

**NON-STATE INSTITUTIONS AS A BASIS OF STATE RECONSTRUCTION:
THE CASE OF JUSTICE SYSTEMS IN AFRICA**

THEME: REINVENTING THE AFRICAN STATE AND REDIFINING ITS ROLE IN
DEVELOPMENT.

A PAPER PRESENTED
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ABSTRACT

The state in Africa today is at a crossroad. With the ending of the cold war and the retreat of its juridical importance, a number of countries have imploded along fault lines that were hitherto held in check. Others are struggling to adopt the requirements of democracy, breeding all sorts of contradictions. All these challenges are taking place against the onslaught of globalization, which fast threatens to wrestle the state's control of and relevance to its citizens. However, in the absence of alternative political and economic institutions, the state still remains the chief institution that must negotiate with and cushion Africans from the vagaries of globalization; in a sense, retaining its interventionist role. This therefore calls for the African state to urgently and continually reinvent itself, establishing and renewing its legitimacy in the eyes of its people.

This paper interrogates ways through which the state in Africa can be made more responsive and relevant by incorporating non-state institutions into the formal state structures. Specifically, the paper looks at how the various legal systems in the continent could benefit from the rich experiences of traditional and popular judicial systems, that are central to society's organizing in large parts of the continent especially in rural Africa, but which the formal state for various reasons continues to ignore. In the process, the paper also investigates how these non-state systems could be made more contemporary to reflect the realities of Africa today, while still responding to the specificities and particularities of various communities.

State failure in Africa

Many of the African states have variously been described as failed or collapsed at one time or throughout their post independence lives. They have been variously described as shadow states (Reno 2000), quasi-states (Jackson 1990), criminalized states (Bayart, 1999), disrupted states (Saikal 2000) or collapsed states (Zartman 1995; Cornwall 1999). This is because they have failed to guarantee the minimum requirements to the majority of their citizens, to whom the state has increasingly become an alien construction. However, since African states were born during the cold war, the international face of the state from the beginning outstripped its domestic importance. The juridical (international)

base of statehood maintained African states for much of the post-colonial period, despite severe limitations in terms of their empirical (domestic) statehood (Forrest, 1998). Thus the great challenges in the post independence era has been how to consolidate authority within the international boundaries which are largely taken as a given.

According to Herbst (2000), the fundamental problem facing state builders in Africa, be they pre-colonial kings, colonial governors or presidents in the post independence era has been how to project authority over inhospitable territories that contain relatively low densities of people. Sub Sahara Africa with 18% of the world's surface has always been sparsely settled, with only 11% of the world's population in 1997. Relatively low population densities have automatically meant that it always has been more expensive for states to exert control over a given number of people compared to Europe and other densely populated areas.

This challenge of broadcasting power has been primarily compounded by the nature of the state and its institutions as inherited from colonialism. Most African states differ from other states around the world along most of Weber's and Young's criteria. They are dubious communities of heterogeneous and occasionally clashing linguistic, religious and ethnic identities; their claim to force is rarely effective and much less monopolistic; their governments' frequently predatory nature fails the test of legitimate use of force; their territory is generally at best hesitant and contested and their existence as an idea is

usually limited to an urbanized and schooled minority. In a nutshell, most African states fall short of the requirements for statehood. (Englebert, 2000)

The empirical weakness of African states is a product of their history. The majority of contemporary African states are exogenous institutions superimposed over preexisting political structures and inherited by domestic but westernized elites at independence.

While the feature of an artificial state is not unique to Africa, Africa has the highest proportion of countries where the process of state creation was exogenous to their societies and where the leadership of the ruling class inherited the state rather than shaping it as an instrument of its existing or developing hegemony. As a result, African states were born lacking legitimacy; they were not historically embedded into domestic relations of power and domination, and they therefore suffered from a dichotomization between power and statehood

Explaining this dichotomy, Leonard and Straus (2003) observe that at the dawn of independence, colonial state institutions had only partially transformed the African landscape. African had centralized bureaucracies, nominally modern infrastructure, monetized market economies, a dual system of law and new cultural systems. States that oversaw these institutions covered newly crafted territories. But overall, the states were not powerful. They were marked by shoestring budgets, constant compromises with whichever local actors could be brought online and external sources of power. In short, even if the colonial states internal apparatus were strong, even if they were far more

developed than the preexisting institutions and even if they were authoritarian, their reach and depth were limited. When attempts were made to extend states out of the colonial capital, the states were forced to compromise with local forces on the ground, the net result being that the colonial system was coercive but not strong. Africa's transition to self rule did not alter substantially this picture. Weak states persisted. Statehood continued to derive primarily from the international system.

Weak states in Africa are also a product of the changes within African nationalism that took place after independence. In its infancy, African nationalism understood two critical lessons which were soon abandoned at its prime; first, the nation was not a monolithic entity, rather, it was made up of different segments and interests, which were to be carefully woven into the national fabric. Secondly, those who flocked under the nationalist banner expected that their lives would be improved as a result of decolonization (Mustapha, 2004). However, nationalist triumphs were soon to forget these critical lessons, resulting in the authoritarian deformations afflicting most post colonial states in Africa today. In a sense, these states suffer from a failure of the nationalist vision of the immediate pre- independence era.

Compounding this nationalist phenomenon was also the nature of nationalist organizing. During the terminal colonial period, politics became national in many countries as nationalist movements emerged. However, neglect of the rural areas by colonial governments over decades, combined with organizational problems posed by the large

peasant population atomistically dispersed across a vast hinterland that had few roads or telephones, deterred most politicians from investing heavily in mobilizing the rural areas. As a result, nationalist politics in the 1950s and the 1960s were very much urban based.

The nationalists received states that were appropriate to the way they had conducted their politics: primarily urban with few links to the surrounding countryside where most of the population lived. In turn they furthered the urban bias of their states by marginalizing peasant populations and by providing urban groups with privileged access to many of the resources allocated by the state.

This lack of domestic statehood which translates into a lack of legitimacy of the political system as a whole reduces the loyalty of citizens vis a vis state institutions perceived as alien and makes them more likely to choose 'exit' rather than 'voice' options when faced with policies of leadership they disapprove of. Therefore, rulers of non legitimate states are caught up in a crisis of power: ruling over non legitimate system undermines the very essence of their own power, even if they were themselves legitimately elected and dramatically reduces their freedom of political action and the range of feasible policies.

This is especially critical given that the physical costs of state expansion in Africa are still very high. Indeed many African leaders have not been successful in expanding the scope of the state so that they could be said to be ruling their entire territories. The unfavorable geography, coupled with the poverty of many African states and the

inherited state designs have all made it very difficult for African states to expand their authority outside the core urban areas. As a result, how power is expressed today is similar to the pre-colonial model of concentric rings of authority. States control their political core but often have highly differentiated control over the outlying areas (Herbst, 2000). In addition, the existence of several disrupted or collapsed states in Africa means that there are regions where there is no over-arching authority.

Therefore, the exercise of power by the central government, especially in many parts of rural Africa has been arbitrary. This has not however meant an end to politics in these areas. On occasions, it has rendered more visible the social bases of power that exert more real world influence over the lives of most Africans.

Predicting on state reconstruction in these areas without viable state presence, Forrest (1998) observes that it may not be imitative of the colonially imposed modern state structure but may represent a hybrid authority system combining aspects of pre-colonial, colonial and contemporary leadership structures in ways that more accurately reflect the existing social and political bases of rural societies.

Non-state Justice Systems in Africa

When most sub Saharan African countries became independent in the early 1960s, the majority of African citizens were resolving their disputes using traditional and informal justice forums. Despite their popularity, these forums were regarded as obstacles to

development. It was thought that as Africa became more contemporary, they would eventually die out. This did not occur. Informal and traditional modes of settling disputes have remained as widespread as ever (PRI, 2000).

Their persistence is largely explained by the failure of governmental structures inherited from the colonial state in Africa. This failure has stimulated renewed interest in indigenous knowledge and institutions in recent years. This renewed interest is based partly on the fact that these institutions have proven to be resilient and the fact that they are more effectively institutionalized and are relied more upon by African people to provide them with required goods and services in the face of the failure of the formal, colonial based structures. Such goods and services include; security, roads, bridges, schools, and mechanisms for conflict resolution among others (Olowu and Orero, 2001).

Specifically, traditional and informal justice mechanisms continue to be useful in Africa for a number of reasons; they overcome the principal obstacles which deny access to formal justice systems to many: in practice, traditional justice systems are quick, carried out within walking distance, carried out in the local language with procedures that are understood by all and enforced by people who are socially important to litigants. In addition, they avoid the "prohibitive" costs to individuals and governments where formal state systems are relied upon. The end goal of traditional justice in Africa was primarily the restoration of peace and social harmony by reconciling the parties to the disputes and the wider communities involved in the dispute. Therefore, justice was more restorative

than retributive. This is important especially in communities where formal law apparatus are not always available when needed, where vast areas remain ungoverned in the conventional sense and where the formal government machinery is thin and stretches over vast territories (ibid; Musembi, 2003, undated).

However, a number of criticisms have been leveled against these forms of justice; they are discriminatory, on the basis of age, gender, social status and family circumstances, they have weak linkages with the judiciary and other relevant formal institutions, lack harmonization because they are as varied as there are ethnic groups, and sometimes even variations within the same ethnic group exist and they have also been accused of not being codified, therefore open to varied interpretations and applications.

Their applicability in the current context of the continent has also been greatly questioned. According to Osaghae (2000), in the post colonial period, traditional conflict management strategies remain localized, although the exigencies of colonial rule necessitated the generalization of practices among enlarged ethnic communities. In effect, the strategies remain located in ethnic communities and this makes the adoption of one strategy more likely to be seen as continuation of ethnic hegemony, therefore, exacerbating the conflict. The relevance and applicability of traditional strategies has been greatly disabled by the politicization, corruption and abuse of traditional structures, especially traditional rule ship which have steadily delegitimized conflict management built around them in the eyes of many. The expansive nature of modern conflicts also limits the extent to which traditional strategies can be applied. Although

most present day conflicts, like those of the old center on the struggles for power and succession disputes, among powerful individuals and groups, the wide range of actors and forces, including external ones as well as the national and sometimes regional scope of the conflicts render expedient traditional strategies inadequate. However, as Osaghae (2000) observes this argument underestimates the volatility of so called simple conflicts that can quickly degenerate to involve a big part of the community because of the organic character of traditional communities. Often, simple and large scale or complex conflicts are usually two sides of the same coin. Therefore, resolution of day to day conflicts helps to ensure the stability needed for the prevention or resolution of more serious ones.

Traditional conflict resolution mechanisms are also not static. They represent a synthesis of time honored practices and new techniques, as communities adapt their customs to cope with fundamentally new types of conflict arising from the constantly evolving social, cultural, political and economic circumstances in which they operate; these practices are adaptable and dynamic as opposed to static and timeless (Menkhaus 2000).

A number of reasons have been advanced for the need for incorporating traditional systems into modern conflict resolution efforts. This will help mitigate the disabling effects produced by the perception of United Nations and western powers' conflict resolution and management initiatives as extensions of foreign intervention of the recolonization kind. This perception is reinforced by the larger context of economic and political adjustments which have rendered many insolvent African countries new colonies in all but name (Osaghae (2000)). Although proponents of this school may be accused of

romanticizing Africa's past, PSI (2000), observes that Africans would be less concerned about romanticizing Africa's past than about accepting wholesale another regions past and romanticizing imported Western legal institutions.

From the perspective of indigenous knowledge, the incorporation of traditional systems not only helps to contextualize conflict management but also facilitates the participation of local people who are usually left out of search for peace processes and ensures the sustenance of endangered indigenous formations. Without such contextualization and local participation, interventions in unfamiliar terrain may actually exacerbate rather than reduce conflicts. Allowing for broader community participation also enhances the legitimacy of the process and community ownership of the final outcome.

In the final analysis, both formal and informal systems have their merits, which may vary according to factors such as the nature of the dispute and the relationship between parties. Therefore, rather than being viewed as adversaries, the main concern should be which system provided the most appropriate solutions in what types of cases and how each system's comparative advantages can be enhanced and disadvantages minimized. According to Olowu and Erero, (2001), the institutional crisis in Africa cannot be resolved by relying exclusively on either enclave transplant institutions or purely traditional institutions. The solution is neither in formalizing (or getting rid of) informal

Institutions, nor in informalizing of formal institutions, but in reconciling and encouraging convergence between adapted formal institutions and renovated informal, indigenous institutions.

There are various ways through which non formal justice systems are institutionalized in Africa. They could be state sponsored, community based or NGO supported alternatives. At various moments, governments have officially created or appropriated informal dispute resolution forums that draw from local norms, customs, and practices. Some of these forums are *ad hoc*, their operations being limited to a specific sector like land in Kenya or the Gacaca in Rwanda. Others have an on going role and their jurisdiction is general. Such systems are found among the Ward Tribunals in Tanzania, the Local Council Committee courts (LCC) in Uganda and also in Botswana.

Community based arrangements are the most widespread, most practiced but least visible forms of non formal justice systems. They are hinged on a community's traditions and their everyday experiences. These are as varied as there are different communities and even variations within the same community. They have different degrees of visibility and formality. Examples include:

- intra-family mediation practices, which are known to exist but are not easily observable;

- clan-based systems, which differ from community to community in the degree to which there is a discernible structure and process of decision-making;

neighborhood-based processes that draw in neighbors as mediators;

referral, where such mediation efforts fail, to authority figures such as local administrators for adjudication, notwithstanding that officially they are not given any quasi-judicial powers;

adjudication arrangements set up by networks such as committees overseeing community development projects, associations of traders and artisans and self-help groups.

There has been some NGO involvement in community-based justice systems, in some cases revitalizing 'traditional' systems and in others supporting the emergence of alternative community-based systems. Most such interventions have taken place in areas affected by armed conflict. For example, in Northern Uganda, Oxfam and local Ugandan groups such as ACORD have been providing financial and logistical support as well as capacity building geared toward strengthening community-based dispute resolution systems (Mwaura & Schmeidl 2002; African Rights 2000). Another example is the 'peace elders initiative' facilitated by the Centre for Conflict Research, which has been working in areas such as Laikipia district in Kenya (ICJ 2002). Yet another initiative by a group of market women in Kenya's Wajir district led to the formation of the Wajir Peace and Development Committee which now facilitates the resolution of disputes by inter-clan mediation. The initiative is also linked into the District Security Committee to deal with larger problems that may threaten peace in the area (Video: The Wajir Story 1998). Similar support has come from NGOs, sometimes in conjunction with some bilateral

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

No doubt efforts at strengthening the non-state systems of justice and attempts to make them more visible in Africa will face a number of challenges, not least because of the inherent weaknesses of these systems. The various actors including the civil society, government authorities and the civic population will have to adopt creative ways to deal with these challenges that are entrenched in the system. They include:

Assessing and building legitimacy and accountability. According to Musembi (2003), the less formal and visible a forum is, the more difficult it will be to assess the level of accountability to the people it serves. It is difficult to ensure the accountability of community based forums that do not have a clearly identifiable decision making structure such as family mediation processes. On the other hand, non-formal adjudicative forums sponsored by the state place little emphasis on being answerable to the people they are intended to serve. Attempts to build in downward accountability through elections have not necessarily enhanced their legitimacy, as this has been compromised by political patronage and public perception of the officials as corrupt. Yet the use of appointments has yielded mixed results, with some officials gaining the trust of communities while others are rejected. NGO assisted initiatives raise question as to whether the decision makers are accountable to the

NGO that provides the resources or to the community served. Issues of enhancing non formal justice mechanisms will have to go hand in hand with instituting ethics of governance so that undermining factors especially as they emanate from poor governance can be eliminated.

Another challenge has to do with lack of inclusiveness particularly on the basis of gender and age. In various countries, this problem has been variously tackled including the establishment of a quota system for state sponsored forums applying customary law. Educating the community on the need for inclusiveness has also been largely practiced by NGOs. A related problem has to do with conflict with human rights especially in relation to cruel punishments meted out to suspects by vigilante-style neighborhood security networks. A clear system of differentiating between legitimate non state institutions and those bordering on criminality will help resolve this ambiguity.

One of the greatest challenges facing non state justice institutions is to define the nature of relations that should exist between state institutions, especially those dealing with judicial matters and administration and the non state institutions. Since the simultaneous use of both formal and informal justice mechanisms is a reality for a majority of Africans, then ways through which the two institutions can enhance one another should be worked out.

According to Musembi (2003), there is need to establish clear institutional linkages with the judiciary. This would allow routine review to prevent gross abuses of natural justice,

in much the same way that high courts routinely review lower courts decisions. He further notes that some member of the judiciary view informal forums, as corrupt and needing to be reigned in. Relations with formal courts are sometimes openly hostile, in some cases causing litigants extra expense when decisions of informal processes or administrative processes such as the Land Disputes Tribunals are questioned in court.

On the other hand, PRI (2000) argues that even if it is possible to incorporate several features of traditional justice into state criminal justice processes in order to improve access to justice for the poor and for sections of the population where literacy levels are low, as a general rule, incorporating traditional and informal systems into formal state hierarchy of courts should be avoided as it tends to undermine the positive aspects of traditional and informal justice without any real gain.

Conclusion

The role of traditional authorities in much of Africa, especially in pastoral areas where land is still communally owned is especially important especially due to the many conflicts arising out of land use. Because in these areas land is largely held in trust by the traditional authorities, they wield a lot of power among their people. Since this control gives them a certain measure of legitimacy in the eyes of the community, the formal state must develop and maintain a rough equilibrium in conventional politics between itself and traditional leaders, where neither makes significant inroads on the other's turf, but instead look for ways of tapping on each others strengths. At this juncture, the role of

traditional justice resolution mechanisms as implemented by elders is especially critical for the state.

Precisely how far governments go in utilizing these non-state mechanisms differs from country to country. Ordinarily, the extent to which traditional and informal systems are incorporated into formal systems or remain voluntary dispute resolution forums depend in great part on the historical circumstances prevailing in a particular country.

However, while weaknesses inherent in these types of institutions must be recognized, the society must move an extra mile to reform them where possible, making them more contemporary and in sync with people's lives. Successful reform strategies are likely to be those that build on existing strengths and redress obvious weaknesses. One entry point is where there is already recognition of the need for change by the very people who are the 'caretakers' of the institutions.

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

'budget-neutral' substitute for a comprehensive reform policy toward making formal systems accessible, affordable and useable (Musembi, 2003).

Since the simultaneous use of the two systems of justice is a reality for the majority of Africans, a synergy of the two should be more desirable where each system's comparative advantages are enhanced and disadvantages minimized. Experience has shown that some changes (for example, to permit gender equity) are less likely to be approved from within the non-state systems. The state has a direct role to play here: when the state incorporates or sanctions customary norms, it still has a constitutional obligation to uphold norms such as equality and non-discrimination. Further, efforts towards the combination of the formal legal concepts and institutions such as arbitration and mediation with traditional ones that are intended to achieve reconciliation as in the case with Ward Tribunals in Tanzania (Nabudere, 2002) should be made. This would especially work well with lower courts and the non-state institutions.

Bibliography

Africa Rights, *Facing the Genocide, The Nubia of Sudan*, London, 1995.

Bayart, F., et al (1999), *The Criminalization of the State in Africa*, Oxford, James Currey.

Cornwall, R. 1999. The collapse of the African state. In *Peace profit or plunder? The Privatisation of Security in War-Torn Societies*, edited by J. Cilliers and P. Mason. Halfway House: Institute for Security Studies.

Englebert, P., (2000), *State Legitimacy and Development in Africa*, London, Lynne Rienner.

Forrest, J., (1998), State Inversion and Non-State Politics' in Huxtable, P. and Villalon, L. (eds) *The African State at a Critical Juncture*, London, Lynne Rienner.

- Herbst, J., (2000), *State and Power in Africa: Comparative Lessons in Authority and Control*, New Jersey, Princeton University Press.
- Human Rights Watch, *Going Back to the Basics in the Sudan*, London, 1999.
- Jackson, R. H. 1990. *Quasi-states: Sovereignty, international relations and the Third World*. Cambridge: Cambridge University Press.
- Leonard, D. and Straus, S., (2003) *Africa's Stalled Development: International Causes and Cures*, London, Lynne Rienner
- Menkhaus, K., (2000), 'Traditional Conflict Management in Contemporary Somalia' in Zartman, W. (ed) *Traditional Cures for Modern Conflicts*, London, Lynne Rienner
- Musembi, C., (2003), *Review of Experience in Engaging with Non-State Justice Systems in East Africa*, DFID
- _____ (undated), *Traditional Justice Institutions. Can they be more effective?*
<http://www.id21.org/insights/insights43/insights-iss43-art07.html>
- Mustapha, A., *Intra State Challenges to the Nation- State Project in Africa*, a paper presented at the Conference on the African Union and New Strategies for Development 26th-28 January 2004, Addis Ababa.
- Nabudere, D. W., (2002), 'Towards the Study of Post Traditional Systems of Justice in the Great Lakes Region of Africa' in *East Africa Journal of Peace and Human Rights*, Vol 8 No. 1.
- Nyang'oro, J., (2001), *Greater Horn of Africa Peace Building Project*, Washington, D.C USAID.
- Osaghae, E., (2000), 'Applying Traditional Methods to Modern Conflict: Possibilities and Limits' in Zartman, W. (ed) *Traditional Cures for Modern Conflicts*, London, Lynne Rienner
- Ouko, M., (2004), *Sudan Civil Society Peace Building Initiative*,
<http://www.fmreview.org/text/FMR/21/10.htm>.
- Penal Reform International (PRI), (2000) *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems*

Prendergast, J., (1996), *The Outcry of Peace in the Sudan*, Washington D.C, The Center for Strategic Initiatives of Women.

Reno, W. 2000. Clandestine economies, violence and states in Africa. *Journal of International Affairs* 53, Vol 3. No. 1.

Saikal, A., 2000. Dimensions of State Disruption and International Responses. *Third World Quarterly* Vol. 3 No 1.

Smock D.R., (1997) *Building on Locally Based and Traditional Peace Processes*, <http://southsudanfriends.org/LocallyBasedPeace.html>

Sudan Mirror, (2002), *Building Accountable Societies in the Sudan*.

Kimathi, L., (2002), *The Role of the United Nations High Commission for Refugees in Dealing With Refugees in Kenya, 1963-1999*, Nairobi, Kenyatta University, Unpublished Thesis.

Zartman, W. I., ed. 1995. *Collapsed States: The Disintegration and Restoration of Legitimate Authority*. Colorado: Lynne Rienner Publishers.