Access to justice in sub - Saharan Africa

the role of traditional and informal justice systems

Penal Reform International
November 2000

First published in 2000 by:

Penal Reform International

www.penalreform.org

ISBN Number 0-9535220-1-6

Original language: English

Designed by: Zoe Slade

Printed by: Astron Printers, London

Printed in the United Kingdom by Astron Printers Ltd.

Published by Penal Reform International as part of the New Models of Accessible Justice and Penal Reform Project, funded by the UK Department for International Development.

TABLE OF CONTENTS

PREFACE

This publication is based on a study written by Joanna Stevens for Penal Reform International in December 1998, entitled Traditional and Informal Justice Systems in Africa, South Asia and the Caribbean. The study was based on an extensive review of existing literature on the subject rather than field research. This publication focuses primarily on traditional and informal justice systems in sub-Saharan Africa, reflecting the wealth of material available from the region in contrast to the paucity of up-to-date material from Asia and the Caribbean. However, some positive models from Asia are also included.

Throughout this report the term "traditional justice systems" is used to refer to non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas. The term "informal justice systems" refers to any non-state justice system. The phrase "traditional and informal justice systems" is, therefore, used to denote traditional and other informal justice systems.

The aim of this publication is to make the available information on traditional and informal justice systems accessible to a wider audience. The debate surrounding these systems is already receiving the attention of law reform agencies and donors in a number of African countries. The study on which this report is based was intended to contribute to and facilitate this debate.

The interest generated by the study drew attention to the need for a publication which provided a general introduction to the subject. Penal Reform International has decided to publish a revised version of the report which takes into account comments and additional literature received following its initial distribution at the African Regional workshop, "Access to Justice and Penal Reform in Africa", held in Kampala, Uganda, in March 1999; and at an international conference "Penal Reform: A New Approach for a New Century" held in Egham, United Kingdom (UK), in April 1999.

It is Penal Reform International's hope that a greater understanding of traditional and informal justice and of how it can impact on the issue of access to justice will help broaden this very important debate.

ACKNOWLEDGEMENTS

Penal Reform International would like to thank those who participated in the workshop, "Access to Justice and Penal Reform in Africa" held in Kampala, Uganda, in March 1999 for contributing additional information and comments on the study.

In particular Penal Reform International wishes to acknowledge the invaluable assistance of Professor Wilfried Schärf in editing the final draft, and in providing extensive comments on the study and secondary material unavailable in London.

Professor M.O. Hinz, Klaas de Jonge, and Adam Stapleton deserve special mention for their assistance with information on Namibia, Rwanda and Malawi respectively.

This report would not have been possible without the generous support of the United Kingdom Department for International Development.

SOURCES

Sources on traditional and informal justice in Africa include ethnographic studies of traditional dispute processing in Africa carried out by social anthropologists and some academic lawyers, both before and immediately after independence, and studies by academic lawyers on customary law published particularly during the 1960s and early 1970s. During the late 1970s and early 1980s the volume of such studies decreased, although a steady stream of academic articles continued to appear in journals such as the Journal of Legal Pluralism and the Journal of African Law. From the mid-1980s onwards, literature concerning popular justice forums in South African townships and squatter camps began to emerge. Since the early 1990s there have been a number of studies focusing on the status of women, traditional authority and customary law, and their compatibility with the provisions of new or proposed constitutions, in societies emerging from military or one-party rule and in post-apartheid South Africa. Most recently, Donors, Law Commissions and Non-Governmental Organizations have all published a number of research papers on the role of informal dispute resolution mechanisms in providing access to justice.

THE AUTHOR

Joanna Stevens is a legal consultant on human rights law, with a BA (Hons) in African History and Politics from the School of Oriental and African Studies, University of London, and an LLM in International Human Rights Law from the Human Rights Centre, University of Essex. She has carried out work for numerous organizations including Penal Reform International, Interights, Article 19, the European Union and the UK Department for International Development, and provides pro bono assistance to Commonwealth judges and lawyers involved in human rights litigation. Her publications include The Interpretation of Fundamental Rights Provisions in Africa and other Common Law Jurisdictions (1997); Freedom Subject to Licence: Attempts to Licence Journalists in Commonwealth Africa (1998); The Case Law of the European Convention on Human Rights relating to immigration, asylum and extradition (1992); and The Commonwealth Human Rights Law Digest (founder and editor 1996).

1: INTRODUCTION

"[T]hose who have criticized [informal traditional justice forums] as being too traditional to promote development are often too simplistic in their arguments. They are bound up in the traditional-modern dichotomy in which 'traditional' is equated with 'backward' and 'modern' with 'advanced'. Development can thus only occur within a 'modern' framework. The main problem with this equation is that it is based on a very static view of tradition. It ignores the fact that traditions are often 'invented' and hence, very 'modern' in content." [1]

When most sub-Saharan African countries became independent in the 1960s, the majority of African citizens were resolving their disputes using traditional and informal justice forums.[2] Despite their popularity, these forums were regarded as obstacles to development. It was thought that as Africa modernised they would eventually die out. This did not occur. Informal and traditional modes of settling disputes have remained as widespread as ever.

Three key factors help explain why most Africans continue to look to traditional and informal justice forums to resolve disputes:

- The vast majority of Africans continue to live in rural villages where access to the formal state justice system is extremely limited.
- The type of justice offered by the formal courts may be inappropriate for the resolution of disputes between people living in rural villages or urban settlements where the breaking of individual social relationships can cause conflict within the community and affect economic co-operation on which the community depends.
- State justice systems in most African countries operate with an extremely limited infrastructure which does not have the resources to deal with minor disputes in settlements or villages.

---

[1] Keulder, 1998: 294.

[2] The term "traditional justice systems" refers to non-state justice systems which have existed since pre-colonial times. The term "informal justice systems" refers to any non-state justice system. The phrase "traditional and informal justice systems" refers to traditional and other informal justice systems.

One of the key areas of debate in relation to traditional and informal justice systems is whether justice can be made more accessible by encouraging such systems, by adopting or transforming some of their processes, or by facilitating a more collaborative approach between such systems and formal justice systems. Indeed, there have been proposals that some elements of informal justice should be incorporated into formal state processes. However, the role of traditional and informal justice remains a contentious issue for a number of reasons.

Given the complex and contentious issues involved, it is especially important to state explicitly the basic position outlined in this report in order to avoid possible misunderstandings.[3]

- No one should be subjected to discrimination on the basis of sex or any other status by either formal courts or informal justice forums.
- Physical punishments – whether imposed by formal courts or informal justice forums – amount to inhuman or degrading treatment which is absolutely prohibited. States have an obligation to protect all those under their jurisdiction from such treatment.
- States should make it an offence for traditional or informal adjudicators to order physically coercive punishments, to try a person under duress or in *absentia*, or to try a person for serious offences such as murder or rape.
- These laws should be actively enforced and forums in which such offences are repeatedly committed should be outlawed.

Most traditional and informal justice systems are dominated by men and tend to apply customary or religious norms which discriminate against women and young people. While it is undeniably the case that very few women preside over tradition and informal justice forums, it is also the case that women are grossly under-represented on formal court benches in Africa, as well as other parts of the world. The difference between the formal and the informal systems as regards the equal treatment of women should, therefore, be seen as a matter of degree.

[3] For example, examining the diagram in Chapter 8 (without reading the accompanying text which explains its purpose and its relativity) might cause a "reader" to make false assumptions as to the overall position adopted by this study.

Although traditional forums are on the whole more prone to discrimination than formal systems, there are examples of non-discriminatory informal forums, as well as of discriminatory formal courts. For example, in a number of countries in Africa and Asia, wife beating is not considered a crime under the formal law[4] and blatantly discriminatory laws still remain on the statute books. It would be misleading, therefore, to attribute the discrimination primarily to the informal process itself, rather than to the prevailing attitudes which lie behind discriminatory customary norms and laws.

Just as the formal legal system in many parts of the world has become less discriminatory towards women over the last century, in line with changing social attitudes to women, so traditional and informal justice systems in Africa have witnessed some improvements. Although change has been less pronounced in rural areas, where traditional forums operate, the pace of change could be increased through education, regulation and increased resources. Simply outlawing discriminatory practices, without addressing underlying beliefs, will not hasten a change in attitudes, and may in fact harden them. The aim must be to tackle the root causes of discrimination and not simply its consequences.

It is also the case that some of these systems have imposed cruel physical punishments, although in sub-Saharan Africa the use of corporal punishment, which is usually confined to boys, is declining both under the formal and informal systems.

Most African states do not have the resources necessary to extend the formal justice system to village level to deal with all types of disputes, or to provide the additional legal aid and interpreters that this would require. However, even if resources were not an issue, traditional and informal justice systems might provide a better solution in a large number of cases. Both the formal and informal systems have their merits which may vary according to factors such as the nature of the dispute and the relationship between the parties.

Traditional and informal justice systems are best suited to conflicts between people living in the same community who seek reconciliation based on restoration and who will have to live and work together in future. It is worth noting that similar forms of social control, which also constitute a type of informal justice, are exercised in boardrooms, professional organizations, clubs and fraternities.

---

[4] "Beating a woman 'no crime in many countries'," *The Guardian*, 14 August 1999, p. 17.

Formal state courts on the other hand are best able to provide the legal and procedural certainty required where serious penalties such as imprisonment are regarded as appropriate, or where the parties are unwilling or unable to reach a compromise.

Every individual, whether rich or poor, should be able to freely exercise their right to seek redress in a formal court of law. The choice must rest with the parties. The aim in providing assistance to traditional and informal justice systems should be to encourage satisfactory alternatives which offer more appropriate solutions, not to promote a substitute to formal courts for the poor. Support for traditional and informal structures, therefore, needs to be accompanied by support for legal aid organizations and legal literacy programmes, as well as appropriate assistance to the formal legal sector. Particular efforts must be made to ensure that women and other vulnerable groups are guaranteed a choice through access to legal aid, advice and education.

It is possible to incorporate several features of traditional justice into state criminal justice processes in order to improve access to justice for the poor and for sections of the population where literacy levels are low. However, as a general rule, incorporating traditional and informal systems into the formal state hierarchy of courts should be avoided as it tends to undermine the positive aspects of traditional and informal justice without any real gain. However, the extent to which traditional and informal justice processes are incorporated into formal systems or remain voluntary dispute resolution forums will depend in great part on the historical circumstances prevailing in particular African countries.

A criticism often levelled at any research which takes a positive view towards any aspect of traditional justice is that such a view romanticises the past. However, such a criticism ignores the fact that traditional justice forums are constantly evolving as the social, cultural, political and economic circumstances in which they operate change. This is in marked contrast to the customary law codified by colonial administrations and traditional authorities into rigid unchanging written laws. It is important, therefore, when discussing customary law and traditional courts to distinguish between formal traditional-style courts[5] applying written customary law, and informal traditional justice forums applying unwritten living customary law. Problems associated with the one do not necessarily justify condemnation of the other.

[5] In this publication the term "traditional-style courts" refers to formal courts, with a defined jurisdiction prescribed by law, the judges of which are traditional leaders or were appointed as traditional leaders by colonial warrant.

Caution also needs to be shown in assuming that all forms of informal justice stem from a traditional source. There is a body of literature which describes informal justice in the context of opposition or revolutionary movements, where the justice being practised in certain enclaves of the revolutionary or protest movements is a prefiguration of the sort of system they hope to install in the new system.[6]

The broad charge of romanticism could be summarily met with the equally sweeping and emotive criticism of eurocentrism. It could be said, for example, that one should be less concerned about romanticising Africa's past than about accepting wholesale another region's past and romanticising imported Western legal institutions. However, the main concern should be which system provides the most appropriate solutions in what types of cases, and how each system's comparative advantages can be enhanced and disadvantages minimized rather than whether a predilection for things old or new, borrowed or home grown, can be exposed.

In conclusion, if those concerned with criminal justice reform in Africa wish to have any real impact on improving access to justice for the majority, then the vital role played by traditional and informal mechanisms in providing justice for the majority of people living outside town centres needs to be acknowledged. They will also need to seek to broaden understanding of how and where these forums operate and to pursue policies which take full account of their existence. Training on, resources for, and regulation of traditional and informal justice forums are also required. There should be co-operation between informal justice and the relevant state institutions – such as the police, those responsible for social welfare issues and others – as well as cross referrals between state courts and informal forums. For far too long traditional and informal forums have been ignored, in part owing to entrenched positions on the undesirability of "traditional justice". In the absence of studies aimed specifically at finding practical solutions, such arguments have been used to justify continued inaction. The policy of turning a blind eye to traditional and informal justice systems is long overdue for replacement.

[6] Santos, 1982, 1984; Berman, 1969; Isaacman and Isaacman, 1982; Merry, 1988; Schärf and Ngcokoto, 1990.

1.1 Access to formal state justice systems

One of the arguments often cited in favour of traditional and informal justice systems is that they provide greater access to justice. But what do we mean by access to justice? More specifically, what type of access and what type of justice should we be considering? The answer to these questions reveal some of the major problems besetting the formal justice system. They also help explain why the majority of people in Africa continue to settle their disputes using traditional and informal systems.

While everyone has the right to have access to formal state justice, in practice this is often denied for a number of reasons:

- Most proceedings are subject to considerable delays at all stages, mainly as a result of the sheer number of cases being processed through a limited number of courts.
- For most of the population living in rural areas the distance to the nearest court may be immense.
- The justice administered by the state seldom involves restorative or compensatory awards or sentences. In this it is often out of step with the expectations of people whose view of justice is based on traditional justice models.
- The law and procedure practised in formal courts are both unfamiliar and complicated from the perspective of most citizens.

Similarly, proceedings are often carried out in a language which they do not understand. Despite the fact that interpreters are generally made available, the question remains as to whether substantive justice is done in all cases. For example, one observer of cases before the Magistrates' Court in the Kalenjin-speaking area of southwestern Kenya in 1979 noted:

"When translations are required, the proceedings are usually long and turgid. Quite often the translations are hopelessly inaccurate, and invariably they do not capture the nuances of the speaker's mother tongue." [7]

There is also the question as to whether justice is seen to be done. As one chief in Zimbabwe pointed out:

[7] Saltman, 1979: 322.

"when [people] go to these Magistrates Courts there is someone to interpret. Whether it is wrongly interpreted you never know because you accept the judgment or you argue the judgment in another court that has got the same system." [8]

Any attempt to address the problems of access to justice associated with the formal state system within the framework of the formal state system itself immediately encounters the fact that the cost to the government of bringing the formal state system to ordinary people is prohibitive. To reduce the distances and delays associated with an already congested state system would require a massive expansion of that system. The state cannot hope, at present, to provide the number of courts at the local level or the additional legal aid and interpretation resources that this would require. According to one estimate, South Africa, for example, would require up to 3,000 new courts[9].

It is also clear that the cost to ordinary people of accessing the formal state system is prohibitive. They cannot afford private lawyers and the cost of travel to the courts, multiplied by delays and adjournments, is beyond the means of the majority.

[8] African Rights, 1996: 29.
[9] Schärf, 1997: 26.

"For many people in Zimbabwe, the mere cost of transport to a court may be prohibitive. Especially in the rural areas, people spoke of 'saving money for transport' to the nearest growth point or urban centre. A court case inevitably involves more than one trip as proceedings are frequently postponed due to a variety of reasons, such as the absence of a key witness or the failure of one party to obtain critical documents. In some rural districts, potential litigants may have to travel over one hundred kilometres at a cost of over Z$50 round trip to the Magistrates Court in the district capital that only sits once every two weeks. An accused who has been freed on bail must report every two weeks at the Magistrates Court until his or her trial, which usually occurs several months after he or she has been charged. In every rural district, the cost of transport for these biweekly trips will be overwhelming... Because the trip (on a dirt road) inevitably takes the major portion of the day, the person must also make provision to spend the night. Transportation is irregular and non-existent during the rainy season from November to March in some districts. A litigant may have to walk ten to twenty kilometres to the dirt road along which a single bus might pass. In some rural areas, bus drivers often refuse to pick up passengers travelling short distances of less than twenty kilometres. There are numerous cases in the rural areas of default judgements being entered against litigants who tried but failed because of transport problems to appear in court on the designated day. An accused in a criminal case may be charged with contempt of court and fined Z$20, if the bus fails to keep to its schedule, which is not uncommon... Consequently, many people drop cases or never institute claims they may have because of lack of money... [for example] the grandmother of a certain child had claimed maintenance for the child against its father [and] been awarded $25 per month. Yet she had to pay the bus fare of up to $25 round trip... to collect the same amount..."[10].

Traditional justice systems by contrast do not suffer from these difficulties. Proceedings are quick and take place within walking distance. They are also conducted in the local language and carried out in a manner which everyone understands by people who are socially important to litigants, rather than impersonal state officials.

[10] African Rights, 1996: 26-7.

1.2 Justice under the formal state system

The term "access to justice" is often used to refer exclusively to access to the formal state justice system. This belies the fact that in rural areas, where the vast majority of people live, as well as in some urban communities, "Western-style justice" is distrusted and avoided by most.

Traditional and informal justice systems aim at restoring social cohesion within the community by promoting reconciliation between disputing parties (see chapter 3). The formal state system by contrast is characterized by its adversarial style and emphasis on retribution. It does not, therefore, always provide appropriate solutions for people living in close-knit communities who rely on continued social and economic co-operation with their neighbours.

Under the traditional system, the "judge" is known to the parties and there is a high degree of direct community participation, as well as input from both disputants, in deciding what remedy should be resorted to. The fact that under the formal system, a "stranger" imposes a decision is more likely to be viewed as partial, as between the state and the parties, than impartial, as between the two parties.

Traditional and informal law involves restitution, reconciliation between the parties, and the rehabilitation of the offender. By contrast the emphasis under the formal system is on the punishment of the wrongdoer by the state. Any fines which are imposed are paid to the state. The victim, therefore, is relegated to the status of witness and ignored as far as his or her compensation needs are concerned. Under these circumstances the state system is seen as repressive, patently unjust, and wholly inappropriate to the needs of the parties, and operating simply to further the interests of the government. An elderly relative of a man negligently incapacitated sums up this view in his response to a decision by a Magistrates' Court to impose a prison sentence on the man responsible:

"This judgment is contrary to custom and to natural justice, since only the Government will benefit from putting the man to some labour [in prison]º There is no benefit to his [the injured man's] wife and children, let alone the rest of us who are his relations".[11]

[11] Elias, 1970:20.

In addition, strict procedural rules – which are a necessary element of the structure of formal state systems – are generally misunderstood. For example, instances where cases are dismissed as a result of procedural irregularities are by no means equated with "justice"[12]. As one traditional chief in Zimbabwe commented:

"For most of the people, justice is about restitution. This must be instantaneous and must be seen by the people to be done... people do not understand the procedures and practices at the Magistrates Court, especially in relation to criminal matters where nothing may be paid to the wronged party. They cannot identify with the processes and procedures, such as the fact that a thief is [without restitution] moving about freely on bail. To them, this is a miscarriage of justice. They have lost faith in the Magistrates' Court."[13]

It would appear that not only is it impossible to provide access to formal justice on the Western model, at least for the time being, but that in any case it does not provide the type of solutions – the kind of restorative justice – appropriate to people living in small close-knit communities.

In conclusion, access to justice should be considered in its broad sense to encompass: access to a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts and, if preferred in any particular case, a dispute resolution forum based on restorative justice (both subject to appropriate regulation in order to prevent abuse).[14]

[12] See Chimango, 1977: 55.
[13] *African Rights*, 1996: 34.
[14] Correspondence with Prof. Wilfried Schärf, University of Cape Town, February 1999.

2: MODALITIES

2.1 Terminology

The terminology generally used in the literature on traditional and informal justice is both inconsistent and confusing. The following is an attempt to define the terms used in this publication and to highlight and clarify some areas of possible confusion.

The term **traditional justice systems** is used in this publication to refer to non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas. The term **informal justice systems** refers to any non-state justice system. The phrase **traditional and informal justice systems**, therefore, should be understood as meaning traditional and other informal justice systems. There is no satisfactory generic term to describe **non-traditional informal justice systems**. Such systems include what are referred to in this publication as **popular justice forums** and **alternative dispute resolution forums** run by non-governmental organizations (NGOs).[1]

One possible area of confusion is that traditional justice (as defined above) has also been referred to as customary justice or indigenous justice in some literature. A further complication is that the terms traditional courts, customary courts, and (referring to the colonial period) indigenous courts, may be used to refer to courts which are (or were) part of the formal state hierarchy of courts, but which co-opted traditional leaders as judges or applied a form of customary law.

[1] Schärf and Nina, 2000, use the term non-state to refer to all forms of justice not acknowledged by or incorporated into the state system.

The term **popular justice**[2] has on occasion been used to describe both traditional, and non-traditional, non-state justice. In this publication the term **popular justice forum** is used to refer to justice forums which are not traditional, not run by NGOs and non-state. The term community courts is frequently used in South African literature to refer either to non-state justice systems or, more specifically, to non-traditional, non-state popular justice systems.[3] The difficulty in adopting this term, however, is that it is used elsewhere in Africa – for example in Zimbabwe and Mozambique – to refer to the lowest rungs of the formal state hierarchy of courts.

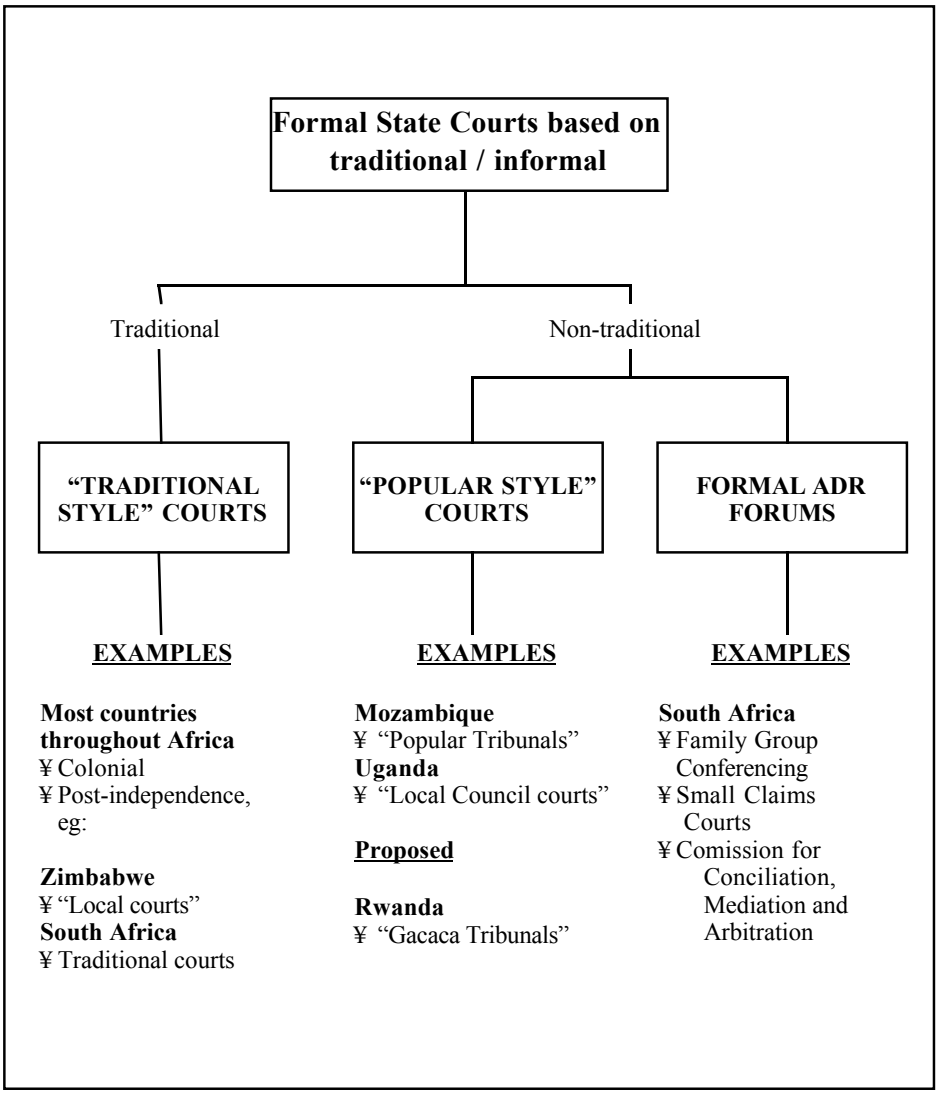
Finally, when referring to traditional and informal justice, the term **disputants** or **parties** is used to describe not only what may be regarded as the plaintiff and respondent under the formal civil justice system, but also the victim and accused, defendant or offender, under the formal criminal justice system. This terminology is adopted because traditional and informal justice does not distinguish clearly between civil and criminal matters in respect of procedure.

---

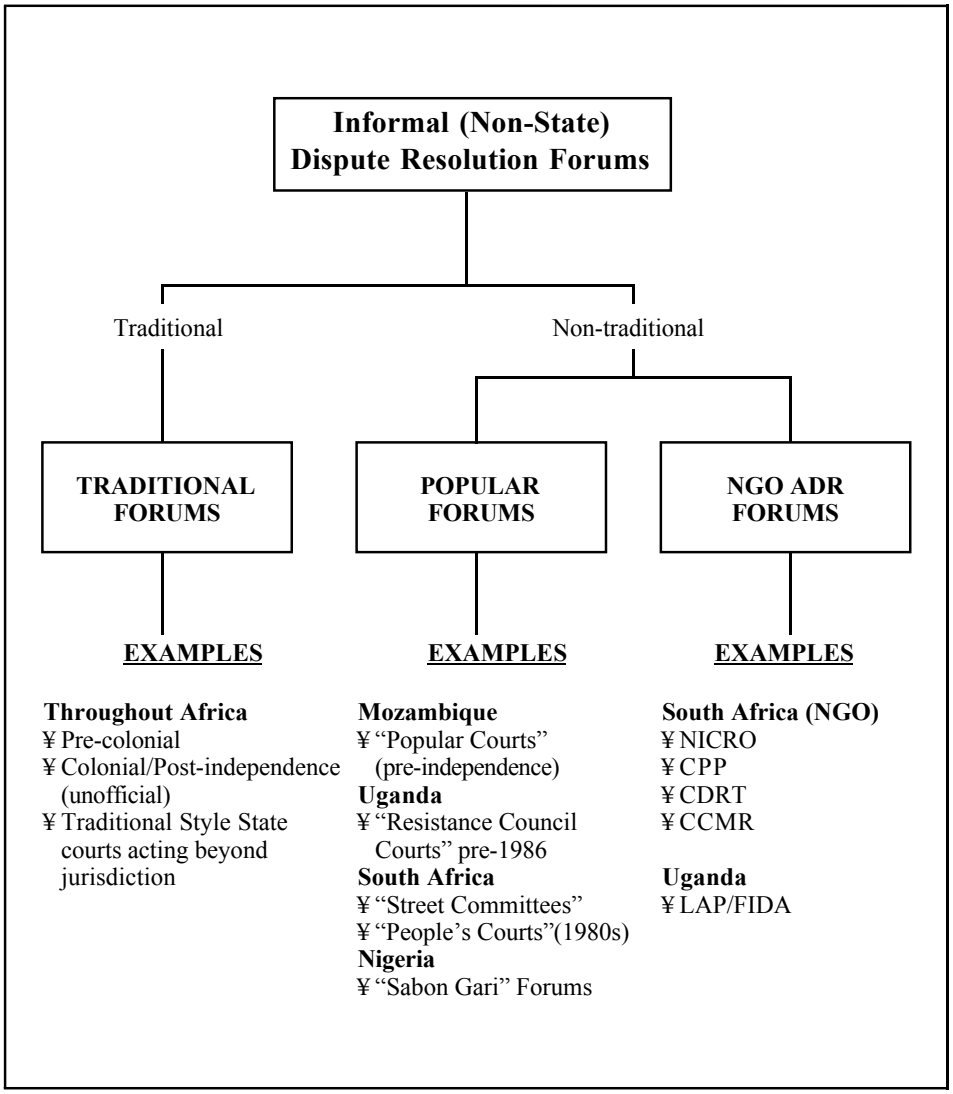
[2] In the literature the term popular justice carries the connotation of a revolutionary, socialist ethos, at the very least a form of semi-autonomous democratic system of self-governance, in varying degrees of tension with the state justice system. (See Santos, 1984:95; Nina and Schwikkard, 1996; and Nina, 1995.)

[3] The term community courts was introduced in 1988 and is still in use in 2000. It was adopted to distinguish the township courts that had operated since 1988 from the people's courts that had operated between 1984 and 1987, which had become discredited by 1988.

MODALITIES


Formal State Courts based on traditional / informal
Traditional
Non-traditional
"TRADITIONAL STYLE" COURTS
"POPULAR STYLE" COURTS
FORMAL ADR FORUMS
EXAMPLES
EXAMPLES
EXAMPLES
Most countries throughout Africa
¥ Colonial
¥ Post-independence, eg:
Zimbabwe
¥ "Local courts"
South Africa
¥ Traditional courts
Mozambique
¥ "Popular Tribunals"
Uganda
¥ "Local Council courts"
Proposed
Rwanda
¥ "Gacaca Tribunals"
South Africa
¥ Family Group Conferencing
¥ Small Claims Courts
¥ Comission for Conciliation, Mediation and Arbitration

MODALITIES


Informal (Non-State) Dispute Resolution Forums
Traditional
Non-traditional
TRADITIONAL FORUMS
POPULAR FORUMS
NGO ADR FORUMS
EXAMPLES
EXAMPLES
EXAMPLES
Throughout Africa
¥ Pre-colonial
¥ Colonial/Post-independence (unofficial)
¥ Traditional Style State courts acting beyond jurisdiction
Mozambique
¥ "Popular Courts" (pre-independence)
Uganda
¥ "Resistance Council Courts" pre-1986
South Africa
¥ "Street Committees"
¥ "People's Courts"(1980s)
Nigeria
¥ "Sabon Gari" Forums
South Africa (NGO)
¥ NICRO
¥ CPP
¥ CDRT
¥ CCMR
Uganda
¥ LAP/FIDA

2.2 Informal (non-state) dispute resolution forums

Two main types of informal justice systems, other than traditional systems, operate in developing countries: popular justice forums and alternative dispute resolution run by non-governmental organizations (NGO ADR) forums. Popular justice forums have mainly been created in urban and peri-urban areas where no traditional justice system previously existed. There are, however, a few examples of popular justice systems which have been created in rural areas where the traditional system has broken down (see 6.1). Both the popular and NGO-led models share, in common with the traditional system, what may be regarded as the fundamental characteristics of informal justice:

- the process is voluntary and not backed up by state coercion;
- it relies on social pressure to secure attendance and compliance with a decision;
- the procedure is informal and participatory;
- it is based on principles of restorative justice;
- the decision is based on compromise rather than strict rules of law; and
- both disputants, and their supporters, play a central role in the decision-making process.

The term popular justice forums is used to refer to popular forums which basically conform to these criteria. In contrast, non-state forums which are involuntary and rely principally on coercive measures and physical punishments, are generally neither popular nor just and may best be described as kangaroo courts. The proceedings of some people's courts in South Africa (see 4.1), for example, illustrate the characteristics of such courts.

"[Their] procedure became persecutorial and disintegrated into a process of harsh interrogation where parties were not given any or sufficient opportunity to state their case. The community did not subject itself to their jurisdiction voluntarily but out of fear. Community support declined and people started taking their grievances to the state structures again. [These] new people's courts, also now called 'kangaroo courts', were set up by youths who acted without the mandate of the community." [4]

[4] van Niekerk, 1998: 88 (emphasis added).

Independent kangaroo courts are usually short-lived as they are unlikely to have the full support of the community and must rely on the acquiescence of the state which, under normal circumstances, would be unwilling to relinquish its monopoly on the use of coercion.

There has been little research published on where and how specific popular justice forums in Africa operate. From what literature is available, it would seem that the main characteristics which differentiate non-traditional informal systems – both popular and NGO-led – from traditional justice forums relate to:

- the appointment of arbitrators or facilitators who may be directly elected in some popular forums or, for example, be volunteers in NGO ADR forums;
- a more restricted degree of public participation in NGO-led and some popular forums;
- the keeping of written records by NGO-led and some popular forums.

Arbitrators and facilitators

NGO ADR facilitators are generally appointed and trained by the NGO concerned. Facilitators may include influential people within the community who have volunteered their services. A panel of mediators usually facilitates sessions and an effort is made to recruit women facilitators. However, there tends to be a greater proportion of men on most panels (see chapters 6 and 7).

Popular justice forums, such as the street committees found in South African townships, generally involve panels of arbitrators elected by the community concerned (see 4.1). This was also the case in the informal popular tribunals which emerged in liberated zones during the struggle for independence in Mozambique[5] (see 4.2).

[5] The traditional leaders had been completely discredited as a result of their role in collaborating with Portuguese colonial forced labour policies. The popular tribunals in Mozambique were incorporated into the state hierarchy of courts following independence.

The popular justice forums found in Hausa settlements in urban centres in southern Nigeria, however, resemble more closely traditional forums. Hausa migrants from the north of Nigeria, began to settle in the Yoruba town of Ibadan in southwestern Nigeria more than a century ago. As with other Hausa settlements, the one in Ibadan "developed into an important trading centre with the Hausa controlling and regulating trade"[6]. In the 1920s, the Yoruba rulers decided to move the Hausa migrants and "other strangers" into an unoccupied area of Ibadan which became known as Sabon Gari (meaning "new town")[7]. It was at this juncture that a Hausa (town) leader, the Sarki Sabo, was appointed with the agreement of the Yoruba paramount chief and the colonial administration. His responsibilities included maintaining law and order.[8]

The title of *Sarki Sabo* has generally passed from father to son. Whereas the *Sarki* is ultimately responsible for dispute settlement, it is the "second in command", the *Wakili* (also known as the *Waziri*), who handles most disputes. The *Wakili* is chosen by the *Sarki* and is currently the *Sarki's* younger brother. He represents the *Sarki's* interests in other Hausa settlements in southwestern Nigeria, over which the *Sarki Sabo* has been recognized as having paramount control[9]. The *Sarki Sabo* also appoints *Shugabas* (local heads) whose main functions is to settle disputes between Hausa and other ethnic groups in their region.

"The Shugabas or leaders are responsible for hearing matters and discharging matters. The Shugaba must be a learned person, who can act as judge whenever [necessary]. Cases among the Hausa should not be taken to court. First they should see the Shugaba... If the Shugaba is not able to settle the matter, then the case is forwarded to the Wakili, from the Wakili then to the Sarki. If the Sarki cannot settle the matter [only] then it is taken to the Court".[10]

One of the few examples of popular justice forums in rural areas that has been documented, but which has not been associated with a liberation struggle, is the *lok adalat* (people's court) in Rangpur, India[11] (see 6.1). During the 1960s an innovative process was introduced into

---

6 Salamone, 1998:140.
7 Salamone, 1998:141.
8 Salamone, 1998:141.
9 Salamone, 1998:147.
10 Miangu, 1990 cited in Salamone, 1998: 145-6.
11 It is notable, however, that the people's court was founded in an area populated by "tribal people", the *Bhils*, who had been "rendered mostly to a condition of serfdom by the devices of money-lenders" prior to "liberation of the land programmes" (*Bhumi Mukti*) which began after independence (see 6.1).

the lok adalat with a view to gradually lessening dependence upon the presiding chairman as decision-maker. Nowadays, once both sides and their witnesses have been heard, and public discussion on the case is concluded, the complainant and the respondent each nominate two people from the public assembly (who may not be close relatives). The nominees leave the assembly to deliberate and reach a decision by consensus. The decision is then announced to the public assembly. However, the consent of both parties to the decision and the general approval of the assembly is required.

Public participation

Popular justice forums generally involve a very high degree of public participation (see, for example, 4.2 for a description of the popular courts which existed in Mozambique prior to independence). The *Sabon Gari* justice forums in Southwestern Nigeria are also held in public, but direct participation would seem to be largely restricted to elder men who act as representatives of the various Hausa families. The following describes a case involving a Hausa employee who took money from his employer, a Yoruba market woman, allegedly because she had not paid his wages in full. The case was referred to the *Sabon Gari* justice forum by the arresting police officer, a Yoruba:

"The trial, which began about 10:15 a.m., took place in a large open courtyard outside the Shugaba's house. It was conducted mainly in Hausa, with translations into Yoruba and English for the benefit of the constable. The market woman, a Yoruba, spoke Hausa. English summaries were provided for those whose Hausa or Yoruba might not be sufficient. There were about twenty elders gathered in judgment. They were arranged in a horseshoe shaped semi-circle, under a large shade tree. Some were seated on chairs while others arranged themselves with their backs to a wall, under the shade of the wall's overhang. There were elaborate rugs placed on the ground for the use of participants. Completing the circle were the complainants, the defendant and some spectators... The Hausa value people who can listen calmly in the face of adversity and who can seek to reconcile seemingly irreconcilable differences... For example, each person gets an opportunity to present the case calmly. Respect is accorded to each presentation. People in the circle are free to ask questions and the Waziri ["judge"] generally waits until all others have spoken, not wishing to inhibit their advice and opinions."[12]

[12] Salamone, 1998:148 and 153.

Public participation in NGO ADR forums varies considerably. The mediation model of the Madaripur Legal Aid Association in Bangladesh, for example, is based on the traditional justice system and permits any member of the public to attend and participate in the discussion (see 6.4). In South Africa, a number of NGOs have initiated programmes to facilitate access to justice and develop popular justice in black urban areas through the formation of community dispute resolution centres. One of the earliest pilots, the Alexandra Justice Centre, which was launched in September 1991 and co-ordinated by the Centre for Applied Legal Studies at the University of the Witwatersrand and the Community Dispute Resolution Resource Committee, adopted an American model of alternative dispute resolution.

"Procedures followed in the Alexandra Justice Centre have features of the inquisitorial process prevalent in indigenous African law. These features may well be the reason why the Justice Centre enjoys reasonable community support and has accomplished some success. It should be borne in mind that Western concepts and principles of mediation and arbitration are very similar to the general principles of indigenous procedural law and law of evidence. In the final analysis, however, the Justice Centre applied an American model of mediation to an African community – a model which does not provide for collective participatory justice, and public proceedings, both of which are features inherent in indigenous African dispute resolution."[13]

Keeping records

Any agreement reached at sessions in NGO ADR forums is reduced to writing and signed by the parties to the dispute. This is also the case in the lok adalat at Rangpur. It would seem that some street committees and other popular justice forums in South Africa have also begun to keep records, but it is unclear whether popular justice forums do so elsewhere.

[13] van Niekerk, 1998: 92 (emphasis added).

2.3 Formal state courts based on traditional and informal justice

Courts known as traditional-style courts and popular-style courts are, in many cases, traditional justice forums or popular justice forums which have been incorporated into the formal state court system with various modifications.[14] The most fundamental change is that, once incorporated, the decisions of the courts are backed up by the coercive power of the state.

It should be noted that traditional judges of formal traditional-style courts have been known to settle disputes outside their formal capacity. On such occasions the dispute settlement process should be regarded as falling within the category of traditional and informal justice. In South Africa, for example:

"The official courts of chiefs and headmen often act as unofficial tribunals when they adjudicate on cases that fall outside the jurisdiction laid down by legislation, and apply the living indigenous law. The administration of criminal justice by these courts may serve as an example. Their criminal jurisdiction is severely restricted by legislation and they are empowered to adjudicate on a very limited number of common law, statutory, and indigenous law crimes. However, owing to the non-specialized nature of indigenous law, these courts in actual fact adjudicate on indigenous-law crimes which fall outside their jurisdiction."[15]

Clearly, when the forum is acting in this capacity its decisions are not backed up by state coercion and it cannot, therefore, be regarded as formal. Similarly, research has shown that unofficial or informal dispute settlement by "judges" of the formal local council courts in Uganda is not uncommon (see 5.3).

---

[14] The proposed *gacaca* tribunals in Rwanda, although based on the structure and procedure of traditional grass-roots forums, will not be merely an incorporation of existing forums. These forums will be composed of newly elected judges and their decisions will be enforced by the state (see 5.4).

[15] van Niekerk, 1998: 84.

3: TRADITIONAL JUSTICE SYSTEMS

This chapter examines the salient features of non-state traditional justice systems in sub-Saharan Africa. The characteristics assigned to traditional justice below relate to traditional justice forums convened before the general public. It should be noted, however, that in most traditional societies less serious crimes may go through a number of stages of dispute settlement. The disputants may call upon family members, co-residents, co-lineage members, age-mates, specialists in religion or magic, or senior and influential people in the community to assist in trying to find a solution before turning to the more public forum.[1] This is evident, for example, in the process followed by the Kipsigis in Kenya:

"A simple domestic squabble between husband and wife will bring together a small group of immediate neighbours, who, acting in an advisory capacity, will initially seek to reduce the level of violence and will then attempt to resolve the actual dispute through mediation alone. If they do not succeed, or if a more complex issue is at stake, there is justification for calling in the larger participation of community members." [2]

Furthermore, not all traditional systems are or were the same. In certain societies, and in particular, large centralized polities where the traditional leader could rely on his own army or police force, the process resembled more closely that of the formal state system. Having said that, it is possible to distinguish a number of overlapping features common to most traditional systems in Africa.

[1] Roberts, 1979: 150-1.
[2] Saltman, 1979: 318.

Salient features of traditional justice systems:

- the problem is viewed as that of the whole community or group;
- an emphasis on reconciliation and restoring social harmony;
- traditional arbitrators are appointed from within the community on the basis of status or lineage;
- a high degree of public participation;
- customary law is merely one factor considered in reaching a compromise;
- the rules of evidence and procedure are flexible;
- there is no professional legal representation;
- the process is voluntary and the decision is based on agreement;
- an emphasis on restorative penalties;
- enforcement of decisions secured through social pressure;
- the decision is confirmed through rituals aiming at reintegration;
- like cases need not be treated alike.

3.1 Community or group involvement

Informal traditional systems tend to exist in small, generally rural, communities dominated by what has been called multiplex relationships[3]; that is, relationships which are based on past and future economic and social dependence, and which intersect ties of kinship.

"Within a multiplex relationship, a disturbance in, say, the political relationship is likely to affect the economic and domestic relationships. Where multiplex relationships prevail, judges and litigants, and the litigants among themselves, interact in relationships whose significance ranges beyond the transitoriness of the court or a particular dispute." [4]

In such communities a dispute between individuals is perceived as "not merely... a matter of curiosity regarding the affairs of one's neighbour, but in a very real sense a conflict that belongs to the community itself." [5] Each member of the community is tied to varying degrees to each of the disputants and, depending on the extent of these ties, will either feel some sense of having being wronged or some sense of responsibility for the wrong.

Closeness of ties generally coincide with membership of a particular group. So, for example, it has been stated in relation to India that "whereas English law valued the individual over 'artificial' groups, the traditional Indian law valued natural associations (family, caste) over the individual"[6] and regulated legal relations accordingly. Similarly:

---

[3] Gluckman, 1955: 19.
[4] Van Velson, 1969: 138.
[5] Holleman, 1948: 53.
[6] Baxi, 1986, 226-7.

"...in most African societies, legal rights and duties are primarily attached to a group rather than to individuals... The individual plays a relatively subordinate role. Very often, the members of the group, as individuals, are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole. A law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others, he never stands alone. In the same vein, a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for vengeance, for in some vicarious manner, they too have been wronged." [7]

Thus the legal subject is constructed very differently in the common-law and traditional systems: as an atom in the common-law system and as a person inextricably linked to family, clan and culture in the traditional systems. The notion of collective injury and responsibility also persists in South African townships. However, the concept of "group law" may sometimes be overstated.

"While there is a measure of truth in this view of the idea of liability for wrongs, it is inaccurate in so far as it assumes that jurisprudence in Africa does not distinguish between primary and secondary liability for offences against the law. No doubt, African sentiments attach great weight to the solidarity of the group as a necessary condition of the maintenance of the social equilibrium of the local community. Thus, it is common for members of the group to make loans of surplus lands, cattle or crops to one another in times of scarcity or misfortune; and it is also natural that, if one of their number should incur the penalty of the payment of blood-money or compensation, other members of his group or family would come to his aid in meeting such an obligation. There is no doubt whatsoever in the minds of these other members, and certainly not in the customary law on the subject that the primary liability is that of the wrongdoer himself alone, and that the other members are merely assuming secondary liability if he fails to pay either in part or as a whole. It is considered by the wrongdoer's kith and kin a matter of family pride that none of their members' legal obligations be allowed to remain outstanding in relation to the wronged family."[8]

Whereas, under the formal state system, the victim is effectively relegated to the status of a mere witness in criminal cases, under traditional justice systems the victim is central to the decision-making process. A dispute cannot be settled unless the victim, as well as the offender, agree with the final decision. As will be discussed below, public opinion acts as a moderating force against excessive demands for compensation, or the refusal to accept a reasonable demand for compensation (see 3.12).

---

[7] Ibokwe, 1998: 449-50.

[8] Elias, 1969: 19.

3.2 Reconciliation and restoring social harmony

The guiding objective of the traditional justice system in Africa is to restore peace and social harmony within the community by ensuring that disputants and their respective supporters are reconciled:

"At the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored unless the parties are satisfied that justice has been done. The complainant will accordingly want to see that the legal rules, including those which specify the appropriate recompense for a given wrong, are applied by the court. But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be reintegrated into the community." [9]

"Among writers there seems to be a general agreement in contrasting broadly the individualistic and penal character of the European law with the social character of the tribal system, where the aim seems to have been more the elimination of social frictions by achieving a measure of balance between the contending parties."[10]

Many writers have argued that the cultural and socio-economic underpinnings of multiplex societies require proceedings which avoid an adversarial approach. Such proceedings tend to increase the tension and estrangement between the two parties, and between their supporters, and thereby pose a threat to the moral cohesion of the community[11]. What has been described as the quintessence of traditional African jurisprudence is the recognition that in most disputes:

" ...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."[12]

---

[9] Allott, 1968: 145.
[10] Epstein, 1951: 36.
[11] Ibokwe, 1998: 451-2.
[12] Adigan, 1991 cited in Ibokwe, 1998: 457.

3.3 Traditional arbitrators

Customary arbitrators are usually of higher social status than the disputants. They hold their position by virtue of their age, inherited status, or influence within the community, and represent the community in articulating the consensus on shared norms and values.[13] Some African communities traditionally had no single head but were ruled by elders of the village. Other communities were ruled by a chief who took advice on judicial as well as political decision-making from elders or councillors:

"Generally, councillors rose to their position gradually and informally through, for example, their contributions at public gatherings, which earned them respect. Some of the factors promoting their rise included age courage or war-like achievement, skill in public debate, ability in unravelling the intricate subtleties of lawsuits during cross-examination, etc."[14]

"[T]he wise ruler did not dictate to his subjects. As a common saying has it, kgosi ke kgosi ka batho (a chief is a chief through his people). He paid careful regard to his councillors, who were the mouthpieces of popular opinion. No important decision could be taken without first consulting them, and because councillors gave voice to current views, they could check self-interested or capricious action." [15]

As traditional arbitrators are not strangers to the disputants and cannot be said to be disinterested parties, they cannot be regarded as impartial in the formal sense. However, their impartiality is secured by crosscutting ties which link them to both parties[16]. Furthermore their personal knowledge of the community, the dispute, the nature of previous settlements, and the disputants – including personal histories and reputations – is "vital to [the arbitrators'] ability to resolve the case and they are expected to use it in doing so."[17]

[13] Ibokwe, 1998: 456; Merry, 1982: 34; Bush, 1979: 269.
[14] Koyana, 1998: 120.
[15] Bennett, 1998: 15.
[16] Merry, 1982: 31; Ibokwe, 1998: 456.
[17] Bush, 1979: 269; see also Merry 1982: 34.

"The judge was not a remote member of an official order, but the man in the next hut. The English fiction of judicial ignorance would have been severely strained in African customary processes. Not only did the local judge or arbitrator often know most, if not all, of the facts of a dispute before it came officially to his notice, but he would also probably be aware of the previous history of the relationship between the contestants; he would know that X was always quarrelling, that Y beat his wife, that Z was a stranger who only came to the community a few years ago; and so on... **The gap between legal truth and actual fact was thus diminished.***"*[18]

This is a stark contrast to the notion of separation of powers between the executive and the judiciary in state justice systems and underscores their different jurisprudential underpinnings

3.4 Public participation

Under the traditional justice system a conflict between two members of a community is regarded as a problem which afflicts the entire community. In order to restore harmony, therefore, there must be general satisfaction among the community at large, as well as the disputants, with the procedure and the outcome of the case. Public consensus is, moreover, necessary to ensure enforcement of the decision through social pressure.

It is, therefore, not surprising that the procedures used in traditional systems allow members of the public to tender evidence and generally make their opinions known[19]. Under the traditional justice system which existed in Malawi for example:

" ...although judgment was delivered by the chief on the advice of the elders, everybody had a right to speak in an orderly manner, to put questions to witnesses, and to make suggestions to the court. This privilege was extended to passers-by who, although they might have been complete strangers, could lay down their loads and listen to the proceedings. The chief and his wise elders would sit for hours listening to what by Western standards might be considered a mass of irrelevant details. **This was done to settle the disputes once and for all so that the society could thereafter continue to function harmoniously.***"* [20]

A description of a Shona traditional forum in Southern Africa shows a similar process at work:

---

[18] Allott, 1968: 137 (emphasis added).
[19] Allott, 1968: 146; Elias, 1952: 244.
[20] Chimango, 1977: 40, (emphasis added).

"[The traditional hearing] lapses into stages in which the court seems to disintegrate into a free-for-all debating society without rules of precedence, speech or conduct. Everyone chimes in and gives his opinion – and the one who sits back, seemingly powerless to keep order, is the chief himself." [21]

However, this should not be seen as a sign of weakness or lack of authority on the part of the chief and his court:

"He is a good chief when he knows how to listen patiently and watch faithfully. If he can do this long and diligently enough, the initial turmoil and stubbornness may very likely spend themselves, and the solution emerges as the common product of many minds. The chief's decision is then as undramatic and uneventful as a full-stop after a long paragraph."[22]

It has been claimed that disputes are "settled not only in public but by the public"[23] and that the arbitrator is merely the "spokesman for public opinion".[24] Nelson Mandela has described the democratic aspects of traditional decision-making among his own ethnic group in South Africa:

"The meetings would continue until some kind of consensus was reached. They ended in unanimity or not at all. Unanimity, however, might be an agreement to disagree, to wait for a more propitious time to propose a solution. Democracy meant all men were to be heard, and a decision was taken together as a people. Majority rule was a foreign notion. A minority was not to be crushed by a majority. Only at the end of the meeting, as the sun was setting, would the regent speak. His purpose was to sum up what had been said and form some consensus among the diverse opinions... A [true] leader... is like a shepherd. He stays behind the flock, letting the most nimble go on ahead, whereupon the others follow, not realizing that all along they are being directed from behind."[25]

Other modes of reaching a solution are to be found in various African societies, but reconciliation based on consensus is by far the most characteristic.[26] A chief or head of an extended family may, for example, "decree" the way in which a breach of norm is to be rectified. However, the settling of disputes is a primary role of a chief or elder and failure to carry out this task successfully would, in the long term, undermine their authority. A degree of deference must, therefore, be given to public opinion.

---

[21] Holleman, 1948: 53.
[22] Holleman, 1948: 54.
[23] Holleman, 1948.
[24] Gulliver, 1969: 24; see also Vincentnathan, 1992: 90.
[25] Mandela cited in de Villiers, 1998: 105-6.
[26] Allott, 1968: 146.

3.5 Customary law and reaching compromise

In order to achieve lasting reconciliation, the traditional arbitrator may take many factors into consideration. A decision is more in the nature of a compromise which takes into account not only the specific charge of the complainant but also any indirect and underlying causes of the conflict, and factors which may have a bearing on successful reconciliation such as the history of the relationship between the parties.

Under the formal state system, with its emphasis on rule-based adjudication, a dispute may be redefined to fit a narrow category of rules; the parties largely lose control over the final outcome which is dictated by the rules; and one party tends to win and the other lose in accordance with those rules.[27] "Most of the time... [what is preferred] is not to know *why* anything has happened, but rather what occurred, or even more narrowly, *what can be shown*... to have occurred."[28]

In contrast, tribunals operating under traditional justice systems "...manifest a concern for dispute-settlement through consensus. They do not isolate the dispute from its overall social context. Rather, in and through that context the indigenous tribunals seek a solution which maximizes social harmony or abates group conflict or tension. Reconciliation of parties through compromise and consensus characterizes decisions of those tribunals, whereas (to borrow a striking phrase) the adversary system manifests a 'winner-take-all' attitude".[29]

Under traditional justice systems, "outcomes are generally compromises rather than zero-sum decisions and take into account the total relationship between the parties."[30] This follows from the need for consensus between the disputants, and the importance of finding a settlement which is mutually acceptable. Thus "the concept of justice is derived from what the society... considers to be fair and just" in light of the overall context, and not "what is fixed in advance by law."[31] This does not mean that there are no rules. Rather, the rules are seen as "bargaining counters"[32] – a "framework for the discussion"[33] – in the process of reaching an outcome, and not necessarily determinates of that outcome.

---

[27] Roberts, 1979: 20-1; Hayden, 1984, p.44.
[28] Felstiner, Abel and Sarat, 1980: 64.
[29] Baxi, 1986: 227.
[30] Merry, 1982: 19.
[31] Wanitzek 1990: 258.
[32] Roberts, 1979: 132-136.
[33] Merry, 1982: 19.

"Often the principles themselves form no more than a starting point for negotiation between the contending parties as to the suitable settlement of their quarrel, and a court may allow a deviation from the rule in the interests of a lasting harmony between the disputants."[34]

The emphasis on solving the entire conflict between the parties means that there is little, if any, difference in the approach to civil or criminal cases. Indeed, civil and criminal matters flowing from the same set of facts are heard simultaneously. A "broad range of issues, which seem to be indirectly connected with the matter at issue, can play a role in the resolution."[35]. This is not to say that the seriousness of a particular issue is not taken into account in working out the appropriate solution.

"Disputes are therefore inevitably very entangled. What appears to be a trifling dispute, to cite an example from my own experience, over the neglect of a woman to give her father a cup of beer, may bring to a head a long record of festering troubles and produce recitals by both parties of grievances exacerbated by smoldering irritations over points of fact."[36]

There are cases where both parties have been publicly admonished by the tribunal or where a traditional forum "met to settle one dispute finds itself adjudicating another which lies behind it."[37]

"Occasionally... an aggrieved person who has been seriously affronted or neglected in terms of general moral norms by a kinsman or in-law, but lacks an issue on which he can sue, will himself commit an offence that forces the defaulter to prosecute him. He goes to court secure in the knowledge that although he may lose the case, the judges will publicly upbraid his opponent for all the latter's breaches of moral obligation."[38]

"... a man wrongfully detained someone else's billy goat overnight to provoke a complaint at the hearing of which a serious grievance as to their respective rights over some arable land and a well could be thrashed out. When the anticipated complaint was made, and the meeting to discuss it took place, talk was at first about the billy but very soon turned to the real issue over which the two men were at odds."[39]

---

[34] Allott, 1968: 140.
[35] Wanitzek, 1990: 258.
[36] Gluckman, 1955; cited in Bennett 1991a: 73.
[37] Baxi, 1986: 238.
[38] Gluckman, 1955; cited in Bennett 1991a: 75.
[39] Roberts, 1979: 53.

Such manipluation of the informal forum is possible and rational given that "traditional justice focuses on the future relationship between two disputants and minimizes the importance of the event which triggered the dispute, while Western (formal) justice looks backwards to punish the perpetrator of the event which precipitated the court appearance."[40] The traditional arbitrator's ability to assist in reconciling disputing parties relies largely on knowledge of their past relationship and the importance of continued co-operation between them.

3.6 Flexible rules of evidence and procedure

It has been argued that the credibility of evidence is determined from the arbitrator's "intimate and direct knowledge of the dispute"[41] which makes an elaborate system of rules of evidence, procedure and pleading unnecessary. This allows a wider sense of relevance in respect of evidence to be adopted.[42]

At a traditional hearing, disputants simply tell their stories as they consider relevant. These lengthy oral testimonies have been seen as equivalent to "pleadings" that produce "a ritually sanctioned purge of anger and emotions as well as a complete exposition of the circumstances"[43]. As already noted, traditional justice forums also show the greatest reluctance to cut short any member of the public – no matter how irrelevant the contribution may turn out to be – where that person claims to have special knowledge of the facts, or simply desires to comment.[44] Having said that, it does not necessarily follow that traditional arbitrators are undiscriminating in their reception of evidence.

"it is the desire of the African judge to maintain absolute impartiality (or at least not to appear to be taking sides by a too meticulous disallowance of witnesses' testimonies where these look irrelevant) that must explain the wide latitude usually given when hearing cases."[45]

[40] Correspondence with Prof. Schärf, February 1999.
[41] Baxi, 1986: 227.
[42] Baxi, 1986: 238; Van Velson, 1969: 138.
[43] Bush, 1979: 269.
[44] Elias, 1969: 21; Van Velson, 1969: 142.
[45] Elias, 1952: 247.

" ...since the plaintiff, lacking trained counsel's advice, may not be seized of the law, but perhaps merely feels that he has been badly treated, justice cannot be achieved unless he is allowed to speak about many things, which at first are apparently irrelevant, but which may later turn out to be crucial. The same observation applies to the other party's initial statement. In the absence of advance preparation and examination in court by counsel, litigants may not be able to present their grievances in coherent, logical, and relevant form. Here traditional judges play the role of counsel, as an English judge may do on behalf of a litigant who appears without benefit of counsel."[46]

Thus, traditional arbitrators "reserve to themselves the right to decide what weight they will attach to any... piece of evidence."[47] Despite the presumptions made in some literature, "numerous [ethnographic] reports show that traditional courts distinguish sharply between the firmness of evidence of eye-witnesses, and the difficulties which attend on determining guilt or liability by circumstantial evidence."[48]

"Although the judges listen to all kinds of statements of fact, they do classify evidence as interested and disinterested, and direct or circumstantial or hearsay. They prefer disinterested and direct evidence, and may advise parties and witnesses not to repeat hearsay, particularly in cases not involving kinsmen. They look for corroboration, and they weigh evidence by several tests."[49]

Finally, it should be mentioned that, in some traditional societies, when the nature of the evidence is extremely inconclusive, and the determination of the disputed facts are essential to the final ruling, the case may be referred, with the consent of both parties, to a diviner who consults the oracle or administers an ordeal in order to discover the truth.[50] Truth ordeals are less common today and had already ceased to be used in some societies prior to their formal abolition under colonial rule.[51]

---

[46] Gluckman, 1969: 22.
[47] Elias, 1969: 21.
[48] Gluckman, 1969: 24.
[49] Gluckman, 1955, cited in Bennett, 1991a: 74.
[50] Saltman, 1979: 319; Baxi, 1976, p.60; Johnston, 1978: 96.
[51] Elias, 1952: 235.

3.7 Absence of professional legal representation

Professional legal representation is not a feature of the traditional justice system, nor can it be regarded as required. As noted above, prior to a formal court hearing, the traditional arbitrator carries out the work normally performed by lawyers, "namely to listen to the whole story as it is poured out, to ignore what is irrelevant, and then to analyse the legal issues involved, and marshal the evidence."[52] Moreover, the informal proceedings in traditional arbitration, which seeks compromise solutions rather than the strict application of intricate rules, are aimed at maximising direct public participation which is essential given the lack of official enforcement mechanisms. (See 3.10.)

3.8 A voluntary agreed process

For the effective restoration of social harmony, it is important that there is genuine acceptance of any ruling. Thus, both parties are asked to give their unqualified consent to any procedure before commencement. Customary arbitrators will not give a default judgment if the defendant fails to appear or walks out.[53] On the very rare occasion that either party disagrees with the final decision, "the meeting comes to an end and formal court adjudication will be the only available option."[54] However, a person who resorts to formal legal proceedings which bypass community settlement may be ostracized by the community. In practice non-acceptance of a ruling merely involves further negotiation on, for example, the size of the award.[55]

"[A Shona chief] will hesitate to pronounce judgment unless he is reasonably certain that the parties will abide by his decision or settlement. He will ask both parties if they are satisfied, and if they are not, renewed efforts are made to bring about a solution acceptable to both."[56]

[52] Van Velson, 1969: 142.
[53] Johnston, 1978: 96.
[54] Ibokwe, 1998: 459; Thacker, 1998: 89.
[55] Saltman, 1979: 320.
[56] Holleman, 1948: 53.

3.9 Restorative penalties

The main purpose of traditional arbitration is to restore social harmony and reconcile the parties. The penalties, therefore, usually focus on compensation or restitution in order to restore the *status quo*, rather than punishment.[57] However, sometimes traditional justice forums may order the restitution of, for example, twice the number of the stolen goods to their owner, "especially when the offender has been caught in *flagrante delicto*" and fines may be levied.[58] Imprisonment has never existed as a penalty for any offence. Corporal punishment, however, has been and continues to be administered by a number of traditional systems in Africa – almost invariably on juvenile offenders, but never on women or girls[59]

In pre-colonial Africa, the traditional forum in a number of societies assumed a more adjudicatory role for the most serious crimes such as murder and witchcraft and capital punishment was on occasion resorted to[60]. On other occasions, the victim's family would accept a penalty of compensation and/or banishment of the murderer from the community, sometimes together with his or her family. Since colonial times, cases of alleged murder have generally been referred to the formal courts.

3.10 Social pressure

In stateless societies, "enforcement lies within the complex of relationships."[61] Thus, although under traditional systems, formal coercion is rarely resorted to, social pressure plays a powerful role in achieving compliance.[62] The high degree of public participation in reaching a solution to a dispute means that disobeying a final ruling is tantamount to disobeying the entire community and may attract social ostracism.[63] This involves the withdrawal by other members of the community of both social contact and economic co-operation.[64] This separation from one's group in traditional African society has been likened to a "living death".[65]

---

[57] Merry, 1982: 20.
[58] Elias, 1969: 20; MINARS, 1998: 94.
[59] Elias, 1952: 288.
[60] Elias, 1952: 288.
[61] Roberts, 1979: 51.
[62] Ibokwe, 1998: 469; Merry, 1982: 36.
[63] Ibokwe, 1998: 459.
[64] Roberts, 1979: 27, 39, 65.
[65] Oputa, 1975: 8.

The fear that ancestral spirits may be disquieted by the breaking of rules and quarrelling, and respond by causing illness or material misfortune on the wrongdoer's kin or on the community as a whole, appears to be common in traditional societies. This may further explain the disputants' desire to reach and abide by an agreement and the public's interest in ensuring this outcome.[66]

"Breach of a taboo or omission of some appropriate offering to the spirits may cause affliction to someone other than the wrong-doer, or even to the community as a whole."[67]

"the group or community is a continuing... self-perpetuating corporation embracing both the living and the dead. The law of the community, therefore, is conceived and accepted as the possession and heritage of an endless chain of generations... [and] an act of rebellion against the legal status quo is regarded as odious and scandalous not only in the eyes of living contemporaries but also of the ancestral spirits who perpetually hover around the edge of the community."[68]

3.11 Rituals of reintegration

Genuine acceptance of a ruling is recognized as essential for the ending of hostilities between disputants and the restoration of harmony within the community. In order to confirm acceptance by both parties, they may be expected to eat from the same bowl or drink from the same cup.[69] This forms part of the reconciliatory approach intrinsic to African traditional arbitration. It "confirms the agreement and make it notorious."[70] The public also partake in the eating and drinking as an expression of "the communal element inherently present in any individual conflict"[71] and of their acceptance of the offender back into the community.

The following is a description of such a ritual given by a complainant, a Banyoro from the Kingdom of Bunyoro in Uganda:

---

[66] Roberts, 1979: 42, 95, 107.
[67] Gluckman, 1955; cited in Bennett, 1991a: 73.
[68] Ebo, 1979: 38-9.
[69] Allott, 1968: 150; Baxi, 1976: 77; Beattie, 1957: 37-8; Chimango, 1977: 42; Elias, 1952, 269; Holleman, 1949, 60; Saltman, 1979: 320; MINARS, 1998: 94; Mondlane, 1998: 167.
[70] Allott, 1968: 150.
[71] Holleman, 1948: 61.

"Everyone present [at the hearing] agreed that Yozefu [the "defendant"] failed in this case... So I asked the village headman to take us to the sub-county chief's headquarters, so that I could accuse him in the chief's court [meaning the formal state 'Native Court']. But many of the people present said to me 'Yakobo, it would be better for you to allow him to pay a "fine" of beer and meat, in accordance with our Nyoro custom of forbearance and good manners'. So I said, 'All right; in that case I shall go home, and if he comes to my house and begs forgiveness I shall forgive him, but if he does not come I shall accuse him in the sub-county chief's court.' He came in the evening... and we told him that he should bring four jars of beer and a goat... On the day arranged... He came, bringing two pots of beer. Then the neighbours who were present said, 'Ho Yozefu, what are you bringing beer here for? Are you coming to marry here or what?'... he begged me to accept two jars of beer only, as he had not been able to get any more. I said that I would accept them, but I reminded him that it was only owing to my kindness that he was not in prison, and I warned him that if he committed a similar fault in the future I would certainly take him before the chief's court... So I and all the people there drank the beer, and we danced, and the matter was finished."

... "If a dispute between neighbours can be settled in the kyaro [traditional forum] that way it should be settled; it is a serious matter to take it to the "Government", where strangers will hear the case and where heavier penalties including imprisonment may be imposed. This should only be done when settlement at the community level is seen to be impossible... If one suggests that the culprit is made to suffer by being compelled to spend his money on meat and beer, Banyoro reply: 'Why should he be angry or hurt? He consumes his share of the things he buys, and he enjoys the feast just as much as the others do.' The main object, then, appears to be to reintegrate the delinquent into the community and, if possible, to achieve reconciliation without causing bitter resentment; in the words of an informant, the institution exists 'to finish off people's quarrels and to abolish bad feeling.' In Bunyoro social attachment and solidarity are typically expressed in communal eating and drinking. **Not only does [the offender] have his share of the food and drink he has provided, but he is himself the host. And this is a praiseworthy thing; from a dishonourable status he is promoted to an honourable one.** *So the beer and meat are not a 'fine', at least not in the usual sense of that term; for their significance is rehabilitative rather than penal."*[72]

[72] Beattie, 1957: 37-8 (emphasis added).

3.12 Like cases need not be treated alike

The informal system allows greater flexibility in the general application of customary norms so that a solution based on compromise may be reached. As a consequence, like cases may be treated differently. From the perspective of a formal legal system, this is anathema to the concept of justice which demands equality before the law based on due process including legal certainty.

It is important to note that the concept of like cases is quite different under the formal and informal systems. In reaching a solution, traditional and informal justice forums consider a broad range of issues focusing on the underlying reasons for any conflict or criminal intent, with a view to preventing a reoccurrence of the problem in the future. From this perspective, few cases are ever alike.

Secondly, the need for legal certainty and due process is less acute in the informal system as the process is generally voluntary in the sense that a disputant is not forced physically to appear or to abide by any agreement.

Thirdly, although the compromise solution must be agreed to by both parties, who may be of unequal bargaining strength, the process is moderated by the arbitrators, who are either traditional chiefs, elders, or other persons of high status elected by the community and who may bring their influence to bear in persuading a disputant to accept no more than what is fair and just.

"In disputes between unequals, the weaker party may turn to a third party to equalize the balance and seek an equitable resolution, as the powerless Cheyenne turns to an important chief. To be effective, the third party must possess sufficient power to equalize the balance between the disputants."[73]

Furthermore, the public may side with the weaker party where the stronger, for example, insists on excessive compensation, or refuses to accept a reasonable demand for compensation. Finally, among the public in traditional societies will be what are referred to as actions sets.[74] These are supporters with whom a disputant enjoys the closest ties, either through kinship or economic co-operation. If influential members of the victim's and the offender's action set agree that a particular compromise is fair, it will be difficult for the victim or offender to continue to demand more or less[75].

[73] Merry, 1982: 39.
[74] Gulliver, 1969: 30.
[75] Roberts, 1979: 125.

Despite these checks and balances, "the appearance of consensus may well be a mask for domination."[76] Members of some sections of the community – for example women or young people – are likely to be put at a disadvantage in relation to more powerful members, such as elder men, particularly as the arbitrators themselves may be chiefs, elders, and religious leaders. This is the major weakness of the informal process. The element of compromise inherent in the system tends to reinforce existing social attitudes whether desirable or not. These include actual customary and religious norms which may discriminate on the basis of social status including gender, caste, age and marital status (see 9.6).

Factors such as the past conduct of the accused, or even that of the accused's family, may be taken into account and compromise the principle that one is innocent until proven guilty.

"*It often used to be said that customary law presumed the guilt of anyone charged with committing an offence and that the accused then had to convince the court otherwise. Use of the common law concept of the presumption of guilt to describe the customary judicial process was, however, misleading. 'Assumption' is probably more apt to denote the attitude of indigenous tribunals, since absolute presumptions of guilt or innocence would make no sense of proceedings aimed at mediating or reconciling the parties".*[77]

Nevertheless, such an "assumption" by the public may reduce the bargaining strength of party in question

[76] Baxi, 1986: 238; 1979: 107, see also Ibokwe, 1998: 469.
[77] Bennett, 1998: 20.

4: NON-TRADITIONAL INFORMAL JUSTICE SYSTEMS

This chapter describes three non-traditional informal justice systems which emerged in South Africa, Mozambique and Uganda. These popular justice forums were created during the struggles within those countries. In both Mozambique and Uganda, liberation zones or no-go areas marked out by the Mozambique Liberation Front (FRELIMO) and the National Resistance Army respectively, produced a judicial vacuum. Such a gap also existed in South Africa during the apartheid era, when the formal police and courts – which held no legitimacy among the black majority population – were directed towards containing political protest and neglected rising crime rates in the townships.

4.1 Street committees and people's courts in South Africa

During the 1970s and early 1980s the terms *lekgotla* (plural) and *makgotla* (singular), were widely used in the townships to refer to street committees and disciplinary committees. At the height of the struggle – between 1984 and 1986 – the term people's courts and disciplinary committees were used to refer to courts that prefigured a post-apartheid vision of local justice. These courts were subsequently discredited and from 1988 onwards a new term – community court – was used. The legislation due to come into force at the end of 2000 is likely to use the term community forums (see 7.3).

From the early 1900s, a dual system of formal courts – or what has been described in the South African context as judicial segregation – operated.[1] A separate hierarchy of courts – consisting of the courts of chiefs or headmen, commissioners' courts and courts of appeal for commissioners' courts (African Appeals Court) – were granted jurisdiction to apply black law and custom to black South Africans. The commissioners courts also exercised criminal jurisdiction over black South Africans. Appeals from the African Court of Appeal were, however, heard by the Supreme Court.

Summary criminal proceedings, the use of inaccurate "restatements" of customary law, long queues and allegations of bribery against the commissioners' courts, meant that, in the vast majority of cases, black South Africans in the townships turned to unofficial agencies to settle their disputes.[2] The fact that the commissioners' courts dealt with influx control and pass law violations only served to heighten distrust of the official system of justice.

[1] Hund & Kotu-Rammopo, 1983: 181.
[2] Hund & Kotu-Rammopo, 1983: 182-3.

The main type of community court which currently exists in South African is the street committee, also known in some areas as the section committee or headmen's committee. Street committees serve areas ranging in size from around 50 houses and sites to more than 200.

In the Cape Town area, street committees began to emerge not long after the first townships came into existence in the early 1900s and they continue to operate in all established townships and squatter camps in the Cape Town area.[3] They constituted the lowest level of a three-tiered system of informal local rule which encompassed not only dispute resolution but other social and economic structures. Above the street committees were the area committees – popularly known as civics – composed of representatives of the street committees. The Western Cape Civic Association, the third-tier in the system, acted as an umbrella body under which executive committees met.[4] Since 1992, the civic movement has been largely consolidated under the South African National Civic Organization (SANCO):

"SANCO attempts to organise in most of the urban communities regardless of racial composition, although it is clearly an African based organisation. Most organisations falling under the SANCO umbrella have a similar organisational structure in which each community has an executive committee which is representative of the local community. Each community is divided into area/branch committees (corresponding to the districts into which the community is divided) and each area/branch committee represents an amalgamation of various street committees, the unit component of each street committee being the individual household. It is at the level of street committees that the primary mechanisms of popular justice function in South Africa."[5]

The fact that street committee courts are linked to civic associations provides them with the potential sanction of denying access to related social support structures, such as informal banks and insurance schemes, informal welfare and childcare systems, and "alternative medico-spiritual health systems."[6] However, in dealing with disputes, street committees emphasize reconciliation between the parties rather than the punishment of the wrongdoer.

---

[3] Burman & Schärf, 1990.
[4] Burman & Schärf, 1990: 706.
[5] Nina & Schwikkard, 1996: 80.
[6] Schärf, 1997: 7.

Street committee members are elected from and by their constituency and do not receive remuneration. They are usually composed of between seven and 11 members, mostly elder men.[7] Very few women are elected onto the committees and, as observed during research in Cape Town in 1990, women are not always expected to play a significant role in the dispute resolution process:

"[I]t was not unusual to exclude... even those women who were on the committees by the ploy of asking them to make and serve tea when the discussion stage was reached, while the discussion continued unabated." [8]

It has been argued that the gender composition of the committees, as "reflected repeatedly in interviews"[9] adversely affected decisions involving women. However, women could turn to local women's committees operating in parallel before approaching their local street committees. A member describes how one women's committee attempted to secure compliance:

"We do get cases of husband and wife disputes. In such cases, when asked by a woman to help her, we do go to her house to meet her husband and find out from both of them what the problem is. We know that the husband usually does not like to see us in his house, but we keep on going. If the wife complains about being battered, we delegate some women within the committee to keep watching by either being at the house at a certain time or stand[ing] next to the house round about the time when the beating up usually takes place. That we do so as to witness and thereafter to threaten the husband."[10]

An attitude change to women was brought about after 1994 by the new Constitution and by the fact that SANCO, which supported gender equality, formed part of the ruling alliance. This change has been reflected in the greater number and more substantive representation of women on street committees.[11]

---

7 Schärf, 1997: 10.
8 Burman & Schärf, 1990: 711.
9 Burman & Schärf, 1990: 711.
10 Burman & Schärf, 1990: 711.
11 Correspondence with Prof. Schärf, February 1999.

Proceedings before street committees are normally conducted at weekends or in the evening. They share many of the features of traditional dispute resolution. Procedures are simple and no formal representation is allowed. The parties to the dispute may "bring as many supporters as they need to help tell the story."[12] The public may participate by asking questions and offering comments and a holistic approach is taken in order to ensure appropriate and lasting solutions to a problem.[13] As this committee member shows, face-saving solutions may form part of this approach:

"A mother was complaining that her children were disobeying her. She is on her own; the father of the children died. When we heard the story from both the children and the mother, we found out that the children were fed up with their mother's drinking habits. From the two stories we could detect that the mother was wrong. We therefore counselled them separately. We did not counsel the mother in the presence of the children. We therefore told the children (aside) that we had talked to their mother. After that there was no report coming in from that family."[14]

No problems are too trivial for street committees.[15] Disputes involving, for example, communal washing lines or noisy neighbours, are resolved before they degenerate into situations where disputants might resort to force. The emphasis on solving the entire conflict between the parties means that there is little, if any, difference in the approach adopted to civil or criminal matters. That is not to say that the seriousness of a particular issue is not taken into account in working out the appropriate solution. It should be noted also that, street committees almost invariably decline jurisdiction in favour of state courts in cases involving rape or murder.

Where a remedy is found to be appropriate, the most commonly used are restitution, service to the aggrieved party, compensation for lost work-time and hospital expenses, or service to the community.[16] Access to civic association services may be withdrawn from recalcitrant residents, while the ultimate sanction for non-compliance is eviction or banishment from the area. As one squatter camp headman stated:

---

[12] Schärf, 1997: 11.
[13] SALC, Issue paper 8/94: 15.
[14] Statement of committee member, Burman and Schärf, 1990: 710.
[15] Schärf, 1997: 9.
[16] Schärf, 1997: 13-14.

"We do sometimes evict the person whom we feel is the cause of the conflict. In many cases a man is usually the cause. In most cases I find that the man has become tired of staying with the woman concerned, that he now has seen someone else and so wants the woman he is staying with to leave. In such cases I evict and forbid the man from going to the shack if the partners do not reconcile within a prescribed term, which I normally give as not more than two weeks. For the first three days after the eviction some of the members of the community usually visit the shack concerned. I usually send them during the late two hours of the evening (maybe 9-11 p.m.). After the three days the woman must come to us if she has any problems. We have been successful in a number of these cases."[17]

"Under South African law, physical punishments and fines cannot be imposed[18], and corporal punishment of juveniles is now legally recognized as inhuman and degrading treatment under the Constitution.[19] Most responsible community courts do not administer corporal punishment any more, although it is a practice that still exists, mainly in the case of juveniles, and then in varying configurations, such as only in the presence of parents and others.[20]

An aggrieved party may appeal to the area committee against a decision of the street committee and it would seem that, in most cases, eviction orders must be ratified by the higher authority before being executed.[21] Following a decision, the street committee monitors the situation to ensure that the dispute has been successfully resolved and, in cases where an appeal has been made, it reports back to the higher authority on progress.[22]

---

[17] Burman & Schärf, 1990: 716.
[18] Burman & Schärf, 1990: 713.
[19] *State v. Williams & Ors*, 1995 (3) SA 632 (CC).
[20] Schärf, 1997: 14.
[21] Burman & Schärf, 1990: 714, 716.
[22] Schärf, 1997: 11, 14.

It is unclear to what extent informal policing structures have become involved in the enforcement of decisions involving sanctions such as eviction. However, relations between the street committees and informal police, known as amasolomzi (home guards)[23], in Cape Town were close and there was some degree of overlap in their membership.[24] Anti-crime committees (ACCs), a feature of Eastern Cape townships in Port Elizabeth, emphasized the functions of investigation and prevention rather than enforcement:

"The ACCs are probably the most sophisticated system of popular policing in operation in the country. Organised as part of the civic structures, each community is required to elect 10 volunteers who will engage in crime prevention and investigation. The volunteers are totally unarmed and pursue the solution of a crime in the community or outside it by employing common sense and by eliciting the co-operation of the residents. Their training emphasises learning about and respect for basic human rights. The volunteers have also been taught about the rights of private citizens to arrest and the limitations of this right. The interaction between this body and the South African Police Services (SAPS) is quite unique. The past year has seen an exchange of support and experience in the combating of crime. However, the ACCs are not part of a project of community policing but rather of a process of policing by the community. The ACCs have a very limited jurisdiction and they only try to solve crimes of a socio-economic nature. This includes crimes such as car theft, house breaking and robbery. Murder and rape are always referred to the police, whilst other matters are referred to the civic structures."[25]

[23] The *amasolomzi*, which were a feature of Cape Town's African Townships, no longer exist. "During the latter half of 1998, a new development took place in which the taxi-drivers, responding to a perceived crime crisis, took it upon themselves to be police and enforcers of vicious floggings and beatings of people suspected of serious crimes such as rape and armed robbery, and whom police seemed unable of unwilling to arrest" (correspondence with Wilfried Schärf, February 1999).

[24] T Burman & Schärf, noted in 1990/715.

[25] Nina & Schwikkard, 1996: 81.

During the 1980s street committees experienced two serious challenges to their legitimacy. In 1977, the government attempted to restructure local government in the townships. New legislation set up community councils and placed them above the street and area committees. Community councillors called meetings with street committee chairmen to disseminate government orders and sat with chairmen in order to discuss cases. Most residents resisted the take-over by refusing to recognize the councillors. Those chairmen of street committees who collaborated with the councils were "given warnings" by their constituents. In the 1983 community council elections in Cape Town, only 11.6 per cent of the electorate voted;[26] and by 1985 most councillors had resigned under pressure following threats, house burning and physical injury. In 1988, no elections took place in certain areas of Cape Town as only eight candidates came forward for 20 council positions.[27]

During the mid-1980s African townships witnessed a period of intense protest against apartheid in the form of boycotts, rallies and marches which were spearheaded by young people. The government directed its police forces almost entirely to containing these protests and neglected the rising crime rates associated with marginalized youths in the townships. It was during this period that the street committees, particularly those which had been closely identified with community councillors, lost much of their court business to newly created people's courts run by youths. These people's courts generally dealt with cases involving delinquent youths over which the youthful members adjudicators) were able to command a greater degree of control. Some women also preferred to take cases of domestic violence to these courts as they became renowned for their willingness to administer corporal punishment in such cases.[28] However, the people's courts' support for women appeared to have "less to do with a belief in gender equality than with the need for a constituency."[29] Indeed, women were wholly absent from the membership of these courts.

[26] Burman & Schärf, 1990: 716-7.
[27] Burman & Schärf, 1990: 720.
[28] Burman & Schärf, 1990: 720-1.
[29] Burman & Schärf, 1990: 720-1.

Whereas some people's courts grew up purely in response to crime, many were linked to political groupings. At a time when state restrictions made it difficult for political groups to openly communicate with and organize residents, these courts provided a means by which people could be educated about the struggle and transgressors of boycotts disciplined.[30] Initially the youths running these courts did not rely excessively on corporal punishment. Wrongdoers appearing before one such court in Cape Town were generally expected to restore stolen property, pay damages or perform some community service such as cleaning old people's yards or distributing political pamphlets.[31] In a number of these courts, however, punitive sentences became increasingly common and severe.

Following punishment, those found guilty by the people's court in Nyanga East, Cape Town, for example, were invited to become members of the court.[32] Such co-option was aimed at rehabilitating the offender under the tutelage of responsible youth members. Within eight months, however, the Youth Brigade in Nyanga East had grown from 50 to 300. The original members were only able to carry out minimal supervision of more recent recruits and as cases were decided by majority vote, they lost control of the courts. Accused persons were invariably convicted and as many as 100 lashes administered. "Intellectuals" who advocated less punitive sentences were resented by the newer members and were, on occasion, accused of collaborating with the defendant and themselves lashed.

It is important to note that not all people's courts followed this pattern. Nevertheless, such excesses hastened the decline of people's courts throughout the country. It has been argued that because many people's courts followed the "triadic model" of formal state courts, with the emphasis on guilt or innocence, this predisposed them to retributive sentencing rather than reconciliatory solutions based on a recognition of all factors leading to the offending behaviour.[33] Certainly, an excluded public could provide little check over the court's punitive trend, and the very fact that the public were excluded meant that community pressure – as opposed to punishments decided and administered by court members – could not be guaranteed in order to correct a particular offender's behaviour.

[30] Pavlich, 1992: 34.
[31] Burman and Schärf, 1990: 724.
[32] Burman and Schärf, 1990: 724.
[33] Pavlich, 1992: 38.

Disillusioned youth activists regarded the continued existence of courts run by youths lacking in political integrity as unacceptable. Furthermore, the courts' increasing tendency to adjudicate cases involving adult married) men and administer corporal punishment, was anathema to the traditional African status of elder men and it is this which may have been the crucial factor in causing most township residents to repudiate the people's courts.[34] By June 1986 most people's courts lacked the popular support which might have allowed them to withstand the introduction of emergency regulations outlawing their existence. By 1988 most of their members had been detained and charged under the regulations. It was in these circumstances that the street committees finally regained the jurisdiction they had lost.

4.2 Popular tribunals and community courts in Mozambique

During the colonial period in Mozambique, the Portuguese maintained two separate legal systems: one for Europeans and *assimilados*[35] and one for the African population. Although Africans were largely subject to the rules of their traditional law under the native courts, they were still subject to the new tax and labour laws which compelled peasants to cultivate cotton in place of food.[36] The co-operation of traditional authorities in the policy of forced labour and cultivation, undermined their legitimacy. Without popular authority, the chiefs relied on the coercive powers of the colonial state and this in turn opened up avenues for corruption:

"The nature of Portuguese colonialism forced it to adopt a high degree of direct state compulsion in its quest for labour, and the chiefs and indunas were given important though junior tasks in the structure of compulsion so created. They helped in the recruitment of forced labour and imposed severe physical punishments on those they regarded as recalcitrant. They participated in the collection of taxes; the provision of information to the authorities about resistance, and in the recruitment of police and soldiers. Those chiefs who showed signs of patriotism were summarily dealt with, many ending their lives as a result of torture, starvation or execution on the prison island of Ibo... Thus to the extent that the chiefs exercised power in colonial times they lost their popular authority; even the judicial power they exercised became tainted, since it came to be regarded as a perk for the services, rendered to the colonial state, handsomely rewarded in terms of the gifts necessary to "open" the court... the only custom that really

[34] Burman and Schärf, 1990: 724.

[35] From 1929, Africans and mulattoes could gain the status of *assimilados* if they proved that they could read and write Portuguese had rejected tribal customs and were gainfully employed. By 1961 less than one percent of the population (Isaacman & Isaacman, 1982: 284) had been granted this "precarious and humiliating" status (Honwana Welch, 1985: 127).

[36] Isaacman & Isaacman, 1982: 286-8.

counted in the courts of the chiefs in the late colonial period was the custom of visiting the chief's house the night before the hearing with a gift more extravagant than that given by the opponent." [37]

It was against this background, and the refusal of Portugal to even consider the possibility of independence for its colonies, that FRELIMO was formed in June 1962. By 1996 FRELIMO controlled a number of small areas in two provinces in the north of the country. Within these liberated zones, it began to create new political, economic and social structures. A new legal system was gradually developed consisting of courts presided over by four to six lay judges who were popularly elected from the local community. Hearings were typically scheduled to take place at weekends and members of the public were encouraged to attend and take part in discussions.

Proceedings in these new courts were simplified and carried out in the local dialect, without any reference to the colonial legal code. Customary law "which did not conflict with FRELIMO's vision of social and economic justice" was used to resolve disputes in order to ensure the developing system would be rooted in the people's history.[38]

"Thieves who stole from the community or people who shirked their responsibilities were not sent to jail or beaten, as they had been during the colonial period; instead, they were required to do extra work in a communal field or on a collective project. The object of such a penalty was to instil an appreciation of the dignity of labor and a sense of community responsibility. Those convicted of more serious crimes, such as murder, treason, or desertion, either at public regional meetings or by the Party Regional or Central Committee, were sent to formal reeducation camps. There, in a highly regimented environment that emphasized both extensive political education and intensive collective labor, an attempt was made to rehabilitate the offender so that he or she could later be reintegrated into society. Given this emphasis on rehabilitation, it is not surprising that capital punishment did not figure prominently in the evolving legal system." [39]

[37] Sachs, 1984: 104.
[38] Isaacman & Isaacman, 1982: 296-7.
[39] Isaacman & Isaacman, 1982: 298.

Popular courts in Mozambique also served as a means of educating the public. Equal rights for women was a frequent topic and FRELIMO members urged that women be elected to serve on the courts. However, this achieved only token success.

In June 1975, Mozambique finally won independence and FRELIMO set about extending popular courts and incorporating them into a new state legal system. These popular tribunals existed as part of the formal system until 1992 when they were formally separated from the state hierarchy of courts and renamed community courts (see 5.2).

4.3 Resistance committee courts in Uganda

Shortly after Milton Obote came to power in Uganda in 1981, a guerrilla army was formed in the west of the country. The National Resistance Army (NRA) waged a five-year civil war before seizing control of the capital in January 1986. It was led by a former defence minister, Yoweri Museveni, who had trained with FRELIMO guerrillas in Mozambique and drew "ideological and tactical inspiration" from the Mozambican liberation struggle.[40] During the early days in the bush, clandestine resistance committees (RCs), elected by and from the civilian population, were established as "instruments of counter intelligence."[41]

"The village council was known as RCI, the parish as RCII and the subcounty as RCIII. All the adult people of a village formed RCI from which they elected their committee of nine to run the local affairs of the village on a day to day basis. All the committees of nine from all the villages in a parish became parish resistance council, RCII. This council in turn elected a RCII committee and this process was replicated to form the RCIII level. Eventually the county resistance council became RCIV and district RCV. The top of this pyramid-like structure was the National Resistance Council."[42]

The grass-root resistance committees began to take on additional functions as the government lost control of areas to the NRA, producing an administrative and judicial vacuum.[43] After Milton Obote was deposed in 1985, the NRA expanded into southern and western Uganda, bringing with it the RC system.[44] The system was further extended throughout Uganda after the NRA took power in 1986 and the RC courts were formalized by statute in 1987.

---

[40] Barya & Oloka Onyango, 1994: 46.
[41] Kakooza & Okumu-Wengi, 1997: 13.
[42] DANIDA Baseline Survey, 1998: 7.
[43] Kakooza & Okumu-Wengi, 1997: 13.
[44] Barya & Oloka Onyango, 1994: 9.

"Although the genesis of the RCs can be traced to the 1981-86 guerrilla war, little analytical work has been undertaken with respect to their nature and operations during this period... Even less has been written about the judicial powers that the RCs exercised during this period, which would have been a useful counterpoint to understanding them in their most unadulterated form, as well as a basis for comparison with the present."[45]

Indeed, without such primary research, any understanding of how the RC courts operated prior to their incorporation into the formal state hierarchy of courts can only be inferred from studies based on the period after incorporation, while allowing for obvious changes brought about by the legislation.[46] In theory, the most significant changes brought about by incorporation of the RC courts are: (1) a much reduced jurisdiction in terms of civil customary law; (2) the loss of criminal jurisdiction under customary law; (3) jurisdiction over formal civil law where the value of the subject matter is minor; (4) jurisdiction over formal bye-laws; (5) the introduction of limited procedural safeguards; (6) the requirement that a percentage of women be elected as RC members; (7) a system of appeal from the RC system to the Western-style system of courts; and, most importantly, (8) a system of ensuring attendance of the parties and enforcing decisions. The effect of these changes on RC courts in practice is considered further below (see 5.3).

[45] Barya & Oloka Onyango, 1994: 9.

[46] The RC courts post-incorporation will be examined in the following chapter which focuses on "informal-style" courts forming part of the state court hierarchy.

5: FORMAL COURTS BASED ON TRADITIONAL AND POPULAR JUSTICE

During the colonial period the European powers introduced their own metropolitan law and systems of courts into Africa. Indigenous laws and procedures were, however allowed to coexist to the extent that they were compatible with European notions of natural justice and morality. This resulted in a dual or parallel system of laws and courts.

In British African colonies, for example, where the policy of indirect rule was applied, two entirely separate court systems were established. The general or common-law court system consisted of different grades of Magistrates' Courts staffed by expatriate officers with appeals referred to the High Court. These had jurisdiction over Africans and non-Africans in respect of both criminal and civil matters and applied English law as modified by local statutes. The so-called native or African courts were presided over by traditional local chiefs or elders who applied the customary law of their jurisdiction. Initially, these African courts operated in a very similar way to the traditional justice systems. However, towards the end of the colonial period, the High Court was granted jurisdiction to hear appeals from the African courts and traditional chiefs and elders were gradually replaced by young lay magistrates with a basic training in law. These changes resulted in the "gradual anglicisation" of procedure.[1]

The process of integration and formalisation was taken still further after independence when native courts were abolished in most African states and jurisdiction in respect of customary law passed to Magistrates' Courts.

5.1 Local courts in Zimbabwe

During the colonial period district commissioners' courts and the Court of Appeal for African Civil Cases (CAACC) were established to deal with "civil suits in which the rights of Africans only were concerned". They existed alongside the common-law Magistrates' Courts and High Court of Southern Rhodesia. An appeal from the CAACC lay to the Appellate Division of the High Court.[2]

[1] Cotran & Rubin, 1970: xxi; Elias, 1952: 277.
[2] Cutshall, 1991: 13; Ladley, 1982: 97.

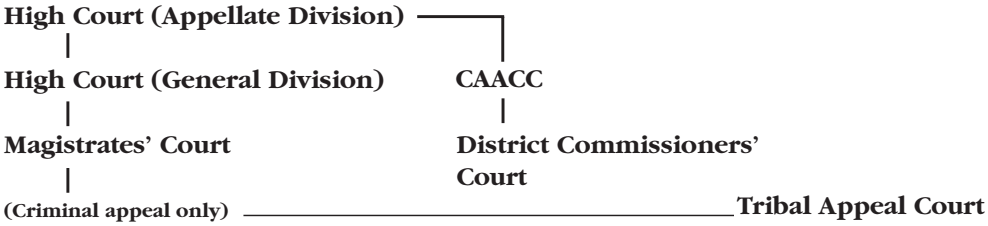


Figure reproduced from
Ladley, 1982: 96

In 1969, the African Law and Tribal Courts Act empowered the Minister of Justice to constitute, by warrant, chiefs' and headmen's courts in the designated Tribal Trust Lands. The Act also established a Tribal Appeal Court composed of three chiefs who were presidents of warranted chief's courts. The tribal courts exercised jurisdiction over both civil and criminal cases. They were able to try criminal cases relating to petty theft and malicious injury to property, as well as cases involving the contravention of certain local government by-laws. The procedures they followed were to be governed by customary practices, subject only to the proviso that they were not "repugnant to natural justice or morality" or "contrary to the provisions of any [statutory] enactment."[3] Tribal courts could impose fines up to a prescribed amount and could sentence juveniles to a "moderate correction of whipping". They could also "make such order for compensation or reconciliation as the justice of the case required."[4]

The role of the district commissioners' courts, as forums of first instance in civil matters involving Africans, declined markedly in rural areas after the 1969 Act was passed. Nevertheless, tribal courts were required to provide district commissioners with court returns and reasonable access for court inspections; and the district commissioner was authorized to quash or annul any decision made by a tribal court which exceeded the limits of its jurisdiction or which failed to conform with customary law "as... understood by the District Commissioner."[5]

[3] Cutshall, 1991: 16-7; Ladley, 1982: 97-8.
[4] Ladley, 1982: 98.
[5] Cutshall, 1991: 14; Ladley, 1982: 99.

Zimbabwe gained independence in 1980. In 1981 the Customary Law and Primary Courts Act 1981 established a new judicial structure. This consisted of the upper courts (the Supreme Court, the High Court and the Magistrates' Courts) and the lower primary courts (the village and community courts). Tribal courts were abolished under the Act and reconstituted as village courts. Above them were the community courts which were presided over by trained judicial officers, selected by the Ministry of Justice.[6] The racially based appellate courts, the CAACC and the Tribal Appeal Court, were abolished and appeals from the community courts were referred to the district Magistrates' Court.[7]

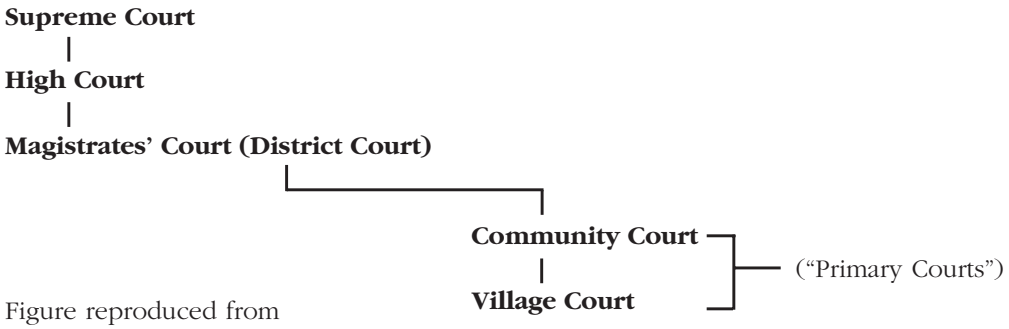


Figure reproduced from Ladley, 1982: 96

The upper courts were granted jurisdiction over criminal cases, and civil jurisdiction in respect of common and statutory law, in addition to customary law. The lower courts were granted jurisdiction in customary law matters only. Although the Customary Law and Primary Courts Act recognized the lower courts' jurisdiction to process cases of petty crime, this section of the Act was never implemented.[8]

Hearings in the village courts reflect the procedure used in the traditional system:

[6] Cutshall, 1991: 18, 21.
[7] Cutshall, 1991: 18.
[8] Cutshall, 1991: 16-7.

"Village-court procedures, having regard for customary judicial practices, place a good deal of emphasis upon simplicity and informality in order to achieve amicable dispute settlements which restore, if not promote, social harmony within the community. This is one of the reasons why legal practitioners and advocates are expressly prohibited from appearing as representatives in village-court hearings. Freed from formal evidentiary requirements, village-court disputants may present any exhibit they choose, and testimony may be presented in any manner, provided that statements made before these courts are not ambiguous, inflammatory or abusive. Moreover, village-court rules indicate that evidence should not be rejected because it is hearsay, but it is suggested that first-hand confirmation should be sought for statements of this type. There is also provision for public participation in village-court proceedings, though the decision actually to permit public contributions rests with the presiding officer hearing a particular case. Where public contributions are allowed, statements are to be addressed to the bench and may not be framed as cross-examinations of litigants or witnesses, or as condemnations or personal judgments which might prejudice the final settlement of the dispute. In sum, village-court proceedings are intended to be open, informal and instructive." [9]

In 1990, the Customary Law and Local Courts Act modified the lower court structure. Under the Act, the former presiding officers of the community courts became assistant magistrates in the customary law division of the Magistrates' Courts. Headmen's courts (renamed primary courts) became the courts of first instance, and chiefs' courts (renamed community courts), the higher tier of the local court structure.[10] The chiefs' courts operate both as courts of first instance and as appellate courts for cases on review from the headmen's courts. The chiefs' courts were empowered to grant up to Z$3000 damages or compensation under customary law and headmen's courts half that amount.[11] These may take the form of monetary awards, restitution orders or specific performance orders. According to reports chiefs and headmen have found the upper limits of their civil jurisdiction "particularly problematic".[12]

[9] Cutshall, 1991: 20.
[10] African Rights, 1996: 28, 35.
[11] African Rights, 1996: 28.
[12] African Rights, 1996: 30.

"We feel we are very much restricted over which cases we should sit and over which cases we should not. Take, for instance, lobola cases where one claims five or six head of cattle. If you value them [at Z$500], this court has no jurisdiction to try that case or settle the dispute between the parties. We have to refer them to the magistrates. It is a very big problem because lobola cases are the most common in the area. The claimants don't like to have to go all the way to the Magistrates Court, [a distance of over forty kilometres on a dirt road. The trip takes over eleven or twelve hours by bus and costs at least Z$8 round trip]. It involves a lot of expense. Travelling to and from the magistrates; sometimes you are delayed; you don't have anywhere to put up or any food. This problem is giving us a very hard time." [13]

Furthermore, in order to deal with discrimination against women under customary law, the Zimbabwe government severely restricted the jurisdiction of chiefs' and headmen's courts to exclude custody of minors, maintenance, dissolution of marriage, and determination of the validity of wills or rights in land or other immovable property.[14] The heavily restricted jurisdiction of the local courts is compounded by the fact that even judgments which are within jurisdictional limits can only be enforced if they are registered with the clerk of court at the Magistrates' Court. A chief from an area in Masvingo noted that:

"Some people may not have the bus fare, $15 round trip. And if they have the money, they are overawed by the idea of going to the Magistrates Court. They have no experience of dealing with the officers there." [15]

Despite their informal procedure, the very limited jurisdiction of the statutory local courts, their difficulty in enforcing cases over which they exercise jurisdiction, the fact that court fees are levied and that the informality of procedure allowed for may lead to an appeal to a Magistrates' Court[16], are all factors which make them less favourable than non-statutory traditional forums.

[13] African Rights, 1996: 33.
[14] African Rights, 1996: 31.
[15] African Rights, 1996: 34.
[16] African Rights, 1996: 28.

5.2 Popular tribunals and community courts in Mozambique

In June 1975 Mozambique won independence and FRELIMO was faced with the task of building a new legal system. There were only a handful of Mozambican lawyers and only five of the 70 Portuguese judges in the country stayed in their posts after independence.[17] Private practise was abolished and replaced with a system of legal aid.[18] A Faculty of Law was established at the Eduardo Mondlane University and, as an interim measure, dynamizing groups – committees of between eight and 12 members chosen by local residents – heard cases relating to family law and petty crime. These groups also had the task of organising health campaigns, literacy programmes, political education and community development plans.[19] During this period, the Organisation of Mozambican Women[20] was expanded and extended its campaign against discriminatory practices throughout the country[21].

In early 1978, 20 law students in their final year of study were sent out in "justice brigades", to establish pilot courts throughout Mozambique. They held public meetings, collected ethnographic material on customary law, and established popular tribunals in a number of localities and districts. The scheme operated for several months and, based on this experience, the First National Conference of Justice was convened which appointed a commission to draft new legislation. The Law on Judicial Organisation was adopted by the national Popular Assembly at the end of 1978 and established a hierarchy of courts throughout the country.[22]

At the local level, the popular tribunals retained many of the features of the legal system operating in the liberated zones prior to independence. The tribunals were composed of unpaid judges chosen from the community in which they served. The judges were not required to have formal qualifications and, although they were elected by the local assembly, they had to be approved by the community at a special public meeting. The tribunals adopted an informal procedure which emphasized public participation. An increasing number of

---

17 FRELIMO, n.d.: 5.

18 Sachs & Honwana Welch, 1990: 12.

19 Isaacman & Isaacman, 1982: 301; FRELIMO, n.d.: 6.

20 In December 1972, FRELIMO established the Organization of Mozambican Women. The organization campaigned against polygamy, wife abuse, child marriages, initiation rites and bride-price. Isaacman & Isaacman, 1982: 299.

21 Isaacman & Isaacman, 1982: 307.

22 Isaacman & Isaacman, 1982: 309-10; Sachs & Honwana Welch, 1990: 5; FRELIMO: 6-7.

women were elected to sit on tribunals and most tribunals had at least one woman judge[23]. Practices such as polygamy, child marriages and lobolo were heavily discouraged, although not prohibited. Similarly, younger people, who were traditionally excluded from decision-making, were also represented.

Popular tribunals involved a high degree of popular participation in reaching decisions. This allowed them to arrive at solutions which were unavailable to the more formalized courts. Tribunals had the power to levy small fines or oblige offenders to carry out service for the community for up to 30 days.

"Activities such as the building of bus-shelters or school-rooms, or the planting of gardens in public places have in general proved highly successful in maintaining the principle that the key objective of penal policy should be whenever possible to reintegrate the offender into the community and not distance him or her from it."[24]

More serious crimes and complicated civil matters were resolved in the district and provincial courts whose procedures were more formal and which had the power to impose heavier penalties, including imprisonment. District courts with their limited powers of incarceration served as "the key links between the highly flexible, community-based courts in the locality, and the more professionalized superior courts."[25] Each district court was presided over by a full-time, trained, professional judge appointed by the Ministry of Justice. The presiding judge was assisted by between two and four lay judges elected by the District Assembly. Provincial courts consisted of a High Court in each of the 10 provinces and one in the capital, Maputo. The presiding judge in each provincial court was required to have a law degree and was assisted by at least three lay judges elected by the Provincial Assembly.

[23] "a feature of the system is the extent to which it is being used by female litigants, acting in their own right and not through their husbands, uncles or brothers" (Sachs 1984: 106).
[24] FRELIMO, n.d.: 14.
[25] FRELIMO, n.d.: 14.

Lay judges in the district and provincial courts took two months paid leave from work to serve on the courts. In 1984 Honwana Welch, a provincial judge, observed that it was common for parties to approach these lay judges informally on questions of family law and that a reconciliation was often reached without going through the formal court process.[26] Although these elected judges introduced an important element of public participation, they tended to make decisions of fact, leaving the trained judge to make a final decision on the basis of the law. However, "in order to increase the confidence of the elected judges and reduce the influence of the presiding judge the former are encouraged to ask questions first and vote first on the decision."[27] Furthermore, whenever possible the court moved to the place where the incident occurred so that public participation could be further increased.[28] A final Court of Appeal, the Supreme Court, was created in 1989, with judges comprising "veterans" of the justice brigades of 1978.

In 1992 popular tribunals were formally separated from the formal state hierarchy of courts by Law 4/92 of 6 May and renamed community courts. Community courts were to be established at different local levels: administrative post, village and suburb. Article 15 stated that popular tribunal judges were to be members of the community courts until new elections were held, but that they were to apply the new rules.[29] Community courts comprise eight members, all local citizens aged over 25, elected by the local government for a term of three years. The members then elect a president from amongst their number who must sit with at least two other members when hearing cases.[30]

Community courts were granted both civil and criminal jurisdiction although most of the cases dealt with are mainly minor civil disputes, customary family matters, and petty criminal offences not liable to imprisonment. "In this respect the community court is no different to its predecessor under the previous court system."[31] They can order such remedies as public criticism, community service compensation, and minor fines.[32] Like the popular tribunals, community courts do not apply written law. Article 2 of Law 4/92 provides that:

1) The community courts shall seek to ensure that in all matters brought before them the parties are reconciled.
2) When reconciliation is not achieved or is not possible, the community court shall judge on the basis of equity, good sense and justice.

---

[26] Honwana Welch, 1984: p. 47.
[27] Isaacman and Isaacman, 1982: 316 fn.
[28] Honwana Welch, 1984: 47.
[29] Dagnino, 1998: 179.
[30] Dagnino, 1998: 179.
[31] Mondlane, 1998: 175-6.
[32] Dagnino, 1998: 179.

According to Justice Mondlane, a Mozambican Supreme Court judge, "In practice, good sense and justice are based on the usage and customs prevailing in the region where each court is located, as occurred under the previous judicial organization."[33]

The actual reason for separating the popular tribunals from the formal state hierarchy of courts is not well documented.

"Although some previous debate [had] been going on before it was decided to separate them from the rest of the judiciary, all this has been done without a profound knowledge and updated information on the real situation of administration of justice at the local level."[34]

A 1994 study of the incorporation of Ugandan resistance committee courts into the formal state court hierarchy notes:

"It is a mark of sheer irony that in the current wave of 'democratization' and privatization, these courts have been abolished under World Bank/IMF advice on the spurious grounds that such courts are too expensive to maintain."[35]

What is clear, is that this separation was heavily influenced by the promulgation of the new Constitution in 1990; its "strong emphasis on the rule of law as the guiding principle for the judiciary resulted in an enhancement of the formal law as a prime source of Judicial Power."[36] Popular tribunals by contrast emphasized reconciliation rather than strict rules of law.

"The Local Popular Courts were profoundly separated from the rest of the judicial apparatus: their composition, the mode of procedure, the admissible evidence, the available remedies and, finally, the substantive norms applied were qualitatively different [from] those of superior jurisdiction. Therefore, the resolution of a case would have differed, depending at what level of the court structure a dispute was presented."[37]

---

[33] Mondlane, 1998: 175.
[34] Dagnino, 1998: 186.
[35] Barya & Oloka Onyango, 1994: 42.
[36] Dagnino, 1998: 175.
[37] Dagnino, 1998: 183-4.

Furthermore, as a result of variations in customs, particularly between patrilineal and matrilineal societies, "the law applied varied depending on the geographical region and the characteristics of the different communities where the Courts were operating."[38] Thus, the variation and uncertainty caused by the continued linking of popular tribunals to the formal judicial system was considered incompatible with the principles of the rule of law, the separation of powers and due process under the new Constitution.[39]

5.3 Local council courts in Uganda

The administrative and judicial powers of the resistance committees (see 4.3) were legally recognized in 1987 under the Resistance Councils and Committees Statute. The Resistance Committees (Judicial Powers) Statute, which came into force on 22 January 1988, established the resistance committees (RCs) as part of the formal state court hierarchy and defined their jurisdiction, powers and procedure. Resistance councils and committees were subsequently renamed local councils and committees (LCs) under the 1995 Constitution which also renamed resistance committee courts as local council courts (LC courts).

The following section outlines the jurisdiction, powers and procedures of LC courts as provided for under the Judicial Statute, before examining the Statute's actual effect in practice.

Under the Resistance Committees (Judicial Powers) Statute, local committees at the village (LCI), parish (LCII) and subcounty (LCIII) level were established as courts with committee members sitting in panels of not less than five to hear cases (s.2 and s.3). The Statute, however, allows for members of the local council to be co-opted in order to realise the quorum (s. 3). If a panel fails to reach a decision by consensus, the case is decided by a majority of members present; the chairperson abstains unless a casting vote is required (s.3).

Under Section 4 of the Statute, LC courts have jurisdiction over:

1) cases of a civil nature relating to debts, contracts assault and/or battery where the value of the subject matter does not exceed Ushs 5,000/=;
2) any case relating to conversion and/or damage to property;
3) customary law disputes concerning land, the marital status of women, paternity of children, identity of customary heirs, impregnating or elopement with a girl under 18 years, and customary bailment;

[38] Dagnino, 1998: 184-5.
[39] Dagnino, 1998: 185.

4) cases involving infringement of bye-laws made under the Resistance Councils and Committees Statute, 1987; and
5) petty criminal offences by children as permitted under the Children Statute, 1995 (see below).

If compensation awarded under paragraph 2 and 3 above exceeds Ushs 5,000/=, the case must be referred, for enforcement of the order, to the Chief Magistrate who may reduce such compensation if he considers it "grossly excessive" (s.4(3)).

In order to initiate a civil case, the claimant must state to the chairman, either orally or in writing, the nature of the claim against the defendant and the relief sought. If made orally, the claim is reduced to writing and signed or thumbprinted by both the claimant and the chairman (s.8). Once this process is complete, the chairman serves notice of the claim upon the defendant and fixes a date for hearing. Both the claimant and defendant are then summoned to attend, either in writing by using a prescribed form, or orally in the presence of a witness (s.9). Proceedings which involve the infringement of a bye-law may be instituted by either a chief or a person appointed by the local council for that purpose. Where a prima facie breach is established, a charge sheet is drawn up and signed by both the complainant and the chairman, who then serves a summons on the accused to appear in court on the date specified (s.10) and has the power to summon witnesses (s.11).

The LC court is required to sit during daylight hours and, unless restricted access is "deemed necessary" during any stage of a case involving domestic relations, must be open to the general public (s.16). The language spoken in the court may be the local language of the area, and interpreters must be provided where any party to the case does not understand the language used (s.14). Except in cases involving the infringement of bye-laws, no one is represented by a lawyer (s.12). The courts are required to hear every case which comes before them "expeditiously without undue regard to technical rules of evidence and procedure", but must be guided by the principle of impartiality and adhere to the rules of natural justice, in particular that: (1) each party is given an opportunity to be heard; to call witnesses and to adduce evidence; and that (2) any member of the court with a direct or indirect interest in the dispute is disqualified from hearing the case (s.15(2)).

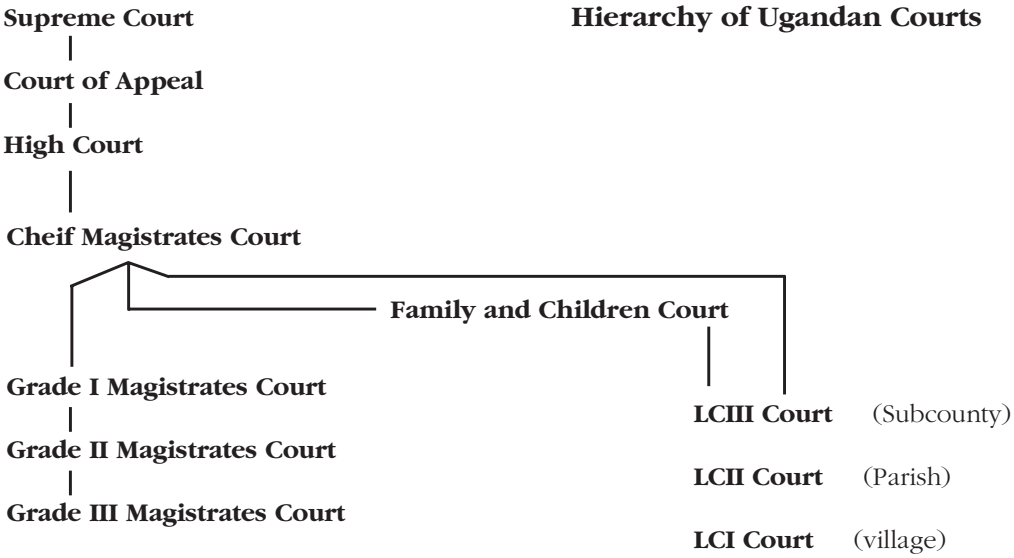
A record of the proceedings must be kept in the language of the court and include certain particulars. In a civil cases, for example, these are: a serial number; the statement of claim; the date of hearing; names and addresses of the claimant, the defendant and their respective witnesses; a brief description of the case; the documentary exhibits if any; the

judgment or final orders of the court and the date thereof; the date of payment of the judgment debt if any; and the particulars of execution of the judgment, if any (s.15(1)).

The LC courts may grant the remedies of: reconciliation; declaration; compensation; restitution; costs; apology; attachment and sale, where the losing party fails to pay any debt; and, in the case of infringement of bye-laws, a fine (s.7). Where a person has no property to attach and sell but is otherwise able to pay a judgment debt, the LC court must refer the judgment to the Chief Magistrate with recommendations that the debtor be committed to civil prison (s.24). After delivering its judgment, the LC court must inform the parties of their right to appeal (s.17). However, "no appeal shall lie from a judgment or order passed or made as a result of the consent of the parties" (s. 26(1)).

Appeals lie from LCI courts to LCII courts and from there to LCIII courts, and then to the Chief Magistrate Court (s.26(2)). A party may appeal from the Chief Magistrates Court to the High Court, but only where the decision appealed involves a substantial question of law or appears to have caused a substantial miscarriage of justice (s.26(2)). Appeals must generally be lodged within 14 days of the date of the judgment (s.27). No order may be made for execution of a judgment or order of the court until this period has lapsed without an appeal being been lodged (s.25). The higher court may dismiss the appeal, reverse or vary the decision, increase or reduce the sentence, and/or substitute any order for its own (s.29). The higher court may also receive additional evidence or even hear the case anew if it is in the interests of justice to do so (s.28). Under section 18, LC courts are effectively prevented from resolving issues between parties which have already been settled in Magistrates' Courts holding concurrent jurisdiction.

Hierarchy of Ugandan Courts



In 1996 the Resistance Committees (Judicial Powers) Statute was amended by the Children Statute (s. 93) which inserted an additional section (s. 4(A)) in respect of the LC Courts jurisdiction. Under this section, LCI Courts were granted original jurisdiction over all cases of a civil nature concerning children and scheduled criminal offences – including affray, common assault, actual bodily harm, theft, criminal trespass and malicious damage to property – where the accused is a child. LCI courts are expressly prohibited from ordering that a child be remanded in custody. The only remedies available to the courts are reconciliation, compensation, restitution, apology, or caution. In addition, the court may make a guidance order for up to six months under which the child is required to submit to the guidance, supervision and advice of a person designated by the court.

Appeals involving the trial of a child lie from the LCI courts to the LCII and LCIII courts and then to the Family and Children Court, created under the Children Statute, before going on to the Chief Magistrates Court, the High Court, the Court of Appeal and the Supreme Court (s. 106 of the Children Statute).

Field research on LC Courts carried out over the last five years would seem to indicate that a number of advantages associated with informal justice forums (see below) continue to exist in LC Courts after their incorporation into the formal court hierarchy.

1) Geographical proximity and the elimination of transport costs;[40]
2) Cheaper court filing fees than the Magistrates' Courts;[41]
3) Faster disposal of cases than the Magistrates' Courts;[42]
4) The use of peer judges;[43]
5) The use of local languages;[44]
6) Simple procedures without the need of a lawyer;[45]
7) Open and participatory proceedings;[46]
8) The promotion of reconciliation and not punishment;[47]
9) The settlement of trivial disputes – thereby reducing conflict, and court congestion. [48]

What seems to emerge from the various studies is that in practice legal incorporation has had little impact on the jurisdiction, powers and procedures of LC courts. Although LC courts are technically now "formal" in the sense that they are governed by legislation, they are little more than a continuation of the "informal" courts existing prior to the passing of the Resistance Committees (Judicial Powers) Statute. This conclusion would seem to be supported by a survey of the so-called problems identified by the various studies in respect of LC Courts, and relate to:

- the knowledge and application of formal law by LC court members
- the jurisdiction of LC courts
- the position of women and the composition of LC courts
- procedural safeguards
- separation of powers
- bias and corruption among LC court members
- fees and remuneration
- enforcement and appeals
- record-keeping
- informal jurisdiction

---

[40] Barya & Oloka Onyango, 1994: 7; DANIDA, 1998: 23; LAP, 1996: 9, 16; Twinomugisha & Kibuka, 1997: 9.
[41] Barya & Oloka Onyango, 1994: 7 and 57; DANIDA, 1998: 22; LAP, 1996: 16.
[42] LAP, 1996: 9 and 16.
[43] Barya & Oloka Onyango, 1994: 7.
[44] Barya & Oloka Onyango, 1994: 7; DANIDA, 1998: 44; Twinomugisha & Kibuka, 1997: 10.
[45] Barya & Oloka Onyango, 1994: 7; Twinomugisha & Kibuka, 1997: 10-11.
[46] DANIDA, 1998: 52; Twinomugisha & Kibuka, 1997: 10.
[47] LAP, 1996: 10 and 16; Twinomugisha & Kibuka, 1997: 10.
[48] DANIDA, 1998: 53; LAP, 1996: 10 and 15.

Knowledge and application of formal law by LC courts

The lack of basic legal training and texts provided for LC court members has been repeatedly emphasized as a major weakness. It would appear that many LC court members do not have access to the Resistance Committees (Judicial Powers) Statute, the Children Statute 1996, or the Constitution, and are largely unaware of their contents.[49] No "institutionalised mechanism was included in the statute to ensure that the LCs would actually be trained in the law."[50] Similarly, in relation to the Children Statute, there is "no evidence[o] to indicate that the conferral of power has been accompanied with training and sensitisation to prepare the LCs for their new duties"[51]. Although some training in relation to the judicial functions of LC officials has been carried out by NGOs, its geographical reach has been extremely limited owing to inadequate funding.[52] Even if relevant statutes were to be distributed to LC officials, they would need to be translated from English into the local languages and their contents explained in non-legal terms.[53]

[49] See, for example, Barya & Oloka Onyango, 1994: 6 and 63; DANIDA, 1998: 34, 38 and 41; Kakooza & Okumu-Wengi, 1997: 12; LAP, 1996: 3; Twinomugisha & Kibuka, 1997: 13.

[50] DANIDA, 1998: 10.

[51] DANIDA, 1998: 18.

[52] See LAP, 1996. Writing in 1989, Basaza noted that the paucity of legal training would also be likely to be compounded by the short tenure in office of LC officials, which would necessitate training at regular intervals Basaza, (cited in Kakooza & Okumu-Wengi, 1997). However, a recent study of LC Courts carried out in 1997 in Kampala and Kabarole districts suggests that this factor may be less significant than originally expected. The study found that the majority of members surveyed had served on the Local Committee for periods of over six years and that there were others who had served for up to ten years (Twinomugisha & Kibuka, 1997: 6-7).

[53] Barya & Oloka Onyango, 1994: 63; Twinomugisha & Kibuka, 1997: 13; DANIDA, 1998: 21.

The jurisdiction of the LC courts

LC courts "routinely handle cases outside their jurisdiction."[54] Not only do they hear disputes where the value of the subject matter is higher than they are authorized to deal with, but they are "notorious for handling criminal cases which they do not have the power to hear", including rape and defilement.[55] The overstepping of jurisdiction may in part be attributed to the LCs' lack of knowledge of the formal law. Without such knowledge it is difficult for LCs to distinguish which types of disputes are covered "solely by customary law" and so fall within their jurisdiction.[56] This failure to differentiate has given rise to conflicts with the police[57]. However, other possible reasons for LC courts acting beyond their jurisdiction have been suggested:

"It has been argued... that LCs charge fees for every case heard and the more they hear the more they earn. It has also been argued that it is the complainants themselves who insist that the LC courts hear the case, presumably because of the inaccessibility of the magistrates court."[58]

This raises additional questions as to whether all the cases alluded to above are in fact heard by LC courts. Studies indicate that many cases are in fact handled informally by the Chairman or other LC officials before the need to convene a properly constituted court arises.[59] What is clear is that incorporation has not had the effect of confining the more serious cases to magistrates' and higher courts, despite legal provisions to that effect.

The position of women and the composition of LC courts

By all accounts, the position of women has not changed dramatically as a result of the formalisation of LC courts, which have been found to be consistently discriminatory towards women and "quite ignorant about the constitutional provisions protecting women's rights."[60]

---

[54] Twinomugisha & Kibuka, 1997: 12; LAP, 1996: 17; Barya & Oloka Onyango, 1994: 6, 58;Kakooza & Okumu-Wengi, 1997: 23.

[55] DANIDA, 1998: 19, 20, 44.

[56] DANIDA, 1998: 21.

[57] DANIDA, 1998: 21; LAP, 1996: 17.

[58] DANIDA, 1998: 20.

[59] DANIDA, 1998: 32; Barya & Oloka Onyango, 1994: 8; Twinomugisha & Kibuka, 1997: 12; LAP, 1996: 17.

[60] DANIDA, 1998: 32; see also e.g., Barya & Oloka Onyango, 1994: 8; LAP, 1996: 13.

"The cause for the bias besides the age old male chauvinism is also the application of customary law which in many cases is oppressive to women. Most of the LC Officials are not aware that where a conflict exists between customary and statutory law then the latter prevailsº This bias is most outrageously manifested in cases concerning customary law tenure, child custody and maintenance, succession disputes and bride-wealth refunds".[61]

Although under the Local Government Act LC executive committees should include at least one woman, the Resistance Committee (Judicial Powers) Statute does not require that a woman be included among the executive committee members (or co-opted members) who make up the quorum necessary for a court to sit.[62] Indeed, one female LC executive committee member indicated that, even if a woman does sit, she "is rarely consulted, and if consulted, her views are not taken seriously."[63] In addition, LC court sittings generally last for several hours and take place outside office hours. This makes it difficult for women, who are burdened with domestic responsibilities, to assume an active role. [64]

It has been argued by some Ugandan women that: "even if women were present on the courts, the existence of deep rooted beliefs that are discriminatory might not result in very different decisions."[65] In addition, some studies[66] have found that not only is there a tendency for women to be excluded from sitting on LC courts, but there is also a tendency to co-opt male elders.[67] In other words the effect of legal incorporation of LC courts as far as their composition is concerned has been limited.

---

[61] LAP, 1996: 14.
[62] DANIDA, 1998: 32.
[63] DANIDA, 1998: 28.
[64] DANIDA, 1998: 28; Twinomugisha & Kibuka, 1997: 6, 10.
[65] DANIDA, 1998: 23.
[66] Twinomugisha & Kibuka, 1997: 7.
[67] "Since elders are significant individuals whose active participation is critical towards effective resolution of social conflicts at the local level, a workable and acceptable practice had to be found using the politically permitted and established mechanism." (Twinomugisha & Kibuka, 1997: 8).

Procedural safeguards

In the absence of training, legal incorporation of LC Courts has done little to promote procedural safeguards and the observance of the rules of natural justice.[68] One of the "problems" associated with many traditional and informal justice forums is the non-observance of the principle of the presumption of innocence, and this appears to remain a feature of the formalized LC Court.[69] As will be explained later, the more a justice forum relies on formal coercion to enforce a decision, as opposed to voluntary agreement based on social pressure, the more important procedural safeguards become. A presumption based on past reputation may, however, act in favour of a first offender. For example, in one case "a shop attendant was accused of theft by his boss. He was declared innocent and set free on the basis that he was known to be of good behaviour by all in the community."[70]

Separation of powers

The formalized LC system does not alter the position in respect of the (non) separation of judicial and executive powers.[71] Bye-laws, for example, are made, administered and adjudicated upon by LC members.[72] The vast majority of those interviewed for the DANIDA survey regarded the executive function as a necessary concomitant of the LC's judicial role which enhanced legitimacy. The general perception was that: "you cannot be a judge without being a leader so there is no problem."[73]

Bias and corruption among LC court members

Whereas corruption does occur in some LC courts, it occurs on a small scale when compared with the Magistrates' Court.[74] It is far more difficult to bribe five to nine people sitting on any particular LC case that one magistrate.[75] Nevertheless, the fact that LC courts can rely on the state to enforce their decisions does make them more susceptible to corruption than informal forums.

---

[68] DANIDA, 1998: 21

[69] "There is a tendency to be biased against one of the parties from the beginning where the [LC] officials happen to know one of the parties to be notorious for one thing or the other. In such cases they proceed from the view that the party who is known to be bad or notorious must be the one in the wrong and that the case should go against him" LAP, 1996: 16).

[70] DANIDA, 1998: 48.

[71] DANIDA, 1998: 11.

[72] Barya & Oloka Onyango, 1994: 14, LAP, 1996: 4.

[73] DANIDA, 1998: 44.

[74] LAP, 1996: 9; Barya & Oloka Onyango, 1994: 59, 61, 70.

Fees and remuneration

It has been suggested that LC members should be given some form of remuneration to "boost morale and protect against corrupt practices."[76] Despite formalisation of the LC courts, there is an absence of governmental support for example for salaries, allowances, offices, transport or communication equipment.[77] The law provides for a court fee of Ushs 500/= when filing a case in an LCI court[78], but this amount has not been updated for almost a decade.

However, LC courts have not waited for court fees to be formally reviewed and in practice fees of between Ushs 1,000/= and 10,000/= are charged.[79] Factors such as the gravity of the case and the financial means of the litigant are taken into account in deciding the amount to be charged.[80] LC officials have explained that the fees are used to purchase writing materials required for case management and records, and that if the claimant wins the case, the cost of the fee is awarded against the defendant.[81] They also indicated that the fee is determined in agreement with the community, although community members have expressed the view that fees are too high.[82]

Enforcement and appeals

It would seem that many LC courts do not always use the correct procedure when summoning parties. A secretary for defence may be sent to arrest a defendant who fails to obey a summons.[83]

"The Secretaries for Defence have been known to proceed to the party complained of and either give them fines or drag them to the Chairman's home or wherever he may be found at times in drinking places. This is more especially so where the secretary for defence has been armed with a gun."[84]

---

[75] DANIDA, 1998: 34; Barya & Oloka Onyango, 1994: 62.
[76] Kakooza & Okumu-Wengi, 1997: 12.
[77] DANIDA, 1998: 39.
[78] S.1, RC Court (fee) Regulations, 45/1990.
[79] DANIDA, 1998: 39.
[80] DANIDA, 1998: 36, 52
[81] DANIDA, 1998: 36.
[82] DANIDA, 1998: 46, 52.
[83] DANIDA, 1998: 35; LAP, 1996: 12.
[84] LAP, 1996: 17.

In the case of non-observance of LC court decisions:

"the accused is summoned with the help of the Secretary for Defence to explain the reason for non compliance. The accused is then reminded that a further refusal to comply to the agreement [will lead] to his/her arrest with the help of a local defence police. [If there is further intransigence] a fine [may be] imposed on him/her and the case referred to a higher LC court, or chief magistrate court with a charge of court contempt."[85]

These methods of enforcement were clearly not available before LC courts were legally formalized. However, the DANIDA survey indicated that LC Court decisions are observed "because people generally respect the collective decisions made."[86] Furthermore, more traditional methods may be preferred in certain cases:

"In some serious cases like witchcraft, persistent thefts/fights, the culprits may be expelled from the village or isolated[º] [and in minor cases] there are instances where the court officials invite the parties and revise the fine imposed [where] there is a request from the accused person that it is too much to bear."[87]

It is not clear to what extent LC courts make use of formal enforcement mechanisms. While it is important to acknowledge that the threat of their use may, in itself, act as a means of coercion, there are, nevertheless, indications that LC officials prefer to settle disputes without resorting to outside intervention. In relation to appeals from LC courts, studies reveal that dissatisfied parties are not generally made aware of their right to appeal or are actively discouraged from exercising this right. LC officials do not appear to perceive the right to appeal as an inevitable and necessary component of just procedure, but rather as a threat to their authority and legitimacy as decision-makers.[88] Furthermore, because of the lack of or inadequacy of records kept of proceedings, or even the alleged "withholding of documents from appellants"[89], appeals to a formal court must in practice be heard afresh. Thus, the linking of the LC courts to the formal court hierarchy has made little difference.[90]

---

[85] DANIDA, 1998: 49.
[86] DANIDA, 1998: 48.
[87] DANIDA, 1998: 49.
[88] DANIDA, 1998: 51; see also Kakooza & Okumu-Wengi, 1997: 19.
[89] DANIDA, 1998: 49.
[90] DANIDA, 1998: 51-2; see also Kakooza & Okumu-Wengi, 1997: 18; LAP, 1996: 18.

Record-keeping

LC courts have no systematic method of keeping those records which are made.[91] In insecure areas of the country, the keeping of records in private homes also presents a danger to officials.[92] Improvement in record-keeping since incorporation has been limited. Factors contributing to this are the lack of stationary and offices and the reluctance of LC courts to provide records for appeals.

Informal jurisdiction

LCI courts hear around two cases per week while LCII courts hear a case every two or three months or so.[93] The low number of cases can be explained by the tendency in rural Africa for disputing parties to try and reach an amicable resolution through private settlement before turning to more adjudicatory forums. "[Informal] mechanisms include elders and clan leaders, religious leaders, friends, husbands in case of family disputes, traditional doctors and legal institutions."[94] In other words, "most of the cases that come to the LC courts are those that forums like [these] have failed to resolve."[95] The choice of the particular forum is dependent on the nature of the dispute; for example, family and personal problems are usually taken first to family heads or church leaders,[96] whereas disputes involving land are often taken directly to traditional courts presided over by chiefs or elders.[97]

The general conclusion reached by recent studies is that, despite the "problems", the formalized LC courts can "largely be defined as a success."[98] The features which have been put forward as an indication of such success, however, are the very attributes the LC system shares in common with traditional elders' courts and, indeed, the informal RC court system prior to incorporation. These positive features include the fact that LC courts are "accessible in both physical and technical terms, affordable, user friendly, participatory, and effective."

In order to assess the success of the current LC court system, the questions which needs to be addressed is what improvements have occurred as a result of legal incorporation which were not already present under the informal RC system. Some advantages one might expect from formalisation would be: less discrimination against women, knowledge and application of other constitutional rights by LC court members, the introduction of some form of monitoring and supervision of the courts, and improved case management and record-keeping.

---

[91] LAP, 1996: 18.
[92] DANIDA, 1998: 31.
[93] DANIDA, 1998: 31.
[94] DANIDA, 1998: 37, 48; Twinomugisha & Kibuka, 1997: 8.
[95] DANIDA, 1998: 48.
[96] DANIDA, 1998: 48.
[97] DANIDA, 1998: 36.
[98] DANIDA, 1998: 55.

The reality of the LC court system is that virtually no human rights or gender awareness training has been carried out nor has the quota system for women applied in relation to LC committee and council membership had any real impact as far as LC courts are concerned. As far as monitoring and supervision is concerned:

"Generally, the Ministry of Local Government seems to have handled the administration of the LCs except with respect to their judicial functions. This they seem to have left to the judiciary, which seems not to have picked up the ball. The result has been some form of lacuna with respect to the administration and monitoring of the courts."[99]

Finally, with regard to improved case management and record-keeping, there has been a notable absence of governmental logistical support of LC courts.

Factors such as the past conduct of the accused, or even that of the accused's family, may be taken into account and compromise the principle that one is innocent until proven guilty.

Another question which needs to be considered is to what extent might training, monitoring, supervision, and logistical support could be provided without incorporating LC courts into the hierarchy of state courts and so making their decisions enforceable via state coercion. When coercion is used to ensure attendance and compliance with a decision which is not agreed by all parties, the fundamental nature of the system changes. (See Chapter 7.) The relaxed, non-technical and highly participatory nature of informal hearings, which is so crucial to a mediated settlement, becomes a serious impediment to justice under the involuntary process. Under the formal involuntary hearing, adherence to strict procedural safeguards become essential to a fair trial. For this reason the incorporation of informal-style courts into the formal court hierarchy can only ever be a qualified success. Indeed, it can be argued that the reason formal LC courts have been relatively successful in Uganda is because the provisions of the statute under which they were incorporated has so far had very little impact in practice.

[99] DANIDA, 1998: 25.

Gacaca tribunals in Rwanda

Proposals for a hierarchy of informal-style tribunals, based on the traditional justice forums of Rwanda known as gacaca,[100] were published by the Rwandan Government in July 1999. The aim was to provide a suitable forum to hear cases arising from the genocide and massacres which took place between 1 October 1990 and 31 December 1994. The use of informal-style gacaca tribunals was advocated as a means of ensuring participation at the village level and of promoting reconciliation. It was considered that the truth commission model was inappropriate given the culture of impunity which had prevailed following previous massacres. On the other hand, it was recognized that the sheer numbers involved meant that formal justice would be impossible to provide in any meaningful sense within a reasonable time.[101]

The judicial machinery was practically non-existent when the Government of National Unity took office in Rwanda in July 1994:

"The magistrates and civil servants associated with the former regime had fled the country. Almost all Tutsi civil servants and magistrates had been killed, along with a large number of their Hutu colleagues who had shown signs of independence under the former government. The human resources available had therefore been dramatically reduced in number, and experienced people from the Hutu community were not trusted. There were few trained lawyers among the new arrivals from the Diaspora and those there were had hardly any legal experience".[102]

With the assistance of the international community, a period of judicial reconstruction followed. On 30 August 1996 a law (une loi organique) was passed providing for the prosecution of the crime of genocide and crimes against humanity.[103] The first cases to be tried under the 1996 law commenced in December 1996 and were heard in special courts, presided over by three magistrates. Although these were formal courts, they failed, particularly during the early trials, to meet international standards of procedural fairness.

"The [early] trials were conducted cursorily and in an atmosphere of over-excitement. They concluded within a few hours with heavy sentences and hardly any concern for the rights of the defence".[104]

---

[100] *Gacaca* literally mean grass and refers to "a meeting of neighbours seated on the grass, (the *gacaca*) for the purpose of settling litigation between the inhabitants of the neighbourhood" (Rose, 1995: 3).

[101] Republic of Rwanda, 1999: 4.

[102] ICG, 1999: 7.

[103] ICG, 1999: 8.

[104] ICG, 1999: 57.

Some of these trials resulted in death sentences, the first of which were carried out in April 1998, "before large and often festive crowds."[105]

The conduct of trials has reportedly improved in a number of regions in recent years. Under Rwandan law, every defendant has a right to legal representation.[106] However, most defendants cannot afford the cost a lawyer. An NGO, Avocats Sans Frontières, arranged for some 15 lawyers from Africa and Europe to assist in representing defendants. Only a handful of Rwandan lawyers have become involved in defending people charged with genocide. However, one Rwandan lawyer who did become involved "disappeared" in January 1997.[107] Security clearly poses a major problem for lawyers, as well as for judges and witnesses, particularly in certain areas of the country. By the beginning of 1999, the number of defendants with access to legal representation had risen to around 60 percent. It is expected that this figure will improve further following the recent training of 88 people by the Danish Human Rights Centre.[108]

The number of witnesses appearing in court has also increased in the last couple of years.[109] Previously there had been a tendency by the prosecution to rely exclusively on written witness statements without calling the witnesses to give evidence and be cross-examined in court.[110]

Regrettably, the system of appeals, the fairness of which has also been called into question, has been the subject of little improvement. Under the current system, leave to appeal must be applied for in writing, and while the Public Prosecution Department may make oral submissions at the appeal, the defence is restricted to written submissions. In these circumstances, the right of appeal is effectively denied to an illiterate defendant without legal representation.

---

[105] HRW, 1999.

[106] Rwanda has ratified the African Charter on Human and Peoples' Rights which guarantees, under Art 7 (1)(b), the right to be defended by counsel of one's own choosing. It may be noted that international treaties ratified by Rwanda are directly incorporated into Rwandan law, and take precedence over ordinary legislation (Schabas & Imbleau, 1997:165 and 319).

[107] HRW, 1998.

[108] ICG, 1999: 22.

[109] HRW, 1999; ICG, 1999: 16.

[110] ICG, 1999: 16.

Whereas fair trial, the examination of witnesses, and the right of appeal can be, and to some extent have been, improved, a far more intractable problem remains. This concerns the right to trial within a reasonable time and the rights of detainees. By the beginning of 1999, over 900 people charged with genocide offences had been tried. However, a staggering 123,000 were awaiting trial in overcrowded and inhuman conditions; 82,000 people were held in prisons built to hold 37,000 inmates and an additional 41,000 people were detained in communal lockups.[111]

In the last couple of years, attempts have been made to address these problems. Firstly, in 1999 the Rwandan government increased judges salaries by between 25 and 45 percent.[112] The resignation over the last few years of around 20 percent of judges because of low salary levels, difficult working conditions, and, in some areas, physical insecurity had undoubtedly led to delays in the processing of cases. Secondly, more than 34,000 people have been released. Some did not have substantial charges against them and were released without trial. Others, such as the sick and elderly, have been set free on humanitarian grounds.[113]

Another factor which has speeded up the processing of cases is the opportunity, provided for in the 1996 law, for those guilty of charges against them to automatically receive reduced prison sentences by confessing their guilt prior to trial. An early guilty plea preserves court time thereby allowing for a greater number of cases to be heard. In addition, the resultant reduction in the length of prison sentences will have the effect of reducing prison overcrowding in the future. Furthermore, this form of plea bargaining counteracts the formal law situation whereby those guilty have everything to lose, and nothing to gain, from telling the truth. The wrong can be admitted publicly with the opportunity to express remorse. Finally, it creates the situation whereby the victim's family need no longer wonder as to the exact truth of what happened. By December 1998, nearly 9,000 detainees had admitted guilt and qualified for reduced sentences.[114]

Despite these measures, it is estimated that under the formal law system it will take around 160 years for all those accused of genocide offences to be tried and sentenced.[115] In other words, unless the current system of trying detainees accused of genocide offences is changed, fewer than five percent will be tried within their lifetime.[116]

[111] ICG, 1999: 14-15.
[112] ICG, 1999: 59.
[113] ICG, 1999: 14.
[114] ICG, 1999: 16.
[115] ICG, 1999: 16.
[116] HRW, 1999.

In a speech given at a seminar on *gacaca* tribunals in July 1999, the Rwandan Vice-President and Minister of Defence commented that, "victims and suspects alike are both very upset at the slow pace of justice", and that, as "communities in various areas where killings took place have not participated in disclosing the truth... a degree of mistrust still remains between various sections of the population." The Vice-President emphasised that the potential contribution of the process of justice to national reconciliation has yet to be realised[117]. According to field research carried out in 1995:

"The idea that conflict should be handled in public surfaced in interviews with local leaders[º] who stat[ed] that, the genocide trials should be held in public in order that everyone can witness and learn from them."[118]

With the above considerations in mind, a Commission was established in October 1998 charged with the task of formulating proposals for a system of participatory justice:

a) to establish the truth about what happened, with the communities which were eye witnesses of the crimes giving witness about the crimes;
b) to punish the crime of genocide in order to eradicate once and for all the culture of impunity and afford an opportunity to all Rwandans to reach a common understanding of the tragedy which decimated our country;
c) to promote unity and tolerance between Rwandans through justice for both the victims of the atrocities and those accused of being responsible for them;
d) to prescribe penalties which promote the reformation of the criminals and their eventual re-integration in society without prejudice to the rights of other citizens;
e) to re-construct a new Rwanda free from conflict and sectarianism in order to make it possible for all Rwandans to reconcile;
f) to promote security and stability within the country, to establish the truth about what happened to find lasting solutions to the problems caused by genocide and its consequences and to expedite the conduct of genocide trials and carrying out of sentences.[119]

[117] Republic of Rwanda, 1999b: 5.
[118] Rose, 1995: 11.
[119] Republic of Rwanda, 1999b: 5.

The Commission reported its findings to the July 1999 seminar. It concluded that, new tribunals based on the traditional system of justice in Rwanda, known as *gacaca*, should be established to try genocide offences. A major feature of the tribunals would be to allow members of the public to provide evidence as eyewitnesses, to identify those responsible for such offences, and to participate in determining appropriate penalties[120].

The Commission proposed that *gacaca* tribunals be set up at cell, sector, commune and prefecture level. Each level will have the power to investigate, prosecute, try and impose penalties for the offences under the 1996 law.[121] The cell *gacaca* tribunal will comprise "persons of integrity" elected by residents of the respective cell. *Gacaca* tribunals at higher levels will be elected by members of the tribunal immediately below them in the hierarchy.[122] A quorum of two-thirds of members was set and, failing consensus, decisions will be made by a majority of the members present.[123] Decisions will be recorded in writing and filed in a register established for the purpose.[124] The *gacaca* tribunals will have the power to:

- summon any person to a trial;
- order and conduct the search of suspects, subject to full respect of their property and human rights;
- deliver to the Public Prosecution Department for prosecution those who refuse to give evidence, give false evidence or destroy evidence;
- determine penalties for defendants who are convicted;
- order the lifting of attachment orders affecting property belonging to defendants who are acquitted;
- summon, where necessary, the Public Prosecution Department to provide explanations on matters in respect of which it has carried out investigations.[125]

Cell *gacaca* tribunals will be required to compile lists of people who died in the cell, as well as lists of those alleged to have taken part in killings. The cell tribunal will place suspects into one of the four categories of offences provided for under the 1996 Law:[126]

[120] Republic of Rwanda, 1999a: 25.
[121] Republic of Rwanda, 1999a: 7 and 26.
[122] Republic of Rwanda, 1999a: 25.
[123] Republic of Rwanda, 1999a: 13.
[124] Republic of Rwanda, 1999a: 12.
[125] Republic of Rwanda, 1999a: 18.
[126] Republic of Rwanda, 1999a: 13.

- category 1 covers those chiefly responsible for the genocide and massacres;
- category 2 covers "ordinary killers";
- category 3 groups together those who wounded without killing; and
- category 4 is reserved for those who vandalised and looted.[127]

The cell *gacaca* tribunal will have the power to try suspects in category 4. Category 3 cases must be transferred to the sector gacaca tribunal for trial. Category 2 cases must be transferred to the commune *gacaca* tribunal and category 1 cases will also be transferred to the commune tribunal, but after it has been confirmed that suspects have been placed in the appropriate category. Cases will then be transferred to the Public Prosecution Department to be tried under the formal court system.[128]

Only one appeal will be allowed against judgments and sentences pronounced by *gacaca* tribunals. Thus, people convicted of category 4 offences may appeal once to the sector tribunal; those convicted of category 3 offences may appeal once to the commune tribunal; and people convicted of category 2 offences may appeal once to the prefecture tribunal.[129]

As regards sentencing by *gacaca* tribunals, the penalty for category 4 offences will be restitution of property stolen or destroyed or, where this is not possible, community service. It is also proposed that around half of the prison sentences prescribed under the 1996 law for category 2 and 3 cases be substituted by community service. Details concerning the organization and functioning of community service work are not included in the proposals.

It is not clear how much overlap will occur with pre-existing informal *gacaca* forums at the cell level. It would seem likely that some of the cell tribunal members elected by the residents of the cell may already be performing adjudicatory roles under informal *gacaca*. There is evidence, despite suggestions to the contrary by some observers, that some *gacaca* continued to function during the war, while fieldwork has indicated that many of those "which fell into disarray during the war due to the loss of leadership and neighbourhood constituency," were in the process of being reorganized.[130]

[127] ICG, 1999: 9.
[128] Republic of Rwanda, 1999a: 13-17.
[129] Republic of Rwanda, 1999a: 26.
[130] Rose, 1995: 3.

" Gacaca at the family, cell, or sector levels are very active in many communes. The gacaca, which operate mainly according to unwritten customary law, ideally serve to resolve minor disputes and administrative matters. According to our interviewees, gacaca *commonly hear the following types of cases: land disputes (e.g., involving inheritance, allocations, boundary, cattle trespass); fighting; insult; minor assault drunkenness; failure to repay a loan, often in the form of cattle theft; security problems; and wife-beating... Everywhere we travelled in Rwanda, we asked people about the gacaca. Most often people spoke positively about it: to them, it remained the idealised community-level meeting of neighbours, as in the past. A few people, however, told us, with a sense of regret, that the* gacaca *have lost some of their informal, local character as they have increasingly come under the formal control of the commune administration."*[131]

It would seem that, in recent years, local administrative officers have assumed a supervisory role over the affairs of the informal gacaca forums in some communes. As a result there have been some changes in the organization and operation of the gacaca in some areas, for example:

- leaders who handle gacaca problems may be elected and their names submitted to the commune administration;
- *gacaca* leaders may be more (or equally) responsible to the administration than to the local community;
- *gacaca* have been organized increasingly by geographic as opposed to kinship boundaries;
- the jurisdiction of the gacaca has been restricted to minor civil cases, whereas the jurisdiction of the local administration has been expanded to cover more serious civil cases and minor criminal cases;
- cases heard by *gacaca* may be recorded in writing and appealed to "higher levels in the administration."[132]

[131] Rose, 1995: 10 and 28.
[132] Rose, 1995: 11.

These changes will clearly have an impact on the informal nature of traditional forums. It is not clear how often cases are appealed to formal local administrative levels but "when the *gacaca* mediates conflict cases, it normally asks the party deemed at fault to make compensation to the aggrieved party. Or, it orders the party at fault to restore peace by buying beer."[133] The formal *gacaca* tribunals, on the other hand, "will be in charge of the difficult task of trying criminal cases involving extreme brutality. They will have the power to pass some very strong sentences", including life imprisonment in respect of category 2 offenders.[134] Formal state courts are by far the most appropriate forums to provide the legal and procedural certainty required where serious penalties such as imprisonment are involved. Unfortunately, however:

" ...there can be no miracle solution for what appears to be an irresolvable contradiction between rigorous respect for procedures and the reality of 125,000 people waiting to be put on trial..."[135]

[133] Rose, 1995: 14.
[134] Republic of Rwanda, 1999a: 18.
[135] ICG, 1999: 22.

6: JUSTICE FORUMS IN SOUTH ASIA

Informal non-state legal systems in South Asia survived both colonialism and the "massive reassertion of Western legal culture"[1] following independence. The cruel, arbitrary and discriminatory nature of some traditional justice forums, particularly in relation to women, has justifiably been a subject of concern to local and international human rights organizations.

As has already been stressed, informal or informal-style justice – that is justice without stringent rules and procedures – can only be regarded as legitimate and lawful if it is voluntary and it does not inflict physical punishments except in certain extraordinary circumstances, (see 5.4). Some South Asian justice forums fulfil neither of the above criteria and are a sober reminder of the dangers of forums which lack the most basic statutory regulation and appropriate monitoring and training, and of the failure to enforce criminal sanctions in the face of abuse. In these circumstances, the policy of turning a blind eye amounts to acquiescence by the state in abuses. However, this chapter will focus not on these forums, but on a number of South Asian forums which have attempted to combine the positive features of traditional justice and formal justice, and to highlight their respective successes and difficulties.

6.1 *Lok adalats* in Rangpur, India

Throughout most of South Asia's pre-independence history, there was no direct or centralized systematic control over villages, where most people lived. *Dharmasatra* (Hindu) and *Shar'ia* (Muslim) classical texts influenced but did not replace local law and the majority of the population continued to operate their own traditional systems of justice.[2] There were few formal courts outside urban areas. This, combined with the language and law used, rendered them inaccessible and irrelevant to about 95 percent of the Indian population.[3] The three main types of traditional or informal systems existing in rural India were the caste-based systems, known as caste or *jati panchayats*; community-based systems centred on the village, known as village *panchayats*; and innovative systems such as *lok adalats* (people's courts).[4]

---

[1] Baxi, 1986, 1979: 105.
[2] Meschievitz & Galanter, 1982: 49.
[3] Baxi, 1986: 247.
[4] Baxi, 1986, 1979: 105.

The term *panchayats*, in the context of judicial forums, refers to councils consisting of around five people which hear and decide disputes either brought to them by one of the disputants, or occasionally, of their own motion. As the name suggests, traditional caste *panchayats* deal primarily with disputes concerning caste membership and solidarity.[5] Village *panchayats* handle cases cutting across caste factors. In terms of procedure, however, they retain the common features of "notorious informality", "collectivized justice" and "free-wheeling public participation."[6] Sanctions include fines, public censure, civil boycotts, ostracism and, in the caste *panchayats*, the powerful sanction of "outcasting" and "excommunication".[7] The innovative/reformist non-state legal systems, exemplified by dispute resolution mechanisms known as lok adalats, are to be found, for example, in places such as Rangpur, Muzzafarpur and Nagaland. They were introduced by charismatic reformers and based on the principle of *lokshakti* meaning "people's power for social transformation".[8]

Rangpur is situated about 100km from Bashoda in the State of Gujarat. The area is populated by tribal people, the *Bhils*, who had been "rendered mostly to a condition of serfdom by the devices of money-lenders" prior to independence and *Bhumi Mukti* (liberation of the land) programmes. In 1949, Harivallabh Parikh, who was from a "well-to-do background" and had spent substantial time with Ghandi, travelled to Rangpur and decided to establish there an *Ashram* (a religious retreat for a colony of disciples). Since its inception, the Ashram has launched a number of agricultural and educational programmes.[9]

By 1986 it was estimated that the *lok adalat* at Rangpur had successfully settled more than 25,000 disputes.[10] Almost all disputes in the region were referred to it and decisions were rarely disobeyed.[11] What makes the *lok adalat* particularly interesting is that it appears to combine the participatory restorative justice of the traditional system while eschewing domination on the basis of gender or other status.

---

5 "Ritual lapses, marital relations, commission of pollution acts, sexual deviance, *inter se* land disputes, credit transactions, patron-client relations all fall typically within [their] range" (Baxi, 1986: 237).

6 Baxi, 1986: 237-8.

7 Baxi, 1986: 239; 1979: 107.

8 Baxi, 1986: 235.

9 Baxi, 1976, 53-58.

10 Baxi, 1986: 244.

11 Baxi, 1986: 244.

"In some ways, this Court [at Rangpur] achieves a quality of justice still sought for by the state legal system; for example, it more effectively protects women's equal rights of inheritance, matrimonial property, etc. The open Court's criminal justice system already provides for effective compensation for the victims of crime which is still on the legislative anvil of the state legal system. Its rehabilitative techniques are much more advanced in some respects: a murderer is "punished" by having to look after the widow and minor children of the victim for a term of years under close supervision of the local community, whereas his imprisonment in the official legal system would have rendered both families destitute."[12]

The *lok adalat* dealt with serious criminal matters such as murder only in the early years; these are now referred strictly to the state legal system[13]. However, cases such as the Ravli case (see below) suggest that the lok adalat will take on serious cases where the state system fails

The procedure adopted by the *lok adalat* is in many ways similar to that of traditional justice systems. The complainant brings his or her complaint first to the *Mantri* (secretary) of the *lok adalat*. Since the mid-1970s complaints have been recorded in a written register. The hearing may be fixed at this stage and the complainant given a written slip confirming the date of hearing, the names of the complainant and respondent, and the case registration number. The respondent is sent a letter inviting him or her to attend on the date fixed.[14] The letter includes the standard words, "You surely know (appreciate) that expensive and frequent futile visits to law courts are not in the interests of us poor farmers". This veiled threat appears to act as a sanction against non-compliance.[15]

The hearing involves a high degree of public participation. Large numbers, estimated at between 300 and 400, attend and anyone can put a question or make a comment.[16] The disputants sit facing each other in front of the chairman of the *lok adalat*. Each side is heard together with witnesses and during this time the chairman intervenes frequently to ask questions. The dispute is then summarized by the chairman. This may include not only the facts but reference to customary norms, and possibly to the need to modify them. Interestingly, approval of the summation is sought from the public assembled.[17]

---

[12] Baxi, 1986: 245.

[13] Baxi, 1976: 93.

[14] Baxi, 1976: 64-69.

[15] Baxi, 1986: 239; 1976: 106.

[16] From the meagre ethnographic literature available on traditional *Bhil panchayats* – which had broken down prior to the establishment of the *lok adalat* – it appears that only "the old men" and those directly involved were permitted to attend and participate in the traditional hearing process (Baxi, 1976: 59, 71-2).

[17] Baxi, 1976: 72.

The next stage involves an innovative process, namely the nomination of *pakshakars* (representatives). The complainant and the respondent each nominate two people who are instructed by the chairman to arrive at a decision fairly and impartially – "Now you belong to the l*ok adalat*, not the parties". The nominees must express their willingness to fulfil this role to the whole assembly. Elder relatives are usually chosen by the disputants but "it is essential that near relations should be avoided."[18] It is not clear whether such an instruction is given to the disputants nor whether the assembly may object to, or the chairman reject, nominations.

The nominees, now elevated to the status of *panchas* (decision-makers/jury), leave the assembly to deliberate under a nearby tree. They must attempt to reach a decision by consensus. If they are unable to do this, they announce their disagreement to the public assembly and the chairman is asked to make a final decision.[19] Details of the decision, mostly relating to fines, can be varied by the Chairman. However, it is not clear to what extent this occurs.

The system of nomination was adopted in 1966 "with a view to *gradually* lessen the dependence upon [Harivallabh Parikh] as a decision-maker."[20] In 1976 Harivallabh Parikh's presence at the meetings as chairman was "virtually considered indispensable."[21] However, the *lok adalat* would appear to have functioned normally in his absence for almost a year. The question of succession is, therefore, no longer considered crucial to the survival of the *lok adalat*.

"It has been argued that insistence on consensus among the nominated *panchas* may "lead to a role-strain which is often productive of arbitrary compromise or the manipulation of outcome by the powerful elements in a decision-making group."[22] Whether or not consensus can be reached in every case, the system of nomination clearly has the effect of extending public participation to the final decision-making stage[23] and this is further bolstered by the process of public approval by the assembly after the decision is announced. Public approval is no doubt an important stage in the *lok adalat* process as it confirms, in the absence of more crude coercive measures, the all important sanction of social pressure.

---

[18] Baxi, 1976: 72.
[19] Baxi, 1976: 74.
[20] Baxi, 1976: 72, (emphasis added).
[21] Baxi, 1976 p. 64
[22] Baxi, 1976: 74.
[23] Baxi, 1976: 73.

The decision having received public approval, a *kararkhat* (compromise deed) is drawn up and signed or thumbprinted by the parties. In the rare event that both disputants do not agree a kararkhat, it would be torn up and the matter considered afresh.[24] Thus the signing of the *kararkhat* signals an element of voluntary agreement directly between the disputants. The final stage of the process is marked by the distribution of gur (jaggery or brown sugar) to all those present at the hearing. This would seem to be influenced by the drinking together of liquor practised in traditional *Bhil panchayats* – which was aptly-named j*hagada bhango* (breaking the quarrel). This element is a recurring feature in both African and Asian traditional justice systems. The distribution of sugar instead of liquor is, however, more in keeping with the "prohibition ideology" of the *Ashram* and State of Gujurat.[25]

Finally, an important aspect of the *lok adalat*, is its role as an educational forum. When the nominated *panchas* leave the assembly to deliberate on a particular case, Harivallabh Parikh has often addressed the crowd on certain issues such as "family planning, the ill-effects of overconsumption of alcoholic drinks, honesty in credit transaction, civil liberties, irrationality of belief in witchcraft, equality of women, agricultural innovation, etc."[26] Of course, the hearing itself may provide the opportunity to examine such issues, as is shown in the following case[27].

A young women named Ravli had been accused by the witch-doctor of her village of being a witch and apparently responsible for the illnesses of two people and some bullocks, all of which had died within the space of a few weeks. She was brutally beaten by the villagers and left for dead. Miraculously she survived, but the police advised the family that they could not guarantee their safety and that they should refrain from making a complaint and leave the village, an option which would have left them destitute; it later emerged from the hearing in the *lok adalat* that the police had been bribed. The family turned to the *lok adalat*, and the entire village in question was invited to the hearing.

[24] Baxi, 1976: 76.
[25] Baxi, 1976: 77.
[26] Baxi, 1986: 245, 1976,: 74.
[27] summarized from Baxi, 1976: 104-9.

During the hearing, the villagers finally admitted beating Ravli, but explained that after discovering that she was a witch they did not know what else to do. After explaining that such appalling incidents based on superstition had become rare, and that it was of great shame to the district that such ignorance persisted in certain villages, the Chairman, Harivallabh Parikh, asked the witch-doctor to perform what the villagers agreed was a very simple task for someone claiming his powers. This was to identify a dissolved substance in a glass of water. The witch-doctor was unable to fulfil this task and the villagers regretting their actions, admitted that under his influence they had "committed a great sin" and that the *lok adalat* could punish them "as it deems proper." After nearly an hour, the nominated *panchas* returned to announce their verdict. It was decided that as the villagers had acted in ignorance, a "fine" would not be appropriate; Ravli's medical expenses, nevertheless, were to be paid in full. The decision was unanimously accepted and Ravli herself purchased a large amount of jaggery which was distributed to all concerned.

6.2 Nyaya panchayats in India

Following independence there was an attempt to establish village-level courts as a means of increasing access to formal justice in rural areas of India. The underlying objective in establishing these courts can be traced to the commitment by independence leaders to "democratic decentralisation" based on the Ghandian ideology of village *swaraj* (self rule).[28] This policy objective received recognition in Article 40 of the 1948 Constitution which obliged the government to "take steps to reorganize village *panchayats* and endow them with such powers and functions as may be necessary to enable them to function as units of self-government". During the period 1959-1962, a three-tier system of local government, consisting of the *gram* (village) *panchayat*, *panchayat samiti* (bloc) and *zilla parshad* (district council), was established. But it was the need to ensure the separation of powers, as enshrined under Article 50 of the Constitution, which led many states to set up separate *nyaya* (judicial) *panchayats*.[29]

Most states which introduced *nyaya panchayats* (NPs) adopted the method of indirect election to determine court membership. Each *gram panchayat* (itself popularly elected) elects NP members. In a few states people are nominated by *gram panchayats* and are screened by a sub-divisional officer before being appointed by an advisory committee. However, this appears not to have inspired the confidence of villagers because of the perception that some appointments may be affected by favouritism or are overtly political.[30]

[28] Baxi & Galanter, 1979: 352.
[29] Baxi & Galanter, 1979: 352, 359.
[30] Baxi and Galanter, 1979: 361, 363, 367.

NPs exercise civil jurisdiction in claims under a prescribed amount. Their criminal jurisdiction extends to a large number of offences under the Penal Code including theft, criminal negligence, trespass, nuisance, intimidation and perjury. They have no power to order imprisonment, but fines may be levied up to certain level and victims compensated from the fines collected.[31] A judgment is written, and is signed or thumbprinted by the parties.[32]

"Although NPs exercise a greater degree of procedural informality than the higher state courts, there are a number of major differences between NPs and traditional *panchayats:*

- The membership of NPs is fixed rather than flexible and is based, indirectly, on popular election rather than social standing.
- Their constituencies are territorial units rather than functional or ascriptive groups.
- They decide by majority vote rather than by rule of unanimity.
- They are required to conform to and to apply statutory law.
- Minor court fees are levied.
- They have the power to issue summons and to proceed ex parte in the case of a recalcitrant defendant or respondent.
- In some cases they have the power to issue attachment orders to enforce compliance with decisions.
- They maintain written judgments.
- They keep written registers of civil and criminal matters.
- They are overseen by the higher judiciary subdivisional or district magistrates may transfer a case from one NP to another or intervene on the grounds that a miscarriage of justice has or is likely to occur.
- Their decisions may be revised or appealed at the request of one of the parties.[33]

NPs do not follow statutory rules of civil and criminal procedure and evidence, nor is formal legal representation of the disputants permitted.[34] A local magistrate in Bharatpur has remarked that "every *NP* decision has at least one procedural error, making every application for revision technically meritorious." Furthermore, "all [the NP *panchas* (judges)] expressed concern that the manuals, forms, and procedures provided for the *Nyaya Panchayat* were too complicated for them to understand and said they left things to the sarpanch [head judge] to decipher". However, none of the *sarpanchas* or *panchas* serving at that time had ever been to training sessions.[35]

---

[31] Meschievitz & Galanter, 1982: 57; Baxi & Galanter, 1979: 364.
[32] Meschievitz & Galanter, 1982: 58.
[33] Baxi & Galanter, 1979: 360, 365-6.
[34] Meschievitz & Galanter, 1982: 57; Baxi & Galanter, 1979: 364.
[35] Meschievitz & Galanter, 1982: 58-9.

The failure to provide travelling allowances has meant some benches were inquorate.[36] Although NPs are geographically less remote than state courts, the long distances between villages and NP headquarters discourage villagers from lodging complaints and "delays and postponements mean repeated trips to NP every month, perhaps just to find out that it is not meeting."[37] In addition, there is a problem of legitimacy:

"The Nyaya Panchas *are not magistrates (except in some statutory context), nor are they adjudicators in the traditional sense. They are not elders of caste* panchayats*; they do not necessarily enjoy a reputation for integrity and wisdom; nor are they necessarily members of dominant* jatis*, respected or feared and obeyed as such. Rather; especially when not directly elected, they are ultimately the nominees of the* Sarpanch *or a distant official. However, the* Nyaya Panchas*, like community adjudicators, are to perform their tasks in the spirit of community service; unlike judicial officers they are not paid, their services being honorary. And yet they are to work on this basis for the state."*[38]

Only those villages which are closest to the location of the NP, and thus on the home ground of the *sarpanch*, tend to make use of these courts. Indeed, "many villagers did not know who the *sarpanch* was, or where and how often the NP met." NPs are, thus, perceived by villages as alien institutions, and those who make use of NPs, are viewed as "litigious" and "bad" people who "insult the village." The vast majority of disputes in the areas studied were resolved under traditional mechanisms. Those willing and able to take their dispute further afield tended to bypass the NP and utilise the more formal state courts.[39]

Prior to the abolition of NPs in the State of Maharashtra in 1974, a committee report recommended that there should be either a fully fledged extension of the state legal system with all the training and resources that entailed, or the traditional systems should be left unimpeded in their "commendable" efforts. The committee expressed concern that informal traditional systems operating "on the basis of common consent rather than the strength of any law" might be put at risk by the presence of NPs and advised that the latter be abolished:

"We consider it a fortunate circumstance that these bodies (NPs) have not yet come into vigorous existence and not much damage is done. It would be better to withdraw these steps when there is enough time."[40]

---

[36] Baxi & Galanter, 1979: 367-8.
[37] Meschievitz & Galanter, 1982: 67.
[38] Baxi & Galanter, 1979: 384.
[39] Meschievitz & Galanter, 1982: 65-9.
[40] cited in Baxi & Galanter, 1979: 374-5.

Despite the abolition of NPs in a few states, researchers have claimed that a "panchayat ideology" exists among many government officials and academics in India. This is described as a "belief in the efficacy of the [*Nyaya*] *panchayat* in resolving disputes in rural areas in the face of strongly inconsistent evidence." It has been suggested that NPs in reality manifest "the worst attributes of traditional and more modern legal institutions" and are not the first or even the second choice of disputants.[41] Further it has been argued that "while [*Nyaya Panchayats*] have not been successful as courts, their typically court-mode of operation has precluded their being effective as panchayats."[42]

6.3 People's Council for Social Justice in India [43]

The People's Council for Social Justice (PCSJ) was founded in 1985 by Justice Krishna Iyer, former Judge of the Indian Supreme Court. The stated objectives of the organization are:

- to promote and strengthen efforts to ensure social justice for all people, with emphasis on the weaker and vulnerable sections of society, through non-litigative resolution of disputes and grass-roots justice systems; and by offering free legal aid before formal courts;
- to promote and strengthen the recognition and implementation of human rights, and disseminate legal knowledge.

The PCSJ currently services the people of Kerala State. Its headquarters are located in Cochin and eight offices have been established elsewhere in Kerala. Since its inception, its president has been Justice Janaki Amma, former judge of the Kerala High Court. Several other retired judges and lawyers are actively involved in the organization. Currently, the main funder of the PCSJ's work relating to dispute resolution is the Ford Foundation.

The PCSJ started its work by organizing *neethimelas* (otherwise known as *lok adalats*). Neethimelas is the Malayalam term used to describe dispute resolution meetings based on participatory traditional justice procedures aimed at reconciliation and restoration. It means literally "festival of justice". As with the term *lok adalat* (people's court), *neethimelas* may be used to describe ad hoc dispute resolution meetings as well as a regular court structure. The PCSJ has conducted *Neethimelas* at 217 different locations throughout Kerala. Over 37,000 disputes have been settled, around a quarter of which involved motor accident claims. Also common are matrimonial disputes, land disputes, landlord and tenant disputes, and disputes over money.

[41] Meschievitz & Galanter, 1982: 56, 68-70.

[42] Hayden, 1984: 49.

[43] This section is based on information provided to PRI by the People's Council for Social Justice.

In addition, the PCSJ mediates disputes at its offices. The active participation of retired judges, senior advocates, labour leaders, professors, journalists, social workers and various organizations allows for a continuous process of dispute settlement. Since May 1997, a Family Counselling Centre aided by the Central Social Welfare Board has been functioning in the headquarters of PCSJ. Further, the PCSJ use their good offices to facilitate social benefit claims under governmental schemes.

The PCSJ also has a programme to spread legal literacy and create awareness of the rights and duties of citizenship. Around 645 legal literacy camps have been held so far at different places throughout Kerala. An integral part of the legal literacy programme is the para-legal training of selected groups within communities. The PCSJ has conducted two three-month courses, four 45-day courses, thirteen one-month courses and five 15 day courses so far, four of which were exclusively for women and seven of which were exclusively for members of tribal groups. Finally, the PCSJ has organized 34 seminars and six workshops on current topics of public interest including human rights, terrorism and the police, public interest litigation, AIDS, the rights of the girl child, harassment of working women, women's problems within the family, and minority rights.

The PCSJ complains that it does not have sufficient resources to properly monitor and follow-up cases before the neethimelas, making it difficult for the organization to evaluate accurately the full extent of their impact and to make improvements. At present they rely on parties to a dispute in which an agreement either could not be reached or was broken to re-establish contact with the PCSJ through their offices.

6.4 Madaripur Legal Aid Association in Bangladesh [44]

Since the 1980s, an increasing number of NGOs in Bangladesh have been offering mediation services based on the traditional system of dispute resolution known as *shalish*. The oldest of these NGOs, the Madaripur Legal Aid Association (MLAA), was launched in 1978 primarily as a legal aid organization to provide free representation before the formal courts to the poor. In 1983 the MLAA began facilitating mediation between parties and now manages to settle around 80 percent of cases without going to court.

[44] This section is based on information contained in Stephen Golub, *A Measure of Choice: A Strategic Review of the Madaripur Legal Aid Association's Current Impact and Possible Future Directions* (Ford Foundation 1997), in addition to information provided by the Madaripur Legal Aid Association to PRI.

The MLAA began to systematize its mediation from 1985. It started organizing village-level mediation committees in 1989 and began to offer training in its mediation method to other NGOs throughout Bangladesh. The MLAA has continued to expand and now operates in three districts in the southern part of the country, servicing a population of over one million. It currently facilitates the successful resolution of around 5,000 disputes annually. One of its main sources of funding has been the Ford Foundation.

Mediation sessions are facilitated by Mediation Committees, the volunteer members of which are respected people from the particular community. A village-level mediation committee consists of around 10 members who are given training in family law, land law, mediation skills and related matters. A union[45] meditation committee is then formed with representatives from the village mediation committees in each of the unions serviced by the MLAA. According to MLAA's 1995-96 Annual Report, 4,520 people belonged to 487 village committees while 694 of these members also served on the 59 union committees so far established by the MLAA.

Disputants generally approach the MLAA through the organization's mediation workers. The vast majority of people who approach the MLAA are women. The MLAA has 63 full-time mediation workers located in each of the 58 unions of Madaripur and in five unions in Shariatpur. If mediation fails or is inappropriate, the MLAA may take the matter to court through its Free Legal Assistance Project. According to information gathered by MLAA's Monitoring and Evaluation Project, parties abided by the agreements in 2,384 out of 2,699 cases sampled, indicating a success rate of around 88 percent.

The training centre in Madaripur, which was financed by NORAD and has been operating since 1993, increased the MLAA's capacity to train dozens of individuals at one time. The MLAA now provides training for around 30 NGOs each year for mediators and mediation workers who come from all parts of the country. For the last two years the MLAA has undertaken a major programme with the Bangladesh Legal Aid and Services Trust (BLAST) which, in co-operation with local bar associations, is setting up legal services programmes throughout much of Bangladesh. BLAST has offices in 13 districts and plans to expand its offices to all 19 districts within the next couple of years. It has sent co-ordinators, mediation workers and local bar association presidents from three districts (Barisal, Khulna and Sylhet) to the MLAA for training, and hopes to expand mediation to other BLAST districts if the pilot efforts prove successful. Around 1,000 disputes annually are already being mediated in the three pilot districts.

[45] Unions normally comprise around 10 villages.

7: SOME CURRENT INITIATIVES

The following chapter explores some current initiatives in the field of traditional and informal justice systems. The chapter draws on the information provided by the organizations themselves.

7.1 Penal Reform International.

Penal Reform International (PRI) organized a three-day workshop on "Access to Justice: Towards a People-Friendly Legal System" in Kampala, Uganda, between 18 and 20 March 1999. The workshop brought together experts and practitioners involved in the criminal justice system, including Law Commissioners, from Kenya, Malawi, Mozambique, Namibia, South Africa, Tanzania, Uganda and Zimbabwe and provided an opportunity to obtain up-to-date information on existing mechanisms and initiatives. The aim of the workshop was to identify how non-formal mechanisms of justice might be promoted, in accordance with international human rights standards, to increase public security and provide greater access to justice for the poor and other disadvantaged groups in society. The specific objectives were:

- to review existing trends and issues of access to justice under the formal system;
- to examine models of popular justice and pre-trial dispute resolution existing in the region or elsewhere;
- to assess the use of non-formal mechanisms in expediting justice and in promoting greater safety and security;
- to identify potential model activities;
- to formulate a draft workplan of action; and
- to establish a network of key people within the region who could assist in the design and implementation of any activities identified.

The delegates recommended that the positive contribution that traditional and popular justice can make to social justice – provided they satisfy constitutional and international standards – should be recognized and that the responsible forums should be strengthened and promoted. The delegates also recommended the reform of laws to enable incorporation of elements of traditional or informal justice into the state justice system in order to:

- make the state system more accessible and user-friendly for the majority;
- make the state system come closer to popular expectations of restorative and compensatory justice;
- reduce prison congestion by favouring non-custodial sentences;

- speed up trials, especially if combined with better case-flow management;
- strengthen the influence of local communities by making them willing partners in the supervision of community service orders and rehabilitation projects;
- reduce recidivism, because community informal social control systems would dove-tail with the state's methods and processes to form a seamless re-enforcement of the same values and similar processes.

The type of changes that were recommended were that:

- Community representatives should be encouraged to air their views during bail hearings, to ensure that their fears were heard and that the state justice system was seen to be serious about protecting community members from dangerous people.
- Community structures and their members should be allowed to act as assessors in the lower courts. In countries where there is a formal link between informal and state courts, such as Uganda, this would involve representatives of the local council from which the case emanated, or in whose jurisdiction the events occurred, attending court so that the relevant authority figures are part of the justice process.
- Evidence should be presented to the state courts in narrative form, as happens in inquisitorial systems, so that it does not alienate or confuse the witnesses, complainants or the accused. The role of the presiding officer is then to sift out what is relevant and admissible.
- State courts should take the social setting of the parties to a criminal case into consideration when dealing with the case, so that the crime and the solutions, outcome or punishment are seen in the context of the future relationship between the parties.
- The purpose of a trial should be the search for the truth and an appropriate remedy for the wrong committed, once it is established that a wrong has taken place. The evidentiary shadow-games which revolve around admissibility and relevance are alien to people from traditional backgrounds and create the impression that there was technical interference in the substantive justice of a case.
- The presiding officer should be responsible for protecting the parties from the infringements of their rights. This is particularly the case when the accused is not represented. In such cases the presiding officer should adopt the role of the investigating magistrate in the inquisitorial systems in the search for the truth and the appropriate remedy for the wrong which has been committed.
- In considering sentence, there should be space for complainant and the local communities in which the accused person and the complainant reside to state their views about the appropriate remedy. They should be encouraged to be part of the solution by contributing to the re-integrative shaming of the convicted person. This could

happen either through their co-supervision of a non-custodial sentence; through visiting the person in prison to remind her or him of their community ties and obligations; or through their involvement in the process of receiving the person from prison once time has been served. This is done in Canada (Yukon), Australia and New Zealand with considerable success.

- Where possible the sentence of a convicted person should include some positive skills transfer to people less skilled than her or him so that the sense is created that they have value and a place in society.
- The monitoring of people after their release from prison should involve the community structures in which the person resides so that recidivism is minimized.[1]

A major international conference held by PRI and the International Centre for Prison Studies between 13 and 17 April 1999 in London attracted 120 participants from around the world. The aim of the conference was to devise new policies in respect of criminal justice and penal reform which are culturally sensitive, economically viable, cost effective and would protect human rights, and to guide reformers worldwide as regards implementation. Issues covered included traditional and informal forms of justice, restorative justice, alternatives to pre-trial detention and prison sentences, dealing with violent crimes, alternative ways of dealing with juveniles, and the role of civil society in penal reform. Reports from PRI regional workshops, including the Kampala workshop on access to justice, informed the debate. Based on the findings of the conference and related activities, PRI is currently developing additional programmes in six countries in Africa, South Asia and the Caribbean. It is hoped that it will be possible to replicate the models identified, with appropriate modifications, in additional countries in the future.

[1] Schärf, 1999: para 4.4.

7.2 Save the Children Fund (UK).

In October 1996, Save the Children Fund (UK) and Rädda Barnen of Save the Children, Sweden, organized a conference in Swaziland bringing together national and international NGOs and government representatives from 11 African countries to discuss juvenile justice in Africa. *Justice for Children: challenges for policy and practice in Sub-saharan Africa*, a book based on the papers presented at and proposals arising from the conference as well as additional research, was published in June 1998. One of the main themes of the conference was to examine to what extent traditional justice systems promoted or undermined the rights of the child as set out in the UN Convention on the Rights of the Child. The overall finding was that there was evidence of both positive and negative effects but that there was insufficient primary research on informal mechanisms, particularly those existing in urban and peri-urban areas, to draw generalized conclusions. A series of meetings in London in early 1999, attended by staff from the various Save the Children field offices worldwide, examined the organization's work on juvenile justice. This included discussion of traditional justice systems and how the organization might become involved in the sector in specific target countries such as Angola, Ethiopia and Lesotho and possibly certain countries in southeast Asia.

7.3 South African Law Commission

The South African Law Commission is currently investigating how community forums, whether indigenous, urban, township or religious, can play their proper role in ensuring that all South Africans, particularly the poor, receive access to justice. The Commission organized a legal forum on 11 March 1998, followed by nine workshops in all the provinces. A national forum, "Access to Justice: Community Structures", held in July 1998 completed the initial stage of the consultation process.

During the national forum, reports from the provinces were synthesized and a number of "consensus issues" arrived at. One of the consensus issues was that community structures should not be incorporated into the formal state court system. It was suggested that the Law Commission should develop a number of different experimental projects of its own, based on the research carried out in each of the provinces.

A discussion paper, published by the Law Commission in September 1999, started the next phase of the investigation. This invited comments to be submitted by 31 October 1999. "Community Dispute Resolution Structures" (Discussion Paper 87 Project 94), contains guidelines for legislation based on the following recommendations:

Because community-based dispute-resolution structures (hereinafter called "community forums") serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice, these structures must now be recognized and supported by law.[2]

Reference to these structures as "community courts" is misleading and a new name should be found for them. Community forums should not be considered to be "courts" but dispute-resolution and peacemaking structures which provide "first aid" justice for local communities. To call them "courts" confuses the issue because it pre-empts many questions including those of jurisdiction, training of personnel, voluntariness of participation and the binding nature of decisions.[3]

Recognition of community structures should be based on an Act of Parliament setting out their status, role, function, jurisdiction, procedure and other related matters.[4] Any such legislation should be drafted only after careful investigation and consultation and should take the form of creating a broad framework which is flexible enough to accommodate the different kinds of community structures that exist in the country while setting out a set of minimum standards for the operation of these structures.[5]

Attendance at any community forum should be entirely voluntary at the inception of each attempt to resolve a dispute, as well as for the duration of the dispute-resolution process.[6]

In view of paragraph 5 above, decisions of a community forum are binding on the parties only if they have agreed beforehand to be bound by such decisions. Certain levels of community forum should not have decision-making powers at all, their task being mainly to facilitate reconciliation between the disputants.[7]

Where a community forum arrives at a decision that the parties have agreed to be bound by, the role of the law should be to make sure that the agreement or settlement is respected.[8]

In the legislation, care must be taken to ensure that community forums remain informal and flexible in their procedures, inexpensive in their operations; accessible, non-alienating and responsive to the needs of the communities in which they operate.[9]

---

[2] SALC, 1999b: para 3.3.4.3, 3.3.4.6.
[3] SALC, 1999b: para 4.1, 4.4.3.
[4] para 4.2.
[5] para 4.2, 4.6.
[6] para 4.3.2.
[7] para 4.3.3.
[8] para 4.3.3.
[9] para 4.3.1.

Since community forums do not stand in a hierarchical relationship to the formal courts, there should be no question of appeal from these structures to the formal courts. If a matter remains unresolved, the parties retain their rights as citizens to pursue the dispute in any other forum of their choice.[10]

Separation from the formal justice system should not mean the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards.[11]

Community forums shall function at all times within the laws and the Constitution of the Republic of South Africa.[12]

Where there is a functioning customary court in a rural area, a community forum should not be introduced. Duplication of functions should be avoided, even though in exceptional cases there might be such a mixed population in a particular area that the claims of the community to a choice of forums should be respected.[13]

Training in various aspects of leadership, mediation and the ideas of restorative justice must be given to the individuals who operate community forums in order to empower them.[14]

The Commission specifically requested comment on whether community forums should have criminal jurisdiction and, if they did, what restrictions, if any, should be placed on it.

A memorandum annexed to the discussion paper sets out some "tentative proposals" for the development of legislation providing for the recognition, establishment, status, role, jurisdiction and functioning of dispute resolution structures based at local community level.[15]

It recommends that the proposed legislation recognize two kinds of forums operating within any local community:

Popular tribunals involved a high degree of popular participation in reaching decisions. This allowed them to arrive at solutions which were unavailable to the more formalized courts. Tribunals had the power to levy small fines or oblige offenders to carry out service for the community for up to 30 days.

---

[10] para 4.3.4.
[11] para 4.2.
[12] para 4.7.
[13] para 4.4.
[14] para 4.5.
[15] Annex, para 1.1.

- a grass-roots based (mediation) forum known as a peace committee and
- an upper-level (arbitration) forum known as a community forum.

The fundamental difference between the proposed peace committees and community forums is that the former will rely purely on social pressure to ensure compliance whereas the latter will operate in a manner similar to that of an arbitration tribunal. What this means in practice is that the consent of the offender and the victim to participate in the community forum will imply their consent to abide by the forum's decision which, in turn, will be enforceable by state coercion[16].

Peace committees will be made up of a group or organization of facilitators trained to assist disputing parties in reaching agreement. It will have no power to impose a decision which will be arrived at by the parties through negotiations within a peacemaking circle. The peacemaking circle will comprise people who command respect in the community and in the lives of the disputing parties – for example parents, other family members, a school headmaster, a church elder, a social worker. No formal legal representation will be permitted.[17]

In addition to its peacemaking function, the peace committee will also be involved in "peacebuilding" – described in the memorandum as "programmes aimed at fostering peaceful co-existence and lasting stability within the community." This recommendation, as well as the peace committee proposals as a whole, would seem to be influenced by the pilot projects being carried out by the Community Peace Project (see 7.6).[18]

Community forums will have the power to impose a solution where both parties have voluntarily consented to be bound by a decision and mediation fails. Although termed a second-level forum, there is nothing to prevent disputants from approaching the community forum in the first instance, without having to go through a peace committee. No formal legal representation is allowed.

The memorandum also raises the issue of remuneration of members. It advises that the legislation should set out the criteria for any remuneration "keeping in mind the need to encourage the spirit of volunteerism and to avoid the creation of a new elite within the community."[19]

---

[16] Annex, para 2.1-2.3.

[17] Annex, para 3.1-3.3.

[18] The community forum reflects more closely the community court model being piloted in Gugulethu in the Western Cape, South Africa. As van Niekerk (1998: 99) notes "unfortunately there is little information available onº this programme" (see Chapter 10 for contact details).

[19] Annex, para 4.1-4.2.

Neither peace committee nor community forums form part of the formal hierarchy of courts. There is therefore no right of appeal to the Magistrates Court from either body. A party may take a case directly to the Magistrates Court if they so choose without having to go through either a community forum or a peace committee. However, a Magistrate's Court may, with the consent of the parties, transfer a matter to a community forum, just as a community forum may, with the consent of the parties, refer a matter to a Magistrate's Court.[20]

The memorandum recommends that an office be established under the legislation to be responsible for the operation and control of the proposed forums – the Office of the Ombudsman (Regional or Provincial) for Community Forums and Peace Associations. Each peace committee and community forum will adopt a constitution and code of conduct in consultation with the local ombudsman. State funding for forums will be provided through the ombudsman. The memorandum also recommends that the Ombudsman be given the functions of:

- reviewing decisions on grounds of procedural or administrative irregularity;
- auditing the performance of community structures;
- receiving, and acting upon, complaints; and
- developing and controlling a budget to support the work of community structures.

The Ombudsman will have a level of autonomy and independence guaranteed in the legislation, but shall report to the Minister of Justice.

The legislation will also set out fully the paradigm and ethos (informal, community-based, restorative, etc) within which community structures must operate, and which the Ombudsman should be duty-bound to protect and promote.[21]

Following a final legal forum held by the South African Law Commission between the 27 and 28 October 1999, the Commission started the process of drafting legislation.

7.4 DFID Malawi Safety, Security and Access to Justice

The UK Department for International Development (DFID) is in the process of designing a project proposal for the Malawi Safety, Security and Access to Justice Programme. There are three main components to the proposed programme:

---

[20] Annex, para 4.3.
[21] Annex, para 4.4.

- primary systems – including formal, informal or customary forums that assist poor people in respect of safety, security and access to justice;
- formal courts and penal systems; and
- formal policing.

A consultant appraisal team carried out research in relation to the primary systems component between 22 March and 19 April 1999. This included field research; literature surveys and research; and interviews with key stakeholders. The field research was undertaken in 22 traditional authorities in seven districts in rural Malawi across the three regions of the country using PRA (participatory research action) techniques. An estimated 600 people attended meetings or participated in interviews.

A draft final report was discussed by secondary stakeholders at a workshop held on 29 April 1999 and the final report of the consultants was submitted in May. The report concluded that traditional justice systems are "playing a useful role in supplying access to justice in rural Malawi", but that the systems need strengthening through support and training of traditional authorities to ensure that the systems operate in line with human rights guarantees. The need for civic education and on-going and comprehensive research into the working of traditional courts in rural Malawi was also emphasised. Specific proposals on access to justice included:[22]

a. Strengthen the role and accountability of TAs in providing justice

An option worth pursuing would be to encourage self regulation, perhaps through a Community Justice Forum as one of the functions of a future Chiefs Council. (7.4.1)

b. Train traditional leaders in the development of good practice in traditional courts

Affirm existing good practice in procedures and decision-making aimed at conciliation, and offering guidance on issues where traditional leaders are requesting assistance. Special attention should be given to consideration of the needs of vulnerable groups. The rights of women and children need to be fostered within traditional systems in line with the international conventions to which Malawi is a signatory. (7.4.2)

[22] DFID, 1999.

c. Train government extension workers to assist rural Communities in operating a complaints system

Extend the use of the network of NICE officers, teachers and other government extension workers, such as Community Development Officers in the Ministry of Women, Youth and Children's Affairs. Training should be available as part of a national crime prevention strategy to encourage local demands for increased security, and improved access to justice. More advice should be made available on the use of complaints systems through the Ombudsman's Office to stamp out corruption in the administration of primary systems. (7.4.3)

d. Introduce more participation in the formal system

Allowing more participation in the formal system of Magistrates Courts is likely to result in an increased confidence in their procedures. Experimentation could be encouraged to see how far the use of the narrative style of the traditional courts, in contrast to cross-examination and more adversarial approaches, could be permitted. Traditional leaders who are knowledgeable in customary law should be encouraged to return to the Magistrates Courts as advisers. Other areas for increased participation could include a community role in bail hearings, assessors in court and lay visitors to prisons and police cells. (7.4.4)

e. Involve Chiefs in the administration of community sentencing and alternatives to custody arising from Magistrates' judgements

Alternatives to custody are currently being explored in Malawi and traditional leaders should be involved in schemes to investigate local options. (7.4.5)

f. Support legal reform to amend the Chiefs Act and fulfil the constitutional commitment to customary courts

This process would produce more clarity about areas of jurisdiction, terms of reference, the extent and limits of the powers of Chiefs and traditional courts. It could also encourage experimentation with women's and youth courts in pilot areas. (7.4.6)

g. Extend civic education

ARespond to rural people's request for more information by making further use of the radio, the role of NGOs and the training of extension workers in the rural areas.(7.4.7)

h. Establish a fund to encourage pilot schemes from civil society organisations to promote innovative access points

such as setting up family mediation schemes and victim support groups, preparing television and radio programmes, and using drama groups to promote new ideas. (7.4.9)

The report was intended to feed into a comprehensive sector project proposal to be developed and submitted to DFID's Projects and Evaluations Committee in 1999/2000.

7.5 DANIDA judiciary programme

As part of the DANIDA judiciary programme, a Baseline Survey of the Local Council Courts of Uganda was commissioned in 1998.[23] The overall aim of the survey was to assess the LC court system in order to ascertain whether it had achieved the objectives for which it had been established as a "significant arena for delivery of basic legal services" and to determine if and how its operation and efficiency could be improved.[24]
The terms of reference for the survey were:

a) To review the literature and basic data on the LC court system;
b) To assess the strengths and weaknesses in the process and functioning of the LC court system in particular in relation to its composition (election and gender), procedures, jurisdiction (laws applicable, remedies granted) and accessibility (geographically, economically and administratively);
c) To examine the relationship between the LC court system and the formal as well as informal dispute settlement practices in communities;
d) To assess user perception of the decisions made by LC courts and to what extent the decisions may be influenced by economic, cultural-environmental or religious factors and gender biased attitudes;
e) To identify caseload and case flow within the different levels of the LC court system and to ascertain the incidence and result of cases appealed to higher LC court levels and Magistrates' Court level;
f) To consider the possibility of introducing, as an alternative to appeals within the LC court system, the option for parties who are not satisfied with the decision of LC courts to file a complaint as a case of first instance in a formal court;
g) To make recommendations accordingly for changes of the LC court system;
h) To develop indicators for monitoring the accessibility and effectiveness of legal services to the poor.[25]

[23] The Survey was jointly commissioned also by the Ministry of Local Government (Decentralisation Programme) and the Royal Danish Embassy and was implemented by Nordic Consulting Group (NCG) – Uganda.
[24] DANIDA, 1998: 2, 4-5.
[25] DANIDA, 1998: 5.

In addition to the literature review, data was collected through 100 questionnaires, five key informant interviews, 30 in-depth interviews, and three focus group discussions.[26] These were carried out in a number of villages in five selected districts – one district in each of Uganda's four regions plus Kampala. A guide to the topics covered in the interviews and discussions are reproduced below.[27]

A) Topic guide for local group discussions with LC officials

1. Composition of courts

- Qualifications and background of some of the officials. (These may relate to academic and/or experiential qualifications)
- Record the gender representation by post held.
- What do they perceive as their major roles and functions in their judicial capacity?
- Any problems in combining administrative and judicial functions? (Ensure this is clearly explained in vernacular)

2. Court records

- How many cases on average are reported per day/week/month?
- Whether or not Court records are kept and if not, why?
- Types of cases commonly reported?
- How the records are kept and problems associated there (Request of a sample of court records if available)
- Where records are not kept, what happens in the event of an appeal?

3. Mode of operation/court proceedings

- How many cases are on average handled per day/week/month?
- What factors affect case flow?
- Whether they have knowledge of the limits of their jurisdiction (what are they?)
- What factors are taken into consideration before making a decision?
- Are they capable of mediating cases within and outside their jurisdiction (how)?
- Can they cite instances where they have given legal advice to parties?
- Whether they seek technical advice from other institutions or bodies and if so, which ones and for what type of cases/situations?

[26] DANIDA, 1998, Annex 1: 3, 4, 7.
[27] DANIDA, 1998, Annex 4: 1-5.

- What procedures do they use in summoning parties and witnesses?
- How do they go through court proceedings?
- Are their cases referred to other authorities (which are those cases and to which authorities are they referred?)
- How are the fees and fines determined and collected?

Any additional/informal fees?

4. Efficiency of LC court officials/good governance

Whether they have benefited from any form of support in terms of training or other forms of strengthening their efficiency (some examples)/How effective/beneficial?

Do they have any reference materials or similar resources used in their judicial functions? (Some examples)

Have they received any practice guidelines/directions regarding costs, fees, and procedures?

How do they enforce judgments and what are the consequences of non-observance?

Can they identify aspects or areas where support is needed to make them more efficient?

5. Other Issues

Who are the dominant users of the courts?

Have you handled children in conflict with the law?

How familiar are you with the Children Statute 1996?

What do you consider to be the most relevant provisions in that statute?

What problems do they as court officials face?

Do they have infrastructure e.g., court room, office premises (rented, free, donated, borrowed, makeshift), stationary and other facilities?

What is their opinion on the introduction as an alternative to appeals within the LC Court system the option for a party unsatisfied with the decision in the LC Court to file their complaint as a case of first instance in the formal court?

Comments on alternative dispute resolution mechanisms within the community?

* Any other comments? Or reactions from the LC officials?

B) Interview guide/structured questionnaire

Personal/ household data

1. Respondent's Identification Record the sex/Name/Age /Village /Sub-county /District?
2. Marital Status

3. Do you have children? Number of girls? and boys?
4. What contribution do you give to the running of your home?
5. How do you do this?
6. What educational level did you attain?

Composition of courts/mode of operation/user's perception

7. Are you comfortable with the combination of executive and judicial functions of the LC?
8. If so why?
9. If not why not?
10. How easy is it for you to access LC courts?
11. Do you have confidence in LC courts?
12. Why?
13. Do you perceive LC courts as impartial?
14. If not, explain why?
15. What are your comments on the following aspects of LC courts:
16. Fees and any other costs involved?
17. Expediency of their operations?
18. Appreciation of the technicalities and procedures involved?
19. What do you perceive/consider as factors influencing the decisions of LC?
20. What other dispute settlement forums exist in the community?
21. In the event of a dispute indicate to which dispute settlemen forums you would appeal in order of priority (find out whether priority is determined by nature of the dispute)?
22. Are decisions from LC courts enforceable/enforced?
23. What are the consequences of non-observance?
24. Give your comparison between LC courts and the formal court system.
25. Give your opinion on the possibility of introducing as an alternative to appeals within the LC court system, the option for a party unsatisfied with the decision in the LC court to file their complaint as a case of first instance in the formal court.

Efficiency of LC court officials/good governance

26. What would you consider to be indicators that LC courts are efficient and effective?
27. Can you identify areas where the LC courts need support?
28. Any suggestions for change in the LC courts?

In-depth issues

29. Do you have any experience in using LC courts?

30. If so, can you relate what the experience(s) was/were like, whether good or bad?
31. If not, can you relate an experience of somebody close to you that you recall?

* Any other comments?

C) INTERVIEW GUIDE FOR KEY INFORMANT INTERVIEWS

1. Name/Age/Sex (record)/Duration in office/District/Post-held?
2. Is there collaboration between your office and LC courts?
3. If so, what form does the collaboration take?
4. If not, why?
5. Do you perceive LC court as impartial?
6. If not why?
7. What do you perceive as factors influencing the decisions of LC courts?
8. Have you any knowledge/received reports of problems faced by various people in accessing or using LC courts?
9. If so what are the common problems and complaints?
10. Have you been approached to assist in the enforcement of decisions of LC courts? Cite examples.
11. What do you consider as:
12. the strengths of LC courts?
13. weaknesses of LC courts?
14. Give your comparison between LC courts and the formal court system.
15. What other alternative dispute resolution mechanisms exist the community?
16. Identify them in order of priority given to them.
17. Indicators of efficiency and effectiveness of LC courts?
18. Any suggestions for change in LC courts system?
19. Identify areas where you think LCs need support

* Any other comments?

The general conclusion of the survey was that, on balance, LC courts provided a "vital means of dispute resolution" and should be retained.

"*In summary the survey has established that for a significant percentage of Ugandans, the LC Courts are accessible in both physical and technical terms; they are affordable, user friendly, participatory, and effective. Most significant of all is that the people have confidence in the LC Courts as administrators of the justice that the people understand.*"[28]

According to the survey, however, the Resistance Committee (Judicial Powers) Statute 1987, under which the LC courts are recognized, requires general revision, and there is a pressing need for LC officials to be given basic legal training relevant to their judicial function[29]. The main recommendations for reform were:

1. **Gender composition of courts:** at least one third of those sitting on LC courts should be women.
2. **Separation of powers:** LC executive officials should appointindependent judges to be approved by the local council **or** alternatively, LC officials should continue to hold both judicial andexecutive functions.
3. **Quorum:** the statute should provide greater guidance on who should be co-opted to make up a quorum.
4. **Court records:** training should be organized by the Judicial Service Commission and the idea of central registry explored.
5. **Legal knowledge:** LCs should be given training in both substantive and procedural law.
6. **Access to legal texts:** copies of the (amended) LC court statute should be translated into local languages and distributed together with simplified versions of other relevant laws.
7. **Fair hearing:** training should be provided in court procedures which are non-technical but which comply with minimum rules of natural justice.
8. **Remuneration/logistical support:** this should be provided for; the law should give guidance on how money collected as fees and fine should be used towards this purpose.
9. **Monetary jurisdiction:** this should be increased from 5,000/= (value of the subject matter in dispute) to 200,000/=; the maximum fine should also be increased to 200,000/=.
10. **Concurrent jurisdiction:** judicial functions should be withdrawn from LCII courts with appeals from LCI lying directly to LCIII courts. The removal of grade II magistrates should also be considered.

[28] DANIDA, 1998: 2.
[29] DANIDA, 1998: 2.

11. **Linkage with magistracy:** appeals from LCIII courts should be heard by grade I magistrates (and not chief magistrates) and lie from grade I magistrates direct to the High Court.
12. **Enforcement:** LC courts should refer matters which they have failed to enforce to grade I magistrates and other means of enforcing judgments should be explored.
13. **Court fees:** the disparity between the amount charged for court fees under the regulations and in practice needs to be considered and standardized.
14. **Human rights:** LC courts should be trained in human rights and their relevance to the delivery of justice.
15. **Inter-ministerial co-operation:** co-ordination between the Ministry of Local Government and the Ministry of Justice in the administration of LCs should be improved.
16. **Monitoring and evaluation:** an improved system should be devised with grade I magistrates being formally entrusted with this role.
17. **Awareness training for officials of formal system:** LCs, magistrates and the police should be trained to understand each others duties and in means of improving co-operation.

An interim report of the survey was submitted to an Advisory Committee composed of representatives from the Ministry of Local Government, the Ministry of Justice (Law Reform Commission), the Judiciary, the Ministry of Gender and Community Development, and the Uganda Human Rights Education and Documentation Centre. After comments were received from the Committee, a final report was submitted and its findings disseminated through a workshop on "Good Governance – Accessibility to Justice for the Poor".[30]

7.6 Community Peace Programme, South Africa

The Community Peace Programme (CPP), formally known as the Community Peace Foundation, was set up after the lifting of bans on political organizations in South Africa to work on policy for policing in a democratic society. Its aims were to expand the definition of policing to include issues relating to community security – including individuals and organized units other than the police and formal structures – and to train police in the philosophy and practice of community policing. Initially the CPP concentrated on intensive policy work and conducting retraining workshops for the police. However, after a few years, the CPP decided it was appropriate to move on and begin to address safety and security from the community perspective.

[30]" DANIDA, 1998, Annex 1: 8.

– Since mid-1997 the CPP has been running a pilot project in Zwelethemba, the black township of Worcester, about 70 miles from Cape Town. The aims of the project are:

– to test the hypothesis that ordinary "non-expert" people in a poor community are capable of taking on responsibility for dealing peacefully with most matters of safety and security in their community;
– to develop structures and procedures for carrying out dispute resolution (peace-making) and for tackling broader generic problems in the community (peace-building);

– to empower individuals in the context of community-building;

– to develop a relationship of co-operation and equal partnership with the organs of the state, in particular, the police and the courts; and

to develop a model which can be replicated, with appropriate local adaptations, in other communities. The Zwelethemba project is funded by SIDA and the Raoul Wallenberg Foundation, who have also expressed interest in supporting the transferral and testing of the community-based peace-making and peace-building model to two quite different communities: one rural (probably in the Eastern Cape) and one to another country in southern Africa (possibly in Namibia).

Initially, two researchers (or facilitators) who were Xhosa-speaking African graduates, spent some time in Worcester and produced an information map of the whole area, including Zwelethemba. This identified, for example, what institutions were in existence, where the police and magistrates were located, as well as collating general statistical data. More intensive research was then carried out in Zwelethemba itself through interviews based on a questionnaire, the main aim of which was to find out what the main problems were in relation to safety and security, how they were normally handled, and the effectiveness of these methods.

Following this baseline research, a series of public meetings were held and around eight people from the community volunteered to work on an interim Liaison Committee. The interim Committee comprised both men and women from a mixture of backgrounds including a primary school teacher, a municipal officer, a "struggle veteran", two youths, and unemployed people. The Committee started work by organizing a number of workshops on peace-building. According to the CPP, peace-building involves strategic thinking, planning and co-operation in relation to generic problems. For example, a significant proportion of

violence in Zwelethemba is associated with *shebeens* (semi-legal drinking houses). One proprietor in the township had already devised a code of conduct for his customers. Through the peace-building process, the idea was discussed and it was decided that it should be expanded upon. A bilingual poster for *shebeens* wishing to be recognized as "peace shebeens" has now been produced. The other major strand of the project in Zwelethemba is dispute resolution, which is referred to as "peace-making". Again, a number of workshops were organized by the Liaison Committee and "peace-making steps" were devised which were to act as very broad guidelines on the procedure to be followed in handling disputes.

The peace-making procedure follows the basic informal model (see diagram in Chapter 8). One interesting addition is that both parties to the dispute agree on a person to monitor whether the decision reached is actually honoured. Decisions, however, can only be enforced through social pressure; physical coercion or punishments are not permitted. Various wards (municipal councils) of Zwelethemba are experimenting with differences in detail as regards the peace-making model, for example, whether or not agreements should be written and signed by the parties, and whether there should be permanent panels of arbitrators or selection should be on an *ad hoc* basis from a relatively large number of people who have received training and committed themselves to the code of conduct. The CPP is anxious to extend empowerment as much as possible down into the community and not simply to establish a small group of experts. But it is the community itself which must ultimately decide what details are best suited to their particular circumstances.

In August 1998, a general public meeting was held which formally established the Zwelethemba Peacemakers Association (ZPA) with an elected Executive Committee comprising a Chair, Deputy Chair, Secretary, Treasurer and representatives from each of the five wards of Zwelethemba. The meeting, which was preceded by workshops on constitution-making and related matters, also adopted a constitution and a code of conduct.

The requirements for membership of the ZPA are still being worked out. Currently, anyone who is working regularly in peace-making or peace-building in Zwelethemba and who has committed him or herself to follow the code of conduct and undergo training is considered a member; there are around 40 active members at present. The ZPA is considering the introduction of a savings scheme; anyone who saves money every week will become eligible for membership and be able to apply for a loan for any purpose. They will also become eligible to apply for a loan from a separate fund (discussed below) which is available strictly for the purpose of income generating projects.

The CPP is seeking to develop a model which can eventually be taken over by the government, not only in terms of its principles and procedures but also terms of administration and finance. The aim is to present the government with a package which demonstrates what the running costs are likely to be. One proposal is for a fund to be set up, 10 percent of which will be available to the ZPA for peace-building initiatives, and 20 percent of which will be available to the wards to cover expenses for peace-making cases, including the salary of a full-time clerk and a facilitator. It is also proposed that the 20 percent go towards the cost of providing certain incentives. Thus, every time the ward hears a case, it will receive, for example, 2.50 Rands, and every time case forms are completed, and it is clear that all the "peace-making steps" have been complied with, the ward will receive 10 Rands. It is proposed that the remaining 70 percent be used for income generating projects. Anyone who is an active member, will be entitled to apply through the ward committees for a loan for an approved project. In addition to interests on loans, other means of sustaining the fund are being explored. The ZPA, for example, has already organized half a dozen paid walking tours of the township for overseas visitors.

According to the CPP, the Deputy Magistrate of Worcester has noted that there has been a marked decline in the number of cases coming before the formal courts from Zwelethemba, and he attributes this to the work of the ZPA. There have already been a number of referrals by the ZPA to the police or directly to the courts and visa versa. There have also been instances where the ZPA has, on the invitation of the Magistrates' Court, supervised community service orders.

The CPP's immediate plans are to take the model to a second township in South Africa, with the intention of spreading it widely throughout the country This next stage, a pilot project in itself, will take place in Thembalethu, the black township of George, a large regional centre about 250 miles from Cape Town. Thembalethu is different from Zwelethemba in that it has a much larger population (about 70,000 as against about 18,000) and a very active civic organization, through whom the CPP will need to work. The CPP believes that the Thembalethu pilot is likely to have broad ramifications for the future of community-based justice systems in South Africa and elsewhere in that:

- It will test and fine-tune the model of peace-making and peace-building that the CPP has been developing in Zwelethemba in a different community.

- It will aim specifically to define the nature of the articulation between the existing state justice system and community-based structures, and to devise and test the necessary practices and procedures that will form and regulate this relationship.

7.7 Community Dispute Resolution Trust (South Africa)

The Community Dispute Resolution Trust (CDRT) was established in 1991 and operated under the umbrella of the Centre for Applied Legal Studies at the University of the Witwatersrand until December 1994, when it became an independent trust. Its main sources of funding at present are USAID and the Kagiso Trust. The CDRT was founded with the aim of empowering communities to resolve conflict. Recognising that local dispute resolution capabilities at the grass-roots level are effective and not simply a "poor person's" option, the CDRT has sought to achieve its objectives through dispute resolution training for community members and the establishment of Justice Centres to provide communities with mediation services and skills training. The Centres are fully accountable to the community through representative local management committees.

The CDRT programme currently covers five provinces. The national office of the CDRT is in Johannesburg and two regional offices were established in 1995, in the Western Cape and Kwa-Zulu Natal. Four Justice Centres are presently in operation: two in Gauteng, one in Kwa-Zulu Natal and one in North West Province. Four new Justice Centres were planned for the latter part of 1999 and CDRT plans to establish at least 25 Justice Centres throughout the country over the next two years.

The Justice Centres receive in the region of 5,000 cases in total per annum, with each centre dealing with an average of 100 cases per month. The success rate is around 77 percent. This figure represents not simply the number of agreements reached but the number of agreements that have been honoured by the parties concerned. Typical cases involve consumer disputes, non-unionised labour disputes, family disputes, child support and maintenance disputes, neighbourhood conflict, land invasions and illegal settlement.

Approximately 10 percent of the cases received have been referred by the courts; 15 percent from the Department of Labour; and the remainder from individuals who approach the Centres directly. Cases referred regularly involve juvenile offenders, child custody, maintenance, access or other family matters. The Justice Centres have also been contracted by the Family Advocate's office to mediate all outstanding divorce cases before the Central Divorce Court. The President of the Central Divorce Court has suspended all such cases pending mediation. The Centres themselves refer cases where organizations and government departments are better placed to deal with the particular problem presented.

In addition to resolving disputes, the Justice Centres also provide workshops in conflict resolution skills training to community based

organizations in their respective areas and the CDRT has begun to offer specific training for certain groups such as students and teachers, Community Police Forum members, prisoners, and women domestic workers. The CDRT and the Kokstad Justice Centre in the Eastern Cape, for example, are currently working on a schools programme at two schools in Kokstad. The project will train about 100 pupils, teachers and community members, and establish peer mediation and community mediation networks at the schools. The school governing body and community members were key participants in the design of the dispute resolution system for this pilot project which it is anticipated will be replicated elsewhere in South Africa.

The CDRT West Rand and Greater Nigel Justice Centres have been awarded a tender to implement a restorative justice pilot project in Gauteng by the Provincial Department of Safety and Security. The project focuses on two areas: youth in conflict with the law, and crimes directed against women, in particular domestic violence. The primary interventions in this project will be victim/offender mediation services, family group conferencing and a training component. The training will be aimed at both the victims and perpetrators of offences and will encompass assertiveness training, anger management and conflict transformation.

TCDRT National Office, the West Rand Justice Centre, the Western Metropolitan Local Council and other community based organizations are exploring a partnership to allow better reintroduction of released prisoners into the community. The project hopes to introduce a prisoner/victim reconciliation programme aimed at reducing repeat offending.

Finally, the CDRT is launching an 18-month project aimed at assisting traditional leaders and democratically elected councillors in the Eastern Cape. The programme includes intervention strategies, training in mediation and conflict management skills, and the design and incorporation of an integrated dispute resolution system. The overall aim of the project is to enable local communities to resolve development related conflicts within the local government sector.

7.8 Community Conflict Management and Resolution (South Africa)

Community Conflict Management and Resolution (CCMR), based in Johannesburg, was founded in 1992 by black South African lawyer Pat Mkhize who had studied alternative dispute resolution in the USA. The founding of the organization followed a workshop held in 1991 by the Black Lawyers Association in which the need for conflict resolution

skills was identified as being essential to South Africa's transformation into a truly democratic society.

CCMR's motto is "conflict in itself does not bring about chaos, but mismanagement of it does". Its objective is to reduce community conflict through appropriate education and training. With initial funding from Rädda Barnen and UNICEF, activities were developed which comprised mediation courses structured around the needs of specific target groups, and human rights training aimed at facilitating an understanding of individual and group rights in order to minimize conflict. The primary target groups were children, out of school youths and students. CCMR points out that around 50 percent of the black population in South Africa is 20 years of age or younger, that most crime is associated with this group, and that the targeting of this group is an investment in the future of democracy in South Africa. Teachers, women's groups and social workers were later identified as essential in developing the link between CCMR and the primary groups.

CCMR has now trained an estimated 3,500 school children, youths, teachers, women, social workers, police officers and community leaders in mediation, conflict management and human rights. In 1995 youths, who had been trained by CCMR and graduated as peer mediators, formed a regional association of youth mediators with an elected executive committee. The aim of the association is to share information and give direction to present and future initiatives. Local associations such as the West Rand Association of Peer Mediators and the East Rand Association of Peer Mediators had already been formed. An Association of Lay Mediators has also been set up by non-youth mediators.

In 1995 CCMR convened an workshop in Johannesburg on "Peace Education as a Necessity for Transformation in Democracy" attended by senior members of government departments, youth organizations, the legal profession, the police, NGOs, religious leaders, and interested parties from around the world. The aim of the workshop was "to explore methods in which peace education can be utilised to promote democracy, a human rights culture and sustainable development within all sectors of society." Following the conference CCMR gained many new recruits from the former resistance youth and student movements and opened up branches in the Free State, Kwa-Zulu Natal and Mpumalanga.

Over the last couple of years, CCMR has suffered from a lack of resources which has meant that the number of paid staff has dwindled from 12 to four. The few police officers who have undertaken the lay mediators course have voluntarily paid for the training themselves. Funding is, however, often given for specific projects. For example, the

British Consulate sponsored the training of 24 youths, most of whom were African National Congress (ANC) supporters, from the violence-torn community of Richmond. According to CCMR, divisions at present are such that separate workshops need first to be held for ANC, Inkatha Freedom Party (IFP)and United Democratic Movement (UDM) supporters respectively in the area.

In April 1997 CCMR organized a workshop in Durban bringing together traditional leaders and youth mediators from Kwa-Zulu Natal. The aim of the conference was to inform youth mediators, who are based mainly in urban areas, of indigenous methods of resolving disputes still being practised in the rural areas, as well as to allow both parties to discuss the pros and cons of various aspects of the systems. As a result, the Association of Youth Mediators has resolved to involve community elders and to continue to learn more about indigenous methods and to incorporate them in their work.

CCMR believes focusing too heavily on Euro/American-style alternative dispute resolution as the means of dealing with conflict in Africa disempowers indigenous institutions and thus the community itself. CCMR's immediate plan is to establish a training centre, "The Emandulo Reservoir for Peace", along the road between Johannesburg and Pretoria. This will combine education and training in conflict management, mediation and human rights with particular emphasis on traditional methods of dispute resolution and restorative justice. This emphasis is reflected in the use of the word "Emandulo" which roughly translates as "olden days". The idea is also to generate local archives, and to research and publish material on indigenous dispute resolution. CCMR intends, furthermore, to include "indigenous African teachings and cultural exchange" as a means of achieving "prejudice reduction" within multicultural communities.

7.9 Centre for Applied Social Sciences (University of Namibia)

The Centre for Applied Social Sciences (CASS) at the University of Namibia has been involved for a number of years in the research and documentation of customary law and of traditional judicial and political systems. A very interesting project is being carried out by CASS in the Owambo traditional authority of Uukwambi.

In May 1993 CASS facilitated a consultative meeting between the Owambo traditional authorities on the harmonisation of certain aspects of their customary laws. Seventy-nine delegates from six of the seven Owambo traditional authorities took part in the workshop, which was held in Ongwediva.[31] They resolved, *inter alia*, that "women should be allowed to participate fully in the work of community courts".[32] Since the late 1980s the Uukwambi traditional authority had already begun to enhance the participation of women in political and judicial decision-making, but the consultative meeting provided an impetus for renewed efforts:

"*Following this meeting, the council of Kwambi senior headmen started an initiative to institutionalize women's participation in customary court and traditional authority structures. The traditional authority called a meeting of all Kwambi headmen during which they were told that a* ***female*** *representative had to be selected in each ward* (omukunda). *This female representative was assigned to actively participate in hearings of customary courts, and generally act as deputy to the headman. She should further encourage other female community members to attend and speak during court hearings and other community meetings. Despite a great deal of initial resistance to this measure by traditionalist headmen, female representatives have now been put in place in most Kwambi* omikunda."[33]

In addition to this newly-created position within the lower traditional authority structures:

"*the senior headman in chief, i.e. the chairman of the Uukwambi traditional council, has appointed a woman to step into his position if he is prevented from attending to his duties. Meetings of the traditional council or hearings of the chief's court are therefore nowadays, at times, presided over by a female chair.*"[34]

After facilitating the Owambo consultative meeting, CASS ran a course in Uukwambi to train community legal activators (CLAs). The initial pilot programme ran from July 1994 to May 1995 and comprised seven weekend seminars which were attended by about 30 women and men of different ages from all areas of Uukwambi.[35]

---

[31] The traditional authority of Uukwaluudhi was absent, but the king of Uukwaluudhi later expressed his full consent to all decisions made (Becker, 1998b: 241).

[32] Becker, 1998a: 270; 1998b: 241.

[33] Becker, 1998b: 235.

[34] Becker, 1998a: 270.

[35] Becker, 1998a: 283; 1998b: 239.

"*The programme to train Community Legal Activators (CLAs) included strong gender components with regard to both substantial and procedural aspects. Overall, it emphasized the need for gender equality in all spheres of life in independent Namibia, and particularly before both general and customary law. Regarding specific norms and practices it focused on legal matters relating to marriage and the family from both the general law and the customary law perspectives. These legal matters included marriage, matrimonial property regimes, marital power (and its then still pending abolition), maintenance and customary norms relating to premarital pregnancy, inheritance, divorce, and violence against women (rape and domestic violence).*"[36]

The programme would seem to have made some impact. The participants who completed the programme, 50 percent of whom were women, now hold new positions within the Uukwambi traditional authority structure.[37] Furthermore, focus group discussions carried out in September 1995 to evaluate the CLA programme revealed that the initial opposition from many ward headmen had dissolved.

"*The majority of men acknowledged, and seemed to accept, the changes in gender relations at (public) community level with independence. They were aware of the example of women who have been elected and appointed to high-level positions in the South West Africa People's Organization (SWAPO) government, which virtually everybody in Uukwambi supports. The argument usually went like this: 'If women can become government ministers, there is no reason why they should not also become traditional leaders'. Never did any male community member put up an argument that preserving 'tradition' would require the exclusion of women from decision-making.*"[38]

The women also linked their newly acquired rights to the political and social changes that were occurring following Namibia's independence in 1990:

"*Many were well aware of the gender equality requirements of the Namibian constitution, and saw the constitution as the main source of their rights to participate in decision-making at community level. Women also referred in many cases to women in leading positions, in particular government ministers, whom they regarded as living proof that women can be capable leaders.*"[39]

---

[36] Becker, 1998a: 271.

[37] "The senior Uukwambi traditional authority has acknowledged the position of CLA as a new office within the structures of the traditional authority"(Becker, 1998a: 271).

[38] Becker, 1998a: 272.

[39] Becker, 1998a: 273-4.

Interestingly, CASS detected among the women, but not the men, a generation gap in attitudes to the rights of women and their participation as traditional judges or leaders. It was also found that:

"*there were more voices among women than among men who alleged that women were usually not able to be leaders. It seems that there are deep-seated beliefs that 'only men are fit for leadership'; many women were reluctant to take on leadership positions due to a fear that such a task may be 'too big' for them.*"[40]

[40] Becker, 1998: 274.

8: COMPARISON OF FORMAL AND INFORMAL JUSTICE

8.1 Differences are a question of degree rather than substance.

The diagram below highlights the major differences between the formal state system and the informal or traditional system. It is important to note first that whereas we tend to define the two systems by their differences,[1] they are not completely different from each other. They share common features, for example, there is a hearing where the alleged wrongdoer and the person wronged are heard and a solution arrived at. The differences highlighted in the diagram are a question of degree rather than substance.[2]

For example:

- Although under the formal system **state coercion** is the main means employed in securing attendance, compliance with the decision, and future "good behaviour", **social pressure** clearly continues to play a strong role.

- **Public participation** does take place under the formal system. Members of public (other than witnesses) are permitted to attend and may participate as jury members. Furthermore, changing social attitudes may impact on the decision-making process, particularly those decided at common law.

- A judge in the formal system may look beyond the **strict rules of law** at the **overall context**, in determining mitigating circumstances which may reduce the penalty imposed.

- Under the formal system in the Magistrates' Courts, where most cases are settled, the process is more **informal** than in the superior courts. This is particularly the case where a person is unrepresented when the magistrate needs to carry out a greater degree of sifting of the evidence normally done by a lawyer prior the hearing.

  A comparison between the systems can, therefore, be based only

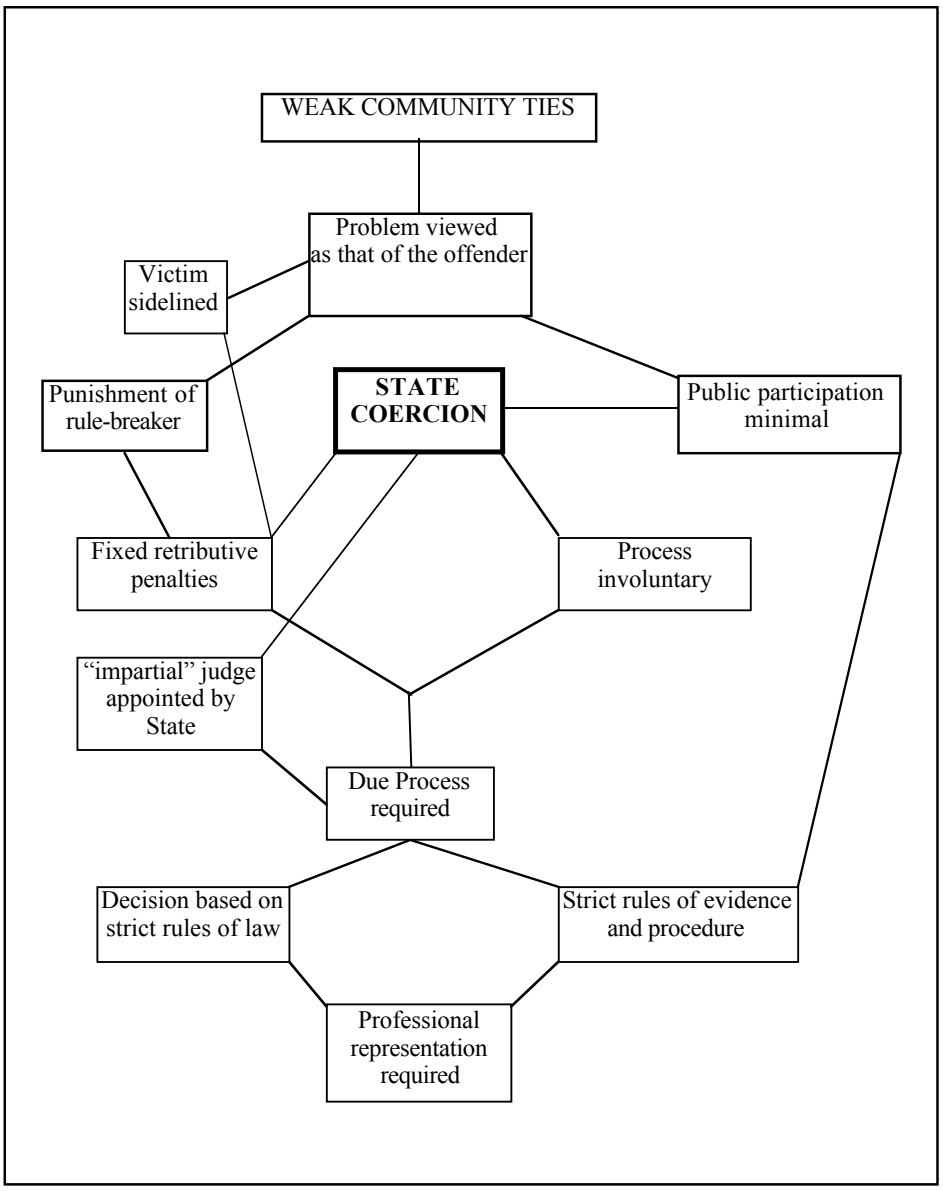
[1] Griffiths, 1988: 130.
[2] Van Velson, 1969.

on generalisations. This is, however, an important point to note. For example, "multiplex relationships" (see 3.1) which exist in small rural communities are not altogether absent in larger urban communities and social pressures from family, friends, colleagues or other peers have been used in alternative dispute resolution:

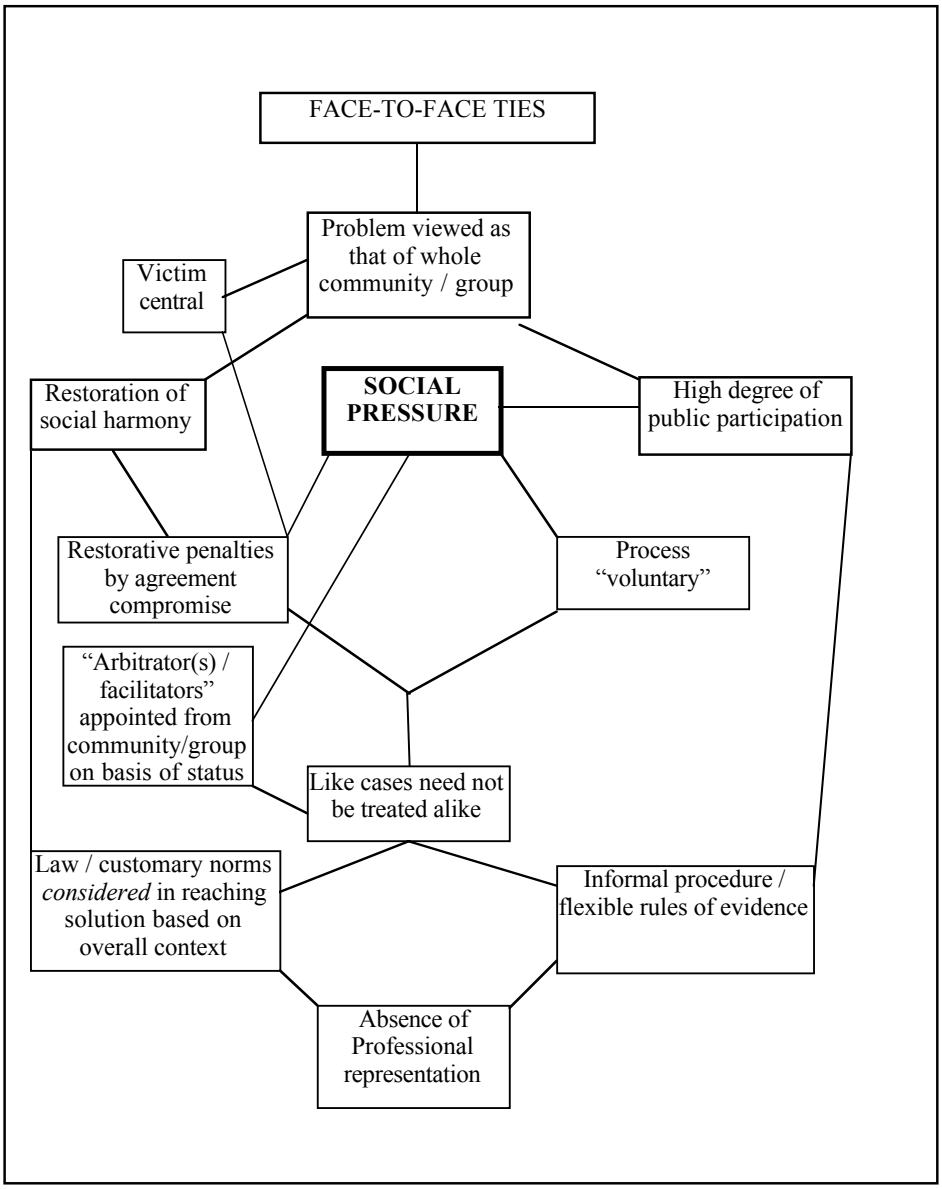
"*In a multiplex relationship, such as husband-wife or parent-child, the aggrieved person may be forced to play down a conflict for the sake of preserving the relationship. On the other hand, where the relationship consists of a single interest, such as a contract, the aggrieved party may simply 'exit' i.e., withdraw from the situation and terminate the relationship completely*."[3]

[3] Bennett, 1991a: 107.

FORMAL STATE SYSTEM



INFORMAL SYSTEM



8.2 Both systems possess separate integral structures.

As the diagram[4] attempts to illustrate, the two different systems possess separate integral structures. Their differences (or difference of emphasis) revolve around the means by which their decisions are enforced. The formal system relies on state coercion; the informal system relies on social pressure.

As already noted, informal traditional systems tend to exist in small communities where multiplex relationships predominate. In industrialized societies, where simplex relationships are prevalent, the relationship may be confined to the dispute itself, and any further relationship ceases once the disputants have had their day in court.

Because the formal system must rely on direct coercion, in the sense that the accused may be physically forced to appear and accept the ruling, and because the accused faces the prospect of a criminal record and penal sanctions including loss of liberty, it is important that strict rules of law are applied by an independent and impartial adjudicator. It is also important that strict rules of procedure and evidence are followed in order to determine whether or not a rule has been broken:

"*where the penalties may be severe and deprivation of liberty involved, there is a great need for the application of clearly established principles contained in proper criminal codes, and for the matter to be adjudicated upon by a team of persons including at least one professionally trained judge.*"[5]

The formality of procedure required under the formal system further limits the scope for public participation as well as making it necessary for the accused to seek professional representation.

Because the informal system can only rely on social pressure and the voluntary compliance of the disputants, it must take account of the broader picture and come up with a solution acceptable to the public as well as the disputants – a solution which restores social harmony. This requires a high degree of public participation and informality in procedure. The informal system must, furthermore, allow greater flexibility in the general application of customary norms so that a solution based on compromise can be reached in any particular case. The result is that "like cases" may not necessarily be treated alike (see 3.12).

---

[4] I am grateful to Professor Wilfried Schärf for suggesting that the relative "sidelining of the complainant" under formal court proceedings is an important difference (of emphasis) from that of informal justice proceedings and one which deserves specific representation in the diagram.

[5] Sachs & Honwana Welch, 1990: 22-3.

Thus, although the characteristics highlighted in the diagram, represent differences of emphasis, these component differences are, within each system, interconnected. In other words, both the formal and informal system possess integral structures, such that, modifying one component feature may have implications for another and affect the integrity of the system as a whole. What is most apparent is that the formal linking of the two systems cannot be achieved without dysfunctional modifications. This will be discussed further in the following chapter (see 9.1).

8.3 Advantages and disadvantages of traditional and informal justice.

The advantages inherent in most traditional and informal justice systems are that:

- They are accessible to rural people in that their proceedings are carried out in the local language, within walking distance, with simple procedures which do not require the services of a lawyer, and without the delays associated with the formal system.

- They employ a non-repressive approach which addresses the underlying causes of crime and solves minor conflicts before they escalate to the point where the state may need to get involved.

- In cases which do not involve serious offences, they provide a very cost effective means by which people can voluntarily choose to settle their disputes, thereby reducing court congestion.

- In most cases, the type of justice they offer – based on reconciliation, compensation, restoration and rehabilitation – is more appropriate to people living in close-knit (multiplex) communities who must rely on continued social and economic co-operation with their neighbours.

- They are highly participatory giving the victim, the offender, and the community as a whole, a real voice in finding a hopefully lasting solution to the conflict. Furthermore, they assist in educating all members of the community as to the rules to be followed, the circumstances which may lead to them being broken, and how ensuing conflict may be peacefully resolved.

- The fact that they employ non-custodial sentences effectively reduces prison overcrowding, may allow prison budget allocations to be diverted towards social development purposes, permits the offender to continue to contribute to the economy and to pay

compensation to the victim, and prevents the economic and social dislocation of the family.

- Their processes keep communities strong, thereby constituting the "social glue" which simultaneously provides social support and social control and reducing the need for large scale state expenditure.

Community based sanctions

The excessive reliance on imprisonment in developing countries in effect discriminates against the poorer members of the society. It is the poor who are unable to raise bail or to pay fines and are forced to "pay" by the loss of their liberty. An accused person unable to raise bail may spend many months in prison before being acquitted. In Africa, it is estimated that as much as 16 percent of the total prison population has been incarcerated in default of the payment of fines (see 9.10). Deprivation of liberty, furthermore, carries with it the inherent risk of numerous other violations of human rights, including disease and death associated with prison overcrowding. Women and children are particularly vulnerable to abuse in prison.

Given the lack of state sponsored social security in African countries, the incarceration of the offender may mean economic hardship for his or her family. Indeed in many developing countries the family may have the burden of supplying food and medicines to the detained relative as well as coping with the loss of income.

The incarceration of the offender may also materially affect the victim's family, to whom the offender would have paid compensation under the traditional justice system. Alternatively, this burden may fall on the prisoner's family, who may face social ostracism and the withdrawal of economic co-operation unless compensation is paid.

Resolving disputes, in appropriate cases, within the community is far more cost effective that resorting to formal apparatus. As already noted, community based dispute resolution mechanisms deal also with what may be regarded as "trivial issues". Minor disputes can thereby be settled before they degenerate into situations where force may be resorted to.

Disadvantages associated with traditional and informal justice

- The compromise reached may reflect the unequal bargaining strengths of the parties. While checks and balances exist, particularly public participation, existing social attitudes may in fact reinforce inequalities on the basis of gender, age, or other status.

- Factors such as the past conduct of the accused, or even that of the accused's family, may be taken into account and compromise the principle of "innocent until proven guilty".

- Traditional leaders may favour certain parties depending on their political allegiance, or power in terms of wealth, education or status, where not to do so might pose a threat to their own authority. They may also be subject to bribery. (To the extent that the informal process is voluntary, however, traditional arbitrators cannot afford to accept bribes on a wide scale. In theory, the lack of public participation and involuntary nature of the proceedings under the formal system actually makes it more susceptible to corruption).

- Under some traditional and popular justice forums in sub-Saharan Africa, corporal punishment may be administered. Although such punishments are usually mild and confined to boys and young men, corporal punishment is, nevertheless, inhuman and degrading treatment prohibited under the Fundamental Rights Chapter of African constitutions. It has been held to be unconstitutional by the formal courts of African jurisdictions who have had the occasion to decide this issue.

- Although parties are not physically forced to appear, it may be virtually impossible for accused women and children to refuse to submit themselves to the traditional process, or to refuse to abide by a decision. Furthermore, in many traditional forums, women do not appear in their own right. They are represented by older male relatives who are expected to make decisions on the woman's behalf.

- Under some traditional systems, particularly in South Asia, there have been examples of extremely brutal punishments being meted out, for example on girls and women from Islamic communities who have been accused of extra-marital relationships.[6]

[6] Some commentators argue that certain traditional justice systems, for example in Bangladesh, have been employed as a means of reasserting male dominance in the face of increasing organization and economic independence among women.

9: GENERAL OBSERVATIONS AND CONCLUSIONS

9.1. Incorporation: existing traditional and informal justice forums should not be incorporated into the formal state system

Ideally, the rationale behind incorporating traditional and informal justice forums into the formal state system of courts is "to combine the virtues of traditional legal institutions (accessibility, informality, economy of time and money, and familiarity of legal norms) with those of the state legal system (impartiality, uniformity of law and procedures and [state] legitimacy)."[1] However, attempts at incorporation in various countries have generally failed. Linking the two systems tends to undermine the positive attributes of the informal system. The voluntary nature of the process is undermined by the presence of state coercion. As a result, the court need no longer rely on social sanctions and public participation loses its primary importance. At the same time, decisions which do not conform to procedural requirements, or which deviate from the strict law in the interests of reconciliation, may be reviewed and overturned on appeal to the higher courts. Procedural requirements invariably become greater and public participation is curtailed.

State coercion

During the colonial period, many traditional leaders were co-opted into the formal administration under the system of indirect rule. This had the effect of undermining the checks and balances that had regulated traditional decision-making:

"*for once African rulers had been co-opted to the colonial administration they had no need to look to their subjects for acceptance or approval. Their authority was supported by the full weight of the colonial state.*"

When the customary courts in Botswana were co-opted:

"*an essential part of the traditional procedure has disappeared: the discussion among the members of the public after all sides of the case have become clear... Popular participation, public control, mediation and reconciliation are no longer keywords for the adjudication of these courts.*"[3]

---

[1] Meschievitz & Galanter, 1982: 48.

[2] Bennett, 1998: 15.

[3] Bouman, 1984: 115.

It is clear that:

"*One of the effects of removing the chiefs reliance on popular support has been to erode the traditional ideal of consensual decision-making in favour of personal power and authority*".[4]

Procedural requirements

The linking of the native courts to the common-law courts in Africa towards the end of the colonial period led to the "gradual anglicisation" of procedure. This kind of creeping procedural formalism has been observed in the primary courts of Tanzania. Like the grass-roots courts in Mozambique and Zimbabwe, the primary courts are intended to resemble informal traditional justice forums in character. However, instead of combining the positive attributes of informality and due process, these courts may end up achieving neither:

"*The different character of the Primary Court would appear to make legal representation superfluous. Instead, the magistrate is expected to assist the parties who come before him to accomplish certain functions which, in the higher courts, are usually performed by an advocate. However, this is not always the case in practice. Some Primary Courts try to operate like higher courts by insisting on formal procedural requirements, thus reducing accessibility, or by assuming the passive role of the judge in an adversary system. This has meant that* ***parties, while being confronted with procedural requirements which are unknown to them, remain without any guidance or assistance, of legal counsel which is not provided at the Primary Court level.***"[5]

Similarly, in India, no formal legal representation is permitted in the *nyaya panchayats*, which are also intended to be procedurally informal. *Nyaya nanchas*, who are expected to preside over informal-style tribunals yet, at the same time, apply statutory rules of law, face a number of difficulties.

[4] Bennett, 1998: 22; Hammond-Tooke, 1975.

[5] Wanitzek, 1990: 256.

"*In the discharge of their statutory functions, the Nyaya Panchas are to administer justice according to the law; but the law they are to administer requires basic training which they do not have. Nor are they to be assisted in the task by trained lawyers or lawmen. They have little option, in strict theory, except to follow the law, which at best they may only partially understand* ***when, in fact, they reach decisions in disregard of the law or on a basis other than law (conciliating when not explicitly provided or deciding on solidary lines), they are liable to social and official criticism. The*** **Nyaya Panchas**, ***at any rate the conscientious among them, may thus be exposed to continuous role conflict.***"[6]

Whereas the *nyaya panchayats* in India and, to an extent the popular tribunals in Mozambique, were creations of the state itself and not co-options of existing informal justice forums, they provide examples of the difficulty faced in attempting to incorporate elements of the informal model within the formal state structure.

"*The pathos of the NP is that they have achieved neither the impartiality of the regular courts (at their best) nor the intimacy, informality and ability to conciliate of traditional* pachayats *(at their best). Instead NP seem in large measure to have achieved a rather unpalatable combination of the mechanical formalism of the courts with the political malleability of traditional dispute processing.*"[7]

The South African Law Commission, has recommended that the community forums proposed in its recent discussion paper should not be linked to the Magistrates' Courts for two "weighty reasons":

"*Firstly, Community Forums would lose the advantages of despatch and informality if their decisions were to be subject to appeal to a magistrate. With all Forums, but particularly in the case of religious family tribunals, an additional loss would be that of autonomy. Secondly, the practical implications of appeal are that these Forums would have to become courts of record, a further inroad into informality, flexibility and despatch. Experience with customary courts has shown that in the absence of a written record an appeal simply becomes a retrial. Since the citizen's right to approach the Magistrate's Court directly is left intact by these proposals, no constitutional harm is done to any party's interest by the absence of a right of appeal.*"[8]

---

[6] Baxi & Galanter, 1979: 384 (emphasis added).

[7] Baxi and Galanter, 1979: 384. See also Hayden 1994, 49.

[8] SALC, 1999b, Annex, para 4.3.

Whereas it would seem, from the available literature, that Mozambique has made the most successful attempt by any Commonwealth country to incorporate the attributes of the informal system into the formal state system, this has had much to do with historical circumstances. Moreover, it has only been achieved by following the standard formula, namely, relegating the informal-style courts to the lower tiers of the state structure and limiting their jurisdiction while largely maintaining the formality in the superior courts. A tension clearly remains between maximising public participation by not adhering to strict procedures on the one hand, and the onus on the state to adhere to strict procedures under a system backed by state coercion on the other. Under these circumstances, there is a tendency for the informal model to give way to the dictates of the state system:

"*What is very noticeable [in Mozambique] is that great emphasis is being placed on the evolution of the legal system in the direction of making it more compatible with what are regarded as international norms of procedure and due process*."[9]

Sadly, those gains have been eradicated since the abolition of the popular courts in 1992. Although there were supposed to be mediation structures set up to take their place, this had not happened by 1999. The current situation is that private individuals have randomly set themselves up as chairpeople of "courts" to deal with disputes and crime. Teachers, shop owners, traditional healers and others have used the vacuum of state organization and policing to perform a service, but also to enrich themselves through the service. They are not accountable to anyone but themselves.[10]

The irony of the attempts to incorporate informal systems into the formal state system is that the state is obliged, in respect of criminal proceedings, to conform with the requirements of due process under the Constitution. Thus, in order to counteract the need for strict procedural rules in the grass-roots courts, the state may heavily restrict their jurisdiction, as happened in Zimbabwe. Under these conditions, incorporation loses much of its significance as any gains regarding, for example, "accessibility, informality, economy of time and money, and familiarity of legal norms", are confined to the most trivial of issues. Indeed, if traditional leaders are co-opted into the system, this could create a vacuum in respect of important issues in their constituency and people unable to afford access to the state system will be denied justice.

---

[9] Sachs & Honwana Welch, 1990: 21.

[10] Presentation by Dra. Ana Pesoa, Head of the Law Reform Commission, Ministry of Justice, Mozambique at the Penal Reform International Kampala workshop, "People's Access to Justice: Towards a People-Friendly Legal System", 18-20 April 1999.

Written customary law[11]

Another problem with formally linking traditional and formal courts is that such incorporation would have the effect of "casting their structure in stone"[12], making them unable to adapt to changing conditions and community needs. This point can be related also to written customary law.

"*to be avoided is any temptation to think of the customary law as static; for it is anything but that, and never was. Even in its traditional setting, it was undergoing a continuous process of modification and development. Although the pace at which change occurred may at times and in places have been slow, change itself was endemic to customary law: the result of a subtle and intricate interplay between the respect for tradition, which gave to the law much of its legitimacy, and the dynamic capacity of any unwritten system of law to adapt itself to new and altered facts and circumstances as well as to changes in the economic, political and social environment.*"[13]

Whereas, so-called customary law has been applied in formal courts since colonial times, it has to a large extent been cast in stone. Thus, developments occurring from below may be rejected on appeal to the higher courts based on written restatements of the law (which in fairness were intended as broad guidelines only). In Zimbabwe during the colonial period, for example:

"*the District Commissioners' courts drew largely upon a body of general, and often* archaic*, customary law found in the rulings of the CAACC [Court of Appeal for African Civil Cases] and its predecessor, the Native Appeal Court. The development of customary law was thwarted as a consequence, and the judicial determinations emanating from these courts became increasingly detached from the evolving realities and economic and political relations within the Black community.*"[14]

African Rights expresses a similar view in respect of the customary law applied in the formal courts of Zimbabwe courts today:

---

[11] See also 1.1 for a discussion on the problem of a written customary law.
[12] Schärf, 1997: 26.
[13] Cotran & Rubin, 1970: xix.
[14] Cutshall, 1991: 13.

"*Not only was the customary law apparently recorded inaccurately by white Rhodesians, but the three textbooks on customary law used by judges and lawyers for reference in cases on appeal in the Magistrates Courts and High Courts fail to reflect the fact that custom differs between different groups and even between families and also that it changes over time. By reducing customary law to a set of rigid and uniform rules and misrepresenting them in the process, the customary law applied in the courts often distorts the custom to such an extent that the results are viewed as handicaps in the search for justice.*"[15]

Given that the majority of the population in most African countries settle their disputes informally, they have been largely shielded from any gaps between the written and living customary law. In the event of incorporation of traditional justice forums into the lower tiers of the state system, however:

"*the greater certainty of the law, which is one of the principal aims of progressive unification… may actually result in greater uncertainty among common folk, and in their estrangement from the courts in which they expect to find redress for their grievances and the kind of justice they can understand.*"[16]

Incorporation

The South African Law Commission has recommended that community forums should not be incorporated into the formal system of courts. A position paper prepared for the Ministry of Justice and included as an annex to the Law Commission Paper on the National Forum states:

"*Research about community courts during the last decade suggests that there is a danger that the issue of community courts could be managed in such a way that it defeats the object of incorporating them into the justice system… The main danger is that a formal-law mind-frame is employed in deciding what ought to happen to informal structures, and in doing so runs the risk of destroying what is good and useful about community courts.*"[17]

The following reasons have been put forward as to why community courts should not be incorporated into the state court hierarchy:

[15] African Rights, 1996: 49.
[16] Holleman, 1973: 602.
[17] Schärf, 1997: 2.

"*(i) It is likely to change quite fundamentally the basis on which these courts win their legitimacy and support, (ii) The bureaucratisation and payment of some members of the community courts and not others is likely to cause division and jealousy, (iii) The bureaucratisation is likely to retard the degree to which the community courts are going to be responsive to community sentiments, (iv) The low criminal jurisdiction might rob the court of its influence and power in civil matters, (v) The procedures may be beyond the reach of the local population, (vi) Communities might continue to form and run courts that suit their needs as parallel or in competition to the newly acknowledged state courts, (vii) The bureaucratisation and formalized procedures will diminish the capacity to combine multiple problems in a holistic manner, (viii) There is likely to be a focus on individual cases rather than inter-linking issues that constitute a problem, (ix) [formalisation of] These courts [will] retard the ability of the community to tackle matters that are related to the cases that they hear, e.g. imposing a curfew on shebeens, (x) The blend of policing decision-making and crime prevention performed by the community courts to date will in all likelihood be jettisoned for purposes of bureaucratic niceties and departmental homogeneity.*"[18]

It has been argued that the effectiveness of informal processes relies on a "cohesive, stable, morally integrated community" which calls on social pressures in persuading parties to reach an amicable solution without resort to formal enforcement. Linking them to the formal process will have the effect of "corrupt[ing]" this process.

"*It is my submission that informal justice processes… should not exist as adjuncts of the court process, rather they should function as alternatives wholly separate from the established court system… the professionalisation/ formalisation of informal justice processes with its resultant production of professionals is tantamount to a negation of the objectives of these processes because not only will the cost of justice remain high but the delays associated with formal adjudication will infect these processes. The mixture of the two would at best be described as a marriage of inconvenience which will not augur well for the realisation of the objectives behind the use of informal processes.*"[19]

[18] Schärf, 1998: 28-9.
[19] Ibokwe, 1998: 467-8.

The incorporation of the informal system into a formal state system is more aptly described as an adoption rather than a marriage. Under such an arrangement, the informality accepted is largely confined to the lower rungs of the system and may be "corrected" on appeal. The implication being that under such tutelage the grass-roots courts will gradually "develop" in the image of their superiors. However, it should be acknowledged that informal systems can play a greater role than merely providing additional courts:

"*We need to remind ourselves that apart from court decongestion, informal processes also aim at providing more accessible forums to people with disputes; reducing expenditures of time and money; speedy and informal settlement of disputes otherwise disruptive of the community or the lives of the parties and their families; enhanced public satisfaction with the justice system; and increased satisfaction and compliance with resolutions in which the parties have directly participated.*"[20]

A consensus appears to be emerging among academic writers that the formal and informal systems should remain separate from each other. That is not to say that both systems should not borrow certain aspects from each other. There seems to be no functional impediment, for example, to the greater use of restorative non-custodial sentences in the formal courts, and to general record-keeping in traditional justice forums. Whether dysfunctions occur will depend on which component element is modified; how it is modified; and, clearly, given that differences of emphasis are being considered, the extent to which it is modified. What is most apparent is that the formal linking of the two systems – invariably attempted by relegating the informal justice forums to the lower tiers of the formal state system – cannot be achieved without dysfunctional modifications.

Informal forums should be kept separate from the formal court system, and only formal courts, with all the necessary procedural safeguards, should try people involuntarily or where the possible punishment is severe. The current situation in Rwanda, however, presents an exceptional case where theory must bow to reality. There is no question that all those charged with offences punishable by imprisonment under the genocide law should be tried with all the procedural safeguards recognized as necessary for a fair trial. The impossibility of carrying this out within a reasonable time, given the sheer numbers of people accused, however, has already been discussed in Chapter 5. In these circumstances, the Rwandan

[20] Ibokwe, 1998: 467.

government has proposed the creation of "informal-style" courts, the decisions of which will be enforced by the state. The courts will not operate under such strict legal and procedural standards as apply in formal-style courts but, primarily for this reason, will be much quicker and cheaper. (See 5.4.)

9.2 Voluntary and non-binding: informal systems should remain entirely voluntary and their decisions non-binding

Having argued that traditional and informal justice systems should not be incorporated into the formal state system, the next question to be addressed is whether traditional and informal systems should in any way be modified or controlled, and if so how. Another consensus issue identified by the South African Law Commission consultations was that attendance at informal forums should remain entirely voluntary and their decisions non-binding. This follows from the understanding that social pressure is at the very heart of the informal system. Importing the element of coercion will distort the process by which compromises may be reached. Except in cases of serious crime, disputants should be free to decide whether they wish to try and settle the matter via the informal system or not. This does not mean that they will not be able to approach the formal courts if they are dissatisfied with the informal decision. But making attendance compulsory and decisions of informal tribunals binding will encourage the informal system to rely less on public participation, and less on solutions aimed at reconciliation.

9.3 Jurisdiction: the jurisdiction of traditional systems should not be heavily restricted but physically coercive measures should be prohibited

Heavily restricting the jurisdiction of traditional and informal justice forums may effectively deny justice to those who cannot afford access to the formal state system regarding certain issues. For example in Zimbabwe the local courts have been denied jurisdiction over both criminal and a number of customary civil law matters, but the cost of transport to and from the upper courts are in many cases prohibitive. It would appear that people continue to use traditional and informal mechanisms. However, if informal justice forums were prohibited from hearing such matters, access to justice would be completely denied.

It has also been argued that such restrictions undermine the legitimacy of informal justice forums as a solver of "problems".[21] "[W]ith minor exceptions, the distinction between crime and civil wrongs is not clearly drawn" under the traditional justice system as "the ultimate object of the process is to redress the wrong committed and restore the parties to their original state."[22] The South African Law Commission has commented that:

"*One of the characteristic features of the community courts have always been that civil and criminal cases flowing from the same set of facts were heard simultaneously. It is therefore accepted practice that the community courts would have jurisdiction with regard to criminal disputes. There is however great difference of opinion as to the scope thereof. Taking on criminal cases essentially means taking on the responsibility of determining guilt and innocence, an adjudicatory function which would imply extensive coercive control and would require extensive training. A great amount of regulation will be needed and there should be clear boundaries about the type of cases dealt with and limits on the types of sentencing which they are capable of imposing. Since the civil and criminal aspects of dispute resolution in community courts are however so completely interlinked, it would not seem possible to discuss one aspect without the other.*"[23]

Many informal justice forums settle criminal matters without the need for extensive coercive control. Coercive measures are occasionally required for a number of reasons: because of the serious nature of the offence, because the accused refuses to submit him or herself to informal arbitration, because the victim wishes to press formal charges, because an agreement cannot be reached informally, or because an agreement is broken. In such circumstances formal state courts are unquestionably the appropriate forum in which to settle the matter. It is imperative that strict rules of law, procedure and evidence be applied when the accused is forced to appear or when the offences involved are serious.

It is notable that the South African Law Commission, having identified the consensus that informal forums should remain entirely voluntary and their rulings non-binding, conceded that the question of jurisdiction no longer presented a problem. Provided informal forums are voluntary, then the flexible informal type of procedure followed cannot be regarded as unfair.

---

[21] Schärf, 1997, 24.
[22] Wanitzek, 1990: 258.
[23] SALC, 1997: 16.

"*One can go so far as to say that in an African tribunal the individual probably had a better guarantee of procedural fairness than in a Western court, for African tribunals sought a reconciliation of the parties approved by the community. Because reconciliation required a slow but thorough examination of any grievance, litigants had every opportunity to voice their complaints in a sympathetic environment. By comparison, the highly professionalized Western mode of dispute processing is calculated to alienate and confuse litigants.*"[24]

It may be noted that traditional and informal justice forums have not only the power of social pressure to secure attendance and compliance with an agreement, but nowadays there is also the threat of litigation and prosecution in the formal courts. In these circumstances informal justice forums which cannot function without physically coercive measures are unlikely to enjoy legitimacy and so are no longer desirable. Thus, traditional and informal justice forums should be allowed a wide jurisdiction in terms of both civil and criminal matters save only in cases involving the most serious offences such as murder and rape. This broad jurisdiction must, however, go hand in hand with the absence of physically coercive measures. What this means in practice is that the state should make it an offence for traditional or informal adjudicators to order physically coercive punishments, to try a person under duress or *in absentia*, or to try a person for serious offences without leave of the court (acting under prescribed guidelines).

9.4 Legal representation: formal legal representation before traditional and informal justice forums should not be required

The threat of litigation or prosecution in the formal courts may be used as a sanction against non-attendance, or non-compliance with an agreement. For example, the fact that the Madaripur Legal Aid Association (MLAA) provides legal representation before formal courts makes the threat of litigation real. Nevertheless, the MLAA is decidedly against lawyers acting as lawyers in *shalish* (mediation meetings):

"*the Association persuasively argued that the presence of lawyers alters the whole dynamic of a* shalish *in undesirable ways. By interjecting, they become the focus in the dispute at hand. In addition, community awareness of lawyers attending a given session might well open the door for one or both sides to bring attorneys to other mediations in the future.*"[25]

[24] Bennett, 1998: 26.
[25] Golub, 1997: 58.

It has been noted that traditional *shalish* have sometimes suffered from the intervention of legal touts "individuals who capitalize on a bit of legal knowledge and secretly sell their influence" and who may "steer the shalish toward a certain direction."[26] Africa Rights records the observations of a traditional judge in the local courts of Zimbabwe that the presence of lawyers intimidates not only an unrepresented party, but also those expected to reach a decision:

"*Lawyers, you know, sometimes offset things. We feel that lawyers complicate the whole system and the cultural structure that we know. With our limited education, we cannot argue in court with lawyers. Sometimes having heard that there is a lawyer, someone will just admit something in order not to be worried and to go home.*"[27]

Lawyers are not a necessary feature of the informal process as the work which is usually performed by lawyers under the formal system and which is necessary to the informal process is carried out by the informal judge. While it is not clear whether traditional justice forums generally prohibit formal legal representation, this is the practice in the *lok adalat* in Rangpur, India, and in the street committees in South Africa.

The intervention of lawyers may hinder a compromise solution by transforming the broad problem to fit narrow legal categories which attract winner-take-all outcomes. Thus "the disputant may no longer view the original problem as important, since a central tenet of transformation theory is that a transformed dispute can actually become the dispute."[28] This is by no means a slur on lawyers, but a recognition of the fact that what may be entirely appropriate under a formalized system based on strict rules of law may be highly inappropriate under informal system based on compromise. Both systems have their merits and these may vary according to factors such as the nature of the dispute and the relationship between the parties.[29]

---

[26] Golub, 1997: 21.

[27] African Rights, 1996: 29.

[28] Felstiner, Abel and Sarat, 1980: 650.

[29] "The preference of litigants for one dispute resolution mechanism relates to the nature of the conflict, the attitudes of and power relations between the parties, the interests of the parties to resolve the dispute, their familiarity with and knowledge and understanding of the procedures, as well as the degree of external coercion on the parties to initiate particular proceedings. Furthermore, characteristics of the various dispute resolution mechanisms such as the formalities, the transparency, the costs, the delays, the public sphere, the role of a third party, the type of decision and the possible influence of the parties on the outcome of the dispute all have a bearing on the choice for a particular type of dispute resolution mechanism" (D'engelbronner-Kolff, 1998b: 196).

9.5 Arbitrators: the state should not interfere with the "appointment" of informal arbitrators within a community

It is often assumed that informal arbitrators have a greater tendency to deliver decisions which discriminate on the basis of social status than impartial judges. However, it can be argued that the very fact that the community recognizes the informal arbitrators, that the contestants have chosen to submit themselves to their adjudication, and that these arbitrators know them and often know them well, "gives community justice part of its power to shame, to censure and to exert re-integrative shaming."[30]

"*The informality of local courts may not continue to be effective in securing justice when the judges are no longer selected from among the local community and are no longer conversant with the people, with customary law and daily practice, and with what litigants expect from their courts. If other types of persons; less knowledgeable and thus less interested in reconciling the parties, are appointed to these courts, the same looseness of procedure may not be conducive to justice and it may be necessary to lay down strict procedural rules.*"[31]

In addition, informal justice forums rely on social pressure to enforce decisions. If the adjudicators are appointed from outside the community, and particularly if their decisions are not in line with prevailing social attitudes, external enforcement may be required. *Nyaya panchayat* judges in India, for example, although resident within the (broad) area of their jurisdiction, were only regarded as legitimate by the specific community from which they came. (See 6.2).

Legislating that adjudicators must be elected by popular vote may be seen as an unwelcome interference by the state. Communities may either defiantly elect existing adjudicators or, as occurred with the community councillors in South Africa in the 1980s, boycott elections and continue to use "non-collaborating" informal justice forums. In any case, elections alone will not alter the profile of adjudicators. For example, where street committee members are elected by the community in South Africa, they reflect existing social attitudes and women and young people are barely represented.

[30] Schärf, 1997: 13.
[31] Gluckman, 1969: 25.

It would seem that, although the MLAA in Bangladesh does not organize elections to determine membership of its mediation committees, it recognizes the danger in appointing panels which are very different from those that would result from an election. Thus, the greater authority and influence of elder men, particularly on other men who make up the vast majority of the "accused", needs to be balanced against the desire to encourage a positive change in social attitudes by gradually increasing the presence of women on the committees.

"*The members of the Students Association… became critical of their elders' administration and wanted a new panchayat to be constituted with younger married men (in their 40s). They also argued that the present elders had been in office for the last 15 to 40 years and they were getting old, and that some young men should gain experience in village administration so as ultimately to replace them. They wanted the elders to remain in an advisory capacity and help the young men run the village. The elders gave in and a new panchayat was created. A year later the young men returned the positions to the previous panchayat elders, because they had found that they could not exercise authority over the villagers due to their youth and inexperience.*"[32]

This example from the rural village of Anbur, Tamilnadu, South India, in 1985 clearly illustrates that although social attitudes cannot be changed completely overnight, attitudes are changing. Chiefs and elders must move with popular attitudes in order to retain their authority. If they cannot do this, their court "ceases to be a viable and legitimate institution, and disputants will go elsewhere with their problems."[33] Even where coercive measures were available to enforce unpopular decisions:

"*a chief's authority was judged by the extent to which he followed, rather than led, the wishes of his people. He depended upon them, and as a sane and responsible person, he would not risk dissatisfaction and unrest amongst his people… [He] would settle rather than decide, appease and reconcile rather than enforce.*"[34]

[32] Vincentnathan, 1992: 77.
[33] Bush, 1979: 272.
[34] Holleman, 1948: 53-4.

During the colonial period in Mozambique, for example, those chiefs who collaborated lost their authority. As a result in areas liberated under the independence struggle, new tribunals were established bypassing their leadership. The democratically elected tribunals in the liberated zones were not imposed but created by the people. The collapse of traditional authority also assisted in changing traditional attitudes towards women. Even so, this change continues to be a gradual process. It is important to note that FRELIMO did not impose but encouraged the election of women onto the popular tribunals.

Attempting to impose change by coercion will not in itself change social attitudes and may undermine the legitimacy of informal justice forums. The people's courts in South Africa which ignored social attitudes regarding the superior status of adult married men, for example, became more coercive in nature and lost support. Provided informal systems remain voluntary and participatory, however, changing social attitudes can transform the normative aspects of the informal system without undermining the democratic structure of the system itself.[35]

The aim of intervention should be to work with the full support of chiefs and elders and secure incremental changes from below. It would be a grave mistake to force radical changes on unwilling communities. For example, some kind of advisory positions representing women, children and other groups could be established in forums where chiefs and elders act as traditional arbitrators. The representative for women, for example, could be asked by the chief to sum up the position of the women who have spoken during the dispute resolution discussion and generally present an opinion on the case from the group's perspective before any decision is made. Any woman present should be able to state any personal reservations to the general opinion.

The consideration of various alternatives to improve the participation of women in decision-making should be facilitated by providing a forum for communities to voluntarily come up with their own solutions. The experience of Uukwambi, Namibia, serves as an example of how affirmative action may be successful, provided that it is instituted from within (see 7.9).

[35] Sachs and Honwana Welch, 1990: 24.

9.6 Human rights education and gender awareness training must be an integral part of any assistance to traditional and popular justice systems. NGOs which provide mediation services, legal aid and legal advice, provide women and other disadvantaged groups with a choice. They can increase women's negotiating power and assist in transforming social attitudes.

The fact that, under traditional justice, decisions are based on agreed compromises between the parties with the approval of the community, means that less powerful members of the community may be at a disadvantage. Discrimination, for example on the grounds of sex, age or marital status, may be reinforced by men and women alike. Human rights education and gender awareness training must, therefore be an integral part of any assistance to traditional and popular justice systems. Greater participation of women and other disadvantaged groups in the decision-making process should be encouraged.

"*Women who do not conform with the prevailing stereotypes have often been ostracized by men and women alike. But if outspoken women now move into accepted leadership positions, including those which are part of the traditional authority structures, this may encourage other women to become more assertive and men to accept confident women. Therefore, promoting women to positions in traditional authorities may indeed lead to changes in gender relations in rural communities*".[36]

Nevertheless, under informal arrangements simply outlawing discriminatory practices or imposing quotas from outside, without addressing the underlying beliefs, will not hasten a change in attitudes, and may in fact have the opposite effect.

"*It would… be erroneous to assume that the problems that women face under customary law could be solved by abolishing customary law and imposing legislation which closely defines the rights of women and the obligations of society to eliminate discrimination. This course of action appears to be neither realistic nor sensible. Even if it were technically possible, abolishing customary law would not necessarily alter people's practice.*"[37]

[36] Becker, 1998a: 276.
[37] Becker, 1998a: 277.

The aim must be to tackle the root causes of discrimination and not simply its consequences. Real change can only occur by allowing those concerned to make the decisions for themselves.

"*While it is doubted that legislative measures, for example, on minimum quota for women's representation in traditional authority offices, would succeed; a variety of non-legislative measures should be directed at the traditional authorities: They may range from urging them to involve both men and women through strongly worded recommendations, to facilitating an exchange between different communities*".[38]

An example of such an exchange between different communities was facilitated by the Centre for Applied Social Sciences of the University of Namibia, in Ongwediva in May 1993 (see 7.9).

It has been argued that "if mechanisms of popular justice… are in operation and they solve community problems in a satisfactory manner, then instead of replacing them, outside knowledge should attempt their consolidation."[39] Community structures should not be replaced but rather certain "alternatives" should not be discouraged.

It has been argued that certain groups, particularly women, may be at a disadvantage under the informal system and that although social attitudes may be changing, this process is gradual. It has further been recognized that although women may take their problems to the formal court system if they are dissatisfied with an informal decision, the cost may be prohibitive and the solution unsatisfactory in that it may not lead to reconciliation between the parties. Furthermore, women, tend to find the prospect of taking such an initiative daunting. A research project covering seven southern African countries, for example, found that women invariably preferred to approach traditional community based structures, with which they were familiar:

"*Generally, women, especially those with little or no formal education, were confronted with a number of problems if they approached the state courts. Apart from logistical problems such as a lack of money and transport, women felt the state court situation was intimidating due to its formal procedures and predominantly male court personnel.*"[40]

[38] Becker, 1998a: 279.
[39] Nina, 1993: 136.
[40] Becker, 1998b: 223.

Both the Madaripur Legal Aid Association (MLAA) in Bangladesh and the Ugandan Association of Women Lawyers (FIDA) in Uganda were established in the 1970s primarily to provide legal aid and free representation before formal courts for the poor. However, both organizations manage to settle around 80 percent of cases without going to court. FIDA deals specifically with women and has now established four branches – one in each of the four regions in Uganda. MLAA's work is not confined to women but, around 80 percent of those who approach the organization are women.

Organizations such as MLAA and FIDA provide women with a choice where the traditional system is not operating in a satisfactory manner. The availability of such a choice has in itself had an effect on dispute resolution. For example, the leader of one village described instances of "husbands ceasing demands for dowry simply by virtue of their wives threatening to go to MLAA."[41] In Uganda, women never go away empty handed from FIDA's offices. There is either a letter inviting the other party to the dispute to come to mediation or a piece of paper stating the (formal) law. The latter may be sufficient to redress the inequality in negotiating strength and allow the parties to settle the dispute without third-party mediation. As one advice worker noted "women do not feel that they have even come to FIDA unless they leave with a piece of paper."

In the long term, such organizations may help transform social attitudes which adversely affect decisions under traditional systems. Knowledge of equal rights by both men and women alike will give women greater negotiating power before traditional justice forums. Most are generally unaware of such rights. Legal aid organizations such as MLAA and FIDA can enhance this process:

- By informing women coming to their centres of their rights and their right to take a case to the formal courts if mediation fails. As these associations offer legal aid, this knowledge cannot simply be brushed aside by the other party to the dispute under the informal system.

- By conducting mobile clinics in major towns where neighbouring villagers can more easily travel.[42]

- By conducting legal education and rights awareness seminars.[43]

---

[41] Golub, 1997: 30.

[42] FIDA conducts mobile clinics but does not have sufficient resources to carry this out on the scale it feels is desirable.

[43] FIDA normally combines such seminars with its mobile clinics.

In addition, the MLAA offers training in mediation to other NGOs and FIDA trains individual women within the community so that they can be turned to when basic advice is needed.

Legal aid organizations such as the MLAA and FIDA are particularly useful because they offer not only the possibility of mediation but also access to the formal courts. As has been argued, traditional systems are not static and chiefs and elders must remain in tune with popular attitudes in order to retain their authority. If they fail to do so, then people may vote with their feet and choose other available forums.

9.7 Self-regulation: some form of self-regulation of traditional and informal justice systems should be considered which might also carry out functions such as training and research

It has been suggested that minimum regulations be applied to traditional and informal justice systems, by making it an offence for traditional or informal adjudicators to order physically coercive punishments, to try a person under duress or *in absentia*, or to try a person for serious offences such as murder or rape without leave of the court (acting under prescribed guidelines).

It has generally been argued, however, that informal and traditional systems should operate independently of state coercion. An independent non-statutory self-regulatory body, such as a community justice council could be set up, in a similar way to press councils which provide self-regulation for the printed media. The following are suggestions of ideas which might be explored further.[44]

Community justice councils could include representatives of informal and traditional adjudicators as well as members from appropriate backgrounds, perhaps nominated and elected by traditional adjudicators from subcommittees established in regional areas.

Ideally, once such a network of members has been established – perhaps with the assistance of external funding – and once the proper roles of a community justice council have been clearly determined, it could become a constitutional, but not a statutory, body. This could be provided with government finance, but its independence could be guaranteed as is the case with Law Commissions and Ombudsman offices in some countries. It should not be forgotten that the vast majority of people obtain justice through informal and traditional systems, and while these systems should remain largely independent of state control, they deserve governmental support.

[44] See 7.3 for some tentative proposals as to how informal forums might be controlled by ombudsmen, outlined in a recent Discussion Paper by the South African Law Commission.

The first step would be to provide an opportunity for traditional and informal adjudicators to discuss the desirability, composition and possible roles of such a council. Possible roles might include:

- research and publication
- monitoring
- refinement of a code of ethics
- a complaints mechanism (although without adjudication on individual cases)
- annual reports which publish findings
- information seminars for magistrates and the police
- training for adjudicators (for example, mediation techniques, documentation, referral skills, ethics, human rights and gender awareness, statutory limitations)
- workshops (to discuss problems and to gather and exchange information)
- public awareness campaigns
- advice and referral desk for the public
- drafting of proposed constitutional amendments

Such a programme would obviously require a number of paid staff which may raise the sensitive issue of the non-payment of traditional adjudicators. Even honorary payments may prove costly because of the large numbers involved.

"*The fears are that if traditional leaders are paid directly by central government, their role as local leaders might be compromised. They might more and more be seen as tools, agents or even puppets of central government. The view of traditional authorities as local level institutions would be enhanced by the payment of traditional leaders by or through local institutions. This would also be in line with principles of decentralization.*"[45]

Similar considerations have been raised in connection with the fixing of pay and conditions of service for traditional leaders, councillors and other representatives.

"*It is important that the fixing of such remuneration be shielded from any possibility of political manipulation. It should be done by an independent body as is the case with judges whose conditions of service are recommended by the Judicial Services Commission.*"[46]

[45] Hlatshwayo, 1998: 141.
[46] Hlatshwayo, 1998: 141.

9.8 Greater procedural flexibility in the Magistrates' Courts should be considered

Formal state court systems could be modified to incorporate certain features of the traditional system, and state courts could refer certain cases to existing informal and traditional mechanisms.

In principle, there is room for a greater degree of procedural informality in Magistrates' Courts as compared with superior courts. Magistrates court decisions are not binding on future cases and may be appealed. Moreover, many people may be unrepresented before the Magistrates' Court. In Tanzania, for example, the Primary Court Manual states that the magistrate "should not rely entirely and in every case on the parties only; often one of the parties does not realize how important it is to his case to call a certain witness, or produce a certain document, and the court should then itself take action…" However, it has been argued that some magistrates in Tanzania have not applied these procedural principles in the intended spirit and that women are particularly affected by this failure:

"*…by trying to behave like superior courts, Primary Courts actually perpetrate a certain injustice in the name of the law. Although the procedural principles [above] are theoretically, equally important for men and women, in practice it is clearly women who are more dependent on the courts' correct adherence to these principles and as our research shows, it is women who suffer more from the courts' departures from them.*" [47]

9.9 Awareness of informal courts: Magistrates courts and the police should be made aware of existing informal justice mechanisms and refer appropriate cases with the agreement of the disputants

Magistrates courts and the police should be made aware of existing informal justice mechanisms and how they operate, and should refer appropriate cases to them, with the agreement of both parties. Either party should be allowed to reinstitute proceedings if the informal process fails. In these circumstances, attendance in the informal mechanism may remain voluntary and the decision non-binding.

"*If disputants are impelled to try mediation before they can use the court, mediation centers may become meaningless at best and, at worst, another hurdle between the citizen and his day in court.*"[48]

---

[47] Wanitzek, 1990: 256.

[48] Merry, 1982: 40.

9.10 Greater use of alternatives to custody: formal courts should make greater use of alternatives to custody which are based on the principles of restoration and rehabilitation

Whereas it might be difficult for the formal state system to borrow procedure from the traditional system without disturbing the logic of the formal system, there does not seem to be any reason it cannot look to the traditional system as regards sentencing.

In Western countries the emphasis on more and more imprisonment is partly linked to public calls for a crack-down on crime. However, in African societies, where public perception of imprisonment as a solution to crime is far from favourable, there would seem to be no reason for its widespread use and alternatives should be sought. The greater use of the remedy of compensation and restitution typical of traditional justice is likely to be acceptable to the public.

"*African countries have been giving serious thought to alternatives to imprisonment, arguing that the more traditionally accepted measures of restitution, compensation and [affordable] fines be adopted as the main penal measures in place of imprisonment, particularly as the African cannot appreciate a treatment like imprisonment which, if it benefits at all, is benefiting only the government, in total disregard of the victim and the African need to maintain social equilibrium… When it is realised that people who are sent to imprisonment in default of payment of fines can be as much as 16 percent of the total prison population, then the excessive reliance of African courts upon imprisonment becomes evident*"[49]

The remedy of compensation and restitution might be combined with, for example, community service, which could be supervised by community courts;[50] or attendance at educational programmes designed to assist certain kinds of offenders.

In appropriate cases, particularly where juveniles or first offenders are concerned, prosecution could be avoided in favour of measures such as withdrawing charges on the condition that compensation and restitution is made or community service is performed within a specified period. This is in keeping with traditional justice in the sense that a written record of a "conviction", which may be disclosed to third parties, is not held.

[49] Ayedemi, 1994: 53, 61-2.
[50] Schärf, 1997: 31.

Governments in Africa are coming under increasing attack from the media and the courts for the appalling conditions in overcrowded prisons and the high rate of deaths associated with these conditions. In Kenya, for example, any lengthy sentence is labelled a "death sentence" by the press. In Zambia, a High Court judge who recently visited Lusaka Central Prison remarked that, the deplorable conditions and overcrowding in the prison were tantamount to "torture". According to a recent report:

"*Mr Mwansa [permanent secretary in the Ministry of Home Affairs, responding to the outcry] said the government has been unable to improve conditions in all the prisons across the country, built in colonial times over thirty ago, because of lack of resources. As a stop gap measure, he said the judiciary will be encouraged to 'introduce non-custodial sentences for minor offences as a way of decongesting the prisons. From now on only serious felonies will require imprisonment.' Mr Mwansa said, in addition, the government in next year's budget will 'endeavour to allocate capital funds for prison reformation'.*"[51]

But non-custodial sentencing should not be looked upon as a stop gap measure merely to reduce congestion while further prisons are being built. The solution to the problems associated with prisons in Africa cannot be more of the same:

"*In Africa, where nearly all countries have accepted that their prisons are monstrosities, places where human rights are abused and poverty and disease exacerbated, there is a genuine search underway for a new and better approach to dealing with people who are convicted of crime. African penal reformers can move forward from that realization, resisting the blandishments of the technical assistance officers and advisers to have a prison system modelled on the one in Denmark, a probation service just like England's; a court system like the one in the United States, all housed in new and costly buildings with the latest technology provided under some aid programme but too expensive to maintain. The way forward in developing countries is to find a system that is just and fair, relevant to the economic circumstances and expectations of the people and that does not consume all the available resources so that there is nothing left for the real job of preventing crime.*"[52]

Vivien Stern advocates the search for initiatives "based on the principles of repairing the harm through realization, restitution, apology and reacceptance."

---

[51] "Prisons Horror", *Africa Law Review*, No. 74, November 1998.

[52] Stern, 1998: 341.

9.11 Family group conferencing (FGC), which employs aspects derived from traditional justice systems, has been introduced successfully by NGOs in South Africa as well as a number of non-African countries. Any proposal for legislating state controlled FCG needs to take into account the existence of traditional and informal mechanisms

FCG legislation, designed to divert juveniles from the criminal justice system, was first introduced in New Zealand in 1989. Similar schemes are now being tried in Australia, Canada and the United Kingdom.[53] The catalyst for reform in New Zealand was apparently a "hard-hitting report" presented by Maori leaders who were "frustrated with the way in which the system disempowered communities in dealing with their children."[54] The FCG in New Zealand has been largely based on the traditional Maori system.

"*A youth justice co-ordinator convenes a meeting of all the people who are important in the young person's life - family, friends and teachers. The victim of the alleged offence, and/or a representative of the victim, and a police representative are also present. The aim of the meeting is to discuss the incident and to decide how best to respond to it. The young person must accept responsibility for his or her actions; an agreement is then negotiated through consensus decision-making. It might require the offender to apologise; to work in the community or for the victim; to make reparation; or to make a donation to a charity or whatever the family feels is appropriate. The family group conference has been successful in that in over 95 per cent of cases agreement has been reached, with 84 per cent of young people and 85 per cent of their families reporting satisfaction with the result. However, only 49 per cent of the victims expressed satisfaction. The number of young offenders coming before the courts has dropped from 13,000 a year to 1,800. In the first five years of the new legislation, the number of juvenile prosecutions fell by 27 per cent.*"[55]

[53] Skelton, 1998: 100.
[54] Skelton, 1998: 100.
[55] Skelton, 1998: 99-100.

The fact that only 49 percent of the victims – as compared with around 85 percent of the young people and their families – expressed satisfaction with the FGC may be an indication that the "agreement" reached has not been sufficiently confirmed. It might be assumed that although 51 percent of the victims were not satisfied with the FGC that they, nevertheless, decided that the formal system would give them even less satisfaction. The degree to which the victim has a right to reinstitute proceedings, however, may be an important factor in reaching a compromise which reconciles both parties. The following describes how the FGC works in practice:

"*A former probation officer called Matt Hakiaha, a Maori, who then became a Youth Justice Coordinator described one of his cases to David Hayley of CBC. Four boys had broken into a school, done some drinking and then accidentally set fire to it, doing extensive damage:*

"The whole Family Group Conference in this case took about three days. The first day was mainly focused around feelings, feelings of animosity, where teachers, where parents were saying, 'Look, you burned our school down, and our kids have to be catered for now, and they can't be, so they've had to build temporary classrooms.' I've got quite a clear picture in my mind of these four offenders. They were sitting there, so unmoved, so unemotional. And then this young girl walked up with the scrapbook that she had kept in her classroom, and it was half charred. About one-half was just burned to a crisp, and the other half was charred. And she came and sat in front of these four boys, these four offenders, and she said, 'This is all I've got as a remembrance of my brother, because this scrapbook is photos of my family and a photo of my brother, and he died not so long ago, about a year ago, and that's all I've got now.' And then you saw the tears trickling down these four boys. The impact that was made by the victim was amazing. And I wonder whether a court would do that. I wonder whether a court process would allow this emotion to come out."[56]

This case also serves to illustrate that fairly serious crimes can be dealt with successfully outside the formal court system through the processes of reintegrative shaming and reconciliation.

[56] From *Prison and its Alternatives*, transcript of CBC programme, 1996, p. 64, cited in Stern, 1998: 330.

In 1995 the National Institute for Crime Prevention and Reintegration of Offenders (NICRO), a South African NGO with branches in 20 areas across the entire country, began to pilot FGC as one of its ways of diverting juveniles from prosecution. Other NICRO diversion programmes include youth empowerment schemes (a six session life skills training programme), pre-trial community service, and the journey programme (outdoor experiential learning).[57] The Inter-Ministerial Committee on Young People at Risk, which was established to "manage the process of crisis intervention and transformation of the Child and Youth Care System over a limited time period" has also commenced a pilot project in Pretoria on FGC. In November 1994, the Juvenile Justice Drafting Consultancy (JJDC) based at the Institute of Criminology, University of Cape Town, had published proposals for a comprehensive juvenile justice system in South Africa in which it was "envisaged that the majority of cases will end up being handled by a Family Group Conference."[59]

The JJDC noted that the flexibility in procedure of the FGC would allow variations according to the needs of the accused and the victim, as well as the cultural backgrounds of the parties:

"*The most important aspect of the Family Group Conference concept is… that the family and the people affected by the incident have real decision-making powers. These participants are not simply there to rubber-stamp ideas and suggestions made by state officials, and for this reason the draft is very careful not to place too many restrictions on their decision-making powers. This plan also allows for cultural diversity, so that the custom of the family group can be woven into the decision-making process.*"[60]

Interestingly, the family of two boys participating in a family group conference organized under the Pretoria pilot scheme, decided that the family of one of the boys who had stabbed the other would pay for his medical bills and a new shirt. The new shirt was to be presented during a feast at the offender's home where chicken would be cooked and shared.[61] The sharing of food or drink as part of the reconciliation process is very common among African societies.

[57] SALC, 1997b, para 7.6.
[58] SALC, 1997b, f.n. 2 and 60.
[59] JJDC, 1994: 17.
[60] JJDC, 1994: 22.
[61] Unicef Innocenti Digest, 1998: 11-12.

The JJDC proposals recommend that the person performing the role of mediator, the Youth Justice Worker, should be a Department of Justice employee, but should "be drawn from the community which they are likely to serve." The JJDC further suggests that Youth Justice Workers need "not necessarily have to be qualified social workers or lawyers".Their main skills will be "mediation and the ability to communicate effectively with young people." The JJDC proposals were drawn up prior to the current debate in South Africa concerning traditional and informal justice systems and the current or future role of informal community structures is not provided for nor discussed. The JJDC writes, however, that:

"*In rural and village areas where few young people are arrested, it might be possible to use Youth Justice Workers on a pro-rata basis - calling them only when a young person is arrested. This system would ensure that children in urban or rural areas would be offered the same assistance.*"[62]

Part of the reason why few young people are arrested in rural areas may be attributed to the existence of traditional justice systems. If such a system is working in a satisfactory manner then there seems to be no reason in principle why the courts should not refer the case to the traditional system. The difficulty in referring cases to informal mechanisms relates to the lack of knowledge of suitable forums on the part of the magistrate. This requires general research and monitoring in relation to existing traditional and informal systems and awareness training for magistrates. Paying members of the community to deal with problems which may be successfully resolved by traditional judges who are not paid may cause resentment.

The South African Law Commission, which is currently in the process of developing recommendations for a composite juvenile justice system, notes that *ad hoc* examples of diversion by referring cases to traditional structures or street committees already exist[63] No opinion is given, however, as to whether this should be allowed to continue or should be expanded.

[62] JJDC, 1994: 30.
[63] SALC, 1997b, para 7.6.

It has been noted that the multiplex relationships which exist in small rural communities are not altogether absent in larger urban communities and social pressures from family, friends, colleagues or other peers may be used in alternative dispute resolution. It has also been noted that in most traditional societies, less serious crimes go through a number of stages of dispute settlement, usually commencing with just family members, to find a solution before turning to the more public forum. Although family pressure may, in general, have a particularly strong influence on juveniles, there is no reason in principle why the FGC could not be extended to people over the age of 18, provided family and group ties are put to use. An initial extension of the FGC might eventually be piloted with first offenders.

State controlled[64] pre-trial diversionary measures from prosecution which do not involve punitive sanctions, such as corporal punishment or imprisonment; where attendance is voluntarily agreed to by the accused and the victim; where solutions are based on agreement by the parties; and where proceedings are confidential and not admissible in the formal courts if the process fails and the victim decides to reinstitute formal proceedings, may be successfully based on the informal traditional approach of restoration, reconciliation and reintegration. In these circumstances, provided that charges have either not been laid or have been withdrawn to allow the diversion to take place, constitutional due process obligations by the state such as strict evidentiary rules and legal representation need not apply.

It may be noted that pre-trial diversion on the model outlined above, to which the FGC approximates, is to be distinguished from the incorporation of informal structures into the existing formal system. The family group mechanism does not form part of the hierarchy of courts, but rather, exists alongside the court system as an alternative. The formal court may allow a case to be diverted to a FGC and, if the process fails, the victim may reinstitute proceedings in the formal courts. However, this is no different in principle to a case being referred to a traditional court by the formal courts.

[64] If it was left to the victim to decide whether to reinstitute proceedings in the courts, for example in a case where an agreement could not be reached, then such a model would in reality be informal as it would eliminate direct coercion by the state.

At least for the time being, diversionary measures such as the FGC should not be envisaged as replacements to traditional and informal mechanisms for non-serious cases in which the parties are prepared to compromise. Although no legal representation may be required, the cost of providing sufficient facilities easily accessible to all is high, particularly in view of the length of such conferences. Furthermore, given that traditional and informal mechanisms are voluntary, they may well be regarded as preferable by the parties concerned.

9.12 The need for research: there is a urgent need for research into traditional and informal mechanisms operating within a particular country

In order to devise effective proposals for improving access to justice, traditional and informal justice systems must of necessity be considered.

"*every effort should be made to open up the communicating passages between the officially recognized upper storeys and the non-recognized but crowded basement... To ignore what actually goes on below and to discount the pace and trends of development there, is almost bound to perpetuate and aggravate a situation summed up bluntly by a Pakistani student: 'the law of the police and courts is not the law of the people.'... to uphold a view that law proper is that which statutes prescribe or courts apply, would be juristic arrogance and sociological nonsense.*"[65]

It is only recently that donors have begun to include traditional and informal justice as an area requiring analysis. Academic research currently covers only a fraction of the various traditional groupings which exist within developing countries. Field research on particular ethnic groupings have, furthermore, generally been carried out at a single point in time. There are virtually no follow-up studies to determine how the individual mechanisms of dispute resolution researched have developed and responded to external political, social and economic change over time. Although some academic research on popular justice forums within South African townships and squatter camps has been carried out over the last two decades, little is known of informal justice systems existing in urban and peri-urban areas in other parts of sub-Saharan Africa or the developing world as a whole.

---

[65] Holleman, 1973: 603.

What is needed is an audit of existing traditional and informal systems within a particular country to determine where, how, and under what conditions they operate. Given the paucity of concurrent and up-to-date research, it is impossible at present to piece together any overall picture of what non-state forums exist in a particular country.

Once an overall picture or map is gained via general research of the informal justice sector, more thorough examination of specific types of systems can be undertaken. Some examples, by no means exhaustive, of the type of questions which researchers might ask different sections of the community are listed below.

Some basic data required for comparative research of traditional and informal justice systems

- What are the major concerns of the specific community in relation to safety and security?
- What are the possible causes of these problems?
- How do such problems affect the whole or sections of the community?
- In what ways are problems or disputes normally dealt with?
- To what degree do the local police become involved?
- How satisfied are people with the response of the police?
- To what extent have formal courts been used? by whom? involving what kind of problems or disputes?
- How satisfied are people with the way in which cases are dealt with under the formal system, for example in terms of procedure and penalties, and the fact that cases are decided by a judge from outside the community?
- What constraints exist in using the formal courts? How could these be overcome?
- To what extent would use of formal courts increase if they were more accessible?
- Are people satisfied with the informal justice system? What are the reasons for their satisfaction or lack of it?
- Which aspects could be improved? How?
- How many cases are decided by the informal justice forum?
- What kind of cases are heard?
- Who brings these cases?
- What is the procedure?
- Who hears the disputes?
- How are the “arbitrators” mandated by the community?
- Is there any opportunity to change the arbitrators?
- What is the degree of support for the current arbitrators?
- What types of solutions or penalties are used? Are they appropriate?
- Are any records kept? Why are they kept, or not?

- Can a party refuse to attend, walk out, or refuse to abide by an agreement? - Has this ever occurred? What was the outcome?
- In which ways and to what extent do the general public participate? Is the participation of women, children and other groups sufficient and fair?
- How are women, children and other minority status groups dealt with under the informal system? How should they be treated?
- What is the attitude towards the rights of women, children and other groups?
- What aspects of the justice system have changed over time? What are the possible reasons for these changes?

Save the Children, writing from the perspective of juvenile justice, recommends that research be carried out examining the following issues:

"*[1] Ways in which traditional systems have changed over time and at the causes of change; [2] The extent to which children's rights are better protected in the informal than the formal system, and ways in which practices abusive of children's rights might be moderated; [3] Non-formal systems in rural, urban and peri-urban communities. This should consider the potential for interaction between the formal and non-formal systems, and make relevant policy recommendations; [4] Opportunities for incorporating the principles of reconciliation and restitution in formal justice systems. Policy-makers should investigate the extent to which these principles are understood and supported across the population as a whole.*"[66]

Save the Children also emphasizes the need for primary studies to classify the ways in which conflict resolution is taking place in urban communities across the continent. Such research should identify:

"*[1] Where the ultimate authority is located; [2] What kinds of sanctions are used - have the principles of reconciliation and restitution been maintained or do informal systems rely mainly on summary justice, using corporal or capital punishment; [3] Whether there is widespread, consensual support for the system or whether it relies on the control of a few (i.e., Mafia-type control); [4] Whether there is potential to refer cases in the formal system to traditional justice. This information should inform strategies for dealing with urban crime… It is also needed to clarify potential points of contact between formal and informal systems.*"[67]

[66] Petty & Brown eds, 1998: 102.
[67] Petty & Brown eds, 1998: 103.

Others have advocated that "research should be carried out by nationals of the countries involved, so that it is indigenous in nature and orientation",[68] and that constant and vigilant research should be conducted into the ways in which "laws", both formal and informal, are observed and enforced in different communities within a state, paying particular attention to the types of social problems which tend to elude formal channels, and how they are resolved and new norms and practices by which urban or traditional communities seek, under changing social contexts, to address problems informally, and the likely reasons for the acceptance or non-acceptance of such innovations.[69] As has been suggested above, the research and subsequent monitoring might be co-ordinated by an centralized body such as a community justice council.

9.13 Criteria for projects: criteria should be developed in order to assess the effectiveness of any project aimed at assisting traditional and informal justice systems. Appropriate disaggregated data should be collected before and after any intervention, employing participatory techniques

The main aim of any project intending to assist traditional and informal justice systems should be to promote the advantageous aspects of informal justice while working to eliminate any disadvantages associated with the particular forum. With this in mind the criteria used to assess the effectiveness of any project should include:

- increased safety, security and access to justice in the geographical area covered by the justice forum;
- the absence of physical punishments by the forum;
- voluntary nature of the forum;
- more equitable decision-making;
- improvement to any other weaknesses specific to the particular forum;
- a high degree of public participation in the decision-making process;
- increased capacity to manage disputes efficiently and to implement improvements on the basis of self-assessment;
- an enhanced relationship between the formal and informal sectors;
- sustainability.

[68] Thacker, 1998: 87.
[69] Holleman, 1973: 604.

Increased safety, security and access± to justice

There are a number of factors which may indicate increased safety, security and access to justice, for example:

- a lower crime rate in the target community;
- a reduction in the number of people being sent to prison from the community;
- an increase in the number of cases coming before the informal justice forums which coincides with a decrease in those going before the formal courts;
- he extent to which agreements reached in the informal justice forums are honoured.

These may indicate a greater number of disputes being peacefully settled within the community or a reduction in the degree of conflict. As has been mentioned, informal mechanisms tend to deal with "trivial disputes" before they escalate to a point where "crimes" may be committed. Furthermore, it may be argued that the type of approach adopted under informal justice forums, which emphasizes reconciliation and employs reintegrative shaming, is more likely to prevent reoffending.

In addition, data will need to be collected and analysed according to the category of disputes and disputants. Thus, any increase in the range of cases being settled under the informal system may be indicated by an increase in the number of these types of cases under the informal system with a corresponding decrease under the formal system. Cases involving certain disputants, for example women, should be analysed under that category as well as according to the type of dispute.

The principle that justice should not only be done but should be seen to be done should be regarded as equally important under the informal and informal systems. A reduction in the number of cases or types of conflict which have been identified as of particular concern by the various groupings, for example, may have a greater impact on community perceptions of safety and security and should be given particular weight. However, the crucial indicator will be to monitor community perceptions both before and after the intervention has commenced and to critically examine any variation in objective and subjective results.

Absence of physical punishments

As well as increasing the number and range of disputes settled under the informal system, the aim must be to improve any weaknesses present. A primary objective is to eliminate any resort to physical punishment. The main indicator will simply be a significant reduction in, or the elimination of, the use of physical punishment.

This issue will mainly be tackled through human rights education and possibly state enforcement. Thus, additional data analysed may include, for example:

- a positive change in attitude towards the non-use of physical punishment;
- instances where the formal state system has intervened, for example, charges being laid for the illicit use of such punishment.

Voluntary nature of the forums

A fundamental check against any abuse under traditional and informal systems is that the process is entirely voluntary. No person should be forced to appear or to abide by a decision against his or her will. Thus, if decisions under certain informal forums become tainted by social or political bias, or corruption, or if physical punishments are ordered, individuals can choose not to submit themselves to that particular forum.

The use of physical punishments may in itself indicate that the process is not voluntary. One indication of the voluntary nature of a forum may be the absence of instances where a person is physically escorted to the justice forum; the extent to which a guardian of a child has the right to physically escort a child needs to be examined within the particular context. The absence of escorting may not in itself verify that the process is voluntary. The thought of being physically coerced may exist because of past practices. Thus, it is important that the subjective element be measured:

- awareness that no person should be forced physically to appear or to abide by any decision of the informal forum;
- trust that no person refusing to appear or to abide by any decision will be physically compelled to do so.

The question is a complex one. A person may feel compelled merely because of social pressure. A distinction, however, needs to be drawn between social and physical coercion. The former is the legitimate means by which the informal system effects compliance. The latter is only legitimate under the formal system where the necessary procedural safeguards can be guaranteed. All members, and particularly vulnerable groups, need to be made aware that the process should be voluntary. In the majority of cases, it is likely that both parties will want to seek a solution without going to the formal system. However, unless legal aid is available it may be impossible to ensure that the process is truly voluntary in all cases. At worst, powerful accused members could simply refuse to appear with impunity, while weaker accused members, unable to take the case elsewhere, may fear physical revenge. Analysis may need to take into account:

- improvement in accessibility to the formal courts and legal aid, particularly in respect of vulnerable groups;
- a greater percentage of cases being taken to the formal courts by weaker groups.

Equitable decision-making

The problem of discrimination will mainly be tackled by human rights education and, it is submitted, by providing alternatives through making available NGO ADR and legal aid (see 9.6). Indicators of a successful intervention will include:

- a positive change in attitudes towards the rights of women, children and other minority-status groups;
- an awareness and acceptance of the principle of "equality before the law";
- a positive change in the way in which cases involving women, children and other minority-status groups are dealt with under the informal forum.

Some further factors which may indicate improvement are:

- the adoption of a code of ethics which recognizes the equal rights of women, children and other minority-status groups;
- greater participation of women, children and other minority-status groups, either as arbitrators or as members of the public contributing to discussions during dispute resolution meetings.

Where progress is slow important factors may be:

- greater availability of alternatives such as NGO ADR forums and legal aid;
- the awareness of women, children and other minority-status groups of these alternatives;
- the increased use of these alternatives by women, children and other minority-status groups.

Other weaknesses

These will be identified during the initial assessment of the particular forum prior to any intervention and may vary from forum to forum. Improvements in relation to specific concerns raised by the community – for example, over the favouring of disputants who are supporters of a political party, or the acceptance of bribes – will generally need to be measured by asking members of the community whether and to what extent such problems have become less common.

Accountability via public participation

In theory, if the process is voluntary and involves a high degree of public participation, it will be difficult for arbitrators to make decisions contrary to what the public regards as fair. Any intervention with

traditional and popular forums which restrict attendance (and it would appear that this is uncommon) should encourage the forum in question to allow greater participation. It is also possible that the times and place in which dispute resolution meetings are held may serve as a constraint to certain groups. Appropriate indicators will, therefore, be:

- that everyone is permitted to attend and participate in the proceedings;
- that indirect constraints to attendance are minimized.

As mentioned earlier, the fact that the general public can attend hearings assists in educating all members of the community as to the rules to be followed, the circumstances which may lead to their breaking, and how any ensuing conflict may be peacefully resolved.

It may be argued that attendance should be restricted in certain cases in the interests of confidentiality, particularly where juveniles are concerned. However, whereas this may hold true for NGO ADR forums carried out outside of the community, it would not seem to apply in respect of traditional and informal forums. It has already been noted that in most traditional societies less serious crimes go through a number of stages of dispute settlement – usually commencing with just family members. The reason for taking a dispute to the public forum, for example in the case of a fight between two juveniles, is precisely because the family of the two juveniles have been unable to settle the matter between themselves, and wish to make use of the wider forum – with its greater influence on the disputants, through reintegrative shaming – in order to reach a fair compromise.

Increased capacity

An important goal in providing assistance to traditional and informal justice forums will to be to build the capacity of the community to manage disputes efficiently and to implement improvements on the basis of self-assessment. Indicators of a successful intervention might include:

- a draft of a code of ethics and procedural guidelines;
- the keeping of records of cases registered, including names of parties, type of dispute, etc;
- the keeping of records containing a brief statement of the facts of the dispute established during hearing, and any agreement reached;
- regularisation of times and places where disputes are heard, aimed at maximising participation by all sections of the community;
- regularisation of procedure for electing arbitrators (where applicable);
- regular public meetings to review and discuss how the forum is progressing and any changes to be made or action to be taken in relation to safety, security and justice.

A salaried clerk may be needed to keep records, send invitations to disputants to attend hearings, and to compile and present statistical information at the appraisal meetings. A procedure for arriving at collective decisions will also need to be devised. The Peace Association being developed in Zwelethemba under the Community Peace Programme (see 7.6) may provide a possible model.

Relationship with formal system

Safety, security and access to justice are ultimately the responsibility of the state. This means that it is the duty of the state to ensure that any delegation of power in this regard is exercised responsibly. It is therefore important that officials of central and local government, as well as members of the judiciary, legal profession, police and prisons service, are aware of the informal forums which exist in their area of operation, and what sort of co-operation with them is both desirable and provided for under the law.

The relationship between the formal and informal system may be measured by comparing data collected before and after the commencement of the intervention to ascertain whether there is:

- greater awareness by local magistrates, police, and relevant government officials of the informal forum;
- greater recognition by local magistrates, police, and relevant government officials of the informal forum as a lawful, legitimate and worthwhile institution.
- an increased number of referrals from the formal courts to the informal forum, and from the informal forum to the police and formal courts;
- instances of other forms of co-operation such as community service orders being supervised by the informal structure.

Sustainability

Sustainability may be illustrated in part by the extent to which decisions are being made and action is being initiated by the community itself. In terms of economic sustainability, costs relating to incentives and administrative costs, including the cost of a full-time clerk, will need to be covered at the end of the project. Sustainability may, therefore, depend on:

- the willingness of the government to meet recurrent costs after the end of the project;
- the development of income generating projects which accrue to the informal justice system.

Data collection and evaluation

In order to properly assess the impact of any intervention, appropriate data should be collected both before and after the intervention. The gathering of statistical data such as crime rates, the number of formal cases, and prison sentences will need to come from official records. Being able to discover *inter alia* the residence, gender and age of the disputant as well as the type of dispute under the formal system will greatly aid any analysis. Technical assistance in improving the record-keeping and data collection methods of the police, courts and prison service would, therefore, be a worthwhile intervention in itself.
Certain factors may need to be taken into account in analysing data. These may include:

- a general increase in crime as a result of some external factor, for example pre-election violence;
- government or institutional policy changes in relation to justice, safety and security.

Whereas qualitative data is far more difficult to assess accurately, its measurement is crucial in the area of informal justice, given that the success of any intervention will depend mainly on the changing of attitudes. Where subjective assessments are required, it is the community members themselves who must be the subject, and not merely the object, of development. That means allowing them to identify their needs from the outset, and to assess for themselves whether and to what extent any particular intervention has addressed those needs.

It may be necessary to adopt special measures in order to ensure the full participation in any assessment by women, who may face constraints in respect of cultural norms, time, literacy and access to information. Separate consultation may be required. Women may be more likely to speak out about their special needs in the absence of men. It is, however, very important to encourage women to voice their interests and opinions in general, mixed, group discussions. The promotion of women's groups which can represent women's views on a collective basis may assist in empowering women where traditionally they have been excluded from decision-making.

Monitoring and evaluation should be carried out using participatory assessment methods – including semi-structured interviewing and focus group discussions – comparing similar data gathered prior to the commencement of the intervention, and focusing on the priority concerns of the community.

Data collection should be carried out by local people, who understand

the language and culture of the target community, co-ordinated by a social scientist. Training in participatory research and other assessment techniques should be provided, particularly in relation to the collection of gender sensitive data. Ideally the evaluation team should contain a representative mix of people in respect of gender, age, and other factors, depending on the community concerned. Thus, around 50 percent of those interviewing should be women. Evaluation should aim to determine how different groups have benefited from the assistance given. Data should be disaggregated by gender, age, and other factors relevant to the particular community. The views of traditional arbitrators and local elites should also be distinguished. Data involving actual dispute settlement should be categorized by the type of dispute involved.

9.14 People should be allowed to "shop for justice"

In conclusion, the question of reform should not be regarded as one of formality versus informality but rather one of choice and appropriateness. Traditional and informal justice systems are best suited to conflicts between people living in the same community who seek reconciliation based on restoration. Formal state courts are best suited to provide the legal and procedural certainty required where serious penalties such as imprisonment are regarded as the only appropriate penalty, or where parties are unwilling or unable to reach a compromise. Parties are less likely to be willing and able to reach a compromise in larger urban communities unless their relationship "ranges beyond the transitoriness of the court or a particular dispute";[70] or unless social pressures from family, friends, colleagues or other peers can be brought to bear in encouraging a compromise.

[70] Van Velson, 1969: 138.

"It is clear that one of the main goals of the informal justice movement – reconciliation of the parties – is tied to a particular type of socio-political structure. Where courts have at their disposal the necessary machinery of state to enforce judgments, it is unlikely that they will take the time and trouble that is necessary to persuade litigants to compromise their differences. Nor should it be assumed that the parties will see any benefit in reconciliation. The reason litigants bring court actions is to secure the help of a third party in equalising, power imbalances. And reconciliation is predicated on long-term, multifaceted relationships. Few urban tribunals operate in this type of social milieu. They may hear claims arising between people who happen to be involved in long-term relationships, such as landlord-tenant, but these relationships tend to be specific to particular interests; they are not the same as the generalized relationships of kinfolk or spouses."[71]

Family group conferences and NGO ADR forums may provide additional options for reconciliation where either traditional or popular justice systems are not operating in a satisfactory manner or do not exist within the particular community, or where the parties themselves are not from the same community but wish, for example, to continue their economic relationship.

"*The problem facing those who wish sincerely and profoundly to transform the colonial-type structures of justice and replace them with new structures that clearly serve the interests of the people, is precisely how to create the conditions both institutionally and subjectively for the integration of… so-called universal standards of justice [due process] into a popular community-based [state] system.*"[72]

However, once it is accepted that the formal state system of courts cannot be adapted to provide all types of justice to all of the people all of the time, then the path is clear for reform which considers not only where justice should be located but also where different kinds of justice are present, and can be located:

[71] Bennett, 1991a: 108-9.
[72] Sachs & Honwana Welch, 1990: 22.

"*It is important to take seriously the realisation that the 'law' is only partially constituted by the state's formal apparatus… Any attempt at delineating a legal system of the future must… take the existing plurality of legal forums as its point of departure.*" [73]

"*This entails understanding that there is no one solution to community conflict resolution, but multiple solutions.*"[74]

In other words, people should be allowed to shop for justice[75].

[73] Pavlich, 1992: 40.
[74] Nina, 1993: 139.
[75] Schärf, 1997.

10: SOME USEFUL ADDRESSES

10.1 African NGOs

CPP (South Africa)
(Community Peace Programme)
14 Barrington Road
Observatory
P.O. Box 34692
Groote Schuur 7937
South Africa
Tel: + 27 21 4486582
Fax: +27 21 4481566
Email: cpfound@sn.apc.org
Contact: Prof. Clifford Shearing (Director)
John Cartwright (Media and Communications)

CDRT (South Africa)
(Community Dispute Resolution Trust)
University of the Witwatersrand
P O Box 31322
Braamfontein 2017
South Africa
Tel: + 27 11 4038280
+ 27 82 8829775
Fax: + 27 11 403 1391
Email: cdrtdir@iafrica.com
Contact: Kevin Lancaster (Programme Manager)

CCMR (South Africa)
(Community Conflict Management and Resolution)
P.O. Box 1863
Fourways 2055
Johannesburg
South Africa
Tel: + 27 82 4115665
+ 27 11 4655308
Fax: + 27 11 4671534
Contact: Pat Mkhize (Director)

ECCRMP (South Africa)
(Eastern Cape Conflict Resolution and Management Project)
Unit 2, No. 3, St James Road
Southemwood, East London
P.O. Box 219
Mdantsane 5219
South Africa
Tel: + 27 431 421122/3
+ 27 83 6589901
Fax: + 27 431 435271
+ 27 431 421124
Contact: Andile Matshele (Director)

Guguletu Community Court (South Africa)
NY141 No. 11
Gugulethu 7750
South Africa
Tel: + 27-21 6373389
Fax: + 27 21 6370664
Mobile: 0027-82-6988629
Contact: Sipho Citabatwa
(Community networker/court member)

LAP (Uganda)
(Legal Aid Project)
P.O. Box 426
Plot 81 Kira Road
Kampala
Uganda
Tel: + 256 41 543173
Fax: +256-41-53053
Email: legalaid@imul.com
Contact: Robinah Namusisi

FIDA (Uganda)
(The Ugandan Association of Women Lawyers)
P.O. Box 2157
Kampala
Uganda
Tel: + 256-41-530848
Fax: +256-41-530848
Email: fida-ug@starcom.co.ug
Contact: Sarah Banenya (Executive Director)

HURIPEC (Uganda)
(Human Rights and Peace Centre)
Faculty of Law
Makerere University
P.O. Box 7062
Kampala
Uganda
Tel: + 256 41 532954
Fax: + 256 41 543110
Email: huripec@bushnet.net
Contact: Samuel B. Tindifa (Director)

FHRI (Uganda)
(Foundation for Human Rights Initiative)
P.O. Box 11027
Kampala
Uganda
Tel: + 256 41 530095
Fax: + 256 41 540561
Email: fhri@starcom.co.ug
Contact: Livingstone Sewanyana (Executive Director)

LRF (Zimbabwe)
(Legal Resources Foundation)
P.O. Box 918
Harare
Zimbabwe
Tel: + 263 4 794780
Fax: + 263 4 728213
Email: lrfhre@samara.co.zw
Contact: Eileen Sawyer

LAC (Namibia)
(Legal Assistance Centre)
P.O. Box 604
4 Körner Street
Windhoek
Namibia
Tel: +264 61 223356
Fax: +264 61 234953
Email: legal@iafrica.co.na
Contact: Clement Daniels (Director)

Lawyers for Human Rights (South Africa)
National Office Pretoria
Kutlwanong Democracy Centre, 357 Visagie Street
Pretoria 0002
South Africa
Tel: + 27 12 320 2943
Fax: +27 12 320 2949
Email: Lhr@lhr.org.za
Contact: Dr. Vinodh Jaichand (Director)

NICRO (South Africa)
National Institute for
Crime Prevention and Rehabilitation of Offenders
P.O. Box 10005
Caledon Square
Cape Town 7905
South Africa
Tel: + 27 21 4221225
Fax: + 27 21 4221550
Email: rosebud@nicro.co.za
Contact: Rosemary Shapiro

Tanzania Conflict Resolution Centre
PO Box 2824
Dar es Salaam
Tanzania
Tel: +255 22 285 1008
Fax: +255 22 285 1534
Email: cfr@intafrica.com
Contact: Dr Abdallah Safari (Director)

Liga Mozambicana dos Direitos Humanos
(Mozambique Human Rights League)
Av. 24 de Julho
Maputo
Mozambique
Tel: + 258 1 430705
Fax: + 258 1 430706
Email: liga@zebra.uem.mz
Contact: Irene d'Oracao Afonso (Co-ordinator Prisons)

Malawi CARER
(Malawi Centre for Advice, Research and Education on Rights)
P.O. Box 30479 CHICHIRI
Blantyre 3
Malawi
Tel/fax: + 265-636007
Email: pas-mazengera@sdnp.org.mw
Contact: Shenard Mazengera

Projecto Sociedade Civil Mocambicana
(Mozambique Deprived Civil Society Project)
Centre for African Studies (CAS)
Eduardo Mondlane University
PO Box 2391
Maputo 2
Mozambique
Tel: +258-1-49161
Fax: +258-1-49161
Email: cserrcea@zebra.uem.mz
Contact: Carlos Serra (Director)

WLSA (Mozambique)
(Women and Law in Southern Africa)
Centre for African Studies
Eduardo Mondlane University
PO Box 2391
Maputo 2
Mozambique
Tel: +258-1-491896
Fax: +258-1-49161
Email: ceadir@zebra.uem.mz
Contact: Conceicao Osorio, Eulalia Tembe, Andre Jose

LINK (Mozambique)
(A coalition of Foreign and local NGOs in Mozambique)
Rua Dr. Antonio Jose Almeida
No.191 Barrio da Coop
Maputo
Mozambique
Tel: +258-1-496279/80
Fax: +258-1-496304/06
Email: forum@link.uem.mz
Contact: Ms Bodil Wikman

10.2 South Asian NGOs

People's Council for Social Justice
Ravipuram Road
Valanjambalam
Cochin 16
Kerala 682016
India
Tel: + 91 484 371109
+ 91 484 361527
Fax: + 91 484 380113
+ 91 484 380113
Contact: Bitty Joseph (Senior Programme Director)

Madaripur Legal Aid Association
Bangladesh
New Town
Madaripur-7900
PO Box-09
Bangladesh
Tel: +880 661518
Fax: +880 661390 (ATTENTION MLAA)
Contact: Fazlul Huq (Secretary)

10.3 International NGOs

Penal Reform International
PRI (London office)
Unit 114, The Chandlery
50 Westminster Bridge Road
London SE1 7QY
United Kingdom
Tel: + 44 20 7217678
Fax: + 44 20 7218785
Contact: Nikhil Roy (Programme Manager)
Email: royn@pri.org.uk

PRI (Paris office)
84 rue de Wattignies
75012 Paris
France
Tel: + 33 1 55 782121
Fax: + 33 1 55 782129
Contact: Ahmed Othmani (President)
Email: priparis@aol.com

PRI (Consultants Africa)
Contact: Adam Stapleton (in Malawi)
Email: pri@eomw.net
Contact: Klaas de Jonge (in Rwanda)
Email: prikgl@rwandatel1.rwanda1.com

Save the Children Fund (UK)
SCF (London office)
17 Grove Lane
London SE5 8RD
United Kingdom
Tel: + 44 20 77035400
Fax: + 44 20 77032278
Email: a.dunn@scfuk.org.uk
Contact: Andrew Dunn

SCF (Uganda office)
P.O. Box 1124
Kampala
Uganda
Tel: + 256 41 344796
Email: scfugasw@imul.com
Contact: P.T. Kakama

10.4 Academics

Associate Prof. Wilfried Schärf
Institute of Criminology
University of Cape Town
Private Bag Rondebosch, 7701
Cape Town
South Africa
Tel: + 27 21 6502988/9
Fax: + 27 21 6503790
Email: glosches@iafrica.com
(Popular Justice, South Africa)

Prof. Tom Bennett
Dept of Public Law
University of Cape Town
Private Bag Rondebosch, 7700
Cape Town
South Africa
Tel: + 27-21-650-3078
Fax: + 27-21-689-8546
Email: bennett@law.uct.ac.za
(African Customary Law)

Dr Daniel Nina
Legal Consultant on Popular Justice
30 Hansen Road
Muizenberg 7945
Cape Town
South Africa
Tel: +27 82 8952636
+27 21 7886373
Email: fdnina@hotmail.com
(Popular Justice, South Africa)

Prof. Clifford Shearing
University of Toronto / University of the Western Cape
c.shearing@utoronto.ca
see also contact details under "Community Peace Project"
(Popular Justice, South Africa)

Prof. Manfred O Hinz
University of Namibia
Faculty of Law
Private Bag 13301
340 Mandume Ndemufayo Avenue
Pioneers Park, Windhoek
Namibia
Tel: +264 61 2063999
+264 61 2063111
Fax: +264 61 2063703
Email: Lawfac@unam.na
(Traditional Justice, Namibia)

Dr Joe Oloka-Onyango
Faculty of Law
Makerere University
P.O. Box 7062
Kampala
Uganda
Tel: +256 41 532956
+256 41 531311
Fax: +256 41 532956
Email lawdean@muklaw.ac.ug
(Popular Justice, Uganda)

Ms Gita Honwana Welch
Tel: +61 418 694 894
E-mail: gita_welch@hotmail.com
(Popular justice, Mozambique - ex-judge)

Prof. Upendra Baxi
School of Law
University of Warwick
Coventry CV4 7AL
United Kingdom
Tel: +44 1203 52323
Fax: +44 1203 524105
Email: ubaxi@gn.apc.org
(Popular Justice, India)

10.5 Law Commissions

South African Law Commission
Private Bag X668
Pretoria 0001
Tel: +27 12 3226440
Fax: +27 12 3220936
Email: tnhlapo@salawcom.org.za
Contact: Prof. Thandabantu Nhlapo (Project Committee Chairperson)
Nombulelo Mkefa (Project Committee Researcher)

Mozambique Law Reform Commission
Ministry of Justice
Maputo
Mozambique
Tel: +258 1 302549
Email: crladmin@sortmoz.com
Contact: Ana Pessoa (Law Commissioner)

Malawi Law Commission
Private Bag 373
Lilongwe 3
Malawi
Tel: +265 782822
Fax: +265 782532
Email: lawcommission@malawi.net
Contact: Justice Elton Singini (Law Commissioner)

Law Reform and Development Commission of Namibia
Ministry of Justice
Private Bag 13302
Windhoek
Namibia
Tel: +264 61 239280
Fax: +264 61 240064
Email: not known
Contact: Uutoni Nujoma, Commissioner

10.6 Donor projects

Malawi Safety, Security and Access to Justice Programme
DFID (Department for International Development,)
Central Africa Office
P.O. Box 1030
Corner House, Samora Machel
Takawira
Harare
Zimbabwe
Tel: +263 4 774719
+263 4 7747(20-28)
Contact: Mary Straker (Project Advisor)
Email: m-straker@dfid.gov.uk

DANIDA - Judiciary Programme (Uganda)
C/o Ministry of Justice
Directorate of Public Prosecutions
P.O. Box 1550
Floor 2, Room 7
Kampala
Uganda
Tel: +256-347-116 or 341-316
Fax: +256-341-316
Contact: Marlies Bouman (Project Co-ordinator)
Email: bouman.dppjust@infocom.co.ug

DANIDA - Legal Sector (Mozambique)
104 Sector Legal Moz 62
Av. Patrice Lumumba 539
Maputo
Mozambique
Tel: +258-1-429 429
+258-1-429 430
Fax: +258-1-300 134
Email: ucp@mail.tropical.co.mz
Contact: Nina Berg

BIBLIOGRAPHY

Abel, Richard L.
1982 *The Politics of Informal Justice: Volume 2*, Academic Press.

Abrahams, Ray
1987 "Sungusungu: Villiage Vigilante Groups in Tanzania", *African Affairs*, Vol. 86, No. 343, April 1987, pp. 179-196.

Adeyemi, A.A.
1994 "Personal Reparations in Africa: Nigeria and Gambia", in Zvekic (ed) *Alternatives to Imprisonment in Comparative Perspective,* Chicago pp. 53-66.

Adinkrah, K.O.
1991 "We shall take our case to the King: legitimacy and tradition in the administration of law in Swaziland", *Comparative and International Journal of Southern Africa*, vol. 24, 1991, pp. 226-239.

African Rights
1996 *Justice in Zimbabwe*, African Rights.

Alemayehu, Yitayew
1998 "The Potential of Traditional Institutions in Ethiopia", in Petty & Brown (eds), (1998), pp. 96-98.

Allott, A.N.,
1968 "African Law", in Derrett , J.D *An Introduction to Legal Systems*, Sweet & Maxwell, pp. 131-156.
1980 *The limits of law*, Butterworths, 1980.
1997 "The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", in *Journal of African law*, Vol. 21, No. 1, 1977, pp. 1-23.

Barya, John-Jean & Oloka Onyango, J
1994 *Popular Justice and Resistance Committee Courts in Uganda,* New Vision Publishing, Kampala.

Baxi, Upendra
1976 "From Takrar to Karar: the Lok Adalat at Rangpur - A Preliminary Study", in *Journal of Constitutional and Parliamentary Studies*, Vol 10, No. 1, 1976, pp. 52-116.
1979 "People's Law, Development, Justice", in Verfassung und Recht im Übersee, Vol 12, No. 2, 1979, pp. 97-114.
1986 "People's Law in India: the Hindu Society", in Chiba (1986).

Baxi, Upendra & Gallanter, Marc
1979 "Panchayat Justice: An Indian Experiment in Legal Access", in Cappelletti & Garth , *Access to Justice (Volume III): Emerging Issues and perspectives*, The Florence Access to Justice Project, Sijthoff and Noordhoff.

Beattie, J.H.M.
1957 "Informal Judicial Activity in Bunyoro", reproduced in Cotran & Rubin (eds) (1970) *Readings in African Law*, Frank Cass & Co. Ltd.

Becker, Heike
1998a "Gender aspects of traditional authorities and customary courts in northern Namibia", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authorities in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek pp. 1257-288.
1998b "Premarital Female Sexuality and Customary Law in Northern Namibia", in University of Namibia, *Human Rights and Democracy in Southern Africa*, Papers presented at the Conference Cultivating Co-operation amongst Human Rights Institutions in the UNITWIN Network in Southern Africa, New Namibia Books, Windhoek pp. 215-245.

Bekker, J.C
1989 *Seymour's Customary Law in Southern Africa*, Juta & Co Ltd

Bennett, T.W
1991a *A Sourcebook of African Customary Law*, Juta & Co Ltd.
1991b "The Constitutional base of traditional rulers in South Africa", in D'Englebronner-Kolff, Hinz and Sidano (eds), 1998, *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek pp. 14-30.
1991c "The Compatibility of African Customary Law", in *Acta Juridica*, 1991, pp. 18-36
1995 *Human Rights and African Customary Law*, Juta & Co Ltd.
1996 *Customary Law and the Constitution: A Background and Discussion Paper*, Law Reform and Development Commission, Windhoek, Namibia, Oct 1996.

Berman, J
1969 "The Cuban Popular Tribunals", Columbia Law Review, 1317.

Booth, Alan R.
1992 "European Courts Protect Women and Witches: Colonial Law Courts as Redistributors of Power in Swaziland 1923-1950", in *Journal of Southern African Studies*, Vol. 18, No. 2, June 1992, pp. 253-275.

Bouman, Marlies
1984 *Crime and Punishment in Botswana*, unpublished MA Thesis, Law & Criminology , Free University, Amsterdam.

Brooke, N.J.
1992 "The changing character of customary courts", *Journal of African Administration*, vol. 6, 1954, p. 67.

Bukurura, S.H.
1994 "The Maintenance of Order in Rural Tanzania: The Case of Sungsungu", in *Journal of Legal Pluralism*, No. 34, 1994, pp. 1-29.

Burman, Sandra; Schärf, Wilfried
1990 "Creating People's Justice: Street Committees and People's Courts in a South African City", in *Law & Society Review*, Vol. 42, No. 3, 1990, pp. 693-744.

Bush, Robert A
1979 "A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations", in Cappelletti & Garth (1979), pp. 261-310.

Cappelletti, Mauro; Garth, Bryant (eds)
1979 *Access to Justice (Volume III): Emerging Issues and perspectives*,The Florence Access to Justice Project, Sijthoff and Noordhoff.

Chanock, Martin
1978 "Neo-Traditionalism and Customary Law in Malawi", in *African Law Studies*, No. 16, 1978, pp. 80-91.
1991 "Law, State and Culture: Thinking about 'Customary Law' after Apartheid", in *Acta Juridica*, 1991, pp. 52-70.

Chiba, Masaji
1986 *Asian Indigenous Law*, KPI Publishers.
1993 "Legal Pluralism in Sri Lankan Society: Towards a General Theory of Non-Western Law", in *Journal of Legal Pluralism,* No. 33, 1993, pp. 197-212.

Chimango, L.J.
1977 "Tradition and the Traditional Courts of Malawi", in *Comparative and International Law Journal of Southern Africa*, Vol. 10, 1977, pp. 39-66.

Cooney, Mark
1994 "The Informal Social Control of Homicide", in *Journal of Legal Pluralism*, No. 34, 1994, pp. 31-59.

Cotran, E., & Rubin, N.N. (eds)
1970 *Readings in African Law*, Frank Cass & Co. Ltd.

Cutshall, C.R.
1991 *Justice for the People: Community Courts and Legal Transformation in Zimbabwe*, University of Zimbabwe Publications, 1991.

Daannaa, H.S.
1994 "The Acephalous Society and Indirect Rule System in Africa", in *Journal of Legal Pluralism*, No. 34, 1994, pp. 61-85.

Dagnino, Francesca
1998 "Mozambique: the Administration of Justice at the Local Level" in *Österreichische außenpolitische Dokumentation*, Special Issue, Building Justice: A Conference on Establishing the Rule of Law in Post-Conflict Situations, Vienna, 26-27 June 1998.

DANIDA
1998 *Baseline Survey on the Local Council Courts System in Uganda,* Final Report, Danida, December, 1998.

D'Engelbronner-Kolff, F. Marina
1998a "The people as law-makers: the juridical foundation of the legislative power of Namibian traditional Communities", in D'Englebronner-Kolff, Hinz and Sidano (eds), 1998, pp. 62-82.
1998b "Justice in a Legally Pluralistic Society: A Court Tale from Sambuyu", in University of Namibia, 1998, pp. 195-214.

D'Engelbronner-Kolff, Hinz & Sidano (eds),
1998 *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek.

Derrett, J.D
1968 *An Introduction to Legal Systems*, Sweet & Maxwell.

de Villiers, F.
1998 "Democratic aspects of traditional conflict management", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoekpp. 102-118.

DFID (UK Department for International Development)
1999 *Malawi Safety, Security and Access to Justice: Research on Primary Systems in Rural Malawi,* Final Report, DFID, May, 1999.

Diescho, Joseph
1998 "Human Rights and African Customary Law: Similarities and Contraditions", in University of Namibia, 1998, pp. 246-252.

Ebo, Chukwuemeka
1979 "Indigenous Law and Justice: Some Major Concepts and Practices", in *Vierteljahresberichte,* No. 76, 1979, pp. 139-150, reproduced in G. Woodman & A.C. Obilade (eds), (1995) *African Law and Legal Theory*, Dartmouth pp. 33-42.

Ejidike, O.M.,
1999 "Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria", *Journal of African Law,* Vol. 43, 1999, pp. 71-98.

Elias, T.O.
1956 *The Nature of African Customary Law*, Manchester University Press.
1969 "Traditional Forms of Public Participation in Social Defence", in *International Review of Criminal Policy*, No. 27, 1969, pp. 18-24.

Elias, T.O.; Nwabara, S.N. & Akpamgbo, C.O,
1975 *African Indigenous Laws*, Nigerian Government Printer, Enugu.

Epstein, A.
1951 "Some Aspects of the Conflict of Law and Urban Courts in Northern Rhodesia", in *Rhodes-Livingstone Journal*, No. 12, 1951, pp. 28-40.

Fahey, Richard P.
1971 "The Poro as a System of Judicial Administration in Northwestern Liberia", *African Law Studies*, No. 4, 1971, pp. 1-25.

Felstiner, W; Abel, R; Sarat, A
1980 "The Emergence and Transformations of Disputes: Naming, Blaming, Claiming…", in *Law & Society*, Vol. 15, Nos. 3-4, 1980, pp. 631-654.

FRELIMO
n.d. *Mozambique Briefing: Building a new Legal System*, Information Department, Frelimo Party Central Committee.

Gluckman, Max
1955 *The Judicial Process among the Barotse of Northern Rhodesia*, Manchester University Press.
1969 *Ideas and Procedures in African Customary Law*, Oxford University Press.

Golub, Stephen
1997 *A Measure of Choice: A Strategic Review of the Madaripur Legal Aid Association's Current Impact and Possible Future Directions*, evaluation report, Ford Foundation.

Gordon, R.J.
1991 "Vernacular Law and the Future of Human Rights in Namibia", in *Acta Juridica*, 1991, pp. 71-85.

Griffiths, Anne
1996 "Between Paradigms: Differing Perspectives on Justice in Molpolole Botswana", in *Journal of Legal Pluralism*, No. 36, 1996, pp. 195-214.

GTZ
n.d. "Traditional Mechanisms of Conflict Resolution", in *The Challenge of Democracy in Malawi*, pp. 66-74.

Gulliver, P.H.
1969 "Dispute Settlement without Courts: The Ndendeuli of Southern Tanzania" in Nader (1969), *Law in Culture and Society*, University of California Press, pp. 24- 68.

Gundersen, Aase
1992 "Popular Justice in Mozambique: Between State Law and Folk Law" in *Social and Legal Studies*, Vol. 1, 1992, pp 257-282.

Hayden, Robert. M.
1984 "A Note on Caste Panchayats and Government Courts in India", *Journal of Legal Pluralism*, No. 22, 1984, pp. 43-51.
1987 "The Ideology of Popular Justice in Sri Lanka", in *American Journal of Comparative Law*, Vol. 35, 1987, pp. 849-857.

Hinz, M.O.
1998a "The 'traditional' of traditional government: traditional versus democracy-based legitimacy", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek.1998, pp. 1-13.
1998b "The Conflict between the Constitution and Customary Law - Conflict between Systems and Concepts", in University of Namibia, 1998, pp. 168-181.

Hlashwayo, B.
1998 "Harmonising traditional and elected structures at the local level: experiences of four Southern Development Community Countries", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek.1998, pp. 131-154.

Hobsbawm, E.J & Ranger, T., (ed.)
1963 *The Invention of Tradition*, Cambridge University Press.

Holleman, J.F.
1949 "An Anthropological Approach to Bantu Law: With Special Reference to Shona Law", in *Rhodes-Livingstone Journal*, Vol. 10, pp. 51-64 / reproduced in G. Woodman & A.C. Obilade (eds), *African Law and Legal Theory*, Dartmouth (1995) pp. 5-18.
1973 "Trouble-Cases and Trouble-Less Cases in the Study of Customary Law and Legal Reform", in *Law & Society Review*, Vol. 7, pp. 585-609 / reproduced in G. Woodman & A.C. Obilade (eds), (1995) *African Law and Legal Theory*, Dartmouth pp. 61-86.
1974 *Issues in African Law*, Mouton, The Hague.

Honwana Welch, Gita
1984 "The Question of Access to Courts", in Sachs & Honwana Welch, *Liberating the Law: Creating Popular Justice in Mozambique*, Zed Books. (1990).
1985 "Beyond Pluralism: The Mozambican Experience", in Sachs & Honwana Welch, *Liberating the Law: Creating Popular Justice in Mozambique*, Zed Books. (1990).

HRW (Human Rights Watch)
1998 "Rwanda", in *Human Rights Watch World Report 1998.*
1999 "Rwanda", in *Human Rights Watch World Report 1999.*

Hund, John G.
1982" Legal and Sociological Approaches to Indigenous Law in Southern Africa", in *Social* Dynamics, Vol. 8, pp. 29-40 / reproduced in G. Woodman & A.C. Obilade (eds) *African Law and Legal Theory*, Dartmouth (1995) pp. 131-144.
1983 "Justice in a South African Township: the sociology of Makgotla", in *Comparative and International Journal of Southern Africa*, Vol. 16, 1983, pp. 177-208.

ICG (International Crisis Group)
1999 *Five Years After The Genocide in Rwanda*, http://www.intl-crisis-group.org/

Igbokwe, Virtus Chitoo
1996 "The Law and Practice of Customary Arbitration in Nigeria", in *Journal of African law*, Vol. 41, No. 2, 1996, pp. 201-214.
1998 "Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Ibo-Speaking Peoples of Eastern Nigeria and their Implications for Community/Neighbouring Justice System in North America", in *African Journal of International and Comparative Law*, Vol. 10, 1998, pp. 446-471.

Isaacman, B; Isaacman, A.
1982" A Socialist Legal System in the Making: Mozambique before and after Independence", in Abel (ed) The Politics of Informal Justice. Vol 2, Academic Press, New York.

Johnston, Marguerite
1978 "Giriama Reconciliation", in *African Law Studies*, No. 16, 1978, pp. 92-131.

JJDC (Juvenile Justice Drafting Consultancy, Juvenile Justice for South Africa)
1994 *Proposals for policy and legislative change*, JJDC, Cape Town.

Kakama, P.T.
1997 *Children in Conflict with the Law in Uganda*, Save the Children, July 1997.

Kakooza, J & Okumu-Wengi, R
1997 *A Review of Literature and Basic Data on the LC Court System in Uganda*, Judiciary Programme, Danida, May 1997.

Karibi-Whyte, A.G.
1997 "Sanctions in Nigerian Customary Criminal Law", in Bello & Ajibola (eds), *Essays in honour of Judge Taslim Olawale Elias*, Martinus Nijhoff Publishers, pp. 541-561.

Keulder, C.
1998 "Traditional leaders and rural development", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 289-323.

Koyana, D.S.
1998 "Administrative functions of traditional leaders", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek pp 119-130.

Ladley, Andrew
1982 "Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act", *Journal of African law*, Vol. 26, No. 2, 1982, pp. 95-114.

LAP (Legal Aid Project of Uganda)
1992 *How to Conduct a Fair Trial: Handbook for LC Courts.*
1996 *A Final Report of the Kabarole Local Councils Legal Education Pilot Project*, Final Report.

May, J.
1983 *Zimbabwean Women in Customary and Colonial Law*, Mambo Press, Gweru.

Merry, Sally
1982 "The Social Organisation of Mediation in Nonindustrialised Societies: Implications for Informal Community Justice in America", in Abel (ed) *The Politics of Informal Justice, Vol. 2* pp. 17-45.
1988 "Legal Pluralism" Law and Society Review, vol 22, no 5, pp869-901.

Meschievitz, C.; Galanter, Marc
1982 "In Search of Nyaya Panchayats: The Politics of a Moribund Institution", in Abel (ed) *The Politics of Informal Justice, Vol. 2* pp. 47-77.

MINARS (Ministry of Social Assistance and Rehabilitation of Angola)
1998 "Traditional Justice in Angola" in Petty & Brown (eds) *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa*, Save the Children, pp. 92-95.

Mokgoro, Y.
1998 "Customary Law, Human Rights, and the Position of Women in Africa", in University of Namibia, *Human Rights and Democracy in Southern Africa*, Papers presented at the Conference Cultivating Co-operation amongst Human Rights Institutions in the UNITWIN Network in Southern Africa, New Namibia Books, Windhoek1998, pp. 182-194.

Molokomme A.
1995 "Customary Law in Botswana: Past, Present and Future?" in Botswana in the 21st Century by Brothers, Hermas and Nteta, Botswana Society, Gaborone,

Mondlane, Luis Antonio
1998 "Access to Justice and Alternative Dispute Resolution" in *Österreichische außenpolitische Dokumentation*, Special Issue, "Building Justice: A Conference on Establishing the Rule of Law in Post-Conflict Situations", Vienna, 26-27 June 1998.

Nader, Laura (ed.)
1969 *Law in Culture and Society*, University of California Press.

Ncube, W.
1998 *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*, Ashgate Publishing Ltd.

Nduka, Ontonti
1977 "The Traditional Concept of Justice Among the Ibo of South-Eastern Nigeria", *Odu*, Vol.15, pp. 91-103 / reproduced in G. Woodman & A.C. Obilade (eds) *African Law and Legal Theory*, Dartmouth pp. 19-32.

Nina, Daniel
1993 "Community Justice in a Volatile South Africa: Containing Community Conflict, Clermont, Natal", in *Social Justice*, Vol. 20, Nos 3-4, 1993, pp. 129-143.
1995 *Rethinking Popular Justice – self-regulation and civil society in South Africa,* Community Peace Foundation, Cape Town.

Nina, Daniel & Schwikkard, Pamela
1996 "The 'Soft' Vengeance of the People: Popular Justice, Community Justice and Legal Pluralism in South Africa", in *Journal of Legal Pluralism*, No. 36, 1996, pp. 69-87.

Ojwang, Jackson B.
1989 "The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenyan Case", in *Law & Anthropology*, Vol. 4, pp. 125-40 / reproduced in G. Woodman & A.C. Obilade (eds) *African Law and Legal Theory*, Dartmouth (1995) pp. 43-58.

Oloka Onyango, J
1989 "Law 'Grassroots Democracy' and the National Resistance Movement in Uganda, *International Journal of the Sociology of Law*, Vol. 17, 1989, pp. 465-480.

Oputa, Hon. Mr Justice C.A.
1975 "Crime and the Nigerian Society", in Elias, Nwabara & Akpamgbo *African Indigenous Laws*, Nigerian Government Printer, Enugu (1975).

Otlhogile, B
1993 "Criminal Justice and the Problems of a Dual Legal System in Botswana", in *Criminal Law Forum*, Vol. 4, No. 3, 1993, pp. 521-533.

Pavlich, George
1992 "People's Courts, Postmodern Difference, and Socialist Justice in South Africa", *Social Justice*, Vol. 19, Nos 3, 1992, pp. 29-45.

Pessoa, Ana
1999 *Law Reform and Judicial System in Mozambique,* paper presented at Consultative Group Meeting on Access to Justice and Penal Reform in Africa, Workshop organised by PRI and FHRI, March 18 to 20, 1999, Kampala, Uganda.

Petlane, T. & Mapetla, M.
1998 "Gender aspects of female chieftainship in Lesotho", in D'Englebronner-Kolff, Hinz and Sidano (eds), 1998, *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 247-256.

Petty. Celia; Brown, Maggie (eds)
1998 *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa*, Save the Children

Ranger, Terrence
1983 "the Invention of Tradition in Colonial Africa" in Hobsbawm, & Ranger (ed.) *The Invention of Tradition*, Cambridge University Press.

Regan, F
1989 "Legal Resources Development in Uganda", *International Journal of the Sociology of Law*, Vol. 17, 1989, pp. 465-480.

Republic of Rwanda
1999a "Gacaca Tribunals Vested with Jurisdiction over Genocide Crimes against Humanity and other Violations of Human Rights which Took Place in Rwanda from 1st October 1990 to 31st December 1994", July 1999.
1999b "Speech of the Vice-President and Minister of Defence on the Occasion of the Opening of the Seminar on Gacaca Tribunals", July 1999.

Roberts, Simon
1979 *Order and Dispute*, St. Martins Press.
1979 "Tradition and Change at Mochudi: Competing Jurisdictions in Botswana", in *African Law Studies*, No. 17, 1979, pp. 37-51.
1984 "Introduction: Some Notes on 'African Customary Law'", in *Journal of African law*, Vol. 28, No. 1 & 2, 1984, pp. 1-5.

Rose, Laurel, L
1995 *Justice at the Local Level: Findings and Recommendations for Future Actions*, Rwanda Rapid Response Rule of Law Program, Project Report, USAID, May 1995.
1996 "Are Alternative Dispute Resolution (ADR) Programs Suitable for Africa? *Africa Notes* ,Sept. 1996, www.einaudi.cornell .edu/AFRICA/notes/Sept96/

Sachs, Albie
1983 "The Two Dimensions of Socialist Legality: Recent Experience in Mozambique", in Sachs & Honwana Welch *Liberating the Law – Creating Popular Justice in Mozambique,* (1990).
1984 "Changing the terms of the Debate: A visit to a Popular Tribunal in Mozambique", in *Journal of African law*, Vol. 28, No. 1 & 2, 1984, pp. 99- 108.
1992 *Advancing Human Rights in South Africa*, Oxford University Press, Cape Town.

Sachs, Albie; Honwana Welch, Gita
1990 *Liberating the Law: Creating Popular Justice in Mozambique*, Zed Books.

Salamone, Frank A.
1998 "The Waziri and the Thief: Hausa Islamic law in a Yoruba city, a case study from Ibadan, Nigeria", in *Journal of Legal Pluralism*, No. 42, 1998, pp. 139-156.

Saltman, Michael
1979 "Indigenous Law among the Kipsigis of Southwestern Kenya", in Cappelletti & Garth *Access to Justice (Volume III): Emerging Issues and perspectives*, The Florence Access to Justice Project, Sijthoff and Noordhoff., pp. 311-340.

Santos, Boaventura De Souza
1982 "Law and revolution in Portugal: The Experiences of Popular Justice after the 25th of April 1974" in Abel, R (ed) The Politics of Informal Justice, Volume 2, Comparative Studies, Academic Press, New York. pp251-280.
1984 "From Customary Law to Popular Justice", in *Journal of African Law*, Vol. 28, No. 1 & 2, 1984, pp. 90-98.

Schabas, William & Imbleau, Martin
1997 *Introduction to Rwandan Law*, Les Edition Yvon Blais Inc. (Quebec).

Schärf, Wilfried
1997 *Specialist Courts and Community Courts*, Position Paper Commissioned by the Ministry of Justice, South Africa. Institute of Criminology, University of Cape Town.
1999 *Report on the Proceedings of the Consultative Group Meeting on Access to Justice and Penal Reform in Africa*, Workshop organized by PRI and FHRI, March 18 to 20, 1999, Kampala, Uganda.

Schärf, Wilfried & Ncgokoto, Baba,
1990 "Images of Punishment in the People's Courts of Cape Town 1985-7: from Prefigurative Justice to Popular Violence" in Political Violence and the Struggle in South Africa, by Manganyi, C and du Toit, A (eds), Macmillan, London, pp341-371.

Schärf, Wilfried & Nina, Daniel, (eds)
(in print, 2000) *The Other Law: non-state forms of ordering in South Africa,* Juta, Wetton, South Africa.

Shamena, M.E.
1998 "The concept of 'traditional community'", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 323-327.

Skelton, Ann
1998 "International trends in the re-emergence of traditional systems", Petty & Brown (eds) *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa*, Save the Children pp. 99-101.

Snyder, Francis G.
1984 "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal", in *Journal of Legal Pluralism*, No. 19, 1981, pp. 49-90.

S**outh African Law Commission (SALC)**
1997a *Alternative Dispute Resolution*, SALC Issue Paper 8, Project 94.
1997b *Juvenile Justice*, SALC Issue Paper 9, Project 106.
1998 *Access to Justice: Community Structures*, SALC Workshop 2-3 July
1998, Pretoria.
1999a *The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders*, SALC Discussion Paper 82, Project 90.
1999b *Community Dispute Resolution Structures*, SALC Discussion Paper 87, Project 94.

Stern, Vivien
1998 *A Sin Against the Future*, Penguin Books.

Temngah, Joseph N.
1996 "Customary Law, Women's Rights and Traditional Courts in Cameroon", in *Revue Generale de Droit*, 1996, vol. 27, pp. 349-356.

Thacker, Ronald
1998 "Traditional Justice Systems", in Petty & Brown (eds) *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa,* SAVE THE CHILDREN, pp. 83-91.

Tiruchelvam, Neelan
1986 "Competing Ideologies of Conflict Resolution in Sri Lanka", in Chiba *Asian Indigenous Law*, KPI Publishers.

Trubek, David M.
1996 "Law and Development: then and now", presented at the American Society of International Law's 90th Annual meeting, Washington DC, March 27-30, 1996.

Twinomugisha, Nathan & Kibuka, E.P.
1997 *Good Governance and Easing Social Tensions in Uganda: Studies of Operations and Justice of Local Councils.*

University of Namibia
1998 *Human Rights and Democracy in Southern Africa*, Papers presented at the Conference Cultivating Co-operation amongst Human Rights Institutions in the UNITWIN Network in Southern Africa, New Namibia Books, Windhoek.

Uwazie, Ernest E.
1994 "Models of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria", in *Journal of Legal Pluralism*, No. 34, 1994, pp. 87-103.

van Niekerk, G.J.
1998 "Democratic aspects of traditional conflict management: Unofficial dispute resolution", in D'Englebronner-Kolff, Hinz and Sidano (eds), *Traditional Authority and Democracy in Southern Africa*, Proceedings from the workshop, Traditional Authories in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 83-101

van Velson, J.
1969 "Procedural Informality, Reconciliation, and False Comparisons", in Gluckman *Ideas and Procedures in African Customary Law*, Oxford University Press, pp. 135-150.

Vincentnathan, George S.
1992 "The Social Construction of Order and Disorder in two South Indian Communities", in *Journal of Legal Pluralism*, No. 32, 1992, pp. 65-102.

Wanitzek, Ulrike
1990 "Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania", in *Journal of Legal Pluralism*, No. 30-31, 1990-1, pp. 255-271.

Woodman, G.; Obilade, A.C.(eds)
1995 *African Law and Legal Theory*, Dartmouth.

Woodman, Gordon R.
1996 "Legal Pluralism and the Search for Justice", in *Journal of African Law*, Vol. 40, No. 2, 1996, pp. 152-167.
1969 "Some Realism about Customary Law - The West African Experience", in *Wisconsin Law Review*, 1969, pp. 128-52 / reproduced in G. Woodman & A.C. Obilade (eds) *African Law and Legal Theory*, Dartmouth. (1995) pp. 145-170.

Yadudu, Auwalu H.
1992 "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria", in *Journal of Legal Pluralism*, No. 32, 1992, pp. 103-139.

Zips, Werner
1996 "Laws in Competition: Traditional Maroon Authorities within Legal Pluralism in Jamaica", in *Journal of Legal Pluralism*, No. 37-8, 1996, pp. 279-305.

Zvekic, U. (ed)
1994 *Alternatives to Imprisonment in Comparative Perspective,*