

**REVIEW OF EXPERIENCE IN ENGAGING WITH ‘NON-
STATE’ JUSTICE SYSTEMS IN EAST AFRICA**

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1. SUMMARY OF KEY FINDINGS

This report seeks to help DfID understand the range of non-formal justice systems in the East Africa region, and to apply this understanding to develop guidelines on how to work with non-formal justice systems to achieve DfID's goal of making justice more accessible to poor people. The report is based on a review of relevant experience in three East African countries: Uganda, Kenya and Tanzania.

The range of 'non-state' justice systems¹ in the region fall into a continuum between community-based forums that have little direct contact with formal state structures, and forums that are created or endorsed by the state and sanctioned to apply community norms or customs.

There has been official acknowledgement of the central role played by non-formal justice systems in the administration of justice in the region. However, with few exceptions, government engagement with non-formal justice systems has been sporadic. At the level of rhetoric only are they integrated into national policy on the justice sector.

NGO engagement with non-formal justice is growing, with human rights and legal awareness groups now shifting their focus from simply helping people find their way around the formal court system to training paralegals and equipping decision-makers in community-based justice forums, thus making these forums sites for human rights awareness too. Beyond the legal/judicial sector, NGOs working for secure and sustainable livelihoods in pastoralist communities are working with these systems for the peaceful resolution of conflict over resources.

Reforming non-formal justice systems to improve access to justice for poor people and other vulnerable groups in the East Africa region is likely to face the following challenges:

¹ Defined in the Terms of Reference for this work to mean any system that applies norms/rules the source of which is (or purports to be) primarily non-state in origin. This report uses the term 'non-formal justice systems' interchangeably with 'non-state justice systems'.

- **Assessing and building legitimacy and accountability:** the less formal and visible a forum is, the more difficult it will be to assess the level of accountability to the people it serves. It is difficult to ensure the accountability of community-based forums that do not have a clearly identifiable decision-making structure, such as family mediation processes. On the other hand non-formal adjudicative forums sponsored by the state place little emphasis on being answerable to the people they are intended to serve. Attempts to build in downward accountability through elections have not necessarily enhanced their legitimacy, as this has been compromised by political patronage and public perception of the officials as corrupt. Yet the use of appointment has yielded mixed results, with some officials gaining the trust of the communities while others are rejected., NGO-assisted initiatives raise questions as to whether the decision-makers are accountable to the NGO that provides the resources or to the community served.
- **Weak linkages to the judiciary and other relevant formal institutions:** these have to be central to the reform in order to enhance the capacity of the informal decision-makers, open up channels for routine review, and make it easier for people to use both forums, since simultaneous use of formal and non-formal systems is a reality for a significant number of people.
- **Lack of inclusiveness, particularly on the basis of gender:** whereas Uganda and Tanzania have quotas for women in state-sponsored forums applying customary law, Kenya has made no effort toward inclusiveness. Some NGO-assisted initiatives have included women and youth, but there are doubts as to their sustainability, especially when the initiatives are in response to a crisis such as armed conflict.
- **Conflict with human rights principles:** these have arisen in the areas of gender-based discrimination, particularly in family relations; and in the cruel punishments meted out to suspects by vigilante-style neighbourhood security networks. Because of these conflicts, many in the legal profession generally, and human rights lawyers in particular, have called for the scrapping of quasi-judicial tribunals, criminalization of 'vigilante' activities, and 'benign neglect' of low-profile community-based forums.

2. RECOMMENDATIONS

Engagement with non-formal justice is not an end in itself but a means towards enhancing personal safety and securing entitlements necessary to sustain livelihoods. The recommendations are made with this objective in mind.

- i) DfID should be careful that its involvement in the non-formal justice sector is not perceived as concern with ‘neo-traditional’ institutions, but as a broad concern about justice at the local level whether formal or informal. The reason for this is two-fold: first, to avoid distancing and marginalization of non-formal justice from the broader context of reforms to the formal justice sector and thereby alienating the legal profession and judiciary who are major stakeholders. Second, to avoid falling into the larger political controversy over restitution of ‘traditional’ structures of authority, such as the kingdoms in Uganda.

A tailored approach (paragraphs 4.1-4.12)

- ii) Guidelines for operationalizing DfID’s policy on engagement with the non-formal justice sector have to be tailored so as to be specific to different types of systems. Non-formal justice systems are many and varied. This means that different types of non-formal justice systems have different implications for the changes that reforms would be seeking to introduce, such as increased legitimacy, accountability, inclusiveness and smoother institutional linkages with the formal justice sector.

A ‘bottom-up’ approach in identifying institutions to engage with

- iii) Decision on which institutions to prioritize should be informed by practice on the ground, by following the ‘paths’ of the people themselves. For instance, asking ‘where do people go to resolve land disputes?’ may reveal that reform efforts (e.g. in the form of capacity building) need to place more emphasis on the village headmen and clans than on the LDTs. It may also reveal that the LDTs need to be decentralized further from the District level to Location Level. Basing such a

decision on policy documents developed from above risks failing to achieve the chief objective of improving access to justice for poor people at the local level.

A comprehensive approach to justice sector reform (paragraphs 5.17-5.21)

- iv) Ensure that DfID-supported justice sector reform strategy papers go beyond the rhetoric on the need to take non-formal justice systems into account. Ensure that they spell out specific activities, clear performance indicators and budgetary allocation. Kenya's Expanded Legal Sector Reform Strategy Paper does not go beyond rhetoric as it lacks suggestions on how to achieve incorporation. Uganda's claims to take a comprehensive approach by incorporating LCC courts into judicial reform, but there is no mention of community-based informal systems or tribunals set up under other statutes such as the Land Act.
- v) Expand the reach of justice sector reforms to cover sector-specific adjudication forums that are 'tucked' away in sectoral bureaucracies. DfID's SSAJ policy already defines the justice sector broadly beyond simply the police and judiciary. However, sector-specific adjudication forums such as Land Disputes Tribunals and Land Adjudication Committees in Kenya risk being excluded. In fact they are omitted from Kenya's Expanded Legal Sector Reform Strategy Paper. Yet their work has serious implications for the security of people's entitlements to land and livelihood, particularly in rural areas.

Creating real options (paragraphs 5.17-5.21)

- vi) Measures to improve non-formal justice should be pursued alongside efforts to decentralize and streamline formal justice structures so that people are able to meaningfully choose remedies from the range of systems available. The fact of high usage of non-formal justice systems in rural areas does not automatically lead to the conclusion that those systems are the best; it could simply mean that they are the only ones available. A well-functioning accessible formal court system, with the necessary support such as affordable legal advice could broaden the range of options for some. Investing in reform of non-formal systems should

not be seen simply as a ‘low-cost’ and ‘budget-neutral’ substitute for a comprehensive reform policy toward making formal systems accessible, affordable and useable.

Strengthen links with formal institutions to enable people to claim rights

(paragraphs 5.25-5.27)

- vii) DfID should support reforms aimed at strengthening institutional linkages with the judiciary so as to open up avenues for the application of human rights principles to the operation of non-formal justice systems. Therefore people’s access to higher courts that are vested with power to uphold constitutional rights should not be blocked, for instance, by laws curtailing the right to appeal decisions made by quasi-judicial tribunals applying customary law. Reform efforts could start by undoing legal arrangements that amount to such restriction, such as section 82(4) of Kenya’s constitution, which exempts personal laws (customary and religious family laws) from application of the anti-discrimination clause.
- viii) The suggestion on repeal of section 82(4) is bound to be a politically sensitive one. Any reform proposal that seems to come close to upsetting the insulation of personal laws is likely to be read as a threat to the Muslim community. Although the community has welcomed reforms in the draft constitution that amount to restructuring the Kadhi’s court system, they are unlikely to welcome the removal of section 82(4) which has largely come to be perceived as protecting the autonomy of Islamic law.

Accountability (paragraphs 5.8-5.16)

Support demands for accountability from below

- ix) Adopt an empowerment approach that equips the people who are served by these systems with knowledge that enables them to demand accountability. This approach is particularly important for accountability in the case of community-based justice systems that do not have a visible structure of decision-making, or where decision-making is

diffuse and authority is exercised by various people from time to time. Empowerment should focus on knowledge on issues such as:

- what the scope of these forums' authority is;
- what their own rights are in relation to that authority; and
- where they may lodge complaints when they are aggrieved.

DfID's approach should complement and support the efforts of NGOs involved in addressing these issues through their involvement in activities such as paralegal training.

Support the strengthening of accountability measures in 'state-sponsored' informal tribunals

x) Urgent attention needs to focus on instances when state agencies and officials assume quasi-judicial powers at the local level by default due to the absence or failure of the appropriate institutions. Examples include the gap-filling roles played by chiefs and assistant chiefs in Kenya, and the Ward Secretary in Tanzania. In many places, their authority is habitually relied upon to give back-up to mediation systems in networks of family, neighbourhood, self-help groups and informal businesses.

In general there is need to invest effort in strengthening the downward accountability of state-sponsored informal tribunals whose focus tends to be on upward accountability.

Partnerships (paragraphs 4.5; 4.12-4.14;

xi) In deciding on partnerships, DFID should choose organizations that are linked both upwards and downwards; who are able to influence policy in the relevant government agencies but who are also well connected at the grassroots level. Examples of groups that fit this criterion include the Uganda Land Alliance, which is working in close partnership with the government concerning the incorporation of community-based systems in the implementation of the Land Act. At the same time it is also playing an active role in raising awareness at the grassroots level about the Act.

xii) Partnerships with civil society groups around non-formal justice will need to go beyond groups working in the area of law/human rights/governance. Groups working in

the area of sustainable livelihoods and armed conflict have already built up considerable experience on working with community-based justice systems to resolve conflict, for instance conflict over water and pasture in pastoralist communities. This implies establishing linkages within DfID between the justice sector/governance work and work on sustainable livelihoods/social development, and building onto existing partnerships so as not to duplicate efforts. Making use of entry points in sustainable livelihood programs to impact justice systems may appeal more to communities as the efforts are more likely to be viewed as rooted in the fulfilment of tangible and immediate needs. In addition, the organizations involved in these initiatives from a livelihoods perspective (e.g. Oxfam) have already established a strong link within the communities and therefore the initiatives are more likely to be sustainable.

Addressing gender bias (paragraphs 5.25-5.27)

xiii) Intra-family disputes constitute a large proportion of the cases handled by non-formal forums. Targeting this category of cases in initiatives intended to improve the capacity of the chiefs and their assistants (in rural areas this will include the village headmen) would have significant impact in improving their overall effectiveness in facilitating access to justice at the local level. DfID's role in this regard should be to support groups that are taking a constructive approach to the problem of gender bias in family disputes. examples include groups that are training (or proposing to train) local administrators to understand their role as advisory, and therefore placing emphasis on referral to relevant social services and formal legal institutions.

xiv) DfID should avoid appearing to endorse the view that non-formal institutions themselves have no role to play in addressing the problem of gender bias. Kenya's ELSRSP, for instance, identifies gender bias as a key problem in community-based justice, but in the section that identifies the institutions that are expected to play a role in tackling this problem there is no role given to local chiefs and community leaders, only NGOs.

Gaining the support of key stakeholders (paragraphs 5.30-5.31)

xv) DfID should support broadening and decentralizing of the dialogue on reform of justice systems at the local level, formal or informal, to include all major stakeholders. This dialogue could focus on district or sub-district level and include all magistrates, lawyers, provincial administrators, those who serve as arbitrators or mediators on various tribunals or village councils, representatives of neighbourhood security networks and any other institutions whose work impacts safety and access to justice. Reforms should be informed by this broadly inclusive process.

xvi) It is important to secure the support of the legal profession in an incremental way by working with those sections of the profession that already see the need to engage with non-formal justice systems. These include lower level magistrates and groups that are already involved in the training of community-based paralegal workers. These groups are only in the early stages of exchanging views with each other² and working constructively with non-formal justice institutions. The approaches they are developing, which include paralegal training for community-based mediators and training on cross-referrals to formal institutions such as social services, resonate with the recommendations made here.

² For instance, a regional conference organized jointly by the Human Rights and Peace Centre (Makerere University) and the Danish Centre for Human Rights brought together human rights activists and scholars from the East African region to discuss 'post-traditional justice and human rights'. See symposium report in *East African Journal of Peace and Human Rights*, Vol.8 No.1 (2002).

3. BACKGROUND

3.1 In post-independence era discussion of rule systems outside of formal judicial structures related quite specifically to African ‘customary law’. Though there were (and still are) systems that draw from religion (e.g. Islamic and Hindu law) these were seen as addressing distinct minority groups and therefore the need for separate institutions to administer them was not questioned. Therefore the discussion on ‘integration’ and harmonization of the previously bifurcated legal systems focused on how to accommodate customary law rules and institutions within the post-colonial legal systems.

3.2 It needs clarifying that the ‘customary law institutions’ that were being discussed then did not refer to African ‘traditional’ political structures such as chieftaincies or kingdoms. By independence, such structures, where they had existed at all, had been replaced with structures endorsed by the colonial administration through the policy of indirect rule. Indirect rule was the policy that dictated that where possible, local administration was to be exercised indirectly through ‘native’ laws and institutions. Where such native laws and institutions did not exist in a centralized and identifiable manner, or where those that did exist were not seen as suitable for the administration’s purposes, new ones were invented and vested with both administrative and quasi-judicial authority.³ This is how the parallel system of Native Courts and Native Tribunals came about.

³ Sir F.D. Lugard (who is referred to as the architect of indirect rule) counseled, “The first step [in establishing indirect rule] is to endeavour to find a man of influence as chief, and to group under him as many villages or districts as possible, to teach him to delegate powers,...to support his authority, and to inculcate a sense of responsibility.” [quoted in Mamdani 1996: 53]. In 1902 the Village Headman Ordinance was enacted to enable the Commissioner to create Native Authorities and Native Courts, which would exercise ‘traditional’ authority. *See also* Robert Tignor, “Colonial Chiefs in Chiefless Societies”, Vol. 9 No.3 *Journal of Modern African Studies*, 339-359 (1971); Terence Ranger, “The Invention of Tradition in Colonial Africa”, in *The Invention of Tradition* (Terence Ranger & Eric Hobsbawm ed.s, 1983);

3.3 After independence, the approach adopted in the three East African countries was to abolish the structure of Native courts or tribunals and instead give the lower courts jurisdiction as the courts of first instance in hearing cases on customary law.

The questions that preoccupied legal reformers at that time were:

- Codification: customary law was largely unwritten. Would it not need to be codified first before it could be made usable by judges and magistrates?
- Standardization: customary rule systems are as varied as there are communities in these countries. Does this not pose a problem for the underlying values of uniformity and predictability in a legal system?
- Scope: what types of cases would customary law be applied to? Under what conditions? To whom would customary law be applicable? What about cases involving people who do not belong to the same community?
- Conflict with written laws: what guidelines would be given to the judiciary in dealing with this?
- Conflict with standards of justice and fairness.

3.4 Codification and standardization policies never really took root and were abandoned. Of the three countries Tanzania came closest to codification and nationwide harmonization of customary laws through the work of Hans Cory on customary laws dealing with marriage, divorce and succession. In Kenya, through a project organized by the School of Oriental and African Studies, Eugene Cotran compiled monographs on various communities' customary laws, largely in the area of family law. Even though these initiatives did not (and could not possibly) result in 'codes of customary laws', the (now rather dated) monographs they produced are widely consulted in judicial decision-making, sometimes quite rigidly to the detriment of a flexible approach that would more closely reflect the dynamic nature of custom and practice.

3.5 Contemporary discussion has expanded to include a larger array of systems and practices beyond 'customary law' as a legal category. The discussion now includes a wide range of systems that can be thought of as being in a continuum. At one end of the continuum are community-based systems that have little or no relationship with formal

state structures. Examples range from intra and inter-family mediation, self-help dispute resolution mechanisms set up by market traders, to ‘popular courts’ set up *ad hoc* by neighbourhood based ‘vigilante’ groups to ‘try’ and ‘punish’ suspected criminals, bordering on illegality. At the other end of the continuum are forums that are sponsored by or created by the state, but sanctioned to apply norms such as customary law, which are seen as generated outside of the state structure. Some are one-off forums set up to deal with a specific problem or process. The Land Adjudication Committees in Kenya set up to resolve disputes that may arise in the process of land titling are one such example. Others are set up to operate on an on-going basis and to deal with more than just one issue. An example is Uganda’s Local Council Committee Courts. In between the ‘state-sponsored’ and ‘community-based’ forums are forums set up with the support of community activists or NGOs, for instance to settle disputes amicably in an area affected by armed conflict. They draw from community norms with some adaptations, for instance requiring representation of youth and women in decision-making.

4. TYPES OF NON-FORMAL JUSTICE SYSTEMS

4.1 This section outlines the range of non-formal systems that exist in the region. The systems are grouped under three categories drawn from the continuum discussed above: ‘state-sponsored’ arrangements, community-based arrangements and NGO-supported alternatives. In order to keep the accounts brief, detailed information on some of the arrangements, where necessary, are included in the annex.

STATE-SPONSORED ARRANGEMENTS

4.2 At various moments governments in all three countries have officially created or appropriated informal dispute resolution forums that draw from local norms/customs and practice. Some of the forums are *ad hoc*, their operation being limited to a specific sector such as land. Others have an on-going role and their jurisdiction is general.

Sector-specific arrangements

4.3 Sporadic and sector-specific intervention has targeted primarily the resolution of land disputes. In Kenya there are two land disputing forums set up to apply customary law:

- land adjudication committees set up under the Land Adjudication Act (1970), made up of appointed elders whose role it is to resolve disputes that arise in areas undergoing formalization of title;
- Land Disputes Tribunals (LDTs) established under the Land Disputes Tribunals Act (1990), also staffed by appointed elders and chaired by the District Commissioner.

4.4 The land adjudication committees' role is by definition *ad hoc* (one-off), since their task is completed once the land registration exercise is completed. The justification for Land Adjudication Committees (LACs) is the speedy adjudication of land disputes in areas undergoing titling, to prevent the delays that would be experienced if the exercise had to be held up pending resolution of disputes by courts. Land Disputes Tribunals were justified in terms of the prohibitive cost of litigation over simple land matters that could be resolved by elders from the local area knowledgeable on the social context of the disputes. The LDTs are not *ad hoc*. They are envisioned as a somewhat permanent feature of district-based alternative land dispute resolution system. (see annex 1, Box 1 and 2).

4.5 Uganda's 1998 Land Act establishes Land Tribunals under a decentralized system at the parish and district levels. Some recognition is given to customary authorities such as clan leaders and chiefs who may be called upon to act as mediators in the Land Tribunals. The tribunals are also allowed to advise parties to settle a dispute through mediation. Calls by the Uganda Land Alliance for formal integration of community-based customary structures into the statute's institutions was not successful.

Under Tanzania's Village Lands Act 1999, Village Land Councils mediate in disputes. Customary law advisers serve as advisers to the District Land Court judge. (see annex 1, Box 3)

State interventions conferring general jurisdiction

4.6 While Kenya has adopted only sector-specific interventions, Uganda and Tanzania have given general quasi-judicial powers to Local Council Committee Courts (LCC courts) and Ward Tribunals respectively. LCC courts are built into the three-tier local government system in Uganda and have concurrent jurisdiction with the lower Magistrates' courts in civil matters and petty criminal offences. (see annex 1, Box 4)

4.7 Tanzania's Ward Tribunals established under the Ward Tribunals Act (1985) are given jurisdiction over both criminal and civil matters. However, empirical investigation shows that these tribunals have virtually collapsed due to the failure of District Councils to pay remuneration to the members as is required under the Act. What has emerged in practice is that the Ward Secretary steps in sporadically to deal with disputes that must be attended to, even though he has no statutory authority to do so. This has implications for accountability as will be discussed below.

The approaches adopted by the respective East African governments are compared below.

COMMUNITY-BASED ARRANGEMENTS

4.8 Systems in this category have varying degrees of visibility and formality. Examples include:

- intra-family mediation practices, which are known to exist but are not easily observable;
- clan-based systems, which differ from community to community in the degree to which there is a discernible structure and process of decision-making;
- neighbourhood-based processes that draw in neighbours as mediators;

- referral, where such mediation efforts fail, to authority figures such as local administrators for adjudication, notwithstanding that officially they are not given any quasi-judicial powers;
- adjudication arrangements set up by networks such as committees overseeing community development projects, associations of traders and artisans and self-help groups.

4.9 As a general practice, these community-based systems are presumed to be beyond the reach of state-initiated reforms. For instance, even though Uganda's strategic plan for judicial reform boasts comprehensiveness on account of the fact that it incorporates the LCC courts, there is no acknowledgement of other justice systems that exist outside of the LCC structure. Even when community-based systems are acknowledged, as is the case in Kenya's justice sector reform program, the policy statement often does not go beyond acknowledging the fact that community-based systems serve the majority of people and therefore they need to be strengthened. The policies are short on specifics: how this strengthening is to be done, what resources will be invested in the effort, what the performance indicators will be.

4.10 Vigilante-style arrangements present dilemmas due to the reputation they have acquired for brutal punishments to suspects in disregard of fair trial principles. Such arrangements exist largely in urban poor neighbourhoods that are poorly policed by the official systems although some are to be found in rural areas that have experienced insecurity. The difficulties they present are discussed in the analysis that follows.

NGO-ASSISTED INITIATIVES

4.11 There has been some NGO involvement in community-based justice systems, in some cases revitalizing 'traditional' systems and in others supporting the emergence of alternative community-based systems. Most such interventions have taken place in areas affected by armed conflict. For example, in Northern Uganda, Oxfam and local Ugandan groups such as ACORD have been providing financial and logistical support as well as

capacity building geared toward strengthening community-based dispute resolution systems (Mwaura & Schmeidl 2002; African Rights 2000). Another example is the 'peace elders initiative' facilitated by the Centre for Conflict Research, which has been working in areas such as Laikipia district in Kenya (ICJ 2002). Yet another initiative by a group of market women in Kenya's Wajir district led to the formation of the Wajir Peace and Development Committee which now facilitates the resolution of disputes by inter-clan mediation. The initiative is also linked into the District Security Committee to deal with larger problems that may threaten peace in the area (Video: The Wajir Story 1998).

4.12 Similar support has come from NGOs, sometimes in conjunction with some bilateral programs, working on issues of sustainable and secure livelihoods, particularly in pastoralist regions. They have been supporting the use of community-based systems for resolving conflicts over resources such as water and for dealing with the problem of cattle-rustling (Mwaura & Schmeidl 2002).

4.13 There are definite advantages to these NGO-supported measures. First, they are linked to a response to tangible needs that are interwoven with people's livelihood and therefore are grounded and of immediate relevance. They are therefore likely to be seen as acceptable and are easy to justify against potential challenges that they are compromised by external support. Second, they have more room to be innovative because while they do draw from community norms ('tradition') they can adapt to the needs in response to which they were formed. For instance, the Wajir women's initiative marked the beginning of broad inclusiveness in inter-clan negotiations to include women and youth (The Wajir Story 1994). The 'peace elders initiative' in Laikipia district incorporates youth and women as elders. In Kwale mistrust for official and semi-official forums for dealing with land disputes, following chronic conflict over land resulted in an innovative system whereby villagers *elect* elders to deal with such cases (ICJ 2002). Reforms seeking to address the problem of lack of inclusiveness in non-state justice systems could begin with working through these initiatives.

4.14 Until recently, NGOs working in legal awareness and human rights have not been keen on engaging with justice forums outside of the formal court system. However, initiatives are beginning to emerge as these organizations have taken on community outreach programs such as paralegal training since the later part of the 1990s (African Rights 1996; ICJ-Kenya 2002).

5. EVALUATION AND COMPARISON OF APPROACHES

This section evaluates and compares the approaches taken in Kenya, Uganda and Tanzania. The evaluation is grouped under six themes, namely legitimacy, accountability, linkages with the formal judicial system, inclusiveness, conflict with human rights principles, and attitudes of the legal profession.

LEGITIMACY

5.1 When government, NGO or donor initiatives decide to engage community-based justice systems, questions of legitimacy arise. Whereas Uganda and Tanzania have tried to address this issue by incorporating elections into the systems, Kenya has not. In all three countries legitimacy is further put into question by public perception of these systems as corrupt, and this must be addressed both in the formal and non-formal justice systems.

5.2 In Uganda's LCC courts, the members (councillors) who serve on the lowest tier (LC 1) are directly elected, while those serving on higher levels are elected by an electoral college. The LCC courts initially enjoyed a measure of legitimacy largely due to their reputation for delivering speedy and affordable justice. They were (and in most places still are) commended for being accessible, quick in delivering justice, using simple procedures and familiar language, allowing for broader community participation and being oriented toward reconciliation and harmonious relations. A 1994 survey found that they still enjoyed a high popularity rating. (Barya & Oloka-Onyango 1994: 58). Recent opinion suggests, however, that their popularity is waning, and that they are characterized by partisanship and partiality. (Luutu 2002:47; Khadiagala 2001). This shows that representation may be a necessary but not sufficient factor in establishing legitimacy. It

also opens up the broader question: when a government takes it upon itself to ‘invent’, adapt or reform justice systems parallel to the formal judiciary, how can problems associated with lack of legitimacy be avoided or minimized?

5.3 Tanzania’s 1999 Village Lands Act provides for elected Village Land Councils, who report to the Commissioner of Lands. There is no indication of how the system is working and whether it enjoys acceptance and legitimacy.

5.4 Kenya, by contrast, has never employed electoral representation in local justice. The staffing has always been by appointment: Land Adjudication Committees and the Land Disputes Tribunals are constituted by appointment by the Minister for Lands and the District Commissioner respectively. Similarly, the provincial administrators are civil servants appointed by the government.

5.5 The use of appointment has led to mixed results. In some areas the appointments coincide with local people’s perception of the appointee as credible. In others it has been more obvious that political patronage was at work. Therefore perceptions of the institutions themselves varies from place to place, depending on who is in office at any particular moment. This is particularly true of the provincial administrators (chiefs and assistant chiefs). In some places their role is viewed quite negatively, to the extent of calling for the scrapping of the provincial administration system altogether (Chweya 1998). These calls for abolition have been taken up in the draft constitution prepared by the Constitution of Kenya Review Commission. The Commission proposes to replace it with a strengthened and more decentralized local government system. If the proposal does succeed, the default informal dispute resolution role that is currently being filled in by these local administrators will have to be addressed by some alternative structure. It is not yet clear what that alternative will be.

5.6 In other places the role of local provincial administrators is clearly appreciated in the absence of any formal system that works, and as a back-up to the family/clan-based systems in the rural areas. Some people will often make a distinction, criticising the

chiefs and assistant chiefs and praising the village headmen. (Village headmen are at the bottom rung of the provincial administration ladder and are not on the government payroll). In urban areas provincial administrators often function as the court of first resort for the urban poor and resolve day-to-day disputes such as spousal and child neglect, adultery, child custody and property division following separation, particularly of couples not formally married. In Nairobi province they handle more complaints on domestic violence than do the police (COVAW 2002).

How is the question of legitimacy to be assessed when there is such a wide range of views with respect to one institution?

5.7 What accounts for the difference in the approaches of the three countries? Why has there been more of an effort to establish legitimacy in Uganda and Tanzania? One obvious explanation is that in Kenya, measures such as LDTs were introduced hurriedly to plug gaps in the previous system of panel of elders (see annex). The panels of elders in turn had been set up hurriedly as a populist measure in response to a presidential promise to make land dispute processing cheaper for the ordinary *mwananchi*. Neither measure was discussed at length in parliament and there was no public consultation on the proposals at all. The government did the easy thing by setting up tribunals by the quickest means possible: through the provincial administration, which has a centrally supervised structure with a deep reach into the grassroots. The question of legitimacy was not addressed. In Tanzania, by contrast, the establishment of Village Land Councils under the Land Act was preceded by broad nationwide consultation via a presidential commission of inquiry.

ACCOUNTABILITY

5.8 Closely related to the question of legitimacy is accountability, which raises the following key concerns:

- do the various systems have standards of fairness that they adhere to?
- To whom are they answerable for such adherence?

- Do the people who are served by these systems know of those standards and the expected procedures, so that they are in a position to demand that the forums operate properly and fairly?
- Are there any established channels for verifying that these forums are operating in a fair and just manner? Are there records that can be examined?

5.9 Obviously the less formal and visible a forum is, the more difficult it will be to assess the level of accountability to the people it serves. It is easier to speak of establishing accountability procedures for the state-sponsored and NGO assisted arrangements than it is for community-based arrangements. But even within the category of community-based arrangements, it is easier to speak of accountability in relation to traders and artisans' self-help adjudication forums than it is for intra-family mediation, which has a much lower profile.

5.10 Discussion about accountability mechanisms for community-based justice systems has not gone beyond a concern with the excesses of vigilante-style groups: their sham 'trials' and cruel punishments. In a context of high crime and inadequate and ineffective policing, the problem is not solved by simply outlawing the groups, considering that people in those neighbourhoods acknowledge the important role they play. For this reason, Tanzania took action by, first, formally regulating their arrest powers under the Peoples' Militia (Power of Arrest) Act, 1975. Second, requiring them to work together with the state's security officials. In some areas of Tanzania (e.g. Serengeti) arrangements have emerged that enable mutual accountability between the state's security agencies and *sungusungu* groups (Bisimba 2002). If the groups identify an incident as a crime they are to hand over the suspects to the Ward tribunal, and if it is a very serious crime, to the police for prosecution in the formal courts. The groups, through representatives, are allowed to monitor the police and courts' handling of the case to ensure that it is not compromised by bribery and ineptness.

5.11 With respect to family-based systems it is difficult to put in place mechanisms for routine accountability due to the decreased visibility of the decision-making structure.

Some systems do have a defined structure, with a leadership that is elected albeit not on a regular basis. Examples include the Njuri Ncheke council of elders among the Meru in Eastern Kenya, and the clan councils in the Kamba-speaking areas of Eastern Kenya. (Nyamu 2002; Away & Oloo 2001). Where there is such a structure there is an entry point for developing channels for answerability for decisions taken. However, cases get to the clan councils or Njuri Ncheke after having passed through less visible family mediation forums. The accountability measures may not necessarily filter down to these family-based forums. At that level, what would work is an approach that assures the users of the system that should they raise a complaint about unjust treatment, the decision makers will be held answerable and required to justify their decision. If they are found to have acted unfairly, judging by the community's own standards as well as by rights standards recognized under the law, then they will be held accountable.

5.12 With respect to the state-sponsored arrangements described, there are some measures for accountability upward (to the responsible state bodies) but only a few have any measures for accountability downward (to the people whom the arrangement is intended to serve).

5.13 For Uganda's LCC courts, accountability downward is arguably through the election of the councillors, but this is only periodic and does not address on-going accountability for their exercise of quasi-judicial functions. Some LCC courts are perceived by the public as corrupt and subject to abuse by powerful officials (African Rights 2000: 45-6). Some councillors are seen to be accountable only to their informal networks such as 'drinking companions' (Khadiagala 2001).

5.14 In Kenya's LDTs and Land Adjudication Committees the appointees are answerable to the minister or District Commissioner who appointed them. The process of appointment itself is not spelled out so there is no transparency and no basis for opening up an appointment for questioning or calling for review of an elder's performance.

5.15 Where a state agency or official has taken on quasi-judicial powers by default there are serious implications for accountability. In the absence of any legal basis for such authority and without official acknowledgement that the agency or official in question is exercising such powers there is no avenue for accountability. This is the case with the Ward Secretary in Tanzania taking on cases due to the virtual collapse of the Ward tribunals. The Ward Secretary presides over the disputing process without any tribunal members, thus placing his activities outside of the Act and opening doors to corruption and arbitrariness (Kilekamajenga, 2001:39). Similar concerns arise in Kenya over the role of the provincial administration in dispute resolution. There is no specific statutory authority, except for a broad mandate under the Chiefs' Authority Act to maintain law and order. The quasi-judicial powers they exercise are not officially recognized, so there are no guidelines and the practice is very uneven from one location to the next. For instance, while some are meticulous about keeping records of all incidents that are brought to them and what action they took, others do not keep detailed records that would enable review of their conduct.

5.16 With respect to NGO-supported initiatives a question that arises is: are the decision-makers accountable to the NGO from whom the resources come, or to the communities they serve?

LINKAGES WITH FORMAL JUDICIAL SYSTEM

5.17 There is need to establish clear institutional linkages with the judiciary. This would allow routine review to prevent gross abuses of natural justice, in much the same way that high courts routinely review lower court decisions. Some members of the judiciary view informal forums, such as provincial administrators, as corrupt and needing to be reigned in. For example, a magistrate in Taita Taveta viewed them as setting up 'illegal' courts that imposed fines without any accountability (ICJ 2002:8). Relations with formal courts are not always smooth and in some instances are openly hostile, in some cases causing litigants extra expense when decisions of informal processes or administrative processes such as the Land Disputes Tribunals are questioned in court. (African Rights, 1996:113-115; Kenya Law Reform Commission, n.d.).

5.18 Some of the common points of tension that arise due to failure to define the relationship with the formal judicial institutions are:

- Over-stepping their jurisdiction. In some cases, intervening in cases that were already before magistrates' courts;
- Lack of clear understanding of their functions due to lack of training;
- Poor record keeping, which makes it difficult for courts to consult the decisions arrived at;
- Poor monitoring or supervision, largely because it is often not clear whether responsibility for monitoring lies with the relevant executive agency or statutory body under which they are established or with the courts.

5.19 In Uganda, some of these concerns are being addressed by incorporating the reform of the LCC courts in the overall strategic plan for judicial reform. Since LCC courts are presided over by LCC councillors who also play local government roles, there is extensive discussion on whether they should be under the supervision of the Ministry of Local Government or the judiciary. Calls to have them placed under the judiciary have come largely from the legal profession who view the combining of administrative and judicial functions as out of step with democratic practice. The compromise appears to be that both the judiciary and the Ministry of Local Government will exercise joint supervision. Joint workshops and joint drafting of a bill between the judiciary and the local government ministry suggests seriousness and commitment, although, as noted above, community-based systems are not taken into account at all.

5.20 Nonetheless, Uganda appears to be a step ahead of Kenya where quasi-judicial tribunals such as LDTs are not featured at all in the Expanded Legal Sector Reform Strategy Paper (ELSRSP). There is vague reference to the need for inter-agency networking. In discussing 'procedural reforms to strengthen linkages between formal and informal justice' Kenya's ELSRSP lists measures such as research into the potential for such linkage, cross-referral between them and getting Magistrates to emphasise compensation and restorative justice. (ELSRSP 88;107) More focus is directed at what

goes on inside the Magistrate's court, not what goes on in the informal forums themselves and how their links with the Magistrate's court can be strengthened. Nothing is said about how such strengthening will enhance the capacity of the informal decision-makers and or whether it will make it easier for people to use both forums, since simultaneous use of both formal and informal systems is a reality for a significant number of people.

5.21 NGOs such as the Coalition on Violence Against Women (COVAW) have made relevant proposals. These include a proposal that chiefs be trained on referral systems linked to the relevant social services offices (such as Child Welfare Department) and formal law enforcement. This is a more concrete proposal than the vague one in the justice sector reform strategy paper which simply 'encourages' paralegals to 'work with local chiefs to mediate between disputing parties using a human rights framework' (ELSRSP 85).

INCLUSIVENESS

5.22 The composition of non-formal justice forums, whether state-sponsored or community-based is often lacking balance. It tends to exclude women, youth and poorer people. Gender-based exclusion has been of particular concern. Uganda and Tanzania have enacted laws requiring a certain level of representation of women in non-formal tribunals established by the state. In Uganda, each LCC must have at least three women (since 1998). In Tanzania, the Village Land Councils are made up of seven members, three of whom must be women. The composition of Village Councils under the Local Government (District Authorities) Act 1982, which are elected by village assemblies, must be one-quarter female. Kenya, by contrast, has made no attempt at all to deal with women's exclusion. There is nothing in the Land Adjudication Act or the Land Dispute Tribunals Act that says that only men can be appointed to serve as elders, but this is the established practice.

5.23 There is intense debate but little agreement on whether affirmative measures such as the quotas adopted by Uganda and Tanzania make a difference at all in local settings

where social pressure and awareness of social status may constrain women's freedom to act independently anyway. Analysts are also sceptical about the degree of influence that such small numbers can have. For instance, with respect to the LCCs, pointing out that the largely male dominated electoral colleges tend to elect socially conservative women anyway (Khadiagala 2001:64).

5.24 In some places where activists and NGOs have supported community-based justice systems initiatives, they have tried to innovate by broadening participation to include women and youth. Examples of the Wajir and Laikipia peace initiatives have already been noted. However, these activist or NGO-assisted innovations raise questions. The available examples of positive innovation have been made possible by crises (such as armed conflict), which make it easier for people to accept new and radical measures to respond to the crises. What happens after the crisis subsides and these institutions begin to deal with day-to-day disputes that have little to do with the initial crisis? Will the women's role continue to be accepted in intervention in ordinary day-to-day informal justice delivery? Will the communities still view them as having authority? For instance, the conflict in Laikipia has cooled off and the peace elders are taking on land and family disputes that are not necessarily related to the armed conflict (ICJ 2002). Do the communities still view them as having authority? The answer is not known as there has not been any such inquiry.

CONFLICTS WITH HUMAN RIGHTS PRINCIPLES

Two main issues around which conflicts have arisen between the operation of non-formal justice systems and human rights principles are:

- Gender discrimination
- Cruel punishment and unfair trial procedures

Gender discrimination

5.25 Opinion on how to deal with gender bias in non-formal justice systems varies. There are some who view gender bias as an incorrigible trait and call for disengagement

with informal justice systems (Khadiagala 2001), and those who take the pragmatic view that the option of reform must be kept open because these systems will not go away (Byamukama 2001; Nyamu 2002).

The gender bias is perceived as being particularly pronounced in matters dealing with inheritance and other marital property issues (COVAW 2002; Byamukama 2001; Khadiagala 2001). This is significant as a majority of the cases dealt with in non-formal justice systems deal with family matters, notably violence, neglect and property. These have direct implications for women's physical and economic security. Measures aimed at addressing gender bias in these forums would make significant progress by focusing on making the adjudication of family disputes fair. The Coalition on Violence Against Women (COVAW)⁴ proposes that this could be done by training chiefs and assistant chiefs to:

- view their role as advisory and not necessarily always leading to the conclusive resolution of disputes;
- understand and use referral systems linked to the relevant social services and formal legal institutions;
- understand that the process is voluntary and therefore that people should not be compelled to use them when they have no faith in the solutions they offer or when they do not provide them with tangible means of obtaining redress due to lack of enforcement of agreements reached.

5.26 This is one area that would be greatly improved by routine and regular review by courts since women in vulnerable circumstances may not initiate appeals. Even such routine review will only benefit some, not all women in vulnerable circumstances. Some cases needing such review may not even appear on the radar of higher profile non-formal

⁴ An initiative bringing together several NGOs under the co-ordination of FIDA-Kenya. COVAW conducted a study in Nairobi province examining the responses of various institutions to the needs of women and children affected by violence. They found that chiefs and assistant chiefs handle more reports of domestic violence than do the police. In addition, they handle cases of spousal neglect, adultery, child custody, and separation, all of which have far-reaching implications for gender relations (COVAW 2002).

systems such as LCC courts or chiefs' offices. They are likely to remain in the low profile processes of family mediation. This problem is a difficult one to address, beyond reiterating the suggestion made under 'accountability' for a general principle that should a person raise a complaint, the decision-makers whose conduct is in question will answer for any violation of such a person's rights as if they were a public body.

5.27 This suggestion that customary practices should be held accountable to a human rights standard is not new. Uganda's 1995 constitution prohibits 'laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status' (article 33(6)). In Tanzania courts have ruled that certain aspects of customary law are discriminatory and inconsistent with the 1988 constitution (Peter 1997). Kenya's constitution does the opposite: section 82(4) of the constitution exempts personal laws (religious and customary) relating to family from scrutiny under the anti-discrimination clause. This means that if any person complains against a customary practice on the basis that it caused their rights to be violated, the court would not be able to enforce the bill of rights to deal with that situation.⁵ However, this may well change when the new constitution comes into force, but it is also likely that the spirit of section 82(4) will be left intact due to political sensitivity around the protection of Muslim personal law. The clause protects both customary and religious family law systems.

Cruel punishment and unfair trial procedures

5.28 Human rights concerns have arisen with respect to the conduct of vigilante-style neighbourhood security groups. They are accused of assuming the powers of police, prosecutor and judge and disregarding the presumption of innocence. The common practice is that once a suspect is identified and apprehended, he/she is asked to prove his/her innocence, often after having been subjected to torture. The Tanzania High Court has ruled their activities illegal on several occasions, hence the reforms in some areas to

⁵ The person may win on grounds that the custom contradicts a written law or is repugnant to justice and morality (as per the criteria laid down for the application of customary law under the Judicature Act), but it is not a matter for the constitution as long as it falls within the sphere of family.

bring them under the supervision of the official security forces and to confine their activities to apprehension of suspects, surrender of suspects to the police and monitoring of the prosecution and trial process to satisfy the community that the process will not be compromised (Bisimba 2002).

5.29 Human rights concerns have also arisen over the punitive measures adopted by state agencies claiming to apply customary law. In Kenya's Transmara district, for instance, the provincial administration, in conjunction with the Anti Stock Theft Unit were accused of using very drastic measures to deal with the problem of cattle-rustling. Once a cattle-rustling incident was roughly identified as originating from a particular community, the administrators would give the community notice to either produce the rustlers or the livestock. If nothing was done, the community's livestock would be confiscated to compensate the people robbed of their livestock, effectively imposing communal punishment for the crimes of unidentified individuals, purporting that this was consistent with traditional practice (ICJ 2002:20).

ATTITUDE OF THE BAR AND JUDICIARY TOWARD COMMUNITY-BASED JUSTICE SYSTEMS

5.30 At the higher levels of the judiciary and the bar attitudes toward non-formal justice are largely hostile and at best indifferent. The term 'mirror critiques' comes to mind in describing the overall tone of lawyers' criticisms. Many criticisms of non-formal justice systems by legal professionals fault these justice systems for not being like the courts. For instance, pointing out lack of evidentiary rules, lack of reference to relevant laws, lack of understanding of the principle of separation between judicial and executive power (Lawyer's Comments on LDTs to Kenya Law Reform Commission, n.d.). Some commentators have characterized this as a 'traditional lawyer's response' steeped in refusal to accept that lay people can exercise judicial power (Barya & Oloka-Onyango, 1994:15).

5.31 The attitudes of rural magistrates and groups engaged in community outreach activities, such as paralegal training are more positive. Lower courts inevitably have more contact with the reality of the active role played by community-based systems. It would

be more meaningful to focus any efforts (such as deliberation on enabling more synergy between the courts and community-based justice systems) at the lower levels of the judiciary. This focus would bring to the fore practical problems such as poor record keeping, which has been the subject of bitter complaint by magistrates when they hear appeals from forums such as the LCC courts (Barya & Oloka-Onyango 1994: 52).

6. SUGGESTIONS FOR FURTHER RESEARCH OR EVALUATION

6.1 An exploration of ‘user perceptions’ of justice at the local level would be very central in deciding on appropriate reforms aimed at strengthening the positive aspects of these justice institutions and alleviating the negative aspects. There are few studies that convey a sense of what communities in both rural and urban areas think of the justice systems that they encounter at the local level, state or non-state. A quick survey will not do. This should be undertaken through a participatory research process that permits sustained engagement with the relevant community. It will be useful for such a study to disaggregate the information by factors such as age, gender and socio-economic status so that the needs of vulnerable groups can be taken into account in any reforms.

6.2 Are elected bodies more accountable and legitimate than non-elected ones? What informs the public’s perception of legitimacy? What measures work for strengthening and monitoring downward accountability? How is accountability to be assured for systems that are not so visible? For example, is it realistic or desirable to enact a general principle that should a complaint ever be raised they will answer for any violations of human rights as though they were a public body?

6.3 What are the common mistakes that governments make and how can they avoided so that the resulting structures are more likely to be viewed as legitimate and fair? As the PRI report shows, in evaluating critiques of non-formal justice, it is important to distinguish between the effects of poor administration when aspects of local justice are co-opted into the official system, and deficiencies in the actual character or content of local justice. (PRI, 2000:4).

6.4 An evaluation of measures aimed at increasing inclusiveness: What effect has the use of quotas (in Uganda and Tanzania) had? What would work to improve the representation of women and other marginalized groups in less formal community-based systems? Where inclusion is enabled by NGO-assisted innovation or by response to a crisis have the gains been sustained? Do such experiences provide a starting point for justifying an inclusive approach?

6.5 State reliance on community justice to deal with land, particularly rural land, emerges as a common feature throughout the region. Uganda and Tanzania's statutes explicitly call for the incorporation of local ideas and institutions of justice. There is little documentation on how these land tribunals are operating in practice. Their decisions need to be evaluated in terms of their effectiveness or otherwise in enhancing security of property for poor people, and also in terms of their interface with the formal institutions both in the land sector and in the judiciary generally.

ANNEX 1: INFORMATION ON SPECIFIC SYSTEMS BY COUNTRY

Box 1

Kenya: *Land adjudication committees and arbitration boards*

Established under Land Adjudication Act.

Function: to resolve land disputes in areas undergoing titling.

Composition: at least ten elders (committee); at least five (appeals board).

Appointed by: Land Adjudication Officer in consultation with the District Commissioner.

Justification: 1) timely adjudication of disputes that would otherwise cause delays in the land titling exercise if they had to rely on a backlogged court system.

2) disputes are dealt with in an open forum by people conversant with the local area.

Box 2

Kenya: *Land Disputes Tribunals*

Established under Land Disputes Tribunals Act 1990.

[Replaces *ad hoc* panels of elders established by a 1981 amendment to the Magistrate's Jurisdiction Amendment Act. Previous system was criticised for not defining the panels' jurisdiction clearly and for being silent on procedure for bringing and hearing claims, necessitating a hailstorm of clumsy administrative seculars dealing with various aspects- a populist measure that was passed in haste].

Composition: three or five elders chosen by the District Commissioner from a list of elders compiled by the ministry of Lands.

Appointed by: Minister for Lands. In practice the list is drawn up based on recommendations forwarded through the provincial administrators.

Function: to hear land disputes dealing with agricultural land less than Kshs.500,000 in value.

Appeal: to Land Disputes Appeals Committee at provincial level. Further appeal to High Court but only on ‘matters of law’.

Justification: to maximize on elders’ intimate knowledge of the communities, as magistrates were thought to be too remote from the issues; to protect small-scale farmers from ‘exploitation’ by lawyers and long delays and expense in the formal courts.

Box 3

Tanzania: *Village Land Councils*

Established under the Village Land Act 1999.

Composition: seven members, of whom three are women, nominated by the Village Council [set up under the Local Government (District Authorities) Act 1982, amended 1999] and approved by the village assembly [consisting of all adult members of a village].

Function: to mediate in any matter concerning village land if parties choose to refer it to the council. Their jurisdiction is voluntary.

Appeal: to District Land Courts presided over by a judge and two advisers drawn from a panel of regional customary law advisers.

Justification: to give a measure of local autonomy in land matters but also balance that with broadening of options for people.

Box 4

Uganda: Local Council Committee Courts

Established as Resistance Committees in NRA-controlled areas (Luwero) during the guerrilla war between 1981 and 1985. Judicial powers later officially recognized by the Resistance Councils (Judicial Powers) Statute, 1988. Following 1997 Local Government Act, they were renamed ‘Local Councils’ and given administrative and legislative powers.

Composition: they are within the three-tier local government system, starting from the village level (LC I) to parish (LC II) and sub-county (LC III) levels. Between five and

nine members drawn from among the council members, with the possibility of co-opting other community members, adjudicate in any one dispute.

Function: to carry out local government administrative and legislative functions and also to play a judicial role by deciding cases in a flexible manner without being constrained by procedural technicalities.

Appeal: from LCIII to Magistrates' courts.

Justification: justice should be seen to work through democratic and representative processes at the grassroots level, which are faster, affordable and in tune with local understandings of justice.

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