

Non-State Justice Systems in Southern Africa: How should Governments Respond? -

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1. Introduction

Non-state justice systems are a reality in almost all countries all over the world. Their extent, their character and their importance vary greatly depending on a wide range of factors. Among those are the nature of the state and its capacity; the diversity of the population in terms of ethnicity/race, religion, ideology, language and income. Crucially important are also the levels of urbanisation and the type of economy, the moral economy as well as commercial one.

Very important in understanding the nature and shape of non-state justice systems (NSJS hereafter) in developing countries is the process by which the state configured itself in the decolonisation period, the post-1960s. The second most important period which determined the nature of non-state justice is the post-cold-war era, which in Africa is characterised by moves towards democratisation after 1990 in which 34 of the (then) 47 states made some moves in that direction (Bratton and van de Walle, 1997). By 1994 most of those attempts had failed for reasons that are important to non-state justice systems.

The 6 countries investigated will be profiled in varying detail. They are South Africa, Malawi, Lesotho, Zambia, Botswana and Mozambique.

The structure of the report starts with an examination of the terminology used over the last 50 years when talking about non-state justice. I try to show that its not all semantics but that the names take on particular ideological baggage, depending on whether the form of non-state justice is pro-state or anti-state. It also depends on who is talking, a person in a liberation struggle or someone opposing that liberation.

Secondly, I will explore the different forms that non-state justice takes in the six countries under scrutiny. The state's responses to these phenomena will then be sketched followed by recommendations about how states, donors and citizens could contribute to better governance and more effective co-operation between different forms of non-states justice.

2. Making Sense of Non-state justice systems

While the term non-state justice systems, hereafter NSJS, may sound at first blush to be uncontroversial it is a field that cannot be separated from politics and history. The reason for this is, of course, that law-making and enforcing is one of the core functions of a state, and in political theory, at least the state is constituted by some spoken, written or, at worst, implicit social contract, supposedly understood by all in the country. If, however, the social contract is unclear, unfair to certain groups, if the state has limited capacity (or will) to live up to it, then the marginalised and victimised groups in the country are likely to generate systems of justice that suit their needs and express their values. Such expressions may not be benign, they may constitute a challenge to the state, or they may embarrass the state, and so the state will have to react.

Struggles ensue and these struggles are usually reflected in the names that their protagonists give their endeavors. What follows is a small flavour of the way in which authors have made sense of non-state justice.

2A: What's in a Name? Non-state Justice versus other Names

Using the term 'Non-state Justice System' does need a little scrutiny, because the field of non-state justice is one where no one theoretical approach is dominant at the moment. Each theoretical approach to the field brings with it new ways of making sense of the phenomenon, which is usually accompanied by new names in order to distinguish it from the old, or discredited names:

The field of 'informal justice'—a name not beyond dispute itself (see Santos 1992) as I will demonstrate shortly--is already littered with a range of different terms which have gradually settled in over the last 30 years. In a recent edited

volume, Feenan (2002: 1-13) provides a useful route-map to explain the different labelling baggage which the usual terms carry with them: Informal justice, informal criminal justice, collective justice, popular justice (which has 5 sub-types: pre-capitalist societies, exceptional justice in fascist regimes aimed at eliminating enemies, popular participation in the administration of justice in capitalist countries; state socialist regimes and revolutionary justice). Populist justice is also sometimes used to refer to vigilantism, which is itself the subject of many definitional debates (Abrahams, 2002: 25-40). Then there are the terms that describe the broader field itself: Legal dualism, legal pluralism, and its post-modern version, plurality (Santos, 1992). Each of these terms signal the different standpoint of the researchers involved in relation to the legitimacy of the state described and the relationship between the main actors in the conflict. The term 'Non-state justice' is a relatively new addition (Schärf and Nina, 2001).

The existing clutch of terms denotes a normative hierarchy of entitlement and attitude. For example, legal dualism connotes the literature in which the normative stance is taken that the law of the coloniser is the hierarchically superior set of laws, under which falls the indigenous law, which has to pass the repugnancy-test as measured by the coloniser's values, before it can be called law (van Niekerk, 2001). The term informal justice, too, does not suit every circumstance. It is like the South African term 'non-white' in racial labelling: White is the norm, non-white the marginalised and delegitimised exception. Similarly, it is with caution that one gravitates to the term 'non-state ordering' which was coined only two years ago (Schärf and Nina, 2001). That term was to label all ordering (a suitably vague form for doing things that have a justice-affinity) that occurred outside of the state's immediate control, whether complementary to, or in opposition to the state. Santos' post-modern term of the late 1980s--plurality-- was used to refer to a plethora of different forms of ordering both within the state and outside it, each vying for legitimacy within particular constituencies, sometimes overlapping, sometimes complementing each other, and sometimes in fierce competition with each other. Most of these

were acting within the terms of state law, but others unashamedly flouting or circumventing it (Santos, 1982).

2B: What Forms Does Non-State Justice Take in Southern Africa?

The stereotypical approach to non-state justice is to assume that it is only 'done' by civilians. My research shows that much of the non-state justice in our focal countries is undertaken by state functionaries. This has its roots in the fact that the colonial state was one in which the armed forces, military and police, were there to ensure regime-security rather than citizen-security (Harris, 2000; Bratton and van de Walle, 1997, Nield (2001) for comparison with South America). That pattern had continued to a large extent into the democratic era. Zimbabwe is a good example at the moment, where ruling-party functionaries or agents take it upon themselves to fulfil a policing (or intimidation) role against anyone who does not support the ruling party, and the state condones their actions because they keep the state in power. The legal system condones that violation of law. Thus the state officials in both their official and unofficial capacities exploit the power and influence they have by getting advantage out of a range of situations. I use this example to illustrate how difficult it is to draw the line between state justice and non-state justice. Bayart, Hibou and Ellis (1998) graphically sketch the 'criminalisation of the state in Africa' with the marvellous sub-title: "from Cleptocracy to Felonious state! "

The more conventional depictions of non-state justice are:

- ♥ Vigilantes: Citizens who have beliefs or values which the state does not enforce or does not enforce sufficiently harshly, and they take it upon themselves to administer the enforcement at the level they deem appropriate;
- ♥ Customary justice forums usually run by chiefs in counsel with their ndunas in term of pre-modern notions of statehood and local governance. These are not recognised by the state law as official forums and their decisions and subsequent enforcement actions have no force in law;
- ♥ Private citizens for hire for any dirty work: Mapogo a Matamaga (SA)

- ♥ Neighbourhood dispute resolution forums such as street committees
- ♥ Religious courts not recognised by the state
- ♥ Non-Government Organisations
- ♥ Families, extended families and particular configurations of families

There are combinations of some of these, such as where state functionaries, say the police, unofficially 'farm out' dirty work which they are not entitled to perform to civilians (Buur, 2002)

3. The State in Africa, its Forms and Capacity

The globalisation of the post-cold war world affects all countries to a greater or lesser extent. It is characterised by a 'retreat of the state' (Garland, 1996), the 'hollowing-out' of the state (Braithwaite, 2000) in developed countries and a resort to non-state forms of ordering or governance in which the state plays the regulator rather than the doer: Private security, private prisons, private regulation of what were formerly public domains (shopping malls, industrial parks).

By contrast most developing countries have had to contend with dramatic and wide-scale political and institutional changes during the decolonisation phase (late 1960s to the mid-seventies), followed fairly shortly thereafter by the democratisation phase from 1994 onwards. Bratton and van de Walle (1997) describe 34 of the 47 states in Africa making efforts to move in the direction of democratisation.

3A: Weak States

With the exception of Botswana most states in Southern Africa are what political scientists describe as weak states. There are several ways in which one can measure strength and weakness of the state, but it is generally agreed that a state that is unable to provide basic services to its citizens can be called a weak state (Jeffthas, 2002). There is a basket of service provision one can use to test the capacity of the state, e.g. provision of water, electricity, education, health, a transport infrastructure, a stable currency and banking system, a functioning

legal system, safety and security. A state that cannot provide those (or some of those) to its citizens is dubbed a weak state, some theorists use the euphemism of a 'troubled state'. Even a state which uses its armed forces more to ensure regime security than citizen security can be called a weak state, despite the apparent show of strength. "Coercion is invariably directed at the population rather than at what most people regard as criminal behaviour", says Harris of weak states (2000, 185). When the state is weak by not serving the needs of its citizens, the citizens create structures and processes which suit them, which express their values and needs.

In weak states the state responsibilities to its subjects in the field of safety and justice are characteristically poorly resourced¹. Most states in Africa prefer to resource the military better than other agencies so that they provide regime security. Citizens are inclined; some may argue they are forced, to create institutions that will fill the governance vacuum which the weak state has left (Goldsmith, 2002, Schärf, et al, 2002). But this typology is not uncontroversial. A state, for example South Africa, may be strong if measured by the resilience and functionality of its democratic institutions (multi-party political representation, electoral systems, independent courts, separation of powers) but it is perceived by the majority of its citizens as being weak in the field of criminal justice. Ironically this weakness occurs because the constitutional due process provisions are so strong that its conviction rate is very low, and it is therefore perceived as weak in the area of criminal justice. Civilians, and often the state too, resort to illegal and unconstitutional means to 'do justice' under those circumstances.

3B: Customary Law and the Chieftaincy

In 4 of the six countries chosen in Southern Africa the largest manifestation of non-state justice is the customary law administered by chiefs - traditional leaders.

¹ In Malawi, the police in many rural areas do not have transport (to collect suspects), the courts often run out of paper half way through the month and then can't hear cases until more paper arrives, parties have to pay marshalls to serve summonses, court records are written on already used documents and folders, some court buildings leak so badly during the rainy season that the court records get damaged. (Schärf et al, 2002)

Only in Botswana and South Africa is customary justice is mainly exercised by accredited chiefs. In pre-modern forms of governance there was no separation of powers. Chieftaincy was hereditary and governance inhered in them without an independent judiciary. They were the judges, police and governors wrapped in one personality. During the British colonial era of indirect rule, this fusion of powers was continued but subject to a repugnancy clause, a reduction of the criminal jurisdiction of the chiefs and lesser local government powers (van Niekerk, 2001). In the decolonisation period countries such as Malawi and South Africa (whose decolonisation period took the form of apartheid) the chiefs were co-opted and used as political tools to exercise political control over the opponents of the new regimes. Their roles as judges and local government officials were abused to this end.

That taint precluded them from playing an official judicial role in the emerging democracies of the 1990s. They retained fairly minor local government functions, and even those are eroding in the first years of the 21st century². Only South Africa and Botswana still have a small formal judicial role for chiefs, and that predominantly in the rural areas. All other four countries have stripped them of their judicial powers and placed their former powers in the hands of (poorly trained) lay (as opposed to professional) magistrates, who are civil servants.

The utility of the chiefs to the democratic polities now seems to be to deliver the electorate to the ruling party. Even though they still have some local government functions, for which they are paid (paltry) allowances, and even though they in practice still preside over many disputes, they have no formal jurisdiction. They are free to mediate but if they judge, their judgements have no force in law. They function mainly as referrers to the police, the District Commissioners (for inheritance and land dispute issues (in Malawi) and the courts.

But it would be naïve to believe that their formal powerlessness robs them of authority. Any resident living under their jurisdiction who wishes to appeal a 'judgement' of theirs must think very carefully what the cost of that decision is

going to be. Given the fact that they and their extended family may need the chief's goodwill for a future decision in relation to local government functions - allocation of land, invitation to be an nduna (adviser), inclusion in a development project, referral to any other government service - all these decisions are inter-related. Bratton and van de Walle (1977) characterise the form of governance in Africa as neo-patrimonial rule, and that applies not only at state-, but also at local levels.

Given the fact that urbanisation is very low in most southern African countries (South Africa has the highest level at 53%, Malawi the lowest at 2%) the dispute resolution function of chiefs as village headmen/women constitutes the bulk of disputes processed in the countries. The state system is statistically the exception (WLSA, 1999:32).

The exception to the rule in the 6 countries is South Africa and Botswana. Given its high levels of urbanisation and the low levels of legitimacy of the chiefs because of their political role during apartheid, they only have authority in the rural areas. And even there the form of the decision-making has been influenced by the anti-apartheid urban structures (Mangokwana, 2001, IPT, 2001). Mangokwana observed that they were forced to work as chairpeople of a committee hearing a dispute rather than a chief sitting with his (and very occasionally her) elders/advisors.

3C:: Other Forms of Non-state Justice

The other forms of non-state justice will be dealt with in greater detail under the country profiles. But it is useful here to suggest the broad types of non-state justice in operation:

- **Private policing, private armies** : This can take the form of a formal contract by a landowner, a property-owner commissioning someone to protect the asset. Payment for those services may take many forms. It can be continuous or sporadic and in many cases it is innocent and clean. It has,

² In Malawi the chiefs are members of the rural local councils but have no vote on them. Local Government Act, 1997

however, in the past taken on sinister dimensions when political parties hire groups of men to 'encourage' residents to support the political party for whom they are working. Conversely they 'discourage' residents to support the party against whom their sponsors are campaigning. This can easily degenerate into a private army as is the case in Nigeria with the Bakassi Boys. They become so powerful and untouchable that they threaten to get out of control of their sponsor, whom they are then able to extort). Sometimes the state apparatus is used unashamedly for these party-political purposes as we are witnessing in Zimbabwe.

- **Vigilantism:** This means citizens of a certain mind-set enforcing a particular set of values. The borderline between vigilantism and a private army is thin. South Africa currently (January 2003) has a spate of vigilantism whereby suspects are summarily judged in a street hearing and then punished, even executed by various means [stoning, burning, beating, shooting, all of which sometimes preceded by torture to extract the confession].
- **Religious courts:** In some countries certain religions are not recognised and therefore their courts fall outside the state-recognised law. In South Africa Islamic law falls into that category and therefore the consecration and dissolution of marriages is not recognised by the state. Other private law domains in Islamic custom such as testation and custody are also not recognised (Moosa, 2001),
- **Street Gangs and Organised Crime:** Sustained illegal operations need to protect themselves from the police, their opposition and need to keep their local customers sufficiently safe to purchase their merchandise. If it is in their interests they will and do intervene in disputes between residents in their neighbourhood, and in some cases act as judges and implementers of their own judgements. They are also known to form coalitions with other syndicates and operators if they need more clout. They judge and take action against the police on their payrolls when they have violated their mutual agreements.

- **Non-government organisations:** There are a large range of NGOs that perform non-state justice functions such as victim support organisations (for example supporting victims of domestic violence and other forms of victimisation. Others do forms of empowerment that involve community workers settling disputes, or teaching residents to solve their own disputes peacefully. Or teaching residents about bail laws and human rights training to traditional leaders, facilitating state-civilian dialogue towards urban planning for a better quality of life. Such empowerment for citizenship may seem to be outside of the strict definition of non-state justice, but my view is that this form of non-state activity is empowering citizens for a law-abiding contribution to development and poverty-alleviation. There are many types of NGOs whose work supports the better functioning of the justice system, such as developing a pre-trial project to gather all the necessary information that will enable a presiding officer to make an informed decision about bail on the first hearing, thus preventing wrong decisions and making pre-trial incarceration a feature of trials only when it is warranted by verifiable facts.
- **Dirty Police:** In some of the countries under scrutiny the police are involved in organised crime activities as initiators and as subcontractors of dirty work they are not legally authorised to do. This may take the form of political policing.
- **Civilians settling disputes:** Some countries have well-organised communities in which rural models of dispute resolution are adapted for urban consumption. SA has street committees in poor residential African areas. Malawi has Ndunas (Mzuzu) and peri-urban courts presided over by influential people who may or may not be chiefs. They hear disputes arising from the friction and competition for resources in the peri-urban areas.

3C: Choice of Countries: Southern Africa is usually defined as the SADC countries (Southern African Development Community) and comprises South

Africa, Mozambique, Lesotho, Swaziland, Namibia, Zimbabwe, Botswana, Malawi, Zambia and Angola.

All these countries experienced three important and distinct phases: Colonialist phase: Imposed law (or received law as the euphemism has it), the post colonial era (between the 1960s and 1990s), and lastly the post-cold war era of democratisation and globalisation.

As a general statement, most African countries were colonies during which a dual legal system was allowed to exist: Western law (received law) on the one hand and indigenous laws and customs on the other. The British style of colonialism was not an integrative one, whereas the Portuguese form was far more integrative and intimate. Indigenes could become full citizens if they conformed to less strict property and educational standards than the British version. The inclination of the indigenous population to assimilate (they were called *assimilados*) to colonial values and customs was thus more pronounced in the Portuguese model. That is likely to affect the patterns of non-state justice systems in the post-colonial era.

Many of the liberation movements which fought for independence adopted a socialist ethos: Mozambique, Zimbabwe, Angola, and South Africa. That affected the approach to law and procedure as well as the notions of professional lawyers and judges. It also partly shaped the type of dispute resolution, both formal and informal, in the post-liberation-war era. The extreme case was Mozambique which, after independence in 1975 shut down the law school, and sent the law students into the countryside to proselytise the new communalist ethos of people's law. (Sachs and Honwana Welch, 1982; and Isaacman and Isaacman, 1982).

In the post-colonial era, and even more so in the post-cold war era, the biggest challenge of these legal systems is to find a *modus vivendi* between fairly liberal constitutions and customary law, which is generally very patriarchal. The new constitutions became the substitute to the "repugnancy clause" of old. A strong

tension arises between democratic values and their concomitant legal principles on the one hand, and a communalist life-style and legal philosophy on the other.

The expedient use of the indigenous chiefs as political tools by quasi-military rulers (Banda in Malawi and the military rulers in Lesotho, the apartheid rulers in SA) has created in some SADC countries a deep suspicion about the roles of the chiefs in the legal system. It resulted in their marginalisation in the democratic post-cold war era. Some countries (Zimbabwe, Botswana) still have chiefs playing an important and integral role in the legal system, whereas in Malawi, Mozambique (where they are called regulo) and Lesotho they are excluded from formal legal functions, while being accorded several local government functions. Regardless of the regime, local chiefs play a large role in the lives of their 'subjects'. In Malawi and Lesotho they have no formal legal functions, but nevertheless still preside over disputes among their 'subjects', sometimes alone, but often with advisers ([I]ndunas), the village elders.

3B: Why have I chosen particular countries?

The countries I chose are: Malawi, Lesotho, South Africa, Mozambique, Botswana and Zambia. All but one of these were British colonies. Mozambique was a Portuguese colony.

Zimbabwe could have been chosen for its unique position of 'war veterans' forming a type of private army for the ruling party, as was common in Malawi before democratisation with the Malawi Young Pioneers. Zimbabwe deserves scrutiny. What is particularly interesting here is the contamination of the police and courts by the illegitimate regime, since the police don't implement the High Court orders. As from 2002 onwards, most of the independent judges were replaced by less independently-minded ones. But the difficulties of doing research there at this time of high political tensions and acute famine make it less likely that a productive research process will be possible.

Malawi, Lesotho Zambia and Mozambique have in common the fact that traditional leaders do not play a formal role in the justice system, although they play minor roles in local government. However, they remain the most important justice resource to the poor rural citizens, but it is non-state. Lesotho is interesting also because it is a constitutional monarchy. Mozambique is particularly interesting to see how its socialist past (from 1975 to 1995) has left vestiges in the NSJSs.

South Africa is chosen for its high level of urbanisation (53%), high levels of crime which generate a lot of non-state forms of justice and for its 11 ethnic groups, weak and transforming state justice system.

Botswana is also a more developed country with a higher level of urbanization and one of the highest per capita income levels in Southern Africa. It has chosen an integrative approach to acknowledging and utilizing customary systems. It has not chosen just to supplant them.

Zambia: It is styled in my personal typography as a middle-of-the-road country. It is poor, multi-ethnic, it was a former settler state, but not at the levels of Zimbabwe and South Africa. It has some strange customs that are still enforced, and the justice system has changed very little since independence.

I did NOT choose Swaziland, even though it is a despotic and paranoid monarchy because my sense is that it will be too difficult to get anyone to talk freely about the systems. The option of sub-contracting a local person to do it will also not be fair to that person if the information s/he has produced is discovered.

I also did NOT study Angola because of the danger, language issues and the absence of NGOs focussing on justice issues.

4. Hypotheses About the Origin of Non-state Justice Systems

The four hypotheses that emerge from this reading of history as far as NSJS is concerned are:

Firstly, the more legitimate (and sensitive to the needs of the poor) the regime, the more the 'non-state-type' structures will be integrated into the formal system, or at very least tolerated by it. The emphasis, so this thinking goes, will be more on the desirable outcomes than the procedures by which those outcomes were achieved.

Secondly, regimes that are fairly doctrinaire and do not tolerate high levels of diversity within the social fabric, such as not recognising religions other than the state-sponsored religion in all or parts of their country, inevitably force the non-recognised religions and other non-acknowledged justice systems to minister outside of the realm of the state.

Thirdly, democratisation has usually been introduced by discrediting and dismantling old forms of social control and policing, before putting new substitutes into place. That power- or law-enforcement vacuum is usually filled by non-state mechanisms of social control and crime prevention. These structures are likely to be temporary and disappear when the state develops the capacity to cope with the problems. For example, when the police try and cope with the move from paramilitary to democratic styles of policing,

Fourthly, urbanisation is likely to create mutations from, and additions to the rural indigenous justice systems to regulate the rigours of urban survival. A host of different types of non-state justice-and-governance systems are likely to develop in the urban residential areas where the poor congregate. They experience different problems than do their rural counterparts and need different structures to address them.

5. Critique of Joanna Stevens': Access to Justice in Sub-Saharan Africa - The role of traditional and informal justice systems.

This book is a valuable source of information about Africa and has some useful comparisons from SE Asia. It tries to fit two bills: That of a resource book as

well as a source of analysis of the main literature in the field of formal and informal justice.

As a resource-book it shines. Its strength is that it gives the reader a practical overview of the most important approaches to non-state justice in contrast to state justice. It also gives the reader a wide range of projects in several countries and good practical approaches to the topic. It certainly digs up almost all the available practical literature on the topic. For a non-expert in the field of non-state justice this is a very substantial accomplishment indeed. She weaves the literature well into the themes and presents a convincing argument.

The fact that she ranges widely to include youth justice in non-state justice analysis is very insightful, because that is the area in which a lot of innovation and experimentation is taking place world-wide.

The book is easy to use and very accessible, the ideal book for the newcomer to the field.

My criticisms have to be seen in the light of my dual persona of an academic and a researcher in the field of non-state justice. Some of my criticisms which follow are not presented in a chastising manner, but have emerged since the publication of the book. We have learned more about the field since then.

The book could have done with a periodisation of the global development of NSJSs: Colonial, post-colonial, and post-cold war and post-modern/globalised eras. For most of sub-Saharan Africa globalisation was also the period of democratisation. My growing skepticism and cynicism of governance in Africa have made me very wary of the political will and the capacity of the states on sub-Saharan Africa to get even the basics right. I believe that the three eras do to some extent shape and constrain what we can expect of the future. The Zimbabwe crisis, the current stand-off (almost showdown) between many donors and the Malawi government and the New Partnerships for African Development seem at this stage more like a different form of aid procurement than anything else and are likely to sour relations with the west rather than anything else.

Locating the book within the political-historic context of the regions would have made more sense rather than presenting NSJS in a historic vacuum.

In hindsight the rendition of NSJS which the book assembled paint a rosier picture than is warranted by the emerging research. I am as guilty of that as Joanna was. The tough reality is that the traditional justice that falls outside of the state justice processes in many countries is tough justice. Women in particular get the worst of both systems. In the traditional systems in Zambia, women whose husbands have died are subject to 'purification' rituals which include sex with some relative in the extended family. Similarly, in all the traditional systems which are patrilineal and patrilocal, women remain minors all their lives. And if one thinks that women in matrilineal and matrilocal systems (in parts of Mozambique, Malawi, Zambia) have a better deal then that's wrong because it's the matrilineal uncle who controls a woman's financial affairs. The bottom line is that women get low quality justice, or no justice at all in both systems.

Secondly, and here again I plead equal guilt in my earlier work, the fact that the fusion of local government powers and de facto judicial powers resides in a chief means that the resident who wishes to appeal against the chief's judgment has to think very carefully how the decision to appeal will shape the chief's discretion when it comes to future decisions. For example, a chief may bar the appellant from participating in development projects or allocation of land. While that fusion may have benefits when their combination is used benignly, it is highly problematic when the chief takes a dislike to a person and uses his powers in one field to the disadvantage of the resident in another field.

A further improvement in the book would have been a link between the forms of economy and the forms of disputing. As societies become more stratified the different levels require models of disputing and -settlement which suit their needs.

Lastly, I may have missed the theme in a quick re-read of the Stevens book, but the point does need to be made once one takes a big-picture look at western and non-western systems of justice: Western models of justice have resource

assumptions that no African country can afford. Consequently the western system in an African setting fails abysmally to do justice, and particularly for the poor. Even South Africa's transforming justice system is, on balance, still a very poorly-functioning system of justice in comparison to the systems in developed countries. It may have some laws that are more progressive and user-friendly, but the poor person still gets a very raw deal when seeking justice, whether from the police, courts or prisons.

6. Country Profiles

6.1 Lesotho

Lesotho is a constitutional monarchy, a "sovereign democratic kingdom" according to section 1(1) of the 1993 Constitution. It is 32% urbanised. Its economy is dominated by and dependent on the South African economy. SA buys its main export, water and employs the majority of its able-bodied men as migrant labourers on mines. South Africa's gradual replacement of migrant labourers with South African labourers is creating severe hardship to the Lesotho economy (Lesotho SSAJ Project Design Memorandum, DFID, Pretoria).

Each village has a headman above whom is an area chief, above whom is a principal chief, whose domain extends to either all or part of a district. If there is more than one principal chief in a District, a Senior Principal Chief is appointed by the king. Chiefs perform their official services for the department of Local Government but are also accountable to the king (in relation to customary law and succession issues). When it comes to governance, it is the chiefs who are the most immediate manifestation of the state for the majority of people in Lesotho.

There are 22 Principal chiefs in Lesotho's 10 Districts. The chiefs occupy the Senate, the upper house of the legislature. All 22 principal chiefs are entitled to a seat in the Senate. A principal chief may nominate another person to deputise for her/him in the Senate. Given the fact that chief's allowances are so paltry they often 'subcontract' the chieftaincy to their wives or other relatives. As a result there are a disproportional number of female chiefs at all levels in comparison to

other countries in the region. That fact becomes important when female chiefs deal with disputes. Their interpretation of customary law often reduces the prejudice to women which inheres in most customary law rules. Even the head of the Judicial Commissioner's court is a woman and she is adamant that she has never, and will never allow a woman to be disinherited. Her explanation is that it is inconsistent with constitutional principles. The head-of-household in Lesotho is frequently a woman because of the conditions of migrant labour.

78% percent of the population lives in rural villages and settlements. The main sources of income are labour remittances from migrant labourers in South Africa, water (which is sold to SA) and mohair. Lesotho is landlocked and surrounded by South Africa. It has a population of 1.2 million.

Chiefs in Lesotho have no formal jurisdiction in the state legal system. It was taken from them in 1947. In reality, however, they process the VAST majority of disputes in the country. A safe guesstimate puts their level of dispute processing at 80% of all disputes in the country. Extended families deal with matters relating to insults, domestic violence and other inter-personal disputes. Those disputes which the families are unable to resolve, either within the family or between families, are taken to the traditional leaders. They in turn attempt to solve the problem by mediation, spiced with the authority the chief usually wields in the lives of their subjects. But if they cannot resolve the issue they refer it up their chain of command for processing, or horizontally across to the state courts. This referral takes place by means of a letter to the higher chief. If that is not feasible then they refer it, also by letter, to the relevant state institutions be they the police, the local and central courts or other state institutions.

The headmen/women and principal chiefs interviewed in April 2002 said that they spend the greatest proportion of their official time processing disputes, either presiding over them or assessing whether they should be referred to other institutions. They entertain matters which would conventionally be the exclusive domain of the formal courts, such as rape, but given that they are predominantly 'mediating' in such cases, they are not technically encroaching on the state's

exclusive criminal law domain. In cases such as rape, they provide a forum in which the matter can be taken up in a way which looks to the future relationship between the families living in their villages, and strive to avoid recurrence of the crimes. The other cases they hear are land disputes about cattle grazing in land allotted to others, cattle theft, building dwellings on land allocated for agriculture, assaults, insults, theft of crops and burning of crops. They preside over these cases (at their discretion) if the perpetrators are known to the complainants. When the perpetrators are not known, they refer the case to the police. The police, however, do not have a reputation for high levels of success in investigating and prosecuting crime, and so the pressure is on the chiefs when their subjects bring cases to them.

Non-State justice, seen from a formal legalistic viewpoint, occurs both in the realm of private and public law.

In the realm of *private law* the main actors are, for historical reasons, the chiefs and the gendered village courts. Although Lesotho has a dual legal system, chiefs and elders as arbitrators are left out of the customary legal administrative system. Instead, lay magistrates preside over local courts and call expert witnesses (the chiefs) if customary law needs to be proved. This anomaly has been further exacerbated by the 1993 Constitution of Lesotho that contains a freedom of discrimination clause (clause 18) but from which the application of customary law is exempt (subsection (4)(c)). From this it would appear as if Lesotho is willing neither to embrace a rights-based system in its entirety nor to retain its customary system in its original form. The net result of this dichotomous situation is that the formal legal system has left a space, outside of the formal state ordering system, for customary law arbitrators to maintain their historic role, albeit in a somewhat reduced form.

Seen from the angle of poverty reduction chiefs courts and gendered village courts are cheap and accessible (WLSA, 2000) and there is thus a valid argument for the State to tolerate their continuation. They constitute the vast majority of disputes processed in the country. When a dispute exceeds the

capacity of the village headman as well as the chief/tainess it is referred to the appropriate state institution.

However, from another angle of poverty reduction (Selebalo, 2001) the gender discrimination that is perpetuated by the customary system and sanctioned by the Lesotho Constitution exacerbates poverty. There seems not to be any scholarly research on the entire economic effect of customary law on women in latter-day Lesotho. One example came to light during research for the Project Memorandum in April 2002: In the rural areas rape is NOT only a criminal matter. It is usually dealt with in the villages firstly, by the families concerned, and then, if necessary, taken to the local chief, and up the ladder of traditional leaders, who usually impose a financial fine on the family of the perpetrator. If the victim is a virgin the rape diminishes bride price, which is a very important issue in the survival of families and the ties between them.

If the rape results in such injuries that it prevents the woman from bearing children it is extremely serious for the victim's family: In subsistence cultures children constitute the labour force available to a family. If a woman cannot bear children the family is bound to suffer severe economic hardship and she is unlikely to find a husband, and her family will lose out on the bride-price which is the equivalent of an old-age insurance.

It is usually only if the perpetrator of the rape is a stranger that the matter is treated as a criminal matter and referred to the police.

In the domain of private law, the churches seem to have an on-going, albeit *ad hoc*, conflict resolution role (see WILSA, 2000). Christianity is the predominant faith in Lesotho and there appears to be no other religious grouping that plays a dispute resolution role among its adherents.

The arena of *public law* provides a more diverse array of non-State ordering systems. The divide here seems to be between urban and rural needs. The reason for this lies predominantly with the fact that there is a greater concentration of State policing in the urban areas (see Telephone Interview with

Inspector Raleting, September 2002; UNAFRI/UNICRI, 1998), leaving rural areas more prone to self-help justice.

The latest crime statistics were not available from Lesotho government sources, but if one looks at the Interpol statistics (Interpol Crime Statistics, Lesotho, 1999) and the International Crime (Victim) Survey in Maseru (UNAFRI/UNICRI, 1998), all forms of assault and all forms of theft and housebreaking make up the highest crime figures nationally.

In the rural areas stock theft, coupled with easy access to illegal arms, the sale of marijuana that facilitates the purchase of weaponry, which in turn converts stock theft sorties into murderous attacks and counter-attacks, seems to be the endemic problem (see Nedbank ISS Crime Index, 2001; Laniel, 1997; New People African Feature Service, 1999; Kynoch and Ulicki, 2000). Considering that Lesotho is still largely a pastoral-based economy and that the customary practice of measuring wealth in live-stock is still strong, the extent to which stock theft contributes to poverty is trite (Kynoch and Ulicki, 2000). That rural people respond to stock theft in their own manner, in the absence of sufficient policing, is therefore not surprising. Exactly who the role-players are is not quite clear. Police talk of 'stock theft associations' as *ad hoc* members of rural communities that band together to retrieve stock as and when their stock has been stolen and mete out brutal punishment when the culprits are found (see Telephone Interview with Inspector Raleting, September 2002; Telephone Interview with Trish Kabi, TADI, September 2002). Villagers pay membership fees to these associations, allegedly as a hedge-fund to pay for bail and court fines for those members of the association that have committed assault/murder in the process of retrieving stock (Inspector Raleting, September 2002; Telephone Interview with Trish Kabi, TADI, September 2002; Kynoch and Ulicki, 2000). What muddies the water is that the perpetrators of stock theft are an unknown quantity. The study by Kynoch and Ulicki (2000) indicates that chiefs and corrupt police are an essential component in keeping this lucrative cycle going. It is therefore conceivable that chiefs and stock theft committees, in addition to being police, judge, jury and executioners, could in addition, interchangeably, be 'responders' to crime as well as

perpetrators of stock theft. Add to this a brisk trade in arms and marijuana and geographically situate this cycle on the national border between Lesotho and South Africa and the terrain becomes extremely complex. The Lesotho police and the South African police, as well as civilian groupings from both sides of the border have attempted to deal with this phenomenon (Hansard, 14 April 1997; Station Commissioner Barnard, Ficksburg SAPS). The Lesotho government's latest response to stock theft associations is a drive to dissuade people from participating in stock theft associations and concomitantly exhorting people to form Crime Prevention Committees that operate in partnership with the authorities and operate within the frame-work of the law (Telephone Interview, Inspector Raleting, September 2002).

Crime Prevention Committees are not only a rural response to crime. Such non-state ordering systems have their genesis in the state-sanctioned notion of community policing. According to the National Head of Community Policing, Inspector Raleting, nationally 964 Crime Prevention Committees had been registered with the police by end 2001 (Telephone Interview, Inspector Raleting, September 2002). The capacity and profile of Crime Prevention Committees was researched by Dr. Mohome of an NGO, The Training and Development Institute (TADI). This research constituted the first phase of the Safety and Security Project, a pilot study co-partnered by this NGO and the Lesotho police. Although this research was not made available to us, the Institute avers that the majority of the 964 Crime Prevention Committees were either non-functional or not functioning optimally. Lack of capacity and understanding of the notion of community policing and the law was cited as the main reason for this (Telephone Interview with Trish Kabi of TADI, September 2002). The second phase of the pilot project consisted of in-depth training of all the community stake-holders – chiefs, stock theft associations and crime prevention committees – in four pilot sites. The implementation phase of the project, consisting of profiling the crime in each pilot area, developing an area-specific crime prevention strategy and implementing it, will continue until March 2003. The specifics of these aspects in all four sites seem to be in their infancy still (Telephone Interview with Trish Kabi

of TADI, September 2002). However, Inspector Raleting, who is integrally involved with this project, holds that the establishment of Neighbourhood Watches, particularly in urban areas, that are affiliated to Crime Prevention Committees is already being actively touted at public gatherings (Telephone Interview, Inspector Raleting, September 2002).

It is not known yet whether Crime Prevention Committees will bring on board the private security industry. The lone night-watchmen outside private business premises has long been a feature of most African countries, but Lesotho has not escaped the world-wide phenomenon of a burgeoning private security industry. The successive coups in Lesotho have often been coupled with the shedding of military personnel, making ready material for private security firms (Telephone Interview, James Atema, DFID, September 2002).

Lesotho has commenced a DFID-funded Project design phase for an SSAJ project in 2002, which will commence implementation some time in 2003.

Recommendations

1 The government of Lesotho needs to come clean about its liberal Constitution which excludes women's rights from its protection under customary law. Comparative insights from other SADC countries should be encouraged, and the local WLSA (Women in Law in Southern Africa) branch should be strengthened to provide the necessary impetus for a women's rights movement, which will pressurise the government to become more progressive regarding women's rights.

2. A harmonisation project needs to be undertaken in a similar vein to the one recommended in Malawi in this paper. A long engagement with chiefs over the values contained both in the constitution as well as in customary law and how the two can find a harmonious and liberating, educative role for customary law in the body of laws in Lesotho.

3. Given that the state's capacity to deliver to its citizens is so under-developed it is to be expected that voluntary organisations emerge. The Lesotho government

must make sure that it works VERY CLOSELY with these organisations lest they become too independent and self-serving, rather than perform a service to the broader population. If stock theft is such an emotive and destructive force in the lives of the Mosotho, then a smart project needs to be created. Crime Prevention Committees need to be beefed up, trained and well managed. In a small country like Lesotho with such a small population getting a handle on these problems should not be insurmountable.

4. There are far too few NGOs and voluntary organisations focussed on justice and safety issues. The University is not as actively involved as other Universities in other SADC countries in the development of new ideas and solutions for Lesotho's prosperous future. In this respect the academics are lagging behind (with a few welcome exceptions) those in Malawi, Zambia and South Africa. We haven't got a good sense about the Botswana academics. The government should encourage them to apply their minds to seek solutions to the safety and justice challenges they face.

Useful Resources

Lesotho: Death Squads in the Mountain Kingdom New People African feature Service (86) May 1999.

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Useful Contacts

Apart from the references in the text, the following resources are useful:

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Alister Moir: DFID, Pretoria: 012 431 2100: a-moir@dfid.gov.uk Programme Manager for Lesotho:
Tebocho Green of Sechaba Consultancy: 316555:

David Ambrose, 340300, who has the largest literature collection relating to Lesotho.

Siabatha Motsamai: Lesotho Council of NGO's: 317205: www.lecongo.org.ls List of NGOs in Lesotho

Dr. Fanana: Roma University: 340601: Lecturer in customary law.

James Atema: DFID Lesotho

Simon Baphane: Private Sector Forum: 322-794. Simon@lesoff.co.ls

Trish Kabi: Training and Development Institute (TADI): 322562.

Andries Odendal: Centre for Conflict Resolution: 021 422 2512: Busy establishing the Lesotho Network for Conflict Management, an IMMSA type of body that would jump into the breach to facilitate conflicts at local government level, as they arose.

6.2 South Africa

South Africa is the most prosperous economy on the African continent with a population of 42, 5 million people, and 11 languages. It is 53% urbanised, has 40% unemployment. It also has one of the highest relative income gaps in the

world. It has several hundred NGOs in the field of justice, law, victim support and -empowerment, advocacy, crime prevention, policing, research, corrections/prisons, restorative justice, training, legislative drafting and more. It has an active research community both within the Universities and the NGOs.

One of its negative legacies still being addressed, is the poor service the poor black residential areas receive from the state, be it safety services, transport, housing, education, health services. Compared to the rest of Africa the services are good, but in comparison with affluent South Africans, the services are poor. That inclines residents to develop their own services and structures, particularly in the NSJ field.

South Africa currently has a wealth of NSJSs along a wide spectrum, ranging from benign and complementary to the state system on the one hand, to brutal and self-serving on the other.

Street Committees: During the anti-apartheid struggle the main liberation movement set up a form of informal governance in the townships, the African residential areas, called street committees. Among other tasks they processed disputes and also, at the height of the violent urban struggle between 1984-6, they ensured political compliance with the struggle-ethos. The structures which processed violation of the political rules were called **people's courts**. They no longer exist, and all forms of township organisation have weakened in the context of a state that is struggling to reform itself to suit the needs of a democratic polity.

Street committees are still widely distributed in poor African townships, but they have lost a lot of support and respect in the democratic era. Some of the crimes they used to process in their deliberations are nowadays passed onto the local police. One of the reasons why they have lost a lot of support is that they refer most criminal cases to the police, whereas they used to handle many types of crimes themselves, using mainly restitution or compensation as the main remedy. Because of their political clout in the past they had a high compliance rate but nowadays they hear ever more minor disputes. Their ethos is to work with the state justice system. One of its off-shoots, called the Community Court,

conceptualised and run by lay civilians, hears cases and refers them to the relevant state institutions, be they magistrates court or other body, if they cannot handle the matter themselves. In one state court the magistrates and prosecutors have been co-operative and also refer cases to the community court, which they believe is more appropriate to handle certain matters than the courts.

Street committees have immense potential in sorting out disputes that emerge in high-density poor residential areas. At this stage they work together with their respective community policing for a for criminal matters, but in civil cases there is as yet no form of coercion (other than community pressure) which can force a disputant to abide by the outcomes. There is space for a strategic intervention in which such structures such as the state's Small Claims Courts could link with street committees to enforce their judgements. These developments are being steered by the Restorative Justice Initiative, a Cape Town based religiously affiliated NGO.

Peace Committees: This is a very interesting new initiative in which making peace, in the form of dispute resolution, is combined with financial incentives to the mediators. Run by the Community Peace Programme it works in poor residential areas in a growing number of locations. Its innovative formula is to combine peace-making with development activities: An amount of R100 is made available for every successful mediated outcome by local residents who join the programme and receive some training, after which they sign a code of conduct and may then facilitate the processing of disputes. One third of the money goes to the mediators, the other into a small business development fund, which the members can dispense (within parameters) and the rest to a community development fund decided on by the local community. It has been running for the last three years and its claims are very up-beat about the volume of cases processed and the spread of peace, and the combination of peace, business development and community development all administered by the local poor residents themselves under the guidance of the NGO. The hope of the CPP is that local government will adopt the process and fund it so that the current NGO funding can be withdrawn.

Self-Defence Units: Another type of non-state justice structure emerged in the turbulent pre-democracy period, 1990-3, called Self Defence Units (Affiliated to the ANC liberation movement) and Self-Protection Units (affiliated to the Inkatha Freedom Party). Once democracy arrived their members attempted to become formalised into the police service but few achieved this. Some of them re-invented themselves as private security, available for paramilitary assignments and retrieving stolen goods for a fee. In Cape Town they are called **PEACA, Peninsula Anti Crime Association** (Tshehla, 2001). A similar structure operates in New Brighton in the Eastern Cape called the **Amadlozi**, and the police pass on to them cases they have been unable to investigate successfully. The police ask no questions about how the evidence has been obtained and are glad to have their dirty work done for them. (Buur, 2002).

Vigilantism is a complex phenomenon in poor residential areas. From time to time crime gets out of hand, the police are slow to react and civilians step in to protect themselves and their families. In 1998 an African township outside of Cape Town, Gugulethu, experienced a very high level of violent crimes and sexual assaults. The taxi drivers, who are mobile, armed and organised, took it upon themselves to respond to requests by civilians to punish perpetrators. They would punish suspects severely, sometimes allowing the victim to also flog the alleged perpetrator, and then the perpetrator would have to 'model', walk down a public street naked as a shaming process, often whilst still being beaten. During 2000-2002 the residents of Khayelitsha have resorted to lynching suspects of serious crime, and then demolishing their shacks.

South Africa's democratisation process was accompanied by rapid rising crime at the time when almost all arms of the state were grappling with their own internal transformation. This hit the criminal justice system hardest, because it had to cope with the huge move from a confession-based form of prosecution to an evidence-based one. The system was not skilled enough to accomplish this so drastically high violent crime rates characterise the new democracy. The

efficiency of the criminal justice system is still very low and the state suffers a legitimacy crisis in that sphere.

Poor people have marveled at the fact that the police were so effective during apartheid yet they, and the rest of the criminal justice system, cannot protect them sufficiently in the democracy. Malawi experienced the same rapid rise in crime once the authoritarian Banda regime was replaced with democracy. Many blame democracy for the ills of the post-cold-war regimes.

There is a relatively easy solution to vigilantism of this sort. It is a rapid-response facility of a mobile police unit combined with intensive community awareness campaigns about bail laws and the fact that a suspect has been released pending trial does not mean that the state has acquitted them/him.

Poor people generate their own forms of justice mainly through voluntary organisations such as **Neighbourhood Watches**, which are armed and do street patrols and are supposed to work in conjunction with the police, but that relationship remains fraught with suspicion and rivalry. Many abuses had been perpetrated by neighbourhood watches until the provincial and local governments in one province (Western Cape) decided to 'harness' them and turn their good intentions into lawful actions. They commenced training processes with neighbourhood watches so that their actions remain within the law. Both levels of government have equipped them with batons, torches, uniforms and mobile phones (the latter provided by the telephone companies as their contribution to fighting crime). This has met with moderate success, but it depends crucially on the close working relationship between them and the police. In some high-crime residential areas the neighbourhood watches outnumber the police by 10 to one. Neighbourhood watches in South Africa are groups of 10-15 men armed with their council issued batons as well as their own hand-guns. They patrol their streets and confront anyone they deem suspicious. This can easily degenerate into scuffles and assaults when the civilians challenge the right of the neighbourhood watches to stop and search them or to effect a citizen's arrest. The mistake the government departments made was not to hold joint training

sessions with the police and their local neighbourhood watch groups so that they get to know each other and diminish the mutual suspicion between them. The results have been very uneven, and issues such as insurance for neighbourhood watch members getting injured while 'on duty' and abuses of power of civilian volunteers have not been thought through sufficiently. However the idea holds a lot of potential for SA and other SADC countries as long as it is well-managed.

Community policing has become the vehicle through which dialogue between police and their local communities is routinely maintained, but the relationships remain difficult, mainly because of the low conviction rate and poor service delivery from the police. However, it has led to some de-demonisation of each other and greater understanding of each other's needs and shortcomings.

Most of the initiatives mentioned thus far have been generated by civilians for their own protection and regulation. Community policing is the only initiative among them in which state-civilian partnerships feature. Since 1998 many new initiatives have emerged that have as their founding principle state-civilian partnerships: Among them are:

Community Safety Forums: An extension of community policing is being developed, called Community Safety Forums. Their function is to enable poor people to participate in planning and implementing large-scale development projects which will increase the quality of life in their area, and in the process hopefully also reduce crime. The idea is to draw on the resources of all levels of government (local, provincial and national) rather than only rely on the police resources. There was a four-year pilot phase, and based on its successes the government has committed itself to mainstream the project. Since October 2002 the concept has been accepted nationally and will be gradually rolled out. The pilot phase was funded by DFID. The key to its success is a very competent NGO called UMAC, which is able to mobilise the many different role-players AND the state departments to co-operate.

Urban Renewal Strategies, (URS): In 1999 the President chose some of the highest crime-riddled areas in some provinces for special attention. What

became known as Urban Renewal projects were initiated to bring about a general improvement in the quality of the urban infrastructure and services to citizens. This included street lights, transport amenities, victim support facilities, both legal and medical (select police stations would get a 'comfort-room' exclusively used for victims of domestic and sexual assaults). The thinking behind this strategy is that an improvement in the general quality of life should reduce the levels of crime. It is too early to tell whether the hypothesis will work in SA, a country with an inordinately high incidence of violent and sexual crime. CCTV is also a feature of URS in some urban projects.

The Cape Renewal Strategy: This is a localised renewal strategy focussed specifically on parts of Cape Town that has a high concentration of street gangs, whose general activities endanger the lives of the residents. It commenced in 2002. It adopts the 'crime-and-grime' approach combined with the fabled zero-tolerance cum broken windows tactics which were claimed to have worked so well in the USA. These claims are not uncontroversial, and their success or otherwise remain to be seen. What is happening in the early stages of the implementation of the project is that a displacement of gang-related crimes is taking place. The gangs feel the heat and move (temporarily) to a place where the heat is less searing. At least for a short while the residents are free from stray bullets and gang intimidation. Longer-term solutions are harder to come by but it remains to be seen how well these strategies will work.

Local government police forces as well as private security hired by local government for "**City Improvement Districts**" have become features of urban landscapes since the late 1990s once local government restructuring had taken place, particularly in the new metropolitan areas. Their effectiveness remains to be proven seeing that police crime statistics have been withheld from the public since the end of 2001. This is a combination of local government money buying private security firms to patrol particular suburbs in addition to the already-deployed city-police. It's a strategy based on saturation police-patrol presence. One of the early problems these multi-agency policing initiatives are throwing up

is the communication and co-operation between the different agencies all responsible for the same area.

CCTV: Private business in several of the major cities have pooled funds to purchase and install CCTV in their business districts. After three years of operation in Cape Town it is being hailed a success, and it seems credible. It is accompanied by increased foot patrols, so it is very expensive and labour-intensive. No-one has, as yet measured to what extent it is simply displacing the crime to areas not yet covered by CCTV.

Despite this exponential growth of policing institutions civil society appears not to feel safe. The affluent citizens hire **private security**, the poor try to protect themselves from predation by forming **voluntary organisations**. Some poor people living in gang-dominated areas, request the **gangs** to provide security for them. This is done sporadically in Cape Town which is well known for its high proliferation of street gangs,

On the less violent part of the safety spectrum there are many hundred initiatives on the part of NGOs to provide peer mediation at schools, teach conflict resolution to community workers, a 3-year German government-funded project that has 20 peacemakers/mediators on foot in an African township (Nyanga) in Cape Town. There is a project called Peace Committees which picks up as an NGO where the street committees left off when they became less active and confident. The difference is that the mediators in the Peace Committees are paid per mediation by the NGO.

Victim Support Initiatives: There are many hundred victim support initiatives in the justice field. Apart from the existing individual initiatives such as a single NGO providing one service, say abused children, there are others which attempt a new approach. Sometimes they are part of an approach which aims to bring all necessary services within a small geographic area, so that a victim does not have to walk from one institution to the next for her/his package of services. So one-stop centres are being constructed in pilot areas where police, social workers, medico-legal examiners, prosecutors, judges, correctional services,

legal aid are all available. The inevitable teething problems and over-stretched budgets often incline these good ideas to peter out after the honeymoon period and once the foreign donor projects have reached a point where they hand over management and funding to the government.

While victim-support projects may not be seen as relevant to NSJS at first glance, they are very important. Almost all people who resort to retaliatory violence and who are inclined to join vigilante or other violent organisations, have themselves been victimised in one or other way. The existence of victim-support institutions assists the victims to find other means of coping with their ideal other than raw violence. Such organisations make an important contribution to preventing cycles of violence.

Traditional Leaders in the Democratic Dispensation: The situation of chiefs in SA is one the government is trying to avoid finalising, for fear of the political conflict it will generate, seeing that the largest concentration of chiefs are in rural KwaZulu-Natal, a province in which the main opposition party has its stronghold. The SA Law Commission has recently published a draft law on customary courts in which it tries revalorise customary courts and make sure that the gender representation on it is 'reasonable' (SA Law Commission, Project 90). The Bill attempts to marry the constitutional values with customary values, but ensures that constitutional values trump customary ones. This opens the door for a considerable development of customary law. The Bill gives the customary courts limited criminal and more extensive criminal jurisdiction.

This is a very bold step, one the government has been trying to postpone for as long as possible. It will be interesting to see with what urgency the Bill is pushed through the legislature, and then, how eager the government will be to establish the courts and their supportive infrastructure. Also of interest will be the degree to which the customary courts will be resisted by men, when their favoured position in customary law is subjected to a leveling of the court's battle-field.

The dilemma is the same issue as in other countries: The role of chiefs in constitutional democracies cannot remain the same as they were before the

advent of democracy. Local government should be run along the same democratic lines as national government, namely by elected representatives, not hereditary chiefs.

The problematic side of that dilemma is that the state has limited reach in the rural areas, the chiefs historically constituted the pivot of government administration there, and how is the government going to provide a cost-effective and legitimate alternative?

A question left unanswered by the Bill is whether the chiefs will retain their local government functions and payments. That may be clarified when immanent new legislation in relation to the chiefs is developed.

Recommendations:

1. SA has been able to develop very progressive and far-sighted and appropriate policies, but has been very poor indeed at translating them into practice and even worse at sustaining them when donor funding runs out. Some blame the recalcitrant civil service for sabotaging the reforms, and there is no doubt some truth in that. Others argue that the planning and management of the transformation is/was faulty, and there is also a lot to be said for that. Many other reasons are given for failed reforms: Not enough time, not enough resources, too much simultaneous pressure on the staff, and out-of-synch-ness with the rest of the system that is not transforming yet. I am not aware of any project that has been sustained successfully after the funder and its expertise withdrew. The receiving government obviously blames the donor for premature exit.

It seems that serious attention needs to establish what methodologies of reform/transformation work best in developing countries at particular times. A project should devote serious time and resources to develop insights about sustainability and durability of reforms/transformation. Among the themes researched should be the incentivisation to the country and its officials to make sure the new programs work. I therefore propose serious attention be given to methods of successful change in any developing country's justice system. That

will hopefully result in better justice systems. It's as much a learning process for the donors as for the recipient country/project.

2. The SA Law Commission is busy with a project on non-state justice systems and one on customary justice. Since the ascendancy to power of Pres Mbeki and his Cabinet in 1999 progressive legal reforms have slowed considerably and are accompanied by a swing to the right and an aversion to reasoned thought in the planning of projects. It has also resulted in jettisoning projects which would have reduced prison populations and enhanced human rights. This get-tough-on-crime and criminals has been undertaken in the most ham-fisted style which has as its base assumption that getting tough on individuals will deter others from committing crime. If the major premise that people turn to crime because their life is tough, then making things even tougher for them may not be the answer. The SA Law Commission needs to forge ahead with a progressive and creative approach and be supported in its bold endeavours to improve the quality of justice, including the non-state justice arena. The emerging trend in the Law Commission is to regulate non-state justice systems rather than incorporate them. Generating clear and easy links between state and non-state links is imperative so that they all operate within the law. They are also going to recommend increasing the number of Small Claims Courts, which are equity-based civil courts presided over by volunteer lawyers. The benefit of these is that they have the power of government behind them when it comes to implementation of judgements.

3. A National Institute for Civic Education should be established like the one in Malawi to keep citizens, particularly ones with limited access to media and educational facilities, abreast of developments and to encourage positive citizenship. South Africans' 'culture of entitlement' is very negative, and renders people less creative and enterprising because they feel wronged by the past and wish 'someone', particularly the government or foreign donors, to solve their problems for them. Unlike other countries in Africa, South Africans do not believe that their future is in their own hands. The NICE equivalent should assist in changing popular mind-sets about the path to a better quality of life.

4. One of the most debilitating and serious problems in SA is the objectification of women and the belief that women can easily be sexually harassed and assaulted, with very few consequences, given how difficult it is for these issues to be proven in courts. Witness protection is not of the quality that would make any woman want to subject herself to that. A non-state (or state-partnered) large-scale multi-faceted project should be launched to reduce victimisation of women of all ages. The NICE-type NGO as well as all forms of media should be involved in attitude-changing programs. The type of community service to which offenders of sexual violence should be sentenced in addition to their usual punishment should be positive re-enforcement of attitude and behaviour changes. Parenting skills should play an important role in such holistic programs. Safer-schools-campaigns should bring peer mediation skills to schools.

5. **Vigilantism:** The danger for governments trying to understand vigilantism is that they may look at the symptoms of the problem rather than at the causes. SA did just that in 1996 when a group called People Against Gangsterism and Drugs (PAGAD) emerged in the Cape Town area. The cause was the expansion of the retail drug-market to start targeting lower middle class Moslem youths, whose parents formed neighbourhood watches in Cape Town and took some heavy-handed action against some drug dealers. There was a cause with a great deal of public support across the racial and class spectrum. Gangs had for decades made life of the poor people of Cape Town a misery, many people being killed or injured in the cross-fire during gang-turf battles. Many policemen had become corrupted by the huge sums that successful drug-lords could pay. The police, in the throes of their internal transformation from a force to a service, messed up badly by promising to investigate the 189 drug-dealers named by PAGAD, but neglected to tell PAGAD what their capacity constraints were. They only had the equipment and human capabilities to launch 4 high-intensity covert investigations, while the impression they gave PAGAD was that they were going to investigate them all. After 3 months of waiting for the promised results, and after desisting to take action against the drug-dealers, PAGAD then took the law

into their own hands and began attacking and murdering drug-dealers, many of whom had been police informers for many years and considered themselves immune. The drug-dealers had considered themselves immune because they had information about the illegal activities which the police had perpetrated during the apartheid years and which the police hadn't disclosed to the Truth and Reconciliation Commission. They knew that the police would not risk their careers by prosecuting some prominent drug dealers. They'd rather allow them to continue dealing. PAGAD's campaign became more forceful, attacking houses of people who disagreed with them and attacking government buildings and police stations. The police then shifted their attention to prosecuting PAGAD, who fought back. The situation deteriorated badly and a more militant sector of the Moslem population added a political dimension to PAGAD's fight. They became labeled as 'urban terrorists' and islamic fundamentalists by the police, that label enabled them to draw on more state resources and tougher law. And so the situation spiraled and took 5 years to bring under control and many lives of policemen, magistrates and innocent civilians lost in the process. Thousands were badly traumatised, and judges needed permanent body-guards. 28 drug dealers were assassinated by PAGAD over a three year period. The surviving drug dealers laughed all the way to the bank with all police resources focussed on PAGAD.

The moral of this story is to engage with the problem as soon as it emerges and try and find solutions to it which are acceptable to a wide spectrum of stakeholders, and negotiate in good faith. Hopefully that will de-escalate the explosive situation.

6. The celebration of the rich diversity of NSJSs should be the policy that is adopted and promoted, as long as they fall within constitutional limits. There might have to be some monitoring and training, which should be conducted in the spirit of positive development as opposed to curtailment and control. Local government and the security agencies should become involved in the non-state ordering initiatives by supporting them in ways which are not too resource-intensive. Non-state justice should NOT be an issue which only the police are

tasked to deal with. In some examples there is a healthy cross-referral between the state courts and non-state justice initiatives, and that works well. The Restorative Justice Initiative in Cape Town is the organisation involved.

7. Getting the criminal justice system to function more efficiently would assist in reducing the number and radicalism of some of the non-state justice initiatives.

Useful Contacts in SA's non-state justice field:

Centre for the Study of Violence and Reconciliation, Johannesburg, Director: Graeme Simpson, website: www.csvr.org.za

Institute for Security Studies, Pretoria and Lilongwe, Malawi: Eric Pelsler, Martin Schönteich. +27-12-346-9500

Independent Projects Trust, Durban. Director: Glenda Caine glenda@iafrica.com Research on traditional leaders in SA.

NICRO: National Institute for Crime Prevention and Reintegration of Offenders, head office, Cape Town. Director.Soraya Solomon: +27-21-4221225.

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Restorative Justice Initiative, Cape Town. Keith Vermeulen. Tel +27-21-695-2810

Centre for Conflict Resolution, Cape Town: Director: Laurie Nathan +27-21-4222512

Quaker Peace Centre, Cape Town. Director: Jeremy Routledge. +27-21-6861308

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South African Law Commission, Project Alternative Dispute Resolution:
Professor Dick Christie, chairperson, project

Arbitration Association of South Africa. Chris Binnington, bca@icon.co.za

Arbitration Forum, Cape Town, Willie Pienaar. www.lawforum.co.za

Boyane Tshehla, Institute of Criminology, University of Cape Town, researcher
and lecturer, non-state justice systems. btshehla@law.uct.ac.za

Useful Publications/Resources

White Paper on Safety and Security, 1998

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6.3: Malawi

Malawi made the transition to democracy in 1994 through the vehicle of a fairly liberal Constitution. Given the autocratic, almost despotic Banda era that preceded it, the democratic era has coped relatively well with the changes. It has multi-party political institutions and a clutch of watchdog bodies to promote fidelity in governance. It is currently one of the 5 Southern African countries gripped in a deadly famine, exacerbated by the fact that members of the

government sold the bulk of the country's grain reserves to an undisclosed buyer for their own account.

The President has not had the matter investigated, which in itself speaks volumes. His quest for a third term in office is causing serious political tensions. Malawi has 9.2 million subjects, most of them poor subsistence farmers who have access to on average only one hectare of land, not enough for a family to survive on. As a response to the wide-spread protest about the third term issue, the President has, since January 2002 begun deploying intelligence agents throughout the country in all strategic government institutions (such as District Commissioners' Offices). This bodes ill for general freedoms and is likely to complicate the life of chiefs who will, in all likelihood, come under pressure to provide intelligence to the President's office to ensure their survival in office. In turn this may well affect the style and course of day-to-day customary justice forum proceedings, particularly if the disputants' political leanings are known.

The Malawi Law Commission is currently working on a project about the structure of the courts, and the place of customary justice. Its aim is to rationalise and/or improve the structure, jurisdiction, training, resourcing, and management of the courts. The Commission also wishes to assess the areas in which harmonisation of the laws become desirable.

The structure of the subordinate courts has 4 tiers. All the first grade magistrates are based in larger towns while second; third and 4th grade magistrates are located in towns as well as villages. There are less than 15 4th grade magistrates left in the country and they are not being replaced when they leave the service.

Customary justice forums are the structure in which the vast majority of disputes and problems are processed in Malawi. The figure cited by most experts is between 80% and 90% of all disputes. There are at least 24,000 customary justice forums in Malawi as that is roughly the number of villages³. 98% of the

³ Interview with Dr. Harry Potter, First Secretary (Natural Resources Development), DFID Malawi. 27th January 2002, Lilongwe.

population live in rural areas⁴. The chiefs, assisted by their ndunas (advisors, all men) preside over customary justice forums. They have no formal jurisdiction and their judgements and recommendations do not hold the weight of law. Nevertheless, their 'judgements' are important in the lives of village members because ignoring or appealing the judgement of one's local chief, who is the administrative head of one's village, inevitably has consequences.

By comparison there are 217 court centres, in which there are magistrates courts⁵. Only 9 of the magistrates are professionally trained lawyers, three of whom are women⁶. The staff complement of magistrates is 300 for the entire country of 9.2 million citizens (1999) but many of those posts were vacant in the year 1999. No figures are available in the literature about how many. Consequently many courts are closed. Most of the magistrate's courts are located in the urban and peri-urban areas. Poor people in rural areas have very limited access to them. The state justice system has very limited reach and capacity.

There are only about 300 private lawyers for the entire population, and they are heavily concentrated in the commercial centres. The legal aid council has 85 posts for legal assistance to the poor, but in 2001 only 25 were filled (Nedley Report, 2001, p6). The police don't have transport to respond to calls from villages (Interview with Senior Assistant Commissioner Willie Chingaru, national police HQ, Lilongwe, 25th Jan. 2002) the backlogs in cases is not doing justice to the cases (Rose Report, 2000).

The customary justice forums are vestiges of legal forms that were common in pre-modern social settings of peasant societies. There is effectively no separation of powers in that political economy. In pre-modern societies the chief was the 'political' head of the village as well as the judge in the customary justice forum (advised by his elders or counselors). Customary justice forums attempt to

⁴ WLSA Malawi, 2000: *In Search of Justice: Women and the Administration of Justice in Malawi*. Dzuka Press, Blantyre, page ix.

⁵ Rose Report, p1.

⁶ Rose Report page 8, updated by Chikosa Banda (April 2002)

deal with, and solve, all the problems that arise in their village, either directly or by referral to other agencies which is empowered to address the problem. They do not usually separate civil and criminal matters; the separation is a western innovation.

However, despite the creeping influence of constitutionalism and the legacy of the Banda-era's manipulation of chiefs, "...traditional authority in Malawi plays a central role: it is respected and serves as a point of reference for most Malawian citizens. This is because villages in Malawi function as cohesive and co-operative social units organised under customary law with authority vested in a traditional village head or chief"⁷. The most common problems brought before the customary justice forums are family disputes, land disputes and property-grabbing matters⁸.

Some analysts find the situation of the traditional leaders problematic, arguing that not only in terms of the local government decentralisation policy and through civil service structures but also through political party structures; they are part of the executive. That is a situation which the ruling party will not want to change seeing that the chiefs and village headmen, being 'promoted' (meaning paid) by the Office of the President and Cabinet, will deliver the electorate to the ruling party.

Another problem cited was that village headmen tend to favour 'their own' people in decisions. For example, where a woman takes a matrimonial matter to the chief in the neighbouring village, where the chief is the uncle of her husband. Many village headmen, group village headmen and Traditional authorities (senior chiefs) have blood ties to their subjects and that may well influence the fairness of the outcome of their judgements. Bribery of chiefs for a favourable decision is also a danger for disputants who do not bribe⁹.

⁷ WLSA, 2000: *In Search of Justice: Women and the Administration of Justice in Malawi*, Dzuka Publishing Co, Blantyre, p 44

⁸ WLSA, 2000 p33.

⁹ WLSA 2000, p34.

The post-1994 constitutional dispensation requires the government to take serious steps to eradicate discrimination. The National Gender Policy (p21) commits the government to eliminate customary practices which prejudice women, such deprivation of property obtained by inheritance. The clash between constitutional values and traditional/customary practices remains a big challenge in all sub-Saharan countries. The key difficulty is to preserve culture, even if it is expressed in customary justice forums, but not at the expense of newly introduced rights. The trend is towards equality at all levels.

In customary law and practice women are disadvantaged in that they do not have representation on the council of elders in the villages. The irony of the Malawi situation is that even though the majority in the society is governed by a matrilineal and matrilocal private-law regime¹⁰, women still come off worst when it comes to their legal status. The explanation for this situation is that the private law regime is not matched with matriarchal power¹¹. Men still dominate almost all aspects of women's lives in the matrilineal and matrilocal regime.

Other forms of non-state justice in Malawi:

In 1999 there was a growing perception of a deteriorating security situation in the rural areas of Malawi¹². As a result self-protection groups were being formed. The tendency to work outside of the partnership with the police was being discouraged, but given the poor proliferation of the police and their limited mobility, there was little the police could do to discourage self-help groups from taking the law into their own hands.

In 2002 the early phase of the famine had created a tense situation in relation to theft of foodstuffs and crops. Self-help remedies were being preferred to taking a matter to the authorities. Theft of even three cobs of maize was considered serious and the perpetrators would be lucky to get away with a serious beating, in some areas "chop-chop" groups literally chopped off the fingers, even the

¹⁰ Dorothy Kaunda-Kamanga, interview 24th January 2002

¹¹ White, Seodi, 2001: p 26. See bibliography.

¹² International Organisation Development, 1999: "Malawi safety security and access to justice - Research on Primary Systems in Rural Areas, Final Report" p10.

hands that had stolen quantities of food. As the famine progresses for its projected two years into 2004 the situation will doubtlessly become more volatile in respect of self-help justice.

Ndunas and peri-urban 'chiefs': In Mzuzu the local government is experimenting with community-workers attached to local government elected councillors. They have been called ndunas. Each councillor has a few at her/his disposal, and their function seems to be to keep their ear to the ground as an early warning system about the functioning of the local authority. When births and deaths occur they should alert their councillor, and when urban facilities are broken, or when people erect illegal structures in their properties, the ndunas are dispatched to negotiate a solution to the problem. It was not clear how the ndunas were being remunerated, whether by the city council or the councillor her/himself, our questions were answered with some embarrassment but we didn't get a clear answer. The initiative seems a recent one as we were told by the chief executive of the City Council that ndunas had not yet been allocated to all councillors. The idea sounds and looks good, but there was already talk about overload on the ndunas because of the large area they had to cover.

One of the Ndunas, who used to be a prominent traditional leader has set himself up as a chief in the city, a move which has no legal authority, and he proceeds to settle disputes alone, and sometimes with his informal ndunas.

Recommendations for Malawi:

1. Harmonisation of the laws that haven't been dealt with in the transition to democracy, in particular the status of the traditional courts and all the laws having a bearing on magistrates, so that the haphazard process of integration can be finalised.
2. Reduce the 4 grades of magistrates to two and train the remaining contingent by means of a rigorous and ongoing in-service training programme which includes training for their support staff. Their deployment throughout the country must be based on demand for justice services rather than on their personal convenience.

3. A comprehensive policy on traditional leaders and the customary law needs to be developed and their place in the justice system carefully considered, particularly if they also have local government functions. Customary law and liberal constitutions clash continuously and those potential clashes need to be ironed out by a long and constructive, patient and fruitful dialogue between traditional leaders and the state, preferably the Law Commission or some such body. The dilemma of traditional leaders being simultaneously part of the executive and the judiciary has to be resolved constructively. A joyful by-product of this dialogue would be certainly about what cases chiefs may hear and which they should refer to other structures.

4. Better physical, financial and procedural access to justice needs to be introduced throughout the country, particularly in the state courts. This includes better facilities for police for their work and for marshalls serving documents and executing judgements. This should be established through thorough research by means of a needs assessment and demand-measurement.

5. The operation of the formal court system needs to become a lot more user-friendly to the poor, uneducated civilian. Procedure can be simplified, evidence can be led in narrative form, the presiding officer should adopt an inquisitorial approach to the presentation of evidence and assist with eliciting the required evidence from the parties in order to do better justice to the case. In poor countries with little or no legal assistance to the poor in criminal cases, the fiction of equally balanced scales of justice cannot be allowed to continue. A much more realistic strategy of joinder of causes, both civil and criminal in one action should be allowed. This is one advantage of the customary law system, it looks at a problem holistically rather than focus on one event which triggered the immediate dispute between the parties.

6. Supervision of, and in-service training for magistrates by their judicial superiors is desirable, so that both can learn about each other's strengths and development needs, and so that Chief Resident Magistrates can rest assured that they are delivering good quality justice in their jurisdiction.

7. Courts should be given the option to conduct proceedings in the vernacular and dispense with translations, where appropriate.

8. The Nduna system in Mzuzu needs more thorough investigation and evaluation to assess its strengths and weaknesses. It is an interesting model that constitutes an early warning system of potential disputes/problems.

9. The peri-urban 'chiefs' in Lilongwe need to be 'harnessed' into an arrangement whereby the local authority either formalises their activities and pays them a stipend, or provides some other local authority presence there to deal with issues such as supplies of basic services and urban amenities. A police post would also make sense.

Useful Contacts

Malawi Law Commission: Judge Elton Singini and Mr Chikosa Silungwe

Alternative Dispute Resolution Association in Malawi:

Centre for Advice, Research and Education on Rights -Blantyre. Dr Vera Chirwa
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Dr Wiseman Chirwa, Anthropologist involved in primary systems of justice.

Centre for Social Research, University of Malawi, Zomba.

Dr Garton Kamchedzera, Dean, Faculty of Law, Chancellor College, Zomba.
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Catherine English, USAID, Lilongwe. Justice and Human Rights: 771-911

Judge Dunstan Mwaungulu, Malawi Law Commission. 09-951-599

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6.4: Zambia

Zambia's formal legal structure is made up of a Supreme Court, regionally based High Courts and a three tier Magistrate's Court structure. In addition it has a Local Court structure of 438 widely distributed courts that operate in the interstices between formal and informal. The local courts are governed by the Local Court's Act (Cap 29 of the laws of Zambia), however the uneducated retired bureaucrats who staff the courts are untrained, very poorly remunerated and resourced and thus very susceptible to influence.

The Local Courts administer the co-opted version of customary law, established during the colonial period, and continued virtually unchanged to this day. Though the Local Court structure is part of the formal legal system, it is out on a limb. Regarded very much as the poorer cousin of the "General Law" structures, no formal and structured form of overview of the cases takes place, there is administrative control but not substantive guidance allegedly because of the different law being implemented. The Local Court structure is supposedly an independent structure with no linkages to the Traditional Courts as the latter have no legal authority or recognition and consequently should have no links to the chiefs. However in the rural areas the chiefs are required to nominate potential candidates and this ensures the entrenchment of the influence of the chief in the Local Court system. (WLSA,1999. 165) The customary law has never been codified, varies from region to region and from chief to chief, should the Local Courts need expert witnesses they invariably call on a chief from the area of the plaintiff and defendant.

The Local Court structure does nonetheless potentially undermine the power base of the chiefs who have no legal powers to dispense justice, but only to detain and hand over to the police. Consequently the chiefs are constantly lobbying to have local justice issues incorporated into their legal jurisdiction. (The Barotse tribe have even gone as far as petitioning US AID for assistance to fund research on defining the contradictions between the various systems with a view to unification under the auspices of the chief. (Sydney Watae, US AID, personal communication, interview, Lusaka, August 2002).

A traditional court system exists, is widespread and is a mechanism of the local chief not only keeping social harmony but also through which he dispenses and enforces patronage and through which his goodwill can be bought. The traditional system, because of its lack of legal standing requires the participants to contribute to the costs of the court. In addition the Local Court justices are very poorly paid; it is not uncommon to pay for a favourable judgement under their jurisdiction (Col Mupenda, Legal Aid Clinic for Women). The Law Commission, headed by Dr. Margaret Kamuwanga, is in the process of completing a detailed national study of the customary law as it is being practiced by the various language groups. The aim of the study is to develop a common codified customary law that does meet general human rights requirements. There is some debate as to whether her goal is achievable because of its potential to undermine the system of patronage. Chiefs remain politically very powerful in Zambia.

Both the Local Courts and the traditional courts are predominantly used by women, mainly because the key issues of its jurisdiction are family or subsistence farming issues, and inheritance, divorce, adultery and land disputes. Customary law in Zambia appears to be particularly harsh to women who are mostly left destitute in the case of either divorce or the death of a husband. The wife then starts the search for justice, starting in the informal justice system and gradually moving into and up the line of the formal system provided she finds the resources to do so.

Though traditional courts are known to deal with issues like murder, it is believed to be uncommon and that these cases are handed over to the police.

The verdicts of both the traditional courts and the Local Courts are considered to be idiosyncratic, inconsistent and in the case of the traditional courts punishment can be brutal; severe beatings, solitary confinement and public humiliations. The Local Courts do give judgements which exceed their jurisdiction but financial awards are negligible as those aspects defining awards for damages of the Act require revision (WLSA, 1999:62). It is, however, generally believed that the Local Courts are less idiosyncratic and less punitive in their verdicts than traditional courts (Advocate Geoffrey Mulenga, Legal Resources Foundation), it is however a matter of degree rather than absolutes.

Notwithstanding a fair number of Local Courts they do not adequately cover all the rural areas with some villages more than 30kms from the nearest Local Court in areas without public transport systems. On top of which the court facilities are largely those that were built by the colonial power and are now inadequate for current needs.

Despite denials to the contrary the Local Courts and the Traditional Courts end up working as an uncomfortable unit with cases passing up through the Traditional Court to the Local Court (though the latter is under no obligation to take into account anything which transpired in the Traditional Court) and the Local Courts passing land dispute cases back to the Traditional Courts. (WLSA, 1999;163)

It is clear from this description of the court structures that some key facets of peasants' lives are decided primarily by dispute resolution structures outside of the formal legal system. Land disputes, including allocation of communal land by the chiefs, are but one such important arena. Divorce and inheritance issues are also crucial to livelihoods and therefore affect poverty or wealth directly. It is clear that most peasants in the rural areas are most likely to use the traditional courts because of the patronage that accompanies them. The decision not to use the traditional court has to be weighed up carefully in order not to invite negative attitudes from the chiefs in future decisions such as land allocations be a counsellor in his court.

Non-state justice is by no means confined to traditional courts and the decidedly grey area of the Local Courts. A large number of organisations are involved in mediation around civil issues with a sprinkling of criminal issues as well. These

organisations range from the family itself and the church to places like the Legal Resources Foundation which will formalise the result in a legal agreement.

Mediation is not the only area where non-formal systems exist but the policing and punishment arena has seen the development of neighbourhood watch organisations and straight vigilantism. The police, inefficient, under trained, underpaid, under-resourced and lacking the political will, have not managed to curb a perceived significant increase in local level crime in recent years.

In the urban areas these latter organisations operate very much as Neighbourhood Watches in the African sense of the word. They regularly patrol the streets themselves, fairly heavily armed; some even may be armed by the police. What they do to suspects they apprehend is unclear. The fact that they are considered to be very effective in preventing urban crime suggests that they administer more than just a tap on the wrist. They are registered organisations and in addition are registered and acknowledged by the police with whom many work very closely. They often comprise 20 – 30 people who may monitor and patrol a fairly large area. The urban Neighbourhood Watches have significant public support from a broad base of urbanites. We interviewed and met no person critical of them, which we found surprising. On the other hand the brutality of the rural vigilantes was frequently mentioned. In the rural areas these groups tend to be vigilantes and in fact refer to themselves by that label. They work in association with the local chief as well as maintain relationships with the police. They will arrest and detain people on behalf of the chief and together with the chief's assistant will hear and deal with lower order criminal issues.

Mediation by the family is an intrinsic part of customary practice in Zambia. Custom dictates that issues first have to be raised within the broad family unit before they are taken to the Traditional Court. Fraught as this is and prejudicial on the whole to women, the family remains the first step in the dispute resolution process and does not appear to be circumvented.

Since colonial times the church in its various forms has been prepared to mediate on substantially the same issues as are brought to both the Local Court and the Traditional Court structures.

More recently however the NGO movement is becoming an increasing mediation and arbitration resource base though many would not indicate that Dispute Resolution is part of their mission. The Legal Resources Foundation actively successfully mediates around 1,000 cases a year that could have gone through the court process. Women for Change who set up CBOs in order to create awareness in their communities on human rights and gender issues are finding their CBOs increasingly mediating disputes and forming pressure groups for a just outcome to an issue.

Two of the NGOs focus on offering alternatives or further opportunities to the erratic, "unjust" and discriminatory patronage that is perceived in the judgements of both the Traditional and Local Courts and offer alternatives or support to take a case to the higher courts. These are the Legal Resources Foundation and The

National Women's Legal Aid Clinic. The latter is surprisingly a project of the Law Association of Zambia.

The Foundation offers three services: legal advice which is frequently in the areas of matrimonial and land disputes as well as on debt, labour issues and landlord/tenant disputes: legal assistance in drafting documentation or issuing summons and finally legal representation. Twenty-five percent of the Foundation's clients had already been through the Local courts prior to approaching the Foundation for assistance. This was established in the cases of intestate succession, maintenance and matrimonial disputes. (WLSA,1999;46)

The Legal Aid Clinic headed by Col Mupenda handles predominantly property grabbing after the death of a husband, other aspects of inheritance law, maintenance and divorce. One out of three cases are mediated successfully while the rest go to court. (Col Mupenda, interview, August 2002)

Similarly the Zambia Civic Education Association has moved into offering legal advice, civic education, legal representation and advocacy work as does the Women in Law in Southern Africa. The YWCA too has been increasingly drawn into mediating the recurring problems of land grabbing, maintenance, matrimonial issues and inheritance problems. They actively work with the Police Victim Support Unit (as does the National Women's Legal Aid Clinic) and seek to resolve issues before they end up in one or other court.

Indeed even the Law and Development Association get into the fray and work closely with certain chiefs trying to introduce the concept of rights into their thinking.

The lack of resources and the lack of training, the inequitable outcomes, and a form of justice that does not equate to concepts of human rights has brought the attention of the Aid organisations into the traditional and local court arena. GTZ, Norad and Danida are all running programmes which intervene in particular through training or communicating legislation to justices. It is a fraught political arena with locally based NGOs and aid organisations appearing in instances to be in a competitive relationship.

GTZ are actively training paralegals in Inheritance Law (a new Act which offers slightly better protection for women married under customary law but which has never been disseminated to Local Court justices or chiefs). The principle is for these paralegals to offer low key advice to women in the rural areas. In this approach GTZ has essentially taken a similar approach to Women for Change who believe that change will not happen until women in particular in the rural areas have a greater understanding of their rights.

Recommendations;

Recommendations from people interviewed veered from banning both Local Courts and Traditional Courts and embarking on a massive and extensive

training programme of magistrates, to approaches that insisted on the unification of the Local and Traditional Courts together with a comprehensive monitoring process because of the historic abuses. Many of the legal professionals felt that customary law had to be codified in order to first get the customary law in line with the constitution and human rights, and secondly to ensure some consistency in judgements and a reduction of discriminatory patronage. They argue that there are sufficient common elements in customary law to allow for a common base across all language groups hence widespread support for the work of the Law Commission.

We recommend the following:

1. Support for the move to unify the Local and Traditional Courts
2. Support in the work to codify Customary Law
3. Develop a Programme for training justices of the unified court
4. Develop appropriate programmes on selection criteria for the employment of justices.
5. Develop a programme that facilitates the state paying an adequate wage to justices to reduce the need for corruption to ensure a living wage.
6. Support and expand programmes that train paralegals in legal advice work in the rural areas
7. Support and develop programmes that educate chiefs on individual rights that exist beyond patronage.
8. The rural vigilante situation is very difficult to tackle seeing that they are linked to the political authority, the chiefs. This means that they also have the power to intimidate citizens who support parties other than the ones of their local chief. This is fairly common in the region. The best one can hope for is an amended version of community policing in which the accountability to both the police and local authority ensures that their actions remain within the law. Rurally based watchdog NGOs ought to be encouraged, in so doing confining the brutal excesses to a minimum. Sustained human rights training of the chiefs, vigilantes, coupled with carrots and sticks, need to become routine.

Key Organisations and contacts

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19. Police Victim Support Unit

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6.5: Mozambique

Mozambique has experienced three dramatically different forms of state justice over the last 30 years. They in turn have partly shaped the forms of non-state justice. But to say that the state justice systems are the determining ones would be over-simplistic. The two types of system interact in a dynamic way depending on the state of the international context and its ideological underpinnings in which the country finds itself at a particular time.

This country profile draws substantially on a dominant (and the only recent) research study conducted by radical researchers from Portugal and Mozambique, who describe the form of law in Mozambique at any particular time as being shaped partly by international forces (globalisation, democratisation, and the tension between capitalism and democracy). They are acutely conscious of the possibility that in the globalising context, capitalism and democracy may NOT be compatible, seeing that capitalism is global, yet democracy is national. The reason for the incompatibility is that democratic stability relies on social inequalities being reduced while weak states in

developing countries tend to exacerbate the inequalities. Thus the very form of democracy is threatened by capitalism, they argue.

Given the difficulty of sustaining democratic institutions in Africa -there seem to be two stable democracies at this point in time - Botswana and South Africa - their argument is worth exploring.

Their stance is that the supply of legal services is created in many countries without taking into account the social needs for that type of service. This is particularly so when the type of legal services are provided by institutions in a foreign country. The type of law provided by Portugal during the colonial era was not aligned to the needs of poor people, and they therefore had to create structures that would suit their needs, their values, their style of doing things. And thus when poor people do use the state courts for the first time it is almost always in the form of an appeal. They had tried a local and informal process first.

The characteristic of contemporary Mozambique's legal system is that "internal legal pluralism occurs within the official legal order and justice, community justices and traditional authorities lie outside the official system" (Santos and Trindade, 2001:6)

But before elaborating on the present system, a brief overview of the three systems of the last 30 years needs explanation. Mozambique was subjected to a Portuguese colonial legal system until 1975. Its independence movement had a strong socialist ethos and introduced a socialist form of law after independence in 1975. This was a bold and dramatic experiment in which the formal trappings of a colonial legal system were dismantled, the law faculty closed, private land ownership abolished, central state planning was introduced and formal legal practice abolished (all private lawyers fled elsewhere). People's courts were established throughout the country. The people's courts were the norm, they were the official courts during the post-1975 period, but during the civil war (which lasted till 1984) that was only the case in Frelimo-held areas. From 1985-1994 the country underwent increasing restructuring in the direction of a capitalist economy. This is when the donor community began to play a role in assisting

the government in its quest for sustainable development. Since 1994 there has been a multi-party form of governance which brought a neo-liberal approach to politics and a market economy.

Mozambique's population is 77% rural based according to the 1997 census.

As for the court structure, all levels of courts, Supreme court included, have, in principle elected non-professional judges sitting with career judges, thereby living up to the principle of popular participation in the administration of justice. In reality that is only happening in the most exceptional cases. Elections for lay judges last occurred in 1987 and seeing that they are not paid; very few of the remaining ones are still working. At this stage the state courts do not cover the entire country, 53 districts do not have courts. A law passed in 1999 allows for non-state arbitration, conciliation and mediation, and so the state legal system is only one of many systems that deal with conflict. Under these circumstances it is not surprising that the state legal systems is functioning at a very low and inefficient level and that informal justice is the level to which the vast majority of the people, especially in the countryside, turn for help.

The people's courts are no longer official courts they have been replaced by local courts, the bottom of the official hierarchy of courts. Below the official hierarchy are two sets of structures, which the overwhelming majority of citizens use, the community courts and traditional authorities. The traditional authorities are multi-ethnic. The community courts generally still follow the form of the former socialist people's courts, but they are no longer part of the official hierarchy of courts. They are informal and now have institutional competition from the police, the contemporary remnants of the dynamising groups the church and traditional authorities. The dynamising groups were political cadres who were sent out to the country-side to educate the peasants about how to run collective courts in terms of revolutionary values (Sachs and Honwana-Welch, 1990, Santos and Trindade, 2001).

The community courts vary substantially in levels of activity and style, seeing that they have no financial or other support from the government. Some are entirely

independent of any government structures and sustain the values of the revolutionary ethos, meaning loyalty to the party is paramount, while others are more focussed on settling disputes and working towards social harmony in villages and urban settlements. Some are comfortable with being subservient to local administrative authorities.

Of all the informal structures the most important are the traditional authorities, who have sustained the use of customary law, or lineage law as it is sometimes called in Mozambique.

Community justice is highly fragmented and plural. Apart from the dynamising groups and community courts, which are both identified with Frelimo (governing party) there are the chiefs and traditional authorities usually identified with Renamo (opposition party). There is a Women's Legal Office in Pemba, religious leaders, civic associations and an association of traditional healers, to whom residents also turn to cope with their disputes/problems. In the urban areas many of the NSJS are inter-related with other forms of social support such as burial societies, savings associations, and religious groups.

The community courts function very erratically and at a low level of formal linkage to the party. Their most common cases are marital status matters, theft, slander and bodily harm. A few cases of debt, housing and land disputes are also heard in these courts.

The reason for their low level of functioning is the poor resourcing and the low priority accorded to them by the government. When they cease functioning properly, they are usually taken over by traditional leaders.

The courts run by traditional authorities are more active and more used than the community courts. They are gradually re-establishing themselves in the model of their former operations. It is clear that they are geographically based in the area, have an interest in harmony in the villages they control, and have the hereditary authority as the de facto local government. They are usually related to some of their subjects.

Recommendations proposed by Santos and Trindade:

They have 34 recommendations, too detailed to reproduce here. Some of the most important one will be reflected and condensed:

1. The government should acknowledge the reality of the plural situation and the limits of its formal system and act on its nascent law and policy in relation to non-state justice system. For example, community courts are provided for in legislation but the government hasn't acted to trigger the elections of its members which would kick-start them again and legitimise them.

2. On the strength of the realisation in point 1 the government should clearly define the relationship between the different structures and the eligibility of people to serve on them. Resourcing that will ensure the viability of the structures is obviously desirable

3. The rural areas need the most attention seeing that they have been most neglected and deserve a state presence. If necessary the national court network needs revision and re-allocation of priorities to where it is needed most.

4. The distribution of resources to the judicial enterprise is very top-heavy. Assess the case-load across the system and allocate resources to where they are needed most. However, the moment legal supply is improved, so legal demand will grow and that will require high levels of resources for the justice sector, for example in the expansion of the Attorney-Generals' office.

5. A new relationship between the community court and the district courts must be developed so that there is recourse to higher authority, where necessary.

6. In the districts where there are no district courts, community courts should be established.

7. Improved and increased and continuous training of the incumbents and potential incumbents of the courts, both formal and informal needs to take place urgently, so that a degree of predictable and uniform justice is achieved. Court management and case-flow management should also be part of the training. That includes the administrative staff as well.

8. Some viable system of public defense needs to be developed that is sustainable and fair.

9. Procedures in courts need to be rationalised, simplified and modernised. Information management needs to ensure that records are retrievable and statistics can be compiled. Oversight bodies need to be either created or if they already exist, improved to ensure the integrity of the legal system.

10. A comprehensive policy on traditional leaders and the customary law needs to be developed and their place in the justice system carefully considered, particularly if they also have local government functions. Customary law and liberal constitutions clash continuously and those potential clashes need to be ironed out by a long and constructive, fruitful dialogue between traditional leaders and the state, preferably the Law Commission or some such body.

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6.6 Botswana

In contrast to many of the other southern African countries Botswana has a far more integrated justice structure in spite of the fact that they to have a dual legal system i.e. customary law operating in tandem with general law (based on the Roman Dutch system inherited because of its South African connections during colonial times).

The structure of the justice system for “general law” is a simplified three tier structure headed by the Court of Appeal under which is a structure of High Courts and thereafter Magistrates Courts. The Customary Court structure has four tiers headed by the Customary Court of Appeal. The customary Court of Appeal is a warranted structure which means that it is empowered to enforce the Penal Code and therefore forms a fourth tier in the formal system while simultaneously administering customary law. It has a direct relationship and reporting line to the High Courts. The Customary Court of Appeal though in theory staffed by traditional chiefs is in practice sometimes staffed by bureaucrats with no relationship to the various chiefs. Two other levels of warranted customary courts exist (the senior and junior courts) that are always staffed by hereditary chiefs except in urban areas where there is a president of the court.

These courts will normally be part of the head of the ward social structure in predominantly but by no means exclusively rural areas. The ward social

structure consists of the principal village structure in a group of villages that pay allegiance to a particular chief. The sub villages in turn run unwarranted but recognised customary courts run by sub-chiefs and headmen, in which they are not entitled to enforce the penal code of Botswana but can execute Customary Law provided it is not in conflict with the General Law. In theory this means that they are only entitled to do mediation and reconciliation work between disputants. In none of the Customary Court structures are people allowed to have legal representation regardless of whether it is a warranted court or not. In addition to this formal structure there are numerous unwarranted and unrecognised customary courts. The reason for their lack of formal recognition appears to have more to do with bureaucracy than any substantive reason. Mandates are however exceeded as the cut-off between customary law and the penal code are not hard and fast. In this sense for the first time one has a situation where the NSJS and the formal system co-exist in the same bodies.

None of the literature highlights or even refers to the presence of a NSJS except for the presence of the unwarranted and unrecognised customary courts. The customary courts, however, are notwithstanding the fact that they are part of the state justice mechanism, still very much a community type forum located in villages, easily accessible, using local languages and based largely on local customs.

In a 1994 publication Molokomme made the following statement; "It is difficult to say with certainty how many customary courts exist countrywide, because not all operating customary courts are recognized by the state. Apparently there were approximately 203 registered customary courts in 1979, 158 of which were presided over by warranted chiefs or headmen. In 1978 the officially recognized courts heard 8,759 cases. The remainder were presided over by unwarranted but paid headmen, which shows a recognition by the state of the vital role of these courts. By 1992 the number of courts filing returns with the customary courts division of the Ministry of Local Government had doubled." (pg 358, Molokomme, 1994)

All warranted and/or recognised chiefs, sub-chiefs and headmen are effectively civil servants who are paid by the central government for the services provided. They however do not have any formal legal training (not even in terms of the penal code which they may be legally competent to enforce). There is however an overview process of decisions taken at least at the higher customary court structures by the customary court commissioners, however the lower customary courts appear to be notoriously bad at documenting both procedures and outcomes so one would assume that oversight does not apply to them.

Not only do the senior chiefs run courts but have a link to the recognised and authorised Local Police who manage most rural enforcement activities. Urban and serious crime is managed by the Botswana Police Force. The Local Police are very much a poorer cousin to the national force and do not have the same level of facilities or resources. The Local Police operate in terms of The Local Police Act of 1972 and report politically through to the Minister of Local Government and Lands.

The Local Police arrest offenders, prosecute offenders in the Customary Courts and execute the orders of the court as well as act as messengers in Customary Court matters. In addition to these two policing bodies the Botswana Police Force tried to get Crime Prevention Committees established in villages but have met with patchy success.

The Customary Courts are seen to handle two distinctly different bundles of issues, on the one hand they hear criminal cases, predominantly theft and assault and then civil issues such as marital disputes, impregnation, insults and property disputes. All levels of the court will hear a similar spread.

The impression gained from the (dated) literature is that although there appears to be a sufficient access to the courts the work-load of the warranted courts is increasing while the others remain constant or are declining (Simon Roberts, 1972). As people become more educated but retain links to their village they show a preference for taking cases to either the Chief's Customary Court or the

magistrate's court. In spite of taking a case to a customary court the plaintiff retains the right to request to have the case moved to a magistrate's court.

The literature reveals an active dialogue between customary courts and magistrates' court and equally that in this situation neither legal system remains pure. In other words customary law is increasingly incorporating aspects of general law and vice versa. The two courts will actively refer cases to each other. This however does not mean that the relationship is not without its tensions and its conflicts, as firstly, the relationship is a hierarchical one, both in terms of the content administered as well as the structural relationship. Secondly the magistrates can and do overturn the judgements of chiefs and thereby yet again undermine the power and influence of chiefs and headmen. Their power has been systematically removed over much of the twentieth century, even after independence.

However as in other countries with customary courts there is a critical weakness. The justices of these courts always hold positions of power in the village and may have a direct conflict of interest in the matter brought before them. Justice (using the Western interpretation of equity and even-handedness) remains elusive for people in the village who do not have powerful blood connections or are not influential in their own right. The outcomes of the cases tend to reinforce kinship ties and social status, as opposed to have a neutral unbiased outcome. Increasingly however, kinship may be supplanted by the fact that an individual is educated, affluent and employed. These benefits might place them in a better position to receive a favourable outcome than an uneducated and poorer person. (Anne Griffiths, 1996). The argument is put forward however that although a person might lose a case that on paper should go in their favour they have not necessarily "lost" as they have succeeded in making issues public which often serves to modify the defendant's behaviour.

Customary family law, however, is not evolving in tune with what is happening in society due to various social and economic factors i.e. that fewer people are marrying and more women are now entering into serial relationships and their

children have different fathers from different villages with different chiefs. The peculiarly hard and fast rules of Tswana custom, in terms of a woman's right of support and method of proving paternity, no longer apply in these circumstances. Women therefore are often better off taking these cases to a magistrate's court.

The type of cases heard in customary courts is changing with an increase of criminal cases (in excess of 60%) and less of the traditional family issues (civil matters). The criminal cases are mostly assault and theft. By 1991 the customary courts were hearing 50% more criminal cases than were the magistrates courts while the magistrates courts were hearing 640% more civil cases than were the customary courts. (Athaliah Molokomme, 1994) These comparisons are obviously clouded as the magistrates courts will be dealing with civil claims from the commercial sector. There is nonetheless in absolute terms a decline in the number of civil cases that the customary courts are handling despite population growth. We can infer from this that customary courts meet the needs of the populous more in terms of criminal complaints than civil.

Botswana seems to have had a commitment to institutional development and modernisation. Local authorities, district councils, the various courts and the dual police force do not appear to be characterised by widespread incompetence as they are in lesser developed countries. Consequently one does not hear of the re-emergence of traditional non-aligned courts or modern street committees that are not linked to state structures.

Problems in the operating of justice mechanisms in Botswana relate more to contradictions that pop up between the customary and general legal structure and to the lack of education of justices in the customary court structure as well as the inherent kinship bias that outcomes in the customary court clearly reinforce. In addition, problems arise where the evolving of customary law has not kept pace with social realities thereby leaving an access-to-justice gap. Some courts are apparently overloaded, in particular magistrates courts and the higher Chief's Courts and cases take time to clear.

Recommendations

The room for interesting interventions still lies with the customary court system even though they are de facto part of the state system. We would suggest that there are three requirements.

1. The customary courts are fast becoming a lower criminal court in Botswana while simultaneously dealing with any civil aspects of the case. This ongoing role makes good sense but could well be augmented with some appropriate training for all justices in the customary courts. Whether the training should be formal or non-formal should be decided in conjunction with the responsible ministry.

2. This should be supported by more development programs for the Local Police as opposed to the Botswana police force.

3. Women who are poor with no auspicious kinship ties are unlikely to find justice in absolute terms. In order to facilitate their chances the training of locally based paralegals might manage to firstly offer such women advice while simultaneously raising her awareness of her choices and rights. Such action would also start sensitizing the wider village over time.

4. Both warranting and recognizing customary courts appears to have reduced the worst excesses of such courts. It might therefore be advisable to remove whatever bureaucratic blockages exist to the warranting and recognition of the free floating courts. They are already operating as an integrated whole with the formalized courts.

Key Organisations and Contacts

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7. Women Against Rape

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7 Different Modalities of, and Approaches to non-state justice systems in the Southern African Region

What has shaped the different forms of non-state justice in the region? What has informed the strategies of the respective governments to them?

7a: How have non-state justice systems been shaped in the post-cold-war era? In Southern Africa the most common form of non-state justice are the traditional or customary courts presided over by chiefs, advised by their (i)ndunas (council of elders). The two exceptions are Botswana and South Africa. In the case of Botswana the reason is that it was never a settler state, which meant that there was not as much need for a strong 'western law' presence as in the settler states. Therefore the customary law and its institutions (the chiefs and their courts) are integral to the system. There is some uncertainty about a number of courts which are not warranted, meaning they have no right to enforce the penal code, but that seems to be more of a bureaucratic laxness than a matter of principle. Therefore, technically speaking, there are some courts in Botswana which are non-state courts. South Africa has customary law as part of the system but only in limited contexts, namely in the former 'Homelands' of the apartheid system. In the democratic era chiefs are considered to be somewhat of an anachronism, but because of the low reach of the state in rural areas, they still de facto are the local authority in their domain. Chiefs retain a very limited jurisdiction in rural chief's courts. In the urban areas of South Africa, community dispute resolution structures are active throughout the townships, but they are run along democratic lines.

But because South Africa is 56% urbanised traditional courts don't constitute the bulk of non-state justice systems. The most common form are the street committees in African urban settlements/townships.

7b: A weak, transitional or troubled State creates the space for non-state justice systems: The most important shaper of non-state justice systems is the shape and service deliver of the state's justice system. The weaker the state, the stronger and more varied the non-state justice system. The more appropriate the state's justice system to people's needs, the fewer non-state justice system there will be. The more heterogeneous the population along ethnic, linguistic, religious, ideological and gender-political lines, the greater the proliferation of non-state justice systems, because the state's legal system is usually not flexible enough to cater for the needs of minority-status groups.

7c: History is, as always, an important shaper of the place of the chiefs in non-state justice systems. If the chiefs were used by the former regimes as part of the justice system to suppress the population or to side with the illegitimate and abusive regime (South Africa, Malawi) their role in the democratic era is suitably limited. In Mozambique the chiefs lost their status and power at the advent of the socialist regime in 1975 but are steadily regaining it informally because of the weakness of the state since the 1993 Constitution. Lesotho chiefs were ousted from their formal roles as part of the justice system during the fractious period in which the Lesotho monarchy was seeking independence from England in the late 1940s.

7d: The legal status of chiefs is deceiving: Their de facto power is immense: It is very important to be aware of both the legal and de facto position regarding chiefs. The key factor in determining whether the chiefs play a central or peripheral role in the lives of the citizens is the strength or weakness of the state. If the reach of the state into the rural areas is poor, as is the case in Lesotho, South Africa, Malawi, Zambia, Mozambique, then the chiefs play a pivotal role in the lives of their subjects regardless of their legal exclusion from formal justice functions. They process disputes and their subjects generally abide by their 'judgements' even though they hold no weight in law.

Chiefs derive this power mainly from four sources:

- Tradition-heredity,
- Local government functions,
- As repositories of customary law in the formal courts, and most importantly,
- as the people who deliver the electorate to the political parties.

This latter function often inclines the government to pay the chiefs allowances for their local government functions. In Malawi the chiefs resort under the Office of the President and Cabinet, so that they are very aware of the power to reduce their (paltry) allowances if the chiefs don't perform in that most important function.

The bottom line is that traditional leaders are the most important manifestation of government in the lives of poor rural people, whether they like it or not. Their role in non-state justice systems is only one aspect of it. They usually chair the local development committees, which determine who benefits and who loses out on development projects in villages, along lines which Bratton and van de Walle call neo-patrimonial rule, the dominant form of governance in Africa.

7e: Which strategies do countries adopt towards non-state justice systems?

Mozambique, the poorest of the six countries under scrutiny, had an extensive system of socialist-style popular tribunals, the community courts prior to the 1993 Constitution. They were found mainly in the MPLA-dominated areas, while the RENAMO areas had traditional leaders' (lineage'), customary courts.

The reason why the unified government ignored this issue is difficult to fathom. One can only surmise that the task of restructuring all other aspects of government simultaneously left no space for such enterprise. Less charitably, it can be surmised that the new judges and bureaucrats were far more intent on getting resources for their particular formal justice system hobby-horses rather than messing with 'soft law' issues and institutions. The majority of the population simply continued with what they had become used to.

Between 1998 and 2001 the only detailed study of these courts took place, its recommendations suggested a menu of training, linkage by referrals to the formal systems of local courts, and the appropriate accountability systems. Little was said about resourcing them. This is a mistake, because volunteers soon tire of their tasks unless there are some rewards in the form of status or material rewards. Daily survival is tough enough without having to spend unproductive time on volunteer activities.

Codification of customary law: There is a growing movement in some of the countries towards a written customary law. The introduction of liberal constitutions in a few countries (SA, Malawi, Lesotho, Mozambique) adds a further impetus to explore the points of convergence and divergence between

customary and state law. Technically the Constitution is the supreme law of the land, but the reluctance of governments to 'take on the chiefs' is very evident. So they buy time and do nothing, or very little. Its one of the hardest tasks, and the only workable strategy seems a thorough and inclusive national dialogue. There is pressure towards a codification, or at very least a statement of customary law in Malawi and Zambia.

The success will depend on at least three factors:

- The inclusiveness and timing of the process: It cannot be a short, sharp process. It should work until everyone is convinced that it is the best for the poor people and for the people who are its officiators,
- The pragmatism with which it is devised and conceptualised. The state is in no position to dictate the terms, be supercilious, simply because it has a minimal presence in areas where the customary law rules.
- The user-friendliness of the outcomes: High resource solutions and complex procedures are not going to work regardless as to how clever they are. It has to be a system that is easily administerable, simple and pragmatic. There should be a direct link into the state court system. The Zimbabwean and Botswana systems could act as pointers.

If the Law Commission has the skills and the personnel to steer the process then it should be encouraged to do so. Donors could draw on quite a rich batch of precedents in Malawi, South Africa, and in the case of Zambia, GTZ made a small grant to begin the statement of the existing law.

The SA Law Commission's project team on non-state justice systems is moving towards a policy that has five options:

- **Create channels for referral to both state and other non-state services.** Once the need is identified, look for options that are both state and non-state, or are to be found in joint projects; these could include crime prevention projects and development projects. This approach conceptualises problems more broadly than just in the strict law arena. For example, conflicts that erupt

in dense urban shacklands, such as disputes over the use of communal washing lines or toilets, could be addressed by requesting local government to supply more toilets and washing lines.

- **Partner, Incorporate, Co-opt:** A potential example here is: If a community dispute resolution structure comes to a decision about a preferred outcome in a dispute, and the responder is required to pay back some money to the complainant, could the state's enforcement machinery, the deputy-sheriff enforce that 'judgement'? As far as incorporation goes, the community assessor system in the magistrates courts provides two community-members as lay assessors and they can overrule the professional magistrate on the facts but the magistrate is the authority on the law. Botswana seems to have successfully incorporated most forms of non-state systems into its law.
- **Regulate:** The state could develop a framework, a code of conduct and a range of acceptable outcomes which non-state justice systems are able to arrive at. An oversight body would have to be created to cope with policing the registered institutions.
- **Criminalise:** The non-state justice systems which are not prepared to work within the law will, after all negotiations with them have failed, have to conform to the law if they continue with their criminal strategies.
- **Hybridise-reform the state system to address shortcomings relating to access:** There are already some state institutions that have a low formality in its rules of court, such as the Small Claims Courts. A proliferation of Small Claims Courts in poor residential areas will reduce the need for non-state systems of justice.

Neighbourhood Watches and vigilantes:

In most cases neighbourhood watches and vigilantes will fall away if the safety threat is tackled successfully, except if the vigilantes start becoming self-serving and extortionist. South Africa's approach to neighbourhood watches was to 'harness' them into a law-abiding trajectory, as has Zambia with its urban

neighbourhood watches. However its rural ones under the auspices of the chiefs remain murderous. The strategy there ought to be to establish training, co-operation protocols with the police, establish an accessible and open communication channel so that accountability to a lawful *modus operandi* is assured.

The failure to develop a good working relationship in SA between neighbourhood watches and the police lay partly in the training programme, which did not have a period of joint training between the police and the neighbourhood watches. Hence each side to this new partnership arrived with the notion that they were the principal partner, that they could dictate the terms of the relationship and dominate the action agenda. Police agencies in Africa are generally not happy to let civilians meddle in 'their' domain, nor look behind the scenes of how the police agency works (or doesn't).

What could work in the case of 'non-ideological' vigilantes, as has happened in Cape Town, is that a vigilante organisation is now converting itself into a 'private security' company and will therefore need to conform to a standard of professionalism that is acceptable to its governing body.

The more difficult forms of vigilantes are ones that are ideologically driven, and their cause becomes highly politicised. The South African government's attempt to co-opt them (PAGAD) into a law-abiding partnership failed because of the police's bad faith in negotiating with the organisation. If there is a space for a vigilante group to convert into a 'private security ' company that could be tried as long as close tabs are kept on them lest they become a private army.

8. General Guidelines for Country Officers Regarding Non-state Justice Systems

8.1 Relatedness of non-state justice systems and other forms of governance: The boundaries between non-state justice systems and other forms of non-state governance are not as tight as the purist lawyers among us

would like. The core enquiry should be what contribution can non-state justice systems make to safety of the person, of the person's property and how can it create access to appropriate problem-solving institutions? But NSJSs are related to structures such as burial societies, savings clubs, sometimes to traditional healers (as in Mozambique), all of which together cement the reciprocal dependencies poor people are subjected to. Donors can assist in strengthening those ties, because they form the social safety nets which non-welfare states don't deliver.

8.2 If non-state justice systems become unaccountable and too violent, it is advisable to encourage the creation of a responsible partner organisation, be it an NGO, or the police (if they are trustworthy, or any other organisation such as a religious organisation) to create accountability. These and other organisations can assist with training, monitoring, mediating the relationship with state departments. Better still, if one can generate a referral system to which issues can be sent which are not appropriate for the existing participating organisations. The South African neighbourhood watch training programmes and their increasing accountability mechanisms between police is a good example. Similarly, urban neighbourhood watches in Zambia have to be registered with the police and, by all accounts have high levels of legitimacy.

8.3 While many non-state justice initiatives have no relationship with the state, it is useful at least to assess whether the state institutions nearby are worth being drawn into a partnership. Projects which create happier citizens are good for business and usually also good for the state institutions, who claim some of the credit of an increased quality of life. In the South African transformation it has always been very heartening to come across a few highly committed and talented (often ambitious) bureaucrats, who are sometimes useful to have on board. They usually have more sway with other state functionaries than civilians do. The police are not necessarily the only potential partners. Local government, which sometimes has a legislative mandate to deal with land disputes. In Malawi, the one problem of local chiefs is to get to the far reaches of their areas to settle land disputes.

Donors providing bicycles can make a huge difference to the speedier settlement before matters degenerate into violence.

8.4 How does one avoid victimisation of minority-status people in non-state justice systems seeing that they usually reflect and reproduce the existing social hierarchies?

In all likelihood the answer, in the short term, lies in the NGOs, many of who will have a human rights arm and an education arm. Four NGOs in Malawi¹³ run information groups and training sessions with both the chiefs and local residents about customary law and human rights issues. It helps of course if the government is progressive and passes legislation or takes the Constitution seriously, and moves towards a legislative framework. This is where donors can be of assistance in providing the necessary wider support from experts outside of government, and from comparative examples, and offers of training. The climate for those interventions is favourable seeing that chiefs are gradually losing more and more of their former power and authority, particularly relating to their local authority functions. In Malawi they don't have a vote on the local council and they have lost their formal jurisdiction in settling disputes. They are therefore keen to find means of enhancing their status

8.5 If the government is not yet ready for a legislative programme, all one can do there is to engage the players in small scale and then bigger dialogues about moving into the future progressively and explore, very delicately the equality issues. The South African draft legislation on customary courts and law states in section 7(2) "Customary courts must give effect to Chapter 2 of the Constitution, in particular section 9 (the equality clause) and section 39(2) [interpretation of the Bill of Rights]". This means that the customary law will, from the time the Bill is passed, come under considerable pressure to change. Whether that will happen through court pronouncements or legislation remains to be seen. What about state

¹³ CARER (Centre for Advice, Research and Education on Rights), CHRR (Centre for Human Rights Rehabilitation), WLSA (Women in Law in Southern Africa) as well as MHRRC (Malawi Human Rights Resource Centre)

officials? What do they need to know and do about non-state justice systems?

8.6 What role can the judiciary play in arriving at fairer laws? In all the SADC countries customary law is coming under pressure. The South African and Malawian Law Commissions are busy with projects on customary courts, the structure of the courts and customary law, in Zambia there is growing pressure to take progressive steps away from outdated inequalities. Time is slowly running out for discriminatory customary law.

8.7 Some Select Projects, Experiments and Potential Problems

Peacemakers in Nyanga, Cape Town, SA: This was a project that started around 1996 in a township that had very high levels of crime. About 40 peacemakers were trained and employed. Their job was to spread themselves throughout the township and communicate with residents and passers-by to assess the types of problems people experienced. When people brought problems to them, they would refer the person to the correct authority, or assist where they could. The original plan was that they would be part of a sector policing initiative to bring down crime so that every block of streets would have one family to whom complaints and information could be taken. The peacemakers would then be able to relay that information to the appropriate authorities. The sector policing part did not work because the police believed they didn't have the person-power for such an enterprise. But the peacemakers continued with their work and were able to reduce the levels of street crime quite considerably (I'm still trying to get the figures). The project had a development plan which entailed that each peacemaker would work for two years only and then be replaced. The experience gained would enable them to obtain a steady job, while others took their place as trainee peacemakers.

Problems ensued when project funding came to an end. No arm of government was ready to pick up the project, seeing that the state was still in the throes of its own internal transformation and reorganisation. It is not clear what happened to that project. (I'm still trying to find out)

NGOs and their range of services: Zambia is a good example of how a clutch of NGOs can create a range of service which substantially enhance the prospects better safety and security of both person and property as well as significantly increase access to justice to both state and other institutions, such as victim support organisations:

The churches mediate on almost all the same issues as are brought to the both the local and traditional courts,

The NGOs are becoming stronger, thanks to donor support. They range from specialised legal aid for women who are prejudiced by the customary and traditional courts. The Legal Resources Foundation mediates more than 1,000 cases a year. Community empowerment is undertaken by Women for Change empowers local village women to understand their rights and to find the appropriate forum for their problem. They even resort to mediating themselves.

Some NGOs such as the Legal Resources Foundation and National Women's Legal Aid Clinic, under the auspices of the Law Association of Zambia assist women to navigate the complex court structures to find the appropriate remedy. Without these NGOs there would be no such recourse to the law.

The NGOs providing civic education complete the range of service offered to poor and uninformed disputants. Notable is the Zambia Civic Education Association which now provides legal advice, civic education, legal representation and advocacy work. See the more detailed descriptions in the country sections.

Citizen Education

Malawi has a NICE organisation, National Initiative on Civic Education. It was formed during the Banda years by a coalition of religious groups when all other opposition was cowed. It is nowadays one of the more important sources of citizen education about government policies and civic issues and has offices throughout the country. Its method is well-honed for its target audience, and is appropriate for the levels of technology available in the country. It contributes

greatly to informing citizens about all relevant issues across most disciplines, but especially political rights, social issues. It is closely aligned to the Public Affairs Committee. Together they make a valuable team.

The vulnerable situation of chiefs: Both democratisation and authoritarian governments dramatically affect the power and status of the chiefs and headmen. They constitute the local power, whether one likes it or not. The increasing uncertainties about their future can have negative spin-offs: In Lesotho, where the chiefs and village headmen are paid VERY badly and have only local government functions, even though they do a great deal of conflict resolution, there is a growing trend towards their involvement in crime. Stock-theft is rampant, and some chiefs are suspected of being part of it, sometimes in cahoots with the local police. It is not clear how many, but just a few chiefs known to be part of stock-theft syndicates has a dramatic effect on public sentiments. Symbolically it signals a collapse of a particular order.

The point here is that the reduction of power and status of chiefs, if it is going to happen, has to be managed very delicately, and donors may well want to assist in reducing the negative consequences of governance vacuums created by their downgrading. In the rural areas chiefs are all there is for local residents. Transition strategies should be clear and the relegation of the chiefs to cultural leaders with no administrative power should be given sufficient time.

Safety Issues as the Entry-point to Development Projects: Community Safety Forums (CSF)

The community safety forums in South Africa are an innovative attempt to use crime concerns as the trigger for broader development. They were started by a DFID-funded NGO initiative, which was then adopted by the Western Cape Province. The basic idea was that safety issues should be addressed holistically as a development issue and not only as a policing issue. They used community policing forums as the kernel around which to recruit every other level of government relevant to improving the quality of life. Of course all relevant community-based organisations and NGOs are also important participants. The

beauty of this approach is the local empowerment of ordinary citizens, who are part of developing a community safety plan together with all other participants in government. Each month all justice system structures, all relevant local government structures, education representatives (Safer Schools Projects) and Community-based organisations meet and identify problems and generate solutions. This results in the CSFs being able to recruit resources from all levels of government. In October 2002 the concept went national and was adopted as a bottom-up planning process. A local woman's group, for example, can have its needs built into a much bigger plan of social development. The assumption is that a general improvement in the quality of life should reduce crime. That still needs to be proven, but at this stage there is a high level of hope invested in this process. Results have so far been the co-operation of all related institutions to a common goal, using each other's resources rather than having to duplicate. For example, the Correctional Services Department has adopted a new policy of community corrections, for which it needs offices to which parolees should come for monthly meetings, workshops and reporting. These offices should be as close to their homes as possible, otherwise the trouble of getting there reduces compliance. The co-operation at the CSF means that building offices is no longer necessary, but Correctional Services can rent (or even use free of charge) the facilities of local government. The key principle is different institutions working towards the same goal but using their core strength. The danger of this project is that it is energised and managed by an NGO on behalf of the government. Hand-over to the government will require a well-managed and careful process. Many prior projects have fizzled out once full hand-over to the government has taken place.

9. Checklist for Country Officers

1. What is the range of state policing	Is it a national, regional/provincial or
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services?	local police force/service, or a combination of the three?
	Are there formally accredited police forces linked to or accountable to local government or chiefs?
2. What is their style of policing?	Coercive, consensual, negotiated at local level?
3. To whom are they accountable: According to the law and in reality?	Local chiefs, local authorities, Ministry of interior, Ministry for Security, Office of the President?
4. Whose interests do they mainly serve?	General population, supporters of a particular party, the wealthy, the poor, the elite, the government, the President?
5. How legitimate and well-used are they?	Does their track-record endear them to the majority of citizens, or are they an additional safety risk to poor people?
6. What is the perception about their levels and forms of corruption? What bodies exist to reduce/discourage police corruption?	Is their corruption small-time or endemic and large-scale, or both?
7. What role does the army play in policing citizens?	Does the army focus more of its attention on regime-security than citizen-security?
8. In comparison to the police, how well is the army resourced by the government?	If the army is better resourced than the police, that confirms the observation that the army is better valued than the police

9. What role does the army play in public order policing?	
10. What role does the army play in party-political issues?	
11. What role does the secret service play in party-political issues?	Prior to elections the secret service may heighten its activities both within and outside the civil service to strengthen the chances of the incumbent party to be returned to office
12. What forms of non-state policing exist?	Vigilantism, neighbourhood watch, farmers protecting their livestock and fields, particular interest groups, eg religious, ethnic, ideological. Organised crime?
13. What is the style of their activities?	Conforming to the law? Exceeding legal constraints? Do they charge for their services?
14. What level of popular support do they enjoy?	From local, national or sectoral groups?
15. To whom are they accountable?	Local government, politicians, druglords, warlords, chiefs, syndicates?
16. What is the attitude of the government towards them?	Local government, regional, national?
17. What initiatives exist to respond to their activities?	Engagement, negotiation, developing partnerships with the state and becoming accountable to the accountable state? Training, beefing up state efforts to avoid civilians taking the

	<p>law into their own hands?</p> <p>Denouncement, repression, prosecution?</p>
<p>18. Are the causes of non-state policing being addressed?</p>	<p>Is the state acknowledging the weakness, inefficiency, corruptness, unaccountability, self-serving, self-enriching nature of their policing/military forces and justice system? Is it acknowledging its ineffectiveness to reduce crime by lawful means?</p>
<p>19. Who are the social actors available as interveners/partners to the state to research the situation, develop an intervention plan and reduce this phenomenon?</p>	<p>Religious organisations, the Universities, voluntary organisations, NGOs, private policing agencies (the private security industry), other donors?</p>
<p>20. How accessible is the state justice system to the poor residents in both rural and urban areas?</p>	<p>When we talk about accessible, we mean accessible in terms of distance, cost, procedure, language, values, appropriate outcomes.</p>
<p>21. Are steps being taken to make the justice system more accessible, efficient, representative and effective?</p>	<p>Integrated justice systems programmes such as in Uganda, South Africa; efficiency projects in the courts to reduce awaiting trial populations; plea bargaining to reduce processing time and costs?, etc</p>
<p>22. How sensitive are the prisons to notifying local communities when long-term prisoners are about to be</p>	<p>One of the big fears of residents in poor areas is that their victimisers may return from prison and settle old scores</p>

released?	
23. What are the expressed and perceived causes for the creation of NSJS in this country?	Is it the general weakness of the existing institutions such as police, courts, prisons and other parts of the justice system? Or general weakness of the state in delivering safety and justice services to its citizens? Or is it some specific issue such as religion, or high-crime, or bandits?
24. Are there ways of addressing the causes (wholly or partly) and joining hands working with the NSJS concerned	This could take the form of creating legislation or policy allowing a certain group or groups to continue its/their activities as long as they fall within the law, and make it conditional that they work with the state to address the problem.
25. If its not desirable or possible to work with the particular form of NSJS, then a process of monitoring (policing) its activities while putting pressure on it to act within the law	
26. The policy options are condonation, co-optation, incentivisation to operate lawfully, regulation and criminalisation.	All of these can be coupled with lesser carrots and sticks, such as training, equipping, putting the angry energy to constructive and lawful uses.

8. Method

Book, academic and NGO-journal literature research; gray literature searches web-site searches.

Country visits to Mozambique (1999, 2001), Zambia (August, 2002), Lesotho (March/April 2002) and Malawi (January, June and July 2002) were conducted. The author is resident in South Africa.

I have conducted primary and secondary research for other recent (2002) DFID missions in Lesotho and Malawi.

I have done primary research in Mozambique as part of a DANIDA mission in 1999. Since then their University has completed a detailed study on informal justice, an English version of its executive summary was acquired.

9. Bibliography:

Chuulu, MB, Chileshe, PM, Ntalasha, H and Chanda, A, 1999 Justice in Zambia: Myth or Reality? Women and the Administration of Justice. WLSA, Zambia.

Other bibliographic references are in the country sections

10. Actual Schedule of Activities

March - April 2002	Lesotho literature search and country visit conducted in connection with another DFID project
June and July 2002	Commencement of literature review on the SADC region. Consolidation of existing materials on South Africa. One-month research visit to Malawi on a Massaj project.
20 th August to 30 th August	Zambian country visit -interviews and literature collection by an associate researcher
September to October	Book and gray literature study Botswana, Malawi literature collection

End October	Submission of first draft
November and December	On holiday in South east Asia
January	Work on second draft
22 nd January	Submission of Second Draft
March 2003	Attendance at London Workshop and finalisation of paper on the strength of the discussions