

## REASSESSING CUSTOMARY LAW SYSTEMS AS A VEHICLE FOR PROVIDING EQUITABLE ACCESS TO JUSTICE FOR THE POOR

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**Abstract:** This paper describes the main advantages and disadvantages of customary law systems, and concludes that they meet a fundamental need in society. It notes, however, that insufficient empirical research has gone into understanding customary law systems. It recommends that user surveys be carried out to better understand user perceptions of customary tribunals and user preferences among the various dispute resolution services available to them and reasons for such preferences. It further notes that customary laws naturally evolve with changing circumstances, and recommends that empirical and participatory assessments of the contemporary status and content of customary laws be carried out. These would demystify customary laws, and ensure that the voices of all stakeholders are heard as these laws naturally evolve. Empirical assessments would also validate the day-to-day social practice of customary law, over the ideology of customary law which tends to be articulated for political or other gain, or by ideological extremists. Finally, it recommends that the limits of customary (or written) law reform be more openly discussed and that multidisciplinary expertise be more effectively engaged to deal with behaviors and practices that are symptomatic of psycho-social dysfunction.

**Keywords:** *access to justice, common law, customary law, Uganda, Sierra Leone*

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## **Executive Summary**

This paper explores the use of customary law systems as part of the delivery of justice services to poor and vulnerable people in common law African countries, with a special focus on Uganda and Sierra Leone as case studies. We discuss the main advantages and disadvantages of customary law systems, in the context of the numerous other dispute resolution mechanisms available to poor and vulnerable people. We make some basic recommendations for improving the delivery of justice services to the poor, and the place of customary law in this process. The paper notes that Customary Law systems have many valuable features. They are flexible; they evolve as communities evolve and provide communities with a sense of ownership, in contrast to formal legal systems that are perceived as alien to a considerable number of people in Africa. Customary law tribunals are inexpensive, accessible, and speedy. Their proceedings are easily understood by users of the system. They are useful when the formal state institutions are unable to reach the people, or where such institutions have broken down or are affected by civil strife and conflict.

However, the rulings of Customary Law institutions can be inconsistent, unpredictable and discriminatory. As decisions are often not recorded, and appeals from decisions may be difficult, there is insufficient monitoring and supervision of their operations. Indeed, customary laws are vulnerable to capture by powerful groups within communities. We recommend measures to correct these flaws and also to ensure that laws are used to empower and protect people rather than to entrench or abuse state power. At the same time, it is important to note that insufficient research has gone into understanding both the dynamics and the operation of customary law tribunals and into assessing the content and status of most customary laws to ensure that they in fact reflect the values and mores of the communities subjected to it. We recommend comprehensive research into the universe of dispute resolution services available to poor and vulnerable people, including surveys to gauge user perceptions and preferences within this universe. Customary law, by its very nature is constantly evolving. We recommend that a participatory assessment of the contemporary status and content of customary laws be carried out in order to open up knowledge of customary laws and ensure that the voices of all stakeholders are actually heard as these laws naturally evolve. Finally, we point out that there has been a tendency to ignore the psycho-social drivers of practices that are discussed in the context of

customary laws. In particular cross-gender interactions and social relations have been distorted by social stresses including war and poverty. We recommend that the limits of law reform be more clearly and openly discussed and that multidisciplinary expertise be engaged to deal with behaviours and practices that are symptomatic of psycho-social dysfunction.

## 1. Introduction

A key development problem in Africa is the issue of access to justice for poor and marginalized people. This paper explores the use of customary law tribunals as part of the delivery of justice services to this population in common law African countries. It also looks at the impact of customary laws, rules and practices on social and economic welfare and development. The Paper explores these issues within the context of two African countries, Uganda and Sierra Leone, which share a common history of colonialism by the British with eleven other African countries<sup>1</sup>. The two also share the experience of civil strife and conflict with its attendant impact on both the formal and informal structures of governance, and dispute resolution, and on psycho-social wellbeing.

## 2. Revisiting the Origins of “customary law”

During the colonial era, the British applied a dual system of law: in areas under “direct rule” English law applied while in areas under “indirect rule” customary or traditional laws were allowed to continue to apply to native populations under the supervision of the British. English law applied in all areas to people of English descent and to Africans who “opted out” of customary law. In addition, serious offenses against the state, or criminal offenses, were generally dealt with under English law. Common Law systems recognize unwritten rules and norms as part of the law (as opposed to civil law systems that generally require law to be written) and today customary law is increasingly treated as part of the common law. The constitution of Sierra Leone, for example, explicitly states that customary laws are part of the common law of the country.

Customary laws today are derived from the mores, values and traditions of indigenous ethnic groups. However, they are heavily influenced by other sources, such as Islamic and

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<sup>1</sup> Botswana, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, The Gambia, Uganda, Zambia and Zimbabwe, were all colonized by the British and today have systems that combine customary/traditional African law, and received English or written Law. Cameroon was partly British, partly French. In Lesotho, Namibia and South Africa, English law is mixed with Dutch law to reflect their particular colonial history. Sudan and Somalia use Sharia, Muslim law. Liberia is a common law country due to its historical association with the United States of America. Ethiopia, although Anglophone, prides itself as being the only African country to never have been colonized. The other African countries were colonized by the French or the Portuguese.

Christian values, central government administrative policy, pronouncements of superior courts of record (who have jurisdiction to interpret customary law), customary court records where these are kept, and district council and chiefdom byelaws. The non-formal justice sector also has substantial influence on the evolution of customary law. Conflict resolution techniques and advocacy activities of community based organizations, social workers, and even marriage and other community counselors all impact on the evolution, interpretation and application of customary laws. In this paper we will focus on customary laws as defined in this paragraph, keeping in mind that they operate in and are impacted by these other sources.

### **3. Customary Tribunals**

#### **(a) Legal basis**

In several of their colonies (e.g. Nigeria, Botswana, Zimbabwe, Malawi, South Africa and Sierra Leone), the British created a dual tribunal system, with "customary courts" being given first instance jurisdiction in matters of customary law. Appeal from these customary courts was to the formal judiciary. In other countries, like Kenya and Tanzania no separate customary tribunal systems were created and the formal judiciary adjudicated on matters of customary law. In these countries, informal customary law tribunals continued to operate at the level of the village and the community, in several forms, including councils of elders, clan or family tribunals and village associations.

In Uganda, the British recognized the traditional Kingdoms and allowed them to exercise judicial power in their courts. However, these kingdoms and their judicial tribunals were abolished in 1966 by the post-independence Government. Customary tribunals were re-introduced in 1986 when the National Resistance Movement (NRM), engaged in armed struggle against the government, and set up the Resistance Committee Councils and Courts at the village level. These courts were later renamed Local Council Courts (LCCs). LCCs were set up to provide "grassroots" justice as part of the struggle against a government that was seen as oppressive. They were an attempt to de-formalize or 'popularize' the administration of justice and were hailed as both an attempt to bring justice closer to the people and to re-connect people to their customary traditions.

Today in matters of customary law, people can choose to take their civil matters to the customary tribunal or to the formal court system, as both LCCs and the magistrates courts have unlimited first instance jurisdiction in matters of customary law<sup>2</sup>.

The LC courts have jurisdiction<sup>3</sup> to try among other things, land matters relating to customary tenure, disputes involving children and other family matters. Their jurisdiction is limited only to civil cases. LCCs may<sup>4</sup> make orders of “reconciliation, declarations, compensation, apology; and caution,” and attachment and sale as well as fines for infringement of by-laws. In matters relating to children the courts make orders for guidance, and remand in custody. The Courts have special jurisdiction in criminal matters over children for the offences of affray, common assault, causing actual bodily harm, theft, trespass and malicious damage to property.<sup>5</sup>

Although their jurisdiction in civil matters is not restricted by the monetary value of the subject matter in dispute,<sup>6</sup> where an LCC awards compensation exceeding five thousand shillings, it is required to refer the case to the Magistrates Courts for the purposes of execution of the order, and the Chief Magistrate may, if he or she finds the judgment award grossly excessive, reduce the amount of the award taking into account awards in similar cases.<sup>7</sup> In effect, formal and customary systems are often so intertwined that it is often difficult—nearly impossible—to meaningfully distinguish between the two. In practice, poor people are more likely use customary tribunals, as they are unable to afford to take their matters to the formal judiciary. Lawyers are not allowed to appear in LCCs and this also reduces the cost of these tribunals, while being an incentive for those who can afford a lawyer to take their matters to the formal judiciary. LCCs also have jurisdiction over a limited number of minor criminal cases.

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<sup>2</sup>See Section 5(2)(b) of The Executive Committees (Judicial Powers) Act and Section 207 of The Magistrates Court Act, cap 16.

<sup>3</sup> Under Schedule 1 of the Executive Committees (Judicial Powers) Act, Chapter 8 LOU

<sup>4</sup> Under Section 5(5), Executive Committees (Judicial Powers) Act

<sup>5</sup> Section 6, Executive Committees (Judicial Powers) Act

<sup>6</sup> Section 5(2)(b), Executive Committees (Judicial Powers) Act

<sup>7</sup> Section 5(3), Executive Committees (Judicial Powers) Act

LCCs start at village level where the elected village Executive Committee (LC I) constitutes itself into a court to hear disputes that arise between individuals in the community.<sup>8</sup> Following that is the LC II court at parish level, and then the LC III court at the sub-county. There are altogether 953 LC III Courts, 5,225 LC II Courts and 44,402 LC Courts in Uganda. The courts are therefore mostly physically accessible, even in the rural areas and the areas which are still inaccessible by the other JLOS institutions because of conflict and insecurity. One of the most important distinguishing factors of LCCs is that from their origin, they were mandated to have women serve on the tribunals. Some type of gender balance is still required for LCCs, with the law now stipulating a 30% representation of women for LCC1s (the lowest level of LCC).

LCCs are constituted when 5 of the 8 members of the committee are present to hear a dispute. Where the quorum is not constituted the committee may co-opt one of the members of the local government committee of the same area to sit as a member of the court.<sup>9</sup> The courts therefore sit regularly and are not bogged down by the failure to constitute quorum as is the case with the Land Tribunals.

The procedures in LC courts are simplified<sup>10</sup> and hearing is informal, conducted in the indigenous languages of the people<sup>11</sup>, as opposed to the formal courts where proceedings must be conducted in English and the records kept in the same language. Suits in LC courts may be instituted verbally by stating the nature of the claim to the Chairperson of the council who then reduces it into writing. This is the start of the record of the proceedings of the court. Brief particulars of the parties and their addresses are also recorded on file.

In Sierra Leone, the customary tribunals that existed during the colonial times were formalized in 1963 by the Local Courts Act. In the provinces<sup>12</sup> where 70% of Sierra Leoneans

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<sup>8</sup> Section 2 Executive Committees (Judicial Powers) Act

<sup>9</sup> Section 4(4) Executive Committees (Judicial Powers) Act. The description of LCCs in this and the following paragraph is taken from Kakooza, I "Uganda Justice Sector Assessment", unpublished.

<sup>10</sup> Section 10, Executive Committees (Judicial Powers) Act

<sup>11</sup> According to Section 1 of the Executive Committees (Judicial Powers) Statute, "language of the court" means the language that the court may determine to be its language."

<sup>12</sup> The area of Sierra Leone outside of Freetown and its surrounding area is divided up into 3 provinces and is usually referred to as "the provinces". This is the area that historically had the least western presence and where customary law predominates.

live, Local Courts are the sole judicial presence. Local courts have jurisdiction over all cases of a customary nature and over some minor criminal matters. The court's civil jurisdiction includes such matters governed by customary law as marriage, land and debts. Its criminal jurisdiction covers cases 'where the maximum punishment which may be imposed does not exceed a fine of two hundred leones or imprisonment for a period of one year.' All those resident in a local area are subject to its criminal jurisdiction.

They are presided over by chairpersons appointed for three years by the Minister of Local Government, who also has the power to remove them. Local court chairpersons are immune from criminal prosecution or civil suit for anything done in their official capacity. No formal qualification is needed for the position of local court chairperson, and hardly any local chairperson has any formal qualifications or previous experience for the positions they hold. Other local court officials are a panel of elders, court clerk and chieftom police.

The court chairperson and elders interrogate the disputants and suspects; and the chairperson in consultation with the elders, passes judgment. The court clerk records court proceedings and judgments, and issues summons, warrants and court notices. The main role of the court police is arrest, or seizure of property in default of obedience and imprisonment. There is no provision for lawyers' presence. The local courts are courts of record and their proceedings are conducted in public, although written records are rarely kept.

**(b) Strengths of Customary Tribunals**

*i. Cost*

Customary tribunals are cheap. Lawyers are not permitted to practice in customary tribunals and this eliminates another major expense.

*ii. Geographic proximity*

Litigants do not have to travel a great distance to access them. Most of the structures of the formal judiciary tend to be in major urban centers and the judiciary is not well represented at the village level.

**iii. *Simplicity and familiarity***

The language used in customary tribunals tends to be the language of the parties involved. This contrasts with the formal judiciary where the language of proceedings tends to be technical English which cannot be understood by the majority of the people of Africa. Procedures used in customary tribunals tend to be simple and clear, unlike the formal judiciary where procedures tend to be complex and archaic.

**iv. *Speed***

In general customary tribunals do not have the backlogs that formal courts do and matters are dealt with expeditiously.

**v. *Relevance***

The law applied in customary tribunals can, counter-intuitively be more “modern” and “relevant” than the written law. This happens when the legal framework and laws in the formal legal and judicial sector become obsolete and out of tune with modern jurisprudential and socio-economic developments and governments are too strained for resources to undertake the vast work involved in legal reform. For example, English laws dating as far back as 1677 are still applicable in Sierra Leone, despite the fact that even in England many such laws have either been updated or struck off the statute books.<sup>13</sup> The customary tribunals will thus be guided much more by existing realities, than by archaic legislative fiat.

**vi. *Sense of ownership***

In Uganda LCC structures altered not simply the shape but the character and content of local governance. Thus, by virtue of the stipulations in terms of participation regarding women, people with disabilities, youth and other disadvantaged groups, the monopoly of the process of local adjudication was removed from the traditional dominant actors, namely (elderly) men, with a particular social or historical status in society. Josephine Ahikire, for example argues that the immediate effect of these measures in Uganda was to introduce 10,000 women into a local

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<sup>13</sup> These laws include the Statute of Frauds 1677; Wills Act 1837; Common Law Procedure Act 1852; the Conveyancing Act 1881; the Settled Land Act 1882; the Perjury Act 1911; the Forgery Act 1913; the Larceny Act 1916; Married Women’s Maintenance Act Cap. 100 enacted in 1888; and the Matrimonial Causes Act Cap. 102 of 1950.

government system previously the exclusive preserve of men.<sup>14</sup> A World Bank/Ministry of Gender, Labor and Social Development (MGLSD) study conducted around the same time found that the decentralized legal and political environment in Uganda had increased women's access to legal and judicial services, since 84 percent of the women interviewed who filed legal claims had achieved justice.<sup>15</sup> This situation is different in Sierra Leone where the monopoly of male elders still endures in many Local Courts.

**vii. Resilience**

In both Uganda and Sierra Leone, when civil war decimated the formal legal system, customary law structures stepped in and provided much needed conflict resolution services. Being organized at the grass roots and informal level, they are much less vulnerable to national disaster. As they are closer to the people, confidence in customary law structures may persist even in times of crisis or a breakdown of confidence in the formal structures.

**viii. Restorative Justice**

In general, customary tribunals tend to encourage mediation and to reach decisions that are restorative. Fines or compensation tend to go to the aggrieved party, even in criminal cases. Fines imposed by formal courts go to the State rather than the individual. This type of restorative justice is very appropriate to the needs of poor people and tends to rebuild community relations, as opposed to the formal judiciary which is largely adversarial.

**ix. Flexibility**

One of the biggest strengths of customary law is that like common law, it is flexible and changes with time and circumstances. It is not rigid like the written law where certain rules have to be applied because that "is the law". Common law tribunals use common sense and their idea of justice and equity to reach reasonable solutions, given all the circumstance of a case.

**(c) Weaknesses of Customary Tribunals**

The informality of customary tribunals presents some disadvantages.

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<sup>14</sup> See Ahikire, 2001.

<sup>15</sup> Quoted in CTA, 2002 at 42-43.

***i. Ill-defined legal status***

A large obstacle to the operation of customary courts is related to their ill defined (and sometimes precarious) legal status. For example in Sierra Leone the Local Court Act of 1963 bars chiefs from adjudicating cases, though the practice is widespread. The effect is that dispute settlement that is widely accepted and resorted to by many people in the provinces falls outside the law. This affords easy manipulation by elites who use the acceptability of the courts, when it suits them; or citing its non legality, squash its decisions when it does not suit them. This also poses difficulties for chiefs who are always reminded of the illegality of their adjudication, even where fair and just, by disputants they have ruled against. Similar problems also plague adjudication by tribal headmen in Freetown and its surroundings. Furthermore, the Local Court Act gives a dominant role to the Ministers of Justice and Local Government and chiefs in the appointment and dismissal of Local Court officials. Thus the tenure of these officers depends on the whims of the executive branch, which on a number of occasions used these courts to harass political opponents at the local level.

In Uganda, the LCCs are part of the executive branch and officers often sit on the tribunals while simultaneously holding executive local government positions. This creates great risks of political manipulation and at the very least the lack of perception of impartiality.

A related vulnerability with customary law is that if not carefully monitored, it can be unduly influenced by the executive as it does not benefit from the same constitutional protections as the formal judiciary. In Sierra Leone, the rule of law in general was destroyed by the civil war. In rebuilding the justice sector, care needs to be taken to ensure the protection of the customary law system in ways that include independence from the other branches of government.

***ii. Lack of adequate training and supervision***

In Sierra Leone, the Local Courts Act makes provision for customary law officers to supervise and advise Local Courts in matters of law; train their personnel and exercise the right of judicial review over their decisions. However, because of the inability of the central government to offer competitive salaries, few lawyers have taken up appointment as a customary law officer in the past fifteen years.<sup>16</sup> The result is that no such officials were posted during the

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<sup>16</sup> Discussions with Timothy Sowa, State Counsel, Law Officers Department, Sierra Leone in July 2005.

late 1980s and there was only one for all three provinces in the 1990s. In practice, this leaves the Local court system unsupervised and extremely inconsistent. Excessive fines and jail terms are imposed for minor offences. This situation is pretty much identical in Uganda, where officials on the LCCs are under-resourced and lack sufficient training. Furthermore, given their vast number, supervision is lax.

*iii. Lack of records*

As decisions are not recorded, it is difficult to monitor the substance of the decisions made. They are often seen as inconsistent.

*iv. Discrimination*

A number of limitations inherent in customary justice systems stack the system against youths, women, the poor, ethnic minorities and groups who were traditionally discriminated against in the traditional setting for various reasons. This in turn poses big challenges for such core rule of law principles as equality before the law, due process, fair hearing and commensurate punitive measures.

In Uganda there was an explicit attempt to deal with this by mandating the representation of groups that were traditionally discriminated against on the LCCs. Inadequate research has been done to determine what the effect of this measure has been on the justice provided by the LCCs. However, indications are that mandating representation is necessary, but not sufficient to end discrimination and that the presence of women on the tribunals has not had the desired impact on the decision making process in terms of bias against women litigants.

The Constitution provides for at least a one-third representation of women in all local councils. Furthermore, there are no formal legal bars to women standing for any of the other seats on the LCs aside from those traditionally reserved for them. Women can stand for the chairperson's seat, and for any of the other positions in the nine-person committees. However, anecdotal evidence suggests that even the one-third quota has not actually been filled.

Even where women have taken up positions of influence in local government in general and LCCs in particular, their presence in the system appears to have limited impact on the quality of decisions made. Ahikire offers some explanation, contrasting the fact that you can have a woman Vice President or several women MPs selected on the non-affirmative action seats

because these are remote to daily lived reality, and arguing that matters are different in the sphere of local government because this is “... where power [is] exercised directly in people’s daily lives. Power at local level [is] likened to a household, where women holding power [are] seen symbolically to rule over men—as wives ruling over husbands.”<sup>17</sup> In a nutshell, the struggle is as much about reforming the substantive law as it is about dealing with the more subtle conditions of dominance, patriarchy, and the exercise of domestic power that abound in Ugandan society.

In Sierra Leone, Customary law tribunals and their procedures and processes remain discriminatory. They are gerontocratic, or tend to favour the disputant who is older<sup>18</sup>, which greatly alienates youths from its adjudicating processes. In criminal cases, the majority of accused persons are youth and most of the cases against them involve ‘woman damage’- with husbands (mostly elders) demanding compensation from alleged lovers (mostly younger males) of their wives.

The systems are also patriarchal or tend to favour male disputants. This is especially the case with marital disputes. These disputes are mostly settled in ways that would make a husband ‘not lose face,’ even where he is openly wrong, a consideration that is rarely accorded to women. It is interpreted as better for a woman rather than her husband to ‘lose face.’<sup>19</sup> Thus, whilst a woman may be reprimanded in front of her husband, the reverse is exceedingly rare.

These customary norms and attitudes impact on the procedures employed in customary tribunals as well as on the substance of the rules applied. The expectation that women be submissive not only leads to a gender imbalance on the tribunals themselves, it also leads to the voices of women who manage to get on the tribunals not being heard.

**v. *Transcommunity Issues***

As people become more mobile issues of dealing with parties from different communities when the laws relating to them are in conflict will become more prominent. In post conflict countries, and especially in the aftermath of civil war, there is an urgent need to find appropriate

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<sup>17</sup> Ahikire, 2004 at 44.

<sup>18</sup> Focus Group Discussions, Makeni, J3, 2005.

<sup>19</sup> Various discussions with women in Makeni, Kenema, Bo and Freetown, April – May 2005.

ways to deal with the aftermath of conflicts between members of different communities. Customary law often does not have the tools to effectively do this.

*vi. Supernatural considerations*

In some instances, customary laws and processes for adjudicating or resolving disputes are influenced by beliefs in supernatural forces. In some communities in Sierra Leone, for example, incest is considered a defilement that must be cleansed through processes that evoke and make use of the supernatural. Amongst the Mende, incest is a defilement and the Humoi sodality (a secret society) is responsible for dealing with the culprits. Among the Temne, it is referred as pathake and the cleansing rituals are performed by the rogbenle sodality. Finding offenders through a diviner is a legitimate customary process. The use of 'swears' or curses is also legitimate. The Mende, for instance, have ngegba, tilei and humoi and the Temne have ke-gbom. The influence of these sodalities takes many cases out of the realm of open transparent court processes and places them in non transparent sodality processes. Sodalities and supernatural resources are mostly controlled by elderly males. All local court chairpersons (presiding officers) are senior members of the prominent sodalities in their localities. This provides ample opportunities for the use of sodalities and supernatural resources against youths through excessive fines, or labour in farms of elders in default of payment. Most people believe in the existence of Sorcery, and sodalities such as Soko and Ariogbor amongst the Temne are used to detect the witches. Most times, they detect women from poor or weak lineages.

#### **4. Customary Rules and practices**

In Sierra Leone, the interpretation of Customary Laws remains deeply rooted in patriarchy and ageism. For example, Customary Law is interpreted to permit the husband to beat his wife, and to not allow a women to administer or outrightly inherit her husband's property. A woman can generally only only benefit from her husband's estate if she marries one of her husbands relatives.

In Uganda, the LCCs are caught between applying customary law (which arguably they were set up to do) and following the written law – most importantly the Constitution- which now applies to everyone, even to people subject to Customary Law. The area in which this conflict is greatest surrounds provisions regarding the status of women as several constitutional provisions

go against the grain of customary laws and norms. Despite the conceptual and rhetorical lip-service paid to the many concepts enshrined in the 1995 Constitution, the breach with practice is striking, as is the absence of a grounded understanding of the precise manner in which these concepts should be translated on the ground.<sup>20</sup>

It should be noted that prior to colonialism Customary Law was presided over and adjudicated by traditional cultural leaders, who were often knowledgeable about it and vested with the authority of their communities to translate it.<sup>21</sup> Transferring the adjudication of Customary Law to formal courts has in certain respects caused Customary Law to lose its original force although provision was made for Customary Law 'expert witnesses' to assist courts and for courts to take 'judicial notice' of a particular fact that had been established by such witnesses.<sup>22</sup> In fact, particularly in the case of Uganda, it can be said that the customary system has been reduced into a secondary source of law for the formal courts.<sup>23</sup> Indeed, according to Jennifer Okumu Wengi<sup>24</sup>, the LCC system can be regarded as an integral part of the judicial structure in Uganda, given the umbilical link between the two.

Against the backdrop of this development, the formal system in general certainly views Customary Law as subordinate, if not so much in the same fashion as their colonial predecessors did. In addition to reconstructing the interpretation of Customary Law, the formal system has also effectively made it a secondary source of law through the legal positivism of the judges, who often exclude Customary Law in favor of written law.<sup>25</sup> There are any number of explanations for this attitude, including the generational, plus the increasing remoteness of the Customary experience from daily life in urban Uganda, where the courts are based. There is also the profound influence of the 1995 Constitution, which, albeit still in only nascent form, is causing judges and magistrates to become more attuned to the demands of constitutional fidelity. Because of these attitudes, Customary Law must be put to the strictest proof by the party seeking

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<sup>20</sup> See McGee *et al* (2003), at 56.

<sup>21</sup> Morris & Read, 1966, at 237.

<sup>22</sup> Morris & Read, 1966.

<sup>23</sup> See Sections 15 (2) of the Judicature Act, Cap 13 and Section 10(2) of the Magistrates Court Act, Cap 16.

<sup>24</sup> Okumu-Wengi, 1997 at 6.

<sup>25</sup> Okumu-Wengi, 1997 at 6.

to secure its application.<sup>26</sup> A competent court must decide on the existence of a Customary Law after the party seeking to secure its application has adduced evidence of its existence.<sup>27</sup> Formal courts have used this inherent power to pronounce or reject Customary Law according to their whims.<sup>28</sup> Despite the legal provisions such as section 15 of the *Judicature Act* and section 10 of the *Magistrates Court Act* that favor the application of Customary Law, judges continue to reject Customary Law in favor of written law.<sup>29</sup>

*i. The example of the DRB*

The case study that we highlight in Uganda focuses on the Domestic Relations Bill which attempted to modify certain rules and practices which are seen as customary, including child marriage, forced sex within marriage, forced widow inheritance, and domestic violence.

Few issues in post-colonial Uganda have either taken as long to be debated or been as contentious as the discussion over the reform of the laws relating to the family.<sup>30</sup> The debate is especially important to our analysis because it represents, *par excellence*, the clash between formal written law and customary informal law. Indeed, the length of time it took for the DRB to reach Parliament is testimony to the convoluted, intricate and tension-riddled issues with which it was concerned.

The history of the DRB is retraceable to the time the first government after independence set up a Commission on Marriage, Divorce and the Status of Women in January 1964.<sup>31</sup> Although many of its findings and recommendations reinforced several of the patriarchal biases extant in Ugandan society at the time, it proposed several progressive measures for the reform of the marriage and family institutions. Its recommendations were rejected and law reform in the

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<sup>26</sup> Okumu-Wengi, 1997.

<sup>27</sup> Okumu-Wengi, 1997.

<sup>28</sup> Okumu-Wengi, 1997.

<sup>29</sup> See, for example *Administrator General v. Swaibu Nyombi and Ors* (1990) where the High Court of Uganda came to the conclusion that Customary Law was not applicable to a succession matter.

<sup>30</sup> As a sampling, see Husna Zziwa, "Fellow Muslims Totally Misunderstood DRB Concepts," *The Daily Monitor*, November 11, 2004; Miriam Nalunkuuma, "Women MPs Split over DRB," *New Vision*, April 27, 2005, and Yasin Mugerwa, "DRB A Coup Against Family Decency," *The Daily Monitor*, May 7, 2005;

<sup>31</sup> See Report of the Commission on Marriage, Divorce and the Status of Women (W.W. Kalema, ed.), 1965.

area of domestic relations made little headway until the very progressive provisions in the 1995 Constitution providing for gender equity. Armed with these provisions, human and women's rights activists began to exert pressure for the reform of the diverse statutes governing marriage, divorce and succession, that were at variance with the spirit of the Constitution, culminating in the issuance of the DRB at the end of 2003.<sup>32</sup>

Perhaps not surprising, the first line of resistance against the DRB was derived from the same Constitution. Opponents of the DRB argued that customary law was also protected by the Constitution in Article 29 (on the freedoms of conscience, expression and religion), Article 36 (on the rights of minorities) and Article 37 (on the right to culture). They argued that these protections of customary law took precedence over human rights in general and gender equity in particular. Thus, the debate over the reform of family law brought into bold relief the tension between the various provisions of the Constitution. Although this tension was seen as primarily about the applicability of Customary Law, in fact organized resistance emanated much more from the religious sector than it did from those describing themselves as 'traditionalists.'<sup>33</sup>

The Bill managed to get through the first and second 'readings' (or stages) of debate in Parliament. Before the third reading it was submitted as per procedure to the Parliament Committee on Legal and Parliamentary Affairs (comprising three women and nineteen men) for a clause-by-clause scrutiny and to receive public input. After receiving testimony and conducting its analysis of the issues, the Committee issued its report.<sup>34</sup>

The report of the Parliamentary Committee spoke volumes about the difficulties confronted by the advocates for a reform of the law. In relation to customary marriage and divorce, the Committee stated,

To outlaw marriage gifts, which might be an essential requirement for the marriage is a contradiction in terms. What would then amount to a customary marriage if the gifts as proposed by the Bill

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<sup>32</sup> See Bills Supplement to the Uganda Gazette No.60, Volume XCVI; dated December 3, 2003.

<sup>33</sup> This is not to say that the traditionalists were any less opposed to the bill. It is also important to point out that there is often an overlap between matters religious and matters cultural.

<sup>34</sup> Republic of Uganda, 2003.

cannot be demanded back; what would then amount to a divorce under the custom, which originally required the gift?<sup>35</sup>

However, it is quite clear that the point of the DRB was not to ‘outlaw’ customary marriages. Indeed, the Committee caricatured those very marriages by asserting that the only thing necessary to make them legal was the exchange of gifts. Rather, the point of the DRB was that customary marriages have evolved from the earlier court decision which held marriage gifts to be an essential requirement for a valid customary marriage.<sup>36</sup> Hence, the Bill proposed that the absence of marriage gifts—which happens in a good number of them—should not render the marriage void. This would have validated the day-to-day practice of customary law. However, the Committee chose, instead to base their reasoning on an “ideology” of what customary law should be.<sup>37</sup> The DRB also made it an offence to demand the gifts back on divorce, basing itself on the experience of thousands of women stuck in repressive customary marriages because their families could not afford to refund the gifts.<sup>38</sup>

In its assault on the DRB, the Committee also attacked the conditions attached to polygamy, the concept of cohabitation and the use of the phrase ‘widow inheritance.’ On polygamy, the DRB proposed that the permission of the first or existing wives be sought prior to a man taking another wife. On cohabitation, it was suggested that cohabitantes be given legal rights, particularly on separation, and finally, it proposed the abolition of the practice of widow inheritance. The Committee described use of the term ‘widow inheritance’ as,

... a deliberate coining to make this cultural form of remarriage derogatory. For as long as there is free consent of the widow this should be a form of recognized marriage. The reason for supporting this is that it gives protection and dignity to the children according to the customs of the clan. As long as we have patrimonial system, re-marriage within the clan provides a way of maintaining the lineage.<sup>39</sup>

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<sup>35</sup> Republic of Uganda, 2003.

<sup>36</sup> See *Uganda v. Eduku* [1975] HCB 359.

<sup>37</sup> This distinction is discussed further on page 20 below.

<sup>38</sup> Republic of Uganda, 2003

<sup>39</sup> Republic of Uganda, 2003.

Again, the Committee missed the point which was that the custom operates independent of the consent of the widow, and even where it has been secured, in many instances the context in which consent is given is highly suspect. Furthermore, neither statute law nor Customary Law prevents a widow from *voluntarily* re-marrying, while the whole idea of widow inheritance is that one is constrained to do so in apparent homage to a customary norm.

The final nail in the coffin was driven in by demonstrations against the Bill by both Moslem and Christian 'activists,' eventually forcing President Museveni to declare that continued discussion of the Bill be postponed 'for further consultation.' He added that the Bill was in any case 'not urgently needed.' It is highly unlikely that the DRB will be passed during the current session of Parliament which ends early in 2006. Indeed, it may never see the light of day, despite the protestations of numerous human rights and women's rights advocates<sup>40</sup>

*ii. The evolution of customary law*

The preceding analysis demonstrates the significant influence of Customary Law on contemporary social structures in Uganda, and the tensions brought into play through any attempts to reform that law via statute or from the "outside".

For a good number of Ugandans the local context is the primary one in which they seek to realize their rights, hence it makes sense that most emphasis is placed on seeking to decentralize both administrative and judicial power. However, to the extent that the local context may remain insensitive to the concrete situation of significant sectors of the population such as women and other marginalized groups, then there are serious issues of access to justice that arise simply from the content of the substantive (statute or customary) law sought to be applied.

When examining the impact and influence of Customary Law, it is important to consider both the internal functioning of the regime, as well as its relationship to statutory, constitutional and judge-made (case) law. Such an approach is necessary because Customary Law does not exist in a vacuum. Neither is such law static and unchanging, but has itself been influenced by

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<sup>40</sup> See William Rwebembera, William (2005) and Walsh, Janet (\_\_\_\_) for examples of strong responses to the President's statement that the DRB was not urgently needed.

the evolution of the social, economic, and even the political conditions in which it operates. Celestine Nyamu-Musembi observes that,

Local custom can be analyzed as both ideology and day-to-day social practice. What is said about custom is often a partial truth, whose completeness can only be observed or experienced in actual social interaction. Local practices are varied, as are people's opinions of what is 'customary' in specific situations. Therefore what people actually do in day-to-day interactions with each other is more revealing of 'living' cultural norms. The ideology contained in assertions of culture will often fail to capture all of social reality.<sup>41</sup>

Along the same lines, it is also important to recall that Customary Law has multiple, diverse and contradictory roots and manifestations. Tensions between the application of Customary Law and the various other regimes of law continue to exist, and to have a serious impact on a wide range of social institutions. Indeed, they are a long-standing feature of the political economy of a post-colonial country like Uganda, made even more complex by the fact that unlike some other countries around the continent, the substance of Customary Law in Uganda has never been reduced into a single codified instrument with uniform application across all communities in the country. For the foregoing reasons, it becomes critically important to enlarge our focus. Not only must we examine the conceptual and institutional forms in which Customary Law has been given expression, but it must also endeavour to understand the various actors, the knowledge deployed and the spaces struggled over in the course of mapping out the concrete situation on the ground.

While embarking on such an exercise, it is also important to point out that general statements about Customary Law often present cultural norms in a rigid manner, describing them as immutable and inflexible and as applicable at all times and to all situations. However, there is a degree of indeterminacy and even flexibility introduced by the concrete conditions in which any norm operates. For example, the statement that it is custom among the Luo for a brother to take on the wife of his deceased sibling may, at some point in time, have been a widespread truism, acquiring the status of a customary norm or law. While there is no doubt that levirate

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<sup>41</sup> Nyamu-Musembi, 2003, at 265.

marriage is still practiced in Uganda today, the fact that recent years have witnessed an upsurge in the scourge of HIV/AIDS (and awareness about its causes and spread), means that levirate marriage can no longer be regarded as 'custom.' Moreover, in such a situation the resistance of a widow to the imposition of the custom would receive a more sympathetic hearing than was the earlier case, even from the ostensible 'custodians' of custom and tradition who may normally exclude women. In other words, the options available and the negotiating space is made wider by the altered social or economic context in which the customary norm is sought to be applied.<sup>42</sup>

A detailed examination of the operation and impact of Customary Law in Uganda today must necessarily consider the nuanced situations within different communities around the country. An additional caution is also in order from the outset of this discussion. It is important not to be self-righteous or paternalistic, and to simply dismiss local cultural assertions as masking a defence of privilege and inequality at the expense of the individual rights of the disadvantaged in the same society.<sup>43</sup> If indeed Customary Law has remained such a potent and powerful force it must be on account of some degree of resonance that it enjoys within the existing social fabric, rather than on account of some vague linkage to an atavistic practice from the past. Put another way, custom has a formidable sphere of social legitimacy by which it is buttressed. A serious and meaningful reform of the institution can thus only result from an internal critique, debate and engagement that respects the essential attributes of the institution rather than begins from the premise of debunking it and seeking the imposition of an externally-defined reality.

While undertaking such a critique it is also important to consider the transformations that have affected customary practices, particularly under the influence of commercialisation, globalization and the increased commodification of social relations. Nowhere is this more apparent than in the institution of bridewealth.<sup>44</sup> Originally meant to consolidate the relationship between the two families of the prospective spouses-to-be, the institution was converted into one

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<sup>42</sup> This is not to say that men do not impose themselves on widows in the name of custom. However, in the context of the ravaging consequences of HIV/AIDS the degree of resistance by widows to this action is certainly higher, resulting, at times into forcible consortium. See Human Rights Watch, "Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda," August 2003, Vol.15, No.15 (A).

<sup>43</sup> Mamdani, 2000 at 3.

<sup>44</sup> For an analysis of the institution and its contemporary contradictions, see Atekyereza, 2001.

that not only gave the husband proprietary rights over his wife, but also gave him *carte blanche* to treat her as he wished.<sup>45</sup> More oppressively, the demand for the return of bridal gifts on divorce (which are often no longer available when the demand is made) can also be turned into an instrument to compel a woman to remain in a marriage even when it has irretrievably broken down.

Finally, it is important to recall that present-day Uganda is a complex mix of diverse ethnic and social groupings, who correspondingly have a wide range of customary practices and laws to which they ascribe.<sup>46</sup> In the absence of a uniform Code in Uganda, there is no coherent body of Customary Law as such. While there are many similarities both in conception and application that extend across these diverse communities (e.g. patriarchy, polygyny and bridewealth), there are also significant differences, which may arise from broader socioeconomic factors, or even from the idiosyncratic conditions peculiar to a specific locality. More importantly, the interruption of protracted civil strife culminating in outright war has meant that the development of Customary Law in Uganda has neither been linear nor coherent. Moreover, it is wrong to assume that the main instruments of 'local,' 'grassroots,' or 'popular' justice enforce Customary Law alone; rather, they oversee a regime of both formal and informal law stipulated by statute. In that respect it is rather anomalous to speak of the main instruments of local justice that exist in Uganda as implementers of Customary Law, *strictu sensu*.

It should also be noted that many problems with discrimination and oppression originate in the written received laws. For example, the rule of law in Sierra Leone is perennially threatened by clawback clauses within the constitution that take away rights guaranteed in the very same constitution. For example, while chapter 2 of the constitution confers equal rights to employment and education, section 14 takes away the legal force of this chapter by stipulating that 'provisions contained in this chapter shall not confer legal rights and shall not be enforceable in any court of law'. Other acts that antedated the constitution also take away from rights guaranteed by the constitution. The Public Order act of 1965 for instance claws back due process rights enshrined in the constitution. Apart from these claw back laws, anachronistic laws derived

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<sup>45</sup> Tamale, 1993: 170, and Asiimwe, 2001.

<sup>46</sup> Uganda has nearly 60 indigenous communities, divided into four main linguistic groupings, namely Bantu, Nilotic, Nilo-Hamite and Sudanic, each of which consists of several smaller sub-groups.

from England that have been nullified in that country are still in the law books of the country. Most of these anachronistic laws derive from a patriarchal era when women were treated as minors and discriminated against. The existence of these laws in Sierra Leone's statute books undermines such cardinal principles as equality before the law and should therefore be replaced.

It would be important in any discussion of customary law today to ensure that the voices of all the people who are impacted upon by the laws are heard. Customary law is not a monopoly to be applied and understood by the few over the many. Healthy societies evolve constantly through dialog and even struggle among its various elements. For example in many African communities today, associations of women are rising up to challenge rules that do not work for them. These women's perceptions of the way in which customary law should evolve today, or even their interpretation of what custom requires, should be part of any empirical investigation into the status of customary law.

Child marriages are an example of a cultural practice that was appropriate in earlier societies but is less functional today. The lag between the circumstances and the attitudes is seen in the problem of defilement in Uganda. The law has criminalized sexual contact with minors, and indeed it is currently a capital offence, while community attitudes in some areas are less critical of this behavior as it was historically not problematic. Uganda is in a transition point on this issue. The solution may be to work with communities to show the harm done by this practice while at the same time re-visiting the law in order to make it less punitive so that communities will be more likely to convict offenders.

### *iii. Codification?*

One of the main reasons given for the arbitrary nature of customary law is that it is unwritten, which ensures a monopolization of its knowledge and interpretation by elderly males. It also gives it an esoteric and non-transparent aura that runs contrary to basic rule of law tenets such as open, transparent and knowable law.

However, codifying customary law would freeze it and deny it the flexibility that has been one of its great points.

A starting point may be working towards a restatement of customary laws and processes. Such restatement would basically comprise of the writing down and compiling of the laws and

usages into a single document covering the main areas in which customary law operates. This is different from codification, which entails entrusting binding legal force to the document.

A restatement of customary laws and usages would provide a basis for increasing the pool of knowledge about these laws, and thereby provide a more informed basis from which a consideration of the existing status of customary law can commence. It would also promote discussions relating to the meanings, purports, substance and actual effects of these laws and usages for different social categories and for governance structures that uphold the rule of law. The engagement may bring out refinements, alterations and knowledge that could inform the future codification of the laws and usages.

*iv. Multidisciplinary Issues*

In order to fully understand the evolution of customary law, one needs to look at the intersection of culture, law and wellbeing. In rapidly changing societies where different worldviews are in conflict, law should be merely one of the many avenues used to meet basic needs for conflict resolution and social control, including behavior modification and management.

Both Sierra Leone and Uganda are countries where communities have been acutely traumatized by conflict. People suffered emotional and mental harm during the conflict, in addition to physical trauma. Families were torn apart, and gender relations were disrupted. Less obvious has been the long term impact of colonization, the shift to independence, and the social and economic upheavals of the post-independence period.

For example, the customary division of labor has, in modern times, become problematic. Women suffer from what has been defined as “time poverty”<sup>47</sup>, while men often find themselves un- or under-employed. Thus at a time when women are particularly stressed by time poverty, many men are struggling with idleness and even a loss of sense of purpose. Men may find coping mechanisms for dealing with this new reality that may include excessive use of drugs and alcohol, exacerbating, among other things, sexual and other gender based violence.

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<sup>47</sup> See World Bank (2005) “From Periphery to Center, A Strategic Country Gender Assessment” for an illuminating discussion of time poverty.

Yet gender based violence is often seen as a manifestation of cultural norms – and indeed culture is often used to minimize the seriousness of this form of behavior. Legal solutions are debated: Should customary law be changed? Should criminal law be more stringent? Yet professional psychological interventions may be more useful than changes in either customary or written law.

The dearth of analysis and support for this critical area may be related to the stigma attached to mental health issues in many African societies. However, as many legal service providers who work with poor and vulnerable people have known for decades, many of the issues presented by their clients would be more appropriately and effectively deal with using mental health interventions. For example, at the legal aid clinic run by the Faculty of Law at Makerere University, a considerable proportion of the issues raised by clients are psycho-social, necessitating that the lawyers at the clinic be given basic social training. Some legal aid providers in both Sierra Leone and Uganda are making efforts to partner with mental health specialists, but there is a critical shortage of such professionals in these countries.

## **5. Conclusions**

Although more data clearly needs to be gathered before concrete and specific conclusions can be reached on several details, certain themes are evident from this examination of the topic.

Customary justice systems in post independence Africa have contributed immensely in the dispensation of justice. Without this system most parts of Sierra Leone and Uganda would not have had any justice system at all during their periods of civil war and in the aftermath of reconstruction. A clear strength of customary law systems is that they represent law that originates with the people in the most direct sense. This is especially the case if the "monopoly" on the interpretation of customary law by male elders is reduced by engaging other members of communities, and efforts are in place in Uganda to bring this about. Customary Law tribunals are accessible and familiar to the local populace. The remedies they offer are often restorative and they encourage mediation and reconciliation as opposed to the largely adversarial approach of the formal judicial system. Ideally, they should complement the formal systems at the local level and there should be easy appeal from decisions of the customary law systems, which would provide an ongoing method of supervision of their activities. Therefore creation and strengthening of customary tribunals does not obviate the need to bring formal courts closer to

the people. Customary law systems have several significant limitations which need to be addressed in order for them to become vehicles for providing equitable access to justice for poor and vulnerable people. They are often inconsistent and discriminatory and can be subject to capture by powerful groups.

Customary rules, like the common law in general, evolve naturally are not static. Therefore the question is not whether or not to apply customary rules, but rather how to ensure that these rules are allowed to evolve organically in order to take into account changing circumstances. In this process, it is important to separate out customary rules and norms, from attitudes and dysfunctions caused by social upheaval. Each should be approached in a different way. Confusing one for the other may lead to a situation where people are unable to deal with dysfunctions due to a misguided preoccupation with maintaining the "integrity of culture".

## **6. Recommendations**

### ***i. Improve Programs of Training and Education***

We recommend that more resources be put into the training and sensitization of officials of customary tribunals. This should focus on ensuring that customary tribunals provide justice that is equitable (especially in relationship to gender), predictable, transparent and non-discriminatory and that conforms to the obligations of the countries under international treaties on the treatment of women, children and other vulnerable peoples. In countries like Sierra Leone where the monopoly of male elders remains oppressive, education and sensitization should focus on the empowering the rest of the community through a process of opening up knowledge and discussion of customary laws. Training should also cover different mechanisms of Alternative Dispute Resolution (ADR)<sup>48</sup> suitable to the context in which customary tribunals operate.<sup>49</sup>

### ***ii. Undertake a Comparative Assessment of customary tribunals***

In order to generate more data on the operation of customary tribunals and on their interaction both with the formal systems and with the even more informal dispute resolution and

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<sup>48</sup> See ICHRP, 2004 at 57-58

<sup>49</sup> Several trainings of LC courts have been conducted by various organizations, but there is a need for a comprehensive examination of the scope and content that they covered.

social control mechanisms in operation in communities in Africa, it is recommended that a comparative assessment of customary tribunals be carried out, including a comparison of these institutions across different localities.<sup>50</sup> Such analysis should include surveys to determine user perceptions and preferences.

In Uganda we recommend that it is time to revisit and critically examine the degree to which LC Courts are meeting their stated objective of improving access to justice for poor people, with particular emphasis being given to looking at the representation of traditionally excluded groups in the LCCs and on the impact of their presence on the quality of judgments reached.

*iii. Appraising the Linkages between LC Courts and the Higher Courts*

There is an additional need to critically examine the degree to which there is an engagement between the courts of the higher judicial levels (from the Magistrates upwards) and the lower-level institutions of justice: What is the extent of contact between the upper courts and the lower ones? How much information is exchanged on both substantive and procedural matters? Are there mechanisms of supervision in place, and if yes, how effective are they? What percentage of cases are appealed? Finally, we need to examine the links (or the lack thereof) with the other actors, especially the different government ministries that have responsibility over the different operations of the Local Councils.

*iv. Assessing Other Primary Justice Mechanisms*

The scope of analysis should be extended to cover all justice mechanisms available to the poor, in order to provide an appropriate and convincing framework of analysis. Thus, there is a need to consider how other informal, or *quasi*-formal dispute resolution structures, such as marriage counselors, benevolent groups, family and clan heads, cooperatives, community based organizations (CBOs), faith-based groupings, guardians and even neighbours, approach justice issues in different communities.

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<sup>50</sup> The consulting group, NCG conducted a baseline survey of LCCs in September 1998, but there is a need for both an update of their operations, particularly in light of the many changes that have taken place, as well as in anticipation of the change from the Movement to a multiparty system of governance.

**v. *Capacity Building of the institutions involved in justice delivery***

The research outlined above would enable policy makers to gauge the most appropriate methods and mechanisms through which to build the capacity of the institutions involved in justice delivery to respond effectively to the needs of the poor.

Certain measures are clearly required to improve the quality of justice in customary tribunals. These include ensuring that judgments are recorded and that there is adequate supervision of customary tribunals.

Reforms to the formal legal and judicial system so that it includes more of the positive aspects of customary law including the restorative aspects, the accessibility, the speed, the affordability, the lack of complexity, should go hand in hand with reforms to the customary systems.

Care should be taken not to sacrifice the advantages of customary tribunals in an effort to reduce the disadvantages.

**vi. *Conduct a Comprehensive Assessment of the Contemporary Status and Content of Customary Law***

In Uganda, for example, such an assessment would tackle questions like:

- to what extent is levirate marriage still regarded as custom within a context of the very obvious ravages inflicted by the HIV/AIDS scourge?
- How does Customary Law operate in a situation of conflict and/or displacement such as that prevailing in Northern Uganda?
- Do economic factors impact on the manner in which Customary norms are formulated?
- How effective have efforts at land tenure reform through the enactment of laws been? For example, how has the requirement for the consent of spouses to transactions in land been operationalized on the ground?
- What was the impact of the debate on the Domestic Relations Bill? The issues debated clearly had resonance in the wider community—urban and rural: to what extent are the

practices which it sought to eliminate or modify so deeply entrenched within the conscience and practice of local communities as to be non-negotiable?

The response to questions such as these will enable us to move away from a situation of imagining what Customary Law and practices are believed to exist, to a situation where 'living' Customary Law can actually be documented and assessed. It will also help us move away from a legalistic concern with the normative shape of this institution to an empirical one. In Sierra Leone, part of the assessment could include a discussion on the present day applicability of supernatural institutions and mechanisms of dispute adjudication.

We recommend that the examination of state of the art customary rules and practices would lead to some documentation short of a rigid codification or restatement of the law. In essence it would comprise a description of prevailing rules at the time of the examination, with the explicit caveat that such rules are evolving and flexible. The description would provide a snap shot at a certain moment in time, of a moving phenomenon.

***vii. Multidisciplinary Involvement***

We recommend that more resources be put into mental health interventions that would work in tandem with legal education and sensitization. This should be accompanied by education and sensitization to reduce the social stigma attached to receiving mental health services.

In particular, it is important to distinguish cultural norm and attitudes from dysfunctions caused by social upheaval. The latter would need to be identified and dealt with in an appropriate way: criminalizing behavior (for example with regard to gender based violence, marital rape or defilement) is not, on its own, an effective solution if people are unable to act differently.

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