Customary Law and Policy Reform:

Engaging with the Plurality of Justice Systems[1]

Leila Chirayath, Caroline Sage and Michael Woolcock

July 2005

Introduction

The importance of building effective legal and regulatory systems has long been recognized by development professionals, yet there have been few programmatic initiatives that have translated empirical evidence and political intention into sustained policy success. A key reason is that such efforts have too often consisted of top-down technocratic initiatives that have inadequately appreciated the social and cultural specificity of the particular context in which they operate, as well as the complexity of the systems they have attempted to create. Justice sector reforms have frequently been based on institutional transplants, wherein the putatively 'successful' legal codes (constitutions, contract law, etc.) and institutions (courts, legal services organizations, etc.) of developed countries have this been imported almost verbatim into developing countries. Reforms have often lacked any clear theory about the roles and functions of justice systems, and have failed to consider how successful legal systems in developed countries were actually constructed—including how they gained authority and legitimacy. Local level context and the systems of justice actually operating in many contexts were largely ignored. As such, justice sector reformers have failed to acknowledge, and thus comprehend, how the systems—which, at least in rural areas, are predominantly customary, idiosyncratic to specific sub-regional and cultural contexts, and residing only in oral form—by which many people (if not most poor people) in developing countries order their lives function.

Given the prevalence and importance of customary legal systems in most developing countries in the world, the relative lack of attention to the workings—and effects—of these systems by development practitioners is striking, even if not surprising. Many governments, however, have tried to engage with customary systems in one way or another, with differing results. This paper attempts to bring customary systems into central focus in the ongoing debate about legal and regulatory reform. It first analyses the ongoing challenges and critiques of customary legal systems and examines why, despite these challenges, engaging with such systems is crucial to successful reform processes. It then turns to an examination of the ways in which customary systems have developed in

[1] Prepared as a background paper for the *World Development Report 2006: Equity and Development*. We are grateful to the Social Development Department and the Legal Department for financial support.

three African Countries—Tanzania, Rwanda and South Africa—and how governments in each of these countries have tried to deal with different systems. Finally the paper draws out some of the lessons of these experiences and the implications they might have for ongoing policy reform initiatives.

Laws, norms and custom

The legal and norm-based frameworks in any given society serve to mediate social life and social disputes; without these the level of cooperation necessary for everyday life—let alone a market economy—would be difficult to sustain. Norms and customs are embedded in the rule systems and institutions that govern everyday life, which in turn serve to maintain and reinforce these systems of meaning. Much like languages, rules systems are deeply constituent elements of cultural norms and social structures; power relations and structures of inequality are thus underpinned by everyday norms, and often entrenched by the rule-based systems that perpetuate them. At the same time, these systems are continually shifting and changing, and are constantly being reinvented; while this happens within the confines of the social structures they serve to reproduce, they remain potential vehicles for social change.

Forms of customary, informal and/or non-state law operate in the majority of nations across the globe.[2] Informal institutions range from dispute resolution systems operating in different markets across the globe to customary ways of ordering life in remote villages and communities. In fact, the vast majority of human behavior is shaped and influenced by informal and customary normative frameworks. Even in societies with the most developed legal systems, only about 5% of legal disputes (that is, 5% of situations that have been understood as 'legal') end up in court. At the same time, nearly every aspect of our everyday lives—from buying a bus ticket to entering a national park—is mediated by both formal and informal normative frameworks, with both institutional and non-legal or social sanctions. However, where state and non-state systems have developed in relation to each other, they often serve to complement and reinforce socially accepted codes and rules; it is well documented that in countries with more developed legal systems the formal law acts as a backdrop for normative behavior and interactions in both the private and governmental spheres.[3] In contrast, in communities where the state systems lack legitimacy and/or political reach, informal and customary systems often act completely independently from the state legal system, which may be rejected, ignored or not understood. Difficulties often arise where the normative understandings embedded in

[2] It is important to note that a vast array of practices, systems, traditions have been defined as informal, traditional or customary law, all existing within vastly differing contexts. 'Informal' is used in this section contrast to 'formal' state systems and is not meant to imply that such institutions are procedural informal. Throughout the rest of the paper we use the term 'customary legal systems' to cover a vast array of social and cultural practices and rule-based systems. We recognize the problems inherent in these types of categorization- one could argue that the only thing that many of these systems have in common is that they are not western-style legal systems, but even this line is blurred in many cases. (see discussion of the emergence of different types of systems below) Our reasons for grouping together this vast group of systems in this paper have more to do with highlighting the importance of non-western systems than it does to do with a belief that these systems are innately similar.

[3] See, for example, Ellickson (1991) and Posner (2002).

local level customary systems are at odds with the rights and responsibilities articulated in state law.

In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone".[4] Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana.[5] Further, customary justice differs depending on the locality and local traditions, as well as the political history of a particular country or region. Ethiopia officially recognizes over 100 distinct "nations, nationalities, or peoples" and more than 75 languages spoken within its territorial borders, although many more exist without official recognition. In many of these countries, systems of justice seem to operate almost completely independently of the official state system.

Some states have tried to integrate traditional systems into wider legal and regulatory frameworks, often with little success. For example, the Constitution of Ethiopia permits the adjudication of personal and family matters by religious or customary laws[6] and South Africa's 1996 democratic constitution explicitly recognizes customary law.[7] Many other countries in sub-Saharan Africa have also made attempts to recognize customary tenure and customary marriage arrangements within their state laws. Efforts to recognize customary land rights have been made in countries in other regions as well, such as Latin America and South East Asia. It is important to note, however, that in countries where customary systems are formally recognized, in practice these systems generally continue to operate independently of the state system (and/or in uneasy tensions with prevailing religious legal traditions[8]).

Challenges and critiques of customary systems

Despite the prevalence of traditional and customary law, these systems have been almost completely neglected by the international development community, even at a time when justice sector reform has become a rapidly expanding area of assistance. In the past decade, for example, the World Bank has dramatically increased its efforts in promoting justice sector reform in client countries, yet none of these projects deal explicitly with traditional legal systems, despite their predominance in many of the countries involved. Of the 78 assessments of legal and justice systems undertaken by the Bank since 1994, many mention the prevalence of traditional justice in the countries looked at, but *none* explore the systems in detail or examine links between local level systems and state regimes.

---

[4] *The Constitution of Sierra Leone* (1991) Chapter XII Article 170(3).
[5] Augustinus (2003).
[6] Under Article 34, *Constitution of the Federal Democratic Republic of Ethiopia*, both parties must consent to have the case heard in a traditional forum. In practice, however, there are no formal links between the traditional and the formal system and no mechanisms to monitor the consent of parties.
[7] Bush (1979).
[8] On Indonesia, for example, see Bowen (2003).

Development organizations have not only tended to ignore traditional systems, they have had a propensity to view them in fairly negative terms. Traditional systems are often seen as archaic, 'backward', or rigid practices that are not amenable to modernization, efficient market relations, or broader development goals.[9] In terms of reform, they are often seen as overly localized and complex, with the diversity of systems making more generalized initiatives too difficult. They are often seen as undemocratic—lacking democratic accountability mechanisms to induce reform—and lacking in legal legitimacy, authority and enforceability.

Customary systems have also often been distorted by colonial rule, and therefore linked to oppressive regimes. They can therefore also lack legitimacy at the local level. For example, many systems in sub-Saharan Africa have been substantially affected or distorted by colonial rule, which often used local chiefs to maintain control and established more authoritarian, rigid and ethnic based structures than previously existed.[10]

Probably the most significant critique of customary systems is that they are seen, in some cases for good reason, as incompatible with economic, social and civil rights, and dominant notions of 'justice' attributed to the western notions of law. Many forms of traditional law are seen to discriminate against marginalized groups and perpetuate entrenched discriminatory power structures within the local community. For example, in much of sub-Saharan Africa, traditional systems are patriarchal in nature and often systematically deny women's rights to assets or opportunities. Women are unable to own, control, or inherit land, and are only able to access land through a man (generally either their father or husband).[11] This dependency, and systematic denial of control over land, exposes women to violence and exploitation, both from the males they are dependent on or from male relatives when they are widowed. Widows, divorcees and orphans are often forced into isolation and destitution.[12] In many regions, land security is linked to food security, with people heavily dependent on their own food production, making the lack of access to land even more devastating for many women.[13] The situation in sub-Saharan Africa has been exacerbated by both episodes of armed conflict and the HIV/AIDS pandemic, with the widowed women making up almost 50% of the female population in places like post-genocide Rwanda.[14]

Reforming laws that deny women's inheritance rights and their access to land is often a crucial first step in assisting them to claim their rights and establish economic autonomy. At the same time, community norms and power structures often make it virtually impossible for women to claim these rights when they exist. For example, in several sub-Saharan African countries, the law provides for a 'choice' of legal regimes at the time of marriage, thereby enabling only those married under the state system to be afforded the

---

[9] This was a prevailing theme of modernization theory in the 1950s and 60s. *See* Escobar (1995) and Moore (1997).
[10] Mamdani (1996).
[11] See Centre for Housing Rights and Evictions (2004).
[12] World Bank (2001). It is important to note that in some situations women may agree with or consent to these situations did to their acceptance and internalization of these discriminatory norms. These beliefs, however, have themselves been developed in the context of disadvantage and oppression.
[13] Centre for Housing Rights and Evictions (2004).
[14] Global Fund for Women (1999).

protection of reformed state laws; marital property or those married in custom fall under customary rules and regulations. This 'choice' gives little regard to the social pressure on women to adhere to community norms or the fact that they may have internalized community values which are not necessary in their own interests. Further, it ignores the crucial fact that it is generally the men who make these decisions.[15] In these situations, working with accepted local level institutions to change discriminatory norms and practices is also a pre-requisite for change.

The importance and relevance of customary systems

While it is important to take concerns about different customary systems seriously, this does not in any way mean that we can ignore their existence. Imposing formal mechanisms on communities without regard for the local level processes and informal legal systems may not only be ineffectual, but can actually create major problems.

First, the failure to recognize different systems of understanding may in itself be discriminatory or exclusionary, and hence inequitable. Second, there are often very good reasons why many people chose to use informal or customary systems which should be considered and understood. Third, there is ample evidence that ignoring or trying to stamp out customary practices is not working, and in some cases is having serious negative implications. Fourth, ignoring traditional systems and believing that top-down reform strategies will eventually change practice at the local level may mean that ongoing discriminatory practices and the oppression of marginalized groups in the local context goes unchallenged. Finally, focusing purely on state regimes and access to formal systems in some ways assumes that such systems can be made accessible to all, while clearly even in the most developed countries this is not the case.

Legal and regulatory institutions gain authority and legitimacy in as much as they reflect social norms and values. It is wrong to presume that all customary law discriminates against marginalized groups—or that western law does not. For example, in the amaHlubi community of KwaZulu Natal Province in South Africa, women and men are considered equal and are both entitled to own property. It is also important to note that customary systems, like other institutions, are constantly open to resistance and change. Women's groups in Africa have arguably made some progress in challenging discriminatory customary practices. In other communities, state institutions have begun to push change at the local level. In South Africa, for example, there is currently one female out of 800 traditional leaders recognized by the state. In 2005, the state has issued a regulation that female participation must be at 30% by the end of the year. Recognizing the difficult road of effective integration of the different systems, the South African model aims at "progressive alignment" with the constitution. At the same time there is no clear strategy of how this change might be achieved.

In many communities, traditional systems not only reflect prevailing community norms and values, but the state systems lack legitimacy; they are seen as mechanisms of control and coercion used by oppressive regimes. State systems are often seen as vehicles for elite political or economic interests, with fragile institutions and lack of an empowered

[15] Centre for Housing Rights and Evictions (2004).

citizenry in many developing countries leaving institutions open to corruption and elite capture.[16] State law may be seen as a repressive tool used by a series of oppressive regimes. In some cases, 'new' customary systems have emerged recently in response to the failure of the state frameworks and the weakening of other local mechanisms of dispute resolution. For example, numerous community courts have been set up in post-apartheid South Africa due to the inaccessibility of the state system and the belief that official law remains 'white man's law'. In rural Tanzania, *sungusungu*—traditionally organized village defense groups—developed in the 1980s, largely in response to rising crime rates and a general perception that established institutions were unable to supply law and order (both of these developments are explored in more detail below). In Indonesia, the state for many years has endorsed this kind of 'neighborhood watch' effort; at worse, this has involved arming local gangs who dole out a type of vigilante justice.[17]

In countries where the state is considered corrupt, working through non-state systems may have better returns for those involved. Even if state systems do not lack legitimacy, they may be at odds with prevailing systems of conflict mediation within a particular community and/or be predominantly inaccessible due to geographical and socio-economic barriers, or alternatively due to a lack of knowledge or awareness of the system on the part of political leaders. Further, state institutions in many developing countries lack basic infrastructure or the capacity to turn law-in-books into "law-in-action".[18]

In many cases state regimes do not have the capacity or legitimacy to fill the gaps in social ordering and conflict resolution when local level systems are undermined. Numerous studies have shown that when neither formal nor informal mechanisms are functioning, human rights abuses and serious conflict are more likely to occur. In a study of formal and informal dispute resolution systems amongst poor segments of rural Columbia, the incidence of communities taking matters into their own hands through vigilantism, "mob justice" or lynching is more than five times greater in communities where informal mechanisms are no longer functioning effectively and state presence remains limited.[19] In other circumstances, breakdown of local frameworks can lead to different types of lawlessness. For example, the criminalization of customary responses to witchcraft in South Africa, and the fact that state courts refuse to recognize the existence of witchcraft, has arguably lead to a form of vigilante justice based on the belief that the state sides with witches.[20]

Formal systems may not only be rejected because they are considered inaccessible or oppressive; they may also threaten traditional power bases by reallocating socio-economic and political rights. In some cases, formal processes can dramatically increase transaction costs, which in turn render market relations less efficient.[21] In these situations,

---

[16] For a discussion of political and economic elite capture of state institutions see Glaeser, Scheinkman, and Shleifer (2002); and Hellman, Jones, and Kaufmann (2003).
[17] See, for example, Welsh (2003).
[18] See Buscaglia (1997).
[19] *Id.* See also Buscaglia (1996).
[20] See Hund (2000).
[21] Mattei (1998). See also Kranton and Swamy (1999).

people often opt out of the formal economic system in order to evade state intervention and/or taxes, and hence must also opt out of the formal legal system.[22] The process of economic development does not, therefore, automatically increase the demand for formal systems. A clear example of this is provided by the development experience of the so called "East Asian Miracle", in which formal law only played a marginal role, supplanted by negotiations between governments and business elites, government rules and decrees and customary rules and dispute resolution processes.[23] Informal and customary institutions arguably underpinned the process of growth and development in these countries during this period.[24] At the same time, since the 1980s questions have been raised about the sustainability of such informal arrangements for ongoing development (as evidenced by the manner in which the 1997 financial crisis exposed and exacerbated the limits of institutional arrangements based predominantly on informal mechanisms).

Finally, not engaging with the array of non-state systems of social organization and dispute resolution may mean that informal mechanisms provide an adequate means of dealing with certain types of conflicts, while other types of disputes remain unresolved.

Understanding the development of modern-day customary formations: a focus on Tanzania, Rwanda and South Africa

State regimes have responded to the customary legal systems in a large variety of ways, which have often shifted dramatically with changes in power. Some state regimes, particularly during colonial rule, have tried to stamp out or take control of customary practices, usually resulting in practices being forced underground or alternatively being fundamentally changed in nature, often undermining the legitimacy of the system. Many countries, have tried to integrate traditional systems into wider frameworks, often with little success.[25] In some cases, customary courts are recognized within formal legislation, but in practice still exist parallel to the official system.

Customary systems themselves vary considerably with any given country—particular given that these have often become imagined communities constructed within randomly allocated national boundaries that often have little to do with tribal or ethnic divisions—let along across different countries. It is therefore not even possible to describe the plethora of different systems that have existed at different times in the three countries discussed below. This is not only because of their variance, but is also due to the fact that our understandings of these systems generally rely on written accounts by western anthropologist, historians and political sciences which will always only give us a partial picture of a given social phenomena. This is exacerbated by the fact that such embedded cultural systems are extremely difficult for outsiders (national or international) to ever fully comprehend.

---

[22] Pistor (1999).
[23] See Pistor and Wellons (1999).
[24] Evans (1998).
[25] See Bush's (1979) discussion of attempts by different African nations at dynamic integration.

Our aim is therefore not to give definitive description of what a particular system looks like in a given area, but rather to draw out some of the historical dynamics that have lead to the emergence of particular—or multiple—systems. In most cases customary systems have, in fact, been substantially altered and re-shaped by different eras of colonial and post-colonial rule. Different regimes have tried to formalize, co-opt or recast existing systems within colonial or post-colonial legal frameworks, often substantially changing the nature of a given system. Sally Falk Moore argues that the British revision of indigenous judicial systems in Africa was fundamentally hypocritical: on the one hand, they sought to preserve custom by recognizing customary institutions, and on the other, "they were to be a vehicle for remolding the native system 'into lines consonant with modern ideas and higher standards.'"[26] For example, indirect rule often distorted "native" authority by strategically assigning duties to certain individuals and fundamentally altering the pre-existing balance of power. Unfortunately, "the colonials' effort to insert their model of a court into a complex and little understood African setting was not without enduring results."[27] In some situations far more rigid or oppressive customary systems have emerged; in other places communities have rejected the new hybrid system and continued to run their own systems of mediation or dispute resolution- often themselves transformed by the processes.

Post-colonial states often shifted towards greater supervision of customary institutions in their quest to modernize.[28] As Koyana points out, customary law was not the domain of professional lawyers; in most colonies advocates were forbidden to appear before native courts, and had rather been left to anthropologists and administrative personnel to understand and manage.[29] For political elites in fledgling independent states, both the diversity of systems and the lack of judicial control were seen as problematic and potentially divisive.[30] Despite pressure to modernize, customary law was also gaining increased legitimacy in parts of Africa as part of the movement away from colonial rule, so again the efforts to engage with customary systems embodied some contradictory intentions.[31]

Efforts to incorporate customary systems into national frameworks has lead to considerable debate over the definition of 'customary', as well as the relationship of these systems to state laws which has tended to result in vague categorizations—often hinting of idealized calls to some authentic past—and unclear demarcations of lines of authority. For example, in Sierra Leone, where over 300 local customary courts preside in the 149 chiefdoms found in the provinces, regulating matters of marriage, divorce, succession and land tenure, these legal systems are recognized and defined in the constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra

[26] Moore (1992), 16.
[27] *Ibid*., 11.
[28] Widner (2001), 85.
[29] Koyana, Digby (1980), 116.
[30] Scholars observe a similar trend in the post-independence period of several British colonies.
[31] The 1963 African Conference on Local Courts and Customary Law was a pivotal element of this movement; the report of the conference indicated several ways in which governments might effectively incorporate customary institutions and codes into national programs.

Leone".[32] Similarly, the Constitution of Ethiopia permits the adjudication of disputes relating to personal and family matters in accordance with religious or customary laws if all parties consent.[33] In practice, however, not only is it unclear which practices are considered customary, there are no formal links to the formal system and no mechanisms to monitor the consent of parties.

The relationship between (what has been deemed) customary and state laws cases leads to even more confusion. Most colonial regimes introduced colonial repugnancy clauses thereby recognizing customary law only to the extent that it conformed to European legal norms. Similarly, most African constitutions now recognize customary courts only in so far as they do not violate any of the fundamental rights enshrined in state constitutions. While this may sound reasonable to those sympathetic to human rights norms, communities are left with the difficult task of defining which practices violate these norms (presuming that there is any attempt to monitor such compliance). Such limitations may also be seen as an attempt to undermine customary systems by setting the standard too high, particularly considering it could hardly be claimed that many state systems currently comply with international human rights standards that are often also enshrined in state law.

In some cases 'new' customary systems have emerged only recently in response to the failure of the state frameworks and the weakening of other local mechanisms of dispute resolution. In other contexts, top-down changes to existing customary courts has resulted in a dual customary system: villagers, skeptical of changes from above (even if there is no resulting change in the content of the law administered), take their disputes to newly formed systems based on traditional practices.[34] Some governments have informally or formally recognized these new systems; others have tried to outlaw them. In other contexts, new 'customary' systems have been 'seeded' into communities by national or regional governments for a variety of reasons: increasing judicial capacity, broadening access to justice, unifying ethnically diverse communities by appealing to common "customary" standards and procedures, and in some instances, preempting vigilantism in communities that feel marginalized by existing procedures. The form these institutions take frequently derives from an idealized pre-colonial model, though in practice they may employ substantially different methods in line with Western conceptions of justice. The *Inkiko-Gacaca* program in Rwanda and Tanzania's Ward Tribunals, both discussed below, can be understood in these terms.

In many countries, changes brought about by successive regimes have often lead to an increase in parallel systems, and rather than increasing coherence has rather lead to conflicting rule systems and a breakdown in social ordering. It is therefore extremely important to understand the historical context in which a particular system has developed in order to understand both its functioning and the differing power dynamics at play.

---

[32] *The Constitution of Sierra Leone*, 1991, Chapter XII Article 170(3).
[33] Art 34. *Constitution of the Federal Democratic Republic of Ethiopia.*
[34] Gluckman (1969),12.

Tanzania: the reemergence of community control

We know something about forms of customary legal systems that existed in different parts of Tanzania[35] from historians and anthropologists writing at the time. From these writers we know that traditions varied across different regions and that these variations impacted on the ways that these systems adapted to different historical events. At the same time, given Tanzania's history and the relatively weak reach of the state in different eras, community driven systems emerge as a dominant theme throughout.

The Haya

Detailed information about the customary legal systems of the Haya can be found in Hans Cory's volume of Haya law. Completed in 1945, his work was intended to serve as a rough code book for Native Courts administrators in East Africa unfamiliar with local customs.

Geographically, the Haya are situated in the Bukoba region of Tanzania along the border of Lake Victoria. They are said to have descended, like the people of Rwanda, from two distinct groups: indigenous Bantu farmers (the "original" Haya, who settled in the northwestern part of Tanzania over 2,000 years ago) and the Hima, a group of Cushitic pastoralists who emigrated from the north roughly 400 years earlier.[36] Though he concedes that both groups coexisted for centuries with no history of internal violence, and that the migration itself was peaceful, Cory terms the Hima movement an "invasion"—an unsubtle reference to the theory of ethnicity prevalent at the time, known as the Hamitic Hypothesis.[37] The Hima, like the Tutsi of Rwanda and Burundi, were heralded as the Hamitic bearers of civilization in inter-lacustrine East Africa. That the shared history of the Hima and Haya is not marked by violence is interesting given the level of ethnic strife in neighboring Rwanda and Burundi.

At the heart of the Haya system was the *Ntegeka ya Bagarusi*, or Courts of the Elders. The courts were not permanent fixtures but rather community committees made up of a number of delegates (*bagarusi)* appointed by the two parties to a dispute. While these delegates could be drawn from any group, parties had an incentive to solicit individuals with political capital, and hence delegates tended to be village elders. The *bagarusi*

---

[35] The country of Tanzania was formed in 1964 as a result of a political union between mainland Tanganyika and the off-shore islands of Zanaibar and Pemba.

[36] There is considerable debate over migration patterns in the interlacustrine region, as the 'separate origins' claim fueled ethnic polarization under colonial rule. Most historians concur, however, that such a migration happened between three and four centuries ago. Mamdani (2001) offers a nuanced analysis of the various hypotheses in a regional context.

[37] Cory and Hartnoll (1971), 256. This theory garnered much attention in the wake of the Rwandan genocide as a feature of colonial rationale that deepened (some would argue fabricated) ethnic distinctions. The theory, proponed most famously by John Hanning Speke, centered on a biblical quote from Genesis, Chapter Five: "Cursed be Canaan [the first-born son of Ham]; a servant of servants shall he be unto his brethren." The quote was the basis of a belief that the Tutsi, Bahinda, and many other East African groups were the original descendants of Ham, shared biblical ancestry with Europeans and thus were naturally superior to the indigenous Bantu population. Speke cited phenotypic similarities between Europeans and so-called Hamites as one proof of the theory; the other was the sheer number of civilizations in the region, which could only have been brought by outsiders. Sanders (1969) offers a historical development of the theory.

elected a chairman, who established the time of the hearing and called for witnesses on either side. The parties represented themselves. After the parties had presented their cases and witnesses were heard, the case was discussed among the *bagarusi*. Cory states that while consensus was usually achieved, the chairman had the final say and awarded damages as he saw fit. In this way, the bagarusi can be seen as similar to modern day "assessors" used in the Ward Tribunals (discussed below).

The outcomes of *Ntegeka ya Bagarusi* were considered binding, however if the judgment was not upheld, the aggrieved party could appeal to the customary appeals court (*Gombolola*). The Gombolola was usually used to formally reinforce the legitimacy of the lower court's decisions.[38] Enforcement was generally achieved through peer pressure. The *bagarusi*'s collective social standing garnered respect in the community; if they were defied, villagers would refuse to extend the offender or his family social invitations to important events such as funerals or weddings and assistance in collective activities such as house construction. Decisions themselves could be appealed to the Chief's Private Court, the *Baraza ya Kikale*, over which the Chief presided. Again, orders by the chief were generally enforced by social pressure.

Among the Haya, separate dispute mechanisms also existed within certain trade groups. The *Ntegeka ya Mukondo* handled conflicts among cattle herders and the chairman was elected by all cattle-owners in a particular village. Conflicts among fishermen were dealt with by the *Ntega ya Bajubi*, chaired by the head of the local fishermen's guild (*ikororo*). These systems were both phased out by the colonial administration; in recent times, the only parallels are land tribunals administered by the Ministry of Justice.

The Arusha

The Arusha, living along the slopes of Mt. Meru in Northern Tanzania, developed a slightly different traditional model of conflict resolution. No word in the Arusha's dialect corresponds to "justice" in the Western sense. Kenneth Carlston argues that emphasis was generally placed on egalitarianism and social cohesion rather than on individual rights.[39] Arusha customary law was also affected by the complex nature of their social organization. Communities were organized by parishes (comprised of several neighborhoods) divided into age-groups and by patrilineal descent groups divided into inner and maximal, or outer, lineages. Each age group within a parish elected six spokesmen, generally the senior men. Each kin group selected one or two counselors to represent them to other lineages.

According to the position of disputants within these two lines of social ordering, one of two types of procedures were employed to resolve disputes. The first was the parish assembly, often referred to simply as "the parish". Similar to the Haya *Ntegeka ya Bagarusi*, the formation of the parish depended on the particular dispute, being made up of spokesmen from both parties' age-groups as well as any individual who had an interest in the dispute. Parish assemblies were used to deal with more serious disputes, such as theft or homicide, or disputes pertaining to the entire parish. Disputes between parties

[38] Here, we refer specifically to the case of *Kokwemage v. Kagaruki*, cited in Cory (1971), 232.
[39] Carlston (1968), 318.

from different parishes could be heard in either assembly, generally depending on the level of support an outsider could muster in a neighboring community.

The dispute resolution mechanism was the moot. Moot proceedings were run by counselors and where confined to either members of an inner lineage (internal moot) or of a maximal lineage (external moot). Moots were used to resolve disputes about inheritance, marriage and other family-related issues.

Both the roles of those leading proceedings—counselors where often appointed as spokespersons in parish assemblies—and matters handled in each institution—which depended in part on a parties assessment of their chances of obtaining a desired outcome in each forum—often overlapped. The process of convening either a parish assembly or a moot required the support of a spokesman or counselor, respectively, for a disputant's claim.[40]

The Arusha term *engigwana,* literally meaning "discussion," was used to refer to the collective body of attendants at both types of proceedings. The terminology aptly illustrates the climate in which the informal dispute mechanisms operated; in essence, they were guided discussions amongst representatives for each disputant rather than adjudication by a third party. The notables and counselors served as moderators, not decisions makers, and their powers were limited by the requirement of consent among the parties in any decision.[41]

Typically, assembly proceedings occurred as follows:

(1) One of the spokesmen made an appeal to *Engai* (the high-god) for his blessing;
(2) The plaintiff stated his case;
(3) The assembly discussed the facts presented; members took turns speaking in the open space left in the middle of the group. Questions and comments were called out to the speaker.
(4) The defendant stated his case;
(5) Witnesses were called. These were generally solicited by the disputant or his notable, though any party who wished to testify were allowed to do so;
(6) Both sides of the assembly (including the disputants) attempted to reach an agreement on any disputed facts of the case; and
(7) Both sides discussed settlement and attempted to negotiate an agreement.[42]

Gulliver states that procedures were, however, often modified to fit the particular circumstances of a case. Based on an analysis of a number of cases, Gulliver identified five consistent traits of the proceedings, namely: (1) the spatial segregation of disputants' parties; (2) the consistent observation of the right of each disputant to fully argue his case, and (3) the right of each speaker not to be interrupted while he was standing; (4) the role of spokesmen and counselors as negotiators, using their positions to persuade disputing parties to reach agreement; and (5) enforcement was ensured by social pressure from the different age-groups to follow-through with the agreement. He argues that some

[40] See Gulliver (1963), 178.
[41] Ibid., 224.
[42] Ibid., 225.

form of consensus was usually reached, even if in practice this was a truce in which both parties "agreed to disagree."

The Chagga

The Chagga, part of the chiefdom of Old Moshi on the slopes of Mt. Kilimajaro, have interacted extensively with anthropologists over the last century. Dr. Bruno Gutmann's history of pre-colonial dispute resolution among the Chagga appeared in the 1920s and served as the first comprehensive text on the subject.

Prior to the establishment of colonial courts in the Old Moshi region, disputes were heard on the "Lawn of Justice" before an assembly of local men. Disputants were represented by spokesmen, in a manner that paralleled the Arusha system. In these courts, however, instead of disputes being negotiated with the help of party representatives, they were adjudicated and decided by community leaders. Proceedings were moderated by a district leader (*mchili*) or chief (*mangi*), who then publicly declared the decision of the assembly. Like that of the Arusha, the Chagga's system involved cross-cutting allegiances in the form of age-groups (or "age-sets"), which partially offset the central authority of the chief and the divisions amongst the lineages.

Colonial Developments

Arab product and slave traders first entered Tanzania in the 17th century. The Island of Zanzibar became center for both spice and slaving from the early 1800's. Under pressure from the British and the threat of a naval bombardment, the Oman Sultan signed a treaty outlawing the slave trade in 1873, although this trade continued on the mainland. In 1890, a British protectorate was placed on Zanzibar. In 1891, mainland Tanzania (Tanganyika) was colonized by Germany and became subject to German rule. The British were then mandated the territory by the League of Nations after World War One. Tanganyika gained independence from Britain in 1961 and Zanzibar in 1963, and unified as Tanzania in 1964.

The British colonial rule led to a hybrid system of law; British common law applied to Europeans and was enforced in formal courts, while Africans fell under the jurisdiction of customary law and adjudication mechanisms. However, "native courts," though subject to a different set of laws, still fell under the control of the Colonial Government; they attained quasi-formal status in the threshold between judicial and administrative functions of the colonial government. This is best reflected in two observations. European District Officers, responsible for administrative functions at the district and local levels, held broad powers of review over judges in customary courts. Further, Africans could sometimes appeal judgments in criminal cases to British lower courts. In practice, customary institutions came to occupy a third or "shadow" tier of the colonial judicial system, beneath inferior and superior courts.[43]

Customary practices were transformed under colonial rule. For example, German authorities fundamentally changed the Chagga legal framework by recognizing chiefs as the only legitimate legal authorities, thus undermining the main traditional check on

[43] Seidman (1970)

chiefs' power- the age-groups. This process paved the way for indirect rule, as it isolated individual chiefs who could serve as points of control to the administration.[44] Gutmann argues that the British policy of selecting chiefs who represented their interests to newly established local courts fundamentally changed the original balance of power among the Chagga and was far less effective than the indigenous system.[45] However, as supervision was fairly loose in many parts of the country, practices in these parts were undoubtedly less affected.

The Unification Era

At the time of independence in 1961, Tanzanian leaders were under great pressure to review the state's role in supervising customary institutions. Tanzania's Unification of Customary Law Project embodied the modernization ethic of the period; customary law as a decentralized, separately administered set of policies seemed unfit to serve the needs of a Western-educated, urban elite and increasing economic specialization. Further, there was fear that customary institutions, bolstered by legislative inaction to incorporate them into a broader system, could create ethnic factionalism and act as a disincentive for Tanzania's 120 groups to remain loyal to the nation.[46]

Hans Cory was called upon to help unify and codify the country's various sets of customary law, a project which resulted in the Local Customary Law Declaration published in 1963. Francis Nyalali, former Chief Justice of the Tanzanian Supreme Court, later deemed the Declaration successful in creating an "indigenous common law" reflective of the country's diverse customary traditions[47]. In the same year, the government passed the Magistrate Courts Act to incorporate what were formerly native courts into the judiciary. The Minister of Justice appointed lay judges (who became magistrates after a three-month training course) to these institutions, labeling them Primary Courts. Records were to be kept in Tanzania's national language, Kiswahili.[48]

Initially, these judges were not required to consult with locals, but this practice quickly proved problematic, particularly for communities with judges from other parts of the country who were unfamiliar with local practices. The year after their initial appointment, the government passed legislation requiring that lay judges consult with at least two "assessors" drawn from the local pool of village elders. While this partially resolved community concerns, judges still retained ultimate control over rendering judgments. Unsurprisingly, these new institutions were often rejected or avoided by local communities, who established new informal mechanisms of dispute resolution based on traditional practices.

In 1969, perhaps cognizant of the potential consequences of separate informal dispute resolution systems, the new government passed an additional law establishing Arbitration Tribunals in each village. The tribunals, principally concerned with reconciliation, were

[44] Moore (1986), 149.
[45] Ibid., 40-42.
[46] Widner (2001), 84-85.
[47] Ibid., 91.
[48] This remains the case. In District and Resident Magistrate's Courts, records are kept in English.

run in each village by laymen faithful to the local party.[49] Again this can be seen as an attempt by the state to take control of these newly developing systems. In 1985, in a climate of increasing lawlessness, the Arbitration Tribunals were placed under the control of local administrative officials and renamed Ward Tribunals.[50] The re-vitalization of arbitration as a means of settling disputes was also aimed at reducing high levels of violence, particularly in rural areas, and the resulting build-up of cases in already overburdened primary courts. The tribunals are managed by district-level government administrators and are not part of the judiciary, though cases may be appealed to the primary courts. Administrators select up to five lay mediators from each ward, one of whom is designated chairman. The Ward Tribunals remain the state's sole outlet for promoting dispute settlement at a grassroots level.

There are few comprehensive assessments of the tribunals, and as such it is difficult to gauge their success. A recent study conducted in the Babati district in North-central Tanzania looked at community perceptions of the tribunals, identifying perceived problems in the structure of the courts, including room for bias in favor of wealthier individuals (who might have disproportionate influence over decision makers) and the dominance of male elders in the composition of arbitrators. [51] However, the study did find that community views of the tribunals were generally positive. When compared with alternative mechanisms for resolving disputes (including primary courts, village and religious elders, and party organs), the Ward Tribunals ranked highest in terms of being seen as "just and fair" in the handling of cases. The study also found that tribunals have been reasonably successful in reconciling individuals – over half the cases received in the areas under study were resolved, with the remainder transferred to primary courts.[52]

The Babti study suggests the tribunals have been relatively successful due to their procedural resemblance to traditional mechanisms. The relative informality of the tribunals was seen as a positive attribute; several respondents cited overly technical procedures and the incomprehensibility of magistrates' decisions as reasons for distrusting primary courts.

In contrast, Moore's study of Chagga customary law yields valuable evidence of the "enduring results" of colonialism. Moore argues that the legal models developed in the administrative center of the Tanganyika colony continued in the post-colonial period and that these models are fundamentally unsuited to the inner dynamics of Chagga society.[53] Even the formation of Ward Tribunals with a specific mandate reflecting elements of traditional dispute management did little to change perceptions of the national court system among the Chagga. Moore argues that this system did not capture the nature of Chagga dispute resolution, given their institutionalized processes and the fact that they had to adhere to a written code. Despite legal and economic theorizing to the contrary, Moore argues that the so-called rigid customs of many societies in Africa were grossly misread:

---

[49] Moore (1986), 161.
[50] Ward Tribunals Act, No.7 of 1985.
[51] Lawi (2003).
[52] *Ibid*.
[53] Moore (1992), 42.

> "There is a widespread assumption outside anthropology that preindustrial peoples are somehow more rigid about their oral rules than postindustrial ones are about their written laws. This is simply not so. Among peoples such as the Chagga, the flexibility of many supposedly rule-governed arrangements was and is a basic fact of life even as it is amongst ourselves."[54]

Many communities therefore used their own community based dispute resolution processes rather than using the state-administered Ward tribunal. Widely varying use of the tribunals on Kilimanjaro indicated that some communities were "already well served by a variety of existing dispute-hearing agencies: primary courts…and the informal, ad hoc groups of kin and neighbors who heard and decided or negotiated cases, as did local officials, priests and pastors, and even ten-house cell leaders [elected officials with the authority to hear all disputes within his territory]." [55]

Unfortunately, formal reforms of customary institutions often undermined traditional systems, while failing to create adequate alternatives for different communities. One clear response to the breakdown of traditional customary systems and the failure of the state to provide access to justice is the emergence of the *Sungusungu*-traditionally organized village defense groups; these were developed in the 1980s, largely in response to rising crime rates and a general perception that established institutions were unable to supply law and order. *Sungusungu*, a Swahili word for an aggressive species of ant, emerged as a new model of meting out justice in 1982 among the Sukuma people of northwest Tanzania. The 1979 war in neighboring Uganda led to increased lawlessness, and government officials were seen as corrupt and unable to control crime.[56] Initially the new system targeted cattle rustling, but it was eventually adapted to deal with all manner of disputes and customary issues, from marriage and divorce to witch trials. It spread rapidly throughout the country, and within a year had transformed into a large-scale system and an ethnic duty among the Sukuma.[57]

One of the most effective tools of *Sungusungu* has been the widespread cooperation and coordination across a substantial number of villages. A recent study identified one case in which armed thieves robbed a store. Guards from five neighboring villages were called upon to monitor the periphery of the area and apprehended two of the four criminals. Other cases have driven *Sungusungu* leaders and guards to travel more than 100 miles in order to capture thieves and bring them to justice. The study also found that coordination efforts are enforced by ostracizing villagers (and in some cases entire villages) that refuse to fully participate.[58]

While technically illegal, the *sungusungu* have not only enjoyed the support of many local communities but have been informally supported by the state due to their large impact in reducing crime. [59] At the same time, *sungusungu* have avoided cooption by the

---

[54] Moore (1986), 38.
[55] *Ibid*., 165.
[56] Bukurura (1994), 5.
[57] Paciotti and Hadley (2004), 119.
[58] *Ibid*., 130.
[59] The government embraced *Sungusungu* when its reach was fully known, and in 1989 the People's Militia Laws granted it quasi-legal status. Former Prime Minister Edward Sokoine went so far as to call it a

state and their lack of knowledge of the law and people's rights can arguably lead to abuse. The *Sungusungu* does, therefore, highlight some of the questions raised about the conflict between customary law and human rights, particularly in the areas of due process and fair punishment. Given its vigilante nature, reports of bloody beatings for petty crimes abound. Additionally, there are concerns that women are unfairly treated, given their lack of representation within the *Sungusungu.* Women were targeted exclusively in the popular witch trials conducted by *Sungusungu* groups in the 1980s; some estimate that thousands of women were tried and many killed during this period.

The state's attempt to legitimize *Sungusungu* by legislation in 1989 and again in 1997 has not brought about increased accountability of leaders; the US State Department noted that as of December 1998, no one had been tried for the use of excessive punishment.[60]

Rwanda: From the formal to informal

At the height of the monarchy, the kingdom of Rwanda covered much of its current terrain and comprised 80 administrative districts, divided further into hills. State institutions, such as the army, had representation in each of these districts and served to reinforce state authority and military control.[61] It is thus unsurprising that pre-colonial institutions in Rwandan society differed sharply from those of the Haya, the Arusha and the Chagga in Tanzania.

In the kingdom of central Rwanda, justice was a function of the highly-regimented state. d'Hertefelt notes "clientship and political structures largely superseded the kinship groups as the loci of adjudicatory functions, with the exception of internal familial disputes." [62] Under the feudal system, clients were tried by their pastoral lords or local land chiefs. Plaintiffs could also appeal directly to the king's court, though this required the support of an official and depended largely on an individual's social status; only wealthy Tutsi ventured into the higher courts. Access to justice in the formal system was highly regulated; disputants in land chief's courts were required to solicit the presence of lineage heads, or in the case of superior courts, their local army chiefs. Those who appeared without the support of authorities were found in contempt of court and could be sentenced to death.[63]

The centralized nature of the Rwandan state precluded the development of informal mechanisms that prevailed in other societies in East-central Africa. The few exceptions to this general rule appeared on the peripheries of the Rwandan kingdom in smaller communities in the north. Among these groups, dispute settlement was much less subject to state control. Any person that held authority could be called upon to adjudicate disputes between those for whom he was responsible. In practice, this meant that disputes between two people of the same lineage were handled by *inzu* (household) and lineage heads, while disputes between members of two different lineages were discussed by the

---

"cultural revolution." Kahura (2004); See also Mwaikusa (1995), 166-178 for a discussion of these complex issues. Also see Bukurura (1994).

[60] U.S. Department of State (1999).

[61] Sebasoni (2000).

[62] D'Hertefelt (1988), 429.

[63] Ibid.

heads of each group, as well as a "council of elders."[64] Anthropologists devoted little attention to these processes, focusing instead on the complexity of the judiciary under the king- *Mwami*; as a result, most histories of Rwanda mention informal justice only in passing.[65]

Colonial Developments

Germany colonized Rwanda in 1897. While they pushed for centralized control and modernization, they relied heavily on local leaders to maintain control. Following a dominant obsession with race present at the time, the Germans saw the Tutsi ruling class as a superior racial type given their apparent romanticized Hamitic origins. After control of the colony shifted to Belgium in 1916, ethnicity increasingly played a role in both administrative and judicial functions of the colonial government. Government-issued reports in the 1920s employed phenotypic distinctions between the Tutsi and the Hutu to justify behavioral generalizations. Tutsi rulers were described as natural leaders destined to reign and "without pity or scruples, using the lance against the weak and poison against the strong."[66] What were once descriptive terms hardened into classifications with ethnic and socio-economic dimensions, exacerbated by the Tutsi's minority status. Even this was erroneously calculated: population estimates took "Tutsi" and "chief" to be synonymous, thereby counting as Hutu the 90 percent of Tutsi that lived in villages and did not hold positions of leadership. These figures exacerbated tensions and reinforced notions of oppressive Tutsi dominance.[67] Tutsi's became synonymous with the elite oppressors, oppressing the majority Hutu.

The transition to independence arguably left Rwanda with no clear or legitimate system of governance outside of a history of centralized control. Within this void, Rwandan social norms underwent a breakdown. In 1964, the new "democratic" regime in Rwanda elicited the support of Catholic missionaries, burgomasters and local officials to organize a massacre of about ten thousand Tutsi[68]. The violence was not a result of increasing lawlessness, as in Tanzania in the 1980s, but rather a systematic shifting of the norms that underpinned the law. By the 1990s, anti-Tutsi propaganda (disseminated by organizers close to the president) stressed the "duty" of the Hutu majority to fight a just war against minority oppressors.

The effect of this propaganda was to legitimize violence and deepen ethnic cleavages at the community level. In 1994, more than half the total population of Rwandan Tutsi perished at the hands of 75,000 to 150,000 thousand killers, often neighbors wielding simple weapons.[69] Most disturbingly, individuals entrusted with important community functions, including teachers, doctors and church officials, served key roles in the killing. The networks that had held Rwandan society together in the past, at least in theory, now worked to undermine its very foundations.

---

[64]Ibid., 428.
[65] See, for example, Maquet (1961), Lemarchand (1970), Newbury (1998), Prunier (1995), and Chrétien (2003).
[66] Établissements Généraux D'imprimerie (1926), 34.
[67] Chrétien (2003), 285.
[68] *Ibid*., 306.
[69] Maogoto (2001).

The first priority of the new government was to stabilize the country and diminish the atmosphere of confusion and distrust. This became increasingly difficult with massive refugee inflows; starting in late 1994, an estimated 600,000 Tutsi and tens of thousands of Hutu returned from neighboring Tanzania, Uganda and Congo to find their homes missing or occupied and their land destroyed[70]. Beyond property concerns, there was an immediate fear that reprisal killing would occur if the culture of impunity established over the last five decades continued. Addressing demands that perpetrators be brought to justice, and that survivors and their families have access to land and property, was thus elemental to the stabilization process.

Post-Genocide Rwanda

In the years immediately following the genocide, leaders floated a number of proposals for dealing with the suspects. A traditional justice mechanism called *gacaca*, a Kinyarwanda term literally meaning "crushed grass," was first proposed at a government-led symposium in 1995. At the time, as responses to the proposal were not favorable: survivor's groups worried that a revival of a largely reconciliatory process would result in amnesty for genocide perpetrators; perpetrators feared that airing grievances in such a public setting might incite mob violence and put them in danger; and the international community feared that such a system might compromise established legal norms for dealing with acts of genocide.

At the same time, the International Criminal Tribunal for Rwanda, enacted in 1994 by the UN Security Council, had little impact on community-level relations. Individual prosecutions undertaken by an international group of legal experts could only address a small element of the greater problem of rebuilding norms and social cohesion at the local level. To supplement the ICTR, the government established genocide courts. Despite increases in trained legal personnel and court capacity (which peaked at a rate of about 2,500 trials per year), the magnitude of the problem only grew as large numbers of perpetrators turned themselves in and overwhelmed detention centers. By 2001, the Rwandan government estimated that it would take 200 years in the conventional courts to try all 100,000 prisoners.

Left with few alternatives, leaders reexamined the potentials of a *gacaca*-style institution to lessen the burden on the judicial system. In early 2001, the Rwandan Parliament passed a revised law laying out the foundations for Gacaca. In the same year, 9,000 communities each elected 19 *inyangamugayos*, or "persons of integrity," to serve as lay judges. An additional 5 people were selected to represent the cell at higher-level gacaca courts, based in each sector of the country. A pilot phase of the program commenced in June 2002 in twelve sectors equally distributed throughout the nation's provinces.

It is important to note that there are few records of the use of *gacaca* during or prior to the consolidation of the Rwandan monarchy, except for scant descriptions of "informal" dispute resolution by lineage heads on the peripheries of the kingdom. A legacy of German and Belgian colonial policy, coupled with the highly centralized Rwandan state prior to colonization, had resulted in a highly centralized system of formal courts under

[70] *Ibid*., 309.

executive control. Further, modern *gacaca* institutions are radically different in jurisdiction and practice from traditional systems that did exist. The new formulation is "customary" in its involvement of large numbers of people in village courts, use of lay judges, and informal, discussion-based procedure. Outside these considerations, gacaca is a top-down process implemented by the Kigali-based Ministry of Justice and accompanied by major "sensitization" campaigns aimed to gain public confidence in the system. Prosecutor General Gerald Gahima affirmed this idea, stating:

> "[Gacaca] is the concept of getting the community to participate in justice, getting the community to be involved in dispensing justice…But Gacaca has never dealt with issues of criminal justice with crimes of such gravity. So it's a concept, an inspiration we borrowed. We are not replicating Gacaca as it has existed in the past."[71]

Reports of the effects of Gacaca courts are mixed. Some commentators argue that the participatory process by which the courts were established and the involvement of communities in the reparations process has an impact beyond the individual victims. However, some victims groups are skeptical of Gacaca's emphasis on consensus and popular approval. They note that many survivors are forced to participate in courts in which the judges, even if they themselves were not involved in the genocide, may be closely allied with the guilty parties.

It is significant to note that the main proponents of Gacaca were former members of the Tutsi rebel army. The leadership of the RPF overlapped considerably with the new leadership in the interim government, leading many to suggest that the procedure would favor Tutsis. This criticism remains; to date, *gacaca* courts have not considered retaliation crimes committed by RPF soldiers against unarmed Hutu civilians after the genocide.

South Africa – the state of customary law

A paper of this length cannot adequately describe the plethora of pre-colonial judicial systems in South Africa. The southern part of the continent is home to several hundred ethnic groups, many of which were consolidated into kingdoms analogous to Rwanda prior to colonial intervention. Pre-colonial customary systems, adapted heavily through interaction with the state, remain the primary form of dispute resolution in rural areas. Since many of these systems had common structures, this section adopts a general perspective based on different accounts of various customary systems in South Africa.

Transkei, Transvaal, and the Orange Free State areas were settled with Bantu-speaking communities as early as the eleventh century. Sachs offers a generic description of adjudication procedures from this period to the beginning of occupation. He emphasizes that Africans generally represented themselves and a premium was placed on successful pleading and negotiation skills. If these mechanisms failed, parties could press their case before the chief, who, with the advice of his councilors (group of elders), would issue judgments in line with the social norms of the group. [72]

---

[71] Gahima (2002).

[72] Sachs (1973), 98.

Ayittey offers a more detailed description of the "advanced legal institutions" of the Bantu societies in the lower third of the continent. Ayittey argues that even in early practices parties were often represented in a relatively complex adjudication process. A bench of judges composed of a chief and representatives of various community groups (probably elders) sat in a semi-circle facing an audience of community members in the center of an outdoor courtyard. Litigants generally sat on either side of the assembly, also facing the elders. Both parties stated their cases, witnesses were called, and finally judgment was pronounced by the bench in a specific order: members seated on the outer ends of the semi-circle (those farthest in hierarchy from the chief) would issue their opinion first, followed by higher-ranking officials. The chief made the final judgment after considering the statements of the bench.[73]

Xhosa litigation procedures were described as more informal: an individual with a complaint appointed a party of advisers, including spokesmen and witnesses, to state his case to the opposing party in the latter's home. After the defendant had consulted his advisors, the parties would meet and discuss the terms of an agreement without a third-party mediator (a process which bears resemblance to the earlier description of dispute resolution among the Arusha). If they failed to agree at this initial point, the dispute would be appealed to the headman and later to the chief's court (*kgotla*).[74] For crimes such as murder, the cases would be taken directly the *kgotla.* [75]

Ayittey distills several principles from Southern African systems, including:

(1) court sessions were open to the public, and all men present were free to cross-examine witnesses and express their opinions;
(2) the chief had the power to compel both parties to attend hearings, and no judgments were rendered by default;
(3) at the court level, there is no legal representation;
(4) though the chief presides, his decision reflects a consensus of the bench;
(5) all records are kept orally;
(6) proceedings are highly informal, such that community members may come and go as they please, talk quietly amongst themselves, and bring food and handicrafts to meetings.[76]

Colonial developments

Colonial recognition of customary law in South Africa varied considerably between the British-administered Cape Colony and the Boer-held regions to the East. In the Cape, local chiefs were replaced with white colonial magistrates. In the Transvaal, as in Natal, the Boers grafted a colonial hierarchy onto existing institutions, leaving the original structures largely unchanged and adding a "Superintendent of Natives" appellate court controlled by government authorities above them.[77]

---

[73] Ayittey (1991), 49.
[74] The same terminology was later used to refer to informal community courts (*makgotla*) in South African townships.
[75] *Ibid*., 50.
[76] *Ibid*., 54.
[77] Bennett (1991), 61.

Indirect rule was in full force in British South Africa and although "chief's courts" retained an aspect of local control in name, in practice they were dominated by the colonial apparatus. Of the Cape Colony, Albie Sachs wrote:

> "the effective repositories of power in the tribal areas were white magistrates – 'fathers of the people' – whose wide-ranging functions extended from hearing law-suits to advising local tribesmen of the approach of a comet…the chiefs were no longer spokesmen for independent communities, but rather low-ranking officials in the governmental hierarchy, expected to do the bidding of the magistrates and the Native Affairs Department." [78]

State-law pluralism, or the co-existence of various official state laws, began in the 1830s when chiefs in Cape Colony were granted authority to enforce indigenous law (subject to review by a colonial official). The tradition continued for several decades and evolved to include legislation like the Kaffraria Native Succession Ordinance, which conferred official recognition on native institutions. Unification of the colonies in 1910 brought renewed interest in customary courts as a mode of controlling the emerging class of African workers. The 1927 Black Administration Act formed the basis for apartheid in separating whites and Africans under a dual-system of official law.[79] The large communities of Muslims, Hindus, and Jews in South Africa have won little support in the legal system; their remains no explicit recognition of no religious personal law by formal courts in South Africa.

Post Apartheid

There are two major sets of informal and at least partially customary justice systems in place in modern South Africa. The first are the chiefs' and headmen's courts, a legacy of the colonial period. About 1,500 of these operate in rural parts of the country and remain governed by the 1927 Act. "People's courts," also known as community courts or unofficial tribunals in urban areas (usually townships) constitute the second type; these emerged as early as 1901 but did not proliferate until the State of Emergency was declared in 1970[80].

Chiefs' and Headmen's courts operate at the discretion of government-recognized African authorities. As yet, there is no hierarchy between these courts or Magistrate's Courts; any one can serve as a court of first instance. The overlap allows for forum-shopping on the part of plaintiffs, which often inconveniences defendants and increases administrative costs.[81] Recent law reform projects have targeted this problem by proposing a hierarchy that designates the headmen's courts as those of first instance and the chiefs' courts as appellate bodies.[82]

Headmen's courts proceed very informally, usually outside a kraal on the grass and under the shade of a tree. [83] Once the men of the community have assembled, the headman

---

[78] Sachs (1973), 111.
[79] Van Niekerk (2001), 349.
[80] Bennett (1991), 90.
[81] *Ibid*., 69
[82] South African Law Commission (2003), 5.
[83] Koyana (1980), 72 gives evidence that courts have modernized since Hammond-Tooke (1962)'s analysis: "Although in the olden days the venue of the court was the cattle-kraal, the chiefs' and headmen's courts

arrives and sits opposite them. The plaintiff then makes their case, enduring few interruptions from the seated assembly. After the defendant states their case, witnesses are called in no particular order. The assembly then begins to discuss the issues of the case in very broad terms. It has been noted that some of the questions asked of disputants would bear little relevance in Western-style courts, but in the intimate atmosphere of headmen's proceedings these queries can reveal much. When the headman feels discussion has yielded a consensus, he pronounces a judgment in line with the assembly's conclusions. When a clear verdict is not reached, his character can heavily impact the proceedings.[84]

The Chief's court employs a more systematized procedure. Though conditions vary by region, the venue is generally indoors, with seating for participants. The chief sits at a table at the front of the room, with a secretary to his left to take written notes. The case is entirely re-stated and clarified with questions from the chief (and no other members of the assembly, unless they are recognized by the Chief). At the close of the presentation, the chief discusses the evidence with his secretary and either renders a judgment or calls for further witnesses. In the rare instances when he requires outside input, the chief solicits opinions from the assembly. Decisions are binding to the extent that social pressure ensures that parties self-enforce, as the chief has weak power in the realm of law enforcement. Despite the apparent formality, these proceedings are reported to be fairly flexible and amicably conducted. [85]

Lest these descriptions lead one to believe that little has changed in the traditional systems, an iteration of legislative developments and review of discrepancies between pre- and post-colonial procedures indicates otherwise. Some of the fundamental principles of indigenous dispute resolution described by Ayittey (as reviewed above) were dramatically affected by nineteenth century laws. The precepts that called for open cross-examination of witnesses, judgment based on consensus of a panel of elders, and oral recording of events no longer apply in chiefs' courts. Default judgments, traditionally prohibited in Southern Africa, were legalized in 1951.[86] These procedural shifts accompanied countless substantive changes in the letter of the law, particularly as it relates to the status of women in customary marriages, land rights of tribal authorities, and the conferral of authority on selected Africans.[87]

People's Courts have emerged more recently in urban setting for similar reasons as Tanzania's *sungusungu* groups: rising crime levels coupled with (or perhaps due to) poor access to justice and law enforcement, lack of confidence in the formal justice system (often viewed as an extension of the colonial system), and a desire on the part of communities to gain some level of control over local governance.

Hund and Kotu-Rammopo provide a complex description of People's Courts in Mamelodi township, outside Pretoria. The urban courts were run by local affiliates of

---

now sit in modern courthouses in which the general administrative functions of the tribal authority are also carried out."

[84] Hammond-Tooke (1962) (quoted in Bennett (1991), 70).

[85] *Ibid*., 72.

[86] Republic of South Africa, Government Notice 2885 of 1951.

[87] South African Law Reform Commission (2004).

tribal authorities in rural areas, and accompanied several layers of informal conflict resolution and prevention mechanisms, including neighborhood patrols to protect private property, vigilante groups and occasionally gangs. These were collectively known as *makgotla* (singularly as *lekgotla*). The lekgotla in the ward under study in Mamelodi formed in 1977 after a young man was released from a police station without being prosecuted for seriously assaulting a female resident. This event, coupled with the general prevalence of crime in the township, prompted a group of outraged community members to take justice into their own hands. The resulting vigilante group, called the "Volunteers," began patrolling the neighborhood and flogging any individuals who violated the law. Despite reports of a dramatic decrease in violence over the next two years, the Volunteers were not viewed favorably by government officials, who claimed their methods violated basic principles of due process. They were later sued in a magistrate's court, after which their influence dwindled considerably.

Other forms of adjudication operate in Mamelodi, under the supervision of tribal representatives, "cultural movements" (brotherhoods) and gangs. Those who turn to the first mechanism (who are the smallest percentage of those with disputes) are usually from rural areas and the lowest socio-economic class in the township. Cultural movements, some with as many as 20,000 card-carrying members, handle the bulk of disputes and have replaced organizations like the "Volunteers" in controlling crime using authoritarian rather than communitarian methods. Of the Vukani Vulimehlo People's Party, a self-described grassroots cultural movement, Hund and Kotu-Ramoppo observe: "brute force is the main factor behind its *makgotla* and the tyranny of the organization lies in the autocratic rule of its leader." Gangs operate with similar principles but were less organized, composed mainly of young, unemployed truants.[88]

Since 1994 South Africa has worked toward bringing traditional systems into the state framework. Traditional institutions and laws are all officially recognized in the 1996 constitution. After a long political process, the national Traditional Leadership and Governance Framework Act was promulgated in 2004, setting out the roles and responsibilities of different levels of traditional leaders and institutions, and their relationships to the different levels of government.

Many celebrated the constitutional and administrative recognition of customary law, but there clearly are difficulties. The South African Law Commission recently issued two reports identifying problems with the law on traditional authorities and suggesting a legislative overhaul. There is consensus that the Black Administration Act (BAA) was a foundational element in the destructive effect of indirect rule. As the Commission argues, "This Act has been one of the principal mechanisms for regulating African people's lives under apartheid and the fact that it remains on the statute book is an embarrassment to the new South African constitutional democracy."[89] The Commission proposed a repeal of the BAA, excepting certain provisions that should remain under other branches of government. The Commission's report serves as a modern illustration of the interaction

[88] Hund and Kotu-Rammopo (1983) as quoted in Bennett (1991), 94.

[89] South African Law Reform Commission (2004).

and frequent conflicts between codified customary law and changing socio-legal norms in a new democracy with significant urban populations.

Customary courts are also currently the subject of a draft bill on traditional courts and the judicial function of traditional leaders. The primary reforms proposed in the draft bill include:

- Creating a hierarchy of customary courts within each ethnic group, and granting formal recognition of headmen's tribunals that still operate unofficially;
- Ensuring that the composition of councilors in customary courts is representative of the community and includes a reasonable proportion of women;
- Clarifying the jurisdiction of customary courts as based on geographical as opposed to ethnic or racial considerations;
- Eliminating the 'repugnancy clause' from the colonial era and replacing it with the requirement that all court decisions must keep with the spirit of the Bill of Rights and Constitution of South Africa;[90]
- Allowing customary courts to apply common law and statutory law, within their jurisdiction and subject to certain restrictions;
- Requiring customary courts to keep basic records of proceedings, and establishing regional Registrars to periodically compile this information;
- Granting disputants the right to representation (not including legal practitioners); and
- Permitting defendants to opt out of the jurisdiction of a customary court in all criminal cases.[91]

These proposed reforms highlighted the changing needs of the South African State, and how non-traditional mechanisms may help meet these needs. At the same time, concerns have been raised about the current legislative arrangements and whether customary practices are in line with formal legal principles, such as the rights in the constitution and the new South African Bill of Rights.[92]

Implications for Justice Sector Reform

The accounts provided above show how deeply entwined customary legal systems are in local cultures and history—indeed, they are constituent elements of the very social fabric. The uniqueness and idiosyncrasy of each context means that attempts by external agents to introduce new, uniform procedures are inherently destined to struggle. The policy conclusion from this, however, should not be that nothing can be done until exhaustive efforts have been made to "understand" local legal systems so that they can be made

[90] Repugnancy clauses were the subject of great debate in newly independent African states. The report holds that these "were a colonial creation to prevent enforcement of customary laws or practices if they offended western moral standards…the old repugnancy clause has been overtaken by time and its scrapping should be welcomed by all." It further argues that conforming to the Constitution does not impose the same burden on customary law since it is much broader than colonial policy. See South African Law Commission (2003), 14.

[91] *Ibid*., 11-14.

[92] See Bennett (1999) for a discussion of this issue.

more "compatible" with formal/state systems; doing so would be hugely time consuming, and unlikely to fundamentally alter the balance of power or overcome the pervasive information asymmetries that exists between local communities and external legal professionals.

We suggest instead that 'pro-poor' judicial reform initiatives should focus on creating new mediating institutions wherein actors from both realms can meet—following simple, transparent, mutually agreed-upon, and accountable rules—to craft new arrangements that both sides can own and enforce. Rather than being stand-alone "judicial reform" projects, these initiatives would be appended on to (and/or incorporated into) more mainstream development projects, seeking to use the powerful incentives associated with accessing material resources for roads, schools, etc. as a basis for establishing new precedents and procedures for decision-making and priority-setting.

References

Allott, Antony (1970). *New Essays in African Law*. London: Butterworths.

Augustinus, C. (2003). "Comparative Analysis of Land Administrations Systems: African Review with Special Reference to Mozambique, Uganda, Namibia, Ghana, South Africa." World Bank. Washington DC. Processed.

Ayittey, George B. N. (1991). *Indigenous African Institutions.* New York: Transnational Publishers.

Bennett, T.W. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Cape Town: Juta & Co.

Bennett, T.W. (1999). *Revised Reprint of Human Rights and African Customary Law under the South African Constitution.* Cape Town: Juta and Co.

Bowen, John R. (2003). *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning*. New York: Cambridge University Press.

Bukurura, Sufian Hemed (1994). "The Maintenance of Order in Rural Tanzania: The Case of the Sungusungu". *Journal of Legal Pluralism* 34: 1-29.

Buscaglia, E. (1996). "Justice and the Strengthening of Democracy", Paper presented before the USAID sponsored Conference on Justice and Democracy. Quito, Ecuador, August 7-9.

Buscaglia, E. (1997). "Introduction to Law and Economics of Development" *Law and Economics of Development*, New Jersey, JAI Press: 13-18.

Bush, Robert A. (1979). "Access to Justice and Societal Pluralism" in Cappelletti, Mauro and Garth, Bryant (eds.). *Access to Justice, Vol. 3.*, Milan: Guiffre Editore.

Carlston, Kenneth. (1968). *Social Theory and African Tribal Organization*. Chicago: University of Illinois Press.

Centre for Housing Rights and Evictions (2004). *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* Geneva: Centre for Housing Rights and Evictions.

Chirayath, et al. (2004). "Establishing Collective Norms: Potentials for Participatory Justice in Rwanda," *Peace and Conflict: Journal of Peace Psychology* 10: 1-24.

Chrétien, Jean-Pierre (2003). *The Great Lakes of Africa*. New York: Zone Books.

Constitution of the Federal Democratic Republic of Ethiopia (1994).

Constitution of Sierra Leone (1991).

Cory, Hans and M.M. Hartnoll (1971). *Customary Law of the Haya Tribe*. London: Frank Cass, 256.

D'Hertefelt, Marcel (1988). "The Rwanda of Rwanda" in Gibbs, James L. (ed.) *Peoples of Africa*. Prospect Heights: Waveland Press.

Ellickson, Robert. (1991). *Order Without Law: How Neighbors Settle Disputes.* Cambridge, Mass.: Harvard University Press.

Escobar, Arturo (1995). *Encountering Development.* Princeton, NJ: Princeton University Press.

Établissements Généraux D'imprimerie (1926). *Rapport Présenté par le Gouvernement Belge au Conseil de la Societé des Nations au Sujet de L'administration du Ruanda-Urundi Pendant L'année 1925.* Brussels.

Evans, Peter (1998). "Transferable Lessons? Re-examining the Institutional Prerequisites of East Asian Economic Policies" *Journal of Development Studies* 34 (6): 66-85.

Gahima, Gerald (2002). Interview with the author. Kigali: 4 July 2002.

Glaeser, E. L., J. Scheinkman, and A. Shleifer (2002). "The Injustice of Inequality." Harvard Institute of Economic Research, Discussion Paper Number 1967, Harvard University.

Global Fund for Women (1999). Africa Report, *Rwanda: Repairing Lives, Recovering from Genocide*, www.globalfundforwomen,org/4news/africa-report/10-rewanda.html

Gluckman, Max (1969). "Introduction" in *Ideas and Procedures in African Customary Lw : Studies Pesented and Discussed at the Eighth International African Seminar at the Haile Sellassie I University, Addis Ababa, January 1966*. London: Oxford University Press.

Gulliver, P.H. (1969). "Case Studies of Law in Non-Western Societies." in Nader, Laura (ed.), *Law in Culture and Society*. Chicago: Aldine Publishing Company.

Gulliver, P.H. (1963). *Social Control in an African Society*. Boston: Boston University Press.

Hammond-Tooke, W.D. (1962). *The Bhaca Society: a People of the Transkeian Uplands, South Africa*. Cape Town: Oxford University Press.

Hellman, Joel S., G. Jones, and Daniel Kaufmann (2003). "Seize the State, Seize the Day: State Capture and Influence in Transition Economies." *Journal of Comparative Economics* 31: 751-773.

Hund, J. (2000). "Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice." *Comparative and International Law Journal of Southern Africa* 33: 366-389.

Hund, J. and Kotu-Rammopo, M. (1983). "Justice in South African Townships: the Sociology of Makgolta", *Comparative and International Law Journal of Southern Africa* 16: 179-208.

Kagame, Paul (2002). Interview with the author (Chiriyath). Kigali: 16 July 2002.

Kahura, Dauti (2004). "In Tanzania, A Different Ball Game for Groups." *The East African Standard*, Nairobi, 19 July.

Koyama, Digby Sqhelo (1980). *Customary Law in a Changing Society*. Cape Town: Juta & Co.

Kranton, Rachael E. and Anand V. Swamy. (1999). "The Hazards of Piecemeal Reform: British Courts and the Credit Market in Colonial India" *Journal of Development Economics* 58(1): 1-24.

Lawi, Yusufu Q. (2003). "Justice Administration Outside the Ordinary Courts of Law in Mainland Tanzania: The Case of Ward Tribunals in Babati District." in *African Studies Quarterly* 1(2).

Lemarchand, Rene (1970). *Rwanda and Burundi***.** Pall Mall: London.

Lyamuya, Addy Nyambo (2002). "The Administrative Judicial Personnel and Court Process: Their Role in the Collection of Evidence and Execution of Judgments in Tanzania Mainland" in Jones-Pauly, Christina and Elbern, Stephanie (eds.), *Access to Justice: the Role of Court Administratos and Lay Adjuticators in the African and Islamic Contexts*. The Hague: Kluwer Law International.

Mamdani, Mahmoud (1996). *Citizen and Subject – Contemporary Africa and the Legacy of Late Colonialism.* Fountain Publishers, Kampala, David Phillip, Cape Town and James Currey, London.

Mamdani, Mahmoud (2001). *When Victims Become Killers*. Princeton: Princeton University Press.

Maogoto, Jackson Nyamuya (2001). "International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory" in *Bond Law Review* 13: 190-223. (http://www.bond.edu.au/law/blr/vol13-1/Maogoto.pdf)

Mattei, U. (1998). "Legal Pluralism, Legal Change and Economic Development.", in Favali, Lyda, E. Grande, and M. Guadagni, eds. *New Law for New States,* Torino, Italy: L'Harmattan Italia.

Maquet, Jacques (1961). *The Premise of Inequality in Ruanda: A Study of Political Relations in a Central African Kingdom.* London: Oxford University Press.

Maogoto, Jackson Nyamuya (2001). "International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory." *Bond Law Review* 13(1): 202.

Moore, Mick (1997). "Societies, Polities and Capitalists in Developing Countries: a Literature Survey". *Journal of Development Studies* 33(3): 287-363.

Moore, Sally Falk (1986). *Social Facts and Fabrications*: *"Customary" Law on Kilimanjaro, 1880-1980*. Cambridge: Cambridge University Press.

Moore, Sally Falk (1992). "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running 'Their Own' Native Courts," in *Law and Society Review* 26:16.

Mwakajinga, Andrew Nehemiah (2002). "Court Administration and Doing Justice in Tanzania." in Jones-Pauly, Christina and Elbern, Stephanie (eds.), *Access to Justice: the Role of Court Administratos and Lay Adjuticators in the African and Islamic Contexts*. The Hague: Kluwer Law International.

Mwaikusa, J.T. (1995). "Maintaining Law and Order in Tanzania: The Role of Sungusungu Defence Groups", in Semboja, J. and Ole Therkildsen (eds). *Service Provision Under Stress in East Africa: The State, NGOs, and People's Organizations in Kenya, Tanzania, and Uganda.* Copenhagen. Center for Development Research: 166-178.

Nel, Sanette (2001). "Community Courts: Official Recognition and Criminal Jurisdiction – a Comparative Analysis" in *Comparative and International Law of Southern Africa* 34: 7-108.

Newbury, Catharine (1998). Ethnicity and the Politics of History in Rwanda. *Africa Today* 45 (1): 7-25.

Nyamu-Musembi, Celeste (2003). *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*. Sussex: Institute of Development Studies.

Paciotti, Brian and Craig Hadley (2004). "Large Scale Cooperation among Sungusungu "Vigilantes" of Tanzania: Conceptualizing Micro-economic and Institutional Approaches", *Research in Economic Anthropology* 23: 119.

Pistor, K. (1999). "The Evolution of Legal Institutions and Economic Regime Change". Paper Presented at the Annual World Bank Conference on Development Economics *Governance, Equity and Global Markets*. Paris, 21-23 June, 1999: 9.

Pistor, K. and P. Wellons (1999). *The Role of Law and Legal Institutions in Asian Economic Development*. Hong Kong: Oxford University Press.

Posner, Eric. (2002). *Law and Social Norms.* Cambridge, Mass: Harvard University Press.

Prunier, Gérard (1995). *The Rwanda Crisis: History of a Genocide.* New York: Columbia University Press.

Republic of South Africa (1951). *Government Notice 2885.*

Sachs, Albie (1973). *Justice in South Africa*. Berkeley: University of California Press.

Sanders, Edith (1969). "The Hamitic Hypothesis: Its Origin and Function in Time Perspective." *The Journal of African History* 10(4): 521-532.

Sarkin, Jeremy (2001). "The Tension Between Justice and Reconciliation in Rwanda: Politics, Human rights, Due Process and the Role of the *Gacaca* Courts in Dealing with the Genocide" in *Journal of African Law* 45: 142-172.

Sebasoni, Servilien (2000). *Les Origines du Rwanda.* Paris: L'Harmattan.

Seidman, Robert B. (1978). *State, Law and Development*, N.Y.; St. Martin, Croom Helm, Ltd. London.

South African Law Commission (2003). *Report on Traditional Courts and the Judicial Function of Traditional Leaders*., January.

South African Law Reform Commission (2004). *Report on the Repeal of the Black Administration Act 38 of 1927*.

U.S. Department of State (1999). *Human Rights Practices for 1998: Tanzania Country Report*. Bureau of Democracy, Human Rights, and Labor, U.S. Department of State. February.

Van Niekerk, Gardiol (2001). "State initiatives to Incorporate Non-state Laws into the Official Legal Order: a Denial of Legal Pluralism?" in *Comparative and International Law of Southern Africa* 34: 349-361.

Welsh, Bridgett (2003). "Street Justice: Vigilantism in West Java." School of Advanced International Studies, Johns Hopkns University, Mimeo.

World Bank (2001). *Engendering Development: Through Gender Equality in Rights, Resources and Voice*. New York: Oxford University Press.

Widner, Jennifer (2001). *Building the Rule of Law*. New York: W. W. Norton & Company.