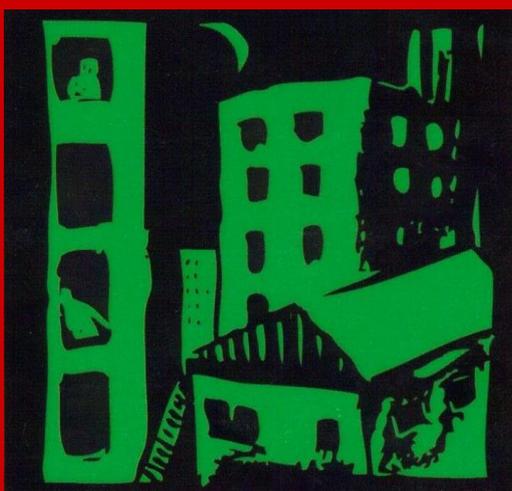


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The institution of traditional authority in Okombahe, Erongo Region of Namibia: can the institution be reconciled with democratic values of justice?

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ABSTRACT

The purpose of the article was to explore the roles and functions of the institution of traditional authority in contributing to access to justice or providing a form of justice through the preservation of customary law to the people of the Okombahe community in the Erongo Region of Namibia. The article's aim was to investigate the factors that have contributed to the institution's resilience and how this resilience may be tied to the

type of justice this customary institution provides and represents. The institution of traditional authority has recently caught the attention of both scholars and policymakers due to the increasing return or revival of this “ancient” form of governance in the contemporary era that is constantly changing its procedures and rules of appointment to adapt to contemporary concerns and social problems. The scope of traditional leaders’ jurisdiction and power is defined in the roles and functions they fulfil. As a popular legitimate informal institution in Okombahe, traditional leaders were found to manage and resolve conflict, and to preserve communal identity, unity, and continuity. This article highlights the significance of the institution of traditional authority as a legitimate customary institution originating from the bottom-up, and as a system that can be complementary to democracy as opposed to the assumption sometimes held that it is contesting with it. In Okombahe, the institution of traditional authority was found to contribute to providing an accessible justice system option grounded in this community’s identity, history and social norms. The data collection employed for this qualitative case study of Okombahe consisted of interviews, supporting documents, and relevant scientific articles.

Keywords: Customary law, the institution of traditional authority, resilience, justice, access to justice, Namibia.

1 INTRODUCTION

Research shows that both civil and administrative justice are delivered by many providers , such as, public courts, private legal services, formal and informal procedures, as well as traditional approaches. In most countries there is no single state institution or private one that has the monopoly of these. People go to lawyers, paralegals, traditional leaders, religious leaders, informal tribunals, and so forth.¹ Recent decades have demonstrated the continued relevance of customary law for the regulation of the lives of many African societies, particularly in rural areas. In many of these societies, people navigate “family relations, access to natural resources and settlement of disputes through customary law”². Many problems are solved through interactions between the parties involved in negotiation or similar processes.³ Rural populations often have better access to informal justice systems than to the state judiciary.

They prefer them for a number of significant reasons, namely, “the procedures take place on site, it is more or less free of cost and less prone to corruption, it is exercised by trusted people in the language everybody speaks and decisions are taken according to

¹ Barendrecht M “Five strategies toward basic justice care for everyone” in Botero JC, Janse R, Muller S & Pratt C (eds) *Innovations in the rule of law: a compilation of concise essays* The Hague : Hague Institute for the Internationalization of Law (2012) at 52.

² Ubink J & Mnisi-Weeks S “Courting custom: regulating access to justice in rural South Africa and Malawi” (2017) 51(4) *Law and Society Review* at 825.

³ See Barendrecht (2012) at 53.

rules known to all community members”⁴. Informal justice systems including customary law are often the only avenues through which the masses can access justice. Customary justice systems provide access to justice for marginalized or impoverished communities that may otherwise have no option for redress.⁵ Röder argues further that “informal justice systems allow for better access to justice”. This is because they typically aim at restoring social peace instead of enforcing abstract legislation.⁶ Informal justice systems have their own norms, leadership structures and dispute settlement institutions, where many relations and rights are regulated by customary law.⁷

The focus of this article will be on what is fundamental to customary law, particularly the institution of traditional authority and justice and the access thereto in relation to the institution. Traditional authorities are the custodians of traditional justice practices. When we speak of the institution of traditional authority as a custodian of traditional justice practices, we are referring to how in the respective rural communities, the institution of traditional authority provides an option for people to seek justice and a justice familiar and fair to them. Research suggests that between 70 and 90 per cent of justice needs on the African continent are met outside of the state-led justice systems.⁸ This is certainly the case in Southern Africa.⁹ It is often assumed that traditional justice practices are patriarchal; however, findings suggest that in many areas women are centrally involved in traditional justice practices as will be seen with the case study. Patriarchy can be found in most world systems.

Similarly, in the evolving systems of justice in Southern African communities, one may find evidence of patriarchy along with evidence of attempts to address this issue as these systems also evolve.¹⁰ There is limited understanding of the institution of traditional authority and the contributions that the institution can make to justice and the access thereto, particularly in rural remote areas. Many generalisations have been made regarding the institution; however, there has been slow progress in terms of moving away from just describing the institution, to investigating what the institution of

⁴ Röder TJ “Informal justice systems: challenges and perspectives” *Max Planck Institute for Comparative Public Law and International Law* (2013) available at 58.

<https://worldjusticeproject.org/news/informal-justice-systems-challenges-and-perspectives> (accessed 2 January 2021).

⁵ International Development Law Organisation “Customary justice: innovations and the role of the UN” in Botero JC, Janse R, Muller S & Pratt C (eds) *Innovations in the rule of law: a compilation of concise essays* The Hague, Hague Institute for the Internationalization of Law (2012) at 55.

⁶ See generally Röder (2013).

⁷ See Ubink & Mnisi-Weeks (2017) at 826.

⁸ See generally Chirayath L, Sage C & Woolcock M “Customary law and policy reform: engaging with the plurality of justice systems”. Background paper for the World Development Report 2006: Equity and Development. Washington DC : World Bank (2005).

⁹ See generally Wielenga C “Introduction: women’s roles, gender politics and justice in Africa” in Wielenga C , Bae B, Marumbadoro R, Matsimbe Z, Matshaka C & Dahlmanns E *Women in the context of justice: continuities and discontinuities in Southern Africa* Pretoria : Centre for Sexualities, Aids & Gender Press (2018) at 5-19.

¹⁰ See Wielenga (2018) at 7.

traditional authority does every day in terms of their governing, and how this governance structure can provide justice and the means to accessing justice.

This article asserts that, pertaining to justice and the access thereto in rural areas, particularly in providing a local institutional option, the institution of traditional authority can be relied upon to deliver justice needs. The institution shares cultural and historical identities with its constituents. Traditional leaders are located within their communities, sharing and mediating these cultural and historical identities, by producing and reproducing them in harmony with their respective communities.

2 ACCESS TO JUSTICE AND TRADITIONAL AUTHORITY IN AFRICA

The concepts of justice and particularly access to justice in the African context targets poor and marginalized societies. These concepts make reference to the state as well as non-state institutions and normative systems.¹¹ In many African countries, the institution of traditional authority is embedded in attributes of customary law.¹² The historic role of the institution of traditional authority was to serve as a bulwark for the defence and integrity of the traditional state. Since time immemorial, traditional leaders were heads of state, chief justices, law makers and enforcers, spiritual leaders and military leaders.¹³ Traditional leaders were mandated to ensure that their people enjoyed peace, prosperity and security at all times.¹⁴

There were processes for seeking justice, punishing crime, rewarding achievement and compensating those wronged by the state and/or individuals.¹⁵ However, due to colonialism, the formal role and rights of traditional leaders in Africa have changed substantially. The institution of traditional authority is an integral part of the contemporary justice system through customary preservation and customary judicial practices. It is important to note that as a justice system, the institution of traditional authority has its own set of social, cultural, legal and economic histories.¹⁶ However, like many customary judicial practices across Africa, colonialism has suppressed, crippled and buried local expressions and understandings of justice.¹⁷

¹¹ Van de Meene I & Van Rooij B *Access to justice and legal empowerment: making the poor central in legal development co-operation* Dordrecht : Leiden University Press, ProQuest eBook Central (2008) at 6.

¹² Logan C "The roots of resilience: exploring popular support for African traditional authorities" (2013) 112(448) *African Affairs* at 353.

¹³ Ndlela RN, Green JM & Reddy PS "Traditional leadership and governance in Africa" (2010) 40(3) *Africa Insight* 1 at 2.

¹⁴ Panin OAO "The role of traditional rulers in Pan-African institutions". (A paper presented by Osag Yefuo Amoatia at a Conference on Global Perspectives on Traditional/Indigenous Leadership, 25-26 October 2007).

¹⁵ See Ndlela, Green & Reddy (2010) at 2.

¹⁶ Bae B "Healing justice: traditional healers' mediation court in a South African township" in Wielenga C, Bae B, Marumbdoro R, Matsimbe Z, Matshaka C & Dahlmanns E *Women in the context of justice: continuities and discontinuities in Southern Africa* Pretoria : Centre for Sexualities, AIDS & Gender Press (2018) at 29.

¹⁷ See Bae (2018) at 29.

A number of Africa States, including Namibia, as well as South Africa, Ghana, Mozambique and Uganda, have “re-incorporated traditional leaders into state hierarchies’ acknowledging their influence and legitimacy as local players”¹⁸. There is nothing new regarding the use of informal institutions as means to attaining justice.¹⁹ Popular notions of justice or the access thereto have focused on empowering individuals to exercise their legal rights in the civil judicial system. Under international customary law, access to justice refers generally to a person’s right to seek a remedy before an impartial court of law or tribunal.²⁰

Access to justice means more than physical access to courts, it incorporates the ability to be effectively heard.²¹ Justice and more specifically access to justice focus on the poor and marginalized people’s lack of access to law and the legal system, which effectively deprives them of their ability to enjoy and protect their rights.²² The United Nations Development Programme relates access to justice to “the ability of people to seek and obtain remedy through formal or informal institutions of justice, and conforming with human rights standards”.²³ People in the rural areas are members of a traditional community, where they are tied in networks of social relations and “a web of mutual obligations”. The obligations which the members have towards each other are more powerful than obligations of “citizens”. The legitimacy rests with the leader of those communities, not with the State or with State authorities who are at the same time leaders in these traditional societal contexts. In rural areas the State shares its authority, legitimacy and capacity with other structures and institutions.²⁴

The key factors which contribute to why most Africans continue to look to informal customary institutions for matters relating to justice and the access thereto include the fact that the vast majority of them continue to live in rural villages where access to the formal State system is extremely limited.²⁵ Often the type of justice offered by the formal courts may be inappropriate for the resolution of conflict between community members living in rural villages, where the breaking of individual social relationships can cause conflict within the community and affect economic cooperation on which the

¹⁸ Buur L & Kyed HM “Contested sources of authority: Re-claiming state sovereignty and formalizing traditional authority in post-conflict Mozambique” (2006) 37(4) *Development and Change* 847 at 849.

¹⁹ Nolan-Haley J “Mediation and access to justice in Africa: perspectives from Ghana” (2015) 21(1) *Harvard Negotiation Law Review* 59 at 61.

²⁰ See Nolan-Haley (2015) at 66.

²¹ Dugard J “Courts and the poor in South Africa: a critique of systematic judicial failures to advance transformative justice” (2008) 42(2) *South African Journal on Human Rights* 214 at 216.

²² See Van de Meene & Van Rooij (2008) at 6-7.

²³ The United Nations Development Programme “Access to justice” (2005) available at <https://un.org/ruleoflaw/thematic-areas/access-to-justice-andrule-of-law-institutions/access-to-justice/> (accessed 17 September 2020).

²⁴ Hinz M “Traditional governance and African customary law: comparative observation from a Namibia perspective” in Horn N & Bösl A (eds) *Human rights and the rule of law in Namibia* Windhoek : Macmillan Namibia (2008) at 70.

²⁵ Penal Reform International *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems* London : Penal Reform International (2000) at 1.

community depends.²⁶ And lastly, state institutions in most African countries operate with an extremely limited infrastructure which does not have the resources to deal with disputes in villages or rural settings.²⁷ As a result of these factors, recent decades have witnessed a re-evaluation of customary justice institutions and a resurgence of the institution of traditional authority.²⁸ When talking of justice and the access thereto in rural communities, this involves local resources and customary norms, as well as the institution of traditional authority.²⁹

3 BACKGROUND TO THE STUDY

The Republic of Namibia which was established on 21 March 1990, is a constitutional democracy which has a “sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all”³⁰. The Namibian Constitution being the highest law of the Republic, sets the rights and duties of everyone in the country.³¹ Prior to independence Namibia was declared a German Protectorate in 1884 and subsequently a Crown colony in 1890 known as South West Africa. Germany colonised the territory from 1884 up until 1915, when it was occupied by the then Union of South Africa and its forces through a military invasion.³² In terms of the Peace Treaty of Versailles, from the 1920s onwards the territory became a Protectorate or Mandated Territory of the Union of South Africa.

This annexation of South West Africa by the Union of South Africa was motivated by economic incentives as well as its apartheid ideals. Mandated to safeguard the rights of the indigenous people, the Union of South Africa instead furthered German atrocities and came to displace and dispossess the indigenous people.³³ The South African administration was characterised by large-scale abuse of human rights of especially the indigenous people of Namibia.³⁴ Even under heavy international criticism, the Union of South Africa expanded the system of apartheid to South West Africa.³⁵ The ushering in of democracy in Namibia meant that the indigenous people could finally be incorporated into the State and how it governs.³⁶

²⁶ See Penal Reform International (2000) at 1.

²⁷ See Penal Reform International (2000) at 1.

²⁸ See Ubink & Mnisi-Weeks (2017) at 825. Also see Englebert P “Patterns and theories of traditional resurgence in tropical Africa” (2002) 30 *Mondes en Development* 51 at 51-54.

²⁹ See Ubink & Mnisi-Weeks (2017) at 849.

³⁰ The Namibian Constitution 1990 Article 1 at 9.

³¹ The Namibian Constitution 1990 Article 5 at 13.

³² Amoo SK & Skeffers I “The rule of law in Namibia” in Horn N & Bösl A (eds) *Human rights and the rule of law in Namibia* 2ed Windhoek : Macmillan Namibia (2009) at 17.

³³ Melber H *Understanding Namibia: the trials of independence* London: C Hurst & Co (2014) at 6.

³⁴ See Amoo & Skeffers (2009) at 17.

³⁵ See Melber (2014) at 6.

³⁶ See Melber (2014) at 9-11.

In Namibia, customary law is formally recognized in Article 66(1) of the Namibian Constitution.³⁷ The Namibian Constitution clearly places customary law on an equal footing with the common law.³⁸ However, the practice of customary law outside of rural community matters is marginal and is seemingly far removed from the public eye.³⁹ Bosco Bae contends that “legal recognition and equal footing in the Constitution does not result in equal standing or an enjoyment of equal infrastructure support, nor does it entail a resolution of past transgressions and historical imbalances”.

4 METHODOLOGY

For the purpose of achieving the research aim and research objectives of this study, a qualitative research design was used. Qualitative research is a way of exploring and understanding the ways in which individuals or groups of individuals come to give meaning to a social or human phenomenon.⁴⁰ This process of research involves designing questions and procedures, and collecting data from the researcher’s or participants’ surroundings. Qualitative research studies human action from the perspective of the participants or social actors themselves.⁴¹ This means that qualitative researchers study things in their natural settings, attempting to make sense of or interpret phenomena in terms of the meanings people bring to them.⁴² Qualitative research involves the studied use and collection of a variety of empirical materials, which include “case study, personal experience, introspection, life story, interview artefacts and cultural texts and production, along with observational, historical, interactional and visual texts” which describe routine and problematic moments and the meaning in the individuals’ lives. Qualitative research has a wide range of interconnected interpretive practices which are adopted to better understand the subject matter.⁴³ In summation, qualitative research stresses the socially constructed nature of reality, the intimate relationship between the researcher and what is being studied, also the situational constraints that shape inquiry, therefore, this research emphasizes “the value laden nature of inquiry”⁴⁴.

A qualitative case study was employed in this research study to gain an understanding of how members of the Erongo Region of Namibia, particularly in Okombahe, and the traditional leaders come to think or perceive of the institution of traditional authority and the institution’s role in justice and access to justice. Phenomenology aided the researcher to gain a better understanding about “what”, “why” and “how” traditional authority is seen and described in Namibia in terms of

³⁷ The Namibian Constitution 1990 Article 66(1) at 42.

³⁸ The Namibian Constitution 1990 Article 66(1) at 42.

³⁹ See Bae (2018) at 23.

⁴⁰ Creswell JW *Research design: qualitative, quantitative and mixed methods approaches* 4 ed Thousand Oaks, CA : Sage Publications (2014) at 4.

⁴¹ Babbie E & Mouton J *The practice of social research* Cape Town : OUP (2001) at 270.

⁴² Denzin NK & Lincoln YS “Introduction: entering the field of qualitative research” in Denzin NK & Lincoln YS (eds) *Handbook of qualitative research* Thousand Oaks, CA : Sage Publications (1994) at 3.

⁴³ See Denzin & Lincoln (1994) at 3-4.

⁴⁴ See Denzin & Lincoln (1994) at 8.

governance and justice. This particular strategy identifies the essence of human experience, in this case the experience of Namibian people with regards to the institution of traditional authority.⁴⁵

The key informants to this research include four traditional leaders, one of whom is a headman who is retired and also a judge of the Okombahe traditional authority community court. One is a headwoman who is also a judge of the community court, and the other two are headwomen who are employed at the Traditional Authority's office. The other two participants work for the local traditional authority community court, as traditional authority assessor to the court and court messenger, respectively. All are registered with the Traditional Authority Councillor. The other interviewed participants also include the traditional authority court clerk, a local nurse and an official employed at the local Gender Office.

5 LITERATURE REVIEW

There are various positions proposed by scholars about the institution of traditional authority and its persistence, resilience or re-position in the modern democratic landscape. The original school of thought on the institution of traditional authority proposed that it would eventually collapse with the adoption of modernity and democracy. This school of thought argued that the persistence of "traditional forms of leadership", even after the introduction of democratic structures of governance and modern constitutions, shows how within Africa traditional leadership constrains the course of post-independence politics and governance.⁴⁶ In more recent years, debates around the institution of traditional authority have taken a different route from the above.

Debates on traditional authority are divided into two schools of thought which have differing arguments. However, their conclusions are the same with regards to the recognition of traditional authority as a legitimate institution. The one school of thought, namely the traditionalist, argues that traditional authority is a legitimate institution that is more democratic than the modern political order and therefore it still plays a vital role.⁴⁷ The modernist school of thought, on the other hand, argues that traditional authority was distorted and corrupted by colonial powers. Therefore, this

⁴⁵ Creswell JW *Research design : qualitative, quantitative, and mixed methods approaches* 3 ed Thousand Oaks, CA : Sage Publications (2007) at 12-13.

⁴⁶ See generally Oomen B *Chiefs in South Africa: law power and culture in the post-apartheid era* London:Palgrave Macmillan (2005). See also Rathbone R *Breaking with "tradition" Nkrumah & the chiefs: the politics of chieftaincy in Ghana 1950-60* Oxford:James Currey; Accra:F.Reimer; Athens OH, USA:Ohio University Press (2000) at 176.

⁴⁷ See generally Ayittey GBN *Indigenous African institutions* Ardsley NY:Transnational Publishers (1991); Keulder C *Traditional leaders and rural development* in Engelbronner-Kolff FM, Hinz MO & Sindano JL (eds) *Traditional authority and democracy in Southern Africa* Windhoek: New Namibian Books (1998); and Tangwa G *Democracy and development in Africa: putting the horse before the cart. Road companion to democracy and meritocracy* Bellington WA: Kola Tree Press (1998).

institution is dated, patriarchal and oppresses women and young people.⁴⁸ The various arguments for each school are expanded on below.

The institution of traditional authority as argued by Mamdani,⁴⁹ Ntsebeza,⁵⁰ and others has been described as the institutional embodiment of “decentralised despotism”. Scholars advancing this position argue that the colonial State captured traditional authority through appointing chiefs as agents of indirect rule in rural societies in Africa. By doing so, traditional leaders were upwardly accountable to the colonial State, removing themselves from the communities they represented, and by so doing, eliminating the legitimacy they once so enjoyed.⁵¹ Mamdani has argued that the post-colonial State has replicated the patterns and interactions traditional leaders had with the colonial State, and that therefore they are still used as instruments of control in the rural areas of Africa.⁵² Other scholars have posited that since the beginning of the 1990s, a wave of “retraditionalization” took place, suppressing the policy changes which feed into the above position, which exhaustively tried to contain traditional authorities. In many sub-Saharan African countries, this wave was an expression of the resurgence or resilience and enlargement of the role of traditional authority in local governance.⁵³ Jean Comoroff and John Comoroff, contrary to the above, argue that rather than this being seen as showing “persistence and resilience”,⁵⁴ traditional authority emerges as a modernist and post-modernist institution.⁵⁵ LiPuma and Koelble further supplement this position by adding that in Africa, when one investigates deeper, one finds that traditional authority invokes a notion of traditional which is modern and plural, which subscribes to a wider national and sub-Saharan political audience.⁵⁶ As a result of these debates, traditional authority is increasingly being included in mainstreaming processes of State building and democratization. The study aims to investigate this institution as a legitimate form of governance, that draws its legitimacy from the bottom-up.

⁴⁸ See generally Mamdani M *Citizen and subject: contemporary Africa and the legacy of late colonialism* Princeton: Princeton University Press (1996) and Ntsebeza L “Democratic decentralisation and traditional authority: dilemmas of land administration in rural South Africa” (2004) 16(1) *European Journal on Development Research* 72 at 71-89. See also Ntsebeza L “Traditional authorities and rural development” in Coetzee J, Graaff J, Hendricks F & Wood G (eds) *Development theory, policy and practice* Oxford: OUP (2001) at 317.

⁴⁹ See generally Mamdani (1996).

⁵⁰ See generally Ntsebeza (2004).

⁵¹ See Logan (2013) at 356.

⁵² See generally Mamdani (1996).

⁵³ See Englebert (2002) at 118-151; Buur & Kyed (2006) at 847-869; and Buur L & Kyed HM *State recognition of traditional authority in Mozambique: the nexus of community representation and state assistance* NAI Discussion Paper 28 Uppsala: Nordic Africa Institute (2005).

⁵⁴ Comaroff JL & Comaroff J “An introduction” in Comaroff JL & Comaroff J *The politics of custom: chiefs, capital and the state in contemporary Africa* Chicago: University of Chicago Press (2018) at 1-2.

⁵⁵ See generally LiPuma E & Koelble TA “Currency devaluations and consolidating democracy: the example of the South African rand” (2009) 38(2) *Economy & Society* at 203-229.

⁵⁶ LiPuma E & Koelble TA “Traditional leaders and the culture of governance in South Africa” (2010) 24(1) *International Journal of Policy, Administration and Institutions* at 6.

Mamdani,⁵⁷ and other scholars, have failed to explain its resilience, necessitating an investigation into the institution of traditional authority and its functioning, to better understand the meanings people ascribe to it and the significance of the institution in governance and justice.

6 INTRODUCTION TO THE CASE OF OKOMBAHE

Okombahe is a rural area in the eastern Erongo Region of Namibia that still very much practises and upholds the institution of traditional authority. The Okombahe community is a small village located in the western dry mountains of the country. It is isolated in a valley on the Omaruru river between the Erongo Mountains with a semi-desert landscape, and has a population of roughly 3000 people.⁵⁸ Okombahe consists primarily of the Damara people with a minority of the Herero population. Okombahe is also the host of the annual Damara festival called the King's festival which celebrates and commemorates the death of King David Goreseb.⁵⁹

At this festival all the different Damara clans arrive in their traditional regalia and clothes, as well as sing songs and tell stories that represent their customs, histories and cultural practices. The Traditional Authority's office which is an old discoloured white building, is located at the centre of the village where there is one office for all those seeking their assistance. The office is located near the police station, the traditional authority community court, the clinic, and a little further from the village's Gender Office. Traditional authority in Okombahe consists of the "*gaob*" (chief) and various *tanakhoeb* and *tanakhoeb*s (headmen and headwomen). The *gaob* is hereditarily chosen and the various *tanakhoeb* and *tanakboeb*s are chosen based on their leadership, involvement in the community and their preservation of the values, norms and practices of the "Oë -#" Gan Damara clan,⁶⁰ and only the *gaob* can dismiss them.

The headmen and headwomen are expected to lead the community by setting an example. Not only are they not expected to lead certain lives (not drink, not smoke, not insult others, etc) but they too recognise the need to steer the community in the right direction by representing and promoting the Damara culture, through their acts. Once chosen, the names of the headmen and headwomen are submitted to the Traditional Authorities Council of the Namibian Government in Windhoek to be added to the register.⁶¹ In total there are fifty-two headmen and headwomen in the Erongo Region; however, only fourteen council members receive money from the State.⁶²

Okombahe is isolated from urban life and development. There is one gravel road leading in and out of the community. The legacies of apartheid segregation laws are still visibly clear because of the divide between the villages and towns. Upon arrival the

⁵⁷ See generally Mamdani (1996).

⁵⁸ Information received at the Traditional Authority's office in Okombahe.

⁵⁹ See Bae (2018) at 33.

⁶⁰ Headwoman 1 & Research Participant 1, 20 August 2018.

⁶¹ Headwoman 1 and Headwoman 2 (Participant 2), 21 August 2018.

⁶² Headwoman 1, 20 August 2018.

researcher was confronted by many social problems prevalent in the village, including unemployment, poverty, lack of development and alcohol abuse. This research took place in the winter month of August and took a week, with some interviews scheduled prior to the fieldwork and the rest taking the form of snowball sampling. The fieldwork data is limited to the time spent in the field ; nevertheless, rich data was collected through seven key participant interviews. The key informants were interviewed in their own capacity and not as representatives of the offices in which they work. With reason, only verbal consent was given by them. Below we first consider the constitutional mandate of the institution of traditional authority, then we will focus on the Okombahe community court.

7 CONSTITUTIONAL CONSIDERATIONS - OKOMBAHE

In this part we will look at the legislation and Acts of customary law and the institution of traditional authority as well as traditional community courts. This will indicate the scope of their jurisdiction. Article 19 of the Namibian Constitution proclaims that “every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion” subject to the Namibian Constitution and “subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest”.⁶³ The Namibian Constitution refers only indirectly to the traditional structures of the country through Chapter 7, Article 66 (1).⁶⁴ The Act promulgates the customary law of Namibia as part of the law of the land, and at the same legal level as the common (Roman-Dutch law) law of the country. Article 102(5) of the Constitution provides for the establishment of a Council of Traditional Leaders; however, its functions are only limited to the advising on communal land matters and other matters which are referred to it by the President of the country.⁶⁵

The institution of traditional authority is customary law,⁶⁶ which the Constitution implicitly confirms.⁶⁷ The Namibian Traditional Authorities Act also provide for the establishment of the Council of Traditional Leaders, and therefore provides the definition of the “powers, duties and functions” of traditional leaders and matters that are related to the institution.⁶⁸ The Act refers to the traditional authority of a traditional community which consists of the traditional leaders of the given community, who are appointed and recognised as such in accordance with the provisions stipulated in the Traditional Authorities Act of 1995.⁶⁹ An amendment to the Act in the year 2000 defined the functions of a traditional authority in relation to a traditional community. It stated that in relation to the traditional community it leads, traditional authorities should

⁶³ The Namibian Constitution 1990 Article 19 at 17-18.

⁶⁴ The Namibian Constitution 1990 Article 66 at 42.

⁶⁵ The Namibian Constitution 1990 Article 102 at 60-61.

⁶⁶ The Republic of Namibia Traditional Authorities Act 25 of 2000, customary law “means the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia” at 2.

⁶⁷ See Hinz (2008) at 66.

⁶⁸ The Republic of Namibia Traditional Authorities Act 13 of 1997 at 1.

⁶⁹ The Republic of Namibia Traditional Authorities Act 17 of 1995 Section 2 at 3-4.

promote peace and welfare amongst the constituents of that traditional community, and supervise and ensure the practice of customary law of that given traditional community.⁷⁰

Section 14(a) clearly states that “any custom, traditional practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law shall cease to apply”.⁷¹ The Act also defines the relationship between traditional authorities and government organs. Traditional authorities shall, according to the Act, exercise their power and perform their duties and functions under the guidance of customary law or in accordance with this Act which stipulates that traditional authorities should give support to the policies of the government, regional councils and local authority councils. Therefore, to promote and uphold the authority of these institutions.⁷² It should be noted, however, that this legislation is very vague and does not define what exactly the “powers, duties and functions” of traditional authorities are.

7.1 Constitutional consideration for community courts

Namibia is characterised by its “ethnic heterogeneity with no single homogenous tradition of community courts and customary law.”⁷³ The Community Court Act⁷⁴ lays down the basics for the official recognition and installation of community courts as they operate today. “A traditional authority of a traditional community may apply in writing to the Minister of Justice for the establishment of a community court in respect of the area of that traditional community.”⁷⁵ The Act allows for the inauguration of a community court by recognised traditional authorities on the basis of a group’s customary law, insofar as it is in accordance with the Constitution. The installation of community courts triggered a process of documenting the variety of customary laws and revised a cultural memory of identity within each community as well as the nation.⁷⁶ Given this constitutional background we will now take a look at the case of the Okombahe community court.

8 FINDINGS

The codification of customary law has promoted the institution of traditional authority in Okombahe. This has also opened up the space for women to play an active role in customary law as is seen with our research participants. Okombahe has women occupying roles in both the Traditional Authorities Office and in the community court. However, headwomen are still heavily outnumbered by the headmen. In the same

⁷⁰ The Republic of Namibia Traditional Authorities Act 25 of 2000 Section 3 at 3.

⁷¹ Traditional Authorities Act 25 of 2000 Section 14(a) at 11.

⁷² Traditional Authorities Act 25 of 2000 Section 16 at 13.

⁷³ Dahlmanns E & Wielenga C “Innovating governance- Integrating judicial systems in hybrid political orders” (2019) *Centre for the study of Governance Innovation Working Paper* (2019) at 7.

⁷⁴ Republic of Namibia Community Courts Act 10 of 2003 Sections 2,3 & 4 at 3-4.

⁷⁵ Community Courts Act 2003 Section 3 at 4.

⁷⁶ Community Courts Act 2003 Sections 14 & 18 at 8-9.

breath one can see this as signalling change from traditional rule and can trace it back to the introduction of the Traditional Authorities Act and its prescripts.

In Okombahe traditional leaders hold a dual function of being both headmen/headwomen and court judges, besides being members of the Traditional Authorities Council. What can be drawn from this research is that the partial resilience of the institution of traditional authority can be attributed to the leadership role the leaders play. In this community the institution of traditional authority is defined as leadership. The headmen and headwomen are perceived on the ground as exemplary in the community, therefore they should as leaders subscribe to certain lifestyles.⁷⁷ Traditional authority consists of the elders of the community who are regarded as custodians of the Damara culture and identity. One of the participants mentioned that they are also custodians of the community's continuity because of how they govern with norms and values embedded in the co-existence of the clans. The resilience of traditional authority is also partly because of the respect community members have for the traditional leaders and because the presence of the institution represents various meanings to different people in the area.⁷⁸ Another participant⁷⁹ mentioned that the continuity of the institution of traditional authority means that the community will continue to be at peace because their presence invokes a comfort point within the community. The resilience of the institution of traditional authority is not dependent on others from outside the community but rather from the community itself, because the community members are the ones who subscribe to the institution and uphold its values and norms.

Often as the closest institution to the people, it is sometimes blamed for matters of political power. State structures are responsible for development and providing the necessary infrastructure for development and justice.⁸⁰ However, some community members feel that the traditional leaders as the only leaders in Okombahe, should be able to bring the needed development and social justice that Okombahe needs.⁸¹ When asked what issues the community identifies as problematic and hindering of development and justice, participants identified politics as one of them.⁸² Political affairs affect the traditional leaders' roles because some community members identify traditional leaders along their political party affiliations and this sparks various rumours about the leaders. One of the headwomen, who is the community court messenger, commented that the political party divisions affect the efforts made by traditional leaders to the extent that even if the leaders try and do good for the community, these members never see it as good enough because they see them as opposition members.

⁷⁷ Headman and Traditional Community Court judge (participant 5), 21 August 2018.

⁷⁸ Gender Office official and Research Participant 3, 23 August 2018.

⁷⁹ Traditional Authority Community Court clerk and Research Participant 4, 23 August 2018.

⁸⁰ The Namibia Constitution 1990, Article 23 at 19-20.

⁸¹ Traditional Authority's Community Court clerk, 23 August 2018.

⁸² All research participants unanimously said the above.

Some of the participants perceived the lack of development in Okombahe as the main evidence of political affairs negatively affecting the community. On the question of whether or not traditional leaders should be given more power to enhance development or justice, the headwomen and headman interviewed responded positively, commenting that they would be able to do more to help the youth and the development of Okombahe. The other research participants, however, opted for the increase of their influence or authority in the community; however, this influence does not translate into more political power. A reason given was that the traditional leaders should be elders in the community and symbolise their tradition and that political affairs should remain separate.

The recognition of customary law has promoted the authority and legitimacy of the institution of traditional authority in Okombahe, as mentioned before. The establishment of the community courts supports this because the court now exists where it had not before and is entrusted with the institution. Traditional leaders are respected leaders and mediators in their communities because of how they carry themselves. Traditional leaders live in their communities and therefore know the community members and the life circumstances of their people. What can be concluded from this research is that the institution of traditional authority and traditional leaders themselves, serve the community in ways that go beyond leadership: they represent their identities, histories, and the rules and norms which govern and regulate the rights and responsibilities between community members. Now we will turn to the case of the traditional authority's community court to further illustrate how the institution serves more than just a leadership role, but goes beyond that to fulfil the justice needs of community members who seek their counsel.

8.1 Okombahe Community Court

The Okombahe community court was established in 2012 and hears about 70 cases per year. The court is comprised of the chief, deputy chief, headmen and headwomen.⁸³ In August 2018 we visited the community court consisting of three of the participants, one being the retired traditional leader and community court judge, a headwoman who is also a judge, and the court assessor. There is a community court clerk whose role is to read testimonies, translate and transcribe, and present the cases to the traditional leaders for their comment before and after hearings. The court messenger delivers the summons which must be signed by the defendant. Anyone from the community is welcomed to attend the hearings, and we are told that everyone is offered a chance to share their views.⁸⁴ The judges examine the evidence presented and make a judgement from customary law that will be seen as helpful in resolving the conflict.⁸⁵

On this day there was a matter brought before the court where a young lady was charged with insulting an elderly lady and as a result would be fined if found guilty of

⁸³ See Bae (2018) at 36.

⁸⁴ Headman and Traditional Community Court judge (Participant 5), 21 August 2018.

⁸⁵ Headman and Traditional Community Court judge (Participant 5), 21 August 2018; See Bae (2018) at 36.

the charge. The court proceedings were governed and prescribed by the Traditional Authorities Act. During the court proceeding, each party was given an opportunity to state their case. We sat there quietly, observing the proceedings as they were in the Oë (Khoekhoe) language of the Damara, which we did not know. However, this was such an informative experience: we were observing the judges, court assessor and court messenger follow protocols, but giving their undivided attention to the complainant and defendant. The easy manner with which each spoke was interesting to see. When the court proceedings came to a break, we went outside to get translations from both the court messenger and one of the female judges.

The court session was held in what had been the structure of a garage, where the judges were seated in front of everyone, on a centred podium. The court messenger sat just in front of the judges and the complainant and defendant were placed a little further from the messenger, on the left and right respectively, where signs were posted on the wall to instruct them on which side to sit. Microphones were also placed for each. We sat on three separate chairs which were on the opposite end of the room, facing the judges and court messenger. The court proceedings went on after the break, and soon after hearing both sides the judges came to a conclusion. This was the only court case for the day. These proceedings, we hear, will be translated into English and later sent for official records.

The Okombahe community court is the only institution within reach which is available to the community. The nearest court to Okombahe is the Omaruru magistrate's court, which handles court cases in the whole Erongo Region. It is approximately 60kms from Okombahe. The local taxi usually makes one trip a day, sometimes two from the village to the town. In this regard, it is not always practical to take a case to Omaruru. The community court provides an option that is accessible to the community. It is quick and cost effective. Within the framework of Okombahe's customary law, it is capable of addressing a wide range of disputes that emerge in the community, such as, assault, domestic violence, property theft, and inheritance, just to mention a few. The community court is controlled by the State; however, the community members perceive it as part of the familiar because local traditional leaders are the ones responsible for it. Through the community court many familial and social relations can be amended before they escalate into more serious matters that will have to be addressed in the magistrate's court.⁸⁶ The community courts apply customary law which is oriented towards negotiation and social harmony, rather than abstract legislation. This can potentially produce better outcomes for both the victim and the accused.

9 RECOMMENDATIONS

African society in rural areas is undergoing major transformations both positive and negative due to various political, social and cultural influences. Customary law is also undergoing changes. It has been changing over time. This flexibility is important in that traditional leaders can make new customary law and amend and repeal discriminatory

⁸⁶ See Bae (2018) at 34.

customs that exist. The institution of traditional authority working with other local authorities can serve to enhance the positive aspects of change and minimize the detrimental effects.⁸⁷ The continued respect shown by local community members toward the institution of traditional authority and traditional leaders themselves can be used to educate, guide, advise and inform the local communities on issues of equality between the sexes, welfare, education, and development.

Traditional leaders can assist the local government administration by providing leadership in maintaining the best customs and traditions, arranging local ceremonies, representing their people on issues of a customary nature, presiding over meetings where matters of interest to the community are discussed, preventing offences among community members, and, especially, encouraging the formation and presence of non-governmental organisation (NGO) bodies to assist in the many socio-economic issues in the respective communities.⁸⁸

Cheka⁸⁹ states that “citizens are both bound by the modern law and traditional values”. As already stated in the introduction, “customary law, traditional societal structures and the institution of traditional authority” have determined the everyday social reality of many African populations, particularly in the rural and remote peripheral areas where the State does not extend.⁹⁰ Hinz argues that the “State’s outposts” be mediated by the informal indigenous societal institutions which have their own logic and rules, which can continue being within the State structures.⁹¹ Customary systems of order have in some instances been subject to deconstruction and re-formation in order to be incorporated into central State structures and processes.⁹² Based on the research endeavour, the researcher recommends re-perceptions of customary systems and institutions as being a problem, instead of perceptions of them being valuable assets and sources of solutions. These institutions can forge constructive relationships with political and social institutions, and between communities and governments. Central State institutions and government are important, but equally so is engaging with communities and non-State customary institutions. The challenge lies in finding an appropriate complementary relation and interaction between the two.⁹³ Justice ought to be indigenised if it is to be accessible and effective. The acknowledgement of the cultural and historical realities of rural communities will aid in providing lasting justice that is fair and familiar to the people involved.

⁸⁷ See Ndlela, Green & Reddy (2010) at 6.

⁸⁸ See Ndlela, Green & Reddy (2010) at 6.

⁸⁹ See generally Cheka C “Traditional authority at the crossroads of governance in republic of Cameroon” (2008) 33(2) *African Development* at 67–89.

⁹⁰ See generally Cheka (2008) at 67–89.

⁹¹ See Hinz (2008) at 64.

⁹² See Hinz (2008) at 71.

⁹³ See Hinz (2008) at 71-72 and Barcham (2005) at 2.

10 CONCLUSION

This article attempts to give a snapshot of the everyday roles and functions of the institution of traditional authority in the Okombahe community. This attempt hopes to describe how the institution of traditional authority is a system and option where people can get justice because State institutions are limited in terms of their reach and resources. One of the aims of the research was not to give accounts for or against the institution of traditional authority as a legitimate institution and structure for accessing justice, but rather to give an account of what they are doing or not doing in terms of contributing to justice and the access thereto in Okombahe. Justice in this article refers to the right to adjudication by a local traditional system familiar to the people of Okombahe. Justice and access to justice require a collective effort of the State, citizens and other involved stakeholder participation and is often context specific. If we want to contribute to meeting justice and gendered justice in these isolated contexts, our starting point needs to be a deep understanding of how justice is practised, and the identities of the people involved.⁹⁴

The institution of traditional authority is a legitimate institution that has been resilient over time and space. It is a local level institution which gains its authority and legitimacy from the local people. It is a bottom-up structure which originates from the rural communities themselves. One of the many functions it fulfils is as an historical institution once capped by colonialism, which, however, represents various rural communities and identities in Africa. Their close proximity to the people and the essence of how they see themselves, has contributed to the institutions' resilience. They are highly valued and desired by their communities for what they represent.⁹⁵ However flawed they may be, their connection with, and accessibility to, the people in their respective communities, makes them more available as problem solvers. Traditional leaders also have the advantage of local knowledge and an understanding of community norms and practices that can make them effective in resolving local conflict.⁹⁶

One of the main takeaways from the research study is that justice and access to justice can be defined in a multiple of ways. Because of the different colonial pasts of various African countries, local residents define justice in terms of their lived realities and histories. In various rural communities where the institution of traditional authority operate, the understanding of justice and access to justice is not necessarily understood within the realm of formal human rights/justice, but in a much broader inclusive, communal and societal sense. Customary judicial practices and local understanding of justice across Africa were suppressed, crippled and buried by colonialism in the past. That does not take away from the fact that the institution of traditional authority is amenable to the cultures and histories of Africa and its people. The institution is linked to the present circumstances of the African people.

⁹⁴ See Wielenga (2018) at 16.

⁹⁵ See Logan (2013) at 373.

⁹⁶ See Wielenga (2018) at 11.

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