



Policy Brief

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Policy Brief Nr 17, October 2009

A place for tradition in an effective criminal justice system

Customary justice in Sierra Leone, Tanzania and Zambia

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INTRODUCTION

Customary laws regulate the rights, liabilities and duties of different ethnic groupings and were the traditional method of dispute resolution in pre-colonial Africa, administered by chiefs and headmen. Such law differs from place to place and ethnic group to ethnic group, being a function not of geography as much as tribal allegiance. As such, customary law can potentially provide justice that is more relevant and accessible than formal criminal justice systems that use concepts imported from colonial powers.

This policy brief summarises research made in three African states into both the official and informal roles of customary law and attitudes towards it. The research aims to understand the role custom currently plays in African legal systems and the extent to which its full potential has been realised.

CUSTOMARY LAW FROM THE COLONIAL ERA TO INDEPENDENCE

In those areas colonised by the British an effort was made to formalise customary law systems, by establishing a dual system of law whereby English common law was applied in areas affected directly by their rule but customary or traditional law was used in areas under 'indirect rule'. From the outset the colonial regime recognised customary law, especially in the area of personal law, and so-called 'native courts' were established in most of Britain's African possessions.

Customary laws therefore existed as parallel legal systems to serve indigenous people, administered by local leaders.

At independence, Governments were faced with the dilemma of two legal systems, one formal and English in nature, and one informal and rooted in the myriad of different tribal traditions that existed within the colonially defined borders. States attempted to create a single system that contained elements of both the formal and the customary traditions. In Sierra Leone and Zambia dual systems were maintained, with local courts that enforced customary law which was enshrined as part of the legal system, even though it remained largely uncodified and unwritten. In Tanzania customary law was restricted to civil matters, with the lower *primary courts* including non-expert *assessors* who attempted to ensure custom is respected.

In Sierra Leone customary law is enshrined in the 1991 Constitution, which states that the common law comprises customary law as well as the penal code. 'Customary law' is defined as the rules that by custom are applicable to particular communities of Sierra Leone. Customary justice is dispensed in line with the beliefs, customs and traditions of the inhabitants of the local area through the administration of customary law by local courts. The local courts have a limited jurisdiction, regulating marriage and divorce, and adjudicating land disputes and minor criminal cases: limited to those where the maximum penalty is imprisonment for six months or a fine of £50 sterling. Local courts, of which there are 288 in the country, dispose of a significant volume of minor criminal cases. They are presided over by local elders, proficient

in customary law; no lawyers are present, but customary law officers assist in the proper application of customary law. The law these courts enforce is however unwritten, geographically dependent and often ad hoc. There is also a dedicated police force, the Chiefdom police that operates under Chiefdom councils and local senior police officers, and a local detention facility, the Chiefdom lock-up.

In Tanzania there are three systems that exist in parallel: the formal criminal justice system, customary law and Islamic law, although the latter two are not formally recognised. The Magistrates' Courts Act of 1963 abolished the criminal customary law, which was jettisoned in favour of English common law. The significant role customary law has played has been diminished by section 11 of the Judicature and Application of Laws Act which although recognising the applicability of customary law, declares that customary law is only applicable to matters of a civil nature. The disconnection between the official justice system and customary notions leads to the existence of a parallel criminal justice regime which operates outside the official state system and largely beyond state control and supervision. However customary law still has an impact on the working of the lower level primary courts, in which assessors can support and even overrule a magistrate's decision, and from which prosecutors and advocates are forbidden as the concerned individuals conduct their case. Assessors are not trained in English law and their adjudication is largely customary in style. Even in the High Court assessors have a limited advisory role in sharing their opinions with the presiding judge. Alongside the customary law is the Islamic law for the Muslim community, applicable to personal civil matters such as marriage, divorce, guardianship and inheritance.

In Zambia, the customary criminal justice system refers to the courts of chiefs and headmen which have existed since pre-colonial times, but today have no formal status and exist parallel to the formal legal system. At independence local courts were established that stripped traditional leaders of their judicial role and allowed the constitutionally recognised role of customary law to be enforced by a formal mechanism that lacked any connection to the traditional arbiters of custom. Local courts are run by officers of the state who lack both the knowledge of customary law of tribal chiefs and the respect given to traditional leaders. The local courts are the lowest courts of the formal system but share a common jurisdiction in customary law matters with the unrecognised chief's courts.

CONTEMPORARY CUSTOMARY LAW IN PRACTICE

The English law that now constitutes the basis of the legal systems of the ex-British colonies remains alienating to a majority of the populations of those states. Such law is not embedded in the customs and traditions of those societies; it is complex, technical and expensive to implement. For ordinary people it is inaccessible, often physically remote and in many cases conducted in a language they do not understand. Customary law potentially offers a solution to these many constraints. However in all three states discussed here customary laws have never been unified or codified: in Zambia, for example, customary law consists of the law of 73 ethnic groups. The exact law that will be applied will depend upon the tribal region concerned, as well as the leader administering it. This is one of the great benefits of customary law: since it is not written it can evolve with the needs of communities at a local level. Customary law also incorporates mediation and restorative elements: compensation can be paid to the wronged and reconciliation is emphasised within a framework in which the entire community is engaged.

In Sierra Leone, the local courts system has been less effective in recent decades as a result of a lack of state subsidies and salaries for the courts, excessive political interference and a lack of staff, including customary law officers. In all areas this has impacted on the quality and speed of justice delivered and in some places courts have simply ceased to function. Fines are not standardised across courts, and in some courts fines have become exorbitant as they have become a principle source of funding. Despite these constraints however satisfaction with the courts remains high in both rural and urban areas. Generally judgements are perceived to be based upon investigations and witness statements, and fines demanded are reasonable. Outstanding problems include the fact that transport costs constitute a barrier to accessing local courts and that the courts are perceived to discriminate against women.

Tanzania is the one case among the three states where customary law is not explicitly part of the judicial framework, even if the primary courts have some of the elements of a customary approach. The remoteness of the formal legal system is seen in the tendency to report offences to the *Sungusungu*, the traditional militia, rather than to the police. The disconnection between the official justice system and customary notions has allowed the emergence of a traditional criminal justice

regime which operates largely beyond state control and supervision. For example, in the central and lake zone regions of the country, it is not uncommon for communities to punish people suspected of committing the 'offence' of witchcraft, mostly elderly women, without benefit of the principles of fair trial that are outlined in the Constitution.

In Zambia informal customary law remains a viable system with Chiefs' courts functioning well but the existence of a formal parallel system of Local Courts means that it lacks the support of the state. There is no infrastructure to the customary law system, with most proceedings taking place informally under trees, and no support of the state in enforcing its decisions. In the Local Courts tasked with enforcing customary law, there is no expertise since local chiefs and headmen are not part of the court. Even when there is a local court in an area, people prefer taking their cases to customary courts because they are considered fairer (except with regard to gender and age): the traditional system, though unwritten, is more familiar to most than the statutory system. The customary criminal justice system is considered to be part of the traditional dispute resolution system and takes a short time to administer. In contrast to the formal courts that use English, local languages are used in customary courts. The lack of any written law leaves customary courts open to abuse or inconsistency, but this can be challenged by the fact that clan leaders represent clan members at proceedings. Where the decision of a customary court is disputed, it can be taken to a higher level (i.e. ultimately to paramount chiefs) as a form of appeal system.

THE CHALLENGE OF CUSTOM: DISCRIMINATION AGAINST WOMEN

Whilst customary law provides a flexible and accessible way for disputes to be resolved at the community level, it also reinforces prevailing hierarchies, not least since the chiefs who dispense such law are invariably older and wealthier men.

The lower status of women in many communities in Sierra Leone allows extra-judicial divorce to be granted, and fails to prevent child marriage, often to prominent elder men. Furthermore, marriage under customary law does not confer an absolute right to guardianship of children, nor does it confer any right to property on divorce. Cohabitation outside marriage is not protected by customary law, denying inheritance. In one case in the Eastern Region a woman was fined by a local court

for refusing intimacy with her husband and having a boyfriend.

In Zambia customary law and practice place women in a subordinate position to men with respect to property, inheritance and marriage, and such laws are often applied despite various constitutional and legislative provisions on equality. Irrespective of whether the system is patrilineal or matrilineal, male domination is common among all ethnic groups. The Intestate Succession Act, explicitly designed to challenge the traditional practice of privileging male inheritance, has been bypassed through the use of local courts, leaving widows receiving little or nothing from their dead husband's estate.

The net result of customary law dispensed by unrepresentative elites is that decisions can violate the law and constitution of the state concerned, as well as the fundamental rights of the victims of such discrimination. It remains a dilemma to resolve the contradictions between a rights-based legal regime and customary law that privileges traditional understandings, such as men as head of the family and the collective nature of duties and responsibilities that underlies customary law. The cultural authenticity or practical expedience provided by customary law should never be upheld at the expense of effective protection of human rights. The challenge is therefore to regulate the content and application of customary law so that it offers better protection and promotion of human rights in local communities.

CONCLUSIONS

In all three states studied here, it has been seen that customary law is more accessible and more relevant to ordinary people than the formal criminal justice system. The three states have taken different approaches to the incorporation of customary law. Sierra Leone and Zambia have explicitly given customary law a role in both civil and criminal justice through local courts, but implemented in different ways. In Sierra Leone these courts are adjudicated by the chiefs and elders who are custodians of tribal customary law. In Zambia the exclusion of such traditional leaders from local courts reduces their attraction to the public, who continue to ensure that the informal customary law system under tribal chiefs flourishes despite its exclusion from the state system. In Tanzania criminal law excludes all customary approaches, and only the presence of assessors in primary and other courts ensures a customary element to proceedings.

In Sierra Leone there is widespread satisfaction at the accessibility and performance of the local courts and a general distrust and dislike of the general law courts by people who seek to settle disputes within the ambit of their customs and traditions. Customary dispute settlement gives satisfaction to parties in disputes, whichever way a judgment goes, as is evident from the findings about the perceptions of people in relation to customary justice delivery in their local areas. Since 70 per cent of the people of Sierra Leone do not have access to the formal justice system, customary law is crucial in delivering justice more broadly.

In Tanzania pressure is mounting for the abolition of the position of assessors in primary and other courts, or to empower magistrates to reject the opinion of the assessors. This would constitute the final rejection of any customary component in the criminal justice system. An alternative strategy to increase the role of customary law in the formal system would be to attempt to bring the substantial customary judicial activity that continues unofficially in communities, into the state system in some way. The Law Reform Commission is currently undertaking a study to both challenge those customary laws that are repugnant to the Constitution and Bill of Rights, and to review the Customary Law (Declaration) Orders of 1963.

Whilst the informal customary law system in Zambia is popular it remains ignored by all governance structures. In addition to a lack of political will to give the system an official status, it is widely perceived to be difficult to restore its former prestigious position pre-independence. However, in the absence of equitable access to the official local courts the unofficial customary proceedings are preferred by the people.

Criminal justice systems in many parts of the African continent are teetering on the verge of collapse as their capacity to deliver justice effectively and speedily is challenged: customary justice offers a potential solution. This study shows that populations prefer the greater access, speed and familiarity of law and process rooted in their own culture and traditions. Empowering and formalising customary process as part of the state-sanctioned justice system and adjudicated by respected local elders can allow affordable and credible justice to be delivered within communities. Safeguards however are required to protect those disadvantaged by traditional hierarchies. Whilst all the states examined here still have challenges to overcome, those that have most comprehensively incorporated tradition into law have created systems that are most responsive to the needs of communities.

RECOMMENDATIONS: ENSURING THAT CUSTOM HAS ITS PLACE

Since customary law systems are both more accessible and more favoured, recommendations largely concern ensuring the status of the customary justice system and in particular in guaranteeing that its role and interaction with other elements of the justice system are well defined.

In Sierra Leone the jurisdiction of local courts should be expanded, through a revision of the Local Courts Act, and a comprehensive review conducted to drive this process. This review must be accompanied by reform of the customary judicial system, including an addressing of the organisational, personnel and fiscal issues that reduce the effectiveness of the local courts, notably concerning regular payment of salaries and training of local court personnel and Chieftdom police.

In Zambia the position of traditional chiefs as the arbiters of customary justice should be restored to give customary law a proper place in the judicial system, rooted in those individuals respected by communities. A reinstatement of customary laws and usage would provide a basis for increasing the understanding of these laws, from which a review of the existing status of customary law can commence; there is a need for inconsistencies and misinterpretations of the oral tradition of customary law to be addressed through a documentation of the system and the keeping of records of tribunals. This should be accompanied by encouragement of interaction between the customary and the formal systems.

For Tanzania, the marginalisation of customary law in the judicial administration of criminal justice alienates the official criminal justice process from the people, and an institution and its collateral system cannot thrive if it is not embedded in the customs of a society in question. While it may be argued that no society has ever escaped borrowing from external institutions, a total transplantation of alien law based on unfamiliar customs, without necessary refinement or filtration, undermines the legitimacy of that law. Therefore, the country must find a way of incorporating customary law in a consistent way into the formal system.

NOTE

This brief is derived from the country reviews conducted by the AHSI in Zambia, Sierra Leone, Mali, Benin, and Tanzania. See the following ISS monographs: The Criminal Justice system in Zambia, No 159; Sierra Leone: A country review of crime

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and criminal justice, No 160; Mali: Criminalité et Justice
Criminelle, No 162; Benin: Revue de la Justice Criminelle, No
163. The monograph on Tanzania is forthcoming.

