and correspondingly, the structure of the *xeer* system, which failed to provide equal access to minority and IDP groups. For example, social attitudes preventing women who have pre-marital sex (whether consensually or through rape) from marrying could not change overnight, nor be disassociated from a longer process of social and economic change. While such attitudes remain, the practice of marrying victims to perpetrators in such cases and exacting compensation under *xeer* will continue (as opposed to referring such cases to court), because this represents the only societal and financial protection available to the women involved.

Similarly, the intervention did not respond to the underlying factors that prompted the elders to remove cases from the state justice system. Given the prevailing security and governance conditions, the clan continues to be the fundamental provider of security and protection,<sup>74</sup> with the result that preserving clan strength is viewed as paramount by clan elders. As long as this remains the case, the elders will continue to organize the release of perpetrators from prison, and the transition from a collective to an individual-based system of justice will prove difficult.

### 5.4 Flaws in the state justice system

The intervention sought to create a bridge between formal and customary judicial fora, without responding to the inherent problems that made the courts unattractive in the first place. First, the courts remain weak *vis-a-vis* the elders and are unable to protect victims who may receive little or no justice under *xeer*. Very rarely will decisions taken by the elders not be ratified or be challenged by the courts, even when complainants actively assert a preference for formal adjudication.<sup>75</sup> Further, since the elders are not accountable to the courts, they cannot be penalized if they withdraw a criminal case, and there are no legal mechanisms to protect victims whose cases are removed from the courts against their will.<sup>76</sup>

A second problem relates to the formal laws in place. Unrealistic evidentiary requirements that discriminate against rape victims make the prosecution of such cases extremely difficult. Such restrictions mean that enhanced access to the state justice system has not translated into more equitable outcomes. Where such requirements cannot be fulfilled, returning the case to *xeer* can be a victim's only means of obtaining some measure of financial and social protection. In the case of IDPs and minorities, however, access to any form of justice may remain beyond reach.

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## 6. Reforming *xeer* as legal empowerment

The intervention in Somalia represents an innovative approach to legal empowerment tailored to complex local conditions. In both Somaliland and Puntland, the barriers to accessing justice are many. The state justice system lacks authority and legitimacy, and until quite recently, did not have a presence in rural areas. In contrast, the customary *xeer* system, while more accessible, deviates from internationally recognized human rights standards and denies access to many marginalized groups. Compounding the situation are ongoing unstable security conditions, weak governance, and endemic gender and social discrimination. In this environment, orthodox, top-down approaches that focus on the reform of and access to state courts and other justice sector institutions are unlikely to yield effective results.

On the other hand, a purely grassroots approach has equally little to offer given the authority of the clan system and its role in maintaining the barriers to justice already in place. In this context, efforts to empower civil society to bypass traditional leaders or hold them to account may have been ineffective at best and counterproductive at worst, particularly in the absence of social, economic and security reforms. This is because such efforts may have encouraged the elders to further tighten their grip on power and increase the divide between the already disparate elements of the Somali justice system.

A middle-ground approach was therefore developed, structured around the notion of the elders as agents of change within their communities. These elders — who represented both the interface with the state justice system and the gatekeepers of access to justice at the customary level — were supported and empowered with the hope of improving the operations of *xeer* and offering better protection to vulnerable groups. Through this process, the elders committed themselves to referring serious criminal acts to the courts, thus breaking the cycle of impunity inherent in the functioning of *xeer* and group compensation mechanisms. Critically, the impetus for revising customary law came from within the *xeer* membership rather than from external actors. Consequently, it was argued, the process of revision was more likely to be regarded as legitimate and hence sustainable.

While the longer-term impact of the intervention appears to be patchy, it is noteworthy because it opens up new pathways within the context of legal empowerment programming. Although some progress was made, particularly in terms of the elders ceding elements of their jurisdiction to the courts, there is still much to be learned in terms of continuing reform of the Somali justice system, and for other developing countries. It also brings to the fore important questions in legal empowerment theory, including how far down the formal-grassroots hierarchy must an intervention sit before it can be classified as “legal empowerment”. An argument might run that the type of intervention presented here is not legal empowerment at all, because it did not motivate users to demand change within a normative framework.<sup>77</sup> Some might even go so far as to label the intervention “orthodox” because it targeted the elites of the customary system, who in practical terms, sit at the helm of the justice hierarchy.

The alternate position is that legal empowerment must be approached flexibly to suit country-specific circumstances and that strict definitions are unhelpful. As Wojkowska and Cunningham state, “legal empowerment of the individual and the community is fundamentally about access and power.”<sup>78</sup> Within this framework, the interventions can be seen as contributing to legal empowerment by enhancing access to justice at both the customary level (by aligning procedures and remedies with human rights standards) and the formal level (through better access to the courts in cases of serious crime). Further, although they ultimately proved relatively ineffective, the interventions did include dissemination components aimed at promoting awareness of the revisions among users of *xeer* and hence creating an upwards accountability mechanism. While the idea that *xeer* users could hold elders to account was not realistic, either at the customary or court level, the notion of elders committing themselves publicly to heightened standards is a social experiment with enormous empowerment potential.

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## 7. Conclusion

Rule of law reform in the Somali context presents formidable challenges. Somalia is a country that has been fragmented by civil war, with weak governance and formal legal structures that the population has little confidence in. Three legal systems operate concurrently, often in competition and contradiction, while the most accessible and most frequently used of these, *xeer*, fails to uphold some of the most basic human rights of users. In such contexts, interventions that seek to engage with and reform the customary legal system clearly have much to offer. But while the situation of Somalia is a particular one, it does not stand alone. The intervention examined in this chapter provides valuable lessons learned when trying to engage with customary systems through a legal

empowerment lens. It provides a platform that can be used to further promote access to justice for vulnerable groups in the country or that can be adjusted in order to adapt to other country-specific circumstances.

First, there is something very captivating and promising about interventions that evolve from the grassroots. How best to support them without slowing down their natural momentum is a fine balance that is not well understood. While it is clear that preserving local ownership is imperative, this does not mean that stakeholders do not need support in certain areas. As was seen in the Somali example, customary leaders are not likely to have skills in advocacy, logistics or strategic networking. Similarly, autonomy of process must be balanced against measures to enhance effectiveness, including monitoring and/or accountability mechanisms. This may consist of both top-down interventions, such as complaints mechanisms covering both customary and formal justice processes, and bottom-up interventions, such as raising awareness, facilitating dialogue between different stakeholder groups, or establishing links between civil society, the courts and/or customary actors. The rationale is that complementary interventions that create both upwards and downwards pressure reach a “tipping point” whereby certain conditions are created that allow users to more realistically demand change and hold their leaders accountable.

Second, interventions aimed at enhancing access to justice cannot overlook underlying structural issues, such as deeply entrenched attitudes that operate to discriminate against or marginalize vulnerable groups, security and economic realities that obstruct normative change, and legislation that prevents courts from presenting viable alternatives to customary justice. Where such impediments cannot be removed or will take time to do so, new pathways should be explored. In Somalia, bridging the gaps between minority and majority clans proved far more complicated than empowering the elders alone. While the elders are still struggling with deeply embedded beliefs that status and the right to justice are inherently intertwined, IDP and minority groups are bypassing *xeer* and relying on legal aid clinics and paralegal programs to access tangible solutions at the courts.<sup>79</sup>

Third, exercises in codification and harmonization of legal systems present particular challenges, especially revising customary law to bring it into alignment with formal legislation or international standards. Although it is difficult to generalize, most customary systems are flexible and dynamic with high local variation, whereas legislation is based on static written codes that are universally applicable. Without careful planning, wide consultation and effective controls, exercises in codification can easily result in a set of rules that lack legitimacy, are too weak to be enforced, or are too vague to offer any real protection.

Finally, in pluralistic contexts, access to justice might best be seen as creating a more even playing field where all users have viable and realistic pathways to suitable outcomes. When viewed this way, a holistic approach to enhancing access to justice that targets all stakeholder groups and components of the justice system is most likely to yield results. Reform to the customary justice system should therefore be complemented by strengthening formal courts, particularly by extending their reach into rural areas such as through awareness-raising, free legal aid and paralegal support. Programs that ‘bundle’ legal assistance into existing community services have particular potential in contexts where groups least likely to access suitable outcomes face exclusion on multiple grounds, such as gender discrimination, poverty, and/or minority status.<sup>80</sup> Similarly, programs that overemphasize one change agent (such as customary leaders) to the detriment of civil society groups, users of customary justice, or formal and religious representatives, have fewer prospects for success.



## footnotes

- 1 It should be noted here that the Declaration is referred to as a 'National Declaration' by its proponents because Somaliland is a *de facto* (albeit not *de jure*) independent state from the Republic of Somalia.
- 2 The state of Somaliland is a *de facto* independent state but without international recognition. For all international actors, Somaliland remains a region of Somalia, yet for all practical purposes, Somaliland functions as a state and provides basic security and other services to its citizens. As the current government was elected democratically and in their self-understanding of Somaliland as a state, it will be referred to as such throughout this paper. The region of Puntland functions under a *de facto* separate administration from the rest of Somalia. The Government held peaceful elections in 2008, and in practical terms, is independent; however, since it has stated a preference to remain part of greater Somalia, it is not considered a separate state. A. Le Sage, *Stateless Justice in Somalia — Formal and Informal Rule of Law Initiatives* (2005) 13-26.
- 3 J. Gundel, *The predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, (2006) ii-iii; see generally Academy for Peace and Development, *The Judicial System in Somaliland* (2002) Academy for Peace and Development <<http://www.apd-somaliland.org/docs/judiciaryreport.pdf>> at 20 April 2011.
- 4 See generally I.M. Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* (1961).
- 5 Ibid 242; see further M. Bradbury, *Becoming Somaliland* (2008).
- 6 Ibid.
- 7 Lewis, above n 4.
- 8 Ibid.
- 9 Gundel, above n 3, 6.
- 10 Ibid 7.
- 11 Ibid iv-vi.
- 12 Ibid 6.
- 13 Ibid 10-11; Le Sage, above n 2, 32-33.
- 14 V. Justiniani, *Xeer procedure in Somaliland*, final report for UNDP Somalia (2007).
- 15 Le Sage, above n 2, 32-33.
- 16 Gundel, above n 3, 9.
- 17 Ibid 51.
- 18 Ibid iv-vi. See generally K. Menkhaus, *Local Security Systems in Somali East Africa*, in L. Andersen (ed.), *Fragile States and Insecure People? Violence, Security and Statehood in the Twenty-First Century* (2007).
- 19 Gundel, above n 3, vi.
- 20 Ibid 12.
- 21 Ibid 8-9, 12; D.J. Gerstle, *Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia* (2007) 40-41.
- 22 Le Sage, above n 2, 35-36; Gerstle, above n 21, 40-41.
- 23 Gerstle, above n 21, 31.
- 24 This, of course, presupposes that the woman raped will not marry. Although this is not strictly the rule, most respondents pointed out that rape victims have very few opportunities to marry another person.
- 25 Gundel, above n 3, 6.
- 26 Ibid 21.
- 27 Ibid iii; see further H.M. Kyed, *Traditional authority and localization of state law*, in A. Jefferson and J. Steffen (eds), *State Violence and Human Rights: State Officials in the South* (2009).
- 28 Gundel, above n 3, 21; see further Danish Refugee Council, *Harmonization of Somali legal systems* (2009) 78-79.
- 29 Gundel, above n 3, 55.
- 30 Le Sage, above n 2, 7, 14-5.
- 31 Academy for Peace and Development, above n 3.
- 32 Le Sage, above n 2, 53.
- 33 Gerstle, above n 21, 32-33.
- 34 Academy for Peace and Development, above n 3; Gerstle, above n 21, 82-83. The Director of the Women Lawyers' Association in Somaliland estimated that 80 percent of all rape cases that begin in the courts are transferred by male relatives of the victims on the ground that they have requested the elders to resolve them through *xeer*; interview with Executive Director for the Somaliland Women's Law Association, Somaliland Lawyers Association Office, Hargeisa, Somaliland (9 March 2010).
- 35 Gundel, above n 3, v-vi; Academy for Peace and Development, above n 3; Danish Refugee Council, above n 28.
- 36 In the case of a homicide, for example, irrespective of the presence of *mens rea*, it will be common for the clans to negotiate a settlement in the form of compensation paid by the *djya*-paying group of the perpetrator to the *djya*-paying group of the victim.
- 37 Gundel, above n 3, 9.
- 38 Ibid iii.
- 39 Ibid 55-56; Gerstle, above n 21, 43.
- 40 Gerstle, above n 21, 31.
- 41 Gundel, above n 3, 6-9, see generally Lewis, above n 4; I.M. Lewis, *Understanding Somalia and Somaliland* (2008).
- 42 Gerstle, above n 21, 41; DRC, above n 28, 72; Interview with members of the Sexual Assault Referral Centre (SARC), SARC offices, Hargeisa Group Hospital, Hargeisa, Somaliland (7 March 2010).
- 43 Gundel, above n 3, 56-57.
- 44 Ibid 57.
- 45 Gerstle, above n 21, 32-33, 40-41.
- 46 Ibid 41; Gundel, above n 3, 55-56; Le Sage, above n 2, 37-38; DRC, above n 28, 16-17.
- 47 Gerstle, above n 21, 41, 59.
- 48 V. Justiniani, *The Toghdeer Experience*, Final Report, DRC (2006).
- 49 Ibid 14-16, 23-5.
- 50 Ibid 21-22, 28-32; Gundel, above n 3, 22-23.
- 51 Danish Refugee Council, above n 28. Dissemination was conducted jointly by the local NGO Horn Peace and the elders from each region; Danish Refugee Council, *Follow up and Dissemination of the National Declaration*.
- 52 Horn Peace, *State Conference for the Traditional Leaders of Puntland*, final report of implementation (2009).
- 53 Le Sage, above n 2, 52.
- 54 Justiniani, above n 48, 4, 33-34.
- 55 It should be highlighted that the sample size for this study is unknown. DRC, *Satisfaction and Awareness Survey on the Dissemination of the Elders Declaration* (2009).
- 56 Ibid.
- 57 Focus group discussion with IDPs and minorities, Legal Aid Clinic, Hargeisa University, Hargeisa, Somaliland (9 March 2010).
- 58 Interview with Puntland Chief Justice, Garowe Court House, Garowe, Puntland (28 February 2010).
- 59 UNDP, Access to Justice Division, *Annual Report* (2009) 5.
- 60 Interview with Haqsoor Representatives, Haqsoor Office, Hargeisa, Somaliland (6 March 2010); interview with Mohammed Ali, Hornpeace Representative, Horn Peace Office, Hargeisa, Somaliland (6 March 2010).
- 61 Interview with Minister of Justice, Ministry of Justice, Hargeisa, Somaliland (7 March 2010); interview with the Director General of Minister of Interior, Ministry of Interior, Hargeisa, Somaliland (7 March 2010).
- 62 Interview with the Chief Justice of Puntland, Garowe Court House, Garowe, Puntland (28 February 2010); Focus group discussion with elders, United Nations Conference Centre (UNCC) Compound, Garowe, Puntland (27 February 2010).
- 63 Focus group discussion with the elders, Horn Peace Office, Hargeisa, Somaliland (8 March 2010).
- 64 Interview with Chief Justice for Puntland, Garowe Court House, Garowe, Puntland (28 February 2010); statement by Regional Court Judge of Hargeisa during prosecutor workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).
- 65 Interview with Sexual Assault Referral Centre employees, Hargeisa Group Hospital (7 March 2010); interview with Minister of Justice (Somaliland), Ministry of Justice (7 March 2003).
- 66 Interview with Gaashan NGO, Ambassador Hotel, Hargeisa, Somaliland (6 March 2010).
- 67 Excerpt from National Declaration of Somaliland Traditional Leaders, Hargeisa, Somaliland (4-10 December 2010).
- 68 Information provided by the Regional Judge of Hargeisa, Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).
- 69 Focus group discussions with minority groups, UNCC Compound, Garowe,

- Puntland (7 February 2010); interview with representatives of Haqsoor, Haqsoor Office, Hargeisa, Somaliland, (6 March 2010).
- 70** Information provided at the Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010); interview with Chief Justice of Puntland, Garowe Court House, Garowe, Puntland (28 February 2010).
- 71** Regional Court Judge of Hargeisa, Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).
- 72** Interview with UNDP staff Garowe, UNCC Compound, Garowe, Puntland (3 March 2010); interview with Chief Justice of Puntland, Garowe Court Houses, Garowe, Puntland (28 February 2010).
- 73** Excerpt from National Declaration of Traditional Leaders, Hargeisa, Somaliland (4-10 December 2010).
- 74** Gundle, above n 3, iii.
- 75** Information presented at a Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010). The director of the legal clinic in Hargeisa recalled one case taken to court that involved the rape of a woman by two men. The alleged perpetrators escaped from custody, but were later apprehended by their clans and the case resolved by *xeer*. The elders submitted the decision to the court to be ratified, however, the regional court judge refused to accept the outcome as the case was pending before the court. On appeal, the Supreme Court ratified the elders' decision: Interview with Mohammed Jama, Director of Legal Clinic, Human Rights section, Legal Clinic, University of Hargeisa (9 May 2010).
- 76** Prosecutor workshop, Mansoor Hotel, Hargeisa, Somaliland (7 March 2010).
- 77** See generally S. Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Rule of Law Series, Carnegie Endowment Working Paper No. 41 (2003).
- 78** E Wojkowska, and J. Cunningham, *Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor*, IDLO Legal Empowerment Working Paper No. 7 (2009).
- 79** Focus group discussions with IDPs and minorities, Legal Aid Clinic, Hargeisa Universitt, Hargeisa, Somaliland (9 March 2010); focus group discussions with IDP women, Legal Aid Clinic, Garowe, Puntland (2 March 2010); focus group discussions with young women, UNCC Compound, Garowe, Puntland (1 March 2010).
- 80** A prime example is the Sexual Assault Referral Centre (SARC), attached to the Hargeisa Group Hospital, which provides basic health care, psychosocial support as well as legal assistance to rape victims. Rape cases received by the SARC were most consistently found to be referred to and resolved by courts, and the principal users of this system — IDPs and minority women — are among the most vulnerable of all Somalis.



## Gender Equality on the Horizon: The Case of Uukwambi Traditional Authority, Northern Namibia

Janine Ubink

### Executive summary

Legal development cooperation increasingly emphasizes that legal empowerment can only be achieved when reforms incorporate customary justice systems. This brings to the fore pertinent questions regarding the alignment of these systems with human rights standards. A typical concern is that customary justice systems often lack gender equality. The dominance of men in all three interwoven domains of customary rule — leadership, dispute settlement and normative content — raises questions on how the inclusion of women in customary structures of administrative and judicial decision-making might be facilitated, and how customary norms can be modified so that they better protect women and their livelihoods.

To gain insight into these questions, this chapter explores a range of activities undertaken by the Traditional Authority of Uukwambi in northern Namibia to eliminate the severe gender inequality inherent in its system of customary justice and administration. These activities include the installation of women traditional leaders, the promotion of women's active participation in traditional court meetings, and the modification of customary norms that were detrimental to the position of women. The research data collected indicates that these steps led to certain positive changes in customary practice, including the near complete eradication of property grabbing and increased participation of women in traditional courts. Although the shift in mindsets needed for gender equality is still incomplete, the initiatives undertaken have enhanced the fairness and equity of traditional rule and customary dispute settlement.

## 1. Introduction

Customary justice systems form the dominant legal arena for most people in the developing world. Recognizing this, agents in legal development cooperation have increasingly emphasized that the goal of empowerment through legal reforms can only be reached when they incorporate these systems.<sup>1</sup> At the same time, these agents struggle with the negative aspects of customary systems and seek ways to improve their functioning in terms of equality, accountability, predictability and individual rights protection. A typical concern is that customary justice processes often lack gender equality and their outcomes violate the right to non-discrimination. Customary systems are also widely regarded as patriarchal and therefore favoring men's interests over those of women. This critique is leveled both against processes of customary dispute settlement and customary administration. Dispute settlement issues include the lack of women judges in courts, cultural impediments to women's participation in court debates, and in some cases, the requirement to have their interests represented by their husbands or male relatives. Some of the principal customary administration issues are that most leadership positions are held by men and that land ownership is often vested in men while women exercise only derived rights.

These norms and practices operate to create a gender bias, for instance, in cases of inheritance and divorce. Some studies criticize the gender bias of customary law as an incorrigible trait and advocate for a complete disengagement with customary law.<sup>2</sup> Others reason that customary systems are unlikely to disappear in the near future and that an agenda of reform should be prioritized.<sup>3</sup> The latter position raises the pertinent question on how to facilitate the inclusion of women in customary structures of administrative and judicial decision-making and, relatedly, how to modify customary norms so that they better protect women and their livelihoods.

To generate new knowledge concerning the possibilities and limitations of introducing gender equality into male-dominated processes, this chapter will explore the activities led by the Traditional Authority of Uukwambi in northern Namibia to combat the severe gender imbalance inherent within its system of customary justice and administration.<sup>4</sup> First, under the leadership of Chief Herman Iipumbu,<sup>5</sup> the Traditional Authority of Uukwambi embarked on a process to increase the number of women traditional leaders and women members of the traditional leaders' committees. Second, the Traditional Authority formally opened up traditional dispute settlement meetings and actively encouraged women's participation on an equal basis as men. Third, it modified a number of customary norms that were detrimental to the position of women and sought to create broad local awareness of these changes.<sup>6</sup>

Critically, the progress made in Uukwambi resulted from a bottom-up process undertaken by the Traditional Authority, with the active involvement of the Chief, grafted onto a broader effort by the combined Owambo Traditional Authorities to harmonize and modernize their customary laws.

52 Another critical ingredient was that the changes facilitated were in no small part promoted by the national government.

In Namibia, a country where both opponents and proponents of gender equality believe that women's rights and traditional rule are "eternal foes",<sup>7</sup> the measure of success achieved by the Uukwambi Traditional Authority is remarkable. The complementarity of local and national efforts is one of the factors that sets this case apart from other attempts at enhancing the position of women under customary law. Similarly, the broad range of changes encompassing all three domains of traditional rule — leadership, dispute settlement and substantive norms — distinguishes this legal reform process from others, and seems to have enhanced the effectiveness of individual measures. A very important aspect of the success of the reforms in the Uukwambi Traditional Authority was the timing of the changes, in a period characterized by a strong momentum for change resulting from the birth of an independent Namibia. These three factors need to be considered when advocating comparable change processes in customary legal systems in other regions of Africa and elsewhere.

This chapter begins with an overview of the legal and institutional framework of Traditional Authorities in Namibia. It then provides a concise description of the Owambo kingdoms of northern Namibia and the position of women within their administrative and judicial structures. It subsequently turns to a more specific presentation of the Uukwambi Traditional Authority and an analysis of the research findings in the critical areas of investigation: women's traditional leadership; women's participation in traditional courts; and the modification of customary norms that were detrimental to women's interests. It analyzes whether these processes have led to improvements in the representation and participation of, and legal protections offered to, women under the Uukwambi customary system.

Through the research data collected, it is clear that the steps taken by the Uukwambi Traditional Authority led to certain positive changes in customary practice, including the near complete eradication of the practice of property grabbing and the increased participation of women in the traditional courts. Although the changes in social attitudes required for women to take an equal role in traditional leadership and customary justice is not complete, it seems that the initiatives undertaken have enhanced the fairness of and strengthened equity in traditional rule and customary dispute settlement. An analysis of this case study can help to determine under which conditions these types of normative changes can occur, and whether such conditions can be found or created in other places where similar concerns of gender inequality in customary justice systems need to be addressed.

The arguments presented in this chapter draw on field research conducted in the Uukwambi tribal area between September 2009 and February 2010. Data were collected principally through qualitative data collection methods, which included semi-structured interviews with women, women leaders, traditional leaders, farmers, governmental authorities, academics, and the staff of non-government organizations (NGO), 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 were conducted in 216 rural households to explore issues associated with access to, participation in, and satisfaction with, the customary justice system.

## 2. The legal and institutional framework of traditional authorities in Namibia

The *Constitution of Namibia 1990* mentions neither Traditional Authorities nor traditional courts; their recognition can only be deduced from articles 66(1) and 102(5). 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.<sup>8</sup> The latter article calls for the establishment of a Council of Traditional Leaders whose function is to advise on communal land management and on other matters referred to it by the President.<sup>9</sup>

Despite the limited debate on the traditional administration in drafting the first Constitution — which, according to Hinz, indicates that “the political minds behind the Constitution did not envisage much of a role for the traditional authorities”<sup>10</sup> — only a year later, President Sam Nujoma established the Commission of Inquiry into Matters Relating to Chiefs, Headmen and other Traditional or Tribal Leaders and Authorities (the Kozonguizi Commission), chaired by Dr Fanuel Jariretundu Kozonguizi (then Ombudsman of the Republic of Namibia). The Kozonguizi Commission was tasked to inquire into rules and practices relating to the appointment and recognition of traditional leaders, their powers, duties and functions, and in particular, their identity and their degree of acceptance by the population.<sup>11</sup>

The Kozonguizi Commission's proposals guided the development of the *Traditional Authorities Act 1995* (Act 17 of 1995), which were largely reproduced in the *Traditional Authorities Act 2000* (Act 25 of 2000), which currently regulates traditional leadership. It provides for the establishment of traditional authorities in traditional communities. Each traditional authority comprises a chief or

head, senior traditional councilors and traditional councilors.<sup>12</sup> It confirms that the designation and tenure of the office of Chief shall be regulated by customary law,<sup>13</sup> and defines the powers, duties and functions of traditional authorities. Their main functions, according to the Act, relate to the promotion of peace and welfare in the community, the administration and development of customary law, and the supervision of its observance, and the preservation of local culture.<sup>14</sup> Section 14(a) of the *Traditional Authorities Act 2000* states that "any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the *Constitution of Namibia 1990* or any other statutory law" shall cease to apply.<sup>15</sup> Article 10 of the Constitution, which prohibits discrimination on the grounds of, *inter alia*, sex, therefore renders redundant any customary law that violates norms of gender equality.<sup>16</sup> In line with these provisions, section 3(1)(g) of the *Traditional Authorities Act 2000* requires traditional authorities to promote affirmative action "in particular by promoting gender equality with regard to positions of leadership".<sup>17</sup> This provision is worded as an obligation of best intents, rather than as a duty to achieve a given result, and no quotas or sanctions of any kind are stipulated. According to officials of the Ministry of Local and Regional Government and Housing, the government agency responsible for the regulation of traditional authorities:

...This legislation was based on the assumption that the Ministry would not interfere with the internal policies of Traditional Authorities; rather, educational measures were expected to promote the appointment of women to positions of traditional leadership.<sup>18</sup>

### 3. Traditional authority and the position of women in the history of Owambo

#### 3.1 Owambo kingdoms

The Owambo people constitute the largest population group in Namibia.<sup>19</sup> Their home was called Owamboland during the colonial period, but today is divided into the Omusati, Oshana and Oshikoto regions. Almost half of the total population lives here on less than seven percent of the Namibian territory.<sup>20</sup> With the exception of the Uukolonkadhi, the Owambo societies were politically organized as kingdoms.<sup>21</sup> Colonial rule seriously affected the indigenous Owambo polities. During the last decade of German occupation, the Germans started to conclude treaties with traditional leaders in the areas north of the Police Zone<sup>22</sup> for the recruitment of contract labor for German-owned mines and commercial farms.<sup>23</sup> This changed the relationship between traditional leaders and their people since "(t)he chiefs soon realized the potential material benefits of this for them personally and they employed their absolute authority to maximize their rewards."<sup>24</sup> In addition, when contract laborers returned home, influenced by the European way of life, they increasingly came to question the local political, social and economic order, which induced a gradual but irreversible process of breaking down the traditional norms and authority.<sup>25</sup>

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South Africa, succeeding Germany after the First World War under the mandate system of the League of Nations, continued and elaborated the German system of indirect rule for the northern Namibian territories including Owamboland.<sup>26</sup> In both Uukwambi and Uukwanyama, the South African administration forcibly removed the King and replaced him with a Headmen's Council.<sup>27</sup> The main tasks of these Councils were maintaining law and order, and ensuring a steady supply of contract migrant workers to the Police Zone.<sup>28</sup> Indirect rule, characterized by the extensive use of indigenous political institutions, closely aligned most of the Owambo Chiefs with the South African colonial regime. This "transformed the indigenous polities into local administrative organs dependent on the colonial state".<sup>29</sup> This collaboration with the colonial regime cost the traditional leaders in the north much of the respect of the population.<sup>30</sup> From the 1960s, Ovamboland became the centre of Namibia's independence struggle and the scene of severe fighting between the South West African People's Organisation (SWAPO) and the South African army, during which thousands of lives were lost. From the 1970s until independence, SWAPO and the churches<sup>31</sup> were seen as the main sources of authority by the population, rather than the chiefs or the Owambo (homeland) authorities.<sup>32</sup>

Notwithstanding the loss of influence suffered during the colonial period, traditional leaders play an important role in present-day rural Namibia. In 1991, the Kozonguizi Commission concluded that despite regional differences and individual dissatisfaction, traditional leadership was a necessary and viable institution, and recommended its retention “within the context of the provisions of the Constitution of the Republic of Namibia and having regards to the integrity and oneness of the Namibian nation as a priority”.<sup>33</sup> Two empirical studies in the mid-1990s showed a positive attitude towards traditional authority among respondents in both the north<sup>34</sup> and south<sup>35</sup> of Namibia. The first study, by Hinz and Katjaerua, included the Ondonga and the Oukwanyama communities in Owambo. In these communities, 25 out of the 27 respondents felt positive or very positive about the institution of traditional leadership. Similar figures were found in other northern communities and in six Nama communities in the south. Keulder emphasized, however, that people’s support for the institution of traditional leadership did not preclude negative feelings toward the incumbent traditional leaders.<sup>36</sup> In line with these data, Becker concludes that in 2006 “while during the colonial era the Owambo chiefs were poised against the local population and SWAPO, they appear to have been remarkably resilient and to have redeemed popular support.”<sup>37</sup>

### 3.2 Women in Owambo polities

The role of women in pre-colonial Owambo is not easily ascertained. According to Becker, “the general assumption of women’s traditionally inferior position is highly disputable”;<sup>38</sup> She points out that, in many communities: women had access to property; the matrilineal system tempered the control of men over women and especially of husbands over wives; women played important roles as healers and ritual leaders; and there were also women traditional leaders, although they were a minority.<sup>39</sup> She concludes that, in the pre-colonial era, “[w]omen and men were ... conceived of as inhabitants of different spheres in a complementary social duality rather than as beings ranked hierarchically according to gender”.<sup>40</sup>

Gender relations changed fundamentally during the colonial period. The colonial rulers’ gender ideology was not in consonance with the existence of powerful women. Further, they perceived a strong need to maintain the authority of male elders over women and youth to ensure social order and stability. This extended to the colonial governments’ relations with traditional leaders: women leaders were all but purged from the local traditional arena; women were largely excluded from participation in traditional courts; the emerging structures of colonial tribal authority “evolved into all-male domains”.<sup>41</sup> Simultaneously, the emergence of male contract labor and the resulting introduction of a male-controlled cash economy weakened the financial position of women *vis-à-vis* men and increased their burden because all work traditionally assigned to men was added to women’s workload when men were away on contract.<sup>42</sup> The influence of Western missionaries and Christianity also contributed to and deepened the subordinate position of women in society. It is these combined factors that determined gender relations during the colonial period and created a widespread belief in Namibia that traditional rule could not and would not accommodate women’s rights.

## 4. Uukwambi Traditional Authority

Uukwambi is divided into five<sup>43</sup> districts (*oshikandjo*), four of which are headed by a senior headman and one by a senior headwoman (*mwene gwoshikandjo*). Each district contains a substantial number of villages, up to 70, headed by their own headman/headwoman (*mwene gwomikunda*). At each level, leaders are supported by their councils. Chief lipumbu is the Chairman of the Uukwambi Traditional Council, which comprises the senior headmen/headwomen as well as several other traditional councilors.

In Uukwambi, there was a weak presence of women traditional leaders during the colonial period. In the current research, interviews revealed that many people believed that there had not been any women traditional leaders during that period. Others, however, were aware of the existence of a particular headwoman or female traditional councilor. According to Chief lipumbu,<sup>44</sup> at the level of



the Traditional Council, there have been women leaders since the reign of his grandfather, King lipumbu Ya Tshilongo (1907–1932). When he succeeded his father as Chief in 1985, there were also women in the Traditional Council, although they were not official councilors. “At that time the men all worked under the red line,<sup>45</sup> so the women were taking care of the houses and the villages. Women were acting on behalf of their husbands, also on the Traditional Council.”<sup>46</sup> Women were also largely excluded from active participation in the traditional courts. In some villages, although women could come and attend court meetings, they were not allowed to speak. In other villages, even their presence was prohibited, unless they were involved in a dispute or crime. Not surprisingly, the traditional system dominated by male leadership and dispute settlement included norms that were detrimental to women’s rights. A salient example is the customary inheritance norm that states that upon a man’s death, his estate is inherited by his matrilineal family. Despite a customary obligation of the husband’s family to support needy widows and children, widows and their children were often chased out of the house, back to her own matrilineal family (a practice often referred to as ‘widow chasing’ or ‘property grabbing’).

In the last decades, the Uukwambi Traditional Authority has undergone change in three key areas: the participation of women in leadership, the participation of women in traditional court processes, and substantive change in customary rules that better protect women’s rights. Before discussing these changes and their impact on the people of Uukwambi, it is useful to highlight that the achievements in Uukwambi were inextricably intertwined with change processes occurring in Namibia at large. When Namibia gained its independence in 1990, the country experienced a tremendous momentum for change, including in 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.<sup>47</sup> The collaboration of traditional leaders in indirect rule of the apartheid government, which cost them the respect of the population, was a determining factor in this articulation. The *Constitution of the Republic of Namibia*, adopted in February 1990, reflected the demand for gender parity in guaranteeing equality and freedom from discrimination on a number of grounds including sex (section 10(2)).<sup>48</sup>

The following sections examine how the Uukwambi Traditional Authority capitalized on this national momentum for change. Considering the dominance of men in all three interwoven domains of customary rule — leadership, dispute settlement and normative content — the transition towards gender equality was not an easy one. It is thus important to understand how such change was facilitated, both from the perspective of expanding reforms to greater Namibia, and the potential for recreating the conditions supporting such processes in other customary contexts.

## 5. Women traditional leaders

### 5.1 Promoting women’s leadership

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

The chief went to tell the people that women can also be leaders. He referred to Queen Elizabeth. The chief called the senior headmen to tell their people that this is what it should be now. He also organized meetings from one village to the other, trying to make people understand. He was everywhere in Uukwambi, up to the most remote villages. The chief was really working hard, trying to bring women at the

same level as men. The chief is very hardworking. He brought men and women together, united them.<sup>49</sup>

As a result, Uukwambi has seen a significant rise in women traditional leaders. Currently, one of the five district senior councilors is a woman, and in the three districts where interviews were conducted, the proportion of women ranged from approximately one out of four (in Onamega District) and one out of five (in Ogongo District), to a mere one out of 19 (in Otuwala District). According to one headman in Onamega District: “the senior headman tells people around him that if they see a woman capable of leading, she must be the first choice.”<sup>50</sup> Although still heavily outnumbered by headmen, this represents a significant change from traditional rule of ten years ago.

## 5.2 The flexibility of traditional leadership positions

A number of forces facilitated the introduction and acceptance of women’s traditional leadership, including the general relaxation of the rules regarding the selection of traditional leaders in the Uukwambi Traditional Authority, at least at the lower levels of the traditional hierarchy. Traditionally, a successor was selected from the family of the last leader. Originally, there was a preference for a member of the former headman’s matrilineal family, but it was not uncommon for the son of a traditional leader to succeed his father if no matrilineal family members were deemed eligible. Over time, it became common for a headman to nominate one of his sons or grandsons. Today, the criterion of belonging to the same family is no longer decisive (although it is still often preferred if a suitable candidate is available). One elder explained that a village may prefer someone unrelated to the former headman if there is a perception that a family member would take over the preferences and hostilities of the former headman.<sup>51</sup>

The new flexibility of traditional leadership positions combined with an increased space for female leadership, for various reasons and in different ways. First, it increased the eligibility of a headman’s widow, because they “have been around their husbands and have witnessed him as headman...”<sup>52</sup> In other situations, headwomen were not appointed because they were related to the former headman, but because their personal commitment and accomplishments made them popular candidates for the position of village leader. A third situation was where there was a lack of men with the necessary leadership qualities.

Another interconnected gradual change observed in Uukwambi is that villagers are demanding to have more influence in the selection of a new headman/woman, which was traditionally a privilege of the chief and the senior headmen.<sup>53</sup> For instance, in Oshandumbala, a process of election was being negotiated after the death of an unpopular headman. In another village, the fact that the headman was not selected by the people was offered as explanation for his unpopularity.<sup>54</sup> The survey showed that these feelings were widely shared among the population: 93 percent of 161 Uukwambi respondents agreed or strongly agreed with the statement, “It would be a good idea if headmen and headwomen would be elected by the people”.

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## 5.3 Acceptance of women traditional leaders

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

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

headwoman to include men in her committee and ensure that headmen from neighboring villages attend her court meetings.

It is to be expected, and was often suggested during interviews, that the acceptance of women traditional leaders is linked to their performance. In the survey, therefore, several questions were asked regarding the performance of men and woman leaders. These data indicate that a large majority believed that their headwoman was doing her job well, with no significant difference between male and female respondents. There was a slight, but insignificant difference in how the performance of headmen was regarded (Table 1). In the same vein, respondents in villages with women leaders described the relationship with their village leader almost identically to respondents in villages with men leaders (Table 2). Here also, the gender of the respondents did not account for a substantial deviation in opinion. The statistical data regarding the senior headmen/women reveal similar opinions: leaders of both sexes were assessed similarly<sup>55</sup> and received strong support from men as well as women (Table 3).

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

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

**Table 2. “The relationship between you and your headman/woman”**

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

**Table 3. “The senior headman/headwoman does his/her job well”**

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

SHW = senior headwoman; SHM = senior headman

One interesting finding from the survey data is that, while men and women assessed headwomen more or less similarly, and that this assessment did not substantially differ from women’s assessments of headmen, these same headmen were assessed significantly more positively by male respondents (Table 1b).<sup>56</sup> With regard to senior traditional leaders, the senior headwoman and the senior headman of Onamega District were assessed almost identically by male and female

respondents. Only Otuwala District showed a significant difference between male and female respondents, again indicating that men assessed their male leader more positively than did women (Table 3b).

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

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

**Table 3b. “My headman/headwoman does his/her job well”**

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

#### 5.4 Gendered leadership *in abstracto*, an incomplete change in mentality

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

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

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When respondents were then asked whether men and women have these above character traits in equal measure, a large minority of the women and more than half of the men answered that men possessed these qualities in larger measure than women (Table 4). This is consistent with the recorded preferences for male or female leadership. Headmen were preferred over headwomen by a majority of the male respondents as well as a large minority of the female respondents (Table 5). In a similar vein, only 21 percent of male respondents and 43 percent of female respondents supported the statement that more traditional leaders should be women (Table 6). The answers to the statement “Men generally make better leaders than women” similarly show that men were still regarded as the most suitable leaders (Table 7).

**Table 4. “Do women and men have the necessary qualities for leadership in equal measure?”**

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

**Table 5. “If you could vote for a new traditional leader in your village, would you prefer a headman or a headwoman?”**

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

**Table 6. “It would be good if more traditional leaders were women”**

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

**Table 7. “Men generally make better leaders than women”**

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

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With regard to the latter two statements, “It would be good if more traditional leaders were women” and “Men generally make better leaders than women”, the gender of the respondents accounts for a substantial deviation in opinion.<sup>57</sup> When the gender of the village leader was taken into account, the data show that male respondents living in villages led by a headman were significantly more negative towards increased women’s leadership than the female respondents in the same villages,<sup>58</sup> and more negative than male respondents in villages headed by women<sup>59</sup> (Table 6b). Similarly, with regard to the statement “Men generally make better leaders than women”, both male and female respondents in villages headed by women scored significantly higher (indicating a lower agreement with the statement) than respondents in villages headed by men,<sup>60</sup> with significantly lower scores from male respondents (Table 7b).<sup>61</sup>

**Table 6b. “It would be good if more traditional leaders were women”**

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

**Table 7b. “Men generally make better leaders than women”**

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

When aggregating the data discussed above, two patterns become visible. First, in villages led by a headman, male respondents had a significantly more negative view of female leadership than female respondents,<sup>62</sup> a difference that was not found or that was much less than in villages with headwomen. Second, male respondents showed a more positive general attitude towards female leadership *in abstracto* when living in a village led by a woman compared to males living in a village led by a man.<sup>63</sup> The latter indicates that men’s opinions about gendered leadership — whether based on traditional values or preconceived opinions regarding the character traits of men and women — undergo significant change as a result of exposure to successful female leadership.

## 6. Participation of women in traditional courts

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

### 6.1 Stimulating women’s participation

In 1993, an important event in the gender mainstreaming of participation in traditional courts took place at a Customary Law Workshop of Owambo Traditional Authorities in Ongwediva. At this meeting, it was unanimously decided that women should be allowed to participate fully in the work of community courts. According to Becker,<sup>64</sup> this resolution, which was subsequently incorporated into Uukwambi’s written customary laws, gave momentum to a process to involve women more actively in political and judicial decision-making. Following the 1993 workshop, the Uukwambi Traditional Authority called a meeting of all Uukwambi headmen, where they were told that a female representative and advisor had to be selected in each village. It was also communicated that women were to be encouraged to actively participate in traditional court meetings. Further, the new representatives were expected to actively participate in hearings of customary courts and generally act as deputies to the headmen in order to enhance the equal representation and treatment of women in the customary arena.<sup>65</sup>

As noted above, the resolution of the Owambo Traditional Authorities on women’s participation in traditional courts and the installation of women representatives in Uukwambi<sup>66</sup> need to be placed within their temporal context, including the prominence of women’s rights in Namibian politics and the inclusion of gender equality provisions in the *Namibia Constitution (1990)*. As one headwoman recounted:

The idea to install women representatives came after independence. The news of the law [the Constitutional provision on gender equality] was spread all over the country. It was passed on to the kings and chiefs, and from them to the senior headmen, the headmen and the villagers. Then the chief [of Uukwambi] decided that every village was to have a women representative.<sup>67</sup>

In 1992/1993, in Uukwambi, another initiative was carried out with the aim of improving women's involvement in judicial decision-making, by the Centre for Applied Social Sciences (CASS) Legal Department. Research conducted in the three northern areas of Uukwambi, Ombalantu and Oukwanyama Traditional Authorities revealed that women had limited knowledge of, and lacked access to, the customary justice system.<sup>68</sup> Many women felt that customary law and the customary judicial system neglected their concerns. They particularly complained that they were excluded from active participation in customary courts. Since the research project showed a clear need for community-based legal education, it was followed by a training program for Community Legal Activators (CLA) with a strong emphasis on gender relations.<sup>69</sup> The aim was that CLAs would: i) assist traditional leaders and customary courts; ii) provide information about and advice on law to community members; and iii) help solve disputes between community members without going to the traditional court.<sup>70</sup> Uukwambi was chosen as the area for the CLA project, on the basis of logistic as well as political considerations, including that the Uukwambi Traditional Authority had made significant progress promoting the "indigenous reform of customary law and the status of women" and showed an overt interest in cooperating in a project to improve the administration of justice in customary courts and the legal status of women.<sup>71</sup> The Chief of Uukwambi and the Secretary of the Traditional Authority were among the participants of the course and still have their certificates nailed to their office walls. A number of the women participants in the CLA course were among the first women representatives elected at the village as well as the district levels.

## 6.2 A mixed response

There was a mixed response to this changed situation from village headmen. A number of them welcomed the idea and encouraged the women to discuss their problems with the women representatives. Other headmen, however, felt insecure and threatened. As one traditional councilor explained, "In some villages, the headmen think the women representatives want to take over the village. Those old men, it is not easy to make them understand something."<sup>72</sup> But it was not only headmen who resisted the new role of women. Criticism and gossip came from many sides, including from other women. Female representatives sometimes dropped out or became inactive due to criticism, or because they did not know what to do due to a lack of training and education. Those who persevered currently play an active role in traditional court and other village meetings, and appear to serve as important role models, encouraging other women to participate in community affairs. At the level of the district court and the chief's court, women also play a prominent role.

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## 6.3 Women in traditional courts today

The scene of the traditional justice domain in Uukwambi has changed dramatically since independence in 1990. There are an increasing number of women traditional leaders and representatives at court cases at the village, regional and Traditional Authority levels. These women are active participants in representing and discussing cases, questioning parties and witnesses, and deliberating on the actions and decisions of the court. Ordinary women are also present in large numbers and even outnumber the men in many villages. This should be understood, however, within the specific context of the high out-migration which characterizes the rural areas of northern Namibia. This phenomenon, caused by the poor economic situation in rural areas, has resulted in a high percentage of women-headed households.<sup>73</sup> A concomitant of this out-migration is that the majority of the men who do remain in the villages are generally very young or very old. Also, with regard to the rest, it is felt that they are not of the most enterprising character. The adult men are largely regarded as 'good-for-nothings', often addicted to alcohol and spending much of their days in the local bars (*shebeens*). Despite their limited presence at traditional court meetings, men seem

to accept the decisions taken by these traditional courts. According to a traditional councilor, “they can’t resist. When we tell the men, ‘the law says...’ they will comply. There is nothing else they can do. The law is clear.”<sup>74</sup>

At many court meetings, women are expressly encouraged to actively participate in the proceedings. At one of the senior traditional councils, the chairman always addresses the women at the beginning of a court session: “You women have been neglected. Now it is time for change. So if you see something you don’t like, speak up. Everyone now, watch carefully. Stand up and speak if you think something is not right, or if you don’t understand something.”<sup>75</sup> In addition, observations during court meetings indicate that many women in fact do so: women as parties and as witnesses speak plainly, seemingly unafraid to vent their anger and irritation with the opposing party, and occasionally sternly refuse to cooperate towards reaching an amicable settlement that involves a compromise. There does not seem to be an easily discernable difference of style in behavior and speech between men and women as parties and as witnesses.<sup>76</sup> Many claim, however, that this is not the case for all women. Older women in particular still believe that only men can make sound decisions and therefore remain quiet during court proceedings.

At higher levels of the court hierarchy, men continue to make up the majority due to the still skewed number of men compared to women traditional leaders. Nevertheless, change is also profound at this level. As Chief lipumbu states: “there has been a big improvement for women since the mid-1990s. Now at every traditional court proceeding, you see many women. Also in higher positions. See this court. It was not like this before.”<sup>77</sup> At these higher court levels, women are said to be more active than men. A woman’s representative describes the present-day practice at the senior headman’s court: “the headwomen come. Many headmen fail to come. Men don’t do their job properly. Men don’t care. Only women are prepared to take responsibilities. In fact, the senior headman encourages women to take over as village leader[s].”<sup>78</sup>

#### 6.4 Women’s empowerment

At the beginning of section 6, the question was raised whether the changes in practice have had an empowering impact on women. This subsection analyzes whether the opening up of traditional courts has resulted in a positive perception of women and their role in them; and further, whether such perceptions are influenced by the gender of the traditional leader in the respondent’s village. When discussing perceptions of the traditional courts, it is important to highlight that approximately two-thirds of the respondents had never attended a traditional court meeting in their village. Thirty-two percent of the respondents had participated in court meetings, but only 8 percent reported to have attended “many times” or “almost always”. Traditional court meetings therefore do not engage the majority of the adult population of a village.

The 51 respondents who answered that they had attended court meetings showed high satisfaction with traditional court performance: only 18 percent reported a need to improve the performance of traditional courts.<sup>79</sup> Male respondents reported a slightly higher need to improve the performance of traditional courts led by headwomen, compared to those led by headmen. Female respondents, on the other hand, were more negative about the performance of traditional courts led by headmen than by headwomen.

When these same respondents were asked whether they felt they could actively participate in proceedings, 72 percent of female respondents and 92 percent of male respondents answered positively, and 28 percent of female respondents felt that they could not actively participate. Women were more positive about participation in villages led by headwomen than by headmen (Table 10).

When confronted with the question of whether men or women were more influential in the traditional court in their village, 56 percent of female respondents and 60 percent of male respondents believed that power was equally divided, with most of the others claiming that men enjoyed more power than women. Opinions of male respondents did not differ with the gender of the



village leader; however, female respondents believed that there was more equal power-sharing in villages with headwomen (Table 11).

When all respondents — including those who had never attended a traditional court meeting — were asked their opinion about the statement, “Men and women are treated equally in traditional courts”, only nine percent did not agree. Both male and female respondents were slightly more positive about this statement where the traditional courts were headed by women as opposed to men. Similarly, only six percent of respondents disagreed/strongly disagreed with the statement “In the traditional court, women and men have an equal chance to get a fair decision or settlement”.

Almost half of all respondents stated that they found it difficult to speak up and give their opinion at a traditional court meeting. These data show a significant difference between men and women (women reporting more difficulty than men).<sup>80</sup> When disaggregated by court attendance, the data indicate that respondents who had never attended a traditional court felt that it was much more difficult to speak up than did respondents with actual court experience (Table 12).<sup>81</sup> Of those respondents who had attended a traditional court, 80 percent of the male respondents and 68 percent of the female respondents disagreed or strongly disagreed with the statement; 28 percent of the female respondents strongly agreed, compared to 4 percent of the male respondents (Table 12b). Further, the data indicate that male respondents found it easier to speak up in traditional courts in villages led by women compared to those led by men.

**Table 10. “Do you feel that you can actively participate in traditional court proceedings?”**

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

N=51, missing=1

**Table 11. “In the traditional court in your village, who do you think are more influential, men or women?”**

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

N=51, missing=1

**Table 12. “I find it difficult to speak up and give my opinion at a traditional court meeting”**

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

**Table 12b. “I find it difficult to speak up and give my opinion at a traditional court meeting”**

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

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

## 7. Ending ‘property grabbing’

Substantive customary norms constitute the third gendered domain of traditional rule. Not surprisingly, the traditional system dominated by male leadership and dispute settlement included norms that were detrimental to women’s rights. A salient example is the customary practice of the matrilineal family inheriting the deceased husbands’ estate, which leaves the widow dependent on her husband’s family unless she chooses to return to her own matrilineal family. Despite a customary obligation on the husband’s family to support needy widows and children, widows and their children were often chased out of the family home. A related norm states that when women remain on the land they had occupied with their husbands, they are required to make a payment to their traditional leaders for the land in question. This section discusses the steps taken to adjust these customary norms and their effectiveness, specifically the extent to which people are aware of the new norms, and whether they have led to effective behavioral change.

### 7.1 Adjusting the norms

At the May 1993 Customary Law Workshop of the Owambo Traditional Authorities, leaders of six Owambo traditional communities came together to make recommendations for the various councils with the aim of harmonizing their customary laws. 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 for such land again. This 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 draft<sup>82</sup> version of *The Laws of Uukwambi Traditional Authority 1950-2008* reiterates these rights of the widow<sup>83</sup> and explicitly acknowledges that this right does not require any payment.<sup>84</sup> The laws also physically complicate property grabbing by stipulating in clause 9.4 that “[t]he widow or any other member of the bereaved family should feel free to walk around the house during the mourning period as it was before [the husband died].”

This normative change reflects a widely felt need among society members to enhance the position of widows, both at the local and national levels. Research carried out in 1992-1993 in Uukwambi found that when respondents were asked whether they agreed or disagreed with the statement “The husband’s family should inherit all the property when the husband dies”, 96 percent disagreed;<sup>85</sup> when asked whether “Women should be allowed to inherit land without having to pay”, 97 percent agreed.<sup>86</sup> In line with this, in 1993, more than 100 women demonstrated against discriminatory inheritance laws at the highest court of the Oukwanyama Traditional Authority.<sup>87</sup> Another high-profile proponent of change was President Sam Nujomo, whose strong feelings on the topic were well-known to the traditional leaders assembled at the 1993 Customary Law Workshop of Owambo Traditional Leaders. Such local and national action combined to create strong pressure for normative change, which was taken up by the Traditional Authorities. Later, the protection of widows was also enshrined in national legislation: section 26 of the *Communal Land Reform Act 2002* (Act 5 of 2002) provides that upon the death of a holder of a customary land right, this right will be transferred to the surviving spouse. Section 42 adds that for this re-allocation, no compensation may be demanded or provided. These sections thus confirm the abovementioned provisions in the written *Laws of Uukwambi 1950-1995* and other Owambo Traditional Authorities.

## 7.2 Legal awareness and behavioral change

Interviews conducted under the current research indicated that the changed norms have become widely known and enforced in Uukwambi. Many people were familiar with the new rules, and it was generally stated that there was a drop in the number of cases of property grabbing, both in traditional courts<sup>88</sup> and at Communal Land Boards (CLBs).<sup>89</sup> Widespread awareness was corroborated through the survey data, which show that, of the 162 respondents in Uukwambi, 82 percent were aware of the norm prohibiting property grabbing, and 81 percent, of the norm prohibiting payment to the headman/woman. Of the 132 respondents who were aware of the norm prohibiting property grabbing, 92 percent stated that they were unaware of any case of property grabbing in their village in the past three years, compared to 8 percent who had heard of such a case.

66 These figures are particularly striking when compared to another research project carried out in 1992-1993 in Uukwambi. In this research, when asked about property and inheritance in a customary marriage, 51 percent of the 600 female respondents answered that they were convinced that on the death of their husbands, all of the belongings of the husband would be transferred to his family.<sup>90</sup>

As stated, property grabbing and payments by widows to headmen to retain land were first outlawed in the written *Laws of Uukwambi 1950-1995* and later in statutory law. During interviews, both customary law and statutory law were referred to as sources of the new norm, and both institutions — the Uukwambi Traditional Authority and the Government — were perceived 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 CLBs show that these institutions still received many property grabbing cases in 2003-2006, and then saw a gradual decline up to the present, where there have been few cases. 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 percent of respondents who were aware of the norm attributed its basis to statutory law, with 5 percent specifically referring to the *Communal Land Reform Act 2002*; 64 percent referred to customary law as the source; 14 percent did not know. A further important point is that respondents often noted that when both parents die, the inheriting 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*<sup>91</sup> but not the written *Laws of Uukwambi 1950-1995*<sup>92</sup> suggests that knowledge of the content of the Act is at best incomplete<sup>93</sup> and that awareness of statutory norms may be stronger when they reflect customary norms.

## 8. Conclusion

### 8.1 Assessing impact

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

The scene of traditional court meetings has changed enormously since independence. Women traditional leaders, women representatives and ordinary women are present in large numbers, often outnumbering men. These women are encouraged to play an active role in the proceedings, and many of them do. The transformation is not complete, however; some women still feel inhibited and perceive the traditional court as a male arena. Only approximately one-third of respondents stated that they attended traditional court meetings in their village. The majority of these people were positive about the performance of the court and their ability to participate. A large majority of total respondents felt that men and women were treated equally and had an equal chance to obtain a fair decision or settlement. However, there was a marked difference between villages with headwomen and with headmen. Female respondents were significantly more positive about proceedings in villages led by women, in terms of their ability to participate and the equal division of influence between sexes. Male respondents did not make a distinction between the gender of their leader with regard to participation and influence, but they did indicate that they found it easier to speak up in villages led by women.<sup>94</sup>

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In 2002, a new norm prohibiting property grabbing by a deceased male's family was promulgated in the written customary laws of the Uukwambi Traditional Authority as well as in the *Communal Land Reform Act 2002*. Its content is widely known among Uukwambi village members and traditional leaders alike. Both at traditional courts and at the CLBs, the number of disputes dealing with property grabbing has steadily diminished over the last decade. This case study thus presents a successful example of normative change, with far-reaching impact on women's lives in rural areas.

### 8.2 Success factors

Three important factors can be identified in the Uukwambi case study that set it apart from many other attempts to enhance the position of women regulated by customary law in Africa. The first is

the simultaneous change undertaken in all three domains of traditional rule, viz. leadership, dispute settlement and normative content. These three domains are interconnected in such a way as to suggest that any effort to promote normative change needs to be holistic. Progress in one field stimulates progress in another, and lack of development in one field may inhibit positive change in others. The second factor is the complementarity of local and national efforts. The changes in traditional rule in Uukwambi neither resulted from direct state intervention, nor formed an isolated local initiative of the Traditional Authority or its chief. The change processes in Uukwambi were part of a broader effort in Owambo to harmonize customary laws and align them with the new national Constitution. This harmonization process was encouraged, legitimated and, at least in part, driven by the Namibian Government. Although officials were careful not to impose direct normative change, they made their ideas and normative views on some topics well known. The Owambo Traditional Authorities, in a bid to assert their relevance in independent Namibia, took heed of these 'suggestions'. The decisions made by the Owambo Traditional Authorities in turn legitimized change processes in Uukwambi. The active engagement of the Uukwambi Traditional Authority and the personal involvement of Chief Iipumbu greatly influenced the success and vigor of the reforms. It was therefore the concerted efforts at the national, regional (Owambo Traditional Authorities) and local levels that enabled the changes. The third factor was the momentum for change in Namibia following its independence. In particular in Owambo, where the high involvement in the liberation struggle created an intense identification with the new independent Namibia, the inclusion of women in national and regional government as well as the gender equality discourse in nationalist politics opened up possibilities for women in traditional rule.

### 8.3 Conclusion

This chapter demonstrates that the representation and participation of women can be connected to specific actions taken in Uukwambi. Although greater representation and participation *per se* do not automatically lead to more gender-sensitive administration of justice and politics,<sup>95</sup> this study suggests that both men and women assessed several aspects of traditional dispute settlement more positively in villages led by headwomen than by headmen, and that both groups believed that the measures taken resulted in increased rights protection for women.

Overall, the actions taken to introduce gender equality seem to have enhanced the fairness and equity of traditional rule and customary dispute settlement in Uukwambi, and thus present a successful attempt at women's legal empowerment. Of special importance is the finding that living under female leadership has led to more positive feelings in Uukwambi men towards female traditional leadership in general. Moreover, three factors had a decisive impact on the nature and success of change processes initiated by the Uukwambi Traditional Authority: simultaneous efforts in all three domains of traditional rule; concentered efforts at the local, regional and national levels; and the momentum for change in the newly independent Namibia. These factors should be taken into account when replication is contemplated in other areas of Namibia or other countries that are

## footnotes

- 1 See, for instance, E. Wojtkowska, *Doing Justice: How Informal Justice Systems Can Contribute*, United Nations Development Programme (UNDP), Oslo Governance Center, (2006); UNDP Bangkok, *Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Asia-Pacific Rights and Justice Initiative (2005). Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Report of the Commission on Legal Empowerment of the Poor Volume 1 (2008); United Kingdom Department for International Development (DFID), *Non-state Justice and Security Systems*, DFID Briefing (2004).
- 2 L.S. Khadiagala, 'The Failure of Popular Justice in Uganda: Local Councils and Women's Property Rights', *Development and Change* 32 (2001) 55-76; Whitehead and Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Return to the Customary', 2003.
- 3 C. Nyamu-Musembi, *Review of experience in engaging with 'non-state' justice systems in East Africa*, report commissioned by Governance Division, DFID (2003) 27.
- 4 Traditional leadership has always been a predominantly male domain in Namibia and was even more exclusively defined as such during the colonial period (H. Becker, 'New Things after Independence': Gender and Traditional Authorities in Postcolonial Namibia' (2006) 32(1) *Journal of Southern African Studies* 34, 47).
- 5 The word 'chief' was an invention of the colonial rulers, which has been reproduced in the *Traditional Authorities Act 1995*. The term has been internalized in Uukwambi and is now commonly used to refer to *Tate lipumbu* by villagers and other traditional authorities alike.
- 6 Similar developments have been described with respect to Ongandjera Traditional Authority (H. Becker, 'A Concise History of Gender, "Tradition" and the State in Namibia' in C. Keulder (ed), *State, Society and Democracy: A Reader in Namibian Politics* (2000) 171-99. Keulder describes the first stages towards the inclusion of women in Tradition Councils of the Nama at all levels including the Nama Traditional Leaders Council (C. Keulder, *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (1998) 25).
- 7 H. Becker, 'We want women to be given an equal chance. Post-independence rural politics in northern Namibia', in Meintjies, Pillay and Turshen (eds), *The Aftermath: Women in Post-conflict Transformation* (2001) 225, 233. Becker points out that both proponents and opponents of gender equality in Namibia start with the presumption of traditional gendered identities and therefore perceive traditional rule and women's rights as irreconcilable. "Rather, the contestations revolve around the moral values attached to these chosen versions of a strictly patriarchal past. The traditionalist discourse contests reforms to promote gender equality with nostalgia for the imaginary past. Proponents of gender equality, on the other hand, ascribe gender discrimination in Namibia to the very same 'century-old traditions'."
- 8 In addition, article 19 of the *Constitution of Namibia 1990*, guaranteeing the right to culture and tradition, is understood to include the right to live according to one's customary law.
- 9 The lack of reference to Traditional Authorities is a reflection of their omission in the 'Blue Bible', a bulky blue-covered report entitled, '*Namibia: Perspectives for National Reconstruction and Development*', published in 1986 by the United Nations Institute for Namibia, located in Lusaka. This publication, which was drafted as a blueprint for an independent Namibia, does not mention Traditional Authorities (M.O. Hinz, 'Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective', in Horn and Bösl (eds), *Human Rights and The Rule of Law in Namibia* (2009) 59, 68-69). This policy document included a short note on customary law and customary courts, including the following statement, referenced on page 69: "In order to uplift the status of customary law, a proper structure of the court hierarchy should be considered and appropriate legislation allowing its application should be provided."
- 10 Ibid 69.
- 11 Ibid 69-70; Keulder, above n 6, 65-66.
- 12 *Traditional Authorities Act 2000* s 2(1). Section 17 notes that the number of councilors is to be determined by the chief or head, but allowances will be paid to a maximum of six senior traditional councilors and six traditional councilors, in addition to the chief or head and a secretary.
- 13 The *Traditional Authorities Act 2000* first mentions that the designation and recognition of chiefs are regulated by the Act itself (section 2(1)(a)), but then repeats the text from the *Traditional Authorities Act 1995*, confirming customary law as the regulating order (s 4).
- 14 *Traditional Authorities Act 2000*, s 3(1).
- 15 *Traditional Authorities Act 1995*, s 11(1)(a).
- 16 In some other African countries, customary law is exempted from the constitutional obligation for gender equality. See, for instance, art 27 (4)(e) of the *Constitution of Sierra Leone 1991*, which stipulates that the protection from discrimination does not apply in the case of the administration of customary law.
- 17 *Traditional Authorities Act 1995*, s 10(1)(g).
- 18 Becker, above n 4, 33.
- 19 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 Ovambo' in C.H.L. Hahn, H. Vedder and L. Fourie, *The Native Tribes of South West Africa* (1966); G. Tötemeijer, *Namibia Old and New: Traditional and Modern Leaders in Ovamboland* (1978); F. Williams, *Precolonial Communities of Southwestern Africa: A History of Owambo Kingdoms 1600-1920*, National Archives of Namibia (1991).
- 20 According to the 2001 Population and Housing Census, 780,000 people, or 43 percent of the country's population were living in Owambo.
- 21 In early times, the King was the highest authority and ruled with his Council. The King's Council acted as the chief executive, judicial and legislative body. Usually, the kingdom was divided into districts or wards, headed by district heads or under-councillors (C. Keulder, 'Traditional Leaders' in C. Keulder (ed), *State, Society and Democracy: A Reader in Namibian Politics* (2000) 150, 155-6).
- 22 The Police Zone spanned the southern two-thirds of the territory of South West Africa/Namibia, in which the Germans established effective police control in the early 20<sup>th</sup> century. In this area, most tribal land was expropriated for white settlers and the indigenous communities were forcibly resettled in "native reserves". Indigenous groups living north of the line were prohibited from entering the Police Zone except for contract labor.
- 23 The Germans decided to turn to the north to recruit migrant labor after the Herero and Nama revolts in the south had almost decimated the Herero and Nama populations (Keulder, above n 6, 39-40).
- 24 Ibid 40. He gives the example of King Negumbo of Uukwambi who "compelled all young unmarried men to serve as contract workers in the south before he would give them permission to wed. He furthermore demanded that they present him with gifts of cattle upon conclusion of their contracts" (Ibid 84). See also Siiskonen, who mentions that in addition to gifts from returning workers, kings were also presented with valuable gifts from labor recruiters (H Siiskonen, *Trade and Socioeconomic Change in Ovamboland, 1850-1906* (1990) 229-236).
- 25 I. Soiri, *The Radical Motherhood: Namibian women's independence struggle* (1996) 40-42; Totemeyer, above n 19, 42.

- 26 Keulder, above n 6, 42; Becker, above n 4, 33.
- 27 King Mandume of Uukwanyama was killed by colonial troops in 1917 (Keulder, above n 6, 156). In 1932, heavy military equipment was used to capture and deport King lipumbu of Uukwambi.
- 28 L. Berat and R. Gordon, 'Customary Law in Namibia: What Should Be Done' (1991) 24 *Vanderbilt Journal of Transnational Law* 637, 641.
- 29 Becker, above n 4, 33.
- 30 Ibid 33. Not all traditional leaders were on the side of colonial government. Certain influential traditional leaders — mostly living in the Police Zone — were heavily involved in the struggle against colonialism. The two main nationalist movements, SWAPO and the South West Africa National Union (SWANU), aligned themselves with these and other progressive leaders (Keulder, above n 6, 47).
- 31 White missionaries are seen as another important force that undermined the authority of traditional structures (Keulder, above n 6, 84).
- 32 Becker, above n 5, 33; Totemeyer, above n 19, 104-105; Soiri above n 25, 50. In the 1970s, the South African Government had to introduce several proclamations to "protect the Ovambo tribal authority and its traditional leaders against the growing discontent of the nationalist movement". These proclamations made it an offence to, *inter alia*: undermine the authority of the Owambo Government, chiefs and headmen; fail to obey any lawful order given by a chief or headman; and treat them (chiefs and headmen) with disrespect. In addition, any political opponents arrested by the colonial government were handed over to the tribal authorities to be dealt with, often through severe flogging. The chiefs' already diminished popularity and legitimacy further waned due to their involvement with reconnaissance work, the reporting of strangers to the colonial authorities, and the drafting of people for the South West African Territorial Forces, which was formed in 1977 in response to the military successes of SWAPO. The results were serious, as Keulder describes: "Chiefs and headmen were often identified as soft targets to be eliminated (by both sides) in order to strike back at the enemy. Many chiefs and headmen accordingly lost their lives" (Keulder, above n 6, 49, 52).
- 33 Commission of Inquiry, 'Report by the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional or Tribal Leaders', Windhoek: Government of the Republic of Namibia (1991) 73; Hinz, above n 9, 70.
- 34 M.O. Hinz and Katjaerua, *To Promote Peace and Welfare: The Political and Economic Sustainability of Traditional Authority* (1998).
- 35 C. Keulder, *Traditional Authorities and Regional Councils in Southern Namibia* (1997).
- 36 Keulder, above n 6, 22. The author proposes several tentative reasons for why most people in Nama communities felt positively about the institution of traditional leadership, including: a) the institution forms an integrated part of the communities' social memories; b) the traditional leaders were elected at popular and open meetings; c) traditional leaders were not incorporated into illegitimate colonial structures; and d) they have done much for the well-being of their communities. He specifically emphasizes a fifth reason, "that support for the institution of traditional leadership is strong because there is no effective institutional rival present or active in the local communities". Whereas the second and third reasons mentioned by Keulder do not apply to the situation in Owambo, and the fourth can be considered questionable, the fifth could be an important argument to be applied in Owambo. This is also indicated by Hinz and Katjaerua. Although they do not analyze the reasons for people's positive feelings about traditional leaders, Hinz and Katjaerua contend that nine of the 13 traditional leaders interviewed believed that traditional courts should be strengthened because "it is the only dispute settling organ in rural areas" (Hinz and Katjaerua, above n 34,79).
- 37 Becker, above n 4, 47.
- 38 Becker, above n 7, 177.
- 39 Ibid 177.
- 40 Ibid 177-178.
- 41 Ibid 178. Becker describes this process in the Owambo Kingdom of Ongandjera, which had a strong tradition of female rulers (Becker, above n 4).
- 42 B. Hango-Rummukainen, *Gender and Migration: Social and Economic Effects on Women in Owambo (1890-1940)* (2000) 79.
- 43 In February 2010, when the author left the field, the Uukwambi Traditional Authority was about to announce the reorganization of the districts and the creation of a sixth district, led by a man.
- 44 Unlike Uukwanyama, where a King was reinstated in 1998, the Uukwambi kingdom has not been restored. After the deportation of King lipumbu, his son was selected to chair the Council of Senior Headmen. In 1986, he was succeeded again by his son, the current leader Herman lipumbu, who is commonly referred to as Chief lipumbu. Since the Uukwambi practise matrilineal succession, the latter is not and can never become King of Uukwambi, which can logically be regarded as one of the factors explaining the limited enthusiasm for the restoration of the Kingdom by the Uukwambi Traditional Authority.
- 45 The red line is a disease control fence that separates northern Namibia from the central and southern parts of the country. Cattle are prohibited from crossing this line, and cattle from the area north of this line cannot be sold overseas, due to European Union conditions relating to food safety. Since the landscape south of the red line is dominated by white-owned commercial farms as opposed to communal farmland of black communities in the north, the red line has become highly controversial since independence, particularly in the current meat market boom. The line also coincides with the northern boundary of the Police Zone during the colonial period (see Keulder, above n 21).
- 46 Interview 55 with Chief and Former Secretary (19 January 2010).
- 47 Becker, above n 4, 47.
- 48 Article 10 of the *Constitution of the Republic of Namibia 1990* provides that all persons shall be equal before the law and that no one may be discriminated on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. With this Article, the Constitution follows Article 1 of the *Universal Declaration of Human Rights 1948* ('UDHR') as well as Article 2 of the *African Charter on Human and Peoples' Rights 1981*.
- 49 Interview (16 November 2009).
- 50 Interview 47, with a headman (18 December 2009).
- 51 Interview 44, with an elder (17 December 2009).
- 52 Interview 47, above n 50.
- 53 The trend to allow non-family members of a headman/headwoman to become the new village leader is also found in other Traditional Authorities, such as Ondonga Traditional Authority. Here, however, the power to select is shifted from the headman/woman to the senior headman/woman rather than to the community. Community influence regarding the selection of new headmen/women is still very much in its infancy in this Traditional Authority (Interviews 31, group discussion with women (11 November 2009); Interview 51, with headman (5 January 2010); Interview 52, with headman (8 January 2010); Interview 53, with a senior traditional councilor, Ondonga Traditional Authority (8 January 2010).
- 54 Interview 49, group discussion with women (29 December 2009).
- 55 When the answers are given based on a five-point scale from 1 (strongly agree) to 5 (strongly disagree), the means per district are: 1.94 (Otuwala District — senior headman); 1.91 (Onamega District — senior headman); 1.94 (Ogongo District — senior headwoman). These differences are not significant.

- 56 Villages with headmen display a significant, albeit small, relationship between the gender of the respondent and the performance assessment of the village leader ( $r = .181$ ,  $p$  [one-tailed]  $< .05$ ). Such a correlation is not found in villages with a woman leader.
- 57  $r = .222$ ,  $p$  (one-tailed),  $< .01$  for the statement "It would be good if more traditional leaders were women";  $r = .156$ ,  $p$  (one-tailed)  $< .05$  for the statement "Men generally make better leaders than women".
- 58  $r = .274$ ,  $p$  (one-tailed)  $< .01$ . There is also a small but non-significant effect ( $r = .148$ ) between the gender of the respondent and their opinion in villages with headwomen.
- 59  $r = .214$ ,  $p$  (one-tailed)  $< .05$ .
- 60  $r = .152$ ,  $p$  (one-tailed)  $< .05$ .
- 61 Male respondents living in villages with male leaders agreed significantly more with the statement, "Men generally make better leaders than women" than male respondents in villages headed by a female leader ( $r = .254$ ,  $p$  (one-tailed)  $< .05$ ).
- 62 In villages led by a headman, the gender of the respondent was significantly related to the respondents' view on female leadership ( $r = .242$ ,  $p$  (one-tailed)  $< .01$ ).
- 63 There is a significant relationship between the answer of male respondents to the statement "Men generally make better leaders than women" and the gender of the village leader,  $r = .254$ ,  $p$  (one-tailed)  $< .05$ . A similar relationship exists with regard to the question "Do women generally make better leaders than men";  $r = .204$ ,  $p$  (one-tailed)  $< .05$ .
- 64 H. Becker, *Community Legal Activator Programme*, Evaluation Report, CASS Papers No. 35 (1995) 7.
- 65 Ibid 271.
- 66 A similar increase in women's participation in traditional court meetings has been described with respect to Botswana, by Chief Linchwe II (quoted in Keulder, above n 6, 9).
- 67 Interview 36 with headwoman (20 November 2009).
- 68 Namibia Development Trust (with assistance from SIAPAC Namibia and CASS), *Improving the Legal and Social Economic Situation of Women in Namibia: Uukwambi, Ombalantu and Uutwanyama*, (1994) ES 9
- 69 This program was carried out between July 1994 and May 1995 by the CASS.
- 70 Becker, above n 64, 15.
- 71 Ibid 6-7.
- 72 Interview 32 with traditional councilor (16 November 2009).
- 73 A 1994 study shows that 86 percent of the women married to out-migrants see their husband 0-3 times per year (Namibia Development Trust, above n 69).
- 74 Interview 32 with traditional councilor (16 November 2009).
- 75 Interview 47, above n 50.
- 76 Personal observation during court meetings.
- 77 Interview 23 with Chief lipumbu and Former Secretary (21 October 2009).
- 78 Interview 29 with women representative (6 November 2009).
- 79 75 percent stated that there was no need to improve the performance of traditional courts as they are operating very well; 8 percent answered that they did not know.
- 80  $r = .057$ ,  $p$  (one-tailed)  $< .05$ .
- 81 When the respondents were divided into two groups, those who attended a traditional court hearing and those who had not, there was a significant relationship between court attendance and perceived difficulty to speak up,  $r = .397$ ,  $p$  (one-tailed)  $< .01$ .
- 82 This draft was still being discussed by the Traditional Council when the author left the field in February 2010.
- 83 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."
- 84 Clause 9.1.
- 85 Namibia Development Trust, above n 68, 63.
- 86 Ibid 63.
- 87 Becker, above n 4, 48.
- 88 At the court of one of the senior headmen of the Uukwambi Traditional Authority, they received only one case regarding property grabbing in 2009.
- 89 CLBs were established in 2003 in line with the *Communal Land Reform Act 2002* and tasked, *inter alia*, with dispute resolution on certain land matters. At the Omusati CLB, one of its members recounted that, in the first three-year term (2003-2006), they had received many cases on property grabbing. In the second three-year term, this number was significantly reduced, and now, in the third term, they had not received any cases (Interview 35, with CLB member, Omusati Region, 18 November 2009). A member of the Oshana CLB confirmed this trend. They also did not receive any cases on property grabbing in the third term of this CLB (Interview 48, with Headman/CLB member, 21 December 2009).
- 90 Namibia Development Trust, above n 68, 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 68, 72).
- 91 Section 42 of the *Communal Land Reform Act 2002* prohibits the payment of any consideration for the allocation of any customary land right excluding registration costs.
- 92 Section 9 of the *Laws of Uukwambi (1950-1995)* mentions only the surviving spouse.
- 93 Limited public awareness of the *Communal Land Reform Act 2002* is reported by L. 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) 43, 80.
- 94 Female respondents found it equally easy/difficult to speak up in villages led by women and by men.
- 95 Keulder, above n 6, 7; D. LeBeau and E.M. Lipinge (eds), 'Beyond Inequalities 2005: Women in Namibia', in *Beyond Inequalities 2005: Women in South Africa*, UNAM/SARDC (2005) 30-31. This study on government power shows that women's increased political representation in Namibia has not seen a corresponding increase in levels of political influence and in the quality of life for women.





## Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems

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### Executive summary

The complex relationship between law, land rights and customary practices is increasingly recognized as foundational to formulating successful development policies. Similarly, the essential role of women's economic participation in development and the current trend of gender discriminatory land and inheritance customary practices have prompted domestic civil society organizations in developing countries to use statutory provisions guaranteeing gender equality to improve women's land tenure security. This chapter examines the particular need for secure land rights for women in the African pluralistic development context, and the mixed results of targeting law reform as a mechanism for change. Relying on primary research conducted in Mozambique and the United Republic of Tanzania on land practices as experienced by divorced and widowed women, it evaluates strategies employed by domestic non-governmental organizations to enhance women's access to justice and land tenure security. In particular, the chapter analyses whether initiatives to disseminate and use statutory law (rather than customary law) are overcoming the lack of knowledge, application and enforcement that have previously limited the effectiveness of rights-affirming legislation. Specific and general conclusions are drawn from the data to generate recommendations for donors, governments and development institutions.

## 1. Introduction

A 40-year patchwork of development policies has succeeded in reducing poverty for 80 percent of the world's population, but left the remaining bottom billion — 70 percent of whom live in Africa — in development traps characterized by lower life expectancy, higher infant mortality and long-term malnutrition.<sup>1</sup> Land titling, registration, formalization and distribution has been a key process in the long-term strategy to promote economic growth and development. To a large extent, however, such policies and subsequent laws have been unsuccessful in pluralist legal contexts, because customary law continues to be observed by the majority of the population who live in rural communities and are largely ignorant of or unfamiliar with formal law and its institutions. Today, increasing recognition of the links between legal empowerment, poverty reduction and development has prompted greater international attention on how legal systems in developing, pluralist countries operate with respect to land.

The distribution of land is a reflection of social, economic and political practices as much as it is an expression of law. In communities adhering to customary norms, decisions made by local leaders are followed as if they are law, but are in fact a product of traditional, cultural and social attitudes. Customary law has evolved in response to changing social, environmental and political circumstances to increasingly discriminate against women. This is particularly problematic given the symbiotic relationship that exists between the advancement of women and development.<sup>2</sup>

However, the internationalization of individual rights and subsequent government commitments to international human rights treaties have prompted several developing state governments to pass legislation explicitly articulating land rights, including women's land rights, in accordance with human rights principles. Contemporaneously, in response to the continuing rural disregard for formal law, international development agencies have shifted their focus to consider the operation of customary law at community levels.

The heart of the dilemma, the reason titling programs have failed in pluralist countries, and the challenge in implementing a more equitable distribution of land rights, lies in the 'catch-22' confronted by any formal approach. Any property system must be respected locally because central governments of developing countries are generally too institutionally and resource-poor to effectively administer and enforce a comprehensive property law scheme. However, traditional local structures<sup>3</sup> are dominated by male local elites, who continue to enforce gender-discriminatory customary norms in preference to gender-neutral formal property law. The questions are then: how to ensure that the formal law will offer sufficiently secure land rights to women; and second, how to persuade or coerce local governance structures to follow formal law?

74 On closer inspection of the domestic context, including through primary research informing the conclusions of this chapter, domestic civil society and non-government organizations (NGOs) are using formal law rather than customary law as a tool to enhance women's land rights. By providing legal education to the rural community, training local paralegals, and establishing paralegal offices to assist women with land rights claims, domestic NGOs are attempting to change the culture and practices surrounding the distribution of land. This chapter explores why and how this approach has evolved, and whether and in what way it is succeeding. While many concepts and arguments apply with equal force across regions, examples and statistics are drawn primarily from Africa; detailed conclusions are drawn from primary research, comprising surveys of women and community leaders conducted in Mozambique and United Republic of Tanzania (hereafter "Tanzania") in early 2010.

Part 1 of this chapter describes the critical role that land plays in the process of economic development, the heightened importance of land in the African context, and the essentiality of women's economic participation to development. Part 2 describes the operation of plural legal systems, traces the traditional approach of focusing on formal laws to influence land usage, and outlines the continuing practical challenges of a law-based approach. Part 3 explores the strategies now being pursued by domestic NGOs and, based on primary research in the two case study

countries, draws conclusions about the importance of legal empowerment programs in promoting gender-balanced land practices.

## 2. The elusive path to development

### 2.1 Land and economic development

The institutional arrangements under which a person gains access to land largely determines, among other things, what crops he can grow, how long he can till a particular piece of land, his rights over the fruits of his labor and his ability to undertake long term improvements on the land.<sup>4</sup>

Land rights, customary or formal, act both as a form of economic access to key markets and as a form of social access to non-market institutions, such as the household and community-level governance structures.<sup>5</sup> In economic terms, an effective system of property rights is a public good because it encourages investment by property-holders and acts as a central element of capital and credit markets. State intervention is typically necessary to establish national systems of land administration to enforce property rights and bear the costs of providing a standardized property system.<sup>6</sup> To that extent, establishing and enforcing property rights is linked to social order, and importantly, also to the perception of social order. Without a legitimate and capable government, the allocation and enforcement of rights may cause conflict when different claimants resort to competing legal, normative and coalitional enforcement mechanisms.<sup>7</sup>

The conventional approach to land rights, as typified by the World Bank's ideology, can be crudely summarized as follows: action must be taken to create land tenure security because increasing land tenure insecurity in most parts of the world forms an obstacle to investment and growth.<sup>8</sup> In the 1980s, the World Bank addressed this issue through land titling and registration as part of its structural adjustment agenda, predicting greater security of tenure through the abolition of customary tenure. In the 1990s, it shifted its approach, conceding that, in some circumstances, customary tenure did not necessarily inhibit agricultural productivity, but nevertheless maintained its previous position that formalization and titling was ultimately the most desirable situation.<sup>9</sup> Today, the World Bank recognizes that defining land rights is key to effectively using land resources, reducing poverty, promoting good governance, and ultimately, stimulating economic growth.<sup>10</sup> However, as the existence of the "bottom billion" and research on women's land rights suggests, the recipe for successful development remains elusive.

### 2.2 Development in Africa

A complete understanding of the relationship between property rights and economic development is especially critical in the context of Africa. First, in most African countries, agriculture supports the survival and well-being of up to 70 percent of the population,<sup>11</sup> employs some 60 percent of the labor force, and accounts for 20 percent of merchandise exports.<sup>12</sup> Agriculture represents 33 percent of gross domestic product (GDP) in sub-Saharan countries, and up to 76 percent of GDP in some states.<sup>13</sup> The family farm is central to the agricultural economies of most African nations; it is still regarded as highly productive and responsive to new markets and opportunities when conditions are favorable.<sup>14</sup> Africa's private sector is largely composed of family farms, and small- to medium-sized enterprises; in sub-Saharan Africa, over 96 percent of incomes are from a range of small-scale domestic entrepreneurial activity on family farms.<sup>15</sup> Thus, the effects of any property rights regime are far-reaching and essential for economic prosperity.

Second, the importance of land is heightened by the explosive population growth and market development across the continent. Africa's urban population increased nine-fold between 1950 and 2000, while its rural population increased by 265 percent — making it the fastest urbanizing continent in the world.<sup>16</sup> Moreover, this growth has manifested in the form of informal settlements

where land ownership is unclear.<sup>17</sup> Consequently, competition over land has increased, fostering conflict between classes and neighbors, and within tightly-knit communities and families.<sup>18</sup> Clarifying and enforcing these rights is therefore critical, not only because urban tenure issues are extremely complex and contestable, but also because of its broader implications for social harmony.<sup>19</sup>

In the context of African dependence on agriculture, increasing demand for land and unexplored potential for economic development, the effective legal enforcement of land rights is paramount. This is particularly so because rights to land in Africa stem from several different sources, including settlement, long occupation, government allocation, inheritance, when land is received through a gift process, and market transaction.<sup>20</sup> Similarly, property rights can be registered in various ways and at different levels, dependent on different systems of authority for their validation. Community councils, the patrilineal hierarchy, local governments, traditional leadership, irrigation authorities, city councils and land agencies comprise a multiplicity of structures that may give rise to inconsistencies in and ambiguity of title.<sup>21</sup> Non-state governance mechanisms, commonly in the form of close-knit kinship networks applying customary traditions, predate the creation of many African states, and have evolved independently from, and often in contradiction to, state institutions.<sup>22</sup>

Consequently, security of property rights depends on recognition of validity both by the state and the local community. Compounding this plurality of authority is the fact that most African central governments have neither the capacity nor the local knowledge to implement a fair national land registration system,<sup>23</sup> resulting in only two–ten percent of land in Africa being covered by formal tenure.<sup>24</sup> Navigating this yawning gap between legality and legitimacy is essential to effectively enforce land rights in rural areas where women are least likely to benefit from gender equality as provided for by formal law.

### 2.3 Women and development

Beyond its intrinsic significance, the systemic disempowerment of women is important because of the symbiotic relationship between the advancement of women and development. This disempowerment derives from the gendered discrepancy in poverty rates, the benefits flowing from increased economic participation by women, and in Africa, the dominant role women play in food production; each aspect improves only if women enjoy security in their control over and access to land used to produce food.

76 In the first instance, strategies for economic development and the eradication of poverty must focus on women simply because they comprise the majority of those in poverty, suffering not just from an average income of less than US\$1.25<sup>25</sup> a day, but also inadequate health, nutrition, education and lifestyle.<sup>26</sup> This “feminization of poverty” is characterized by higher numbers of women in more severe poverty than men, and the association of these two trends with rising rates of female-headed households.<sup>27</sup> Causes for this phenomenon have been variously ascribed to limits placed on female labor force participation including gender differences in access to formal employment, lack of access to credit and wage discrepancies;<sup>28</sup> several of these relate back to poor access to land.<sup>29</sup>

Even with significantly deficient data,<sup>30</sup> it is still clear that the gender discrepancy of the extremely poor has deepened across decades. A study by the International Fund for Agricultural Development (IFAD) across 41 developing countries, accounting for 84 percent of the rural developing population, found that over approximately 20 years leading up to 1988, the gender discrepancy in the *increase* of the number of people below the poverty line was 17 percent; there was a 47 percent increase in poverty for women compared to 30 percent for men.<sup>31</sup> In 2004, women still comprised 60 percent of those below the poverty line.<sup>32</sup> Compounding this disproportionate poverty is the disempowerment experienced through the combination of precarious and underpaid work, caring for children, and other unpaid household responsibilities. Women’s lack of access to land, credit and better employment opportunities handicaps their ability to fend off poverty for themselves and their families, or to rise out of it.<sup>33</sup>

Second, the logical corollary to the above is that the economic, political and social participation of and leadership by women is essential to development. There is growing evidence that suggests that a more equal distribution of assets, including land, leads to faster growth.<sup>34</sup> Indeed, development organizations credit the World Bank's realization of this truth as expressed in the World Development Report 2008: Oxfam notes that the critical message emerging from the report is that "gendered inequalities in access to, and participation in, markets, represent a significant constraint on increasing agricultural productivity and growth; [...] improving the terms on which women engage in markets could have significant effects on economic growth and poverty reduction."<sup>35</sup> As Muhammad Yunus found, this could be attributed to the fact that:

... compared to men who spent money more freely, women benefited their families much more. Women wanted to save and invest and create assets, unlike men who wanted to enjoy right away. Women are more self-sacrificing, they want to see their children better fed, better dressed and, as a result, the conditions of the entire community improved.<sup>36</sup>

In Africa, the contribution of women's labor to the economy is already obvious — they provide up to 70 percent of agricultural labor force and produce up to 90 percent of the food crops.<sup>37</sup> If economic growth depends on broad-based participation, and secure access to natural resources is a prerequisite for women's active participation,<sup>38</sup> then articulating well-defined property rights that enhance women's capacity to contribute to the national economy is essential for economic development. Access to land facilitates women's bargaining power within their household, as well as their representation and participation in decision-making processes at the community level.<sup>39</sup> Agarwal posits that women's ownership of land leads to improvements in their welfare, productivity, equality and empowerment.<sup>40</sup> That is, women's right to have control over land and what it produces diminishes their household's risk of poverty;<sup>41</sup> increases agricultural productivity because they can be more secure that their investment in the land will be returned; is necessary for justice for them; and enhances the ability of disadvantaged women to challenge and modify existing power relationships.<sup>42</sup>

These conclusions are borne out by the research: for example, a comparative analysis of Honduras and Nicaragua suggests a positive correlation between women's property rights and their overall role in the household economy: greater control over agricultural income, higher shares of business and labor market earnings, and more frequent receipt of credit. In Honduras, women with land rights in male-headed households produced higher incomes through their own microenterprises than women without land rights. In Nicaragua, the share of crop and livestock income was higher for women with land rights in male-headed households compared to wives with no land rights.<sup>43</sup> Given the above conclusions, the enjoyment of secure property rights by women is essential for development, and a necessary focus for any broad development strategy. Conversely, the endemic gender discrimination in customary practices relating to control over land precludes the broader society's enjoyment of the benefits flowing from women's economic participation through the secure cultivation of their land.

### 3. Land rights in plural legal systems

#### 3.1 Customary land law

The colonial legacy of plural systems of law comprising customary, religious and statutory systems within one state legal system still exists in many countries. The role of customary law varies between and within countries in its content and form, regulating diverse aspects of life, including family relations and the distribution of property. Customary rules are not static but continually evolving in response to cultural interactions, population pressures, socio-economic change and political processes.<sup>44</sup> With respect to land, one universal underlying distinction is between control of land based on some type of recognized possession (customary or formal, temporary or permanent), and

access to land, which usually includes some decision-making power over the production process, products and use of land, but not ownership or possession.<sup>45</sup> Another general difference in land distribution trends is that resources (forests, water and grazing land) are allocated to the community, and agricultural land to individual households.<sup>46</sup> Since there is generally no further unclaimed land around inhabited areas, agricultural land is now acquired through inter-household (sale or borrowing) or inter-generational (inheritance or gift) transfers, inheritance being the most common type of transfer.<sup>47</sup>

Customarily, control of land is determined largely by gender and class dynamics within the community; for instance, inheritance transfers generally preclude allocation and transfer of land to women, whether they occur within a patrilineal or matrilineal system. In patrilineal communities, property devolves through the male line from father to son; in matrilineal communities, property devolves through the mother's line and is generally owned and controlled by men but women tend to have greater rights than in patrilineal societies.<sup>48</sup> For example, there may be no inheritance rights for women in either system, but a daughter who stays in her birth matrilineal community may receive a small piece of family land as a gift from her father, to bequeath to whomever she wishes. Additionally, women in matrilineal societies often retain cultivation rights on their birth family's land after marriage, provided that they remain in their community. If a woman marries outside of the community, upon return to her birth community she is able to reclaim her cultivation rights: these rights are not generally granted in patrilineal societies.<sup>49</sup> Both systems require the husband to provide arable land to his wife to farm, which is generally used to grow food crops for the family in contrast to the husband's cash crops. Importantly, upon divorce or separation, a woman loses cultivation rights to her husband's land, and can only reclaim them in a matrilineal system if she returns to her matrilineal birth community.<sup>50</sup> Both tenure systems are structured to enable communities to take care of themselves; while women possess only secondary rights, in circumstances of sufficient land supply, they nonetheless retain the means and access to land to maintain their family.

While formal laws are prone to being ignored or conspicuously unenforced in African communities relying on a parallel customary system, customary laws are particularly susceptible to contested interpretations in situations of increased land scarcity, leading to conflict, discrepancies with formal systems, and weak state enforcement capacity.<sup>51</sup> The commercialization of agriculture and land, restructuring programs, urbanization and AIDS have further weakened customary systems, increased individualization of rights, and released the family and community from traditional obligations to certain members, such as women.<sup>52</sup>

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Contemporary deprivation of women's land rights results from the current land scarcity, conflict-driven and socially transformative challenges facing traditional communities. In responding to these existential threats to traditional structures, the typical response of customary leaders has been to tighten customary governance mechanisms or enhance exclusionary rights through a process of collective consensus — which typically excludes women.<sup>53</sup> Indeed, mounting pressures to protect the clan system attributable to increased land scarcity have caused local leaders to further constrain women's access to land through renegotiation of both formal and informal traditional relationships.<sup>54</sup> Many customary systems have come to entrench discrimination and exclusion along status, age or gender lines, or worse, have manipulated traditional rules to consolidate legal entitlements and the subsequent economic advantages in the hands of a few customary chiefs.<sup>55</sup> For example, Tanzanian widows who had historically been allowed to stay on their husbands' land were, immediately prior to the introduction of the *Village Land Act 1999* and the *Land Act 1999*,<sup>56</sup> increasingly dispossessed of that land as it increased in value.<sup>57</sup> In Kenya, loss of property after a husband's death is reported to be frequent, and in Uganda, widows often experience harassment and "property grabbing" attempts by their husband's relatives.<sup>58</sup> Current rates of land ownership by women reflect these disturbing trends: for example, only five percent of Kenyan women own land in their own names; in Cameroon, the figure is less than ten percent; and in Ghana, ten percent. In Lesotho and Swaziland, women were considered legal minors until 2006 and 2005, respectively.<sup>59</sup>

Customary practices in the two case study countries, Mozambique and Tanzania, demonstrate the complex interrelationships between various legal systems. Both are governed by statutory law, customary law and religious law, which overlap to varying degrees. In Mozambique, community courts have existed since colonial times to deal with civil disputes and small crimes, and although they are formally recognized in the Constitution, they are *not* part of the formal justice system. Accordingly, community courts receive no financial or material assistance from the government or judicial courts, and there is no right of appeal of community court decisions to the district courts. They do not comprise legally trained individuals bound to apply the law, but rather local elders elected by the community who generally try mediation and/or conciliation, or make decisions according to “equity, good sense and justice”.<sup>60</sup> In practice, this results in the continuing application of customary law as it is understood by the local leaders at the time, which often focuses on women’s duties rather than women’s rights.<sup>61</sup>

Customary law in Mozambique is practiced in both matrilineal (in the north) and patrilineal (in the south) forms. In recent history, customary practices across both systems have prevented women from owning their land because control rights are vested with her husband or maternal uncles or nephews.<sup>62</sup> Despite the 1975 government denunciation of customary law as “backward and superstitious”, customary norms are still adhered to, particularly in relation to inheritance rights, the division of labor and gender power dynamics.<sup>63</sup>

In Tanzania, issues such as inheritance are traditionally governed by religious or customary law, while other areas are explicitly governed by statute law. Customary law was formally recognized as a source of law in 1961 by the *Judicature and Application of Laws Act 1961* (JALA), but only to the extent that it does not conflict with statutory law (section 9). Unfortunately, the codification of customary law in the *Customary Law (Declaration) Order 1963*<sup>64</sup> prevents women and girls from being granted any right of inheritance to clan property and stipulates that all immovable property shall revert to a deceased husband’s family when the widow dies or remarries.<sup>65</sup> Patrilineal customary law governs 80 percent of the population, with the remaining 20 percent comprising matrilineal communities. Neither permits women to inherit land, and the norm of allowing widows to remain on their family land varies across communities.<sup>66</sup> Right to occupancy is generally through “family transfers” or direct allocations by the state.<sup>67</sup> Given the malleability of customary law, its tendency to favor those who already possess power and authority, and its consequent gender discriminatory impacts, it is not surprising that the universalization and individualization of human rights have prompted governments and civil society to focus on formal law as the mechanism to promote gender equality.

### 3.2 Law reform as a mechanism for change

Both colonial and post-colonial government interventions have concentrated on legislative reform to shape land management practices, including efforts to codify customs. Regrettably, these customs, sourced from the local elites in communities, tended to distort the content of customary law and create a gap between practices on the ground and in the courts:<sup>68</sup> this situation typically entrenched gender discriminatory practices in formal law.

Against this backdrop, many African governments have subsequently enshrined gender equality or prohibited gender discrimination in their Constitutions, and passed legislation relating to land and other socio-economic opportunities explicitly protecting women’s rights. For example, the Constitutions of Burkina Faso, Ghana, Mozambique, Rwanda, South Africa, Tanzania and Uganda all prohibit discrimination on the basis of sex.<sup>69</sup> Each of these countries have also passed legislation protecting gender equality across a range of activities, including political participation, property ownership, education and employment opportunities. Most importantly, the Constitutions generally stipulate that in the case of contradictory provisions between any other laws and the Constitution, the Constitution prevails.

#### 3.2.1 Mozambique

In Mozambique, prior to 1997, land disputes required written evidence to substantiate claims of land use. Most rural farmers, especially women, did not have access to written contracts and over 70



percent of women in Mozambique could not read or write. Moreover, bureaucratic processes and a scarcity of courts and legal advice in rural areas made access to the justice system complicated.<sup>70</sup> Today over 70 percent of the population is governed in accordance with customary law, which varies significantly between and within different areas, but in many instances discriminates against women. In particular, customary law regulating land use and ownership provides that women's access to resources, including land, depends on her relationship by kin or marriage to male relatives. Accordingly, when a married woman's relationship with her husband ends through death or divorce, male relatives acquire control over land, which increasingly involves dispossessing the women of land and all its assets.

The formal law has evolved to be explicitly protective of women's rights, and land tenure security specifically. Article 36 of the 1990 Constitution provides that men and women are equal under the law in all aspects of political, economic, social and cultural life. It also provides that the State "shall recognize and guarantee" the rights of private ownership of property (art 82) and of inheritance (art 83). The Constitution acknowledges the plurality of legal systems that co-exist in Mozambique, to the extent that they do not conflict with the fundamental values and principles of the Constitution (art 4). In the event of any conflict, all other law is subordinate to the Constitution (art 2).

Chapter III of the *Land Law 1997*<sup>71</sup> establishes women's equal right to land use and benefit (art 10), and to inherit (art 16):

Article 10(1): National individual and corporate persons, men and women, as well as local communities may be holders of the right of land use and benefit.

Article 16(1): The right of land use and benefit may be transferred by inheritance, without distinction by gender...

This law was considered a major breakthrough because it combined formal and customary law. In addition to the traditional recognition of written documents in land usage cases, it recognized customary tenure systems and the rights of people who had occupied land for over ten years in good faith.<sup>72</sup> It also established procedures for the delimitation and registration of community land rights to be implemented through a village lands registration regime with minimal funding because it built on existing community structures and relied on a large number of volunteers who were trained as paralegal guides.<sup>73</sup>

80 However, its usefulness to women was severely limited because it only recognized marriages registered within the formal system, estimated to cover ten percent of the Mozambican population. This was subsequently remedied by the *Family Law 2004*, which defines three forms of marriage: civil, religious and traditional (art 16). To be recognized under Mozambican law, religious and traditional marriages must also meet the requirements of civil law marriages (arts 18, 24, 75). The law stipulates that the husband and wife administer the marital property equally and can freely dispose of the property, although disposal of common property requires consent in certain circumstances (arts 102–103); recognizes cohabitation of a year or longer between a man and a woman as a marriage; provides that wives are entitled to inherit the property of their husbands; and establishes a rebuttable presumption that the wife has contributed (non-monetarily, generally) to the marriage so that upon divorce, marital assets are to be equitably divided between the two parties. One additional issue not dealt with is that of polygamous marriage, which is not recognized by the *Family Law 2004* (arts 16(2), 30(1)(c)) but covers approximately one third of all Mozambican women.<sup>74</sup>

Succession and inheritance are known in Mozambique as descent and distribution; both are governed by the Succession Chapter of the Portuguese *Civil Code 1966*, which is based on a patrilineal system of inheritance (for example, arts 2079 and 2080 give preference to male heirs over female heirs) and is currently under review by the Government because of its inconsistency

with the *Family Law 2004* and Constitution. The Committee on the Elimination of Discrimination Against Women (CEDAW) noted in June 2007 that “discriminatory provisions still exist in several areas of Mozambique law including in ... laws governing inheritance rights.”<sup>75</sup>

### 3.2.2 Tanzania

Similarly, in Tanzania rights granted under formal law are far more progressive than those under customary law. The Constitution accords “equal opportunities to men and women alike” in principle (article 9(g)), and pursuant to an amendment passed in 2000, sex or gender as grounds for discrimination are included in article 13(1). There is no explicit guarantee that women have a right to property; rather, every person is entitled to own property (art 24), which constructively includes women. Importantly, any law conflicting with provisions of the Constitution is void (art 64(5)).

Legislation regarding property ownership was passed in 1999: the *Land Act 1999* governs land other than village land, the management of land, settlement of disputes and related matters;<sup>76</sup> and the *Village Land Act 1999*<sup>77</sup> provides for the management and administration of land in villages. This continues the dual system of land tenure developed under colonial rule, whereby there are statutory or granted rights as well as customary rights of occupancy, the difference being that customary land rights are no longer deemed but are now also granted.<sup>78</sup> The intentional consequence of this arrangement is that, since most land is “village land”, authority over land tenure continues to be vested in the existing and well-established village governance machinery.<sup>79</sup> This is reflected in the venues for resolving local land conflicts: village land is vested in the Village Assembly, and the Village Council administers the land through the authority of the Village Assembly.<sup>80</sup>

Both Acts explicitly articulate that women’s rights “to acquire, hold, use, deal with and transmit land” are identical to men’s rights.<sup>81</sup> Section 3(2) of the *Land Act 1999* provides women with the same rights to land as men and requires land co-ownership by married couples.<sup>82</sup> Similarly, when matrimonial land is registered, it is presumed to be held by spouses as occupiers in common,<sup>83</sup> with land security guaranteed by the spouse’s contribution or labor in the productivity, upkeep and improvement of the land (even if land is registered to only one of the spouses).<sup>84</sup> In addition, a spouse cannot transfer, mortgage, sell, lease or give away land that is under co-occupancy without the other spouse’s explicit consent, even if the land is registered in only one spouse’s name.<sup>85</sup> The *Village Land Act 1999* protects existing rights in land, which *de facto*, excludes women, who never owned land under customary law.<sup>86</sup> However, it also prohibits discrimination against women in the application of customary law.<sup>87</sup>

A third critical piece of legislation affecting women’s ability to own and inherit land is the *Law of Marriage Act 1971* (LMA) (applicable only in mainland Tanganyika),<sup>88</sup> which was designed to integrate existing marriage laws under Muslim, Christian, Hindu and customary law, while retaining religious solemnization and the legality of polygamy. The LMA explicitly supersedes Islamic and customary laws,<sup>89</sup> and grants women the enjoyment of equal rights to acquire, hold and dispose of property (section 56). However, if property is acquired in the name of one spouse, it is assumed to belong to that person only (section 60(a)); if it is in both names, the assumption is that they have an equal interest in the property (section 60(b)). Section 114 requires the court to have regard for whether the spouse’s domestic service amounts to such efforts and contributions that entitle her (as it is invariably the woman) to a share of the property upon divorce. Neither the husband nor wife may unilaterally transfer rights in the matrimonial home without the other person’s consent.<sup>90</sup> Controversially, the LMA also creates a rebuttable presumption of marriage if a couple has cohabited for a period of two years “in such circumstances as to have acquired the reputation of being husband and wife”.<sup>91</sup>

With respect to inheritance, Tanzania is governed by three different bodies of law — customary, statutory and Islamic. Where conflicts arise between the different legal regimes, the courts employ two tests: the “mode of life” and the “intention of the deceased” tests. In deciding which law should be applied, the “mode of life” test considers whether the deceased was part of a community where

the customary law is widely accepted and applied. The “intention of the deceased” test considers statements and deeds of the deceased that could have indicated his/her preference.<sup>92</sup> In practice, customary law is assumed to apply unless proven otherwise in rural areas; for African Muslims, the intention of the deceased is determinative.

### 3.3 Current challenges in using formal law to promote change

The effectiveness of statutory law in African pluralist legal systems commonly suffers from some obvious shortcomings: lack of knowledge, lack of application and lack of enforcement. The first two obstacles are attributable to socio-economic and logistical factors affecting numbers of lawyers, levels of legal training, levels of community legal education, and community perceptions of the relevance and authority of statutory law. Lack of enforcement is an unfortunate reflection of the lack of financial, human and logistical resources required for a central government to effectively guarantee rights in practice in rural areas. Indeed, the World Bank has conceded that “formal law that requires gender equity in property rights is mostly ineffective in the face of customary law that does not recognize equitable property rights for men and women”, and that “land legislation may conflict with family or personal law”.<sup>93</sup>

Gender discriminatory customary practices are not constitutionally or statutorily valid, but persist because of power imbalances between the sexes within communities and ignorance about women’s legal rights. It is therefore not surprising that statutory provisions have limited efficacy in improving the gender equitability of land management practices. Inadequate educational initiatives have undermined rural communities’ awareness and exercise of their improved rights, as well as the effectiveness of institutional processes.<sup>94</sup> Local justice is usually delivered through male elders in forums to which women have no access. This perpetuates land security problems faced by widows upon their husbands’ deaths.<sup>95</sup> Consequently, while *prima facie* women have the same individual formal land rights as males, women who separate from their husbands or become widows often lose not only their customary, but also their statutory access and cultivation rights.<sup>96</sup> Moreover, because they enter the formal system “with no property, little cash income, minimal political power and a family to support”,<sup>97</sup> women are systematically disempowered in obtaining land rights.

The ‘catch-22’ situation that emerges is whereby central governments lack the capacity and enforcement mechanisms to fulfill the promises expressed by laws protecting gender equality,<sup>98</sup> and are therefore reliant on local community structures for the administration of women’s property rights, yet, the local elites dispensing ‘justice’ rurally are precisely the people (typically older males)<sup>99</sup> who continue to apply gender discriminatory customary practices in contradiction to the Constitution. Local elites are sufficiently empowered to administer the formal titling regime that protects women’s land rights, but are reluctant to because they perceive it as a system that will erode their own land-oriented power base. Progressive statutory provisions are not enforced because of “women’s lack of awareness and power, resistance from male relations, the fear of sanctions and the lack of political will on the part of the government”.<sup>100</sup> Certainly, national governments often face both a lack of political will and of practical capacity in fulfilling their enforcement responsibilities.

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Entrenched discriminatory attitudes and practices present continuing challenges to a coherent gender-sensitive legal system in pluralist countries, which are only gradually being confronted and navigated. Some of the international literature re-examines customary land tenure institutions in the modern state, concluding that the interactions between different pluralist legal orders are critical for women’s land claims.<sup>101</sup> This approach acknowledges the continuing failures of formal law to deliver the gender equality it promises, and the social embeddedness of land claims necessitating an engagement with customary structures.<sup>102</sup>

In contrast to this mutually constitutive model of legal pluralism,<sup>103</sup> a burgeoning community of domestic NGOs is undertaking a range of initiatives promoting women’s awareness and exercise of their rights under statutory law. These lawyers believe that women’s land rights will be better

secured through statutory law reform than through allowing and encouraging customary law to evolve.<sup>104</sup> Lawyers place emphasis on different approaches, which include legal training, land redistribution, titling registration, the education of officials, special loan facilities for women, and quotas to ensure that women are represented on decision-making bodies.<sup>105</sup> Gender specialists have advocated for the use of paralegals at the local level to promote women's rights with support from the NGO community.<sup>106</sup>

Whatever the focus, there are tangible and continuing positive results from advocacy that utilizes statutory provisions: women have successfully formed informal groups, associations, or cooperatives to secure their rights, and protect or acquire more land in various contexts.<sup>107</sup> For example, in Burkina Faso, Ghana, Mozambique, Uganda and Tanzania, women lawyer associations and civil society groups have advocated for women's property rights, educating the populace, bringing test cases to court and promoting the application of laws that protect women's property.<sup>108</sup> The logical enquiry following these success stories is: are NGO initiatives that disseminate and utilize statutory law leading to changing practices with respect to women's land tenure security in rural communities? More specifically, in reference to the three major obstacles outlined at the start of this section, are these NGO initiatives overcoming the lack of knowledge, of application and of enforcement, that have previously prevented the efficacy of statutory law in protecting women's land rights?

### 3.4 Country case studies

To accurately assess whether current NGO strategies are effective, the statutory legal framework must be sufficiently progressive and explicit with respect to gender equality, land and/or property ownership, and if possible, family and inheritance law. Mozambique and Tanzania were selected as target countries for this research because the land reforms explicitly promote gender equality: for example, a 2005 study of five countries with progressive land laws (Tanzania, Mozambique, South Africa, Zimbabwe and Kenya) found that the land legislation of Mozambique and Tanzania were closest to meeting human rights-based approach standards.<sup>109</sup> Second, a sound indicator of the extent of change as a result of statutory law and NGO activities is the experiences of women most likely to experience gender discriminatory land practices in rural communities. For both countries, these women were identified to be divorced women and widows because their relationship to the man through which access to property is granted under customary law has been severed. For divorced women, the issue is one of retaining control over some of the land as a result of the marriage partnership, whereas for widows, the issue is one of inheritance; both involve practices traditionally considered to be properly administered under customary law.

#### 3.4.1 Mozambique

In Mozambique, a 2007 survey of 15 institutions involved in providing legal support to the poor and 104 individuals across various districts was organized by the United Nations Commission on Legal Empowerment of the Poor, with the objective of contributing to a national consultation process with a specific focus on property rights.<sup>110</sup> It identified a number of difficulties encountered by the poor, particularly those related to the defense of their property rights, including: weak access to justice due to lack of legal knowledge; low levels of schooling and literacy; difficult access to institutions defending them and their property; cultural habits negatively influencing property transfer rights upon death; and weak institutional capacity to provide them with legal support.<sup>111</sup>

The study confirmed that many widows and their children are dispossessed of their inheritance and that 95 percent of interviewees resorted first to neighborhood, district and traditional leaders as a response to such dispossession. However, 92 percent of respondents in rural areas stated that they would comply with the decision made by local structures — taking a case to court was a very rare phenomenon.<sup>112</sup> The report concluded by highlighting four areas of change that were needed to overcome the obstacles faced by the poor in protecting their property rights: education in and dissemination of property rights; facilitation of access to registration; inter-sectoral strengthening and coordination; and reinforcement of policies.<sup>113</sup>

Another survey of 384 individuals<sup>114</sup> conducted across six provinces by Save the Children in April 2007 found that, according to 80 percent of the interviewees, land would be inherited according to the gender of the heir. This was despite the fact that some 52 percent of widows and women heads-of-households knew about the laws establishing gender equality, as did 48 percent of the men and 68 percent of the justice officials.<sup>115</sup> The report identified the central problem regarding inheritance as:

... widows and orphans do not have easy access to the existing institutions and instruments of justice or to the support of law enforcement agencies and officers to protect them and their rights. This problem is particularly acute in rural areas because of inadequate judicial infrastructure, lack of information, poor levels of literacy and stronger, more rigid community traditions.<sup>116</sup>

The recommendations included sensitization of the community, coordination and strengthening of NGOs, other key supporting activities (literacy classes, paralegal training, and support for income-generating activities), law enforcement and victim support, and documentation and advocacy.<sup>117</sup> Accordingly, several organizations are providing legal assistance and legal education on women's rights, including the Association for Women in Legal Careers (AMMCJ), the Rural Association for Mutual Assistance (ORAM) and the Association of Women, Law and Development (MULEIDE).

### 3.4.2 Tanzania

In Tanzania, customary law has evolved over the years and has been shaped by other legal developments, including a Bill of Rights introduced in 1988. Despite progressive and explicit statutory provisions, it remains the law closest to the people, especially in rural Tanzania, and continues to feature practices, norms and tradition-driven perceptions of rights that hinder women's ability to be allocated land as independent individuals.<sup>118</sup> Specifically, land rights are still "viewed in light of a woman's marital status, and women are required to obtain their husband's consent".<sup>119</sup> For example, the Constitutional prohibition of discrimination based on sex or religion is not enforced in cases of customary inheritance. Similarly, despite the existence of provisions in the LMA on property rights for women, their application depends on the status and wishes of the head of the household,<sup>120</sup> a reflection of the inconsistent and often ineffective implementation of the LMA.<sup>121</sup>

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As described above, in both patrilineal and matrilineal communities, customary law precludes women from inheriting land, even following their husbands' deaths. Moreover, as the LMA does not cover inheritance, it does not explicitly supersede these practices. Despite their illegality due to their inconsistency with the Constitution, this makes little difference in practice: several cases on appeal to the High Court have simply been referred back to clan councils or local customary elites.<sup>122</sup> On the other hand, the High Court has opined that customary laws should be modified to meet the requirements of equality and the human rights standards of the Constitution and international law.<sup>123</sup> It has also determined that "[f]emales, just like males, can now and onwards inherit clan land or self-acquired land of their fathers and dispose of the same when and as they like."<sup>124</sup> For example, in *Joseph Sindo v Pasaka Mkondola*,<sup>125</sup> the High Court granted a female petitioner an equitable share of the couple's jointly acquired assets although they were not married. Of course, the challenge is disseminating such decisions throughout rural communities practicing customary law — which based on the factual survey above, has not yet occurred.

The Law Reform Commission subsequently targeted the treatment of marital property as an area of reform. It noted that women are denied shares in properties, or blamed for causing marital breakdown and required to repay dowry under various customary laws. The Commission recommended that the references to customary law be struck from the LMA's provisions on marital property.<sup>126</sup> In a similar vein, a study commissioned by the Ministry of Community Development, Women's Affairs and Children, and carried out by the Tanzania Women Lawyer's Association (TWLA), found that:

female-headed households were largely excluded from access to land by customary arrangements. Women were poorly represented in village and district decision-

making structures pertaining to land administration and were disadvantaged in dispute resolution institutions because of corruption, prejudice, and poor representation. Women surveyed were enthusiastic about titling because it allowed them the possibility for co-ownership of family land. The survey found that women preferred statutory courts over traditional courts because their decisions were binding. Women favored full land rights, including the right to bequeath land, and demanded greater education in land rights.<sup>127</sup>

Consistent with these results, NGOs in Tanzania are also targeting judicial courts, which apply statutory law as the preferred venue for improving land tenure security for women, particularly following the death of their husband or divorce. In 2004, a Gender and Poverty Program promoting equal land rights was established across six regions in the country by the Law and Human Rights Centre (LHRC), the Women's Legal Aid Centre (WLAC), the Women Advancement Trust (WAT), the Tanzanian Women Lawyer's Association (TAWLA), and ENVIROCARE. In each region, a program comprised of a baseline survey, a needs assessment, training, workshops/seminars, and interactive activities was conducted to identify issues requiring future intervention.

The resulting recommendations included: further training, public education seminars and radio programs to raise awareness of the legislation; adequate distribution of reading and reference material; increased attention to legal education; provision of sufficient support to women to allow them to assert their rights; and government follow-up at the village level to ensure implementation of the legislation.<sup>128</sup> WLAC was the most active of these organizations in implementing the program, and continues to maintain 22 paralegal units in various regions.<sup>129</sup> However, to date, no evaluation of the effects of legal education and provision of paralegal services has been conducted.

## 4. The path forward

### 4.1 Evaluating current strategies

The primary research forming the basis for this chapter examined whether and how NGO efforts are influencing the likelihood that women will be dispossessed after divorce or the death of their husband. Specifically, the goal was to determine whether and how laws protecting women's land rights are more effective when combined with the provision of community legal education and legal services. The prediction was that statutory (topdown) interventions aimed at enhancing women's tenure security have greater impact in modifying customary norms and practices when they are complemented with bottom-up legal empowerment programs to improve legal awareness and accessibility to legal remedies.

In each country (Mozambique and Tanzania), surveys were administered to divorced or widowed women and community leaders in three villages where paralegals had been trained on legal rights related to land and to help resolve conflicts ("paralegal villages"); in three villages in which there was an established paralegal office with trained paralegals working under the supervision of a qualified lawyer ("office villages"); and in three villages in which there were no legal education or paralegal services available ("control villages").<sup>130</sup> Partner organizations were selected on the basis of specialization or coverage of land-related rights, the provision of paralegal services and access to women in rural communities. Despite logistical and methodological challenges,<sup>131</sup> the data obtained through the surveys suggested definitive trends and a complex interplay of various social and economic contextual factors; both allow inferences that could prove useful for a range of stakeholders in developing countries with plural legal systems.

### 4.2 Research-based conclusions

There are some overall trends across both countries worth noting at the outset, which provide a general framework and some preliminary insights. The first encouraging pattern is that formal court decisions were, without exception, in favor of women's land rights claims following dispossession

upon divorce or widowhood. While a number of court decisions are still pending in Mozambique, those that have been delivered resoundingly reinforce women's rights to inherit land when their husband dies, and women presumptively receive half the assets upon divorce, including land. This not only bodes well for the high number of cases awaiting decisions, but also for the consistency in application of the law in the formal justice system. However, the small sample size of NGO-assisted land claims in court makes it difficult to conclude with certainty that this trend applies universally across formal courts. If it can be assumed that judicial officers, who are trained in gender equality and land rights, are uniformly applying the relevant statutory law, this is encouraging for both domestic civil society and development agencies and donors. For example, given the prerequisite of paralegal assistance for women to take land claims to court (discussed in-depth below), increasing support for this type of NGO assistance should yield consistently positive results in cases of dispossession.

Second, compliance with court orders remains a challenge in rural communities. Regardless of the reason, the implication is that increasing compliance with court orders depends on better communication of the decision to the relevant parties, and a commitment to enforcement by local authorities including leaders and police. Given women's general lack of influence within their local communities, there is an important role for NGOs to play in notifying police and community leaders of court decisions, and their obligations to ensure adherence to them. Strengthening relationships and information-sharing between civil society and enforcement authorities through seminars and networks could enhance awareness of binding court orders and the sense of responsibility to see them executed.

Third, there was a strong preference among women in villages without paralegal services for formal courts over community structures. This could be read as an indication of dissatisfaction with their experiences with customary procedures and their negative results, and a general perception that formal courts are fair and follow the law.

Community leaders across the two countries had knowledge, to varying degrees, of the relevant laws and acknowledged the benefit of women controlling land. Contrasting with their knowledge was their striking failure to resolve land conflicts in favor of women claimants, including those who went on to obtain court judgments in their favor. Three of the four exceptions to this disappointing trend (out of the 25 women who asked their community leader for a resolution) occurred in a community where the leader was a woman who was knowledgeable about and committed to enforcing gender equality, including in land disputes. Two important conclusions follow from this: first, consistent with the literature, despite their knowledge of legislation, community leaders tend to ignore the law in resolving land disputes within the communities; and second, the presence of NGOs and their capacity to assist with land rights claims is even more important because community leaders should not be expected to apply their knowledge of formal law.

86 Finally, although paralegal services attempted mediation as the first method for resolving conflicts brought to them by widows and divorced women, they were generally unsuccessful. Resistance to paralegal mediation by husbands or husbands' families is likely a reflection of the prevalence of contemporary practices of customary norms, as reinforced by local community leaders. Thus, an approach using law as a tool to coerce behavioral change seems a necessary precursor to a softening of position by adverse individual parties. Accordingly, at this preliminary stage, a sustained focus on strengthening NGO expertise in dissemination, education, legal drafting and practice is likely to be more impactful than diverting resources into mediation. Moreover, cases of dispossessed widows and divorcees tend to legally favor the woman; using mediation, which is often reserved for legally complicated situations or situations in which all parties are legally at fault, is unlikely to be as effective in promoting women's land rights as unequivocal public court judgments explicitly referring to and reliant on statutory law.

In Mozambique, the presence of a paralegal office coincided with: every dispossessed woman challenging their dispossession; a preliminary appeal to the community leadership, which generally

failed to satisfactorily resolve the situation; women unanimously turning from community leaders to the paralegal service; and an emerging trend whereby women bypassed their community leaders and sought legal advice directly. Women in villages with paralegals only generally (all but one) challenged their dispossession in some way; only a few sought legal advice after their community leader failed to resolve their case; and even fewer women took their case to court. These differences are not surprising: the paralegals in each village educated, trained and provided advice to women, but were extremely limited in their capacity to assist with drafting claim documents for court submission. Thus, while women's social attitudes and behavior have changed in these villages, they did not have the support, expertise and therefore capacity to take their claims to a formal venue.

Mozambican women in villages with paralegals and paralegal offices preferred community courts in stark contrast to the women in the control villages, who preferred formal courts; their reasons highlight the dilemma underlying the present inquiry. Community structures have a greater capacity to be responsive, adaptive and accessible — it is the content of their decisions that is problematic. All of the reasons cited in support of community courts relate to the process, not the substance, of the decisions made, and for those who preferred the courts, it was on grounds related to enforceability of decisions and the absence of corruption. This combination of reasons reinforces the ultimate goal — that land rights conflicts be resolved at the local level consistent with gender-neutral legislation.

In Tanzania, the significantly greater impact of a paralegal office compared to paralegals only was similarly obvious. The largest difference between women in villages with a paralegal office and women in villages with paralegals only (no paralegal office) or no services was in the rate of seeking advice and resolution from the community leader. The higher rate of refusal to accept dispossession is predicated both on knowledge of rights and a willingness to protect them. Women in paralegal villages explained that the patriarchal culture was the reason for not approaching their community leader. This suggests that the stronger and more visible the presence of NGOs, the more likely women are to consider challenging the existing patriarchal culture; i.e. the knowledge of an established legal service to assist them with taking claims to the formal court emboldens and empowers women to take the first step of challenging their dispossession. Their preference to approach their community leader to do this underscores the conclusion of the previous paragraph — that women would prefer their problems to be resolved according to the law at a community level, rather than resorting to formal legal mechanisms. The role of the NGOs, therefore, may be most critical and greatest at this point in time when formal law is required to coerce changes in behavior. The long-term hope is that NGO efforts ultimately increase universal understanding and acceptance of women's land rights, which sees disputes resolved satisfactorily within communities without the need to resort to courts.

Overall, there are some interesting cross-country comparisons that further illustrate the importance and nature of the role of NGOs in this context. First, Tanzanian women had a markedly higher knowledge of and preference for formal court systems across all three conditions, which implies higher levels of understanding about rights, awareness of the functioning and role of the court, and knowledge of decisions made according to the law. Therefore, it can be fairly concluded that NGO efforts in disseminating laws to the population and in educating them about the law and how to use it are correlated with a preference for (and therefore an increased likelihood of accessing) formal courts.

Conversely, Mozambican women had a stronger preference for community courts, i.e. traditional structures. This may be due to a combination of: ignorance of the formal law, lack of familiarity or understanding of the operation of formal law and courts, lack of faith in the efficacy, relevance and/or wisdom of the formal court, or merely an attachment to locally applied norms. The cross-country comparison is useful in this case: since Tanzanian women were more likely to be permitted to stay on their land, it is obvious that the preference of Mozambican women is not due to better, more rights-protective practices with respect to women's control over land. It also confirms that legal dissemination and education are critical precursors to any civil society intervention; women



who do not feel familiar with or comfortable about the formal justice system are unlikely to approach NGOs for assistance in accessing its courts.

Consistent with the above differences, it can reasonably be concluded that knowledge, application and compliance with respect to women's land rights are inextricably linked to the relative prevalence, capacity and expertise of civil society organizations educating communities and providing legal assistance to women. The reasons for these trends are multiple, complex and interrelated; they are likely to canvas the nature, age and level of dissemination of the laws, differences in customary practices and their development, and the capacity of NGOs and government agencies to educate and facilitate the exercise of women's rights.

### **4.3 Broader conclusions and recommendations**

There are a number of broader conclusions to be drawn from the cross-country comparative research, which could be useful for development agencies, policy-makers and domestic NGOs focused on women's rights. First and foundationally, customary law, as interpreted and applied by informal community structures, does not universally result in divorcees or widows being entirely dispossessed; rather, they are in an inherently precarious situation in which their ability to continue to control and use land is entirely dependent on family attitudes and circumstances. The value of replacing customary practices with practices consistent with statutory law is the removal of uncertainty in land tenure for these women, the conceptual separation of their individual rights from their relationships to family members, and the impartial consistency with which their rights will be recognized in formal courts.

Second, even if it is established that community leaders who have traditionally followed customary law in determining land-related conflicts involving widows or divorced women know the relevant statutory law, it should not be assumed that they will apply the provisions in their favor. Conversely, formal courts appear to consistently apply statutory provisions in favor of dispossessed widow and divorcee claimants. Accordingly, for the systematic and impartial application of statutory law that may conflict with customary norms, formal courts are the preferred venue for claims. Both legal knowledge and the presence of a paralegal are necessary for women to challenge their dispossession. Since there is no established culture of, practice of, or capacity for self-represented litigation, without legal and material assistance in taking claims to court, legal knowledge alone cannot be assumed to encourage women to challenge their dispossession.

Third, the continuing challenges in achieving compliance with court orders suggest that if community and customary practices are inconsistent with the law, a formal judgment does not necessarily change behavior or even promote adherence to the law. Rather, the law, in the form of both statutes and court judgments is a tool that can be used by NGOs to increase general awareness of women's rights and garner support from enforcement authorities, which appears necessary to coerce obedience from relevant parties. Mediation as an alternative to court-generated resolutions to land-related conflicts is possible but unlikely in these matters. The pressing difficulty facing successful women claimants is a lack of compliance with court orders by the opposing party, and a lack of will within communities to ensure that they are enforced. Women's confidence that court orders will be obeyed may be affected according to the levels of their compliance, which may in turn affect the population's perception of the efficacy and benefit of formal courts compared to community structures.

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Legal dissemination, education and assistance through NGOs appear to be coaxing change in communities and encouraging women to challenge their dispossession, both within their communities and through formal structures. This, combined with the discrepancy between legal knowledge levels and decisions in land disputes by community leaders, suggest that NGOs are a better target group to further catalyze change in rural community land practices with respect to women. The current research also gives rise to a number of recommendations for donors, development agencies, governments and other stakeholders if this approach of supporting NGO efforts founded on statutory provisions is continued.

To address the outstanding issue of lack of compliance, directing resources (financial, human, material and intellectual) towards developing effective enforcement mechanisms is critical to coercing judgment-compliant behavior in the short term, and increasing universal adherence to statutory law in rural communities in the long term. Nonetheless, in recognition of their continuing important role and the ultimate goal of law-abiding resolutions within communities, community leaders must continue to be a focus for the dissemination of laws and education seminars. Training provided to them on how formal laws work in practice, the legal services available to ensure that rights are defended, and the consequences of non-compliance with the law may be necessary additions to existing educational programs on the substance of the law.

Given the significant differences between villages with and without paralegal offices, an increased focus on establishing paralegal offices with permanent staff to assist in drafting and filing claims in court is likely to improve women's likelihood of challenging dispossession, approaching a legal service, taking their claim to court, and thereby (given the likely judgment in their favor) succeeding in having their rights recognized.

While clearly educated and observant of applicable statutory laws, judges of formal courts need to continue to be trained on gender-related provisions, the related challenges in their application in rural communities, and the range of enforcement mechanisms at their disposal when issuing court orders.

Finally, dissemination to the broader population, including community leaders, needs to explicitly disentangle the individual rights that widows and divorced women possess under law from their status and relationships within their family. For example, education seminars could emphasize that it is not the need to raise and care for children or grandchildren that gives rise to the right to either stay on the land or keep half the land, but the fact that wives, under the law, are also entitled to keep property, including land.

To fully assess which and to what extent variables contribute to legal knowledge, women's exercise of their land rights, favorable court decisions and levels of compliance, it would be useful to conduct comparable research in other countries with similarly progressive legislative provisions. Such research may reinforce the current findings: governments, donors, NGOs and policymakers might find that financial, human and advocacy resources bring greater achievements in women's land rights and economic development if they are directed towards community legal education and the provision of accessible services to advance land rights claims in formal courts.

The established literature and current research suggest that the advantage of formal courts for disadvantaged women is its consistent application of statutory provisions in favor of gender equality, its impartiality in deciding land claims, and its increasing accessibility in areas where NGOs provide legal assistance. Women's experiences in Mozambique and Tanzania suggest that the latter is perhaps the most important: without accessible legal advice and assistance, even the best and most progressive statutory land laws have little chance of changing community perceptions and practices in land distribution so that they recognize and sufficiently protect women's land rights.

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- 131** The initial challenge was two-fold: to identify organizations targeting customary law practices as part of their strategy to improve women's land rights, and to

communicate a partnership proposal that would assess the impact of these efforts. A limitation intrinsic to the study's methodology was its focus on quantitative data, which required much higher numbers of participants to yield meaningful results, and compounded the challenges associated with the limited time to gather data in each country. It also exacerbated any logistical challenges encountered by the partner organizations: for example, AMMCJ was not able to organize data collection from a third control village, which undermined the robustness of the statistical analysis and inferences drawn from data in Mozambique. The integrity of the data would not have been as affected if the focus were on qualitative information — while the sample size would have been smaller, conclusions and trends could have been inferred from descriptive answers. It was predictably difficult to access the target group — divorced or widowed women in rural communities of two developing countries. Compounding the customary or traditional disadvantages these women experience are logistical challenges created by their physical circumstances — limited or complete lack of access to electricity, telecommunication services and other social facilities. For example, women's attendance often depended on them being identified and deemed eligible by the community leader or by another woman already participating in the surveys; that is, attendance resulted through an informal word-of-mouth process dependent on the knowledge of the community leader, or other community members, about the marital and property status of women in the community. This method did not guarantee that the participating women were a representative sample of the community.

## Engaging with Customary Law to Create Scope for Realizing Women's Formally Protected Land Rights in Rwanda

Marco Lankhorst and Muriel Veldman\*

### Executive summary

In rural Rwanda, women, particularly widows and divorced or abandoned women, face severe obstacles protecting and upholding their interests in land, resulting in diminishing land tenure security. Women have weak rights under customary law, and while reforms have strengthened their statutory land rights, such entitlements have limited practical value in rural areas where customary law dominates. Research was launched to investigate the types of interventions that might improve the likelihood that women's land interests would be upheld in the context of customary dispute resolution. It was hypothesized that women would receive better outcomes if land-related disputes were resolved consistently at the village level, through mediation by a wider group of stakeholders, including representatives of a women's interest group. The results demonstrate that it may be possible to widen the scope for women's land claims without modifying the substantive aspects of customary law, provided that such outcomes do not sit too uncomfortably with the overarching structure of the customary framework. This chapter discusses the results of this research and draws conclusions that may be useful both for rule of law programming in Rwanda and in similar country contexts.

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## Introduction

There are divergent views, both within the donor community and among development scholars, about the role that customary law can play in the legal empowerment of the poor in Africa. Given the importance of land, both in terms of rural development and securing livelihoods, much of this debate focuses on customary land rights.

Contributors to this debate who view the poor as a more or less homogenous group to be empowered, argue that customary land tenure arrangements are known and owned by poorer communities and their members, and may provide a well-adapted and legitimate framework for securely regulating interactions and transactions between them. Customary law should therefore be strengthened, for example, through formal recognition, codification or the titling of customary claims. Proponents of this view include the World Bank's Land Policy Division, Oxfam Great Britain, and the International Institute for Environment and Development.<sup>1</sup>

Many African women's organizations, gender activists and scholars specializing in gender studies oppose this view.<sup>2</sup> They argue that customary law provides limited access to land for women and that its strengthening or formalization might exacerbate such restrictions. Adopting a rights-based approach and on the basis of international and regional human rights instruments — most importantly, the *Convention on the Elimination of All Forms of Discrimination against Women 1979* ('CEDAW') and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003* — they call for legislation that enables women to inherit, purchase and own land in their own name.<sup>3</sup>

A third group, which includes members of the World Bank's Gender and Law Reform in Africa section, occupies the middle-ground between these two positions.<sup>4</sup> It argues that engaging with customary legal systems is inevitable. Statutory reforms have had little impact or have been counterproductive, principally because very few women in rural Africa have access to courts that properly administer these laws. According to this group, customary law must be reformed from the ground up in a process that allows for women's full participation. Reform in this regard should not be understood as codification or formalization of customary law, both of which create a rigidity that tends to undermine the position of women. Rather, members of this group put their faith in the 'assisted evolution' of unwritten customary systems.

94 To understand the various arguments raised in this debate, it is useful to briefly elaborate on the development of customary law and its effect on women's land rights. In African systems of customary law, women generally claim access to land on the basis of their relationships with men. They can claim access to their husband's land and, often, they will have one or more forms of residual claims to their natal family's land. This creates multiple, overlapping claims to the same land. As far as the pre-colonial period is concerned, these claims should not be understood to have been structured or well-defined rights. The extent to which claims could be realized and the relationship between claims to the same land depended on a process of negotiation within families and communities in which needs and circumstances played an important role. Codifications and other law reforms during and after colonialism — often inspired by concepts in Western law — combined with population pressure and changing economic circumstances, modified the nature of these claims and the extent to which women could rely on them to gain access to land. While some studies maintain that women were positively affected by these changes,<sup>5</sup> the weight of the evidence suggests that such processes adversely affected their ability to exercise derived and residual land claims.<sup>6</sup> This creates important challenges for women where land ownership, transfer and management are principally regulated by customary law, and statutory laws protecting their land interests remain largely out of reach.

This chapter examines a pilot intervention led by the Belgian NGO RCN Justice & Démocratie in Rwanda, which was focused on the customary resolution of disputes involving women's land claims

concerning inheritance or marital relations.<sup>7</sup> The results provide insight into key issues of relevance to the debate outlined above; namely, the entry points and feasibility of reforming customary law from the ground up. The intervention examined whether and to what extent it was possible to increase the scope for acceptance of women's land claims under customary law by: i) promoting more inclusive dispute resolution, including participation by women's interest groups; ii) promoting the resolution of disputes involving women's land claims at fora where women are most likely to be able to capitalize on the flexibility inherent in customary decision-making to draw on moral obligations that support their interests in land; and iii) familiarizing members of institutions involved in dispute resolution with mediation and negotiation techniques.

The chapter is organized as follows: section one provides an overview of land tenure arrangements and land dispute resolution in Rwanda; sections two and three discuss the intervention and associated research findings; and finally, section four provides a discussion of these results and the possible implications for land tenure and law reform policies both in Rwanda and similar developing country contexts.

## 1. Rwanda: Land, land tenure and land dispute resolution

### 1.1 Land pressure

Rwanda is a small, land-locked country in sub-Saharan Africa approximately the size of Belgium.<sup>8</sup> It has a population density<sup>9</sup> of 384 inhabitants per km<sup>2</sup> and a high population growth rate.<sup>10</sup> In its 2009 Human Development Report, the United Nations Development Programme ranked Rwanda 167<sup>th</sup> (out of a total of 182 countries) in terms of its human development, in league with countries such as Eritrea and Liberia.<sup>11</sup> Despite impressive and sustained growth, the majority of the Rwandan population lives below the poverty line. The 2009 per capita gross domestic product was US\$520,<sup>12</sup> which means that the average Rwandan survives on less than US\$2 per day. According to the National Institute of Statistics, 84 percent of the population (52 percent of whom are women) work in agriculture or livestock farming;<sup>13</sup> the vast majority of these are subsistence farmers.<sup>14</sup>

Land holdings in Rwanda tend to be small. This is the result of a decades-long and continuing process of fragmentation, strongly driven by population growth.<sup>15</sup> The average land holding per household measured 0.76 ha in 2008.<sup>16</sup> About 26 percent of family land holdings are smaller than 0.20 ha, and an additional 30 percent are smaller than 0.50 ha.<sup>17</sup> Much of the land is situated on hillsides, and soil erosion presents a serious concern for livelihoods.<sup>18</sup> Most land holdings are acquired by traditional means, that is, through inheritance (46 percent) or donation (11 percent).<sup>19</sup> The acquisition of land by purchase is less common (25 percent), but recent research conducted by the Ministry of Environment and Lands shows that the land market is rapidly developing, particularly in urban and peri-urban areas.<sup>20</sup> The average price per hectare in rural areas is about RWF1.2 million (roughly US\$1,950),<sup>21</sup> which equals about four to five times the average annual income of ordinary Rwandans. Given these pressures, it is not surprising that Rwanda experiences elevated levels of land disputes,<sup>22</sup> most of which (79 percent) concern intra-family claims to land based on succession or spousal rights.<sup>23</sup>

### 1.2 Overview of customary inheritance practices

It is important to highlight that under customary law, inheritance is conceptualized differently than in Western jurisprudence. This issue is intertwined with the institution of marriage, more so than with the death of the rights-holder. Under customary law, sons are entitled to inherit part of their father's land when they reach the age of marriage. This land given to sons is referred to as *umunani*, and its purpose is to enable him to start his adult life by building a house and cultivating food for his family. Where there are no sons or where all sons have died, *umunani* will be given to the grandsons. In addition to *umunani*, a man may also receive land from members of his family or, occasionally, from the family of his wife, either when he marries or when a son is born. Such gifts are referred to as *intekeshwa* (or *inteke*).<sup>24</sup>



Despite some regional variations, customary law clearly provides limited scope for women to acquire the type of rights to land commonly associated with ownership either through inheritance or gifting. Land is strongly connected to the paternal family line and is therefore passed on from fathers to sons. Girls living with their parents can be given a specific share of their father's land to exploit, but generally this is seen as a use right that expires when she marries or when the land is needed for another purpose. The principal means for women to access land under customary law is through marriage. Even in such cases, however, the husband is generally recognized as owning and exercising authority over such land, which was given to him in the form of *umunani*, even if he is expected to consult his wife on matters regarding its management.<sup>25</sup>

Women can receive land as a gift, for example, upon marriage, but its size and the nature of the claims acquired are generally very different from *umunani*. In terms of size, much will depend on the family's wealth and the woman's relationship with her family members, but it is rare that land gifted to a woman would be comparable in size to her husband's *umunani*. Moreover, the claims over such land are not enforceable, but principally rights of use. Where the land is gifted by her family, control over the land (selling, gifting, renting, building) will generally be exercised by her father or one of her brothers; if the land comes from elsewhere, such control will be exercised by her husband. Frequently, the rights acquired over gifted land are more symbolic in nature. Such land will be used and controlled by a brother, who then assumes a moral obligation to pay visits to his sister on important occasions and to support her in times of financial or material need. In principle, a woman's children are not entitled to inherit her claims over gifted parcels of land.

The division of matrimonial property following the death of a husband depends on whether the couple has male offspring, the widow's age and her relationship with her in-laws. If she has adult sons, the property will pass to them and a share may be reserved for her to live on and cultivate crops. Where the sons are minors, the widow can generally retain use rights over her husband's land and will continue to stay in the matrimonial home, holding both in trust for her sons.<sup>26</sup> If there are no children,<sup>27</sup> a widow will generally be permitted stay on her husband's land provided that she is on good terms with her late husband's relatives. If she is considered young enough, she may be required to marry one of his brothers to reinforce familial ties.<sup>28</sup> In other cases, widows will be forced to leave their husband's land and return to their biological families. This may not be easy, however, because she will need to lay claim on resources that have been reserved for her brothers and their families. In the past, brothers commonly assumed responsibility for one or more of their sisters following the death of their parents and in cases where they had been repudiated. As will be explained in more detail below, while such customary practices have become less common, the Government of Rwanda has introduced legal provisions aimed at better protecting women's land interests.

### 1.3 Statutory inheritance law

96 The inheritance law reforms initiated in 1996 were driven by a number of developments related to the violence against the Tutsi that marks Rwanda's recent history.<sup>29</sup> The eruptions of violence of 1959 and 1973 primarily targeted men. The death or flight into exile of husbands and fathers forced many Tutsi women into roles as family breadwinners and farmers. An entire generation — the one that later assumed power in post-conflict Rwanda — thus grew accustomed to female-headed households. With the 1994 genocide, the number of such households further increased. This time, Hutu women were also strongly affected, because many men were incarcerated, died or did not return from exile.

The customary system, which provides women with access rights to land mainly through their affiliations with men, did not meet the needs of this new generation of Rwandan women who were effectively running households on their own. Moreover, formal laws dating from before the genocide did not recognize their claims to the land they depended on for livelihoods, which made them vulnerable to attempts by more distant male relatives to obtain additional lands.<sup>30</sup> This was viewed as a potential threat to political stability and economic development.

To remedy this, the *Matrimonial Regimes, Liberties and Succession Law* ('*Inheritance Law*') was introduced in 1999.<sup>31</sup> Its aim was not only to formalize the way in which inheritance was regulated and bring it within the scope of the state justice system, but also to break with important aspects of customary law. First, it granted daughters the right to inherit land from their parents.<sup>32</sup> Like their brothers, therefore, women are entitled to a share of family land when they get married or when their parents die. Second, it gave wives rights to matrimonial property:<sup>33</sup> land, houses and movable goods are owned jointly by husband and wife. Third, it allowed widows to inherit their deceased husbands' property.<sup>34</sup>

The formal scope of this law, however, is not as wide as it might seem. When the *Inheritance Law* refers to wives and widows, it means those who are formally married, thus excluding many people living in rural areas who marry under customary or religious unions. Moreover, in certain parts of the country, it is not uncommon for a man to be legally married to one wife and, at the same time, to be married customarily to another or others. In practice, therefore, the *Inheritance Law* leaves large numbers of women unprotected. In addition, although it provides that daughters have an equal right to the land left when their parents die, it only provides that they may not be discriminated against when the parents gift land to their children during their lifetime (the *umunani*).<sup>35</sup> In many cases, such gifts involve the bulk of a family's land, leaving little to be inherited. Lawyers frequently interpret the term 'discrimination' used in the law to mean that if a girl has acquired access to sufficient land through her marriage, this justifies her receiving a smaller *umunani* than her brothers.

The *Law on Prevention and Punishment of Gender-Based Violence 2009*<sup>36</sup> ('*Gender-Based Violence Law*') appears to partially fill the gaps left open by the *Inheritance Law*. This new law requires any couple who live together as husband and wife to conclude a civil marriage.<sup>37</sup> In the event that either of the partners (usually the husband) has been living together as a family with an additional person (for example, a second wife), the law also requires him to share with this person the property that they jointly held. For the moment, however, this law remains untested and it is unclear what 'jointly held property' will be interpreted to mean; moreover, it is questionable the extent to which women will realistically be able to use this law to force their partner to formally register their marriage.

#### 1.4 Land dispute resolution

Despite the changes introduced through the *Inheritance Law* in 1999 and the *Gender-Based Violence Law* in 2009, customary law continues to have a strong impact on how property transfers between family members are regulated. As elsewhere in Africa, the bulk of land disputes are handled at the local level, with only a fraction entering the formal court system.<sup>38</sup>

The *inama y'umuryango* (hereafter *inama*) is often the first institution that disputants call on to resolve a land dispute. The term can be translated as 'a family meeting'.<sup>39</sup> The *inama* is not a tightly regulated institution of customary law. The way and frequency in which a family organizes meetings and the reasons for which a meeting may be called can be very different from the traditions of another family. In general, meetings will be led by the head of the family (*umukuru w'umuryango*). In some families, elders and younger members of the family considered trustworthy, wise and eloquent will be heavily involved in the debates, whereas in other families, the *umukuru* will act alone. Likewise, in some families, women will take an active part in the debates, whereas in others, the discussion will be very much male-dominated. Finally, there is strong variation in the methods that families adopt to resolve disputes, which range from mediation to strict adjudication. Although some village heads may offer to be present during this *inama*, as an advisor of the family and to assist in managing the discussions, most do not, and such meetings are generally considered an internal family affair.

An *inama* will not always succeed in putting an end to a dispute, and for some disputes, such as those between members of different families, an *inama* is not considered a suitable forum. Where this is the case, disputes are almost always brought before the *umudugudu* council (the village administration),<sup>40</sup> despite there being no law that provides for or regulates interventions by these

local authorities.<sup>41</sup> This situation must be understood in light of the fact that after independence, when customary land management structures were largely dismantled, local authorities acquired extensive and virtually exclusive power in matters of land allocation.<sup>42</sup>

At the levels of the *inama* and the *umudugudu*, certain individuals play important roles in dispute resolution. They are traditionally referred to as *inyangamugayo*, which means man (or woman) of integrity.<sup>43</sup> *Inyangamugayo* may get involved in dispute resolution for different purposes and at different times. They sometimes work together with heads of *umudugudu* in dispute resolution sessions as part of a regular form of cooperation. More commonly, they are involved in the resolution of a dispute after a family meeting but before the head *umudugudu* deals with it. Their participation may be of their own initiative, or because they are requested to by the disputants, the family or neighbors.

Finally, at the local level, there are the *abunzi* committees, which were expressly created by a law adopted in 2006<sup>44</sup> to deal with all disputes before they could be submitted to a Primary Court.<sup>45</sup> The *abunzi* are primarily required to mediate between disputants and to assist them reach some kind of settlement. It is only if the parties cannot be reconciled that the *abunzi* are required to apply the law and adopt an adversarial decision. This decision is binding on the parties unless one of them submits the case to a Primary Court for review. A committee is composed 12 elected community members. Each of the two sides in a dispute will choose one *umunzi* (*abunzi* is plural and *umwunzi* singular) and together, these *abunzi* choose a third member of the panel. The panel of three leads the debate, but in principle other members of the committee may join in to ask questions or give advice, as can members of the public. In practice, the scope for such interventions varies a great deal; some *abunzi* leave more room for discussion, while others exclude it altogether. The *Abunzi* Law does not allow the committee to charge fees to litigants either for the hearing or for issuing a written decision.

## 2. Problem analysis

### 2.1 Women's land rights

The adoption of formal laws guaranteeing women's access to marital and natal family land has not led to significant changes on the ground. While there is a basic awareness among most men and women that the law has changed in favor of the latter, in practice, customary law continues to have a strong influence on how marriage and inheritance are regulated in rural areas.<sup>46</sup>

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Land, the primary asset of any rural family, is still seen to belong to the patrilineal family. When a woman marries, she is considered to become part of her husband's family. As a consequence, allowing women to claim their land entitlements in compliance with the law means that one family's land is transferred to another family.<sup>47</sup> Second, if daughters are allocated an inheritance share, brothers, particularly younger brothers who have not yet married, see the share of the land that they will come to inherit shrink, which may negatively affect their marriage prospects.<sup>48</sup> There are also social implications for women that result from the operation of the new laws. A woman who contributes considerable assets to a marriage is likely to be seen as behaving independently and being less respectful towards her husband, since if she were to divorce, she would not be dependent on the support of her male relatives. It is also clear that women risk being ostracized by both men and women community members if they try to enforce their legally guaranteed inheritance rights.<sup>49</sup>

The adverse consequences of the failure of formal law to penetrate marriage and inheritance practices in rural areas are exacerbated by the narrowing of the scope for acceptance of women's land claims under customary law. This is the result of several processes.<sup>50</sup> The first relates to an expansion of the land market. Customary obligations, including those that aim to prevent destitution among female family members, attach to land handed down within the paternal family through inheritance. These obligations are often considered not to apply if land is acquired through

purchase. André and Platteau give the example of a man who refused to give a parcel of land to his sister who returned to her village after having separated from her husband on the basis that he had built up his property by purchasing land on the open market.<sup>51</sup>

The second process relates to the reduced flexibility in which customary rules are enforced. In Rwanda, it is custom for a husband's family to pay 'bride price', or *inkwano*.<sup>52</sup> In poorer communities, it has become common to form unions outside of customary law, because the groom's family is generally too poor to pay *inkwano*. In the past, such unions were not necessarily viewed as illegitimate and, as a result, the rights of access to land enjoyed by the persons concerned were generally maintained. Today, unions formed outside the *inkwano* system are frequently considered to be illegitimate, which can have serious consequences for women who separate from their husbands. A woman's natal relatives will generally be disinclined to take her back if the union did not bring material advantages to the family and did not serve to strengthen inter-family alliances in the traditional way.<sup>53</sup>

Women in polygamous unions are particularly vulnerable.<sup>54</sup> Traditionally, only wealthier men could afford to marry a second or a third wife.<sup>55</sup> Modern polygamous practices, however, occur mainly in the context of poverty.<sup>56</sup> Polygamy often reflects a man's attempt to acquire land by expanding the amount of labor he controls. In such situations, bride price is not always paid, which makes it less likely that the natal or conjugal family will offer support in the event of divorce or widowhood.

It can be easily appreciated how these types of situations can give rise to land disputes. Such cases may be initiated by women who see their access to land reduced or completely cut off following divorce or bereavement. Alternatively, cases may be started by family members eager to expand their land holdings by repossessing land in which a woman holds an interest but does not have a customary right to. How these cases are resolved and the extent to which women's interests in land are upheld depends on the dispute resolution approach adopted, as examined below.

## 2.2 Dispute resolution involving women's land interests

A key challenge for bereaved or divorced women seeking to protect their land interests is that disputes involving the succession of land rights are often not dealt with at the village level. Heads of *umudugudu* generally refer such disputes to higher-ranking local authorities or directly to *abunzi* committees, because they consider them too complex. If heads of *umudugudu* do attempt to resolve such disputes, they generally apply adjudicative methods that tend to disadvantage women complainants, as discussed below.

Once referred to *abunzi* committees, it is more likely that a case will be adjudicated rather than mediated. Although the law requires *abunzi* committees to mediate between disputants (only when a mediated settlement cannot be reached are they authorized to apply the law and adopt a binding decision), in practice, many *abunzi* do not see a clear distinction between these two modes of resolving disputes and most understand their role to be similar to that of a judge, even if they consistently refer to this work as *kunga* (mediation).<sup>57</sup> Out of a total of 105 disputants interviewed as part of this research, 43 indicated that the *abunzi* did not make any attempt to mediate a decision between the parties and instead simply applied a ruling. In the 62 cases where respondents considered that some attempt had been made to settle the dispute, such attempts generally did not amount to mediation. Most commonly, *abunzi* underlined the importance of living together peacefully and then asked the parties to try to reach a settlement independently. If the parties could not find a solution, the *abunzi* would apply a judgment. It is important to note that the *abunzi* and village-level actors almost invariably consider discovering the 'truth' and thus determining which of the two disputants is 'right' to be an indispensable component of mediation. Many have difficulty imagining that a dispute could be brought to an end without one disputant admitting 'fault' and asking for forgiveness (traditionally by offering beer to their opponent).

## Box 1

### Why do the *abunzi* often adjudicate rather than mediate?

This issue was not studied in detail as part of the pilot project, but it seems that three factors may play a role. First, the institution of the *gacaca* courts several years before the adoption of the *Abunzi* Law should be mentioned. The primary task of *gacaca* courts was to adjudicate certain types of genocide crimes akin to a formal criminal court. Since *gacaca* trials were organized weekly at the level of almost every cell (group of villages) in Rwanda, as are the *abunzi* committees, and for several years were attended by large portions of the population, their mode of operation may have had a broad impact on notions of justice and dispute resolution. Second, the *Abunzi* Law fails to define what mediation is and how it differs from adjudication. Third, there are strong indications that the perception of the role of the *abunzi* committees *vis-à-vis* the parties is influenced by the fact that they were created by law, are vested with formal decision-making powers and are expected to apply state law (if mediation fails). It is telling, for example, that in many cases, *abunzi* refer to their institution as the *urukiko y'abunzi* ("the *abunzi* court" in Kinyarwanda).<sup>58</sup>

The problems for women seeking to protect their land interests are two-fold. First, it is disadvantageous to them that most land-related disputes are not resolved at the village level because the further away from the village that dispute resolution takes place, the more difficult it becomes for them to secure equitable outcomes. This is because outside of the village structure, the scope for successful mediation diminishes and so does the likelihood that issues of moral responsibility can be used as leverage to secure woman's land rights. Second, whether a dispute is resolved by a head of *umudugudu* or an *abunzi* committee, observations indicate that women have less probability of upholding their land interests when an adjudicatory approach is adopted. Such proceedings are backwards-looking and focus on rights and facts, which, in the context of gender-discriminatory customary laws, does not favor women.

Arguably, women's interests are more likely to be better served by mediation approaches, which aim to restore peace between disputants and where there is more room to consider issues such as the disputants' needs and the moral obligations that may exist between them. Phrased another way, mediation offers a better forum for disputants with weak legal claims but strong needs backed up by moral claims such as a family obligation to protect weaker members from destitution. Likewise, women are likely to receive better outcomes if disputes are resolved at the village level where there is greater scope for them to use the negotiability and flexibility inherent in customary decision-making to promote outcomes in their favor. This scope might increase even further if, at this level, the dispute resolution 'circle' was expanded beyond the heads of *umudugudu* to include *inyangamugayo*, who are skilled in mediation,<sup>59</sup> and local representatives of the National Women's Council (NWC), who are more likely to have a better insight into and lobby for women's needs.

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### 2.3 Hypothesizing on improved outcomes in cases involving women's land claims

Given the above observations, a hypothesis was developed that outcomes in cases involving women's land interests would improve if they were consistently resolved at the village level through mediation involving the head of *umudugudu*, *inyangamugayo* and representatives of the NWC. To test this hypothesis, an intervention was launched targeting both village-level dispute resolution actors and *abunzi* committees.

At the village level, six villages were selected in the Rulindo district in northwest Rwanda, where the dominance of customary law is particularly strong. The group of participants included 20 women (six members of the *umudugudu* council, eight *inyangamugayo*, five representatives of the NWC, and an official of a higher ranking local authority) and 12 men (six *inyangamugayo*, five heads of *umudugudu* and an official of a higher-ranking local authority). Multi-stakeholder focus group discussions were held that addressed three topics: first, how to better coordinate their efforts to resolve disputes; second,

how to ensure that all relevant interests and views were taken into account in dispute resolution with a view to ensuring that the outcome of the process was considered fair by both disputants; and third, the implementation of basic mediation techniques in dispute resolution. Following this, a workshop was organized. Participants were divided into six groups and asked to describe a land dispute they had recently dealt with, and explain how they had resolved it. These cases were used to exchange views on principles regarding land rights and women's inheritance rights embodied in statutory law. In the months following the workshop, 12 coaching field visits were delivered (two per village).

The intervention at the *abunzi* level targeted all 55 *abunzi* members (25 of whom were women) in four selected *abunzi* committees in the district of Rulindo. Two participative training sessions were delivered followed by two follow-up coaching visits to each committee. The training focused on approaches to dispute resolution and women's statutorily protected land rights. Sketches based on typical cases observed during earlier monitoring visits to the target committees were used to stimulate discussion on the nature of dispute resolution and basic procedural principles, such as the right of disputants to be treated equally in terms of presenting arguments and evidence, and the importance of informing disputants of the procedure that would be followed. *Abunzi* were also asked to reenact a land dispute involving an inheritance matter that they had dealt with as a committee. This provided a concrete basis for a dialogue on women's land rights as enshrined in statute.

A research framework was designed to gauge the impact of these interventions, principally through qualitative data collection techniques including observation of dispute resolution sessions, interviews and focus group discussions with disputants and beneficiaries. A control area was selected nearby, making it possible to compare and contrast developments in the intervention zone with developments in a similar but intervention-free environment. Data for both the village level study<sup>60</sup> and the *abunzi* study<sup>61</sup> were collected over a ten-month period (October 2009 – August 2010). The remainder of this chapter draws on this data to discuss whether and to what extent the intervention provoked a change in the way the *umudugudu* level actors and *abunzi* committees handled women's land claims, and whether such changed behavior translated into more equitable outcomes for women with respect to their land interests.

### 3. Results of the intervention

To recap, prior to the intervention it was observed that land-related inheritance disputes were not usually dealt with at the village level but referred to a higher authority. Where dispute resolution was attempted, heads of *umudugudu* usually acted alone and generally adopted an adjudicative approach. It was hypothesized that women's land interests were more likely to be upheld if disputes were resolved consistently at the village level, through joint mediation by heads of *umudugudu*, *inyangamugayo* and representatives from the NWC.

#### 3.1 Encouraging the consistent resolution of land-related inheritance disputes at the village level

Most significantly, following the intervention, all 21 land-related inheritance disputes that arose were dealt with at the village level by the heads of *umudugudu* in collaboration with the *inyangamugayo* and NWC representatives.

#### 3.2 Expanding the dispute resolution 'circle'

In terms of expanding the dispute resolution 'circle', the *inyangamugayo* in all the targeted localities acquired an established role in dispute resolution together with the head of *umudugudu*. On average, three *inyangamugayo* would be present at mediation sessions. It is also noteworthy that through the intervention, the various *inyangamugayo* within the target area came to know or become more familiar with each other and continued to regularly meet to exchange experiences. A practice also emerged whereby *inyangamugayo* started attending *abunzi* sessions in cases that they themselves had not been able to resolve.<sup>62</sup>

Similarly, in cases involving women's inheritance rights, one or two NWC representatives were generally found to participate. The change in the approach adopted by the NWC representatives is particularly noteworthy. Prior to the intervention, in the few cases in which they participated, the approach adopted was far from rights-based. Generally, they advised women on how to behave as 'good wives', on how to avoid clashes with their husbands, and on how to restore ties once a clash had occurred (usually by showing modesty, acceptance and forgiveness). Women's rights to matrimonial property or to participate in decision-making on important family affairs were seldom included in their advice. Following the intervention, NWC representatives actively took part in dispute resolution along with heads of *umudugudu* and *inyangamugayo*, and frequently took the lead in demanding attention to the interests of the women involved in the dispute.

### 3.3 Encouraging the use of mediation techniques in the resolution of disputes

Following the intervention, four positive changes were observed in how dispute resolution was approached by both village-level actors and *abunzi* committees.<sup>63</sup> First, such actors took more time to understand the arguments presented by — and the circumstances and interests of — both disputants, and to reflect this understanding in their attempts to forge a solution. Second, disputants and members of the public were more often encouraged to propose solutions to the dispute. Third, possible solutions were presented at a later stage in the discussion and not, as often observed in the control zone, at the start of the discussion. Finally, more effort was made to explain the reasoning behind the solutions found, particularly to disputants who were asked to make concessions.

With respect to whether these changes in practice were observed more strongly at the village or the *abunzi* level, it can be noted that while the intervention promoted positive changes in the approach adopted by *abunzi* committees, in a significant share of the cases observed committees continued to behave as panels of judges presiding over adversarial proceedings. This occurred much less frequently at the *umudugudu* level, presumably due to the involvement of the *inyangamugayo*, whose approach is generally more conciliatory and facilitative. The *inyangamugayo*, in particular, became more pro-active in their mediation approach. They would speak to disputants prior to and after the mediation session in order to try to overcome the obstacles that kept them from reaching a solution. Further, before a mediation session, they would often urge neighbors and other affected community members to take part in the meeting.

### 3.4 Did a successful intervention translate into improved outcomes for women?

It is clear that each of the intended objectives of the intervention were realized with a reasonable level of success: land-related inheritance disputes were resolved through mediation jointly by heads of *umudugudu*, *inyangamugayo* and NWC representatives, and by using improved mediation techniques. The critical question, however, is whether such changes translated into improved outcomes for women in terms of greater protection of their land interests?

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To answer this question, it is first necessary to recall the protections afforded to women under statutory law. The *Inheritance Law* explicitly grants women the right to inherit property held by their natal family and also to make a claim to such property before the death of the rights holder. It does not, however, go so far as to guarantee women the right to receive an equal share (in terms of value, size and quality) to that of male siblings. It is also important to recall that it is common, under customary law, to grant women residual claims to land or to make symbolic gifts of land to women upon marriage. Women's statutorily protected land rights, therefore, were generally not considered to be completely at odds with customary law.

With these caveats, it can be concluded that the intervention did not result in a significant change in customary dispute resolution practices, at least with respect to incorporating entirely new ideas. Cases in which women asked for *umunani* (equal to that of their brothers when they married) were very few (eight out of 256 cases at the *abunzi* level) and, with the exception of two ambiguous examples, all were unsuccessful. It should be highlighted, however, that *umunani* are traditionally

gifts of land to men upon marriage specifically to establish a household. Since, in practice, women about to wed benefit from their future husband's *umunani* and *intekeshwa*, equalizing such endowments would amount to 'double gifting' and, in a situation of land scarcity, this is generally seen as undesirable.

Yet, on a small and modest scale, improvements in outcomes were observed following the intervention. First, particularly at the village level, the number of unresolved disputes fell markedly. During the final month of the program, for example, only 13 unresolved cases were reported, which represents about half of the pre-intervention caseload. More importantly, none of these cases involved an inheritance issue, whereas normally there would be at least five or six of such cases per month.<sup>63</sup>

Moreover, targeted actors were more inclined to accept claims of women that were conceivable under customary law, although certainly not guaranteed. Three cases were observed where a woman — either divorced or widowed — was permitted to access her portion of the *ingarigari* (residual land remaining after the death of a rights holder) before the death of her parents. Traditionally, *ingarigari* is divided among male offspring; however, under certain circumstances, widowed or divorced daughters may be allowed to make use of part of it. Allowing daughters to claim undivided family land during the life of the rights holder represents a meaningful and positive change in the concept of *ingarigari*. There were also five cases observed where women were permitted to make real, rather than symbolic, use of *igiseke*. Again, granting women real access to family land on the basis of a claim, such as *igiseke*, which was traditionally primarily symbolic in nature, constitutes an expansion in their ability to claim land and a marked departure from common practice (only two similar cases were observed: one in a community prior to the intervention, and one in the control zone). Finally, it is noteworthy that these outcomes were realized in cases where the *abunzi* and village-level actors engaged in mediation, rather than adjudication.

## Box 2

### Case study: the handling of a woman's land claim in the intervention area (February 2010)

The father of Drocella and Alexandre recently married for a third time after their stepmother passed away. Drocella, who was married, agreed that she would take care of the children from her father's second marriage. Drocella had very little land, so she asked her father and brother to give her an additional parcel, which they refused. The head of *umudugudu*, who heard the dispute shortly before RCN's intervention, very quickly took the side of Drocella's brother. Her brother claimed that all of the land that he used was given to him by his father as *umunani*, which their father confirmed. They explained to Drocella that she could only request part of the *ingarigari* once their father passed away. Following the workshop, two *inyangamugayo* who were aware of the case decided to visit Alexandre. They asked another man who recently gave his sister a share of *ingarigari* to join them. Together they persuaded Alexandre to agree to hold a new meeting. At this meeting, the head of *umudugudu* and four *inyangamugayo* were present. They all agreed that Drocella, since she was married, should not ask for *umunani*. The head of the *umudugudu* and the *inyangamugayo* argued, however, that she should be able to use at least the small plot that she was promised when she married (*igiseke*), as well as a share of the *ingarigari*. Why should Drocella have to wait for the death of her father, an *inyangamugayo* asked? He had split his land in two: one set of plots for the children of his first and second wife, and another set of plots for his new family. The *inyangamugayo* insisted that if Alexandre already used his part of the family land, so should Drocella, particularly since she was taking care of their half-siblings. Alexandre accepted that she could start using the *igiseke* and a share of the *ingarigari* after he harvested the crops that he had already planted.



## 4. Conclusions and lessons learned

The questions posed at the beginning of this chapter relate to the viability of strategies aimed at reforming customary justice processes. These strategies are arguably the most feasible entry points in contexts such as Rwanda where the protections offered by the formal justice system are out of reach for many, and the customary rules that prevent women from protecting their interests are bound up in complex social and economic systems that regulate community life.

The intervention led by RCN discussed in this chapter did not try to wrestle with or modify the customary rules in question. It was accepted that, although such rules were the root problem, there were strong social and economic factors that made it unlikely that they could be significantly modified through a short-term pilot intervention. It was reasoned that the most effective way to deliver more equitable outcomes to women was to exploit the flexibility inherent in customary dispute resolution and draw on moral obligations within the existing structure of culture and custom. The results of the intervention yield two principal lessons that may be useful both for rule of law programming in Rwanda and in similar country contexts.

A first lesson is that in any strategy aimed at expanding women's rights under customary law, the modality of dispute resolution can be equally as important as the substantive rules in play. In Rwanda, local institutions, particularly *abunzi* committees, tend to adopt an adversarial approach to dispute resolution, which is mainly backwards-looking and focused on the application of existing or accepted rights. This works to the disadvantage of groups with weak customary rights, notably widows and divorced or abandoned women who usually lack the resources to seek legal advice or refer their case to a state court. In such contexts, women's interests may be better protected through more inclusive forms of dispute resolution that — by adopting a broader perspective and setting a wider objective — provide more scope for complainants to capitalize on moral obligations and bring the respective needs of the disputants to bare in the dispute resolution process. The results of the intervention support that, with appropriate training and advocacy, community-based dispute resolution actors can be encouraged to make greater use of such techniques, which can translate into better outcomes for women.

Some scholars caution a reliance on customary dispute resolution mechanisms in this manner. Wojkowska and Cunningham, for example, point out that the emphasis on maintaining social harmony and negotiation at the center of Indonesian customary law, *adat*, can deprive women of fundamental rights.<sup>64</sup> This is not contested; the flexibility inherent in many systems of customary law can be exploited to protect or strengthen male interests in situations of economic and social change. Still, the results of the pilot project discussed in this chapter suggest that policymakers and development programmers can also make positive use of this flexibility by stimulating reliance on forms of dispute resolution that place greater weight on the needs and circumstances of more vulnerable disputants.

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The second lesson is that modifying customary practices requires that policymakers and development programmers look beyond strategies that seek to align customary practice with statutory law to better understand why rights-abrogating customary practices exist and what other purposes they might serve. The RCN-led intervention did appear to create more space for an acceptance of women's claims to land, provided that they did not sit too uncomfortably with the overarching structure and prescriptions of customary law. It did not, however, open the door for daughters to claim land from their father on an equal footing with their brothers, as provided under statutory law. It should be highlighted that in the locations targeted, customary law strongly influences perceptions about justice and fairness, particularly with respect to family relations and rights to land. Moreover, the limitations preventing women from realizing land claims are anchored in a larger framework of social beliefs (on the role of women and daughters and their place within their own and their husband's families), practices (such as the uniting of two families through marriage) and reciprocal rights and obligations (including the payment of bride price and dowry), from which they cannot be easily severed.

It is therefore too simplistic to frame the issue as one of informing the population of the changes to women's statutory rights and requiring them to modify customary practices accordingly. Such changes constitute a clear challenge to the interests of men, and at the same time, due to the state's weak regulatory influence on village life, the extent to which such changes will be absorbed into customary practice depends on cooperation by these same men, who have a strong influence on land distribution and land dispute resolution.

A better strategy, it is argued, is to encourage a transformation of customary practices in ways that simultaneously meet the interests of male power holders. The results of the pilot project suggest that by involving — rather than challenging — men and appealing to their sense of responsibility for the well-being of female family or community members, positive outcomes can be reached. An alternative and potentially powerful way to create such consensus is to promote reflection and debate within communities on prevailing practices surrounding marriage and inheritance, frictions between such practices and statutory law, and what possible solutions exist to align the two. The results of such dialogue processes should be fed into policy debates at the national level on the implementation of new statutory laws.

In conclusion, in contexts such as Rwanda, policymakers and development programmers face significant challenges in their efforts to legally empower marginalized groups. Women, particularly widows and divorced or abandoned women, have weak rights under customary law, and while statutory reforms offer greater protections over women's land interests, their rights have limited practical value in rural areas where customary law dominates. It is unlikely that these obstacles can be modified in the near future; innovative and pragmatic approaches must be found, therefore, to work around them. Admittedly, appealing to power-holders' sense of good conscience is not the ideal approach for vesting women with enhanced land tenure security. However, in situations where the most accessible justice system contains structural impediments of such a nature that making them the subject of reform is highly unlikely to yield success and might even be detrimental to the interests of the intended beneficiaries, development actors must duly consider the reforms that are most likely to secure beneficial outcomes for women, in a timely manner, irrespective of the path taken.

## footnotes

- 1 It should be noted, however, that there are significant differences within this group; in this regard, see A. Whitehead and D. Tsikata, 'Policy Discourses on Women's Land Rights in sub-Saharan Africa: The Implications of the Re-turn to the Customary' (2003) 3(1) *Journal of Agrarian Change* 67, 94. Members of the World Bank's Land Policy Division tend to see customary law as evolving towards individualized tenure and, thus, as an instrument that will facilitate the opening up of land markets. Oxfam Great Britain and the International Institute for Environment and Development, on the other hand, see reliance on customary land management as a way to empower local communities (i.e. to increase their control over land access) and to make them less dependent on and exposed to the state).
- 2 For a discussion on this point, see *ibid.*; and A.M. Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda' (2004) 7(4) *African Studies Quarterly* 1.
- 3 See for instance, art 16(h) of the *CEDAW*, and art 6(j) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003*.
- 4 In this regard, see G. Gopal, *Gender-Related Legal Reform and Access to Economic Resources in Eastern Africa*, World Bank Discussion Paper (1999).
- 5 See J. Pottier, 'Customary Land Tenure in Sub-Saharan Africa Today: Meanings and Contexts' in C. Huggins and J. Clover (eds), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (2005) 55, 67.
- 6 Whitehead and Tsikata, above n 1, 78.
- 7 The reason for focusing on inheritance and marriage practices is that these institutions arguably offer the most potential to provide secure access to land to considerable numbers of African women. The alternative, which is that women gain access to land through purchase, is much less realistic in contexts where land prices are increasing and most women control few liquid resources.
- 8 The surface area is 26.338 km<sup>2</sup> (Bart, *Montagnes d'Afrique, Terres paysannes, Le cas du Rwanda* (1993) 1).
- 9 The National Institute for Statistics of Rwanda (NISR) estimates that in 2009 there were 10,117,029 inhabitants (NISR, *Fast Facts* (2011) NISR <<http://www.statistics.gov.rw>> at 5 April 2011).
- 10 It is estimated that in 2020 there will be close to 14 million Rwandans (NISR, *National Population Projection 2007-2022* (2009), NISR <[http://www.countrystat.org/country/rwa/documents/docs/population\\_projection2022.pdf](http://www.countrystat.org/country/rwa/documents/docs/population_projection2022.pdf)> at 30 March 2011).
- 11 United Nations Development Programme, *Human Development Report 2009. Overcoming barriers: Human mobility and development* (2010). The Human Development Indicator, on which this ranking is based, reflects levels of income, life expectancy, health and education.
- 12 NISR, *GDP annual estimates 2009 based on 2006 benchmark* (2010), Ministry of Finance and Economic Planning (Minecofin) <[http://www.minecofin.gov.rw/webfm\\_send/1698](http://www.minecofin.gov.rw/webfm_send/1698)> at 15 November 2010.
- 13 NISR, *National Agricultural Survey 2008* (2008) 26, NISR website <<http://statistics.gov.rw/images/PDF/agricole2008.pdf>> at 30 March 2011.
- 14 *Ibid.* 5.
- 15 See for example J. Pottier, 'Land reform for peace? Rwanda's 2005 Land Law in context' (2006) 6(4) *Journal of Agrarian Change* 509; and H. Musahara and C. Huggins, 'Land reform, land scarcity and post-conflict reconstruction: A case study of Rwanda' in C. Huggins and J. Clover (eds), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (2005) 314.
- 16 NISR, above n 13, 35.
- 17 *Ibid.* 36.
- 18 See Government of the Republic of Rwanda (GoR), *National Land Policy* (2004) 16, Ministry of Environment and Lands (MINELA) <[http://www.minela.gov.rw/IMG/pdf/National\\_Land\\_Policy.pdf](http://www.minela.gov.rw/IMG/pdf/National_Land_Policy.pdf)> at 30 March 2011; and NISR, above n 13, 39.
- 19 See NISR, above n 13, 37.
- 20 See GoR, *Results and Analysis of Field Regularisation Field Trials in Four Districts* (2008) (on file with the authors).
- 21 *Ibid.*
- 22 In this regard, it should be noted that in certain rural areas, land cases make up nearly 70 percent of the civil law case load and that the civil law case load makes up about 55 percent of the total case load of Primary Courts. This information is based on data collected by RCN Justice & Démocratie in 2007 and 2008 within the context of a project entitled, *Suivi sur la Capacité de Traitement des Tribunaux de Base et des Tribunaux de Grande Instance*. See also C. André and J.-P. Platteau, 'Land relations under unbearable stress: Rwanda caught in the Malthusian trap' (1997) 34(1) *Journal of Economic Behaviour and Organization* 29.
- 23 See M. Veldman and M. Lankhorst, *Legal Empowerment and Customary Law in Rwanda: Report of a Pilot Project Concerning Community Level Dispute Resolution and Women's Land Rights* (forthcoming), RCN Justice & Démocratie Research Report, 27.
- 24 Literally translated, *intekeshwa* roughly means 'that which is given to cook with'. In other words, it is a gift that should help to establish a household. The content of this gift, who provides it, and who can receive it, varies between villages and families.
- 25 In this regard, see P. Uwineza and E. Pearson, *Sustaining Women's Gains in Rwanda: The Influence of Indigenous Culture and Post-Genocide Politics*, The Institute for Inclusive Security (2009) 8, Hunt Alternatives Fund <[http://www.huntalternatives.org/pages/8249\\_sustaining\\_women\\_s\\_gains\\_in\\_rwanda\\_the\\_influence\\_of\\_indigenous\\_culture\\_and\\_post\\_genocide\\_politics.cfm](http://www.huntalternatives.org/pages/8249_sustaining_women_s_gains_in_rwanda_the_influence_of_indigenous_culture_and_post_genocide_politics.cfm)> at 30 March 2011.
- 26 *Ibid.*
- 27 See Uwineza and Pearson, above n 25, 11.
- 28 *Ibid.* 10.
- 29 The following discussion of the developments after the genocide mainly draws on L. Rose, 'Women's land access in post-conflict Rwanda: Bridging the gap between customary law and pending land legislation' (2004) 13 *Texas Journal of Women and the Law* 197; and Uwineza and Pearson, above n 25.
- 30 This view obviously ignores the possibility that customary law might evolve in response to the changes in demographic and socio-economic conditions. For a discussion of such effects on customary law, see Rose, above n 29.
- 31 Law no. 22/99 of 12 November 1999.
- 32 See art 70 of the *Inheritance Law*.
- 33 See arts 2 and 3 of the *Inheritance Law*.
- 34 See art 70 of the *Inheritance Law*.
- 35 See arts 42 and 43 of the *Inheritance Law*.
- 36 Law no. 59/08 of 10 September 2008 (*Gender-Based Violence Law*).
- 37 See art 39 of the *Gender-Based Violence Law*.
- 38 In this regard, see Veldman and Lankhorst, above n 23, 42, where it is shown that, in Rwanda, only one in roughly 40 disputes started at the village level will enter the formal court system and that 48 percent of the cases that do enter the formal court system are summarily dismissed.
- 39 In this context, the word 'family' must be understood to mean the extended family.
- 40 The *umudugudu* is the smallest administrative unit. It generally comprises between 300 and 1,000 inhabitants.
- 41 In this regard, see M. Lankhorst and M. Veldman, *La Proximité de la Justice au Rwanda: Rapport socio-juridique sur les modes de gestion de conflits fonciers*, RCN Justice & Démocratie Research Report (2009) 51.
- 42 In this regard, see J. Pottier, 'Land reform for peace? Rwanda's 2005 Land Law in context' (2006) 6(4) *Journal of Agrarian Change* 509, 515.
- 43 The use of this term may lead to confusion for certain readers. This is because Rwandan legislators, in an attempt to enhance the legitimacy of the community-level courts created to process genocide cases, chose to refer to *gacaca* judges as

*inyangamugayo*. In this chapter, the term *inyangamugayo* refers to community members who contribute to ordinary *umudugudu*-level dispute resolution in an informal and unregulated manner.

- 44 Law No. 2/2010 of 9 June 2010. Note that during most of this project, a prior version of the *Abunzi* Law was in force (Organic Law No. 31/2006 of 14/08/2006 on Organisation, Jurisdiction, Competence and Functioning of the Mediation Committee).
- 45 Around this time, reforms were undertaken that reduced the number of Primary Courts from 120 to 60 and also substantially reduced the number of magistrates. Policymakers had a dual objective when they instituted the *abunzi* committee. They aimed to guarantee better access to justice, particularly for poorer members of the population for whom it is more difficult to bring a case before a formal court, and also to reduce the number of cases received by formal courts and thus help eliminate case backlogs.
- 46 For a detailed discussion, see Lankhorst and Veldman, above n 41.
- 47 See also André and Platteau, above n 22, 32.
- 48 See Section 1 on land fragmentation and average plot sizes falling below the minimum economically viable level.
- 49 See Lankhorst and Veldman, above n 41; Haguruka, *Etude sur l'application et l'impact de la loi no 22/99 relative aux régimes matrimoniaux, libéralités et successions sur les droits de la femme au Rwanda* (2009); Rose, above n 29; and J. Burnet, 'Culture, Practice and Law: Women's Access to Land in Rwanda' in L. Wanyeki (ed), *Women and Land in Africa: Culture, Religion, and Realizing Women's Rights* (2003) 176.
- 50 See André and Platteau, above n 22, 31. See also Uwineza and Pearson, above n 25; and Rose, above n 29.
- 51 André and Platteau, above n 22, 37-8. They also note that even where lineage land is concerned, brothers increasingly refuse to assist divorced, repudiated, or widowed sisters.
- 52 In the form of cattle, other property or money.
- 53 André and Platteau, above n 22, 40.
- 54 Although polygamy is prohibited, it remains pervasive in parts of Rwanda, particularly in the Northern Province.
- 55 Uwineza and Pearson, above n 25, 10.
- 56 *Ibid.*
- 57 For the purposes of this chapter, mediation and adjudication are distinguished in three ways. First, the *objective* of mediation is to restore some form of peace between the parties, whereas the principal aim of adjudication is to determine the need for correction. Second, the *perspective* adopted in mediation is forward-looking (concerning what can or must be done to ensure peaceful coexistence), whereas adversarial proceedings are backward-looking (concerning what acts have been committed and how must they be appraised and responded to). Third, the *role* of the mediator is that of a facilitator and the disputants themselves are the main agents in the process leading to an accord (or its failure). A judge presiding over an adversarial proceeding, on the other hand, determines an outcome for the parties.
- 58 Observations revealed that when the *abunzi* enter the room at the beginning of a session, many committees require the public to stand up as a sign of respect; in their decisions they will frequently 'order' disputants to do something or stop doing something; finally, during the pilot project, two cases were observed where a committee imposed a fine on one of the disputants for disrespecting 'the court', even though the *Abunzi* law does not provide for this.
- 59 In all communities where the authors worked, the mode of operation of *inyangmugato*, while it differed from person to person, was generally more conciliatory and facilitative, presumably, because they are not vested with any form of formal authority, as compared to *abunzi*.
- 60 For the village-level study, preparatory field visits, including a focus group meeting in each area, started in December 2009, and the workshop was held in March 2010. Monitoring of dispute resolution sessions was an ongoing activity that started in January 2010. Towards the end of the project, in-depth interviews were held with disputants, and focus group meetings were organized in the targeted *imidugudu*. The following data was gathered: i) observation of the handling of 23 disputes; ii) 17 semi-structured interviews with disputants; iii) 65 open-interviews with actors involved in dispute resolution at this level; iv) 48 written and oral decisions or solutions issued by these institutions (21 of which were related to land or succession); and v) four focus group meetings with actors at this level (two at the beginning and two at the end of the project).
- 61 The *abunzi* study started in October 2009 with preparatory visits. The participative training was held in February 2010. Monitoring the *abunzi* committees both in the intervention and control areas was an ongoing activity that started in November 2009. Towards the end of the project, more in-depth interviews were held with disputants, and focus group meetings with the nine targeted *abunzi* committees were organized. The following data was gathered: i) observation of the handling of 64 disputes by the targeted *abunzi* committees; ii) 120 interviews with disputants involved in a case handled by the targeted *abunzi* committees (105 in a structured interview and 15 in a semi-structured interview); iii) 403 *abunzi* decisions collected and analyzed (249 at the cell level and 154 in court registries); iv) 170 primary court judgments assessing the legality of *abunzi* decisions collected and analyzed; v) seven focus group meetings with members of the targeted *abunzi* committees (three at the beginning and four at the end of the project); vi) nine semi-structured interviews conducted with the secretaries of the targeted committees; and vii) interviews with three primary court judges (at the beginning, half-way and at the end of the project).
- 62 A number of *inyangamugayo* interviewed indicated that, after the training, they felt more comfortable in contributing to discussions at this level, whereas before, they were intimidated by the authorities and unsure of themselves. They stated that the workshop helped them feel more confident and to realize the importance of their contribution to dispute resolution.
- 63 Interview with Executive Secretary of the cell (the administrative unit encompassing the targeted villages). Note that prior to the intervention records were not consistently kept at this level. It was not possible, therefore, to verify the information provided by the Executive Secretary.
- 64 See, E. Wojkowska and J. Cunningham, 'Justice Reform's New Frontier: Engaging With Customary Systems to Legally Empower the Poor' in S. Golub (ed), *Legal Empowerment: Practitioners' Perspectives* (2009) 93. Note also that the purpose of the intervention carried out by RCN was to introduce dispute resolution techniques that placed greater weight on *individual* needs and the circumstances of more vulnerable disputants.



## Rights or Remedies? Shopping for Justice in Liberia's Dualistic Legal System

Justin Sandefur and Bilal Siddiqi\*

### Executive summary

Legal dualism in Africa is often portrayed as a clash between protection of human rights through formal law, and respect for indigenous cultures embodied in customary law. Rather than assessing the merits or demerits of each system directly, this chapter takes an empirical approach, analyzing the forum shopping decisions made by plaintiffs. The analysis draws on a survey of 2,500 households in rural Liberia, cataloging over 4,500 disputes taken to a variety of customary and formal forums. The underlying hypothesis is that rural Liberians make constrained but rational choices in navigating the dual legal system, and that these choices embody a trade-off between the broader legal rights provided by the formal system, and the more efficient restorative remedies offered by the customary system. The overwhelming tendency to take disputes to customary rather than formal forums provides important lessons about the design of justice sector reforms targeted at the rural poor.

\* This chapter summarizes the methodology and findings of an earlier paper of the authors, J. Sandefur and B. Siddiqi, *Forum Shopping and Legal Pluralism*, Oxford University, Centre for the Study of African Economies (2011). The authors would like to thank Andrew Zeitlin for his early role in conceptualizing this project; Michael Best, Grant Gordon, Johnny Ndebe and Alaina Varvaloucas for leading various stages of data collection; Tom Crick, John Hummel, Jeff Austin, Sean MacLeay, Pewee Flomoku, David Kortee and the staff of the Carter Center and the Bong Youth Association for invaluable field support in Liberia; Rose Page, Gail Wilkins and Richard Payne from the Centre for the Study of African Economies (CSAE) for administrative and technical support; and Abigail Barr, Chris Blattman, Paul Collier, Stefan Dercon, Misha Drugov, Maria Ana Lugo, Marta Troya Martinez, Horacio Trujillo, Jeremy Weinstein and seminar participants at the CSAE for valuable comments. We were extremely fortunate to exchange ideas and data with Deborah Isser, Steve Lubkemann, Tim Lucarro and Saah N'Tow from the United States Institute of Peace (USIP). The household survey was funded by grants from the Carter Center, the International Development Law Organization (IDLO), the International Growth Centre, the Soros Foundation, and the UK Department for International Development (DFID) as part of Improving Institutions for Growth (iiG), a research program on improving institutions for pro-poor growth in Africa and South Asia. The views expressed, and any errors or omissions, are entirely our own.

## 1. Introduction

Academic and policy debates contain three distinct conceptions of legal pluralism. The first view depicts forced segregation. Individuals with certain characteristics are assigned to either the formal or customary sphere. This is the central thesis of *Citizen and Subject*, Mahmood Mamdani's influential book on the post-colonial African state, which equates legal dualism with a "deracialized legal apartheid" that restricts formal rights to a select few while relegating the rural poor to the "decentralized despotism" of customary rule.<sup>1</sup>

The second view assigns greater agency to the poor, while maintaining a strict hierarchy between the systems. Initiatives promoting 'access to justice' often equate justice with formal law, and implicitly assume that agents make a constrained choice between multiple legal forums, where financial costs and ignorance of the law are the most commonly cited obstacles to the (preferred) formal system.<sup>2</sup>

Finally, a third view, with a long pedigree among Western scholars of African law,<sup>3</sup> contrasts the punitive, winner-take-all nature of formal law with a somewhat romanticized view of customary law in which:

... no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything is done to avoid the severance of social relationships. Where men must live together in a communalistic environment, they must be prepared for give and take relationships and the zero-sum, winner-take-all model of justice is inappropriate in their circumstances.<sup>4</sup>

These competing thoughts are organized in a formal game-theoretic model summarized in this chapter.<sup>5</sup> In this model, dispute resolution comprises three steps. First, defendants choose to inflict harm on plaintiffs. Second, plaintiffs face a choice between seeking justice in a customary or formal forum, or taking no action.<sup>6</sup> Third, depending on the forum choice, the customary or formal judge then issues a verdict in the form of a remedy compensating the plaintiff at the expense of the defendant. The key distinction between formal and customary law in this model is twofold: i) customary judges have different preferences, evincing bias against certain social and demographic groups; and ii) formal law is more punitive, depicted here as a gap or 'leakage' between the utility that formal punishments extract from defendants and the utility they deliver to plaintiffs.

110 The hypotheses underlying this model are subjected to empirical testing using data gathered from a survey of 2,500 households in rural Liberia that collected information on over 4,500 disputes.<sup>7</sup> This dispute database spans both civil and criminal disputes, and includes cases taken to a range of formal and customary forums. The survey data are used to test the core hypotheses underlying this model: i) individuals engage in strategic forum shopping; and ii) face a trade-off between their 'rights' under formal law and the 'remedies' offered by the customary system. The results of the hypothesis testing are summarized below.<sup>8</sup>

To provide a richer context, the analysis draws on evidence from a qualitative study conducted by an independent anthropological research initiative from the United States Institute for Peace and George Washington University, which coincided with the authors' quantitative data collection exercise.<sup>9</sup>

In its implications, the approach taken in this chapter is broadly in line with existing critiques of 'rule of law orthodoxy' in development thinking, which focuses on the promulgation of new laws and reform of formal institutions, and takes for granted the supremacy of the judiciary and central role of trained lawyers.<sup>10</sup> The analysis here suggests that initiatives to promote justice for the poor in pluralistic legal systems would do well to acknowledge and incorporate the attractive features of customary law that draw the great majority of disputes to these forums.

## 2. Legal dualism in Liberia

Liberia has one of the poorest populations in the world, ranking 162 out of 169 countries in the 2010 Human Development Index. Decades of unrest and civil war have led to “an almost unanimous distrust of Liberia’s courts, and a corresponding collapse of the rule of law.”<sup>11</sup> In a 2010 survey carried out by Transparency International, 89 percent of respondents reported paying bribes to access public services in the country — the highest rate in the global sample. Within Liberia, the police were viewed as the most corrupt institution.<sup>12</sup> Formal courts are hard to access, expensive, and slow; few justice practitioners are legally literate; and the laws and procedures of the formal system are alien to most Liberians.<sup>13</sup>

In contrast, the customary system is both accessible and culturally acceptable, but operates under patriarchal and communal norms rather than the notions of individual rights enshrined in Liberian statutory law.<sup>14</sup> The qualitative database compiled by Isser et al documents a range of customary practices that violate international standards, such as *sassywood*, or trial by ordeal, as well as local laws and practices that run contrary to generally accepted notions of women’s rights and the rights of vulnerable groups.<sup>15</sup>

Since the end of Liberia’s second civil war in 2003, international donors have led the push to reform Liberia’s legal system. Community-level interventions by local and international non-governmental organizations (NGOs) have sought to improve human rights awareness through training and education programs. At the same time, top-down initiatives have introduced progressive laws into the formal legal code that often conflict with customary practices. While such changes can in theory make customary law more progressive by creating a better alternative option, too-rapid or radical changes can adversely affect the poorest individuals who have the least recourse to outside options.<sup>16</sup> Further, rapid changes in statutory law and in the allocation of judicial and administrative responsibilities have created widespread confusion about the substance of the law, the proper passage of appeal, and the rights and responsibilities of different actors in the justice system.

### 2.1 The structure of legal dualism

The history of customary law and legal dualism in Africa is well-documented in anthropological scholarship,<sup>17</sup> perhaps most strikingly by Mahmood Mamdani in his seminal work *Citizen and Subject*. Mamdani describes the judicial system in colonial Africa as a deeply bifurcated institution, and argues that ‘apartheid’ in the form of legal dualism is the generic form of the post-colonial African state.

The judicial system ... was everywhere a bipolar affair. At one end were the courts of chiefs and headmen, courts of the first instance ... that dispensed justice according to customary law. At the other end was a hierarchy of courts cast in the metropolitan mold, courts designed to solve disputes involving nonnatives. ... The hallmark of the modern state was civil law through which it governed citizens in civil society. The justification of power was in the language of rights ... In contrast to this civil power was the Native Authority ... that dispensed customary law to those living within the territory of the tribe. ... Customary law was not about guaranteeing rights; it was about enforcing custom.<sup>18</sup>

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Historically, Liberia’s justice system, although outside the orbit of British colonialism, has displayed many of these hallmarks of discriminatory segregation described by Mamdani:

At Liberia’s founding, the state established the dual system to ensure that statutory law would govern ‘civilised’ people — Americo-Liberians and missionaries — while customary law would regulate ‘natives’. The non-Christian, indigenous Africans, who were considered ‘uncivilised’, could not use the statutory system, and chiefs could not adjudicate cases to which a ‘civilised’ person was party. State-sponsored customary



law was the compromise between the government's attempt to coopt the traditional sphere and villages' desire to maintain their autonomy. Although the constitution, statutory laws and common law of the formal legal system now govern all Liberians, the archaic Rules and Regulations Governing the Hinterland still refer to the adjudication of cases for 'civilized people' and 'natives'.<sup>19</sup>

At present, Liberian statutory law applies, in principle, to all Liberians. Yet, statutory law explicitly recognizes the dual nature of the legal system, with magistrates' courts and justices of the peace administering a system of Anglo-American style common law, and a parallel, idiosyncratic customary system administered by local chiefs.

The formal system comprises, for the most part, a vertical hierarchy of statutory courts, including the Supreme Court, circuit courts, magistrates' courts, and justice of the peace (JP) courts. They are supported in their workings by public attorneys, specialized institutions such as land commissioners to arbitrate land matters, and the police.

The most direct provider of customary justice is the town chief, who is the *de jure* leader of the community. He or she is typically selected by a council of elders, who advise and regulate her/his decisions. Chief and elders in turn receive support from several other customary justice providers, including quarter chiefs, the local pastor or *imam*, women's leaders, youth leaders, and representatives of the local secret society. Outside the village, the town chief is the lowest rung in a vertical hierarchy of chiefs of increasing degrees of formal recognition: the general town chief, the zone chief, the clan chief, and finally the paramount chief. Chieftaincy is recognized and receives some support from the state, and is regulated by state-appointed district commissioners and county superintendents.

## 2.2 Navigating the dual system

Although the two systems are parallel in principle, the boundary between them is complex and contentious. Isser et al note:

While it is generally considered that the Rules and Regulations Governing the Hinterland set out the basic legal framework of the dual system, there have been many calls for the overhaul of this anachronistic legislation, challenges to the constitutionality of the dual system, and questions about its legal validity due to an array of overlapping laws. The result is a great deal of legal ambiguity about the role of the customary legal system and its place in Liberia's overall justice sector.<sup>20</sup>

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Importantly for our argument, Isser et al also stress the role of individual agency in navigating the dual system, noting that "cases may jump from the customary chain into the formal one — and vice versa — at nearly any point, due to the assertion of authority by a member of one or the other chain, or by choice of one of the litigants."<sup>21</sup> This differs notably from recent theoretical work on the issue by Aldashev and co-authors that depicts the relationship between the two systems as a unidirectional hierarchy, with the formal system on top acting as the *de facto* court of appeal.<sup>22</sup> This broad point is best exemplified through the following illustrative case of an accidental killing, initially sent to the formal sector but ultimately withdrawn and resolved through customary institutions:

In a hunting accident, A killed B. A denied the act until marks were discovered on his back. At that point he was brought to the Poro (customary secret society) bush where he confessed (the interviewee insisted that in this case there was no trial by ordeal or other coercive means). He was then brought to the police and jailed.

A's relatives pleaded with B's family to resolve the case traditionally. While they initially refused, an uncle of B, acting as a mediator, persuaded the family to withdraw the case as it was an accident. After a series of apologies, B's family agreed, as long as A's

family paid for the expenses they had accrued, which amounted to more than 50,000 Liberian dollars (US\$700) (covering transport fees for their lawyers and fees for those who had searched for B). When A's family responded that they did not have money to cover the expenses, B's family agreed that instead they should sacrifice one sheep, one goat, and one hog for the spirit of the deceased to depart in peace. The two families ate together and "knocked glasses together which proves true reconciliation."

"What satisfied us, was he confessed that he is the doer of the act. And even myself asked him and he said that he didn't do it intentionally. So he asked for forgiveness and that he didn't mean to kill the boy."

The uncle, a male elder in Nimba who recounted the case, explained why traditional resolution was best for both parties: "If this man had remained in the hands of the police or court, bribery was going to take place and this man was going to be released by the police or court overnight. And that could brought misfeelings between his and us, the victim's parents. ... There won't be satisfaction between the both parties because the court's ruling could have decided that A, even though he did not do it intentionally, but the penalty was that he will be sent to prison for either five or ten years. After this length of time in prison, he will be declared freed and come home. These will bring some dissatisfaction in our mind about the way he was treated [sic]."<sup>23</sup>

This case illustrates several themes underlying the formal model: strategic forum choice, the high costs of formal justice, and popular perceptions that formal judgments focus excessively on punishment rather than restitution.

### 3. Game-theoretic analysis

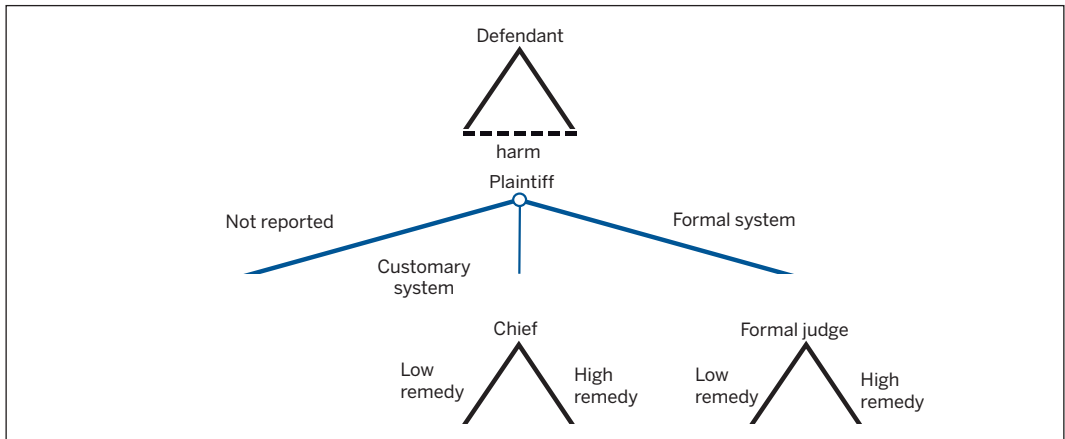
Game theory views agents as players in a game, bound by certain rules of interaction (for example, players move sequentially or simultaneously, are bound to certain choice sets, etcetera). Each player chooses a course of action, or 'strategy' that is to her/his greatest benefit, while taking into account the strategies available to all other players in the game. By eliminating strategies that lead to inferior outcomes, it becomes possible to describe the solutions, or 'equilibria' of the game. In this way, it is possible to subject relatively complex interactions to formal analysis and generate hypotheses about possible outcomes.

Here, dispute resolution is conceived of as a dispute between a plaintiff and a defendant, a forum shopping decision by the plaintiff, and a verdict and corresponding legal remedy offered by either a customary chief or a formal magistrate. The game proceeds sequentially in three distinct stages, as illustrated in Figure 1:

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1. The defendant chooses whether or not to inflict some harm on the plaintiff. Harm is conceived broadly here as encompassing both violent crime and economic losses resulting in civil disputes.
2. In response to this harm, the plaintiff chooses whether to take the case to the chief, the formal magistrate, or neither.
3. Finally, the chosen judge offers a legal remedy, which is essentially an offer to redistribute resources from the defendant to the plaintiff to compensate her/him for the harm.<sup>24</sup>

**Figure 1.**



An equilibrium in the game would involve an 'optimal' level of harm by the defendant, a forum shopping decision by the plaintiff, and a remedy from the chosen judge. All parties are assumed to possess full information about each other's utility functions and the structure of payoffs. A fixed cost of reporting to either forum, incurred by the plaintiff, is also assumed.

### 3.1 Modeling the dual system

There are two key assumptions in the model concerning institutional differences between the customary and formal courts:

**Assumption 1: Custom is biased against certain identifiable social and demographic groups.**

In the empirical application, ethnographic information on specific biases in the customary system will play a role in tests of the model: for example, limits on land rights for widows, ethnic minorities, or persons born outside the village; recognition of a right of a husband to beat or demand sexual intercourse from his spouse; etcetera.

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These biases are built into the judges' social welfare functions, which map their preferences over social states and guide their decision-making. Judges choose legal remedies to maximize social welfare, subject to their own biases. In both systems, judges are primarily concerned with rectifying inequalities between the disputants. Assuming *ex ante* equality, this amounts to repairing harm inflicted by defendants on plaintiffs. Biases may be pro-defendant or pro-plaintiff. In the empirical analysis the direction of the bias will hinge on disputant characteristics.

In accordance with the full information assumption, players also know each judge's biases in advance of making decisions about inflicting harm or choosing a forum. All else being equal, judges prefer peace to conflict, and reparation to impunity. It is assumed that imposing remedies is costless to judges.

The second fundamental assumption about the differences between customary and formal law relates to the remedies at the judges' disposal.

**Assumption 2: Customary courts can more efficiently redistribute resources (financial, physical and social capital) from defendants to plaintiffs.**

In the jargon of public economics, redistribution within formal courts is 'leaky'. In short, if customary courts are zero sum, formal courts are 'negative sum'.<sup>25</sup>

While the differences between the customary and formal system in terms of rights are widely acknowledged, differences in remedies are less commonly discussed, demanding additional justification for this assumption. This starting point for analyzing legal remedies is closely related to one of the central tenets of the law-and-economics approach to criminal justice, dating back to Gary Becker in 1968, who emphasized the efficiency advantages of compensatory over purely punitive remedies:

Fines have several advantages over other punishments: for example, they conserve resources, compensate society as well as punish offenders ... Offenders who cannot pay fines have to be punished in other ways, but the optimality analysis implies that the monetary value to them of these punishments should generally be less than the fines.<sup>26</sup>

The assumption made above about the availability and efficacy of remedies in the customary and formal systems touch on Becker's points. Pure punishment entails a social loss, relative to compensation through, for example, fines or public contributions. It is argued here that customary judges have an absolute cost advantage in enforcing the latter through a range of informal remedies that provide compensation to plaintiffs.

Becker's distinction between fines and other punishments has parallels in the divide between 'restorative' customary and 'punitive' formal law in rural Liberia. Consider the following statement from a town chief in Nimba County:

**Interviewer:** Among the two laws, which one that you more believe in or defend when it comes to administering the town? Is it that you one hundred percent believe in the statutory law or you believe in customary law practice by our traditional people to handle cases such as stealing, public nuisance, husband and wife palaver, etcetera? Which of the two laws that you really defend and protect in administering justice to your people [sic]?

**Respondent:** Actually, the customary law is the one that I prefer and protect in administering justice to our people. Our traditional laws help us handle our dispute very easily, and after the settlement of these disputes, the disputants go with smiles on their faces ... Unlike the customary law, the statutory law is good but in handling traditional matters, it does not fairly do it ... In fact, the statutory law brings separation among our people. After the court ruling we observe that the guilty one is either put in prison or heavily charged to pay cost of court, bond fee, etc. So I prefer the customary system.<sup>27</sup>

Examples of remedies offered by the customary system are detailed by Isser, Lubkemann and N'Tow:

Repair for some forms of harm involves a focus on wronged individuals. Thus, for example, if goods were stolen from someone, they should be returned to that person by the thief, along with any costs the victim incurred in resolving the dispute... Other offenses ... may require forms of atonement toward the community as a whole, most often by cooking a meal for the community or paying a public fine... Securing public apologies is usually also an integral ingredient to achieving a resolution ... [and] also serve as an important opportunity of redemption for the perpetrator.<sup>28</sup>

In contrast, formal judges — backed by police and prisons — are better equipped to mete out punishment, which provides little or no material or social gain to plaintiffs.<sup>29</sup>

The most consistent complaints that Liberians have about the formal justice system are that it rarely is capable of enforcing any redressive measures [sic] at all and that what recourse it does provide is almost always limited to punishment without

providing compensation to the victim or social reconciliation among the parties. In fact, more often than not, when the formal system does provide redress (in a form of punishment), it is regarded as a source of added forms of victimization even of those it determines to be in the right and innocent (through the battery of fees that are imposed in the process), and as the source of accentuated conflict that is ultimately detrimental to all — victims, perpetrators and the community at large.<sup>30</sup>

This assumption is captured in our model through the structure of the payoffs to the two disputants. Defendants receive the full 'benefit' of committing the harm, and suffer the full disutility of being penalized by the remedy in both systems. Plaintiffs receive the full benefit of the remedy in the customary system, but only a partial benefit in the formal system. Thus, formal remedies cause the defendant to suffer more than they console the plaintiff ('two wrongs don't make a right'). This is analogous to the difference between criminal punishments and civil settlement in a purely formal system, or to differential costs of access to court between the customary and formal system. The basic point is simply that punishments meted out to defendants in the formal system do not fully benefit plaintiffs.<sup>31</sup>

### 3.2 Solving the model

The equilibrium of the game can be determined using 'backward induction'. This involves, literally, solving the game backwards, beginning with the final stage. The logic is that since all players possess full information about each other's utilities and payoffs, and are also fully rational and forward-looking (and know that all the other players are also rational and forward-looking), each player assumes that the others will act rationally to maximize their own utility. Thus judges, moving last, offer legal remedies that are optimal for them. Plaintiffs, predicting the remedies that judges will offer, choose a forum that maximizes their benefit. Defendants in turn predict the plaintiffs' choices and the judges' remedies, and choose levels of harm that most benefit them.

In the final stage of the game, formal and customary judges set the optimal remedy for their respective courts by maximizing their social welfare functions. Given the assumptions made earlier, judges will redistribute less from defendants to plaintiffs, i.e. set lower remedies, if they are more biased towards the defendant — since lower remedies penalize the defendant less for a given level of harm. Judges will also set lower remedies if they are able to redistribute efficiently (with less 'leakiness'), as efficient redistribution allows the plaintiff to benefit more from a given remedy, allowing the defendant to be penalized less. The intuition behind this lies in the role of the judge, which is simply to rectify inequality; 'leakier' remedies create a deadweight loss, prompting the judge to redistribute a higher amount from the defendant.

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The welfare ('utility') of plaintiff and defendant is affected accordingly: as pro-defendant bias increases, defendants receive more utility, and plaintiffs receive less. Both plaintiff and defendant utility increase as the remedy becomes less 'leaky'. To set a stark contrast between the two systems, it is assumed that formal judges are perfectly 'unbiased' (or rather, serve as the benchmark from which bias is defined here), and formal punitive remedies are inefficient. Conversely, customary judges are perfectly efficient, but biased (towards either the plaintiff or the defendant). Then, the formal judge compensates for formal sector 'leakiness' by setting a higher remedy than is socially efficient, and the plaintiff and defendant receive equal utilities that are less than socially optimal. Customary judges may under- or overcompensate for the harm inflicted, depending on the direction of their biases; plaintiff and defendant utility accordingly exceed or fall below the socially optimal levels.

In the second stage of the game, with forward-looking knowledge of the judges' remedies, plaintiffs choose their reporting strategy (formal system, customary system, or 'do not report') by comparing their utility under each forum. Here, this is equivalent to a comparison between the cost of reporting and the remedies the plaintiff would receive from either judge. Remedies in turn depend on the bias of the customary judge and the efficiency of the formal remedy.

The various scenarios facing the plaintiff are considered:

1. *The fixed cost of accessing either forum is greater than the remedy offered.* If the customary judge is highly pro-defendant and the formal judge is highly inefficient, the plaintiff will receive low remedies from both forums. Below some threshold levels, the cost of accessing either forum will exceed the plaintiff's utility payoff from either remedy, so the plaintiff will choose not to report.
2. *The customary judge is pro-plaintiff.* If remedies are not low enough to dissuade reporting, the choice remains between the formal and customary system. If the customary judge is pro-plaintiff, there is no competition — the efficient customary judge biased in the plaintiff's favor provides a better alternative to anything the unbiased, but inefficient, formal sector has to offer.
3. *The customary judge is pro-defendant.* As long as the customary judge is pro-defendant, the plaintiff has to choose between customary bias and formal 'leakage'. For a range of values of high bias and low leakage, the plaintiff's utility payoff from the formal remedy exceeds that from the customary remedy, and the plaintiff chooses the formal system. Conversely, for a range of intermediate values of efficiency, the formal sector is too 'leaky' to be attractive, and the plaintiff chooses the customary system.

In sum, as pro-defendant bias increases, plaintiffs are more likely to take the case to the formal system or alternatively, not to report it (as the benefit from reporting falls below the cost of accessing the formal system). Furthermore, plaintiffs who face pro-defendant bias in the customary system are likely to experience higher utility in the formal system, and vice versa.

Given the plaintiff's choice set, forward-looking defendants have to choose the level of harm by maximizing their utility conditional on the plaintiff's forum choice. As described above, the plaintiff switches his/her choice of forum at certain threshold values of bias and leakage. Consequently, the defendant's choice of 'optimal harm' — the level of harm that provides greatest utility to the defendant — also depends on these thresholds, since they determine which forum the plaintiff will take the case to, and which remedy will subsequently be awarded by the judges.

The defendant's utility hinges on the relative efficiency of the formal system. If the formal system is relatively efficient, the defendant's utility is the mirror image of the plaintiff's: defendants prefer the formal system when the customary is pro-plaintiff, and the customary system when it is pro-defendant. If the formal system is relatively inefficient, however, defendants always prefer the customary system due to the higher remedy imposed on them by the formal judge.

The above discussion provides a set of predictions that can be subjected to empirical analysis.

#### 4. Empirical analysis

The fundamental premise of this modeling framework is that plaintiffs exercise agency in choosing a forum to hear their case, and that these choices are made strategically to maximize their own welfare, possibly at the expense of defendants. An extreme alternative hypothesis would be that agents are bound by laws or norms to one sector or another: legal dualism as legal apartheid. At the other extreme, one might speculate that rational forum shopping and strategic behavior by judges could lead to an equilibrium where judgments are indistinguishable between forums, as each forum attempts to 'outbid' the other in an attempt to attract plaintiffs. This is more in keeping with the rational choice approach offered here but taking its logic further than the authors feel is warranted.

This section summarizes the survey data collected and the empirical tests of the propositions generated by the model, implicitly weighing it against the alternative approaches. As detailed below, in instances where individuals are likely to suffer negative bias in the customary system — women suing men, powerless individuals suing the powerful, etcetera — they are more inclined to exit to the formal system, which is consistent with rational forum shopping. It is also shown that plaintiffs bearing these characteristics receive greater utility from the formal system, relative to the customary. Furthermore, it is shown that when defendants with traits favored by the customary system — men, non-farmers, dominant ethnicities and local influentials — do end up in the formal system, they suffer utility losses. All this suggests that judgments in the two systems have not converged, and judgments 'stick', i.e. multiple appeals are not feasible.

#### 4.1 Household survey

The dataset used to 'test' these theoretical predictions is drawn from an original household survey conducted by the authors in September 2008 and February 2009. The full sample includes 2,500 households spread across 176 communities in five Liberian counties: Bong, Grand Gedeh, Lofa, Maryland and Nimba. Together these counties account for nearly two-fifths (38 percent) of the population of Liberia, and more than half (56 percent) of the population outside Monrovia. First-stage sampling of communities within each county was based on random probability-proportional-to-size sampling from the full list of communities recorded in the 2008 Census of Liberia. In the second stage, 12-16 households were selected through simple random sampling within each community.

In the design of the survey, it was presumed that legal disputes would be fairly rare events and would require screening of respondents and a disproportionate sampling of disputants. However, a pilot survey conducted in July 2008 showed widespread incidence of crime and conflict across all communities. On this basis, combined with a desire — for the purposes of policy relevance — to maintain a fairly representative sample of the rural population of Liberia, a simple random sample of households was used within each selected community.

Disputes are the basic unit of analysis in much of what follows. In 2,081 households in the authors' final estimation sample — restricted to those with full socio-economic data on both parties to any dispute — 4,586 separate disputes were reported. Information about disputes was collected through a 60-90 minute interview on the respondents' experience of a wide range of crimes including assault, rape/sexual abuse, murder and theft, as well as conflicts involving land, debt, property, and family. Respondents provided details of each dispute that occurred within the past year, including the forums visited, the time and costs incurred, details of the judgment including reported subjective satisfaction with respect to each dispute recorded.

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In general, only one party to a dispute was interviewed — no attempt was made to track down the adversary when a household reported a particular dispute. In the analysis, dummies were included wherever appropriate for whether the respondent was the plaintiff or defendant in the dispute. While lacking full dyadic data, the interviews did collect limited socio-economic details on both parties to the dispute, including gender, occupation, relationships to powerful figures, and ethnicity. A broader array of socio-economic and attitudinal information is available for the respondent only, including household size, religious affiliation, war experiences, education, limited household expenditure data, asset ownership, legal knowledge, and civic attitudes towards violence and crime.

#### 4.2 Mapping theory to data

Formal modeling is necessarily reductionist. In the following paragraphs, the relatively complex empirical information collected during the survey is transformed into a manageable number of variables and dimensions at each level of the game tree. In so doing, nuanced philosophical concepts such as 'justice' will be captured by simple numerical scales that allow testing of statistical hypotheses about human behavior. Readers accustomed to more fine-grained analysis should judge the model by its falsifiable predictions in the next section, rather than the *prima facie* reasonableness of the simplifications made.

Figure 2 reproduces the theoretical game tree from Figure 1, and overlays it with descriptive statistics from the survey dataset. Beginning at the bottom of Figure 2, plaintiff and defendant utility is proxied by self-reported subjective evaluations of five justice outcomes: 'fairness', 'satisfaction', 'winning', 'willingness to return to the forum', and 'respect received'. 'Satisfaction' and 'respect' were solicited through a five-level Likert scale ('very satisfied', 'somewhat satisfied', etcetera); 'winning' was a three-level scale measuring in whose favor the verdict was given ('my favor', 'neutral', or 'other party's favor'); and 'fairness' and 'willingness to return' were binary variables ('yes' or 'no') measuring whether the respondent felt the decision was fair and whether they would be willing to bring another dispute to the forum.

**Figure 2**

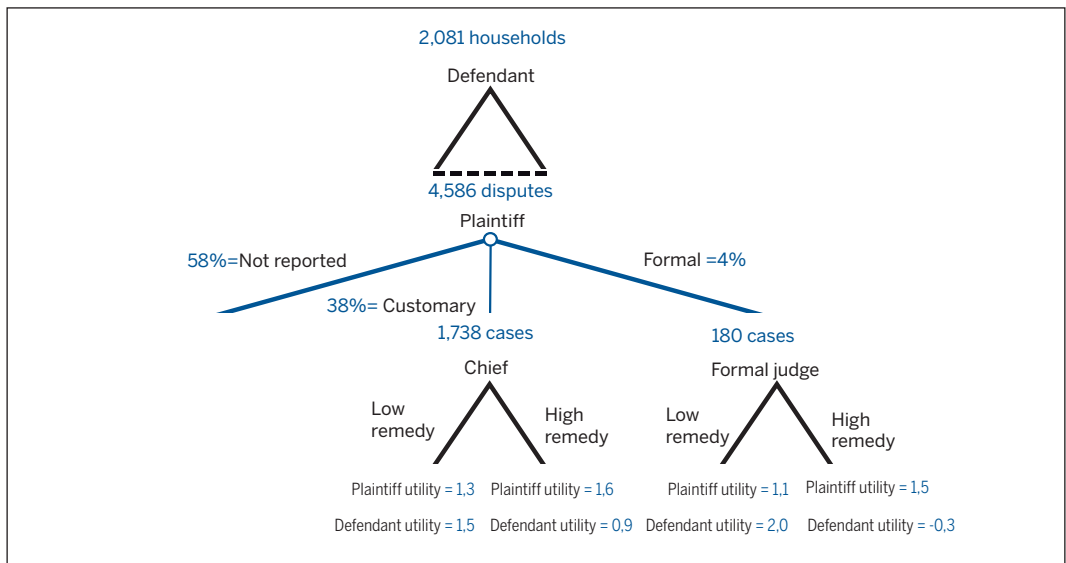


Table 1 below summarizes the relevant favorable response rates for each of these measures (respondents answering 'yes', 'my favor', and 'somewhat satisfied' or 'very satisfied', as appropriate), as a percentage of all disputes resolved in customary forums and formal forums, respectively. Thus 92 percent of respondents who had a dispute resolved in a customary forum thought that the outcome was fair, compared to 85 percent of respondents at formal forums. It is worth noting even at this stage that in all measures, people appear to be happier with the customary system.

**Table 1. Where is justice dispensed? Favorable outcomes by forum**

Outcome	% of disputes taken to each forum	
	Customary	Formal
Outcome was fair	92.3	85.0
Outcome was in respondent's favor	70.3	59.0
Somewhat or very satisfied with outcome	89.3	78.2
Somewhat or very satisfied with respect shown	89.2	75.7
Would return to this forum	90.5	76.4

For brevity, all these subjective measures of justice were aggregated into an index based on the first principal component taken from a factor analysis. The average values of this index for plaintiffs and defendants, respectively, in cases where any remedy or punishment was or was not incurred, are listed at the bottom of Figure 2, and discussed in more detail below.<sup>32</sup>



Remedies in rural Liberia are difficult to quantify. Monetary compensation is rare, especially in the customary sector. Instead, remedies are often in-kind or focus on loss of stature or reputation through mandated apologies. Data was collected on a range of punishments and forms of compensation, including: 'fine', 'apology', 'compensation', 'sacrifice', 'feast', 'beating', 'other public punishment (for example, mortar)', 'exclusion from community activities' and 'expulsion from village'.

**Table 2. Punishments and apologies, plaintiff-defendant pairings (%)**

PLAINTIFF	Punishment only	DEFENDANT	
		No	Yes
	No	81.8	10.8
	Yes	5.2	2.2
PLAINTIFF	Punishment or apology	No	Yes
		No	Yes
	No	16.7	54.6
	Yes	14.3	14.4

These punishments or forms of compensation are summarized in two binary variables (taking the value of 1 if true, 0 if false) in order to measure remedies: the first indicating whether *any* physical punishment or material compensation was received; and a second, which encompasses the first and also includes apologies. Table 2 summarizes these outcomes, pairing plaintiffs and defendants, for 1,646 disputes.

The analysis relies heavily on an empirical measure of customary judges' bias. While no attempt was made to directly observe biases, it is posited that the chief's bias in a given case will be determined by the characteristics of both the plaintiff and defendant, reflecting the hegemony of certain social and economic groups. In particular, our hypothesis is that customary judges will, in general, favor disputants who are male, wealthy (based on a binary variable for whether the household head has any non-farm employment), powerful (based on a binary variable for whether the disputant is or is not related to a local leader), and from the dominant ethnic group in the village.

Both the plaintiff's and defendant's characteristics are clearly relevant for the bias. Table 3 provides a snapshot of the individuals involved in these disputes as well as some idea about the direction of the bias. Each box in the table shows head-to-head characteristics of the individuals involved in the disputes. Sixty percent of disputes, for example, are male versus male, and six percent are female versus female. The remaining 34 percent include 14 percent where women sue men, where pro-defendant bias might be expected in the customary system; and 19 percent where men sue women, where pro-plaintiff bias might be expected. Similarly, around 17 percent of disputants are unequally paired in the 'employment' box, 23 percent in the 'power' box, and 18 percent in the 'ethnicity' box.

**120 Table 3. Who's suing whom? Plaintiff-Defendant pairings (%)**

PLAINTIFF	Gender	DEFENDANT	
		Female	Male
	Female	6.0	14.4
	Male	19.3	60.2
PLAINTIFF	Employment	Farm	Non-farm
		Farm	Non-farm
	Farm	80.6	9.4
	Non-farm	7.8	2.2
PLAINTIFF	Power	No	Yes
		No	Yes
	No	75.0	6.2
	Yes	16.4	2.5
PLAINTIFF	Ethnicity	Minority	Dominant
		Minority	Dominant
	Minority	5.8	5.1
	Dominant	13.1	76.0

The quantitative measure of bias is set as equal to the 'difference' between defendant and plaintiff characteristics (as measured by binary variables), such that a positive number is pro-defendant bias.<sup>33</sup> This implies that customary judges are expected to more likely to side with the defendant, for example, when a woman sues a man or a powerful person sues a non-powerful person.

Table 4 breaks down dispute types by plaintiff characteristics to show who takes which kind of disputes to any court. Columns 2 and 3 show, for example, that men are somewhat more likely to bring disputes over debt, land, property destruction and labor, while women are more likely to bring disputes over family/marital issues, assault, witchcraft and rape/sexual abuse.<sup>34</sup>

**Table 4. What's all the fighting about? Disputes by plaintiff type (%)**

	Cases	Gender		Employment		Powerful		Ethnicity	
		F	M	Farm	Non-farm	No	Yes	Minority	Dominant
Debt Dispute	1,374	25.8	31.0	30.2	28.2	29.2	33.3	29.1	30.1
Family/Marital Dispute	728	19.3	15.0	15.8	16.8	15.9	15.6	13.6	16.2
Assault	561	14.0	11.8	12.4	10.5	12.9	9.4	14.0	12.0
Theft	502	11.2	10.9	10.9	11.1	11.1	10.2	13.0	10.7
Land Dispute	339	5.5	7.9	7.4	7.6	6.8	10.2	7.0	7.4
Property Destruction	275	4.8	6.3	6.0	5.9	5.8	6.9	5.4	6.1
Witchcraft	175	5.8	3.3	3.9	3.1	3.7	4.2	2.8	3.9
Labor Dispute	125	1.8	3.0	2.8	2.4	2.9	1.9	2.4	2.8
Rape/Sexual Abuse	85	2.8	1.6	1.9	1.5	2.1	0.8	1.6	1.9
Murder	66	1.4	1.5	1.4	1.5	1.6	0.8	2.0	1.4
Property Dispute	61	1.7	1.2	1.3	1.8	1.3	1.3	1.4	1.3
Bribery/Corruption	13	0.3	0.3	0.2	0.9	0.3	0.2	0.2	0.3
Other	282	5.8	6.3	5.9	8.7	6.3	5.3	7.6	6.0
<b>Total</b>	<b>4,586</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

The core hypothesis of the theoretical model concerns forum choice. Moving up the game tree, the raw data underlying Figure 2 includes disputes taken to dozens of different forums on a fairly continuous spectrum, from 'family head' or 'elders' at the customary extreme, to police and magistrates at the formal extreme. For most of the analysis, forums are grouped into just three options corresponding to the theoretical model: 'no forum' if the respondent reports that the case was not taken to any third party; 'formal', which is limited to justices of the peace, magistrates, police and other military/government officials; and 'customary', which encompasses all other forums, including town, clan and paramount chiefs, as well as elders, family leaders and secret societies.

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Using these broad categories, 38 percent of disputes were taken to the customary system, while just 4 percent were taken to the formal system. In addition, 58 percent of disputes were not reported to any forum, and were either resolved by the disputing parties themselves or left unresolved. Table 5 disaggregates these patterns by dispute category. There is a clear tendency for violent crimes to be taken to the formal system (25.8 percent of murders, 21.2 percent of rapes and cases of sexual abuse) while the civil cases that dominate the sample are very rarely taken to the formal system (1.5 percent of the debt disputes and 1.4 percent of the family or marital disputes, which together comprise almost two-thirds of the sample).

**Table 5. Where do disputes go?**

	Cases	Percentage (%) of all cases taken to		
		No forum	Customary	Formal
Debt Dispute	1,374	69.9	28.6	1.5
Family/Marital Dispute	728	61.1	37.5	1.4
Assault	561	53.8	42.8	3.4
Theft	502	45.8	47.0	7.2
Land Dispute	339	37.8	56.0	6.2
Property Destruction	275	65.1	29.5	5.5
Witchcraft	175	48.0	48.0	4.0
Labor Dispute	125	61.6	38.4	0.0
Rape/Sexual Abuse	85	47.1	31.8	21.2
Murder	66	43.9	30.3	25.8
Property Dispute	61	55.7	36.1	8.2
Bribery/Corruption	13	61.5	23.1	15.4
Other	282	54.3	42.2	3.5
<b>Total</b>	<b>4,586</b>	<b>58.2</b>	<b>37.9</b>	<b>3.9</b>

Table 6 examines the relationship between forum shopping and plaintiff characteristics. At first glance, the numbers seem counterintuitive — women are more likely than men to take a case to the customary sector (42 percent versus 37 percent); farmers more so than non-farmers (38 percent versus 35 percent) and the ‘powerless’ more so than the powerful (40 percent versus 29 percent). However, it stands to reason that the same groups that are vulnerable to bias are also least likely to be able to afford the relatively high cost of accessing the formal system. The model predictions in the previous section relied heavily on the ability to afford the costs of accessing either system: plaintiffs compare the expected benefits from reporting to the costs of access. Plaintiffs unable to afford access to either or both systems are either constrained to a sub-optimal forum, or do not report at all. This could also partly explain the high level of non-reporting in the dataset.

**Table 6. Who takes disputes where?**

		No. of Cases	Percentage (%) of all cases taken to		
			No forum	Customary	Formal
Gender	<i>Female</i>	939	55.4	41.5	3.1
	<i>Male</i>	3,647	59.0	36.9	4.1
Employment	<i>Farm</i>	4,128	58.2	38.2	3.6
	<i>Non-farm</i>	458	58.3	35.2	6.6
Powerful	<i>No</i>	3,721	56.1	40.0	3.9
	<i>Yes</i>	865	67.4	28.7	3.9
Ethnicity	<i>Minority</i>	501	55.7	37.9	6.4
	<i>Dominant</i>	4,085	58.5	37.8	3.6
<b>Total</b>		<b>4,586</b>	<b>58.2</b>	<b>37.9</b>	<b>3.9</b>

This emphasizes a key point made above: relative privilege *vis-à-vis* one’s opponent determines bias, and forum choice must be analyzed bearing in mind the characteristics of both plaintiff and defendant. In addition, *absolute* privilege may be used as a proxy for the ability to pay the costs of access to justice.

At the very top of the game tree, the level of harm relates to the incidence and severity of losses incurred by the plaintiff. Harm is not observed directly (monetary losses are measured when the

respondent is the plaintiff, but are applicable for only a subset of disputes.) Instead, variation in the severity of harm is accounted for, somewhat crudely, by looking at the type of dispute (listed in Tables 4 and 5). In the formal empirical analysis summarized below, this is accounted for by dispute-type dummies. Thus, the relationship between, for instance, disputant characteristics and forum choice is analyzed by comparing land cases to land cases, thefts to thefts, and so on. Variation in severity of harm within these dispute categories is not accounted for.<sup>35</sup>

### 4.3 Hypothesis testing

In Sandefur and Siddiqi (2011), the authors go one step further to test the two key hypotheses laid out in section 3, regarding forum shopping and the utilities of plaintiffs and defendants.<sup>36</sup> In the interests of space and clarity of exposition, the results of this empirical testing are summarized below.

The key theoretical prediction regarding forum shopping is that as pro-defendant bias increases, the probability of reporting declines, and the probability of taking the case to the formal sector increases. The basic notion is that plaintiff and defendant characteristics associated with pro-defendant bias (that is, a higher score for the defendant relative to the plaintiff as measured by indicator variables for being male, employed, related to powerful people, and a member of the dominant ethnic group) will encourage the plaintiff to avoid the customary sector, either by not reporting or by taking recourse to the formal sector.

The two parts of this hypothesis are tested using a linear probability model in a multivariate regression analysis.<sup>37</sup> First, once 'absolute privilege' is taken into account (by controlling for the plaintiff's gender, employment, relationships with powerful people, and ethnic group), plaintiffs who are disadvantaged relative to the defendant will be less likely to report disputes, but more likely to choose the formal system if they do. In addition, after taking into account relative bias, plaintiffs who can afford the costs of access, as proxied by absolute privilege (men, employed, powerful and ethnic majorities), will be more likely to report and to go to the formal system. The results are strong for gender, occupation and power, although interestingly, results for ethnicity fail to conform to the predicted pattern. On the whole, the model is relatively successful in explaining why plaintiffs choose the formal over the customary sector; it is less successful in predicting their decision to report or not to report in the first instance. In short, the results appear to confirm that plaintiffs who face severe bias in the customary system and have the means to go elsewhere, do so.<sup>38</sup>

The key theoretical predictions regarding disputants' satisfaction (or perceptions of justice outcomes) were summarized at the end of section 3: plaintiffs who face bias in the customary system will experience higher utility in the formal sector. For defendants, the theoretical prediction hinges on the relative efficiency of the formal sector: if it is relatively efficient, defendants' preferences over the formal versus the customary system are the mirror image of plaintiffs' preferences; if the formal is relatively inefficient, defendants always prefer the customary sector.

The empirical results are broadly consistent with the theoretical predictions. Defendants with characteristics favored by customary judges (male, employed, powerful and ethnic majorities) are indeed happier in the customary system, although disadvantaged plaintiffs do not report being any less happy in the customary system. In general, as predicted, plaintiffs and defendants are significantly less happy in the formal system, (although this latter result is not statistically significant). This pattern is consistent with punitive formal sector remedies that harm defendants to a greater extent than they benefit plaintiffs. Finally, and most strikingly, in cases with a strong indication of pro-defendant bias, the previous pattern is reversed, and plaintiffs are dramatically happier in the formal system. Conversely, and also as predicted, defendants in these cases are much less happy in the formal system.

On the whole, this pattern of results suggests not only that forum choices are made rationally to benefit the interests of the plaintiff, but that the judgments received in the chosen forum have utility consequences that are not bargained away or overridden through appeal.

## 5. Conclusion

The goal in this chapter has been to explore the hypothesis that justice outcomes in rural Liberia can be explained through strategic forum shopping by plaintiffs. The assumption of individual agency (and, in particular, forward-looking rational choice) in forum shopping is non-trivial, running counter to prevailing depictions of legal dualism in the qualitative literature on African customary law.

The claim that plaintiffs exercise strategic choice in forum shopping confronts a *prima facie* tension between: i) well-documented bias in Liberian customary law, depriving women and marginalized groups of basic rights; and ii) the simple empirical fact documented here that even these disadvantaged plaintiffs take most (but not all) of their cases to customary forums. Why would marginalized groups choose to bring cases to customary courts that systematically repress them?

An obvious answer, in theory, is provided by the high costs of entry to the formal sector, that is, barriers to 'access to justice'. In rural Liberia, such barriers are undeniable. For plaintiffs in remote villages, travel costs alone to reach a police station or formal court are significant relative to the material stakes in many disputes. Court officials routinely solicit bribes, and rural peasants may be ignorant of formal legal procedures.

The basic survey results presented here — as well as the more in-depth regression analysis presented in Sandefur and Siddiqi (2011) — suggest that barriers to entry may not be the whole story, and that there are positive features of customary justice that attract even disadvantaged plaintiffs. Notably, while plaintiffs who win favorable verdicts in the customary system exhibit higher satisfaction than those who do not, no such pattern exists in the formal system. Comparing cases in the formal and customary systems, plaintiffs are generally less satisfied with the justice provided in formal system, questioning any popular notion of a clear hierarchy in the attractiveness of these systems. Finally, defendants are overwhelmingly less pleased with outcomes in the formal system — even after controlling for demographic characteristics and the nature of the dispute.

These patterns conform to the predictions of our simple game-theoretic model of strategic forum choice, in which plaintiffs trade off the rights afforded them in the formal sector in favor of the more efficient legal remedies delivered by customary courts. The empirical evidence on the impotence of the formal system in generating utility for plaintiffs, combined with its success in creating disutility for defendants, corroborates one of the basic assumptions here: formal courts are relatively punitive, while customary courts are more 'restorative', in terms of efficiently redistributing utility from defendant to plaintiff with fewer Pareto losses.

124 To conclude, it is informative to consider the normative policy implications of the underlying model. As a thought experiment, consider a policymaker with progressive ideals and the power to influence both the customary and formal system — for example, Liberia's central government under the leadership of the first popularly elected woman head of state in Africa, President Ellen Johnson-Sirleaf. This policymaker has a choice between attempting to reform customary norms (lower bias) or increasing the appeal of formal justice by making the system less punitive and more focused on delivering tangible benefits for plaintiffs (lower leakage). Both choices will be effective in theory. In practice, these alternatives are manifested, respectively, in ongoing collaborations by domestic civil society organizations and international NGOs to train customary leaders in their judicial responsibilities, and to provide quasi-formal alternative dispute resolution mechanisms that are less costly and punitive than police and magistrates' courts.<sup>39</sup>

A third policy option for the social planner is to further reform the already progressive norms of the formal system, and to assert greater dominance over customary institutions. This alternative lacks clear coherence in the forum shopping model sketched here, and seemingly fails to recognize the revealed preferences of the rural poor in seeking out customary justice focused on reconciliation

and less punitive remedies. Such well-meaning, progressive reforms are unlikely to have a sizeable impact on the rural poor.

The finding that plaintiffs exercise meaningful agency in choosing where to take their legal grievances suggests that justice sector initiatives in contexts such as rural Liberia may be constrained by a form of market discipline. The poor vote with their feet.

Rural Liberians overwhelmingly opt for customary justice in their everyday legal disputes. This does not imply that they have repudiated the legal rights afforded them by the formal system. It should, however, encourage justice sector policymakers to search for better ways to provide legal remedies in the formal sector that will encourage greater take-up by the poor. There is no reason that rural Liberians should have to choose between robust rights and efficient remedies: effective programs to promote genuine access to justice should aim to provide both.

## footnotes

- 1 M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).
- 2 Commission on Legal Empowerment of the Poor. *Making the Law Work for Everyone*. Working Group Reports, United Nations Development Programme (UNDP) (Vol. 2, 2008).
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- 4 K. Adinkrah, 'We Shall Take Our Case to the King: Legitimacy and Tradition in the Administration of Law in Swaziland' (1991) 24 *Comparative and International Journal of Southern Africa* 226.
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- 6 The model does not explicitly consider, for example, the possibility of revengeful harm, but this is easily incorporated: a plaintiff in one realization of the game could become a defendant in the next.
- 7 The quantitative data collection is part of a broader research project investigating the effectiveness of a new, untested initiative to enhance legal empowerment and access to justice. At the core of the intervention is the provision of pro-bono legal services to individuals with limited access to formal justice, by mobile paralegals ('community legal advisors') trained to work at the intersection of customary and formal law. The intervention is run by the Carter Center, in partnership with the Justice and Peace Commission, a Liberian non-government organization. The evaluation research design follows a baseline and follow-up survey structure, combining difference-in-difference analysis with village-level randomization. Follow-up surveys would measure potential impacts across a wide range of outcomes, and the randomized allocation of villages to treatment and control groups would ensure that any significant differences in outcomes across the two groups can be causally attributed to the presence of the mobile paralegals.
- 8 The formal empirical results are presented in Sandefur and Siddiqi, above n 5.
- 9 The authors are greatly indebted to Deborah Isser, Stephen Lubkemann, Saah N'Tow and the United States Institute for Peace for granting access to the raw interview transcripts underlying this report. Their research is fully presented in D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences With and Perceptions of Local Justice Options*, United States Institute for Peace (2009).

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- 17 For example, M. Chanock, *Law, Custom and Social Order — The Colonial Experience in Malawi and Zambia* (1985); F. Mackenzie, 'Conflicting Claims to Custom: Land and Law in Central Province, Kenya, 1912-52' (1996) 40(1) *Journal of African Law* 62-77; P. Lavigne Delville, 'Harmonizing Formal Law and Customary Land Rights in French-Speaking West Africa' in C. Toulmin and J. Quan (eds), *Evolving Land Rights, Policy and Tenure in Africa* (2000) 97-121.
- 18 Mamdani, above n 1, 109-110.
- 19 ICG, above n 14, 7.
- 20 Isser, Lubkemann and N'Tow, above n 9, 13.
- 21 *Ibid* 23.
- 22 Aldashev et al, above n 16.
- 23 Isser, Lubkemann and N'Tow, above n 9, 29.
- 24 In an extension of the model, the plaintiff or defendant is allowed to appeal this initial verdict, which introduces strategic interaction between the judges. In the basic setup shown here, judges cannot credibly deviate from their *ex post* optimal remedies.
- 25 A zero sum game refers to a transaction in which the total gains to one party are perfectly offset by the losses to another. A negative sum game is one in which there is a 'deadweight loss', i.e. the losses to one party are not entirely offset by gains to another. In the public economics literature on taxation and redistribution, 'leakiness' or 'leaky bucket redistribution' refers to a negative sum game in which some portion of the resources to be redistributed are lost in the process.
- 26 G. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169-216.
- 27 Isser, Lubkemann and N'Tow, above n 9, 48.
- 28 *Ibid* 29-30.
- 29 In addition to economies of scale in running a police and prison service — which gives the formal system only a comparative advantage in punishment but no absolute disadvantage in providing compensation — two further justifications can be added for the assumptions made here: i) the formal

criminal code, which obligates judges to treat serious crimes as offences against the state rather than the individual victim; and ii) 'leakiness' in the form of court fees and other transactions costs associated with the formal system.

- 30 Isser, Lubkemann and N'Tow, above n 9, 49.
- 31 The implication here is not that the remedies offered by the customary system are always material — rather, more symbolic reparations such as public apologies may simply restore social acceptance and social capital to a disputant.
- 32 As noted earlier, only one party to the dispute was interviewed. Thus while the objective characteristics underlying the bias measures referred to earlier (gender, ethnicity, etc.) are solicited for both the plaintiff and defendant from a single respondent, this is clearly not appropriate for subjective evaluations of justice. This means that justice outcome data are available for either the plaintiff or defendant for a given case, not both. However, both plaintiffs and defendants can be analyzed in the aggregate, as plaintiffs were interviewed in some cases, and defendants in others.
- 33 For example, the binary variable for 'gender' is set equal to 1 if the individual is a man, and 0 if a woman. If a woman then takes a man to the customary judge, she faces a pro-defendant 'bias' of  $1 - 0 = 1$ . Conversely, a man taking a woman to the same judge faces a pro-defendant 'bias' of  $0 - 1 = -1$ ; a man taking another man faces a bias of  $1 - 1 = 0$ , etc.
- 34 It should be noted that the plaintiff is not necessarily the 'victim' of the dispute — a man from the household may well represent a woman's case at the forum, or vice versa.
- 35 A special case occurs when the level of harm is zero, and no dispute is observed. As noted in Figure 2, the estimation sample covers 2,081 households. Because these households comprise a representative sample of their respective communities, it is possible to examine the endogenous decision to inflict harm by defendants, by relating the probability of victimization to household characteristics. Due to limits of time and space, this analysis is not included here.
- 36 Sandefur and Siddiqi, above n 5.
- 37 *Ibid*.
- 38 The model's treatment of the decision to report was relatively sparse compared to the attention given to the distinction between the formal and customary systems. Further attention to the possibility of bargaining and reconciliation outside a third-party forum may be merited.
- 39 One of the long-term goals of the research project underlying this chapter, as described in footnote 7, is to provide a rigorous experimental evaluation of the latter approach.

Maggi Carfield

**Executive summary**

Land is of vital importance in Uganda. Most Ugandans are subsistence farmers and depend on the land for their survival. The armed conflict with the Lord's Resistance Army in northern Uganda and the violent inter- and intra-clan cattle wrangling in eastern Uganda have had a major destabilizing effect on Ugandans living in those regions. Over the last 20 years, hundreds of thousands of Ugandans have been forced to flee their homes and seek out shelter in camps for internally displaced persons. With the cessation of insurgent activities in northern Uganda and increased government monitoring of the security situation in eastern Uganda, a relative level of stability has returned to the region. Yet, many Ugandans who have attempted to leave the camps and return home have encountered conflicts of a different kind: land disputes. Unfortunately, just at the moment when land dispute mechanisms are most critically needed, neither the formal nor the informal justice systems are adequately equipped to ensure justice and preserve the fragile peace; the national land policy is in flux, land administration institutions are severely underfunded, and the formal justice system is overloaded. In addition, due to the nature of the insurgency, as well as the destabilizing effect of camp living, customary dispute resolution mechanisms have also been weakened. Unless fair and efficient dispute resolution mechanisms are strengthened, brewing tensions may erupt into renewed violence in the area.

A number of studies have examined the impact of the conflicts in northern and eastern Uganda on the people in those regions, specifically with regard to how the displacements have affected income and poverty levels and tenure security. The general consensus is that land issues pose a significant threat to ensuring peaceful and lasting resettlement efforts in the region. Other than studying the problem, little has been done to actively tackle the justice gap. Recently, however, one non-governmental organization, Uganda Land Alliance, implemented a pilot project, which was designed to address some of the shortcomings of both the customary and formal land dispute mechanisms. Based on fieldwork in three districts — Amuru, Apac, and Katakwi — in northern and eastern Uganda, this chapter examines Uganda Land Alliance's work in the region, analyzes the wisdom and effectiveness of its approach to working with the formal and informal justice sectors, and recommends a framework for thinking about integration in post-conflict situations.



## Introduction

Over the past 20 years, conflicts in northern and eastern Uganda have forced thousands to leave their homes and seek shelter in camps for internally displaced persons (IDPs). Now that a measure of stability has returned to these regions, IDPs have begun to return home and reestablish claims to their ancestral land. This has created conflicts of a different nature, principally, competing claims to land that was occupied during the conflict, but also land encroachments between neighbors and families driven by increasing land scarcity. The most immediate problem is that, at present, neither the formal nor the customary systems can provide accessible justice to rural populations or respond to the current pressures culminating in land disputes. Even if the formal justice system were able to process the current backlog of disputes in a timely manner, the system would be considered inaccessible by disputants in rural areas, and decision-making would be too far removed from the realities of village life to represent an adequate solution. And while the customary system may be more physically and financially accessible, and more attuned to the social realities of disputants, traditional authorities lack training on land and human rights, particularly as they apply to women and the poor. Furthermore, even though the *Land Act 1998* (Cap 227) acknowledges the role of traditional authorities, the formal law does not give legal authority to decisions made by traditional authorities and, therefore, their judgments are unenforceable. Moreover, wealthy, powerful and better educated members of communities regularly forum shop between the customary and formal legal systems, and use their power and influence to manipulate proceedings in their favor in both sets of fora. The increasing number of unresolved land disputes combined with the lack of adequate dispute resolution mechanisms adds to an already volatile situation and has the potential to disrupt the peace process.

The legal empowerment discourse recognizes the importance of non-state justice institutions, which, as noted by Wojkowska, are “the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries ...”.<sup>1</sup> Disagreement continues, however, over the role that such systems should play in legal development strategies. It has been argued that informal justice systems are poor guardians of the rights of women and other marginalized groups and therefore more emphasis should be placed on increasing access to the formal justice system. Similarly, some argue that strengthening the customary system can result in a competing and overlapping set of laws, which, while giving choice, can “obstruct claim-holders’ access to justice and impede effective handling of grievances”.<sup>2</sup> This may create confusion or promote instability.<sup>3</sup> Others still, such as the United Nations Commission on Legal Empowerment of the Poor (CLEP), advocate strengthening non-state justice systems and creating better linkages to formal justice systems. They highlight the financial and geographic accessibility of informal justice systems, as well as their cultural familiarity *vis-à-vis* state courts.<sup>4</sup>

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In 2009, in response to the increasing number of land disputes in northern and eastern Uganda, and recognizing the shortcomings of both the informal and formal justice systems to handle them, Uganda Land Alliance (ULA), an NGO focused on land rights, launched a pilot project aimed at improving access to land justice through the empowerment of traditional authorities and the integration of the customary and formal justice sectors. ULA’s pilot project was unique in two respects. First, it recognized that the legitimacy and authority of traditional leaders comes from two sources — the community and the formal justice sector — and that to be most effective, any effort to empower traditional authorities must address both spheres. As such, ULA reasoned, the legitimacy of traditional leaders must be strengthened in both spheres. ULA’s project was also unique in that it refused to operate outside the realities of present-day Uganda, i.e. it insisted on bridging theory and practice, which meant building on the capacity of existing systems.

In March and July 2010, field research was conducted to evaluate ULA’s project and to help identify the current challenges preventing individuals from accessing the formal and informal land dispute resolution systems. Such information was gleaned from focus group discussions and individual interviews with community members, traditional leaders, local council members and

representatives of the formal justice sector (magistrate judges, legal advocates, and bureaucrats from the Ministry of Land) in each of the three targeted communities. The field research found that ULA's deeply contextualized approach to working with traditional authorities and the formal justice system is an excellent example of legal empowerment in action.

The chapter proceeds as follows. Parts 1 and 2 provide an overview of the social and economic situation in northern and eastern Uganda, as well as the conflict as it pertains to land issues. Part 3 compares existing customary and formal law land dispute mechanisms. Part 4 discusses ULA's Land Justice Project and findings from the research conducted for this chapter, and Part 5 analyzes ULA's project in terms of legal empowerment and offers insights into the question of integrating the two land dispute systems.

## 1. The Ugandan context

### 1.1 Land and development

According to UNDP, Uganda ranks 157<sup>th</sup> out of 182 countries (with data) in terms of overall human development.<sup>5</sup> Just over 50 percent of Ugandans live on less than US\$1.25 a day, and 75 percent live on less than US\$2 a day.<sup>6</sup> Life expectancy at birth for the average Ugandan is 51.9 years; nearly one-third of Ugandans will not survive to the age of 40.<sup>7</sup> Furthermore, over one third of Ugandans do not have access to an improved water source and over 25 percent of adults are illiterate.<sup>8</sup>

Uganda is predominately an agrarian society: 80 percent of the workforce is involved in agricultural production and nearly three quarters of Ugandans are subsistence farmers.<sup>9</sup> In Uganda, as in many developing countries, land is the most highly valued economic and social resource. As a report by the Ugandan Ministry of Lands, Housing and Urban Development states,

[Land is the] medium which defines and binds social and spiritual relations within and across generations. Issues about ownership and control of land are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods. For this reason, control over land and associated resources constitutes, in social and cultural terms, sovereignty over the very spirituality of society.<sup>10</sup>

The *Constitution of Uganda 1995* and the *Land Act 1998* gives nationals the right to own land, unlike many countries in Africa, where the state holds land in trust for its people. Such rights extend to individuals, families and communities holding land under customary tenure, and are recognized regardless of title or formal documentation. While such legal provisions should theoretically support high levels of tenure security, the situation in Uganda is currently one of acute and growing land insecurity. The land market is characterized by rapid buying and selling of land, intense competition, boundary disputes and other land-related legal contests. There have been documented cases of neighbors encroaching on each other's lands in bad faith and in disregard of survey markers; families of deceased men evicting widows and their children from family lands; intra-family conflicts to widen inheritance divisions; and community lands being illegally seized and developed by local elites as individual properties.<sup>11</sup>

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### 1.2 Population growth and displacement: Pressure points contributing to land insecurity

Rapid population growth and decades of violent conflict are two factors among many that have contributed to escalating land insecurity in northern and eastern Uganda. Previously, land was abundant in Uganda: there was more land available to cultivate than hands to do the cultivating. This is no longer the case. In 1990, the population of Uganda was 17.7 million; today, it is over 31.7 million;<sup>12</sup> and it is projected that by 2020, it will have increased to 46.3 million.<sup>13</sup> With the second highest population growth rate in the world,<sup>14</sup> land has become a scarce resource. Currently, there are six times as many people trying to live off of the land as there were 60 years ago.<sup>15</sup> Consequently, as

land has become scarcer, land-related conflicts have increased. This is particularly the case in northern and eastern Uganda where people have taken advantage of protracted periods of population displacement to encroach on and occupy lands that are not their own.

The conflict in northern Uganda involving the Lord's Resistance Army (LRA) began in 1986. Over the next 20 years, thousands of Ugandans were abducted, mutilated, raped, wounded and killed.<sup>16</sup> Although the conflict received scant media attention *vis-à-vis* other violent conflicts in North and East Africa, it had a devastating impact on the region's population. By 2005, more than 2,000,000 people had been displaced, and by 2008, Uganda had the fifth highest number of IDPs in the world.<sup>17</sup> Most sought refuge in disease-ridden IDP camps where they had no access to land to cultivate and depended on food aid for survival.<sup>18</sup> In Acholi, the region most affected by the conflict, more than 90 percent of the population lived in IDP camps at some stage during the conflict period.<sup>19</sup>

Although to a lesser degree, the LRA also caused instability in northeastern Uganda. In addition, intra- and inter-clan conflicts entailing violent cattle rustling and raiding have contributed to a generalized level of instability and insecurity in the area. The prolonged periods of violence and unrest forced thousands of people to seek refuge in IDP camps. As of 2008, the Intergovernmental Agency on Development (IGAD) estimated that there were "thirty potentially threatening inter-communal conflicts brewing in the region".<sup>20</sup> IGAD further noted that because of this, "[i]t is difficult for judicial institutions to work ... in the region and most public officials are reluctant to take up postings in the area ...".<sup>21</sup>

### 1.3 New conflicts threaten peace

In recent years, as conflicts in both regions have begun to subside, the Government has engaged in a campaign to resettle IDPs to their former homes. The resettlement process, however, has created conflicts of a different nature, this time involving land. The key factor driving such conflicts is land scarcity. The result is a severe lack of tenure security among residents, particularly widows and orphans, whose numbers are on the rise.<sup>22</sup> This surge in land conflicts and the resulting tenure insecurity gravely threaten the fragile peace that has been established in northern and eastern Uganda.<sup>23</sup>

Land dispute claims in these regions are difficult to resolve for a number of reasons. First, land in these areas is largely neither documented nor demarcated.<sup>24</sup> Second, years of violent conflicts have destabilized and undermined the authority of traditional leaders, eroded their power base, and left traditional leaders without the necessary authority to successfully and peacefully resolve disputes. In the face of escalating land competition, longstanding customary rules and social norms relating to land have been eroded or reinterpreted to legitimate exclusionary practices, and are proving inadequate to temper such trends. Furthermore, the formal justice system is both inaccessible to the average Ugandan and ill-equipped to handle the volume of land disputes. The next section examines the evolution of the customary and formal justice systems and the current status of each.

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## 2. The legal context

### 2.1 A bifurcated land rights system

In the last century, a number of land tenure systems have operated in Uganda.<sup>25</sup> Prior to colonization, land was controlled by tribes in accordance with local customs and norms.<sup>26</sup> Tribe members could obtain use of or control over land only through the agreement of their respective King or the tribal chief.<sup>27</sup> Based on consumption requirements and labor resources, clans would allocate land to families, who then had the right to use such land indefinitely.<sup>28</sup>

In 1894 Uganda became a protectorate of Britain.<sup>29</sup> Britain governed Uganda through the use of tribal leaders, particularly the Bugandan tribe.<sup>30</sup> During the colonization period, Uganda, like many other African countries, utilized and relied upon two land systems: the customary system and the state

system.<sup>31</sup> Customary law was a creature fabricated by the British in connection with the implementation of British common and statutory law as a “tool for colonizing and pacifying the colonized people.”<sup>32</sup> Customary law was supposed to be based on individual clan culture, norms, and traditions. The customary system operated fairly autonomously and without interruption from the state. The state system, on the other hand, based upon British common law, introduced new ways of managing land relationships, which included mailo, freehold, and leasehold tenures.<sup>33</sup> Following independence, the customary and state land systems were never merged, in part because the resources were not available to “embark on the Herculean effort of unifying the disparate land holding institutions” and therefore “an institutional lock-in occurred and the existing, bifurcated, land holding system remained intact with all the resulting problems of definition and control.”<sup>34</sup> The question of which system has the authority to define rights and adjudicate disputes remains to this day.

The *Constitution of Uganda 1995*, together with the *Land Act 1998*, radically reformed Uganda’s national land policy. The Constitution introduced important changes relating to customary land holdings and ownership. It established that all land held under customary tenure was owned by the people living and working on it, and legitimized customary tenure as a valid and inviolable claim.<sup>35</sup> The *Land Act 1998* also provided specific protection for the land rights of women and other vulnerable groups with land claims. While falling short of giving women rights of co-ownership over land held with their husbands,<sup>36</sup> the Act allowed women to own land in their own right.<sup>37</sup> Further, the law provided explicit protection against discriminatory customary practices; it mandated that any customary decision or action that denies women, children or persons with a disability access to ownership, occupation or use of any land or otherwise imposes conditions that violate Constitutional provisions shall be null and void.<sup>38</sup> Finally, the law established restrictions on the transfer of land by family members without the full, informed and explicit approval of rights holders who may be affected by the transfer. It also forbade the sale, exchange, pledge, mortgage, lease, contract or *inter vivos* transfer of any land on which the family resides without the full, prior written consent of one’s spouse and children of majority age (which should not be unreasonably withheld).<sup>39</sup> If a family member wants to transact land on which orphans or young children reside, the Area Land Committee must approve the transaction and issue written consent.<sup>40</sup>

Furthermore, the *Land Act 1998* introduced safeguards aimed at enhancing the tenure security enjoyed by, in particular, rural and customary land holders and traditionally marginalized groups. It allowed individuals, families and communities who occupied land under customary paradigms to obtain documentary proof of their land claims by applying for a Certificate of Customary Ownership, applying for freehold title, or joining with other community members to establish a Community Land Association and apply for joint title to their lands.

Moreover, the Act reformed the state land administration system and decentralized the land justice system by creating a variety of institutions at the local level responsible for overseeing land registration and adjudicating land disputes. For example, the Act created District Land Tribunals charged with adjudicating land disputes and making orders in relation to, *inter alia*, the grant, lease, repossession, transfer or acquisition of land;<sup>41</sup> the amount of compensation to be paid for land compulsorily acquired;<sup>42</sup> and the issuance or cancellation of Certificates of Customary Ownership or titles.<sup>43</sup> It was envisioned that Land Tribunals, as a more accessible and informal forum than the state courts, would be in a better position to efficiently and effectively adjudicate land disputes.<sup>44</sup> But the District Land Tribunals, like many of the other administrative land institutions created, were under-resourced and quickly accumulated a backlog of cases.<sup>45</sup> The legislative mandate for the Land Tribunals expired in November 2006; all Land Tribunals were formally suspended and all pending cases — 6,000 at that point in time — were transferred back to the courts.<sup>46</sup>

Despite all of these attempts by the state to legislate and administrate a formal land justice system, most dispute resolution still occurs within the customary framework, 80 percent of all land is held in customary tenure.<sup>47</sup> While traditional leaders are bound to follow certain aspects of the statutory law, clans generally ascribe to and are governed by their own set of rules, customs, and practices.

This is somewhat envisaged under, or at least not inconsistent, with statutory law. The law is clear that the establishment of state institutions should not prevent, limit or hinder traditional authorities exercising their “functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matters arising out of customary tenure”.<sup>48</sup> But while traditional leaders may settle the vast majority of disputes, their decisions do not carry any legal authority. Actors of the formal justice system — including both the courts and police — will not enforce a decision issued by a traditional leader. This lack of authority renders traditional leaders’ decisions impotent, unless parties voluntarily choose to comply.

Another problem with customary law, despite statutory provisions to the contrary, is that customary norms often continue to discriminate against women. Upon marriage, women generally leave their families of origin and take up residence with their husband’s clans. During marriage, women have the right to access and cultivate their husband’s land; following their death, land is usually passed from the father to his sons. “Women rarely have full rights to land but must negotiate as secondary claimants through a male relative — father, brother, husband or son.”<sup>49</sup> However, it is important to note that colonial law, upon which the state legal system was built, also did not recognize the right of women to own land. Customary law and colonial state law treated women as perpetual minors who lacked the legal capacity to own land. The assertion that formal law protects women’s rights, while customary law does not, thus grossly oversimplifies the issue and establishes a false binary. Both formal and customary laws have worked, separately and in concert, to subordinate women. Nevertheless, whether entirely founded, there is a perception that customary law works a greater disadvantage to women.

A 2008 report submitted to the Government of Uganda asserted that “[t]he framework of laws for administration of land justice exists, however, the efficacy of the institutions is well below the expected standards, so in practice one can hardly speak of meaningful access in the area of land justice”.<sup>50</sup> The report then notes that since “the public is losing confidence in the justice system, extra judicial means to resolve disputes are now being pursued leading to loss of lives or under hand eviction orders”.<sup>51</sup>

## 2.2 Legal pluralism

To further complicate matters, not only is each of the land dispute systems ineffective at handling land disputes, but working together they exacerbate the access to justice problem. *De facto*, the Ugandan legal system is configured to promote the very worst aspects of legal pluralism. In the absence of clear laws regarding which legal forum has jurisdiction over a particular case, the system encourages forum shopping, which in turn facilitates manipulation of the system by more powerful, wealthy or better informed disputants.<sup>52</sup> Pluralism offers such groups the option of ignoring decisions made by traditional authorities and asserting their right to refer disputes to the formal legal system in an attempt to shop around for a ‘better deal’. In effect, better resourced parties are granted an additional ‘bite at the apple’ without any concern for the policies underlying the doctrine of *res judicata*. *Res judicata* protects parties from having to spend resources for relitigating an issue that has already been fairly adjudicated, conserves dispute resolution resources, and promotes fairness and finality in that parties may act in reliance on a judgment. In the end, parties who have the resources may win simply because they can withstand the cost of multiple legal battles.

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## 3. Promoting a productive framework for legal pluralism

Theorists suggest different approaches to the problem of legal pluralism:

In some countries customary dispute resolution has been proscribed, while in others customary law is recognized through legislation and its fora integrated into the state court hierarchy. In between these two extremes, some states grant limited jurisdiction to specific groups or customary law is recognized insofar as it does not abrogate constitutional or other statutory provisions.<sup>53</sup>

The remainder of this chapter examines these proposals in the context of the access to justice vacuum created in northern and eastern Uganda where land disputes threaten the fragile peace process.

### 3.1 ULA's Land Justice Project

ULA, a national civil society consortium comprising organizations and individuals, was founded in 1995 to advocate and lobby for fair land laws and policies. Since its inception, ULA has been pivotal in accelerating the constitutional recognition of customary tenure and, above all, land and property rights for women. In addition, ULA operates Land Rights Centres in a number of localities, conducts public interest litigation and carries out action-based research on a variety of land-related topics. ULA's priority issues include customary land tenure security, land rights awareness, legal and policy reforms, and organizational development.

In response to growing concerns that the access to justice vacuum was threatening the fragile peace recently established in northern and eastern Uganda, ULA initiated a pilot project entitled *Land Justice for Peace Building in Northern and Eastern Uganda: Traditional Authorities Making a Difference at the Grass Roots ('Land Justice')*.

Recognizing that the *Land Act 1998* explicitly provides for the role of traditional authorities in dispute resolution, but that no efforts had been made toward empowering them to effectively undertake their role, ULA set out to address this gap utilizing a two-pronged approach. First, it sought to foster an efficiently functioning land justice delivery system through the integration of the traditional with formal land justice delivery mechanisms. Second, it aimed to empower traditional authorities by building their technical capacity to effectively address land rights violations as a means of restoring and maintaining lasting peace in northern and eastern Uganda. The pilot project specifically aims to: conduct training with traditional authorities and community members; train paralegals to work with land rights offices; mediate land disputes and oversee referrals; produce and disseminate information, education, and communication materials; and organize advocacy meetings and policy dialogues with key stakeholders. At the conclusion of this research in July 2010, ULA had made headway on all of the above, although their work was still very much in a nascent stage. Land Rights Officers reported having held 2-3 training sessions with traditional authorities and 1-2 community 'sensitizations' in each of the districts. Each of the Land Rights Centers were also in the process of organizing training for paralegals and putting in place a system for mediating land disputes, but their work in this area had been limited primarily due to resource restrictions. The Land Rights Officers had also organized lobby and advocacy meetings in each of the three districts, which had been attended by 132 stakeholders from the local communities.<sup>54</sup>

### 3.2 Evaluating ULA's work

At the time this fieldwork was conducted, ULA's pilot project was operating in three districts in northern and eastern Uganda: Amuru, Apac, and Katakwi. After consultation with ULA staff, one community within each district that had already received or was soon to receive services from ULA was selected as a research site.

During the initial round of field work in March 2010, focus group meetings were held with community members, traditional leaders and local council members in each of the three targeted communities.<sup>55</sup> Community focus group discussions were based on a set of questions developed to elicit general information about the type and number of land disputes, the process by which land disputes are typically resolved, general community perceptions about customary versus formal dispute resolution methods, and the advantages and disadvantages of each system. A separate set of questions was designed for focus group discussions with traditional leaders and local council members. Focus group discussions with traditional leaders aimed to gather information on the land dispute resolution process, gauge perceptions about the various dispute resolution mechanisms, and assess each group's awareness and knowledge of land and human rights law.

In addition, the research team conducted 54 one-on-one interviews with individuals selected from each of the focus group discussions.<sup>56</sup> Individual interviews were designed to gather baseline data

on individuals' personal experiences with land disputes, their perceptions on the available dispute resolution options, and their knowledge and awareness of national land laws, discrimination and human rights. Individuals were selected by the lead researcher based on their contributions during the focus group discussions.

A number of interviews were also conducted with key informants representing different perspectives within the formal justice sector (i.e. magistrate judges, legal advocates, and bureaucrats from the Ministry of Land) in an attempt to better understand the perceived advantages and disadvantages involved with integrating the customary and formal law systems from the formal sector's point of view. Finally, ULA staff were interviewed in each community. Staff interviews sought to gather information on the current status of programming in each community, the plans for the project, their perspective on the issue of integration, and to identify what types of challenges had emerged thus far in the implementation stage of the pilot project and how the staff was responding.

In July 2010, the research team returned to three targeted communities and conducted additional one-on-one interviews with community members, traditional leaders and local council members. When possible, follow-up interviews were conducted with the individuals who had participated in the March 2010 round of field work. In total, 75 one-on-one interviews were conducted with stakeholders in each of the three targeted communities. As during the initial round of interviews, the interview instrument was designed to gather information related to the individual's experience with land disputes and land dispute mechanisms. In addition, this instrument was designed to ascertain information about ULA's work in the community and whether it had resulted in any noticeable change in land disputes or individuals' knowledge about their rights and the dispute resolution process. During this second round of fieldwork, the lead researcher also conducted 14 interviews with individuals from the formal justice sector to gain greater insight into the issues surrounding a possible integration of the informal and formal dispute resolution systems. Finally, the lead researcher interviewed ULA staff in each of the targeted communities, as well as the ULA staff member in charge of training. As before, these interviews were designed to gather information about the various facets of the pilot project.

The overarching goal of the field research was to gain a better understanding of the advantages and disadvantages of the informal and formal land dispute systems, to evaluate whether ULA's pilot project was adequately designed and was being implemented to address the key problems faced, and to explore the idea of integrating different methods of land dispute mechanisms with key stakeholders. It was initially hoped that this research would be able to evaluate early indicators of the effectiveness of ULA's intervention. However, given the relatively short time-period in which to complete the study and the fact that ULA had only recently begun operating the pilot project, it was beyond the scope of this research to evaluate such impact. Nonetheless, research at the implementation stage of a project can be invaluable, particularly, as in this case, when the stakes are high and immediate feedback is essential. In this case, research at the implementation stage was critical for two reasons: the research was able to evaluate whether the design of ULA's project was responsive to the needs and concerns expressed by key stakeholders so that ULA could make modifications to the design of the project; and the research was able to assess the extent to which stakeholders were open or resistant to the idea of integrating the formal and informal justice systems and make recommendations to ULA as to potential points of entry with respect to integration.

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## 4. Findings

### 4.1 Tenure insecurity and types of land disputes

Field research conducted by the author closely investigated the primary concerns and needs of community members in relation to land access and tenure security. Nearly all interviewees stated that they owned or had access to customarily-held land. The majority of these respondents

reported, however, that they did not feel secure in their land holdings. Such feelings of insecurity appeared to be positively correlated to the severity of the conflict; respondents from Amuru where the conflict was at its height, for example, exhibited the highest levels of perceived tenure insecurity. This is consistent with the findings of a World Bank survey where 85 percent of respondents in the conflict-affected regions of Acholi and Langi regions had experienced threats to tenure security; 59 percent of respondents described such threats as significant.<sup>57</sup> Respondents stated that the reasons for such insecurity included lack of physical title to their lands, competing ownership claims and encroachment by neighbors.

Women reported a particularly acute sense of tenure insecurity. Upon examination, it became clear that their land tenure security was closely connected to their marital status and the gender and number of their living children. Women who were married and had children — particularly male children<sup>58</sup> — reported feeling more secure. One woman explained, “I gave birth to girls and only one boy but unfortunately the boy died so they say I am useless because I have no baby boy.”<sup>59</sup> Unmarried women, widows, and women with no offspring reported the lowest levels of tenure security. Many widows felt threatened by their deceased husband’s family or their husband’s children from a previous marriage. Traditionally, under customary law, women have only had usufructuary rights to property. However, in the past when land was abundant, a widow was often allowed to remain on it to provide for her children. A common theme heard throughout the interviews was that women were increasingly being chased off their land after their husbands died. Many people reported that this was a recent phenomenon and attributed this type of land grabbing to shrinking property resources. While not statistically verified, this type of behavior is consistent with the literature on resource scarcity.

These perceptions of insecurity appeared to have a solid grounding in reality. Almost every respondent reported that they had either personally experienced or knew of someone who had experienced a conflict involving the land that they owned or occupied. During focus group discussions, many anecdotal accounts were provided whereby individuals — particularly women, orphans, and the poor — were ‘chased away’ when they tried to leave the camps and return to their land. Many respondents from Amuru and Katakwi reported that after being forced off their land, they had returned to the IDP camps. It was also reported that land conflicts often ended violently, particularly where the disputed piece of land involved more than one clan.

Respondents reported four types of land disputes. While such disputes can be sub-categorized into conflict-related and non-conflict-related disputes, all must be seen as products of increasing land scarcity in Uganda.

The most common form of conflict-related dispute was one in which a person would seize land in the absence of its owner, most commonly when owners had been forced to leave their homes to escape violence in their locality. In most cases the occupier and owner of the land were from different clans, something that was said to further complicate resolution and could easily escalate into inter-clan conflict. Another type of dispute arises when widows are chased from or denied access to land that belonged to their deceased husband. As these widows return from IDP camps, they find that the land they previously occupied with their husbands has been taken over; often the usurper is a brother or nephew of their husband, and other times it is a stranger. The position of widows is particularly weak because many within the clan see women’s claims to land as secondary to claims made by male clan members. One respondent stated, “Women are always undermined and men are favored because they are born there.”<sup>60</sup> Another respondent noted, “Men are favored as it is believed that women are just visitors.”<sup>61</sup>

Disputes not directly related to the conflicts included boundary disputes between neighbors and overlapping claims to the same piece of land based on a theory of adverse possession. In the past, landholders who had more land than they could cultivate might allow a friend or family member to use all or part of it. Such arrangements often continued for years. However, in the context of growing



land scarcity, original owners increasingly try to reassert their ownership rights. The occupants of such land argue that they have worked the land for years and have acquired a form of use tenure or ownership right grounded in fairness.

#### **4.2 Ineffectiveness of land dispute fora**

The field research also examined where and how land disputes were commonly resolved. Almost all women respondents (consistent across each target community) reported first referring their land disputes to traditional authorities. Not a single woman respondent reported filing a case with a magistrate. Similarly, most male respondents referred disputes to their traditional leaders in the first instance. Male respondents, however, appeared better informed and more comfortable with the idea of utilizing formal land dispute mechanisms.

While the exact procedure for mediating land disputes varies between and within clans, there are certain practices that are common to most and that distinguish the customary legal framework from the formal justice system. Usually, traditional leaders conduct an inspection of the land, consult with the neighbors of the disputants and clan elders, and then mediate a resolution between the parties. Such processes are primarily fact-finding in nature; questions of law generally do not enter into the adjudication process. In an attempt to preserve community cohesion, leaders usually seek a resolution acceptable to both parties. Key to this is that customary law is not necessarily governed by a systematic set of procedures; evidence assessment, sanctions and witness requirements, for example, vary and are largely left to the discretion of the individual leader. Fees also varied. Some reported that traditional authorities do not charge any fee for dispute resolution services, while others noted that traditional authorities charge a set amount (which varied from US\$1,000 to 5,000, US\$0.42 to 2.09) plus a fee to conduct the land inspection. Still others reported that some traditional leaders exact 'informal' fees, which were sometimes paid by the winner and at other times by the loser.

Overall, a majority of respondents stated that they preferred utilizing traditional leaders over formal courts in relation to land disputes. First, respondents reported that traditional leaders handle cases more quickly than the formal court system. It was reported that traditional leaders usually take between two days and two weeks to hear and resolve a dispute, whereas a case could take one to five years to be processed by the magistrate's court. Second, traditional leaders were reported to be less corrupt than formal justice sector actors who were perceived as favoring richer disputants who could be bribed.<sup>62</sup> Third, the adversarial nature of the formal justice system was perceived as creating "enmity between the parties"<sup>63</sup> by creating winners and losers. On the other hand, most respondents believed that traditional authorities help the parties reach a compromise that was satisfactory to all, an approach that was thought to better preserve relationships. Finally, traditional leaders were perceived to be more familiar with the realities of community life, land boundaries, the history of land ownership and the relationships between the parties involved than actors within the formal court system. Proximity was seen as a key advantage for traditional authorities, particularly in mediating land disputes, which tend to be very fact-specific. As one respondent stated, "I prefer using the traditional leaders because they know the area and people's lands."<sup>64</sup>

While a majority of respondents stated a preference for customary dispute resolution, when the responses of women and the poor were examined separately, it appears that their use of the customary system had less to do with a preference for customary adjudication, and more to do with the inaccessibility of the state court. There was a general perception among these respondents that they would not be able to utilize the magistrate courts because they lacked the financial resources. In addition to case filing fees and the cost of legal representation, disputants must cover their own transportation costs and living expenses, and that of any witnesses. Even parties who receive a judgment in their favor must meet the cost of enforcing that judgment. One participant explained, "if the other side does not cooperate there is nothing to do unless one goes to the police so that they arrest that person. But again one may not have the money to go to the police."<sup>65</sup> It was commonly asserted that people are often forced to sell land to pursue justice in the formal system, which

means that individuals who lack resources may find it impossible to secure their land rights through the formal justice system and may be forced to relinquish an otherwise valid claim to land. Respondents recounted stories of persons deprived of their land who had tried to utilize the formal justice system but eventually gave up because they could not afford to make multiple trips to court or pay for the transportation costs for witnesses. Respondents reported that a common tactic used by better resourced litigants was to cancel hearings at the last minute after the plaintiff had travelled to the court and paid for the costs of witnesses to attend the hearing. A related factor was the length of time taken to resolve a dispute at the courts. Where a court grants a temporary injunction on the use of land while the case is being adjudicated, access to a productive income source is cut off. This can have severe consequences if the user relies on such land for shelter or livelihoods protection. Again, the formal court system is perceived as favoring wealthier disputants who have the resources to withstand a lengthy court battle. Litigation is reduced to a matter of resource endurance.

Moreover, while most women and poor respondents stated they would first approach customary leaders, this should not necessarily be taken to mean that they were satisfied with customary leaders or the dispute resolution methodology they employed. Most women felt that the formal justice system and law provided them with greater legal protections than the customary system.<sup>66</sup> They noted that under customary law, women are not permitted to own land and their interests in land were generally not protected. Widows again displayed heightened vulnerability; some reported encountering difficulty in getting traditional leaders to hear their case, such leaders arguing that these women were no longer part of the clan since their husband had died. One respondent noted, "If the woman has children she has the right. But if she doesn't have, she has to go back to her father's home."<sup>67</sup> Similarly, traditional leaders may have little or no motivation to resolve the case of a poor person. Marginalized groups also tended to perceive the formal court system as a more objective arbiter than traditional leaders, especially where the traditional leader has a close relationship with one of the parties. It was said that some traditional leaders are easily manipulated by wealthy or more powerful disputants and showed bias in their favor. This appears to be more likely to be linked to intimidation rather than corruption; traditional leaders interviewed reported that a common problem was that they were often threatened and intimidated by wealthy and powerful disputants who had large extended families. Out of concern for their own safety, traditional leaders might refuse to get involved in a case, even though they knew that this was allowing 'might' to triumph over 'right'.

### 4.3 Ideas on integration

Community respondents had a number of ideas about what obstacles stood in the way of ensuring fair and efficient outcomes in land dispute cases; most felt that ignorance of the law was the principal problem, along with problems of entrenched discrimination by leaders towards women and the poor. They also acknowledged that an overall lack of resources and the associated land scarcity were contributing to the problem of land disputes.

The strategy most community members felt would be most effective at responding to these problems was to educate and raise awareness among community members and traditional leaders on the formal law. They specifically suggested that written materials regarding land laws should be distributed and made readily accessible to landowners and leaders. They also suggested that traditional leaders should have greater authority and be provided some security so that they could better enforce their decisions; some suggested that traditional authorities should be trained in the law and skills such as record keeping so that their judgments could be given greater weight by the formal justice system.

Another recommendation was that traditional leaders be paid a reasonable salary; it was reasoned that corruption and bias in decision-making would be reduced if traditional authorities did not have to rely on disputants for their livelihoods.

Traditional authorities agreed that ignorance about the law, both in the community and among traditional authorities, leads to land disputes in the first instance and complicates their resolution.

For them, however, another key issue hindering their ability to effectively resolve land disputes was their lack of authority to negotiate a solution that would be respected by parties to a dispute. Leaders expressed frustration that their decisions carry little to no weight in the formal justice system, which leaves them with no enforcement capacity. The direct result of this is that wealthy, powerful and better educated disputants ignore customary rulings that are not in their favor or bypass informal mechanisms of land dispute resolution altogether.

Finally, traditional authorities also reported being threatened and intimidated by disputants: "Some people abuse us and threaten to kill us. For example, one time they threatened us and we abandoned the case. Some people are ignorant about the law, that is why they threaten us with abuses and killings."<sup>68</sup> As a result, leaders admitted either refusing to intervene in cases or making a ruling in favor of the party exerting threats.

It was anticipated that members of the formal justice system would be resistant to the idea of integration, primarily out of fear that integration might diminish their own power and authority. On the contrary, members of the formal sector were strongly in favor of integration.<sup>69</sup> Respondents cited the formal system's lack of institutional capacity to resolve all of the land dispute cases and the customary system's accessibility, particularly for women and the poor. They also acknowledged that the non-adversarial dispute resolution methods utilized by traditional leaders avoid the 'winner-takes-all' problem, thereby ensuring greater community cohesion, which is particularly needed in the post-conflict areas of northern and eastern Uganda.

## 5. Evaluating ULA's land justice project in terms of legal empowerment

Legal empowerment, while still a nebulous concept, is distinctly different from typical rule of law projects in that it focuses explicitly on the needs of the poor and disadvantaged. A 2009 report of the United Nations Secretary-General to the United Nations General Assembly defines legal empowerment as "the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic actors."<sup>70</sup> An effective legal empowerment strategy arguably entails three key components. First, legal empowerment initiatives should begin with a solid understanding of the experiences and perspectives of disempowered populations. Second, initiatives should provide meaningful opportunities for the targeted population to participate in the design of the legal empowerment strategy. Finally, including the poor in the process of evaluating the actual delivery of services is critical and should be an integral and ongoing part of any legal empowerment endeavor. In this regard, while it is still too early to judge the effectiveness of ULA's Land Justice Project, important insights can be gleaned from the design process and preparatory activities.

**138** The fieldwork on which this chapter is based confirms that ULA has a deeply contextualized understanding of the challenges facing community members, traditional authorities, and the formal justice sector when it comes to resolving land disputes. ULA designed the pilot project with a number of factors in mind. First, ULA recognized that the project needed to be embedded in each target community so that it could be responsive to the expressed needs of individual community members. Setting up a Land Rights Centre and staffing it with a local community member was a critical demonstration of ULA's commitment to legal empowerment. Further, rather than creating a hierarchy of stakeholders (community members, traditional authorities, and formal justice sector actors) in which community members represent the bottom rung, ULA's project was designed to treat them equally.

Second, ULA was keenly aware of the proliferation of land conflicts in northern and eastern Uganda and understood that immediate action was required to contain the outbreak of inter-clan violence. ULA recognized the volatility of the situation and appreciated the role that land plays in keeping the peace. Hence, after weighing efficacy and expediency considerations, ULA decided that it had to utilize and strengthen *existing* capabilities and resources rather than trying to create something new

from scratch. Therefore, ULA determined that it should direct its resources towards working with existing institutions, namely traditional authorities and the formal justice sector.

ULA is an avid proponent of women's rights, particularly with respect to land. As discussed above, there is a general perception among human rights activists that many traditional authorities do not protect women's rights as well as the formal justice system would. Nevertheless, in designing this pilot project, ULA chose to listen to community members, both men and women, who expressed both a practice of and a preference for utilizing traditional authorities. Rather than ignoring this context, or promoting an institution that appears ideal on paper but lacks the resources to launch in practice (such as the District Land Tribunals), ULA tried to improve upon the existing formal and informal justice systems, thereby addressing the lived reality of women and the poor.

ULA's Land Justice Project illuminates several salient considerations with regards to legal empowerment theory and the interface between non-state and state justice systems. Its approach mirrors the literature on pragmatic feminism and offers important insights for those working in this arena. Pragmatic feminism maintains a "commitment against abstract idealism"<sup>71</sup> and favors, instead, "situatedness, contextuality, embeddedness"<sup>72</sup> when confronted with questions of justice. Margaret Radin posits "that there are two ways to think about justice. One is to think about justice in an ideal world, the best world that we can now conceive. The other is to think about non-ideal justice: given where we now find ourselves, what is the better decision? In making this decision, we think about what actions can bring us closer to ideal justice."<sup>73</sup> ULA's work thus rejects abstract idealism and approaches the issue, instead, in terms of the 'non-ideal' justice.

### 5.1 Creating a framework for integration

Clearly, there is an overwhelming consensus among all stakeholder groups that neither the formal nor the customary system, as they are currently configured, can respond to the access to justice vacuum in northern and eastern Uganda. This tension, many contend, could be resolved by integrating the two systems: "Instead of opening up parallel channels for conflict resolution, something that has often contributed to increasing rather than reducing the incidence of land-related conflict, building on informal institutions that have social legitimacy and can deal with conflicts at low cost may be preferable."<sup>74</sup> ULA's Land Justice project seeks to build on the capacity of traditional authorities, but it also recognizes that education and training is not enough to empower traditional authorities. Given the bifurcated nature of land law in Uganda, the formal justice system must play a role in solidifying the authority of traditional leaders. The formal justice system and the customary system reinforce and reconstitute each other. Justice, at least at this moment in time, is best served by linking to the two systems.

There may also be some political support for such an endeavor. In November 1999, a Justice, Law and Order Sector (JLOS) working group, staffed by policymakers and politicians, was formed to promote the rule of law, increase public confidence in the justice system and enhance access to justice, especially for the marginalized and the poor.<sup>75</sup> JLOS has recognized the importance of alternative dispute resolution (ADR) and other novel approaches to enhancing access to justice, as well as strengthening the capacity of local courts and linking them to formal courts.<sup>76</sup> However, thus far, JLOS has not been able to direct significant resources towards mapping out and implementing a framework for integration.

ULA's project also addresses this justice gap. With respect to the question of integration, ULA did not set out with a plan. Instead, it sought to facilitate a multiple-stakeholder discussion about the issue and brainstorm solutions that might fit the Ugandan context. ULA staff have many ideas about what form integration may take, but they also seem genuinely open to exploring the issue from multiple angles. The rest of this chapter discusses some of the insights uncovered by this field work.

First and foremost, what customary leaders need is a way to enforce their decisions. Among the drawbacks of the customary justice system is that it lacks the state-endorsed 'legitimacy' of the

formal justice system. Legitimacy is, of course, nothing more than a cultural construction. In this case, legitimacy is defined by the state and gained through the adherence to — or at least the appearance of adherence to — certain substantive and procedural rules.

Legitimacy, however, is connected to something tangible; it confers authority, power and the resources of the state. Decisions reached by traditional leaders do not carry any legal authority and, accordingly, the customary justice system lacks access to state-supported enforcement mechanisms (i.e. the police). At one time, community norms may have been such that decisions made by traditional leaders were respected and followed. This is no longer always the case. Particularly with land disputes, one disputant may be a stranger to the clan and lack any sense of allegiance or respect for the traditional leader who is attempting to adjudicate the dispute. Lacking social authority and state-endorsed enforcement apparatuses, traditional leaders are rendered impotent.

Integration would involve the following. First, decisions by traditional leaders who adhere to certain standards should be enforceable. The state should make it clear that it will utilize its own enforcement mechanisms to ensure compliance with decisions by these traditional leaders in land dispute cases; otherwise, decisions by traditional leaders can be ignored by disputants. Second, decisions reached through the customary dispute resolution process should be given legal weight in subsequent formal justice proceedings.

For integration to work, members of the formal justice system must be willing to cede some authority to traditional leaders. Fortunately, most of the members of the formal justice sector interviewed were eager to find ways to better use customary dispute mechanisms. However, some formal justice actors suggested that to get their full 'buy in', they would need to be assured that traditional leaders were abiding by certain substantive and procedural standards. Members of the formal justice sector acknowledged that they already, although inconsistently, refer land cases back to the informal system, especially for disputes over customarily-held land. They felt that with sufficient training in substantive and procedural law and oversight, greater legal weight might be given to the decisions of traditional leaders.

## 6. Mapping a way forward: recommendations and key challenges

In order to gain the legitimacy that traditional leaders currently lack (and is required if they wish to exercise legal authority), they will need to provide assurances to the formal justice sector that they have sufficient knowledge of substantive law and are abiding by, at minimum, basic principles of procedure such as recordkeeping and fair hearings.

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To facilitate this, JLOS might be charged with creating uniform training materials on substantive legal issues that relate or contribute to land disputes (i.e. inheritance and land rights). Ideally, the training materials would cover basic matters of land law and procedure. Once field tested, JLOS could then distribute them to NGOs to be used in community trainings. With the formal justice sector leading the initiative, the state could leverage non-state resources that could be passed on to NGOs to support widespread training. The key would be for JLOS to spearhead this effort and gather the necessary financial support; organizations such as ULA cannot be expected to single-handedly train communities.

Minimum standards should also be established in order for a decision made by a traditional leader to be appealed to the formal courts; no doubt this will be a very challenging process. Traditional authorities who wished to have their decisions recognized by the formal justice system would have to participate in trainings and provide proof of compliance with the standards. One pitfall with such a move is that this would require some level of administration and resource injections to be effective.

Moreover, a framework would need to be established for what weight should be given to decisions rendered by these specially trained traditional authorities, and what standard should be applied

when reviewing their decisions. For example, traditional authorities could be empowered to make findings regarding facts. Short of clear error, these findings would be recognized by the formal justice system in subsequent appeals. This could help reduce the cost of litigation in the formal system, ensure accurate fact finding (since most agree that traditional authorities are in a better position to do this), and prevent parties that are disappointed in the outcome reached by the traditional leader from shopping for a better outcome. Of course, on appeal, questions of law would be newly considered by the formal court.

Finally, safeguards need to be established for traditional leaders who make decisions motivated by some interest other than justice (i.e. financial gain or their own reputation). One option is that traditional leaders from different clans might join together to form appellate bodies. Disputants who are dissatisfied with a decision rendered by a traditional leader could bring their case before the appellate body. The appellate body would serve dual functions: monitoring and reinforcement. For traditional authorities who have fallen prey to nefarious influences, the appellate body would operate as a type of surveillance mechanism. Traditional authorities who failed to provide justice would be held accountable. On the other hand, traditional authorities who have the best intentions, but are under pressure from powerful parties to take certain actions, would be able to use the appellate body as a reason to resist.

The key challenge of such an approach is to retain the advantages of both the informal and formal justice systems. Arguably, there is something to be gained and lost by a process of formalization. The customary system is so accessible, at least in part, because it is free from many of the trappings of the formal justice system. Traditional leaders are not required to have any particular education or training, so there is no shortage of traditional leaders available to mediate disputes. Costs are kept at a minimum within the customary system as there are no salaries and no staff. There is also no need to maintain a courthouse. At the same time, it is the lack of such trappings that diminishes the customary system's authority. Some question whether traditional leaders are sufficiently competent to adjudicate disputes. Others worry that the lack of a salary makes traditional leaders more susceptible to corruption. Others still are concerned about whether the customary justice system has the institutional capacity to conduct fair hearings, record judgments and maintain records. The challenge, therefore, is whether the customary justice system can harness some of the authority, power and resources of the state without adhering to all of its prescribed rules. Is it possible to confer greater legitimacy on the customary system in a way that is not merely replicating the formal system? Informality need not be repugnant to the idea of legitimacy, and the goal cannot simply be to repackage the formal system. Instead, the challenge is to find ways to increase the capacity of the customary system without imposing too many of the costs of formality. Empowering traditional authorities through education and training, as well as working towards a formal justice sector that extends legal authority to decisions reached by traditional leaders is certainly a step in the right direction.

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- 34 Joireman, above n 31, 1236.
- 35 *Constitution of Uganda 1995*, article 237: "Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."
- 36 Civil society lobbied vigorously for a 'co-ownership' clause that would establish equal ownership by a husband and wife of the land on which the family's principle place of residence rests, or from which the family derives its principle source of income or sustenance. Proponents argued that co-ownership would increase women's decision-making power in the family and improve family livelihoods because women would be more willing to invest their labor, time and resources in land that they own. See further, P. McAuslan, 'A Narrative on Land Law Reform in Uganda' (Paper presented at Lincoln Institute of Land Policy course on *Comparative Policy Perspectives on Urban Land Market Reform in Eastern Europe, Southern Africa and Latin America*, 7-9 July 1998, 8-9), Lincoln Institute <[www.lincolninstitute.edu/pubs/pub-detail.asp?id=809](http://www.lincolninstitute.edu/pubs/pub-detail.asp?id=809)> at 11 April 2011. A 2004 amendment to the *Land Act 1998*, however, goes part of the way towards resolving the lack of co-ownership rights for married or widowed woman in Uganda: article 38A provides that "every spouse shall enjoy security of occupancy on family land" and goes on to define this as meaning that every spouse shall "have a right to have access to and live on family land." (New section 38A of the Act (*Land Amendment Act 2004*, s 19)). The amendment establishes that "family land" is land on which the family residence is located and from which the family derives sustenance, including all land that is "treated as family land according to the norms, culture, customs, traditions or religion of the family" (*Land Amendment Act 2004*, s 19(4)(d)).
- 37 Women's ability to own land in their own right may be inferred by the use of the gender-neutral language of the *Land Act 1998*.
- 38 Article 27.
- 39 Article 39.
- 40 *Land Act 1998*, art 39(1)(iv).
- 41 *Land Act 1998*, art 76(1) and (2).

- 42 *Land Act 1998*, art 42.
- 43 *Land Act 1998*, art 7(6), art 9(6), art 13(7).
- 44 *Ibid.*
- 45 Ministry of Lands, Housing and Urban Development, above n 33, 24
- 46 *Ibid.*
- 47 *Ibid.*
- 48 Article 88(1).
- 49 C. Toulmin, 'Securing Land and Property Rights in Sub-Saharan Africa: the Role of Local Institutions' in World Economic Forum, *Securing Land and Property Rights in Africa: Improving the Investments Climate Global Competitiveness Report* (2005-06) 34.
- 50 Justice, Law and Order Sector (JLOS), *Final report on the integrated study on land and family justice* (2008) 101, Oxfam UK <[http://www.oxfam.org.uk/resources/learning/landrights/downloads/land\\_and\\_family\\_justice\\_uganda.pdf](http://www.oxfam.org.uk/resources/learning/landrights/downloads/land_and_family_justice_uganda.pdf)> at 12 April 2011.
- 51 *Ibid.*
- 52 International Council for Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009), 82.
- 53 E. Harper, *Customary Justice: From Program Design to Impact Evaluation*, IDLO (forthcoming 2011).
- 54 The targeted audience included local Justice, Law, Order Sector District Coordination Committee members, technical and political officials from the local government, traditional leaders, religious leaders, and other civil service organizations operating in the areas and with an interest in land matters (ULA Report on the Lobby and Advocacy Meetings, 17-21 May 2010 (on file with author)).
- 55 In Amuru District, one community focus group meeting was held with both men and women. After this first community focus group meeting, it was decided that holding two community meetings — one for men and one for women — might encourage more women to participate and contribute freely to the discussion. Therefore, in the two other districts, Apac and Katakwi, separate community focus groups were held. The exact number of participants in each focus group ranged from 12 to over 60 participants.
- 56 In summary, 26 interviews were conducted with traditional authorities and local leaders (10 women, 16 men); and 28 interviews were conducted with community members (18 women, 10 men).
- 57 World Bank, *Northern Uganda Land Study: Analysis of Post Conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement Issues and Lesson: Acholi and Lango Regions* (2008) ii.
- 58 Most tribes in Uganda are patrilineal; therefore, when land is passed down from one generation to the next, custom dictates that it is passed from father to son (MLHD, above n 33, 15).
- 59 Interview with G-2 (Amuru, Uganda, 5 July 2010).
- 60 Interview with V-8 (Apac, Uganda, 8 July 2010).
- 61 Interview with V-1 (Katakwi, Uganda, 9 July 2010).
- 62 A survey by Synovate, a research organization, showed that the judiciary was second last among institutions that the Ugandan people trust (see R. Makuma, 'Smiling at Trouble', *The Independent*, (Uganda) 19 July 2010, *The Independent* <<http://www.independent.co.ug/index.php/reports/special-report/71-special-report/3205-smiling-at-trouble->> at 15 April 2011).
- 63 Interview with V-1 (Amuru, Uganda, 5 July 2010).
- 64 Interview with V-2 (Amuru, Uganda, 5 July 2010).
- 65 Interview with G-4 (Amuru, Uganda, 5 July 2010).
- 66 There are certain questions however, over the extent to which the courts put into practice statutory provisions that prohibit discrimination against women in terms of their access to and ownership of land (C.I. Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Review*, 381).
- 67 Interview with S-3 (Amuru, Uganda, 5 July 2010).
- 68 Interview with G-1 (Katakwi, 9 July 2010). Leaders also reported that they did not have the money to properly conduct site inspections (i.e. transport funds, money for gumboots) and that they lacked the resources such as stationery to adequately record their findings. Some leaders complained about not getting paid.
- 69 Interviews were conducted with key informants representing different arms of the formal justice sector (i.e. magistrate judges, legal advocates, bureaucrats from the ministry of land) to better understand the perceived advantages and disadvantages of such a move.
- 70 United Nations General Assembly, *Legal Empowerment of the Poor and the Eradication of Poverty* (13 July 2009) UN Doc A/64/133, para 3.
- 71 M Radin, 'The Pragmatist and the Feminist' (1990) 63 *Southern California Law Review* 1699, 1707.
- 72 *Ibid.*; also note that "[p]ragmatism is a way of understanding our simultaneous commitments to optimism and pluralism, to concrete empiricism and principles, to an incomplete and dynamic universe and to the possibility of perfection that our ideals impel us unceasingly to hope for and work for." (*Ibid.*).
- 73 *Ibid.* 1700.
- 74 Deininger, above n 25, 12.
- 75 Rukare, above n 20, 115.
- 76 *Ibid.* 116.





## The Community Land Titling Initiative: An Investigation into the Protection of Customary Land Claims

Rachael Knight\*

### Executive summary

In the current context of growing land scarcity in Africa, securing and enforcing the land rights of rural communities is becoming increasingly urgent. In particular, efforts to protect common and reserve areas are critical, as common properties and village lands not under cultivation are often the first to be allocated to investors, elites and state development projects. Various African nations have passed land, forestry and natural resources laws that make it possible for rural communities to register their lands as a single legal entity and operate as decentralized land administration and management bodies. This strategy has the power to protect the full extent of community lands according to customary paradigms and boundaries. However, due to myriad political, financial and capacity constraints, these laws are often not widely or successfully implemented. Moreover, very little is known about how community land titling processes impact intra-community dynamics, and how the land claims of vulnerable groups within communities are affected by such processes.

This chapter discusses findings from a two-year intervention entitled the “Community Land Titling Initiative” undertaken in Liberia, Mozambique and Uganda. The intervention’s goal was to gather information on: i) the type and level of support that communities require to successfully complete community land titling; and ii) how to best facilitate the protection of vulnerable groups’ land rights in the context of decentralized land management and administration. To investigate these issues, groups of communities were provided with different levels of legal assistance while they followed their nation’s legally-mandated process of community land titling. All groups’ progress was monitored, and the results were compared and analyzed to understand how the international development community, governments and national non-government organizations might better facilitate the implementation of community land titling legislation.

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## Introduction and background

In many African nations, the state retains the ultimate title to land. Individuals and groups may hold rights of use or possession over land, but do not enjoy actual ownership. Within this context, land tenure can be defined as the way that land is held by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims can be formal (state-based), informal, customary, or religious in nature and can include leasehold, freehold, use rights and private ownership. The strength of one's land rights may hinge on national legal definitions of property rights, local social conventions or other factors. Land tenure rights may include the freedom to: occupy, use, develop or enjoy land; sell or bequeath land; lease or grant use rights to land; restrict others' access to land; and/or use natural resources located on land.

'Land tenure security' describes the extent to which land users can be confident they will not be arbitrarily deprived of the bundle of rights they enjoy over particular lands. It is the reasonable guarantee of ongoing land rights, supported by a level of certainty that such rights will be recognized by others and protected by legal and social remedies if challenged. Legal systems — state, customary or religious — define the rights and obligations of individuals, families and communities with respect to land and determine how land rights are to be administered and enforced. How and whether the relevant legal system acknowledges one's land rights is the basis for land tenure security.

Secure land rights are a necessary precondition to safeguarding the livelihoods, food production and economic survival of the poor.<sup>1</sup> Enhanced tenure security encourages and promotes increased household investment in land and buildings; people who may be evicted at any time are less likely to use local natural resources sustainably or invest in their homes, villages or neighborhoods. Secure land rights, by contrast, provide incentives to maintain and conserve natural resources, plant long-term crops and contribute to local development. Over the long term, such investment can translate into improved health and living standards. Land tenure security is also often a precondition to accessing credit; banks are less likely to lend to those in physical possession of land but with no formally recognized rights to that land.

In developed countries, individual land titling has been largely successful in facilitating high levels of tenure security. The rights recognized under such frameworks are exclusionary and fixed both geographically and temporally. Arguably, individual land titling is less suitable in contexts where much of the land is held communally under customary land administration and management systems. These systems generally comprise a complex mesh of overlapping land ownership, use and access rights held by individuals, families, clans and entire communities; land rights are often considered to be held not only by all present occupants, but also by all past and future generations. Land holdings are also not always geographically fixed: in rural areas, for example, it is common for users to employ dynamic cultivation patterns (necessitated by factors such as fluctuations in rainfall or soil fertility) that change by season and year. Finally, community members often rely on common resources such as forests, grazing lands and water sources for their livelihoods and daily needs. Under customary legal paradigms, all community members are generally considered the co-owners or rightful users of such land.

In such contexts, the question of how to best promote tenure security raises complex issues. Titling land held by families and communities under customary law is the most obvious means of protecting communities' land rights from encroachment. However, individual land titling schemes have generally proved inadequate to protect the full range of usufruct rights typical of customary land management systems described above. Individual titling is generally not designed to take into account communal or secondary rights over land, such as rights of way, common pool resource claims, or the migratory routes of nomadic groups and hunter-gatherers. As a result, these rights remain unrecorded and may be lost. In some cases, individual titling schemes have led to increased inequity and disenfranchisement of vulnerable groups. A particular concern is the loss of women's land rights where formal title documents are issued only in the name of (usually male) household heads.

While always a concern, the issue of how best to protect the land holdings of rural communities has been brought to the fore in recent years due to increasing land scarcity resulting from population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and multi-national corporations which are increasingly seeking to acquire large tracts of land for tourism-related development, biofuel projects or agricultural production, among other uses. In many cases, governments facilitate land grants with a view to attracting investors that may bring commercial, agricultural or industrial growth and contribute to improvements in gross domestic product (GDP) and living conditions. In other situations, officials may transfer land illegally and/or for personal profit. Because most land in African nations is owned by the state, communities have little power to contest such grants. Moreover, the land appropriated is often held by rural communities that operate under customary law and have no formal legal title.

In these situations, titling land held by families and communities under customary law may be necessary to protect land rights from encroachment. A possible method is to allow communities to register their lands as a whole by reference to customary boundaries, and then empower them to control and regulate intra-community land holdings and usage.

Titling land in this way can yield several benefits. First, since community land titling facilitates the recognition of communal, overlapping and secondary land rights, it may provide particular protection to poor and vulnerable community members who do not have their own land. Second, it has the potential to safeguard an entire community's land at once, hence representing a faster and more cost-effective means of protection than individual titling. Third, community land titling may help to foster local economic growth and promote sustainable natural resource management.

Community land titling is not without its dangers, however. Under such systems, land management and administration are necessarily devolved to the communities themselves. Yet, growing land scarcity and increased land competition have been shown to exacerbate local power asymmetries and effect a breakdown in the customary rules that govern land holdings and the sustainable use of common resources. As a result, there is a heightened risk that vulnerable rights holders, such as widows, orphans, pastoralists, tenants and people living with HIV/AIDS, may lose land to land-grabbing relatives, in distress sales, or in boundary claim disputes with more powerful community members. A further issue is that, although titling provides opportunities for communities to sell or rent land (or the natural resources on such lands), due to power and information asymmetries, communities are in a poor bargaining position to negotiate fair and equitable contracts with the state or private investors.

While various African governments have passed legislation that facilitates community land titling, in most cases, these laws are not being fully or well implemented. Reasons for this include: poor community awareness of their rights; insufficient government capacity; overly complex and bureaucratic processes; opposition by government and the elite (who may lose their power and authority to control land); the prohibitive costs of and time involved in titling and registration processes; the high level of technical expertise and resources involved in land surveying, titling and registration; and the inter- and intra-community disputes that arise during the process of determining community boundaries.

If the potential benefits of community land registration are to be realized, steps must be taken to overcome these difficulties. Steps must also be taken to reduce or eliminate power and information asymmetries and increase communities' negotiating power with parties interested in purchasing, renting or utilizing community-held lands or partnering with communities for integrated development. Finally, where land management and administration are devolved to the community level, safeguards need to be set in place to ensure that the land rights of vulnerable groups are protected and that local elites do not engage in corrupt or exploitative practices.

## 1. Customary land tenure and legal pluralism

### 1.1 Customary land tenure

In rural areas, particularly where state administration and infrastructure are absent or inaccessible, customary legal systems are often the primary means of enforcing community rules and resolving land-related conflicts.<sup>2</sup> It is impossible to comprehensively define the nature of these systems. First, the governing principles and rules are not static but constantly evolving in response to cultural interactions, socio-economic and demographic shifts, political processes and environmental change. Second, customary systems are unique to the communities in which they operate. It may be argued that the reality of the custom practiced can never be known by someone not living and functioning within its precepts.<sup>3</sup> However, while the custom regulating land use and management varies between and within countries, provinces and villages, a number of common characteristics can be identified.

Scholars generally agree that the customary land use and ownership patterns of the rural poor comprise a complex mesh of overlapping and temporal claims, some of which are held privately by families and lineages, and others held communally to advance the health, prosperity and religious practices of the greater community.<sup>4</sup> Other areas are left open for the use of future generations, or to accommodate shifting patterns of agriculture due to fluctuations in rainfall, crop rotation, soil fertility and changing community needs. Land rights are primarily derived from membership to a given group or allegiance to a specific political authority. Chiefs and sub-chiefs (or headmen) must generally approve new grants of land within the community, clan or tribe, but families may sub-grant their lands to other individuals or families through inter-familial arrangements similar to leasing or sharecropping.

Within the framework of customary land rights, there may be a range of secondary rights. These include rights of way; rights to use natural resources located on lands shared by the community or by more than one community; seasonal access to particular areas (i.e. by pastoralists or hunter-gatherers whose customary rights include yearly passage through, visits to, or use of land and natural resources considered to be within the bounds of another sedentary community); and rights to enter into sacred areas for religious practices.<sup>5</sup>

Drawing on the work of various anthropologists, sociologists and other African scholars, Benjamin Cousins lays out various constructs as representative of current pan-African customary land management systems:

Land rights and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks [and various levels of 'community']; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities'); [land rights are inclusive rather than exclusive in character, being shared and relative]. [They] include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water ... Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases). ... Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).<sup>6</sup>

Customary land management and administration systems may also reflect and be shaped by three factors. First, intra-community and intra-family power relationships: the socially embedded nature of customary land rights means that the strength of one's land claims may be influenced by various cultural and societal factors including intra-family dynamics, an individual's place in the community, or his or her capacity to navigate various relationships and social forces.<sup>7</sup>

Second, ecological context: rainfall, temperature, soil fertility and climate may dictate small-scale farmers' use of risk aversion strategies, such as shifting cultivation patterns, diversified plots, and leaving fields to lie fallow. Depending on the type of livelihood practiced and the kinds of crops planted, a household may require access to and control over different types of land and resources over time.<sup>8</sup>

Third, the dominant livelihoods practiced by a community: the manner by which communities hold and manage land will often be influenced by dominant cultivation practices. Pastoralists, sedentary small-scale farmers and hunter-gatherer populations, for example, will necessarily have different land claims, use patterns, and rules governing land use. In certain circumstances and at particular times, therefore, one piece of land may be shared by groups practicing a variety of livelihoods, and thus its administration will be subject to overlapping customary paradigms. According to Cotula: "For a given piece of land, customary systems may cater for multiple resource uses (e.g. pastoralism, farming, fishing) and users (farmers, resident and non-resident herders, agro-pastoralists; women and men; migrants and autochthones; etc.), which may succeed one another over different seasons."<sup>9</sup>

Finally, it is critical not to conflate the term 'customary' with 'communal'. Customary refers to the *system* under which land is held, while communal is the *way* in which *some* of that land is used. Alden Wily explains: "Customary domains are territories over which the community possesses jurisdiction and often root title; ... [within such domains] a range of tenure arrangements typically apply."<sup>10</sup> In contrast, common properties are "properties which are owned by all members of that community in undivided shares .... [claims to such properties are] defined by virtue of membership to the group."<sup>11</sup>

## 1.2 Legal pluralism and tenure security

As noted above, in some rural contexts, communities administer, manage and transact their lands completely within the bounds of customary paradigms. Where one or more customary justice system operates alongside the state justice system, a situation of legal pluralism exists.<sup>12</sup>

The operation of parallel systems that employ different rules and legal paradigms can lead to inequity, undermine the rule of law and foster land tenure insecurity. Individuals may be encouraged to forum shop between such systems in order to obtain the most advantageous outcome. Moreover, where there is no hierarchical relationship or measures to promote consistency in outcomes between formal and customary systems, uncertainty and lack of predictability may result. This may lead to opportunistic behaviours and lawlessness, and weaken the capacity of either system to resolve conflicts and protect rights effectively.<sup>13</sup>

Legal pluralism, combined with weak access to justice, have particularly negative consequences for the rural poor's capacity to protect and enforce their land rights. When the poor cannot access the formal legal system, they are effectively confined to customary fora. If the formal legal system does not recognize customary rules relating to land holdings and transfer, the poor have little protection against land speculation by elites, investors and state compulsory purchase processes. While customary systems may provide a high measure of tenure security within a community, they are often insufficient to protect the poor's rights in the event of a violation by more powerful, external actors who may not only possess the wealth and knowledge needed to access the formal system, but also manipulate this system to their advantage.

## 2. Current trends impacting African land tenure security

As explained above, growing land scarcity and associated increases in the value of and competition over land have led to an overall weakening of the land rights of rural communities. Various forces are contributing to this trend. First, population growth, climate change, environmental degradation and

land speculation by elites are decreasing the amount of fertile, arable land available for allocation within families and to community members. This is particularly the case in urban and peri-urban areas close to main roads, markets, schools, hospitals and other infrastructure.

Second, governments are increasingly granting large land concessions to investors for agro-industrial enterprises, hunting and game reserves, ranching, tourism, and forestry and mineral exploitation.<sup>14</sup> In some cases, the aim is to foster commercial, agricultural or industrial growth to improve national GDP and living conditions. In other cases, officials transfer land illegally and/or for personal profit. The land appropriated is often held by rural communities that operate under customary law and have no formal title that could be used to contest such grants.<sup>15</sup> For example, pastoralists often require large tracts of land for herding livestock. Governments at times argue that since pastures have low food production levels, it is in the public interest that they be converted to commercial farmland.

Third, increases in land values create incentives for individual rights holders to sell land for personal gain in violation of either statutory laws (for example, where land is sold by one family member without the knowledge or permission of other rights-holders), or customary rules (for example, local leaders redefining their customary stewardship of land as 'ownership' rights, and subsequently selling common lands for personal profit).<sup>16</sup> In this context, individuals who have knowledge, power, access to decision-makers and wealth fare better in the outcome of resource struggles. Such asymmetrical relationships are also embedded in community-level social relations, including gender dynamics within families, class relations between individuals within communities, and cultural differences between ethnic groups. In practice, this means that vulnerable groups and those with weaker land claims including women, pastoralists, tenants,<sup>17</sup> people living with HIV/AIDS and other marginalized groups are at the greatest risk of losing land. A prime example is rights holders terminating the use rights of tenants, often unilaterally and sometimes violently and without notice, in order to sell or rent land to richer families or urban investors.<sup>18</sup> There is also evidence of 'distress sales' among families living with HIV/AIDS: as primary income earners fall sick and are unable to work, and as money is needed for medicines and funeral expenses, families are forced to sell land (often below market value).<sup>19</sup>

These trends have in some contexts precipitated a breakdown of the customary rules that govern the equitable and sustainable use of common resources — rules that have functioned in the past to protect the land rights of vulnerable groups.<sup>20</sup> Mathieu et al write:

These new land tenure practices ... reflect a period of uncertainty, a time of "hesitation" as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and the binding element in social relationships.<sup>21</sup>

For example, while scholars disagree on the relative strength of women's land claims under customary systems,<sup>22</sup> the consensus is that as land becomes scarcer, customary safeguards concerning women's rights to land are being eroded. Evidence has emerged that, when land is scarce, customary leaders and families move away from more flexible systems of land holding (which take into consideration women's needs to support themselves and their children) to more rigid interpretations of women's land claims. In some areas, families are reinterpreting and rediscovering customary rules that undermine women's land rights.<sup>23</sup> In short, despite the strength and inherent negotiability of kinship-based land claims, in the context of land commoditization, women often lose their bargaining power among their husbands' kin and within their own families.<sup>24</sup> Woodhouse notes: "When competition for land intensifies, the inclusive flexibility offered by

customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful.”<sup>25</sup>

Further, as land belongs to the state in much of sub-Saharan Africa and therefore may not be conventionally bought and sold, increases in land value have led to the evolution of unregulated black and ‘grey’ land markets. These markets facilitate the transfer of land in violation of either statutory or customary rules through a range of financial transactions — from rental agreements, to sharecropping, to outright sale and purchase.<sup>26</sup> Such illicit land transfers fail to provide adequate protection both to buyers and to families of sellers, who may not be aware of or who may be adversely affected by the sale of their lands. Moreover, they are rarely accompanied by legal proof of purchase or ownership, and there is often uncertainty concerning the terms and conditions of the exchange. Some land sellers take advantage of the covert nature of the proceedings to engage in fraudulent practices such as making multiple sales of the same land or selling family-held land without the consent of other rights-holders.<sup>27</sup>

### 3. The limitations of individual land titling within rural customary contexts

Various African nations have experimented or are currently experimenting with programs of systematic individual land titling and registration. The rationale — originally put forward by the World Bank and later re-emphasized by the Peruvian economist Hernando de Soto<sup>28</sup> — has been that individual titling can safeguard the land rights of the poor, provide a mechanism through which small-scale farmers can use land as collateral for credit, and foster commercial enterprises by bolstering investor confidence in national land tenure security. Such efforts began in post-colonial Kenya and continue today in Uganda, and the United Republic of Tanzania, among others.

Experience has demonstrated, however, that individual land titling and registration schemes do not consistently lead to increased prosperity for the poor and may even contribute to greater resource asymmetries, loss of land, and deprivation of use rights. Specifically, meta-analyses of individual titling and registration initiatives have shown the following:

- Powerful individuals can use their wealth, knowledge and/or influence to acquire unregistered or ‘free’ land, exacerbating power concentrations and class distinctions.
- Formal land titling and registration may encourage ‘distress sales’ in times of hunger and extreme poverty.
- Structural obstacles such as the location of government offices, complex administrative procedures and the costs associated with land registration procedures can limit the participation of disenfranchised groups, and unless specific measures are taken, ethnic minorities and women may be excluded from titling efforts.
- Fear of land taxation or of compulsory government land acquisition (facilitated by land registration) dissuade the poor from registering their land claims.
- Where land rights are registered under the name of the male head of household, women’s land holdings may go unrecorded and be lost.
- Where land registration fails to record communal or secondary land use rights such as rights of way or common pool resource claims, these rights can be lost.
- Where land registration does not record the migratory routes of nomadic groups and hunter-gatherers, or the overlapping and shared use claims of pastoralists and sedentary communities, these rights can be lost.
- Due to the complexity and high cost of cadastral mapping, combined with insufficient government capacity, mapping has often gone unfinished, undermining tenure security.
- Where the costs of titling land are prohibitively expensive, landholders (particularly the poor) can be encouraged to engage in informal, unrecorded and thus unprotected land transactions.<sup>29</sup>

In response to such findings, the World Bank and other multilateral development agencies have slowly moved away from mandatory titling and registration schemes to embrace the potential of



customary law to mediate land relations at the local level. The World Bank actively supports efforts to decentralize land administration systems and has publicly advocated a greater role for customary land tenure practices.<sup>30</sup> This move follows recognition that if they are to be effective, efficient and considered socially legitimate, land tenure systems must be grounded in local and traditional land management practices. Policy-makers also increasingly understand that reliance on customary administration and management practices is often a simpler and less conflict-prone route to the eventual titling, registration and privatization of land ownership (which the World Bank still views to be a precondition for investment and economic growth). This approach is appealing to development actors more broadly because it is deemed consistent with the strengthening and democratization of local politics and the promotion of bottom-up initiatives. The World Bank Policy Review Report (2003) holds that:

Customary systems of land tenure have evolved over long periods of time in response to location-specific conditions. In many cases they constitute a way of managing land relations that is more flexible and more adapted to location-specific conditions than would be possible under a more centralized approach ... [and] in a number of cases, for example for indigenous groups, herders, and marginal agriculturalists, definition of property rights at the level of the group, together with a process for adjusting the property rights system to changed circumstances where needed, can help to significantly reduce the danger of encroachment by outsiders while ensuring sufficient security to individuals.<sup>31</sup>

More recently, the World Bank and other bilateral and multilateral stakeholders have recognized the potential risks and adverse effects of the new trend of governments granting large-scale land concessions to foreign investors, including "displacement of local populations, undermining or negating of existing rights, corruption, reduced food security, environmental damage in the project area and beyond, loss of livelihoods or opportunity for land access by vulnerable groups and women, nutritional deprivation, social polarization and political instability".<sup>32</sup> In response, the World Bank, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) issued seven Principles for Agricultural Investment that Respect Rights, Livelihoods, and Resources.<sup>33</sup> Principle 1 is to ensure that existing rights to land and associated natural resources are recognized and respected. These agencies suggest that:

It is important to recognize that there are few areas truly 'unoccupied' or 'unclaimed,' and that frequently land classified as such is in fact subject to long-standing rights of use, access and management based on custom. Failure to recognize such rights, including secondary ones, will deprive locals of key resources on which their wealth and livelihoods depend ... Recognition of rights to land and associated natural resources, together with the power to negotiate their uses, can greatly empower local communities and such recognition should be viewed as a precondition for direct negotiation with investors. Specific attention to land rights by herders, women, and indigenous groups that have often been neglected in past attempts is critical to achieving a fair, inclusive outcome.<sup>34</sup>

In nations where rural communities hold, administer and manage land according to custom, the questions then become: how to best recognize existing customary land claims and how to best ensure that customary land rights are respected, i.e. successfully claimed and protected? Community land titling may provide an efficient, effective and equitable answer.

#### 4. Community land titling

In recent years, several African states have drafted laws that place custom at the centre of rural land administration and management. The impetus for such measures may have been to, *inter alia*:

adopt laws that derived from a genuinely African perspective; extend state influence to the customary domain while harnessing the governance structures already in place; strengthen the land claims of the poor; find efficient, cost-effective models for rural land management in post-conflict and resource-scarce contexts; and foster national growth and economic development. Ghana and Botswana were the first nations to undertake this effort soon after their independence, and since then, a number of countries including Namibia, Niger, Uganda, Burkina Faso, Mali, Lesotho, Malawi, Swaziland, Mozambique, the United Republic of Tanzania, South Africa, and others have followed.<sup>35</sup>

In several nations, laws make it possible for rural communities to register their lands as a whole according to customary boundaries and formalize communities' land administration and management practices.<sup>36</sup> Under such laws, communities may control, regulate, receive and distribute benefits related to the common lands.<sup>37</sup> In some countries, land laws designate the community as the lowest unit of local government, both downwardly accountable to community members and upwardly accountable to the district government. Under other laws, communities may be required to establish themselves as a private legal entity capable of holding collective land rights, or as a body corporate that holds resource rights on trust for the members of their community and can transact with outsiders.<sup>38</sup>

#### **4.1 The benefits and drawbacks of community land titling**

Integrating statutory and customary landholding systems through community land titling can yield significant benefits. First, it is a means of enhancing the tenure security and safeguarding the livelihoods of rural communities. By facilitating the recognition of communal, overlapping and secondary land rights, it provides particular protection to poor and vulnerable community members who may not have their own land. Moreover, in areas where much of the land is held communally according to custom and includes common resources such as forests, grazing lands and water sources that are critical for community members' survival and livelihoods, titling or registering the community land as the 'meta-unit' (or documenting the 'tenorial shell') may be the most efficient and equitable means of protecting rural communities' land claims. Importantly, it has the potential to safeguard an entire community's land at once, and may therefore be a faster and more cost-effective means of tenure protection than individual titling.

Second, community land titling can foster local economic growth and promote sustainable natural resource management. Community lands often have high income-generating potential in terms of their natural resources and real estate or rental values. Once land is titled and legally recognized as belonging to a community, it may then choose to capitalize on such potential for the benefit of all members. Titled land may also be used as collateral for loans to communities for income-yielding or development-related projects.

Third, land laws that allow for community land titling and that devolve land administration and management to the community level are often designed to protect community land claims and create tenure security while allowing for investment in rural areas, ensuring that development will be sustainable, integrated, and beneficial for local communities. For example, land laws in Mozambique and the United Republic of Tanzania establish that investors who wish to acquire land for development projects must negotiate with the communities who hold the ownership or use rights over that land and enter into rental or profit-sharing agreements in return for land use. Such arrangements have the potential to protect community land holdings and livelihoods, facilitate investment-related economic growth, and boost government tax revenues. Further, it is expected that where communities freely enter into such agreements and benefit from an investor's presence, they will be less inclined to mount legal challenges (clogging up the legal system) or engage in acts of resistance such as sabotage.<sup>39</sup>

However, community land titling efforts, if not carefully performed, have potential drawbacks and dangers. As described above, under systems of community land titling, land management and

administration are necessarily devolved to communities themselves. When land administration is placed at the local community level, without proper oversight and supervision by government officials or the establishment of intra-community safeguards, there is potential for elite capture, corruption and the exploitation of vulnerable groups. In such situations, land management associations may be dominated by local power-holders, and community decisions relating to land titling and management may entrench class differences or perpetuate discriminatory practices.<sup>40</sup> A key risk is that local leaders' negotiations with investors may favour these leaders above community interests, and the economic benefits accrued may not be distributed equitably. Moreover, community members with more tenuous land claims, particularly women, widows, orphans, long-term tenants and pastoralists, are at increased risk of having their rights to land violated or losing land.<sup>41</sup>

The high vulnerability of women's land claims is of particular concern. As described above, in some contexts women may have little decision-making power within their family or be unable to contest violations of their rights through customary institutions. Even when women's land rights are protected under statutory laws, they may face multiple barriers to claiming and protecting these rights. First, customary dispute resolution systems may not uphold statutory provisions. Second, women may lack the economic independence and resources necessary to pursue a legal action through formal channels and/or be at risk of social or physical sanction for engaging non-customary processes. Finally, if women do seek to defend or claim their land rights through the formal state system, they may face discrimination or be at increased risk of exploitation.

## **4.2 Poor implementation of community land titling laws**

While several countries have passed legislation facilitating community land titling, in most cases these laws have not been well or widely implemented. For example, since the *Uganda Land Act 1998* (chapter 227) was passed in 1998, not one community has successfully applied for and received a freehold title to Certificate of Customary Ownership for their community lands.<sup>42</sup> In Liberia, no rural community has secured title to their lands under the *Public Lands Law 1972-1973* (Title 34 of the Liberian Codes Revised) since 1988.<sup>43</sup> In Mozambique, although many communities have undergone the legally mandated delimitation process and have been granted a formal 'right of land use and benefit', this has not provided sufficient protection; communities continue to be pressured by local administrators and investors to agree to private ventures being built on their lands without equitable rent, partnership status or profit shares. Some of the reasons for poor implementation are explored below.

### **4.2.1 Procedural complexity and weak institutional capacity**

Legislative and procedural requirements may be inconsistent with the realities of community life or require evidence that customary rights holders cannot provide. In some countries, for example, land claimants need to demonstrate visible proof of use of and investment in land, such as planted trees, standing crops, or residential structures. This is difficult for pastoralists whose livelihoods require them to range over vast areas, upon which they often do not leave permanent proof of their presence or claims. It may also be difficult for agricultural communities that maintain undeveloped forests for hunting and gathering, and fisherfolk communities who rarely mark the beachfronts that are integral to their livelihoods and survival.

Second, where laws prescribe complex and multifaceted claims procedures, there is a higher likelihood that titling applications will not be processed correctly or within the legally mandated time limits. This is exacerbated in contexts where titling processes involve the approval of multiple government actors, ministries, or departments. For example, in Liberia, the current legal process for granting rural communities deeds for their lands provides a series of strict one-year time limits that communities must adhere to, while also mandating that the application must pass through the President's office twice, that the President must issue an Executive Order approving the land survey, that an application must go back and forth from the county headquarters to the national capital more than twice, and that officials from three different government agencies must sign their approval of the application. Alternatively, loopholes that establish one government body as

responsible for issuing land titles to private investors and another government body for issuing titles to rural communities (as in the United Republic of Tanzania) or that allow for more than one unified, integrated land cadastre may result in the allocation of land to investors already claimed by rural farmers.

Finally, the implementation of community land titling legislation may be undermined by a lack of state resources (particularly funding to support titling schemes and inadequate access to necessary information such as computerized maps, vehicles and technical equipment), staff capacity (caused by understaffing and lack of training, particularly in new laws and legal procedures) and systemic failures (such as excessive centralization of administrative processes and overlapping jurisdictions).

#### 4.2.2 Government corruption and emphasis on investment

Community land titling laws may be manipulated by those in power to secure their access to or control over valuable land and resources. Corruption may mean that services that should be available to all are converted into 'favours' based on kinship, personal networks or political affiliation. At its most extreme, government officials may accept bribes or funnel monies earmarked for development initiatives into their own pockets. Corruption also frequently occurs at local-level state offices where administrators require unauthorized payments for their services as a means of supplementing inadequate state incomes.

A further issue is that while titling may provide opportunities for communities to negotiate with private enterprise and investors to enter into business partnerships, or to sell or rent their land (or the natural resources on such lands), due to power and information asymmetries, communities are often in a poor bargaining position to negotiate fair and equitable contracts. Communities may be unaware of their land rights, the market value of their land or the profits that investors may derive from local natural resources. They may also receive inadequate or incomplete information on the environmental or social impact of the investor's proposed activities. Finally, communities may be subjected to intimidation by investors, state officials or customary authorities and/or forced to sign agreements adverse to community interests.

For example, research conducted in Mozambique into the nature of community-investor negotiations revealed instances where consultations consisted of only one meeting lasting a few hours, with no time provided for community members to discuss the matter among themselves.<sup>44</sup> Further, the borders of the land to be conceded were rarely walked or otherwise physically verified.<sup>45</sup> Calengo, Monteiro and Tanner conclude that such consultations are conducted merely to give the "process a veneer of legitimacy by showing that local rights are apparently respected".<sup>46</sup> They note that communities may also be unaware of their right to reject a proposed agreement, feel pressure from District Administrators to consent, or be "persuaded by authorities that all investment is good, or ... told that they have little choice as 'the land belongs to the State'".<sup>47</sup>

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A related problem is that officials responsible for interfacing with investors often have little or no downward accountability to rural communities. They may be directed by their superiors to promote national development and therefore be more focused on fostering investment and economic growth than on ensuring that communities are equitably compensated for the loss of their lands. With respect to Mozambique, Calengo, Monteiro and Tanner found that, in many cases, "it is clear that officials see their job as helping investors get the land they need, and do not accept that local rights are 'real' in the sense that they give locals secure private tenure that cannot simply be taken away."<sup>48</sup> Similarly, Durang and Tanner have found that:

While the consultation should result in some compensatory benefit for local people, this is very much a secondary objective for the land administration services compared with the need to secure a community 'no-objection' and give the investor his or her new [right of land use and benefit within the time limit of] less than 90 days.<sup>49</sup>

### 4.2.3 Lack of political will

Community land titling laws necessarily devolve powers of land administration and management from central and mid-level officials to rural communities, mandating the transfer of authority and control over (often) increasingly valuable and sought-after land. The executive and administrative officials whose powers have been curtailed often resist such change. Ouédraogo writes:

Nor should we overlook the lack of political will shown by the administrative authorities in implementing legislation favourable to local land rights. Either no practical steps are taken to implement the law or, worse still, the administrative — and even judicial — authorities ... are sometimes persuaded to take decisions which fly in the face of the law.<sup>50</sup>

Commenting on this phenomenon in Uganda, McAuslan argues that: “[a]ny fundamental changes in [land] laws, particularly changes designed to remove powers from ... public officials, are likely to be opposed by those officials unless they can see some specific benefits flowing to them from the reforms.”<sup>51</sup> In Uganda, the *Land Act 1998* grants ownership over all customarily-held lands to individuals, families and communities, regardless of formal documentation, and vests responsibility for land management in District Land Boards that are “not [to] be subject to the direction or control of any person or authority.”<sup>52</sup> According to McAuslan, government officials who previously controlled such land and registration processes felt marginalized and obstructed implementation of the law:

Overnight, officials were stripped of their powers of land management, which were vested in district land boards. Even worse, the inherent powers of land management that are inseparable from land ownership also disappeared from the public domain and became vested in millions of peasants and urban dwellers. Perhaps most shattering of all was that the loss of powers was accompanied by loss of control over resources — funds hitherto available to the centre were to be allocated to the districts. What, then, was to be the future role of the officials, and what access would they have to public and donor funds?<sup>53</sup>

Something similar has been observed in Mozambique; Negrao found that successful implementation of the *Land Law 1997 (Lei de Terras)* was obstructed by “resistance from employees in the title deeds offices to accept the new law ... [because] they would no longer have the monopoly in the decision-making regarding land adjudications.”<sup>54</sup>

### 4.2.4 Lack of legal knowledge and poor access to justice

The potential beneficiaries of community land titling may have only a vague conception of the legal constructs that exist beyond the customary rules governing social relations within their communities. Poor awareness of their land rights may stem from a variety of practical and social factors. First, information dissemination on applicable laws may not extend to rural populations. Where information is disseminated, laws may not be translated into local dialects or include alternate forms of media designed for illiterate populations. Further, laws may contain technical language that is difficult for persons without formal or legal education to understand and follow. Finally, where information on the applicable law is made available, it may not specify rights and obligations, or provide populations with insight into how to claim, defend and enforce such rights.

Even when potential beneficiaries of community land titling are aware of their rights, they may have difficulty accessing and enforcing them. First, administrative and legal processes are often unaffordable for the rural poor. There may be separate fees associated with each step of the administrative process, including obtaining necessary documents, making photocopies and filing applications. Rights-holders also must bear the costs of travel to courts or government offices, the loss of income that may result from being absent from one’s livelihood while pursuing an application, and, in the case of land titling, the high cost of surveyors’ fees. A second factor is time. Administrative processes can be lengthy, and the time required to overcome bureaucratic obstacles

may be difficult to predict. Moreover, people living in poverty may not have time to invest in activities beyond those required for day-to-day survival. Where government offices are located in urban centers, time and cost constraints converge to prevent the rural poor from accessing them. Third, high rates of illiteracy among the rural poor decrease their ability to navigate administrative procedures, which are often based on written documentation and the completion of relevant forms. Likewise, individuals who do not speak the official national language may be unable to successfully complete the necessary administrative processes. Finally, legislation may prescribe complex processes that are difficult for the poor and less-educated to navigate or that require evidence that customary rights holders cannot provide.

## 5. The community land titling initiative

### 5.1 Research methodology

To generate new knowledge concerning the possibilities and limitations of community land titling, an initiative was launched to gather information on the type and level of support that communities require to successfully complete community land titling processes, and that which facilitates the best protection vulnerable groups' land rights in the context of decentralized land management and administration. The intervention was implemented between September 2009 and March 2011 in 60 communities in Uganda, Liberia and Mozambique. This work was undertaken in partnership with Land and Equity Movement in Uganda, the Sustainable Development Institute in Liberia, and *Centro Terra Viva* in Mozambique.<sup>55</sup> In each of these countries, although legislation facilitating community land titling is in place, it has either not been widely implemented, or governments' promotion of international investment in rural areas has resulted in community land rights remaining at risk.

The research methodology employed involved providing groups of communities with different levels of legal assistance with respect to community land titling, and then observing these communities' progress through the various steps outlined in the relevant laws and regulations. In each of the three countries, the 20 communities which requested to participate in the project<sup>56</sup> were randomly assigned to one of four different treatment groups, as described below.

**Monthly legal education and training:** Five communities received monthly three-hour training sessions over a period of 14 months. This training was provided by a field team composed of a lawyer and a community mobilizer/technician. All community members were invited to take part in these training sessions and specific measures were adopted to ensure the participation of women.<sup>57</sup> Country-specific training methodologies were developed to ensure that the information was transmitted in a culturally appropriate manner, taking into account literacy levels and the time and resource constraints of different community members. The training was designed to teach communities about their legal rights and their country's community and titling procedures as well as how to successfully undertake and complete each stage of the community titling process. The training included information on and capacity-building with respect to *inter alia*: national laws on women's land rights, inheritance and natural resource and conservation law; the available legal services and how to access them; the position of customary law within the statutory legal framework; the practical skills required to title lands, boundary harmonization documentation techniques; and conflict resolution skills. Training methodologies employed included role-plays, dramatizations, practice exercises and question-and-answer sessions. The groups also were assigned 'homework' to complete before the following month's meeting related to the step of the process the community was undertaking at that moment.

**Paralegal support and monthly legal education and training:** Five communities in each country received the monthly legal training described above, as well as the added support of two community-based and elected "land paralegals".<sup>58</sup> The paralegals received an initial two-day, in-depth training covering the topics detailed above, plus additional training in meeting facilitation, the inclusion of vulnerable groups, and strategies for aligning customary rights with national laws and

human rights principles, among other topics. Paralegals were required to attend monthly three-hour training sessions with the project field team, during which they reported on their progress, were provided with the opportunity to ask questions and request support, debrief on any obstacles confronted or challenges faced, and receive general support and supervision. The paralegals were also provided with phone credit and encouraged to call and send SMS messages to the legal team with questions on an as-needed basis.

**Full legal support and monthly legal education:** Five communities in each country received the monthly legal training described above, as well as the support of the project lawyer and field team throughout the community land titling process. This support included: assistance during conflict resolution meetings, help with boundary harmonization efforts; assistance drafting and revising community constitutions/by-laws and land and natural resources management plans; and support in the preparation and presentation of the required forms to relevant authorities.

**Control communities:** Five communities in each country were assigned to control groups; these communities attended one meeting where they were provided with copies of their country's land laws and regulations, as well as a guide and other relevant training materials on how to follow the community land titling process. To encourage these communities to go as far as possible through this process, they were advised that should they successfully complete the requisite steps, the project would cover the costs associated with the formal surveying of their lands, which is a near-final step of each country's legal procedures (this particular incentive was created to allow researchers to differentiate financial from procedural obstacles to community progress).<sup>59</sup>

Each community's progress was monitored by: observing and documenting community meetings; observing and recording community interactions with land administrators; recording obstacles confronted and their resolutions; and tracking and documenting inter- and intra-community conflicts.<sup>60</sup> In addition, a baseline survey of 2,225 individuals (covering all three countries)<sup>61</sup> was administered to determine the conditions prevailing in the communities before the titling processes began. A post-service survey was administered to the same respondents at the conclusion of the project. The survey data were supplemented by focus group discussions held at the beginning and conclusion of the project (separately targeting women, community leaders and youth) with the objective of adding narrative content to the close-ended answers in the survey and assisting in the analysis of the baseline survey responses.<sup>62</sup> The objective of these processes was to statistically determine the changes that had occurred during the course of the project and to measure the various impacts of the intervention.

The following overview is not intended to be an exhaustive description of the project's findings. Instead, it gives insight into communities' experiences during their efforts to successfully complete their country's community land titling procedures, as well as some observable impacts of these efforts.

## **5.2 Community processes: Key learnings**

While community land titling procedures varied between the three study countries, there were certain analogous components of the community land documentation processes; in all three nations, communities were required to complete the following steps: i) map-making and boundary harmonization; ii) community constitution and by-law drafting and adoption; and iii) community land and natural resources management plan drafting and adoption.<sup>63</sup> This following section highlights significant challenges encountered and how they were overcome, and then briefly outlines some of the key lessons learned.

### **5.2.1 Boundary harmonization**

One of the first steps of the process of community land titling is for communities to define the physical limits of their land through map-making exercises and boundary harmonization discussions with neighboring communities. In each country, boundary harmonization proved the

most challenging aspect of the community land documentation process, principally because it forced communities to address and resolve existing boundary disputes. The process of harmonizing each boundary took from one day to one year, depending on the complexity of the dispute. A community's inability to harmonize its boundaries was often the single reason that it could not complete the titling activities. Every community in Liberia and Uganda, for example, had at least one land conflict or disputed boundary that needed to be resolved.<sup>64</sup> Moreover, in certain contexts, the process gave rise to *new* boundary disputes; the exercise of drawing definite and permanent boundaries at times created situations in which community members jockeyed to claim as much land for their families or communities as possible before the boundaries were finalized. This particularly occurred when community members suspected that the land in question contained valuable natural resources. Despite such challenges, most communities managed to harmonize their boundaries and formally and informally document them, either by signing memorandums of understanding describing the agreed boundaries with their neighbors, planting boundary trees along borders and drawing maps of the boundaries, or working with government technicians to establish the limits of their lands using GPS.

Communities employed a variety of negotiation tactics and compromise strategies to resolve boundary disputes. These included: dividing contested lands down the middle; agreeing to share the land (marking it on formal documents as owned by both communities, with reciprocal use and access agreements); and allowing the disputed areas or households being claimed by two neighboring communities to choose their preference of which community they wanted to be part of. One important factor impacting communities' dispute resolution efforts seemed to be their strong desire for 'papers' to protect their land claims; this often encouraged them to address the conflict and come to peaceful resolutions. Communities that were prepared to make concessions or compromises to swiftly resolve their boundary disputes were able to move more rapidly and productively through the land documentation process. These communities' capacity to compromise largely stemmed from their appreciation of the bigger picture: for example, they tended to be willing to sacrifice a few hectares in order to be able to document their remaining few thousand hectares.<sup>65</sup> In contrast, when communities were not genuinely interested in resolving the boundary conflict, the harmonization process aggravated tensions and led to further conflict. In some communities, protracted boundary disputes were related to the presence of powerful local or urban-based elites who had an interest in maintaining the conflict so as to allow them to claim more land for themselves before the land was titled.

The research also found that the composition of the 'boundary negotiation team' was important; boundaries were most quickly and peacefully harmonized when traditional leaders were involved, allowing for ancestors to be consulted,<sup>66</sup> and where the team was composed of both community elders and youth since these groups engaged different negotiation tactics stemming from different generational relationships to land.<sup>67</sup>

Some conflicts proved too complicated or entrenched for communities to resolve on their own, and on several occasions the legal team was called in to mediate a long-standing land dispute between communities. In some instances, the team called in clan leaders and government officials to help intervene in protracted disputes.<sup>68</sup>

Successful boundary harmonization processes may also have positive auxiliary effects in terms of fostering peace between communities and increasing community members' sense of obligation to conserve natural resources. The research found that, for many communities, having secure, undisputed boundaries created an increased sense of tenure security, particularly where a community felt threatened by encroachment by its neighbors, rather than government or outside investors. Respondents in all three countries reported that they felt more secure after harmonizing and agreeing disputed boundaries. They also reported that the boundary harmonization efforts, in combination with the mapping exercises (which included mapping all natural resources located within their communities), helped them to understand the limits of their lands and resources, and to recognize that these resources were not infinite.



## 5.2.2 Drafting and adoption of community constitutions or by-laws, and land and natural resource management plans

Other steps in the community land titling procedure include establishing rules for community land administration through the drafting and adoption of community by-laws or a community constitution, and to create land and natural resources management plans.<sup>69</sup> In Mozambique and Liberia, the land and natural resources management plan must also include a zoning plan for future community development.

Although community members reported that they found the process of discussing, debating and deciding their community's rules to be an overwhelmingly positive experience, these processes proved challenging for various reasons.

First, communities had problems integrating new governance concepts into their customary frameworks; for example, in Uganda it was difficult for them to envision and formulate processes for dissolving a Community Land Association. Communities also tended to leave out — or address only in the most skeletal fashion — key topics, such as local election processes, the duration of a local land body representative's time in power, and the various functions and responsibilities of each representative. Only those communities receiving full legal support were able to arrive at a sufficient level of detail in these parts of their community by-laws and constitutions.

Second, making the transition from oral to written rules proved challenging for most communities. While community members tended to know their land use and management rules in great detail, and were able to recite them extensively when prompted, when presented with a written list of the kinds of topics that their community by-laws or constitutions should contain, community members tended to become blocked and not know what to write down. In Uganda, the Constitution outline, set out in the Implementing Regulations of the *Uganda Land Act 1998*, was simply too difficult for rural communities to complete; it required too much detail and involved technical knowledge that communities often did not have. Across all three nations, the more loosely the legal teams explained what should be included in rules or by-laws, the more easily communities were able to write down the first draft of their rules.

Moreover, these exercises revealed how rule codification processes present certain dangers; when reducing community rules to writing, what is not written can be lost. In particular, more inclusive rules and practices may at times be 'forgotten' if the beneficiaries of such practices are not present to remind the group of their existence and lobby for their inclusion. Alternatively, practices that benefit vulnerable groups may be intentionally omitted if these groups are not present to ensure that such rules are included, or if the group of individuals writing the rules are not representative of the community. For example, even though women's land rights are protected by a variety of customary edicts and practices, the articulated rule in many African cultures is that land passes through the male bloodline. Any discussion about current rules therefore needs to be delicately handled to ensure that the transition from oral to written does not undermine — by omission — more inclusionary practices.

These exercises clearly demonstrated that participatory processes for facilitating community discussion of rule frameworks are essential and that specific steps must be taken to ensure that the voices and interests of vulnerable groups are heard and that their rights are captured and protected in constitutions. To ensure that women attended and actively participated in these debates, the legal teams found it necessary to convene separate meetings for women, during which time they could discuss and consolidate their interests and ideas in advance of the general community meetings scheduled to discuss their by-laws and constitutions. Where effective, it was found that communities' public discussion of their rules provided women with the opportunity to question those that discriminated against them in an open forum. In some communities, their questions led to a change or modification of certain rules.

The research also found that the by-laws clarification and adoption process created the space and time for community members to reflect publicly on existing rules — as well as the underlying reasons for these rules — and to question their merits. In many cases, this was the first opportunity for communities to openly discuss their laws; past practice was for community leaders to set rules. Focus group members in Liberia explained:

It was done in a clan meeting. We met in a big meeting and talked about the laws. We stayed for two days; people disagreed and agreed. It really helped us come together closer and make us to know each other;<sup>70</sup>

The rules were decided in clan wide meeting, by the citizens of the clan. Everyone took part and agreed. It was the first time we had a discussion like this, so it was good we all took part.<sup>71</sup>

These statements suggest that participatory rule-drafting processes may help to open up a space for more active civic participation in local governance in rural contexts, and may be an important component in democracy-building in post-conflict environments. Classens writes: “To counterpose democracy and tradition as opposites of one another hides more than it reveals. In many traditional societies the intricate rules, precedents and procedures which have been built up over generations ensure far deeper levels of public participation and debate than the mechanism of elections can achieve on its own.”<sup>72</sup> Such conclusions may also be applied to the process at hand; custom and democracy need not be inherently contradictory concepts.

Again, the drafting process resulted in positive auxiliary effects. Across all countries and in almost all communities, it contributed to improved local governance and strengthened land rights for vulnerable groups.<sup>73</sup> In particular, by-laws helped to define the roles of community leaders and enhance their downward accountability to community members, build consistent norms, and establish clear penalties for infractions. Previously, the consequences for infractions were often unknown or arbitrarily applied by a community leader; following the process, penalties are written down and can no longer vary according to the power/lack of power held by the person who committed the infraction.

The process of ensuring that their by-laws or rules aligned with national law may also have helped to strengthen the rule of law and merge formal, government law with local, customary law. When crafting their community by-laws or constitutions, communities actively considered the national laws of which they were aware. For example, it was observed that while community members might not have known the full content of a particular national law, they were able to recognize when a community law contradicted it and, in many cases, they protested.

Finally, the process of drafting the land and natural resource management plans helped communities to recognize the finite nature and intrinsic value of their common pool resources such as forests and waterways. Communities crafted new rules to conserve these resources, such as identifying and setting aside reserved areas particularly forests, as well as ‘remembering’ and reinforcing old rules that mandated their sustainable use. Communities also began to contemplate setting aside areas that no one was yet farming or logging as ‘reserve forests’ for future use.

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### 5.3 Findings: Preliminary answers to central research questions

This intervention was designed to build knowledge on the type and level of support that communities require to successfully complete community land titling procedures. It also aimed to understand how to best facilitate the protection of the land rights of women and vulnerable groups in the context of decentralized land management and administration. While the final statistical analysis is yet to be completed, several interim observations can be made.

First, across all three countries, communities that received “paralegal support and monthly legal education and training” had the most success in completing the registration process. A particular

observation was that community members' trust in paralegals helped to create momentum from within; they played a large role in galvanizing community participation in the project and created a sense of ownership of the process. For example, in Liberia, communities estimated that they spent between 100 and 150 hours over the course of the project in meetings to complete the necessary work. Only a fraction of this time was spent with the legal team; these communities ran their own meetings. In contrast, those communities that received "full legal support" tended to adopt a more passive, less community-driven attitude towards the process; a common attitude was that the lawyer would arrive and handle the required activities for them.

A second observation is that carefully trained and closely supervised paralegals are having a positive impact not only on their communities, but also on neighboring communities. There appears to be increased information flowing to "control" and "education-only" communities that have a neighboring community led by a paralegal.

These findings suggest that training and supervising local, elected community paralegals may be a low-cost, efficient and effective way to support large numbers of communities through the land documentation processes. Moreover, that community land titling might best be supported by paralegals who have direct contact with and are supervised by a legal and technical support team. This would certainly be more cost-effective than providing "full legal support", because the legal team would not have to travel daily to meet with communities. A lawyer would still need to continue to visit the communities to address obstacles, mediate and resolve boundary disputes, provide a deeper level of legal education when necessary, answer questions, and keep community momentum going — but this would not necessarily be a monthly occurrence in every community.

However, although the level of legal support provided was a critical factor in a community's ability to complete the community land titling procedures, this proved to be less salient a factor in a community's progress than: the perceived degree of external threat to community land rights; community leaders' management abilities; pre-project community cohesion and cooperation (or how 'healthy' or dysfunctional a community is); the degree to which a significant percentage of the community population is transient or lacks a strong sense of 'belonging' or allegiance to the community; and ongoing local land conflicts. It is therefore important to recognize that community land titling may not be suitable for all communities. The data suggest that peri-urban communities, communities with weak leadership, communities with little or no internal cohesion or a highly-transient population, communities with too much internal strife, and communities with no sense of clear threat to their lands may not be a 'good fit' for this kind of initiative.

In addition, the data collected illustrate that to best facilitate the protection of the land rights of women and vulnerable groups in community land titling processes, debating and adopting community by-laws and constitutions is critical. Such processes opened up a space for women to challenge traditional rules that discriminated against them in an open, public forum. In the majority of communities, this led to a change or modification of such rules. In almost every community, both men and women supported the position that women were allowed to own land. There also seemed to be greater acceptance of women in the decision-making process on land use and management, and of their inheriting land on the same terms as men. In their focus groups, almost every community stated that there had been no opposition to these changes, and where there was opposition, women's collective action seemed to resolve it.

However, women's involvement must be actively and strategically encouraged. Women may need to be convened in separate groups — at least initially — to allow them to feel confident enough to voice their opinions and explain their interests. Future community land titling efforts might consider convening workshops for vulnerable groups in which they would highlight how the land documentation process may impact their rights and interests, and allow opportunity for them to discuss relevant concerns and interests among themselves. These groups may then be better

positioned to voice these interests in the larger community meetings and ensure that their concerns are addressed throughout the process.

Finally, and most critically, in rural areas where access to the formal justice system is difficult, community titling may lead to greater individual tenure security for women and members of other vulnerable groups than individual land titling. As described in section 3, individual titling tends to exacerbate power asymmetries, privilege local elites and those with greater access to legal knowledge and government offices, and may lead to a weakening of women's land claims. In contrast, during community land titling efforts, the community must work together to discuss, draft and adopt rules and land and natural resources management plans, and in so doing must confront issues of inclusion, exclusion, and how they will safeguard the land rights of women, and other vulnerable groups. When such topics are discussed publicly, allowing an authentic space for open debate and dialogue, there is a good likelihood that communities will strengthen the land rights of vulnerable groups, or at the very least strengthen intra-community mechanisms to safeguard existing rights.

For example, in Liberia, focus groups explained how "Women are now part of making decisions about land. They are allowed to own land just like men. They can inherit land just like men;"<sup>74</sup> one woman explained that in her community, the men "look at things differently than before. First women were not allowed to talk in land business, now we are invited to all the meetings."<sup>75</sup> One women's group not only mentioned the new laws that protected their rights, but also explained that their community agreed to an expansion of 'outsiders' rights; they described how, under their new by-laws, "Women can now own land, and we agreed that if a stranger stays with us for a long time and does not have bad character, they can own land too."<sup>76</sup>

Similarly, in Uganda, during a focus group of male leaders and elders, it was stated that:

Yes, we changed our rules on women's rights: widows are allowed to stay on the family land until their death ... girls born in a family have the right to inherit this land, girls who have been divorced have the right to be given part of the family land, and elders are supposed to manage land on behalf of the orphans until they are old enough to manage the land on their own.<sup>77</sup>

Importantly, community leaders were not only part of these discussions, but also leading them. In so doing, these leaders were both implicitly and explicitly agreeing to not only abide by these rules, but also to enforce them. In contexts where customary and community leaders are the central arbiters of justice, their support for women's rights is not inconsequential. In contrast, attempting individual titling in rural areas without first establishing strong local mechanisms to ensure local leaders' protection of women's rights may lead to greater inequity.

## 6. Conclusion: recommendations for realizing community land titling

African nations that have introduced community land titling laws have an opportunity to advance an innovative model of integrated rural investment. However, if the potential benefits of community land titling are to be realized, efforts must be made to address the obstacles that prevent the full implementation of these laws and restrict communities' ability to successfully claim and defend their land rights. Whether the potential of this model will be realized depends on levels of political will (at both central and local levels), community empowerment, and the degree of support provided to communities as they seek to successfully complete the administrative procedures set out in relevant legislation.

### 6.1 Recommendations for supporting agencies and organizations

Legal service organizations may play an important role in facilitating community land titling and helping communities to claim and protect their land rights. Such groups might: teach communities about the content of relevant land and natural resources laws and how to successfully complete the

procedures set out in accompanying regulations; train and assist communities to successfully complete land titling processes (for example, filing titling or community land association applications, defining the boundaries of community lands, or mediating intra-community conflicts); support communities to develop structures and processes to regulate the management and administration of land (for example, drafting community constitutions or by-laws to govern community land management and administration, developing natural resource management plans, or establishing community dispute resolution mechanisms); assist communities to develop by-laws through participatory processes that contain provisions addressing intra-community discrimination and conflict resolution; help communities to negotiate effectively with investors; and enforce community land claims through legal processes in the event of bad faith usurpation.

The intervention detailed in this chapter provides many interesting insights regarding how best to provide such support. Specific good practices include the following:

First, choosing the right community leaders to work with is critical, for various reasons. Distrust and suspicion of 'outsiders' is often high, especially when the issues involve productive resources or conflict-ridden processes such as land mapping. Such distrust might be mollified if such outsiders provide support at the invitation, and with the approval, of a leader that the community considers legitimate. Relatedly, the level of community commitment and the general success of the project will largely depend on the zeal of the local leaders to mobilize and lead their communities to work together. A further reason for carefully selecting the leaders to work with is that some leaders may be corrupt or distort the reality of land claims. They may be the ones claiming large areas as their own, or be involved in local land disputes. Alternatively, it may be local elites and influential community members that create obstacles to their community's success in the titling process; in such situations, working in partnership with committed and strong local and regional leaders can be imperative to an intervention's success. Involving *customary* leaders is also critical. The importance of consulting elders and receiving their approval should not be underestimated, particularly during boundary harmonization efforts. Communities particularly need their traditional leaders involved in mapping and boundary harmonization exercises; in many instances, they are the only ones with knowledge of where boundaries are located. In many locales, their inclusion strengthened communities' commitment to remain involved in the process.

Second, women's involvement must be actively and strategically encouraged. Women should be convened in separate groups — at least initially — to allow them to feel confident enough to voice their opinions, explain their interests, and make contributions to the project activities. For example, in Uganda, women did not actively participate in meetings until the field team convened separate women's groups in which they were able to articulate their various uses of the grazing lands and describe the rules that applied to each natural resource found within the grazing lands. Once they began to feel that their input to the process — particularly of writing the constitutions and planting boundary trees — was valued and important, they began to attend the wider community meetings in much larger numbers and to speak out in the larger group to ensure that their rights and interests were protected by and included in the constitutions.

Third, conflict between local elites and external elites may be unavoidable; it should be anticipated and response plans developed. For example, oversight mechanisms should be established to guard against conflict between local, community elites and elites in the capital who have family ties to a community or vested personal interests in that community's land.

Fourth, by-laws and constitution drafting processes should proceed carefully and be derived from existing community rules. It is important to underline that the process of writing down previously unwritten rules and practices inherently changes them. Any rules that are not included in a constitution, set of by-laws or land and natural resources management plan may be, by omission, negated, lost or inadvertently prohibited. Supporting organizations should assist community members to identify all natural resources found in common areas, and to define rules about their

management. Drawing a 'resource map' listing all natural resources located in the community may facilitate such dialogue, and help to create an outline of what the constitution and management plan should address. Similarly, to address questions of local governance and leadership, communities might be supported to draw diagrams of their community's existing leadership structure, and from these diagrams begin to list their leaders' responsibilities and roles.

Fifth, supporting agencies should carefully evaluate whether a community is a suitable candidate to undertake the amount of work involved in community land titling procedures. As discussed above, if a community is not able to cooperate, has weak or corrupt leaders, or has intractable land conflicts, it will likely be unable to complete the process successfully. Moreover, ongoing land conflicts may become more deeply entrenched or possibly turn violent, while new conflicts may also emerge. It is therefore advisable to work only with communities that proactively seek out legal support for documenting their communal land claims, and, before accepting to work with them, carry out an extensive analysis of power dynamics, ongoing conflicts and threats to land, and levels of community cohesion.

Finally, the need for enhanced state support for community land titling and administration cannot be underestimated. Where community land titling initiatives decentralize land administration and management to the community level, new roles and responsibilities should be created for local and regional officials. For example, local land officials may be trained to: provide technical advice and capacity-building to community-level land administration structures to support their efforts to sustainably and equitably manage land and natural resources, resolve boundary disputes, and administer their lands; help communities to negotiate and enforce contracts with investors; support communities to monitor the use of their natural resources, including enforcing penalties for abuse of agreed limits on logging or hunting; and develop the capacity of community leaders to sustainably and equitably manage community resources and resolve land disputes according to principles of fairness and equal rights.

State administrators could also be encouraged to better support community land interests. The research found that local and regional government officials may need training on relevant land legislation and related procedures. They may also need awareness-raising of the needs of rural communities and to be encouraged to see their role as 'solution-providers' and defenders of community rights. Generating such changes in institutional culture is complex and may require oversight and the provision of incentives.

## **6.2 Recommendations for policy and legislative reform**

To ensure an effective and enabling environment for community land titling at the legal and regulatory level, legislative and procedural reform may be required to ensure that procedures can be easily completed by rural communities with minimal external supports. To this end, land laws and their implementing regulations should establish straightforward and unambiguous procedures and clearly set out the rights and responsibilities of all key actors.

Such interventions might include: the review and amendment of relevant legislation and accompanying regulations and procedures to ensure simplicity, eliminate ambiguity and promote ease of implementation (such as streamlining administrative processes) for both administrators and rural communities; the review of legislation to ensure that the procedural burdens imposed on rural communities are reasonable and take into account the cost, capacity, language and literacy restrictions of applicants; and enhanced coordination within and between relevant government ministries (such as establishing comprehensive, synchronized and updated land information and record-keeping systems).

There is also a need to better safeguard the interests of rural communities. Communities may require support in their dealings with investors and government officials to reduce information and power asymmetries. Within communities, individual members with more vulnerable land claims

may need particular support to ensure that their land rights are respected during community land titling processes. Interventions to address these issues might include:

- Establishing oversight and accountability mechanisms such as: laws or regulations to hold investors accountable for delivering agreed upon compensation for the use or leasing of community lands; and expedited complaint procedures and appeals processes, should investors fail to deliver the agreed benefits or rental payments;
- Establishing provisions in national legislation that safeguard women's land rights; in Uganda, the *Land Act 1998* requires that the written consent of the husband, wife and all adult children living on the land be obtained before land can be sold or mortgaged.<sup>78</sup> Other provisions might require that the name of both spouses be put on any formal registration of property used as the family home; legislation that requires communities seeking title to their lands to create a set of by-laws or a constitution concerning how they will administer and manage their lands in a manner consistent with national human rights provisions; and community land titling legislation that requires the democratic election of women and their representation on community land management bodies; and
- Establishing mechanisms to bridge customary and statutory legal systems, for example by requiring that decisions reached by customary courts be registered at district courts, which then review them for compliance with national human rights provisions, or by creating a direct line of appeal for disputes adjudicated at the community level to district level courts and then upwards through the court system.

In conclusion, community land titling presents an exceptional and rare opportunity to help enhance land tenure security and protect communities from encroachment and land-grabbing by outside elites. Community land titling may also have the potential to create positive change that extends beyond the documentation of customary and communal land claims to include improving civic participation; promoting the downward accountability of community leaders; facilitating the enhanced protection of women and other vulnerable groups' land rights; enhancing natural resource conservation; and strengthening internal governance and promoting the rule of law. As one community member in Liberia explained:

I don't care what anyone says, this project is the best thing to happen in our history. Imagine: now we know our borders; we know our resources; we know our rules, and they are written down for everyone to see and know; people are attending clan meetings; and our clan feels stronger together. This has never happened before! Now it is easy for us to organize and ask the government or [foreign investors] for things we want or refuse things we don't want in our community.<sup>79</sup>

While there are many challenges to be overcome, efforts to implement community land titling laws, as tested through this intervention, bring practitioners to a closer understanding of both how to best support communities to document and protect their lands, and how other governments might best approach the development of sound legal and regulatory community land protection frameworks. Such research efforts need to be replicated and compared, and the lessons shared among the development community, policymakers, donors as well as national governments.

## footnotes

- 1 In this chapter, the term 'the poor' is used to include all individuals, peoples, communities and groups that lack the power and capacity to fully and freely access and use formal legal systems to claim and defend their land rights.
- 2 See generally, E. Scheye, *Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks*, Netherlands Institute of International Relations (2009); E. Alemika and I. Chukwuma, *A Report on Poor Peoples' Perceptions and Priorities on Safety, Security and Informal Policing in A2J Focal States in Nigeria*, Center for Law Enforcement Education (2004); B. Baker and E. Scheye, 'Multi-Layered Justice and Security Service Delivery in Post-Conflict and Fragile States' (2007) 7(4) *Conflict, Security & Development* 503; L. Chirayath, C. Sage and M. Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006 (2005); J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003); Penal Reform International, *Access to Justice in Sub-Sahara Africa: The Role of Traditional and Informal Justice Systems* (2000); and W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003).
- 3 S. Falk Moore, *Social Facts and Fabrications. 'Customary' Law on Kilimanjaro 1880-1980* (1986) 319; and A. Whitehead and D. Tsikata, 'Policy Discourses On Women's Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary' (2003) 3(1-2) *Journal of Agrarian Change*, 94.
- 4 See generally, B. Cousins, 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure'' (2007) 7(3) *Journal of Agrarian Change*; L. Cotula, *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 11; C. Tanner, *Law Making in an African Context: the 1997 Mozambican Land Law*, FAO Legal Papers Online No. 26 (2002).
- 5 Ibid.
- 6 Cousins, above n 4, 293.
- 7 J. Quan, 'Changes In Intra-Family Land Relations' in L. Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 53.
- 8 C. Tanner, above n 4 (adapted from C. Tanner, P. De Wit and S. Madureira, 'Proposals for a Programme of Community Land Delimitation' (paper prepared for the *National Seminar on Community Land Delimitation and Management*, Beira, Mozambique, 12-14 August 1998).
- 9 Cotula, above n 4, 11.
- 10 L. Alden Wily, 'The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies (Draft)', (paper presented at the UNDP Conference, *Land Rights for African Development: From Knowledge to Action: A Collaborative Program Development Process*, Nairobi, Kenya, 31 October – 3 November 2005). Ibid 6.
- 11 Ibid 6.
- 12 In reality, due to the complex, overlapping nature of customary and statutory legal constructs, neither the chiefs adjudicating customary disputes, nor the judges hearing cases in formal courts apply a 'pure' version of customary or statutory law. As explained above, centuries of colonial rule impacted the tenor and nature of customary law, infusing it with various statutory constructs. Meanwhile, statutory systems for land management in Africa by nature must incorporate some of the customary constructs underlying land relations in rural areas, particularly in the areas of negotiation, mediation and conciliation. As such, "[t]he neat distinction between 'customary' and 'statutory' land tenure systems is considerably blurred, and ... between the ideal-type 'customary' and the ideal-type 'statutory', a great deal of hybrids and 'in betweens' exist.... Local reality usually resembles more a continuum of different combinations of both." (L. Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects In Africa*, International Institute for Environment and Development (2007) 11).
- 13 P. Lavigne Delville, 'Changes in "Customary" Land Management Institutions: Evidence from West Africa' in L. Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 39.
- 14 L. Cotula, S. Vermeulen, R. Leonard, and J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals In Africa*, International Institute for Environment and Development (IIED), Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) (2009).
- 15 A key issue is that rural communities often hold land communally. Where such land is not under cultivation or use by a specific family, it can be mistakenly (or disingenuously) classified as vacant and hence be particularly vulnerable to acquisition by elites, investors and state development schemes.
- 16 See, for example, J. Blocher, 'Building on Custom: Land Tenure Policy and Economic Development in Ghana' (2006) 9 *Yale Human Rights & Development Law Journal* 166; and D. Ayine, *Developing Legal Tools For Citizen Empowerment: Social Responsibility Agreements in Ghana's Forestry Sector*, IIED (2008).
- 17 For the purposes of this chapter, 'outsiders' may be defined as those individuals or families who have moved into and become part of rural communities but are not directly related (by blood or tribal affiliation) to that community's founding families. With less land available, 'belonging' and social ties are redefined; outsiders may be pushed out, lose their land or face restrictions on their access to communal resources.
- 18 P. Mathieu, P. Lavigne Delville, H. Ouédraogo, M. Zongo, and L. Paré, *Making Land Transactions More Secure in the West of Burkina Faso*, IIED Issue Paper No. 117 (2003) 1.
- 19 Villarreal, (on file with the author) 5, 7.
- 20 The increasing commercialization and commoditization of land have influenced the operation of customary systems of land administration and management. Chimhowu and Woodhouse observe that even during standard customary land transactions, there is a shift towards making reference to market values, evident in the "increasing weight placed upon cash, relative to symbolic elements of exchange, and an increasing precision in the 'seller's' expectation of what they should receive" (A. Chimhowu and P. Woodhouse, 'Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa' (2006) 6(3) *Journal of Agrarian Change* 346, 359). For example, in jurisdictions where gifts are provided to chiefs in exchange for allocating community land, today, these gifts are more closely related to the land's market value (L. Cotula, 'Case Study: Changes in 'Customary' Resource Tenure Systems in the Inner Niger Delta, Mali' in L. Cotula (ed), *Changes in "Customary" Land Tenure Systems in Africa*, IIED (2007) 81, 89).
- 21 Mathieu et al, above n 18, 3.
- 22 See generally: R. Giovarelli, 'Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property' (2006) 4 *Seattle Journal for Social Justice*; A and L. Adoko, J. and S. Levine, *Fighting the Wrong Battles: Towards a New Paradigm in the Struggle for Women's Land Rights in Uganda*, The Land and Equity Movement in Uganda (2009), The Land and Equity Movement in Uganda <<http://www.land-in-uganda.org/assets/Fighting the Wrong Battles.pdf>> at 20 April 2011; and Whitehead and Tsikata, above n 3.



- 23 Another position is that the strength of women's land rights vary widely depending on each woman's particular family situation. Whitehead and Tsikata cite Karanja as arguing that in spite of having no inheritance rights, "women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives..." (Whitehead and Tsikata, above n 3, 96-97). Whitehead and Tsikata also cite a number of authors as concluding that the very strength of women's land claims is in their 'embeddedness' which provides a strong safety net. Other scholars argue a third position, that women's land rights under customary law are actually much stronger than originally imagined. Quan cites Yngstrom's finding that women can be considered to hold primary and often strong land use rights because of the recognition of the centrality of their roles in production and social reproduction; their land use rights are secured by their husbands' social obligations to ensure that they are able to feed themselves and their children (Quan, above n 7, 55; I Yngstrom, 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems' (2002) 30(1) *Oxford Development Studies*. See also L. Cotula, C. Toulmin and J. Quan, *Better Land Access for the Rural Poor, Lessons From Experience And Challenges Ahead*, IIED and FAO (2006); and Adoko and Levine 2009, above n 22.
- 24 Whitehead and Tsikata, above n 3, 91; P. Peters, 'Inequality and Social Conflict Over Land in Africa' (2004) 4(3) *Journal of Agrarian Change* 269; Yngstrom, above n 23.
- 25 P. Woodhouse, 'African Enclosures: A Default Mode of Development' (2003) 31(10) *World Development*, 1715.
- 26 See further, J.-P. Chauveau & J.-P. Colin, 'Changes in Land Transfer Mechanisms: Evidence from West Africa' in L. Cotula (ed), *Changes in "Customary" Land Tenure Systems in Africa*, IIED (2007) 76.
- 27 Interestingly, to improve the safety and validity of these transactions, the parallel development of improvised, de facto written documentation of these transactions is accompanying the emergence of a market for land rental and sale. Such written certificates of sales are essentially contract documents and receipts, creating 'proof' of the exchange for posterity should the transaction be challenged or questioned. The use of signed documents to legitimize land transactions is a kind of 'informal formalization' and aims to reduce the ambiguity and uncertainty of extra-legal and non-customary land transactions (Mathieu et al. above n 18).
- 28 See generally, H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).
- 29 See generally, T. Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 *American University International Law Review* 647; Whitehead and Tsikata, above n 3; D.A. Atwood, 'Land Registration in Africa: The Impact on Agricultural Production' (1990) 18(5) *World Development*; R. Barrows and M. Roth, *Land Tenure and Investment in African Agriculture: Theory and Evidence*, Land Tenure Center Paper 136 (1989); J. Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa*, Land Tenure Center Paper 128 (1986); and A. Haugerud, 'The Consequences of Land Tenure Reform among Small Holders in the Kenya Highlands' (1983) *Rural Africana*. Experience in implementing individual titling schemes has also shown that: i) the high costs of recording the ownership and multiple use claims of every plot of land within a nation can lead to poorly executed or unfinished mapping exercises, which can serve to further undermine the tenure security of those parcels of land not yet mapped and registered; ii) the costs of officially registering one's land may be prohibitively expensive for the poor, which can lead to a situation in which only elites gain formal title to their lands; iii) individual land titling and registration can facilitate and lead to distress sales in time of hunger, sickness and extreme poverty; and iv) land registries can be difficult for already vulnerable groups to access and use, and unless particular care is taken by government administrators, under-represented groups such as ethnic minorities and women may be excluded.
- 30 E. Daley and M. Hoblely, *Land: Changing Contexts, Changing Relationships, Changing Rights*, United Kingdom Department for International Development (DFID) (2005).
- 31 K. Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank (2003).
- 32 FAO, IFAD, UNCTAD and the World Bank Group, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, Extended Version (2010) 1.
- 33 FAO, IFAD, UNCTAD and the World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010).
- 34 Ibid 2.
- 35 L Alden Wily, *Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa*, IIED (2003).
- 36 In some jurisdictions, individual or household/family titling within the context of community land administration and management is also possible. In Uganda and the United Republic of Tanzania, for example, individual or household land can be titled through a publically adjudicated hearing at the village level, with the participation of customary authorities and taking into account overlapping and secondary use rights (*Uganda Land Act 1998*, chapter 227, art 6; and The United Republic of Tanzania's *Village Land Act 1999* (Act No. 5 of 1999), art 52).
- 37 In such processes, lawmakers have had to overcome several difficulties. For example, in many states, constitutional provisions do not allow for private land ownership — all land is owned by the state in trust for the people. A further difficulty is that the vast majority of land transactions are governed by customary land administration and management systems that facilitate various overlapping community and individual use rights.
- 38 Alternatively, formalizing common property management regimes under Community-Based Natural Resource Management (CBNRM) initiatives may help to play a critical role in protecting communal lands, as in the case of Namibia. Taylor suggests that for "states unwilling to accord full recognition to customary rights ... [or] in the absence of legal systems that acknowledge direct community ownership of land, the granting of management rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to outside interests" (M Taylor, *Rangeland tenure and pastoral development in Botswana: Is there a future for community-based management?*, CASS/PLAAS Occasional Paper Series No. 16, Centre for Applied Social Sciences and Programme for Land and Agrarian Studies (2007).
- 39 J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).
- 40 See further, L. Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa*, IIED (2007).
- 41 Mathieu et al. above n 18; Peters, above n 24; Woodhouse, above n 25; and Yngstrom, above n 23.
- 42 See further, R Knight, *The Relevant Legal Frameworks of Mozambique, Uganda and Liberia*, IDLO Community land Titling Initiative Legal Framework Memorandum (2009).
- 43 L. Alden Wily, *So Who Owns the Forests?: An Investigation into Forest Ownership and customary Land Rights in Liberia*, Sustainable Development Institute (SDI) and FERN (2007) 128.
- 44 A review of 260 community consultations undertaken by the Centre for Legal and

- Judicial Training (CFJJ) and the FAO Livelihoods Programme found that communities were not provided with a genuine opportunity to negotiate and bargain with investors for mutual benefits, payments or the provision of amenities in exchange for their land. The research concluded that both investors and government officials tended to view consultations not as a mechanism to promote community development and partnership, but simply as one of various administrative hurdles necessary to complete before securing a right of land use and benefit. The CFJJ/FAO data also indicate that most agreements are poorly recorded; most written records are inadequate, with insufficient detail or no uniformity of presentation, and huge variations in the type and quality of information recorded. The meetings' minutes are generally vague and do not include sufficient detail concerning: the content of the negotiations, the benefits promised, the time frame in which these benefits will be delivered, or the economic gains to be realized by the communities in exchange for their land (A.J. Calengo, J.O. Monteiro and C. Tanner, *Mozambique Land and Natural Resources Policy Assessment*, Final Report, Centre for Juridical and Judicial Training, Ministry of Justice (2007) 13-14; C. Tanner and S. Baleira, *Mozambique's legal framework for access to natural resources: The impact of new legal rights and community consultations on local livelihoods*, FAO Livelihoods Support Programme, Working Paper No. 28 (2006) 5-6).
- 45 S. Norfolk and C. Tanner, *Improving Tenure Security for the Rural Poor Mozambique Country Case Study*, FAO Legal Empowerment of the Poor Working Paper No. 5 (2007), Food and Agriculture Organization of the United Nations <<ftp://ftp.fao.org/sd/SDA/SDAR/sard/Mozambiquecase.pdf>> at 20 April 2011; and T. Durang and C. Tanner, *Access to land and other natural resources for local communities in Mozambique: Current Examples from Manica Province* (2004).
- 46 Calengo, Monteiro and Tanner, above n 44, 13-14.
- 47 *Ibid* 18-19.
- 48 *Ibid* 14.
- 49 Durang and Tanner, above n 45.
- 50 H. Ouedraogo, *Legal Conditions for the Recognition of Local Land Rights and Local Land Tenure Practices* (2002).
- 51 P. McAuslan, 'A Narrative on Land Law Reform in Uganda' (paper presented at the Lincoln Institute of Land Policy Conference on *Comparative Policy Perspectives on Urban Land Market Reform in Eastern Europe, Southern Africa and Latin America*, Cambridge, Massachusetts, 7-9 July 2003, 27).
- 52 *Uganda Land Act 1998*, section 60(1).
- 53 McAuslan, above n 51, 17.
- 54 J. Negrao, 'Land In Africa — An Indispensable Element Towards Increasing The Wealth of the Poor' (2002) 179 *Oficina dos Centro de Estudos Sociais*, 19.
- 55 The Land and Equity Movement in Uganda (LEMU) (<http://www.land-in-uganda.org>) works to improve the land tenure security of the poor and ensure that policies, laws and structures are put in place to allow all Ugandans to have fair and profitable access to land. The Sustainable Development Institute (<http://www.sdiliberia.org>) works to transform decision-making on natural resources and to promote equity in the sharing of benefits derived from natural resource management in Liberia. *Centro Terra Viva* (<http://www.centroterraviva.org.mz>) works to contribute to improved environment and land rights policies and legislation, and to increase the capacity of civil society to participate in environmental management.
- 56 The project worked with local NGOs and community leaders to select 20 communities in each country that actively expressed an interest in seeking documentation for their community land rights and were not currently engaged in a protracted land conflict. It is important to note that in all three countries, defining 'community' was a difficult and often political exercise. In Liberia, the team reviewed with local leaders what level of community would be the most advantageous to work with: the chiefdom, clan or town. The advantages and disadvantages of each option were discussed, and the clan level was decided as the preferred option. In Mozambique, the field team decided to work at the level of the *povoado*, rather than the *regulado* (there are generally three *povoados* within a *regulado*) to ensure that the whole community was able to be involved, and to ensure that the team could convene meetings of representatives of a significant proportion of the community (in the region, there are generally over 2,000 individuals in a *povoado*). These difficulties paled in comparison with those encountered in Uganda, where the project was not documenting the perimeter of a defined community, but the perimeter of a large communal grazing land, often shared by two or more separate villages, which were not identified as a community, but all of which shared ownership rights to the same common grazing lands (see also, R. Knight, *Best Practices in Community Land Titling*, Concept Note, IDLO (2010)).
- 57 Measures included: scheduling meetings in places and at times that women could more easily attend; sending community leaders and the community mobilizer door-to-door throughout the village, specifically requesting that women attend and husbands bring their wives with them to meetings, and, as necessary, holding meetings only for women in order to focus on addressing their concerns and interests and support them to later bring these issues to the wider community.
- 58 The election methodology was decided on by the communities themselves, although the field teams mandated three general constraints: that each community elect one male and one female paralegal; that the paralegals be literate and capable of filling out government forms; and that the paralegals had a high degree of integrity and were trusted by their communities.
- 59 To enhance the accuracy of the research findings, it was important that relevant district and regional land administration officers had adequate knowledge in community land titling laws and procedures. All relevant officials (approximately 30 per nation) were thus provided with two days of training bi-annually by the project legal team. These trainings covered: all relevant land laws and legal procedures (with special emphasis on the procedural rights of marginalized groups); the obstacles faced by rural communities attempting to title their lands; and how officials might assist applicant communities to overcome these obstacles.
- 60 To track the progress of the control communities, the project researcher visited these communities monthly and met with community leaders, who updated the researcher on their community's progress.
- 61 Individuals taking part in the baseline and post-service survey were selected by random sampling to ensure a representative sampling of community demographics. The survey included both structured questions with predetermined answer categories, as well as some semi-structured or open-ended questions, in order to capture both qualitative and quantitative data.
- 62 The three focus group discussions held in each community taking part in the initiative involved: i) seven randomly selected women (including roughly 50 percent widows); ii) seven community leaders; and iii) a random grouping of seven community members (for a total of 60 focus group discussions per country).
- 63 Other steps included: forms to complete, signatures to be sought, visits to the community by relevant government officials, a formal technical survey, and other processes that will not be described herein.
- 64 In Mozambique, as a result of working at the level of the *povoado* rather than the *regulado*, there were fewer boundary

conflicts. Since the *povoados* had clearly agreed boundaries with the other *povoados* within their *regulado*, only those boundaries with other *regulados* remained open to potential conflict.

- 65 The field teams noted that, at times, boundary conflicts hinged on the splitting or splintering of families or clan/ethnic allegiances, caused by old, intra-community disagreements. In such cases, these land conflicts were not about land, but about power, control, authority, autonomy and pride.
- 66 When ancestors were consulted and their approval granted or disapproval taken into consideration, this tended to lead to the agreed boundary being regarded as more legitimate.
- 67 In Liberia, the field team observed that while the elders' opinions were more respected, they tended to be more rigid in their negotiations, defining land *ascriptively*, as "what our forefathers left us" or "where our forefathers are buried", and attaching strong emotional and historical sentiment to a particular area. In

contrast, the 'youth' (aged 20 to 40) tended to be more flexible during boundary harmonization negotiations, and used *descriptive* words to define land (for example, "something a house is built on") as a commodity; land was viewed as something that was tradable, and therefore negotiable.

- 68 This occurred across all treatment groups, as the project deemed it dangerous to deny communities mediation support in the event of an un-resolvable conflict.
- 69 It is important to note that in Mozambique, writing down community 'rules' is not a mandated part of the community land documentation process; it was included among the project activities for two reasons: to ensure comparability with Liberia and Uganda; and to attempt to understand what communities' customary rules were and to verify if they did or did not contradict the *Constitution of Mozambique 1990*. (Mozambique's *Land Law 1997 (Lei de Terras)* makes no provision for community governance or land administration once it has been

delimited, but rather it states that communities may continue to govern themselves "in accordance with customary norms and practices which do not contravene the Constitution" (*Lei de Terras*, art 12(a)).

- 70 Focus group, Siahn Clan (January 2011).
- 71 Focus Group, Zialue Clan (January 2011).
- 72 A Claasens, *It is not easy to challenge a chief: Lessons from Rakgwadi*, Programme for Land and Agarian Studies, School of Government, University of the Western Cape (2001) vii.
- 73 Across all of the study communities, the field teams observed that more people actively participated in the by-laws/constitution drafting process than any other project-related process.
- 74 Focus Group, Jowein Clan (January 2011).
- 75 Focus Group, Female Town Chief, Central Morweh Clan (January 2011).
- 76 Focus Group, Duah Clan (January 2011).
- 77 Focus Group, Akwic Village (January 2011).
- 78 *Uganda Land Act 1998*, section 39.
- 79 School Teacher, Jowein Clan (Community MOU-signing ceremony, 2010).

## Conclusion: Enhancing Legal Empowerment through Engagement with Customary Justice Systems

Erica Harper, Ewa Wojkowska and Johanna Cunningham

### Executive summary

This volume found its origins in the emerging debate on legal empowerment that gained prominence around the time of the United Nations Development Programme-hosted Commission on Legal Empowerment of the Poor. This debate raised a series of questions including how the proposed empowerment framework integrated customary justice, and how it contributed to the significant work that had already been carried out in the area of access to justice at the customary level. The experience of IDLO and others suggested that customary justice systems had much to offer in terms of enabling access to justice, which is considered the foundation of legal empowerment. The sheer volume of disputes dealt with at the customary level indicated that there was significant opportunity to enhance the legal empowerment of individuals and communities by improving the quality of justice processes and outcomes within these spaces. At the same time, it was clear that customary justice systems could also block access to justice, particularly for marginalized and vulnerable groups: these systems often reinforce power imbalances, outcomes can contravene human rights standards, and certain types of cases are deemed to be beyond the capacity of a customary justice system to deal with effectively and fairly.

Despite these clear linkages, the role that customary systems should play in legal empowerment initiatives remains poorly understood. While it is clear that those advocating legal empowerment are open to the synergies that might emerge from partnering with customary justice systems, the literature proffers little practical guidance on how to engage at the customary level. Moreover, there is a yawning gap between the proliferation of customary justice programming and the evidence and knowledge base on which such programming is grafted. There have been few comprehensive or empirically driven efforts that reflect on or evaluate the impact effectiveness of past programming efforts, and there have been insufficient critical analyses of the objectives of customary justice interventions. This chapter thus focuses on the question of the relationship between legal empowerment and customary law programming. It examines the linkages and causalities between the empowerment discourse and grassroots legal processes, and presents a framework on which to build and use as a reference point for structuring and implementing more effective support programs.

## Introduction

Corruption, bias towards the rich and powerful (perceived and real), lengthy delays, and physical, economic and intellectual inaccessibility are all factors that contribute (and often combine) to exclude people from the formal justice system. Those excluded are often poor, less educated and live in rural areas. They may have little understanding of the formal justice system, its language and procedures. They may have also experienced the law as an oppressive force with respect to court-approved forced evictions or the redistribution or control of natural resources, or a general, biased alignment of the formal justice system with the rich and powerful.

Whereas formal justice systems can operate to exclude certain groups, the positive attributes of customary justice systems often draw such populations toward them.<sup>1</sup> The popularity and legitimacy of customary justice systems is evident in their high levels of voluntary usage,<sup>2</sup> satisfaction with outcomes and procedures,<sup>3</sup> and community enforcement of or adherence to decisions. Such systems are generally culturally and intellectually accessible to the communities they serve; mediation or arbitration is often conducted in local languages. Further, since customary law is passed on from generation to generation, its rules are intimately linked to accepted norms and mores.<sup>4</sup> Customary justice systems are also more physically and financially accessible: disputing parties may meet in the evening so as not to disrupt a workday, at a close and convenient location; decisions are often reached in a relatively short amount of time, which reduces costs and allows disputing parties to return to interdependent dynamics sooner and reduces the risk of conflict escalation.

Further, as recognized by the Commission on Legal Empowerment of the Poor, the majority of those who are excluded from accessing the formal justice system work and live in the 'informal sector':<sup>5</sup> Such persons often lack identity documents and formal recognition of their work or assets. This limits the level of support that the formal justice system, with its dependence on strict forms of evidence, can provide. Informal workers and employers, for example, tend to have difficulty gaining access to the judicial system to enforce contracts, leaving them without any means of seeking redress and more vulnerable to harassment, exploitation, abuse, corruption and bribery. Customary systems can offer greater flexibility, for example, in interpreting what constitutes a working relationship in the absence of a contract, or land ownership in the absence of formal title. Similarly, personal circumstances and characteristics are often taken into account in mediating and resolving disputes at the customary level. In some cases, this lack of formal procedure can enable discrimination, but in others, the consequences are benign or justice-enhancing since "[m]utual support in times of need is often a key value in customary law."<sup>6</sup>

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But customary justice systems can also block access to justice and legal empowerment. Customary proceedings, and the mediation and arbitration methodologies they employ, can compromise rights to due process and an independent and fair hearing. As such, they are ill-suited to dealing with serious cases that require the imprisonment of the defendant, or in cases where mediation is undesirable, such as rape, domestic abuse or murder. Customary justice systems can also be barriers to legal empowerment when they provide a remedy or build consensus around a resolution that is discriminatory or does not comply with recognized standards of justice. Typically, such discrimination reflects communities' pre-existing prejudices and is often targeted against women, children, minorities, and 'outsiders' from a different community, family status or caste. In some cases, the general popularity of certain community members can play a role.<sup>7</sup>

Customary justice procedures usually involve mediation or arbitration, and sometimes a mix of both. These participatory, deliberative methodologies, where the problem is often regarded as 'shared' by the entire community,<sup>8</sup> represent double-edged swords. On the one hand, they allow each party to present their story in the language and style with which they are most comfortable, followed by discussions continuing until a consensus is reached.<sup>9</sup> On the other hand, such processes raise questions of inclusiveness and can reflect community biases, particularly where

deliberations are dominated by certain groups. For example, where men speak on behalf of spouses and female relatives, deliberations may perpetuate communal prejudices and deny justice.<sup>10</sup>

Given that customary justice systems can support the legal empowerment of the poor and disadvantaged, but also block it, it is critical that justice reform and empowerment initiatives engage with community actors to maximize the system's benefits and address its weaknesses. The question of how to engage with legal empowerment initiatives and the role that they should play, however, remains poorly understood. Past analyses and research has shed light on how customary systems operate, their characteristics and working methodologies, as well as their flaws and, to some extent, the opportunities they present. But there is less knowledge on how customary systems might be able to contribute to legal empowerment outcomes. Moreover, as with other aspects of rule of law programming, little is known about the level of impact of programmatic interventions to date or about broader questions regarding effective enabling conditions.

This volume evaluated seven interventions, each of which aimed to empower the users of customary justice systems to better access fair and equitable solutions. The outcome mapping methodology used allowed authors to answer the critical questions of whether and in what way justice outcomes had changed as a result of the intervention. It was through such direct examinations of behavioral change that this volume sought to gain a better insight into the conditions that might enable more effective programming and contribute to the development of an evidence base on which program decision-making might be guided.

A key finding from the case studies is the messy, nuanced and context-specific nature of engaging with customary justice systems. There are few guiding principles that can be applied across the board and no model solutions that are guaranteed to advance empowerment in every environment. What works in a given country context is situation-specific and contingent on a variety of factors, including social norms, the presence and strength of a rule of law culture, socio-economic realities, and national and geo-politics, among others. Development practitioners need to possess in-depth knowledge of the target country, its people, the customary legal systems, as well as the theories and practicalities pertaining to legal development and customary justice programming in order to establish relationships and understand community dynamics. Such understanding is also needed to enable practitioners to identify potential entry points to start rights-based discussions and make strategic decisions on what is likely to yield sustainable and positive impact. The case studies serve as a tool in this process: indeed, empirical evaluations and analyses of our past efforts need to form part of the knowledge repository that reformers draw on to design, pilot, adjust and implement more effective interventions.

In terms of the intersection of empowerment and customary justice programming, it can be concluded based on all of the case studies combined that there are four key issues governing the relationship between legal empowerment and customary justice systems: power imbalances, level of legal awareness, choice of dispute resolution fora, and access to remedies which are consistent with minimum rights standards. Recognizing that many of these issues overlap, it is argued that, with the capacity to challenge power imbalances; access the law and legal services; exercise choice regarding alternative recourse options; and obtain remedies that do not contravene minimum rights standards, people living in poverty can improve the justice outcomes available to them and become agents of change for their own betterment. The remainder of this chapter provides the starting pieces in the development of a framework for engaging with customary justice systems for empowerment by considering each of these issues, examining possible entry points and drawing on lessons learned from the case studies and broader scholarship.

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## 1. Power

The lack of, or at least limited, state involvement in customary justice systems by no means suggests that they are not embedded within entrenched and politicized power structures. Even

among the poor and marginalized there are distinct social hierarchies, and power imbalances often dictate justice outcomes. Moreover, lack of and abuse of power lurks behind a range of due process and rights violations. Customary justice actors are generally appointed from within the community on the basis of status or lineage. While this provides a level of authority and command necessary to mediate or adjudicate disputes, such roles may be subject to elite capture by those with a vested interest in maintaining and institutionalizing discriminatory or abusive practices. Decisions and agreements may therefore not be made on merit alone, but be based on outside pressures such as powerful connections or threats of sanction. In this regard, customary justice systems can support and reinforce power imbalances. This is pertinently described in the Somalia case study where minority clans are forced to enter into *xeer* agreements with majority clans, the rules of which clearly work to maintain the latter's interests and dominance. The biggest challenge in ameliorating the negative consequences of power asymmetries is thus that customary structures often operate to reinforce and maintain the status quo. Attempts to challenge existing power structures will create winners and losers, and those who perceive themselves as losing will likely resist any threat to their authority, prestige or access to resources.<sup>11</sup> Those seen as spearheading reforms (community members as well as supporting organizations) may face threats, intimidation or harassment.

However, as Rosalind Eyben of the Institute of Development Studies notes, changes in power relations can and do take place. "They occur by collective agency," she writes, "such as social movements, 'outflanking' dispositional arrangements through networks and alliances that take advantage of points of instability."<sup>12</sup> No single condition is likely to effect change in deeply entrenched power imbalances. Success is more likely through a combination of empowerment tools and strategic movements — a situation in which organized voice(s) and informed choice meet with access to legal services and awareness of rights to seek just recourse. Strategic timing also plays a key part in challenging the status quo.<sup>13</sup> Initiatives need to be implemented at a time that does not run the risk of jeopardizing the end-goal of empowerment for all. For example, law-making or the development of codes of conduct should not be attempted where women are denied access to, and participation in, consultation processes.

## **1.1 Entry points for redressing power imbalances**

### **1.1.1 Increasing the depth and intensity of community organization**

The ability and capacity to organize as a collective has great importance in challenging power imbalances, incentivizing accountability and leveraging greater bargaining power. Such groups have a key role to play in legal empowerment by "provid[ing] an arena for formulating shared values and preferences, and instruments for pursuing them, even in the face of powerful opposition".<sup>14</sup> Accordingly, interveners should seek to engage the support of formal and informal women's organizations, child protection groups, and other collectives that represent vulnerable groups. In the Rwanda case study, it was shown that facilitating the participation of representatives of the National Women's Council in dispute resolution involving women's land claims had a profound impact: such representatives became active participants in mediation, effectively demanding that women's rights to matrimonial property be enshrined in agreements reached. Their success can be attributed, at least in part, to three factors. First, as a pre-existing group, they did not threaten existing power structures. Second, their participation was not inconsistent with accepted customary practice. Third, the group had links to an established NGO, which helped them to organize and enhance their legal awareness. This example demonstrates how a combination of empowerment tools can be used to effect change in local village affairs and gradually modify dominant power structures.

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By definition, empowerment cannot be transplanted or imported. As both a process and a goal, empowerment is most likely to be effective when it grows from community identified needs and initiatives. Donors and international agencies thus need to find methods of effectively supporting locally organized groups without hijacking their agendas. The approach adopted by Peace Foundation Melanesia (PFM), as described in the Papua New Guinea case study, provides some key insights in this regard. PFM structured its intervention around local notions of restorative justice and methodologies that were consistent with the overarching goal of maintaining community harmony. The intervention

was ultimately criticized for not focusing in greater depth on substantive rights and setting normative boundaries for dispute resolution; however, their approach of facilitating local debate on challenging concepts such as gender equity, power-sharing and human rights, as opposed to direct or prescriptive norm changes, may have been what allowed the small modifications that did occur to take root and be woven into the existing fabric of culture and customary law.

Finally, while collective organization is most effective where it is organic, this does not mean that 'fertile seeds' cannot or should not be planted. Microcredit programs, vocational skills training, schools and health clinics are all means of bringing people together around a common purpose. This common purpose can lead to a sense of communal identity, valuable in lobbying against power imbalances at the local level: instead of 'woman A against man B', the issue can become 'mothers', 'small business owners' or 'female-headed households' against injustice.

### 1.1.2 Providing monitoring and oversight

The monitoring of customary proceedings by local communities or national bodies — e.g. national human rights institutions; non-government organizations (NGOs) working on women's, children's and indigenous peoples' rights; and organizations providing legal aid, awareness-raising or paralegal initiatives — can challenge unfavorable power dynamics and assist in preventing abuses of power, corruption and elite capture. Monitoring may also help to ensure that customary mechanisms respect minimum rights standards, particularly those concerning minorities and women. In this way, external scrutiny can promote more equitable dispute resolution and strengthen the overall accountability of customary mechanisms.

Another entry point is where the formal or state system exercises oversight functions. In Uganda, for example, the interface between formal and customary systems acts as a system of checks and balances; the Magistrates Court is charged with reviewing all resolutions where the compensation issued by the Local Council Court exceeds a certain amount.<sup>15</sup> This prevents local actors from extorting excessive financial punishments or unfair compensation claims. Modalities for enhanced integration of the customary and formal justice systems are explored in Maggi Carfield's chapter on the work of NGO Uganda Land Alliance in the northern and eastern parts of the country.

Review panels comprised of representatives of vulnerable groups might also be considered. For example, a female disputant who feels aggrieved by a decision might have a right of appeal to a panel of socially powerful women, such as small business owners or wives of village leaders. The rationale is that, in the interests of maintaining social harmony, customary justice actors may be less inclined to enforce a discriminatory decision that is not supported by influential community members. As the Somalia and Rwanda case studies demonstrate, however, this becomes challenging with respect to minority or other socially excluded groups who hold little or no social influence within a community. In such situations, the only option may be to move disputes outside of the customary system; civil society organizations, legal aid officers, paralegals, workers union representatives and other neutral but rights-aware members of the community might be sources of support in this regard.

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### 1.1.3 Supporting the greater representation of vulnerable groups in customary structures

Another means of improving the access to justice and legal empowerment of marginalized groups is to promote their participation in dispute resolution processes. This might involve vesting such groups with leadership responsibilities or expanding the dispute resolution 'circle' to include representatives of women's, youth or other traditionally excluded groups. As the Papua New Guinea case study clearly shows, women's interpretation and application of customary law can better take into consideration the needs of and protections required by *all* groups; similarly, youths may be more inclined to challenge traditional norms and embrace modern notions of human rights and good governance.<sup>16</sup>

The principal challenge in this approach is that power-holders are unlikely to give up their monopoly over dispute resolution easily. To this end, one entry point is to introduce legislation requiring that



community leaders be democratically elected or introducing quotas for the participation of certain groups. Such strategies have had mixed results. In some cases, appointment has not been followed by meaningful participation, and in others, prevailing social attitudes have constrained appointees' freedom to act independently.<sup>17</sup>

The Papua New Guinea and Namibia case studies demonstrate, however, that in certain situations, customary mechanisms can be expanded to better reflect the composition of society. The key enabling factors were different in both cases. In Namibia, the distinguishing feature seemed to be that traditional leaders themselves were the catalysts behind the reforms. Other factors included post-independence advances at the central political level whereby men were aware that women had been elected and assigned to high-level government positions. In Papua New Guinea, the combined impacts of colonization, copper mining and the civil conflict destabilized traditional power structures and eroded the authority of customary leaders, creating inroads for women and other community members to join the ranks of decision-makers and leaders. This is not to say that efforts to enhance parity in participation will never be effective if such conditions are not present, but simply that transforming the normative aspects of customary systems is a highly complex task that is unlikely to be achieved through the installation of new leaders alone and may somewhat depend upon the presence of factors that cannot be 'imported'. Particularly important precursors to change seem to be where reforms are voluntary and have the support of the local leadership.

#### **1.1.4 Creating strategic incentives and legitimate threats**

Power imbalances can also be challenged by creating incentives for behavior change. As noted above, in any reform effort, there will be winners, losers and spoilers, each with their own agency and vested interests. While monitoring and oversight mechanisms, such as those discussed above, can act as retroactive, corrective mechanisms, they can also add to delays and potentially increase costs, jeopardizing many of the original 'pull' factors of the customary justice system. However, a strategically designed review system with incentives that reward cases handled justly and fairly could also assist in challenging power imbalances at the source — in this case, the customary justice actors.

Creating legitimate threat is a further potential means of challenging power. Trained paralegals or NGOs, for example, can be valuable pathways for empowering community members by providing advocacy through individual mediations with customary actors. Combined with community education programs and other activities, this has on a number of occasions led to impressive results.<sup>18</sup> Vivek Maru, co-founder of Timap for Justice, notes that oftentimes the threat of legal action by well-informed paralegals can result in positive outcomes for marginalized groups. He cites one example where paralegals tracked down people who had been contracted to build wells in an internally displaced persons camp but had not done so. When threatened with legal action, the contractors returned to the camp and built the wells. Maru notes that this credible threat of formal action is often 'the teeth' behind paralegals on the ground.<sup>19</sup>

## **2. Legal awareness**

In general, lack of awareness of alternatives to customary justice and of knowledge of rights and responsibilities under formal and customary systems is a serious impediment to legal empowerment. The degree of a person's legal awareness can affect their perception of the law and its relevance to them, directly impacting their capacity to access legal services, as well as their decision on whether and how to deal with a grievance. Beyond awareness-raising on justice options, information concerning procedures and the content of specific laws can arm individuals with the necessary power to challenge unfair practices and hold those in positions of authority to account. Such awareness-raising should target the rules most applicable to customary justice users, such as: the jurisdiction of customary law actors; minimum rights standards and provisions relating to equality, non-discrimination, land ownership, marriage, inheritance and guardianship; and modalities for accessing the state justice system and legal aid.

It is always important to consider how programmatic interventions can have negative implications on vulnerability or for normative change. Particular attention should be paid to whether and to what extent awareness-raising activities should promote engagement with the formal legal system when this system is not fully functional in terms of reasonable accessibility, impartiality in decision-making, corruption, and gender or other forms of social discrimination. Planners should evaluate the possible consequences if, for example, individuals approach a court expecting to receive certain services but find that there is still a large gap between what the formal justice sector should provide and what it actually does provide. Might such experiences exacerbate feelings of disenfranchisement and cynicism regarding the achievement of a just and effective formal legal system? Might vulnerable groups find themselves in an even more disadvantaged position if, having sought but not received an equitable solution from the courts, they then face recriminations or social sanctions at the customary level? Returning to the case studies, one can envisage a situation in Somalia, for example, where a woman refers a case of sexual violence to the court on the basis of the revised customary law, only to have it either withdrawn by the clan leader or dismissed for lack of evidence. Here, the combination of unrealistic evidentiary requirements, a power imbalance between customary and formal court actors, and the absence of legal mechanisms to protect victims whose cases are removed from the courts against their will, operate to make the ambitious revisions to customary law undertaken in 2003 and 2006 unworkable. In such situations, women are left with an unchanged legal protection situation, but having tested social boundaries by referring a dispute outside of the village structure, may find themselves exposed to social stigmatization.

## 2.1 Entry points for raising awareness

### 2.1.1 Tailoring modalities to the target audience

Assessing people's specific information needs allows for better targeting and greater participation in legal awareness activities. In this regard, it should be kept in mind that people have greater use for information on the specific laws affecting them, such as land regulations or workers rights, than on general information relating to international or constitutional human rights. In Rwanda, Namibia, Mozambique and the United Republic of Tanzania (hereafter, Tanzania), awareness-raising focused on women's land rights in the context of inheritance, widowhood and divorce; in Papua New Guinea and Somalia, awareness-raising targeted violence against women in the form of both domestic and sexual assault.

When planning awareness-raising interventions, it is critical to take into account the special needs and constraints of the targeted user groups. Principally, the medium chosen should be accessible and appropriate for the audience. Women, for example, may have constraints on when they are able to attend training sessions due to family responsibilities or it may be socially unacceptable for them to participate in public training with men, or training that requires them to travel; similarly, the gender and ethnicity of trainers should be carefully selected, as should the composition of training groups. Awareness-raising should also take into account literacy, linguistic and educational constraints, and the extent to which members of the target group are able to access forms of mass media that need to be purchased such as newspapers, television or film. Finally, when awareness-raising seeks to modify deeply entrenched social attitudes, such as perceptions of women as land owners, the rights of children of single parents or the seriousness of violations against minority status groups, it is important to target all groups involved in the power struggle. Results from the Overseas Development Institute's Participatory Governance Assessment in Nepal showed that poor people emphasized the importance of directing awareness-raising, not only towards those who face discrimination, but "especially to those who benefit from systems of dominance and injustice — men, the wealthy, 'upper caste' groups."<sup>20</sup> It may be, then, that campaigns concerning, for instance, gender discrimination are more effective when they are led by and targeted towards men.<sup>21</sup>

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### 2.1.2 Employing popular education methods and involving a range of actors

Marginalized groups should be a priority group for awareness-raising programs due to their overall lower levels of legal awareness, weaker access to information sources and linguistic constraints. To

maximize impact, popular education methods should be adopted, such as cartoons, flyers, radio or television dramas, street theatre, role playing or self-help packages. SMS (short message service) broadcasts through services such as *Frontline SMS* have the potential to disseminate information to a wide audience quickly and at low cost.

In developing and implementing awareness-raising strategies, sound communication skills are often more important than specific legal expertise. Involving non-lawyers with a specialized understanding of or experience in the needs of the target population can enhance impact. Moreover, awareness campaigns will be most effective when they engage actors who are in a position to shape public opinion. As demonstrated in the Namibia and Somalia case studies, the role of progressive change agents who embraced the reforms and (at least in the case of Namibia) galvanized society around ideas of change were key to broad and lasting impact.

### 2.1.3 Understanding the limits of information dissemination

A key lesson to be drawn from the case studies is that, in some contexts, information dissemination will have little potential to modify behavior. In both the Rwanda and Mozambique-Tanzania case studies, it was shown that while information dissemination was effective in improving community leaders' understanding of women's statutory land rights, this did little to modify deeply entrenched customary practices, at least in the short term. In such situations, alternate entry points for enhancing protection need to be found. In Rwanda, this entry point was to modify the manner in which disputes were resolved under customary law, while in Mozambique and Tanzania it was diverting dispute resolution away from the customary system and into the courts through legal aid assistance.

## 3. Choice

Genuine choice only exists when both options (formal and customary dispute resolution) are accessible, efficient, effective and viable. As Leah Kimanthy of Africa Peace Point notes, “[h]igh usage of non-formal justice systems in rural areas does not automatically lead to the conclusion that those systems are the best; it could simply mean that they are the only ones available”.<sup>22</sup> In Somalia and Papua New Guinea, it was shown that in conflict situations, the statutory justice system may be inaccessible or inoperable; even in the post-conflict and recovery period, state courts may be weak, ineffectual and largely distrusted. In the other countries studied, the dominance of the customary system was generally due to a mixture of factors, including structural obstacles such as geographic and financial inaccessibility, lack of awareness and information, and cultural influences that steer disputants towards community-based solutions (not uninfluenced by customary leaders and other power-holders whose interests are furthered by mediating disputes according to customary rules and procedures). Barriers to choice may also be intentional or benign — the latter stemming from lack of awareness or the tendency to form adaptive preferences or “narrow practical aspirations regarding life possibilities”.<sup>23</sup>

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The capacity to make, and act on, free and informed choice is a fundamental characteristic of the legally empowered person. Further, access to recourse is important for legal empowerment as it represents another tool to challenge power imbalances and discrimination. Acknowledging the value of recourse illustrates the importance of simultaneous efforts to improve both customary mechanisms and the formal justice sector in order to make them more accessible and responsive to the needs of the poor, hence providing genuine alternatives for accessing justice.

In situations where state justice is inaccessible or otherwise unresponsive to community needs, and where there are impediments to accessing justice through customary fora, one solution may be the creation of new institutions that offer alternative forms of dispute resolution. Such institutions operate in parallel to customary justice systems, complementing or supplementing them, with a view to promoting access to justice and improving its operation through heightened competition.

Alternate mediating institutions may be created by communities themselves, NGOs or the state, as detailed below.

### 3.1 Entry points for enhancing choice

#### 3.1.1 Supporting paralegal programs

Paralegal programs are an increasingly common and recognized means of enhancing access to justice through the provision of accessible and affordable legal services. When trained in both formal and customary law and procedures, paralegals can refer cases that would be more effectively dealt with by the courts and serve as the link between community and formal legal services. Paralegals that can 'straddle' both formal and customary systems are hence a key means of enabling greater user choice. The aforementioned example of Timap for Justice's paralegal team was initiated through an experiment in training lay-persons in the community in the law and legal service provision. As they were familiar with the social context and customary legal norms, these paralegals could speak with their clients on familiar terms about choosing which system better suited their needs and, when required, could assist them navigate between the two systems.<sup>24</sup>

Paralegals can play an important role in establishing a permanent legal support capacity at the community level. They should be trained in the basics of law and human rights; key legal issues facing the community such as family law, inheritance, property rights; and in how to provide effective counseling and mediation services. Paralegals can also provide legal awareness training to enable a degree of informed choice and enhance legal literacy in key areas.

#### 3.1.2 Supporting legal aid and assistance programs

Disputants may require professional assistance to exercise choice and access justice beyond that available through the customary justice system. Legal counsel, however, is often beyond the reach of poor and disadvantaged communities, and state-provided legal aid may either be unavailable or reserved for criminal cases. Providing free or subsidized legal aid services eliminates the major economic barrier to accessing the formal justice system.<sup>25</sup> Examples include establishing university law clinics, training community paralegals connected to legal aid lawyers, and supporting NGOs to provide legal aid services.

With respect to NGOs that offer legal aid services, Amrita Kapur's chapter describes the burgeoning community of civil society organizations in Mozambique and Tanzania undertaking to enhance women's land tenure security by providing education on statutory law, training community-based paralegals and establishing legal aid offices to assist women claim their rights in court. It demonstrates that in contexts where courts consistently uphold women's rights to land in cases of dispossession, but where community leaders, regardless of their knowledge of the law in place, fail to apply it, the most effective way to obtain a positive outcome may be not to fight against the customary system or attempt to modify customary norms, but to bypass this system altogether; community-based legal aid services were shown to be an effective and efficient means of achieving this. Critically, in these countries, where there is no established culture or practice of, or capacity for self-represented litigation, women require both legal knowledge and assistance to challenge their dispossession. Without this, it was shown that even the most progressive statutory laws have little chance of changing community perceptions and practices in land distribution.

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## 4. Human rights and protection

The central challenge of engaging with customary justice systems is that while they can provide accessible and acceptable justice for a range of integral rights-based issues, the decisions handed down and methodologies employed are not always consistent with human rights standards. Critics argue that, being unregulated, such fora are prone to corruption and produce arbitrary and inconsistent results. Further, such mechanisms can be undemocratic and lack safeguards, leaving

society vulnerable to solutions that are violent, discriminatory and/or exclusionary.<sup>26</sup> The question of how to support the many positive aspects of customary systems while at the same time enhancing their capacity to protect the rights of the most vulnerable, notably women, minorities, indigenous peoples, disabled people and children, remains largely unanswered.

A review of the programmatic landscape over the last decade suggests that this concern over engaging with institutions that do not adhere to rights-based standards, combined with questions of how to support customary legal institutions without formalizing or legitimizing inequitable practices has skewed programming towards approaches where engagement takes place within a framework where all rights are respected, protected and fulfilled in a fair and non-discriminatory manner. Such modalities of engagement have been supported by the United Nations Secretary-General who has called for rights-based approaches “in all phases of the [legal empowerment] process”.<sup>27</sup>

Such approaches, however, have arguably had limited impact in eliminating contentious practices and modifying problematic norm sets. The case studies illustrate that trying to reconcile two divergent models may overlook the important contributions that are made by customary systems. At the same time, it is clear that where customary norms do not align with human rights standards, there are often complex rationales in play, touching on issues such as culture, socio-economics and security. In such contexts, approaches that concentrate on bringing customary systems into alignment with international norms have the potential to be ineffective or even harmful. As demonstrated in both the Somalia and Rwanda case studies, reforms stimulated either by customary leaders themselves or by the state will have little impact modifying entrenched belief patterns if they fail to respond to the underlying, causative factors. In Somalia, insecurity and weak governance conditions were inextricably linked to elders organizing the release of perpetrators from prison, hence preventing a transition from a collective to an individual-based system of justice. Similarly, in Rwanda, statutory provisions protecting women’s rights to own and inherit land, and to joint matrimonial property, contradicted the distributional logic of the customary system, challenging not only male interests within a family, but having implications for community strength and food security.

This is not to say that such issues are intractable or should not be the subjects of intervention, but that reforms must respond to the nature and characteristics of customary systems and be situated within the broader social, economic and security context in which customary dispute resolution takes place. Interventions such as the capacity-building program implemented by PFM in Papua New Guinea, which was couched in community mores and aimed at small incremental changes while accepting that a level of harm would continue, at least in the short term, may be a less conflictual and more sustainable path to introducing normative change.

## **4.1 Entry points for strengthening human rights protection**

### **4.1.1 Supporting complementarity between the formal and customary systems**

Complementarity refers to changes that can occur within formal and customary mechanisms to strengthen the links between the two systems and to enable them to work in a more mutually supportive manner.<sup>28</sup> Legislation that clearly defines the jurisdiction of customary justice systems *vis-à-vis* state courts can regulate the power of local customary actors and offer better protection to disputants. As demonstrated in several of the case studies, however, the state must have the necessary capacity to assume and enforce its jurisdiction. It should be noted that limiting the jurisdiction of the customary system without ensuring access to the formal system can create a justice vacuum that might result in vigilantism or further compound injustice as crimes go unresolved. Reforms must hence be sequenced so that the conditions that make formal courts unattractive or difficult to access are addressed prior to imposing jurisdictional limitations for customary systems. A key dissuading factor may be the different sanctions offered by state and customary courts. Court adjudication may be avoided if the likely result is that the perpetrator is imprisoned and hence able to avoid his or her traditional responsibility of paying compensation to

the victim. If undertaken, these types of reforms are most likely to be successful when they are implemented in concert with measures designed to recognize some customary principles, rules and procedures within statutory law and incorporate them into the operations of state courts.

#### 4.1.2 Facilitating public debate

Organizing or supporting community-level debate and discussion on the positive and negative aspects of customary systems and drawing out internal contradictions or practices that are difficult to justify can be an important precursor to revising customary rules, re-defining the jurisdiction of customary courts and developing better rights protections for vulnerable groups. In Namibia, for example, the forerunner to the gender mainstreaming of participation in customary courts was the Customary Law Workshop of Owambo Traditional Authorities in Ongwediva in 1993. It was this meeting where it was decided that women should be allowed to participate fully in the work of community courts, giving momentum to the process of involving women more actively in local political and judicial decision-making.

#### 4.1.3 Supporting codification, self-statements or ascertainties of customary law

The codification of customary law is proposed by some as a means of enhancing predictability in decision-making and reducing the flexibility and negotiability inherent in customary law. Projects of codification, however, have had limited success. First, the effectiveness of customary systems is premised on their capacity to facilitate negotiated solutions, a feature that may be extinguished through codification.<sup>29</sup> Codification also poses practical difficulties. Customary systems are dynamic and may exhibit wide variation over small areas; written codes may quickly become obsolete and risk locking diverse groups into a single interpretation of norms.<sup>30</sup>

Popular alternatives to codification are self-statements or ascertainties of customary law, which are written documents that describe (but not prescribe) key customary law principles. As illustrated by Janine Ubink in her chapter on Namibia, self-statements were a highly effective means of reducing the vulnerabilities of widows to being chased off their land following the death of their husbands or being forced to pay community leaders for such land. Ubink attributes such effectiveness to the holistic approach adopted: efforts to amend the normative content of customary law were undertaken simultaneously with efforts to enhance women's participation in leadership and in dispute settlement. Change was also pursued concurrently at the national, regional and local levels. This combination of horizontal and vertical action created synergies that were almost certainly important factors in translating pressure for normative change into practice.

#### 4.1.4 Supporting the development of guidelines, minimum standards and codes of conduct

Introducing procedural safeguards into customary justice processes can: lessen the impact of power imbalances; level the playing field to account for asymmetries in wealth, influence and knowledge; and offer human rights protections for weaker parties. Safeguards might include the adoption of clear jurisdictional boundaries, minimum standards of human rights protections, rules on admissibility of evidence, and sentencing guidelines. Measures to stem corruption are particularly important. One approach is to respond to the factors that give rise to corruption. In some cases, community leaders rely on bribes because they have no alternate income sources. This could be counterbalanced by government stipends or salaries, small business opportunities or regulated community contributions.<sup>31</sup> Other entry points include complaints bodies, which encourage transparency in decision-making (for example, by making adjudication public or disseminating written decisions), sentencing protocols and guidelines, and widened access to alternate dispute resolution fora. The development of such tools should be led by customary leaders themselves in partnership with formal legal actors and civil society representatives, and only following open community-level discussion regarding the positive and negative effects of maintaining or reforming certain practices.

#### 4.1.5 Strengthening the capacity of justice providers

In order to effectively resolve disputes, customary leaders must possess a variety of skills and knowledge. In many cases, however, levels of knowledge regarding human rights standards, due

process and, occasionally even the applicable customary laws, are inconsistent among customary justice providers. A logical means of improving the quality of customary adjudication is thus by targeting local decision-makers themselves. Although such leaders are often among those who benefit from discriminatory norms and maintenance of the status quo, they also have incentives to be responsive to changing community expectations since their ability to maintain order and social harmony is closely linked to their authority.<sup>32</sup> Irrespective of whether this makes them the gatekeepers to rights protection, or potential vehicles of social change, they are clearly important elements in any reform strategy.

Dispute resolution and legal skills training might include customary law principles, assessment of evidence, gender-sensitive approaches, corruption prevention, mediation techniques and leadership skills. Training should also examine relevant statutory and constitutional law, particularly the place of customary law within the state legal system, how to access courts and matters of jurisdiction. Finally, training programs might cover associated skills that can assist leaders in avoiding and resolving conflict, negotiating fairly with other communities, the state or investors; and more effectively managing their environment and common pool resources. In the development of any training program, the literacy and education levels of the target audience must be considered, as well as the need to ensure culture, gender and conflict-sensitive approaches. Training tools should be tailored accordingly; examples include simplified versions of statutory codes and low literacy guides to accessing the courts. Materials that discuss human rights standards in local customs and norms, particularly religious texts or tribal 'codes' are often useful entry points. Active learning through role-playing and scenario reconstruction based on real-life community problems is likely to be more effective than instructive learning techniques such as lectures. Finally, literacy training and record-keeping may be precursors to, or heighten the impact of, the above training activities.

#### **4.1.6 Encouraging reform that is both broad and deep**

Perhaps the most profound lesson to be drawn from the case studies is that effecting sustainable change in the behavioral patterns of both perpetrators and the victims of discrimination and disempowerment requires a holistic approach. Engagement with customary justice mechanisms should be complemented by non-legal initiatives that target community attitudes towards vulnerable groups such as women, children, minority groups or the disabled. Several examples were provided in the case studies of legal service providers (such as women community leaders) teaming up with non-legal service providers (such as NGOs operating women's shelters or offering domestic violence counseling) to provide a more integrated response to victims. Other examples include bundling legal aid delivery with existing services frequently accessed by vulnerable groups such as midwifery services or microcredit schemes, or complementing statutory reforms with training for customary law actors, community paralegals and other key change agents on the logic behind and benefits stemming from the changes.

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Interveners should also look 'deep' when planning reforms. Inadequate domestic human rights standards will obviously act as a barrier to legal empowerment and the capacity of the poor to enhance their economic and social position. It is critical, therefore, that international agencies and donors continue to advocate for pro-poor legislative reform and support domestic advocates, legal aid offices and public interest lawyering. Similarly, interveners should lobby for economic, social and security reforms that specifically target obstacles preventing normative change and in order to complement proposed legal interventions.

## **5. Conclusion**

At its most basic level, engagement with customary justice systems is imperative for two reasons: first, because of their great potential to advance legal empowerment, and second, because where discriminatory practices prevail within the system, they can be powerful impediments to legal

empowerment. Customary justice systems are often deeply ingrained reflections of cultural values and traditions. Simply banning them or denying their jurisdiction is likely to have limited effect<sup>33</sup> and risks removing a widely accepted and familiar means of resolving civil disputes. When structuring reforms, knowledge of the environment in which the customary justice system operates is imperative; without it, donors and international agencies will have little idea of where strengths lie and champions reside, and even less of an idea on how to support them.

This chapter put forward a series of recommendations and entry points for engagement with customary justice systems. This is not to say that the success factors outlined are *sine qua non* or that the success inhibitors identified are all that needs to be avoided. Clearly, change that is both broad and deep will often be a precursor to lasting change, while failing to respond to underlying social, security and access to justice issues is likely to be a stumbling block; similarly, modifications are most likely to be accepted and sustainable when reform evolves from within communities themselves. However, articulating the conditions under which customary norms and practices change is an inexact and poorly understood science, contingent upon many situation-specific factors that cannot be generated solely by external sources.

At the core of the challenges related to customary justice systems lies the issue of power. The enhanced capacity of the poor and vulnerable to access the protections and opportunities guaranteed by law is a fundamentally conflicted process. No single approach is likely to effect change in deeply entrenched power imbalances, which powerful elites have a decided interest in maintaining. Success is more likely to be achieved through a combination of tools that support the exercise of choice, the recognition of human rights standards, the capacity to collectively or individually voice concerns or opinions, and access alternative recourse. With these elements in place, people living in poverty can use the law and formal and customary legal services to advance their social and economic development.

Finally, legal empowerment is likely to take years to bear fruit. As with most development and justice sector reform initiatives, a long-term engagement and perspective is necessary. For donors seeking to support individual and community empowerment through the law and legal services, it is critical to work with existing assets and frameworks, for example, by supporting activities that broaden and deepen strengths and developing tools to help vulnerable groups challenge the power imbalances that lock them in a cycle of poverty.



## footnotes

- 1 Characteristics of customary justice systems referred to in this section are taken from E Wojkowska, *Doing Justice: How Informal Systems Can Contribute* (2006); Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Formal Systems* (2001); and B. Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38 *Connecticut Law Review*.
- 2 Although it is acknowledged that, in some cases, the degree of social pressure to attend and adhere to the decisions of customary justice systems is so intense that participation can hardly be described as truly voluntary.
- 3 UNDP, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007); The Asia Foundation, *Law and Justice in Timor Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice* (2008) 13; The Asia Foundation, *Afghanistan in 2008: A Survey of the Afghan People* (2009) 6.
- 4 M de Langen's response to UNDP Democratic Governance Practice Network Query, *Comparative Experiences on Institutionalizing Customary Law* (27 May 2009).
- 5 Defined as "economic activities by workers and economic units that are — in law or in practice — not covered or insufficiently covered by formal arrangements governing both enterprise and employment relationships" (Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone* (Volume 2, 2008) 130).
- 6 Langen, above n 4.
- 7 J. Faundez, 'Should Justice Reform Projects Take Non-Justice Systems Seriously' (2006) 2 *The World Bank Legal Review: Law Equity and Development* 113.
- 8 Penal Reform International, *Access to Justice in Sub-Saharan Africa: the Role of Traditional and Formal Systems* (2001) 22.
- 9 *Ibid.*
- 10 However, solutions are often in line with the communities' values and expectations, and being able to acknowledge and act on values can be considered a strong expression of empowerment (P. Evans, 'Collective Capabilities, Culture and Amartya Sen's Development as Freedom' (2002) 37(2) *Studies in Comparative International Development* 54).
- 11 Peacebuilding Initiative, *Traditional and Informal Justice Systems: Key Debates and Implementation Challenges* (2009) Peacebuilding Initiative <<http://www.peacebuildinginitiative.org/index.cfm?pageid=1878>> at 24 March 2011.
- 12 R. Eyben, 'Linking Power and Poverty Reduction', in Ruth Alsop (ed), *Power, Rights and Poverty: Concepts and Connections* (2004) 15, 24.
- 13 Commission on Legal Empowerment of the Poor, above n 5, 333.
- 14 P. Evans, 'Collective Capabilities, Culture and Amartya Sen's Development as Freedom' (2002) 37(2) *Studies in Comparative International Development* 56.
- 15 M. Kane, J. Oloka-Onyango, A. Tejan-Cole, 'Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor' (paper presented at the Arusha Conference, *New Frontiers of Social Policy*, 12-15 December 2005) 7.
- 16 R.E. Manning, 'The Landscape of Local Authority in Sierra Leone: How 'Traditional' and 'Modern' Justice Systems Interact' (2009) 1(1) *The World Bank, Justice and Development Working Paper Series* 12.
- 17 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (UK) (2003) 4, 26.
- 18 Wojkowska, above n 1, 35.
- 19 V. Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 *The Yale Journal of International Law* 464.
- 20 N. Jones, *Governance and Citizenship from Below: Views of Poor and Excluded Groups and Their Vision for a New Nepal*, Overseas Development Institute (2009) ix. Similarly, Travedi notes that "raising the awareness of government officials in relation to legal empowerment is more important than raising awareness among poor people" (J. Cunningham, E. Wojkowska and R. Sudarshan, 'Making Everyone Work for the Legal Empowerment of the Poor' (Report of the Regional Dialogue on Legal Empowerment of the Poor, Bangkok, 3-5 March 2009, 17).
- 21 See further, B. Ayuko and T. Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, Research report, World Bank Justice for the Poor (2008) 46-47.
- 22 L. Kimathy, *Non-State Institutions as a Basis of State Reconstruction: The Case of Justice Systems in Africa* (2005) 17.
- 23 C. Gibson and M. Woolcock, *Empowerment, Deliberative Development and Local Level Politics in Indonesia: Participatory Projects as a Source of Countervailing Power*, Brooks World Poverty Institute Working Paper (2007) 8, 2.
- 24 Maru, above, n 19, 427, 459, 464.
- 25 Asian Development Bank and The Asia Foundation, *Legal Empowerment for Women and Disadvantaged Groups* (2009) 9.
- 26 S. Engle Merry, 'Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)' (2003) 26(1) *Political and Legal Anthropology Review* 55, 63; M. Chanock, 'Neo-Traditionalism and the Customary Law in Malawi' (1978) 16 *African Law Studies* 80; M Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 72 *International Journal of Law and the Family* 72.
- 27 UN Secretary General, 'Legal Empowerment of the Poor and the Eradication of Poverty' A/64/133, 13 July 2009 [68].
- 28 Peacebuilding Initiative, above n 11.
- 29 UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 103.
- 30 M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems' (Conference Packet Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, United States Institute of Peace, George Washington University, World Bank 17-18 November 2009, 143, 151); UNDP, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 26-27.
- 31 Note however, Jennifer Brick Murtazashvili's study on customary organization in Afghanistan, which found that the finely tuned systems of checks and balances within customary justice and governance systems were disrupted by alien injections of funds: "Customary leaders are able to resolve disputes and provide other goods to citizens because they extract a fee for their services but also because they are accountable for what they extract." Decisions regarding fees for their services should thus be based on participatory discussions and full community consensus about what is reasonable (J. Brick Murtazashvili, *The Political Economy of Customary Village Organizations in Rural Afghanistan* (2008) 36, Boston University <[www.bu.edu/aias/brick.pdf](http://www.bu.edu/aias/brick.pdf)> at 30 March 2011).
- 32 T. Mennen, 'Putting Theory into Practice: Improving Customary Justice' (Conference Packet Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, United States Institute of Peace, George Washington University, World Bank 17-18 November 2009, 138, 140).
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## 1. Legal Empowerment in Bougainville: Customary Law Peace Building, and PEACE Foundation Melanesia

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Research grant recipient: Naomi Johnstone

Project location: Papua New Guinea

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### 1.1 Project description

In contexts involving natural disaster or civil conflict, the customary legal system may be the only — and in some cases the preferred — forum for resolving personal, intra-community and inter-community disputes. In such situations, engagement with customary systems can be an effective entry point for strengthening legal empowerment. A principal impediment in this regard is that, in many cases, key characteristics of customary legal systems, for example, consensus-driven decision-making, gender-based discrimination and elite capture, are at odds with legal empowerment and access to justice objectives. Interventions must therefore seek to balance maintaining those aspects of the customary system that feed its legitimacy and popularity, with a process of internal critique and reform with respect to elements that block legal empowerment and access to justice.

Bougainville is an autonomous region of Papua New Guinea that has recently emerged from a ten-year civil conflict. In 1994, during the height of the conflict, PEACE Foundation Melanesia (PFM) was invited to Bougainville to undertake conflict resolution training. Strong commonalities were identified between the methodologies employed in such training and Bougainvillean customary legal norms and practices, and the training program was expanded to include mediation and restorative justice. PFM's efforts at conflict resolution and peace building are generally regarded as successful. Their contribution to the legal empowerment of users of the customary justice system, however, is yet to be explored.

In contexts such as Bougainville, where customary processes are regarded as highly legitimate, it is argued that interventions aimed at strengthening legal empowerment and access to justice will be most effective where important community norms, values and procedures are not displaced. The popularity and effectiveness of the PFM training, for example, has been connected to its emphasis on preserving community harmony and consensus-based decision-making — values regarded as integral to the functioning of the customary legal system. Certain characteristics of this system, however, are clearly at odds with legal empowerment and access to justice objectives. These include: power imbalances and elite capture; consensus-driven decision-making; gender discrimination; and gender-based exclusion from dispute resolution processes. A related area of inquiry, therefore, is how PFM responded to norms, values and practices that, while characteristic of the customary system, operated to restrict fair and equitable dispute resolution.

## 1.2 Central research questions

- To what extent did the PFM intervention contribute to the legal empowerment and access to justice of users of the customary justice system?
- How did PFM approach the issues of i) elite capture; ii) power imbalances; and iii) gender-based discrimination and exclusion from participation in the customary justice system, and how successful were they at modifying such norms?
- To what extent and how did the PFM intervention contribute to legal empowerment and access to justice in terms of: i) eliminating gender discrimination; ii) heightening the capacity of women to enforce their legal rights and participate in dispute resolution; and iii) strengthening participatory decision-making and power-sharing.

## 2. Evaluating the Effectiveness of Legal Empowerment Approaches to Customary Law Reform in Somaliland and Puntland

Research grant recipient: Maria Vargas Simojoki

Project location: Hargeisa, Somaliland and Garowe, Puntland

### 2.1 Project description

In 2004, a group of traditional leaders in Somaliland began an ambitious program of revising customary law (*xeer*) to enhance its compatibility with international human rights and criminal justice standards, as well as *shari'a* (Islamic law). Traditional leaders from across the country supported these efforts and with external support, changes were ratified that offered better protection to vulnerable groups, such as women and minorities. These revisions were codified in a Declaration signed by traditional leaders at both regional and national levels. The revisions of *xeer* prompted thinking about how customary law might be used to promote access to justice, particularly for marginalized and vulnerable groups. Attention focused on legal pluralism and the need to harmonize *xeer*, *shari'a* and the secular justice system. An initiative of particular interest to this research builds on one particular aspect of the National Declarations, namely that crimes of rape and homicide should be assigned individual as opposed to collective responsibility. The intervention sought to encourage customary leaders to refer such cases to the secular system rather than resolve them through *xeer* where they can only be dealt with collectively.

These interventions are particularly interesting because they use an innovative model of reforming customary law grounded in legal empowerment. In the past, attempts to modify the operation of customary systems to strengthen the protection of marginalized community members have focused on top-down approaches, such as proscribing customary laws that abrogate human rights, training customary leaders to integrate statutory provisions into customary decision-making, or integrating the customary system into the formal legal framework. In this initiative, by contrast, reforms were initiated, driven and implemented by customary leaders themselves through an inclusive and transparent process. Such a legal empowerment approach to reform is hypothesized to be more effective at modifying deeply entrenched mores and culturally specific customary practices.

An evaluation of the pilot project revealed an observable decrease in revenge killings in the region of Toghddeer, Somaliland. Improvements in access to justice, however, have been more difficult to demonstrate. Further, other evaluations suggest that while there has been a decrease in revenge killings, vulnerable groups still find it difficult to access justice because traditional leaders continue to mediate serious cases that should be referred to the secular courts. This research sought to evaluate the impact of the interventions from the perspectives of users of the *xeer* system and gather knowledge about the effectiveness of this type of legal empowerment approach as a means of facilitating reform in customary justice processes.

### 2.2 Research goal

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

### 2.3 Research outcome

To generate new knowledge on the possibilities and limitations of using legal empowerment approaches to bring customary law into alignment with human rights standards, and harmonize formal and customary justice fora.

### 2.4 Central research questions

1. How and to what extent did the interventions (the revision of *xeer* culminating in a National Declaration and efforts to harmonize the customary and formal legal systems) enhance users' access to justice, particularly vulnerable groups?

2. What conclusions can be made regarding the effectiveness of this legal empowerment approach to reforming customary justice processes?
3. What other lessons can be learned from these interventions in terms of engaging with customary justice systems as a means of strengthening access to justice and legal empowerment in Somalia or other contexts?

### 3. Towards Legal Empowerment in Namibia

Research grant recipient: Janine Ubink

Project location: Namibia

Project duration: 24 months

#### 3.1 Project description

Over the last decade or more, customary justice systems have become an increasing priority for international organizations working on legal development cooperation. Such donor engagement focuses on both enhancing the positive elements of customary justice systems, such as accessibility, cost-effectiveness and compatibility with cultural norms, and also overcoming certain challenges, such as gender discrimination and elite capture. One means of addressing such problems is through the concept of customary legal empowerment (CLE), which is defined as processes that:

- 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 such persons; and/or
- 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

In order to gain a deeper understanding of the possibilities and challenges of CLE, a two-year research project was undertaken in Namibia to evaluate the impact of three interventions designed to enhance the functioning of customary law and traditional leadership, in particular regarding gender equality:

- steps taken in the Uukwambi Traditional Authority to enhance the participation of women in traditional political and judicial administration;
- the recording of certain customary laws by the Traditional Authorities;
- the introduction of provisions in the *Communal Land Reform Act 2002* strengthening widows' rights to land.

#### 3.2 Central research questions

1. How and to what extent did the selected interventions impact on the functioning of customary justice systems and traditional leadership in terms of enhanced representation, participation and women's protection, and improved fairness and equity? Can these interventions be classified as CLE?
2. What lessons can be drawn from these interventions regarding the possibilities and limitations of CLE 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 interventions regarding induced CLE processes and their extension to other contexts?

#### 3.3 Partnerships

The program was implemented by the IDLO Unit for Research, Policy and Strategic Initiatives in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University.

### **3.4 Methodology**

The research employed qualitative and quantitative methodologies. The qualitative research consisted of semi-structured interviews targeting rural communities, as well as key stakeholders from academia, government, donors and NGOs. These interviews were complemented by focus group discussions involving local women's rights activists and local women, as well as observations of Traditional Court meetings. In addition, a Namibian research team administered a survey designed to explore issues associated with access to, participation in and satisfaction with the customary justice system.

## 4. Strengthening Land Tenure Security for Women in Pluralist Legal Systems

Research grant recipient: Amrita Kapur

Project location: Mozambique and the United Republic of Tanzania

### 4.1 Project description

Economic development is increasingly understood as relying on women's economic participation, which in turn is dependent on secure access, use and control over land. This relation is particularly important in African states where agriculture supports the livelihoods of up to 70 percent of the population, and where women provide up to 70 percent of the agricultural labor, and produce up to 90 percent of food crops. In many of these countries, pluralist legal systems — comprising statutory, customary and religious laws — interact to regulate the ownership and control of resources. In the vast majority of rural communities, customary law dominates, even where this conflicts with fundamental constitutional principles and national legislation.

In many situations, customary law does not entitle women to own or inherit property. Their access to the land is secured through their relationships with men in their own family (in matrilineal communities) or their husband's family (in patrilineal communities). This has important implications for women's land tenure and livelihoods security. For example, following the death of their husband, women may be forced to marry one of their husband's relatives to ensure their continued rights of use over matrimonial property. In the case of divorce, women may face the choice of either being expelled from their land or exercising rights of use derived from their children. Over time, in the face of increasing land scarcity and competition over natural resources, these customary practices have evolved to systemically disadvantage women to a point where they are routinely dispossessed of matrimonially acquired land and property.

In recent years, several governments have enacted progressive legislation recognizing women's gender equality and their equal rights to own, use and dispose of property. Land titling legislation has also been introduced aimed at better securing women's land rights existing under customary law. However, the continuing dominance of customary legal structures, social and household power imbalances, and discriminatory societal attitudes have both prevented women from exercising such rights, and entrenched their vulnerable status when land is registered in the name of male household heads.

This research considered legislative reforms introduced in Mozambique and the United Republic of Tanzania aimed at enhancing women's land tenure security. In both these countries, legislation gives formal recognition to customary marriages, provides women with equal rights to own and inherit land, and presumptively entitles wives to an equal share in marital assets upon divorce. Non-government legal service organizations have been active in promoting such legislation through community-based legal awareness schemes and the provision of legal aid services targeting women.

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### 4.2 Central research questions

The research aimed to assess:

1. Whether and how these laws have impacted on the operation of customary norms and practices that operate to deny women's land rights?
2. Whether the legal awareness-raising and women's legal representation services have had a material impact on the effectiveness of such legislation in terms of modifying such customary norms and practices?



### **4.3 Methodology**

The research was conducted through a survey targeting community leaders, women, legal service providers and district tribunal judges in nine communities in both countries. In six of these communities, non-government legal service organizations were providing legal awareness education and representation services. The experiences of these six communities was compared with results obtained in three control communities where no such services had been established.

### **4.4 Research hypothesis**

Legislative reforms aimed at enhancing women's land tenure security have greater impact in modifying customary practices when complemented by legal empowerment programs aimed at improving legal awareness and access to legal remedies.

## 5. Assessing the Scope for Enhancing Legal Empowerment through Targeted Interventions in Land Dispute Resolution by the *inama y'umuryango* and the *urwego rw'abunzi* in Rwanda

Research grant recipients: Marco Lankhorst and Muriel Veldman

Project location: Rwanda

### 5.1 Project description

In Rwanda, as elsewhere in Africa, the bulk of land disputes are resolved at the local level, with only a fraction entering the formal court system. Institutions involved in dispute resolution at the local level include traditional family meetings (*inama y'umuryango*), local authorities and *abunzi* committees.

Like its better known counterpart, the *gacaca*, *abunzi* committees were inspired by traditional dispute resolution mechanisms. They are committees of 12 elected community members. Like traditional family meetings, *abunzi* sessions aim to find a solution that is acceptable to both sides (hence the name *abunzi*, or 'those who reconcile'). There are significant differences, however. Notably, if the parties cannot be reconciled, the *abunzi* are required to apply the law and adopt a binding adversarial decision. One disadvantage to the fact that dispute resolution is so easily accessible is that there is little consistency in the decisions taken by the different institutions. Few *abunzi*, local authority officials, or family elders have received training, and laws, especially those regarding women's rights to land, are little known and therefore often not respected. As a result, dispute resolution tends to be highly factual and practical, as well as considerably influenced by the decision-maker's personal appreciation of the situation. One consequence is a widespread belief that different institutions might arrive at a different finding regarding the same matter. This negatively impacts on disputants' respect for decisions resolved, and in particular the incentive for the losing party to accept the outcome. This has contributed to an elevated level of appeals both within the local context and to the formal court system.

This project targeted two of the abovementioned institutions: village level dispute resolution apparatus and *abunzi* committees. The interventions were designed to increase the quality and motivation of decision-making at the local level and to foster consistency with the decision that would be reached by the institution to which an appeal could be filed. The key objective was to strengthen legal empowerment by facilitating faster dispute resolution and more secure outcomes.

### 5.2 Central research questions

Can the level of satisfaction that disputants derive from decisions taken at local level dispute resolution mechanisms be increased, and the number of appeals to other institutions reduced by:

- encouraging members of different institutions to cooperate in the organization of and to be present at dispute resolution sessions (*inama* study);
- providing training on matters of (inheritance) law to increase the probability that different institutions will reach the same outcome and by encouraging them to signal to the parties that the approaches adopted by the different institutions are consistent (*inama* and *abunzi* study);
- facilitating exchanges between institutions at the local level and the formal court system to increase the probability that the former will reach the same outcome and by encouraging them to signal to the parties that the approach is consistent with that of the court (*abunzi* study); and
- making persons involved in local-level dispute resolution conscious of the distinction between reconciliation and adversarial proceedings and by equipping them with tools for conducting such procedures.

### 5.3 Research methodology

The research was conducted using three comparable groups of villages (*imidugudu*; singular: *umudugudu*) in the Northern Province of Rwanda. In the first of these three groups, a number of interventions were carried out at the level of the *inama y'umuryango*, while in the second group, interventions were carried out at the level of the *abunzi*. As discussed above, these interventions were undertaken with the objective of improving legal empowerment by strengthening legitimacy, improving transparency and increasing respect for nationally and internationally protected gender values. The third group of *imidugudu* were used as a control group, allowing for a comparison of results. After the interventions, decision-making in all three groups of villages was monitored for several months to assess the effectiveness of the approach adopted.

## 6. Customary Justice and Legal Empowerment in Liberia: A Field Experiment Using Mobile Paralegals

Research grant recipients: Justin Sandefur and Bilal Siddiqi  
Project location: Liberia

### 6.1 Project description

Decades of unrest and civil war in Liberia have seen the collapse of the formal legal system. Since the advent of peace, Liberia's reformist government has strived to expand the reach of the law and promulgated progressive new legislation. However, formal courts remain hard to access, are expensive, and face long delays; formal laws are often at odds with local norms and customs. Most Liberians thus turn to the customary legal system, which is more accessible and culturally acceptable, but offers little protection to women, minors and vulnerable groups. Traditional institutions also maintain harmful practices such as trial by ordeal, and are prone to capture by local elites. Thus, many ordinary Liberians have little recourse to egalitarian, rights-based justice.

This research investigated the effectiveness of a new, untested initiative to enhance legal empowerment and access to justice through the improved operation of both customary and formal legal systems. At the core of the intervention was the provision of pro bono legal services to individuals with limited access to formal justice, by mobile paralegals ("Community Legal Advisors"; or CLAs) trained to work at the intersection of customary and formal law. CLAs provide free referrals, advice and advocacy, as well as direct mediation services and attempt to bridge both legal systems in the course of their work. They travel to villages on motorbikes, visiting each community at least once a month and often staying overnight. The program aimed to strengthen the functioning of customary legal systems both directly and indirectly by: informing individuals about their fundamental rights and national laws, with a focus on land, inheritance, sexual violence and labor issues; providing informal oversight of agents of the customary and formal systems; and breaking the de facto monopoly on justice currently enjoyed by customary leaders, by providing a direct alternative via mediation and by lowering the costs of accessing the formal system.

The intervention was run by the Carter Center, in partnership with the Justice and Peace Commission, a Liberian NGO. The program pilot began in February 2009 in 40 villages in the southeast; a further 120 villages were added in June 2009 in the north and central counties.

### 6.2 Methodology

The current research aimed to: i) collect new, multi-purpose datasets on the functioning of customary and formal legal systems and local attitudes and experiences of customary and formal law; and ii) generate robust, primarily quantitative evidence on the short- and medium-term impacts of the mobile paralegal intervention, in terms of mitigating conflict, improving the lives of people and bringing communities together.

A randomized controlled trial (RCT) of the mobile CLA program was conducted. The research design followed a baseline and follow-up survey structure, combining difference-in-difference analysis with village-level randomization. All 40 'treatment' villages in the south-east (SE) and 48 of the 'treatment' villages in the north-central (NC) part of the country were randomly selected from a pool of 176 potential pilot villages. The remaining 88 potential pilot villages were assigned to a control group to provide a basis for comparison. All 176 potential pilot villages were surveyed before the launch of the program. The mobile CLA program was then launched in 'treatment' villages only. Follow-up surveys conducted measured potential impacts across a wide range of variables. Randomized allocation of villages to treatment and control groups ensured that any differences across the groups could be causally attributed to the intervention.

### **6.3 Central Research Questions**

- To what extent and how did the CLA program contribute to the legal empowerment of users of the customary justice system?
- Did the intervention improve individuals' knowledge of their rights and the formal law?
- Did the intervention provide better access to justice?
- Did the intervention help strengthen the rule of law?
- Did the intervention improve individual livelihoods?

## 7. Towards Legal Empowerment: Evaluating the Integration of Customary and Formal Law Land Dispute Mechanisms

Research grant recipient: Maggi Carfield

Project location: Uganda

### 7.1 Project description

The conflict in northern and eastern Uganda, which began in 1987, has had a devastating impact on the civilian population. The Lord's Resistance Army (LRA) has inflicted brutal violence in northern Uganda, including raping, kidnapping, torturing, and murdering thousands of civilians. The conflict has also caused widespread internal displacement and insecurity. Although the LRA is yet to sign a peace agreement with the Ugandan Government, it has been driven out of northern Uganda, and communities in the region are beginning to rebuild. Concurrently, conflicts of a different kind are emerging. A recent study commissioned by the Justice, Law and Order sector on transitional justice in northern and eastern Uganda and some parts of the West Nile Region found that land conflicts were respondents' second highest concern (42 percent), outranked only by domestic-related disputes (45 percent). Further, over 90 percent of domestic-related disputes were connected to a land conflict. The study also revealed that most respondents were unfamiliar with the Ugandan court system and had a preference for dispute resolution through local councils or the clan court system.

Uganda Land Alliance (ULA), a national civil society consortium comprising organizations and individuals, was founded in 1995 to advocate and lobby for fair land laws and policies. In 2009, ULA received funding to conduct a pilot project aimed at enhancing the capacity of the Local Council and the clan authorities to resolve land disputes by:

- raising awareness among communities on land rights;
- conducting training on the Local Council's role in litigating land disputes; and
- strengthening the capacities of traditional authorities, especially the clan institution, through human rights and land rights training.

### 7.2 Research goal


This research sought to monitor and evaluate the impact of ULA's work with a view to gaining a better understanding of the challenges of integrating different methods of land dispute mechanisms and the advantages and drawbacks to utilizing informal and formal dispute systems.

### 7.3 Methodology

An instrument was developed to measure the effectiveness of the training undertaken in local communities, with local council members, and with traditional authorities. Data was also collected on the number of land disputes occurring, how they were resolved, and disputants' satisfaction with the resolution. Finally, ULA's efforts to integrate customary law into formal law was tracked and evaluated through interviews with traditional leaders, local council members, and actors within the formal legal system.

### 7.4 Central research questions

1. How and to what extent did ULA's interventions impact on the legal empowerment of users of the customary justice system in relation to the resolution of land disputes?
  - What do community members and formal and informal land dispute authorities perceive as the largest challenges facing individuals with respect to land disputes?
  - Was the ULA intervention designed to respond to such problems and was the intervention effectively implemented?
  - What was the impact of the ULA intervention on dispute resolution processes? Did the intervention contribute to enhanced legal awareness among community members? Has there been a change in the number, substance or outcome of land disputes?

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2. In light of these findings, how might informal and formal land dispute systems be better integrated to ensure greater access to justice and legal empowerment for Ugandans?
- What do users, local authorities and key actors within the justice, law and order sector perceive as the advantages and disadvantages of integrating formal and customary justice processes?
  - What are the potential entry points for integration and what is the overall viability of operationalizing them including an assessment of potential obstacles to be overcome?

## 8. Community Land Titling Initiative

Project manager: Rachael Knight

Project location: Uganda, Liberia and Mozambique

### 8.1 Project description

In Africa, the issue of how best to protect the land holdings of rural communities has been brought to the fore due to increasing land scarcity brought on by, *inter alia*, population growth, environmental degradation, climate change and violent conflict. Due to this scarcity, wealthy nations and multinational corporations are increasingly seeking to acquire large tracts of land for tourism-related development, biofuel projects or agricultural production. In many cases, governments facilitate such grants with a view to attracting investors and stimulating economic growth. In other situations, officials may transfer land either illegally and/or for personal profit. The land appropriated is often held by rural communities that operate under customary law and have no formal title. Even where customary rights are protected, the rural poor often lack meaningful access to justice. The state justice system may be geographically, linguistically or financially inaccessible. Community members may also lack awareness of their rights and the relevant administrative or judicial avenues through which they can assert them.

Titling land held under customary law is the most obvious means of protecting communities' land rights from encroachment. However, creating a legal paradigm to allow for the formalization of customarily-held land claims is a difficult exercise. One possible method is to allow communities to register their lands as a single unit by reference to customary boundaries, and empower them to control and regulate intra-community land holdings and usage. Such a system effectively allows a line to be drawn around the perimeter of each community, thereby creating a 'tenurial shell' within which parcels of land can be held individually, by families, or communally as determined by each community. This procedure will be referred to as 'community land titling'.

While various African governments have passed legislation that facilitates community land titling, these laws have not been widely implemented. Reasons include poor community awareness regarding their rights; insufficient government capacity; overly-complex and bureaucratic processes; opposition by government and elite; the prohibitive costs of and time involved in titling and registration processes; the high level of technicality involved in land titling and registration; and the inter- and intra-community disputes that arise during the process of determining boundaries. If the potential benefits of community land titling are to be realized, steps must be taken to overcome such difficulties and assist communities to attain formal recognition of their customary land rights. Steps must also be taken to reduce power and information asymmetries and increase communities' negotiating power with investors interested in purchasing, renting or utilizing community-held lands. Finally, where land management and administration are devolved to the community level, safeguards needs to be set in place to ensure that the land rights of vulnerable groups are not violated by more powerful community members and that power-holders do not engage in corrupt or exploitative practices at the expense of the wider community.

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In response to these challenges, IDLO undertook a Community Land Titling Initiative in Uganda, Liberia and Mozambique. In each of these countries, legislation facilitating community land titling is in place but has not been well or widely implemented, or due to governments' promotion of international investment in rural areas, community land rights remain at risk.



## **8.2 Research goal**

The objectives of the research were to:

- gather evidence relating to the type and level of support that communities require to successfully complete community land titling;
- gather evidence on the type and level of support that facilitates the best protection vulnerable groups' land rights in the context of decentralized land management and administration.

## **8.3 Methodology**

The research was conducted by providing groups of communities with different levels of legal assistance with respect to community land titling, and then observing their progress through the various steps outlined in the relevant laws and regulations. In each of the three countries, 20 communities were selected to participate in the project. These communities were randomly divided into four groups of five communities. Three groups received varying levels of legal assistance and a control group, that received no assistance, tried to undertake the community land titling process independently. Their experiences were then compared and analyzed.

**Editor: Erica Harper**

Erica Harper joined IDLO in 2005 as the Chief of Party of the Post-Tsunami Legal Assistance Initiative for Indonesia (2005-2007) and currently occupies the position of Senior Rule of Law Advisor with the Research, Policy and Strategic Initiatives Unit. Dr Harper has a Bachelor of Commerce and Bachelor of Laws (honours 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 worked at the United Nations High Commissioner for Refugees (Geneva, Timor-Leste and the Philippines). Her working languages include English and French.

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Naomi Johnstone is an Assistant Research Fellow at the National Centre for Peace and Conflict Studies in Aotearoa New Zealand. She holds a Bachelor of Laws (Hons) and a Bachelor of Arts from Otago University in New Zealand. She has experience working on post-conflict reintegration and transitional justice with the United Nations Office of the Recovery Coordinator in Aceh, Indonesia. She also has experience working on conflict analysis in Sri Lanka, as well as customary law and indigenous rights in relation to natural resources, in New Zealand and Indonesia.

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Janine Ubink is a senior lecturer, member of the management team, and Africa co-ordinator at the Van Vollenhoven Institute (VVI) for Law, Governance and Development, Faculty of Law, Leiden University. She started work at the VVI in 1997, first as a research assistant, supporting the director of VVI in various Indonesia-related activities and, after completing her Masters in International Law at Leiden University, as a Ph.D-fellow. She recently published her Ph.D thesis entitled "In the Land of the Chiefs: Customary Law, Land Conflicts, and The Role of the State in Peri-Urban Ghana". Since 2006, she has been involved as researcher, project co-ordinator, and editor, in a research project on legalization of informal land tenure in nine countries (Tanzania, Ethiopia, Senegal, Namibia, Ghana, Indonesia, China, Bolivia, Mexico). Ms. Ubink's areas of expertise include customary law, traditional authorities, legal empowerment, and legal reform.

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Marco Lankhorst holds Master's Degree in Law from the University of Amsterdam (with specialization in legal anthropology and legal history). He worked as a law clerk at the Amsterdam Court of Appeals, dealing mainly with cases involving land and inheritance disputes, before returning to university to write his Ph.D thesis at the faculty of economics. He has conducted field research in Namibia, the Democratic Republic of Congo and Rwanda. Currently, he is head of mission of RCN Justice & Démocratie in Rwanda. His areas of expertise are land dispute resolution by customary and neo-customary institutions and women's land rights.

Muriel Veldman holds a Master's Degree in Law and a Bachelor's Degree in French Literature, both from Amsterdam University. After completing her studies she contributed to a project supported by the EU Commission for the drafting of common European principles of private law (Lando Project) and later worked as a senior legislative drafter at the Dutch Ministry of Housing and Environment. She has conducted field research in various African countries, including Namibia and Rwanda. Currently, she is a project manager at RCN Justice & Démocratie in Rwanda. Her areas of expertise are land dispute resolution by customary and neo-customary institutions and women's land rights.

#### **Liberia: Bilal Siddiqi and Justin Sandefur**

Bilal Siddiqi is a Ph.D. candidate in Economics at the University of Oxford. His research examines legal empowerment, dispute resolution, and public service delivery in post-conflict settings. He is currently involved in several field experiments in Liberia and Sierra Leone in the areas of legal aid, public health, and reconciliation. Bilal was previously based at the Center for Global Development in Washington, DC, where he worked on aid delivery and governance of health and education. He holds an M.Phil. in Economics from Oxford, where he studied as a Rhodes Scholar.

Justin Sandefur is a research fellow at the Center for Global Development in Washington, DC. His research uses quantitative tools to explore the role of legal reform in economic development, including alternative dispute-resolution mechanisms in Liberia, efforts to curb police extortion and abuse in Sierra Leone, and an initiative to expand land titling in urban slums in Tanzania. Prior to moving to Washington, Justin spent two years as a post-doctoral research officer at the Centre for the Study of African Economies at Oxford University, and served as an adviser to the Tanzanian Government on poverty measurement. He holds a doctorate in economics from Oxford University.

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Maggi Carfield holds a Bachelor's degree from Brown University and a joint degree in law and social work from Washington University. She has been a Faculty Fellow and a Visiting Lecturer in Law at Washington University Law School. She also teaches at the George Warren Brown School of Social Work. Previously, she practiced public interest law and served as a law clerk for Chief Judge David R. Herndon, United States District Court, Southern District of Illinois. The focus of her Masters in Social Work was on community organizing and development. Her current research explores property law within the context of international development. She has conducted research in Haiti, South Africa, and Uganda.

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Rachael Knight is an attorney with expertise in the areas of land tenure security and access to justice/legal empowerment of the poor. A graduate of the UC Berkeley School of Law (Boalt Hall),

Rachael worked for seven years founding and running medical-legal partnership programs to increase low-income families' access to justice within hospitals in the San Francisco Bay Area and fostering replication of the model throughout California. She was a Fulbright Scholar in Mozambique from 2001-2002 and an Equal Justice Works fellow from 2005-2007. She worked as a consultant for the Food and Agriculture Organization of the United Nations (FAO) from 2004 until 2009, both for the Legal Development Service and the Land Tenure division of the Natural Resources Management and Environment Department. Her working languages include English, Portuguese and Spanish.

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