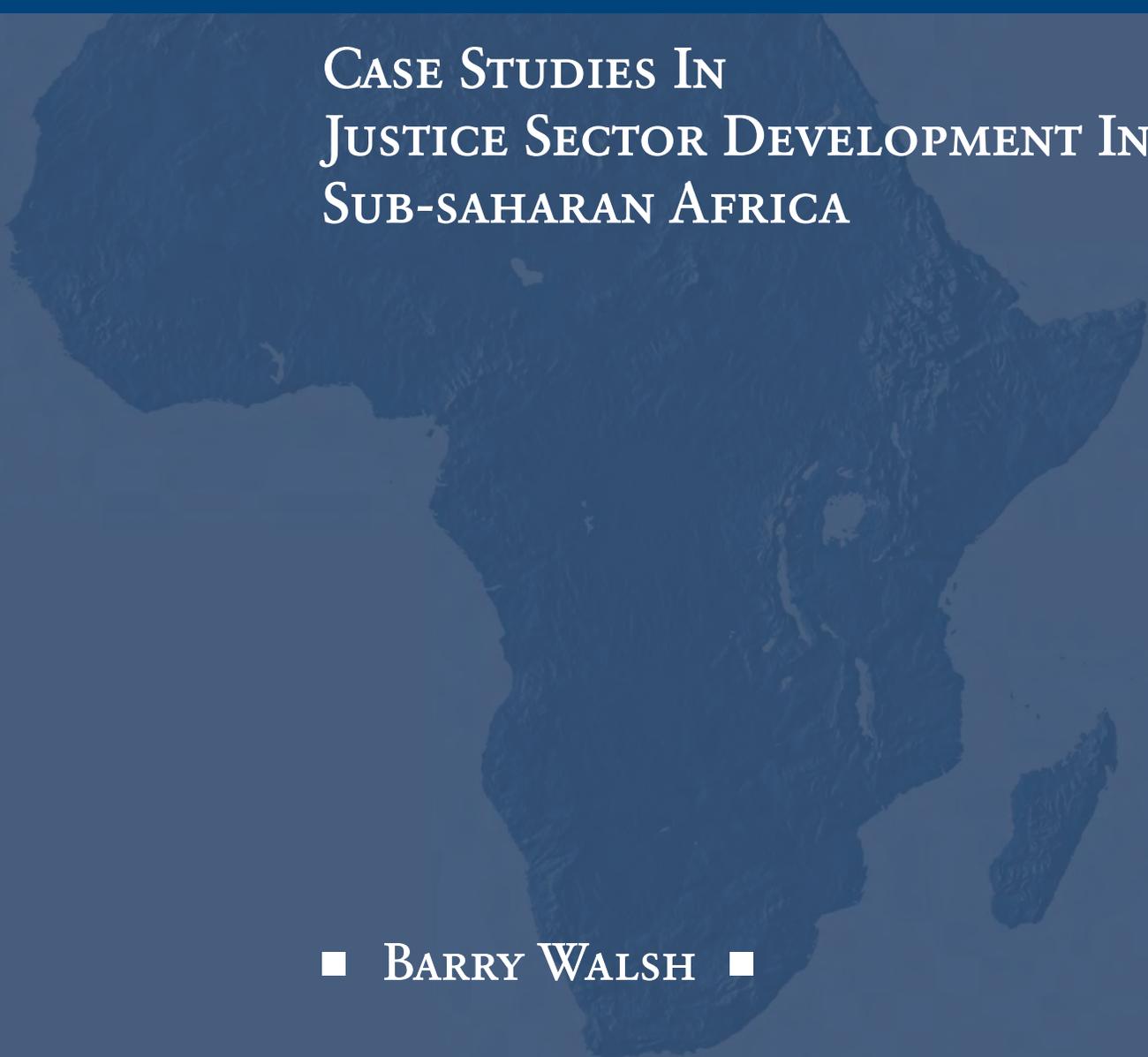


57445

IN SEARCH OF SUCCESS

CASE STUDIES IN
JUSTICE SECTOR DEVELOPMENT IN
SUB-SAHARAN AFRICA



■ BARRY WALSH ■

In Search of Success:

**Case Studies in Justice Sector
Development in Sub-Saharan Africa**

Barry Walsh

June 2010

Contents

In Search of Success:

Case Studies in Justice Sector Development in Sub-Saharan Africa

Foreword.....	4
Acknowledgments.....	6
Acronyms and Abbreviations.....	7
Executive Summary.....	9
1. First Aid in Justice – Alternative Legal Aid in Africa.....	16
Poverty vs. Access to Justice.....	16
Developing Conventional Legal Aid Systems	18
Developing and Using Paralegals	19
A Nation-Wide Paralegal Advisory Service in Malawi	22
Community Paralegals in Sierra Leone.....	24
Conclusions	26
2. Getting the Record Straight – Improving Court Record Management and Court Administration in Ethiopia.....	27
The Court Record and New Technology.....	27
Using New Court Technology in Ethiopia.....	29
Success Factors of CAR II	33
Conclusions	36
3. Trusting the Court – A Judicial Transparency and Accountability Mechanism for Magistrate Court Stations	37
Judiciary Dialogue Cards	38
Court User Committees	39
Peer Review Committees	39
Judiciary Dialogue Boards	40
Conclusions	41

4. Taking Care of Business – Strengthening Commercial Justice Systems in Africa....	42
The Organisation for the Harmonisation of Business Law in Africa.....	43
Conclusions about OHADA.....	46
Special Commercial Courts.....	46
Commercial Courts in Tanzania.....	47
Conclusions about Commercial Courts.....	49
5. Home Spun Justice – State Administered Mediation Services in Nigeria.....	50
Citizens’ Mediation Centre	51
Donor Support to Mediation Administrative Systems Development.....	53
Performance Measurement of Mediation Services	53
Conclusions	57
6. Knowing the Law – Publishing Laws and Case Outcomes.....	59
Codified law	59
Case law	60
Commercial Law Publishing.....	61
Internet Access to Law	61
National Council of Law Reporting of Kenya	63
Conclusions	65
7. Courts of Last Resort – Open Sky Trials in the Aftermath of Genocide.....	67
International Criminal Tribunal for Rwanda ... in Tanzania.....	68
Re-establishing Justice in Rwanda.....	68
The <i>Gacaca</i> Courts Initiative	69
Delay and Rapid Case Clearance	73
Conclusions	76
8. Lessons for Future Justice Sector Development.....	77
Normalising Country-Wide Use of Alternative Legal aid in Africa.....	77
A Stronger Focus on Results in Court Administration Reform	78
Strengthening Judicial Accountability and Service Delivery	79
Pan-African Commercial Laws and Dispute Resolution	80
Expansion of Non-Court Mediation Services	81
Broader Accessibility of Legal Information in Africa	81
Restoring Civil Justice in Failed States.....	82
Final Conclusions.....	83

Foreword

This report was commissioned as a collaborative effort by the World Bank, with support from the Norwegian Ministry of Foreign Affairs, and the UK Department for International Development (DFID) to learn from concrete experiences of justice sector development in sub-Saharan Africa. In pursuing this goal, the team recognized early on that there is limited evidence of the impact of programs that have financed justice sector development in the region. While the search for empirical evidence is challenging, given numerous intervening factors which may affect the administration of justice in a particular country, so too is defining the criteria of what may be deemed a ‘success’ in this emerging field of development.

The World Bank, DFID and other donors have long been engaged in legal and judicial reform in sub-Saharan Africa in such areas as legal drafting, strengthening court administration, judicial training, and the empowerment of citizens through a better understanding of the legal system. This has often been done on an *ad hoc* basis with only limited review of other reform efforts in the region. In order to foster a more responsive approach to justice sector development programs, a collection of case studies was commissioned. One of the more daunting tasks was identifying notable justice sector developments or reforms, which offered specific impacts and which could be examined through both a desk review and field research. Independent of the funding source, the evidence base was not only limited but revealed a need for donors themselves to invest in better data collection, which could then be analysed and measured against benchmarks or objectives such as improved access to justice.

There is a significant need to review and learn from experiences, including controversial ones, in Africa’s justice sectors. These case studies are not homogenous largely because their subjects vary and span a wide array of developments that reflect the realities of the region. Each story stands alone and is in no particular order. In the final chapter, the conclusions offered in each story are digested into ideas for future actions. The collection also represents a modest range of stories and it is to be hoped that other cases will be identified and shared. A comparison of experiences of sector-wide programs (SWAPs), for example, could help both donors and governments enhance socio-economic impact. It should be noted that the emphasis in this report is on providing information about positive directions in justice sector development and the ways

in which lessons learned might be applied to achieve greater impact in the future. The anticipated value of this collection is that some of the conclusions or actions may be taken up and used to contribute to improvements by those committed to improving the rule of law in sub-Saharan Africa and are in search of ‘success’.

Lisa L. Bhansali
Task Team Leader, Africa Region
The World Bank

Acknowledgments

This report was prepared by Barry Walsh, an international justice sector consultant. Many others contributed to the research, editing and logistical support necessary to complete the production effort, including the World Bank team comprised of Lisa L. Bhansali (Task Team Leader), Nancy Chaarani Meza, Linn Hamnergren, Paulina Soto, Tazeen Hasan, Hisham Abdo Kahin, Beth Hoffman, Richard Messick and Denis Biseko. DFID officers involved included Macha Farrant, Justine de Davila, Michelle Law, Kathy Ford and Laure-Hélène Piron who initiated the work with the World Bank.

We gratefully acknowledge the contributions, time and assistance in identifying specific stories and offering research materials and information, including commenting as experts on draft material from the following:

Thomas Vennen of the GTZ Kenya office; Gladys Shollei and Jorum Abuodha of the National Council of Law Reporting of Kenya; and the staff of the Legal Resources Foundation in Kenya;

Atinuke Oluyemi, Director of the Citizens' Mediation Centre of Lagos; Associate Professor Ayodele V. Atsenuwa of the University of Lagos; Jeff Ansell, a justice sector reform consultant from the UK; and Emiola Oyefuga of the DFID-funded Security, Justice and Growth Programme of Nigeria;

Clifford Msiska, Director of the Paralegal Advisory Service Institute of Malawi; Adam Stapleton, barrister and consultant of Prison Reform International; and Shima Baradaran, justice advisor at the DFID office in Malawi;

Donald Rose, justice sector consultant of Canada and former project director of the Court Administration Reform (CAR) projects in Ethiopia; Gebrewold Lemma, former chief of party of the CAR II project; and the staff of the Office of the Commission for Federal Judicial Affairs, Ottawa, Canada.

A special thanks to the Norwegian Trust Fund (Ministry of Foreign Affairs), without which this compilation of case studies for supporting learning toward the promotion of rule of law in Africa would not have been possible.

Finally, this publication reflects the views of the author. The findings, interpretations and conclusions expressed in this publication do not necessarily reflect the views of the World Bank, DFID, the Norwegian Ministry of Foreign Affairs or any of the other contributors.

Acronyms and Abbreviations

ADR	Alternative Dispute Resolution
CAR	Court Administration Reform Project
CCJA	Common Court of Justice and Arbitration
CMC	Citizens' Mediation Centre
CSOs	Civil Society Organisations
DCR	Directorate of Citizens' Rights
DFID	UK Department for International Development
ERSUMA	Regional School for the Training of Legal Officers
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (German Agency for Technical Cooperation)
HIV	Human Immunodeficiency Virus
ICTR	International Criminal Tribunal for Rwanda
IT	Information Technology
IVR	Interactive Voice Response
KMJA	Kenya Magistrates and Judges Association
MOU	Memorandum of Understanding
NCLR	National Council of Law Reporting of Kenya
NGOs	Non-governmental Organizations
OHADA	<i>Organisation pour l'Harmonisation en Afrique du Droit des Affaires</i>
PASI	Paralegal Advisory Service Institute of Malawi

SWAPs	Sector Wide Assistance Programs
TAM	Transparency and Accountability Mechanism
TIMAP	Timap for Justice

Executive Summary

Improving effective access to justice in sub-Saharan Africa has been a goal of international donor agencies for over 30 years. It has naturally also been a foremost concern of governments in sub-Saharan Africa, particularly those that seek to foster economic growth and democratic governance for their countries. Along with many other social ills, poverty and authoritarianism usually work against access to justice by distorting the ease with which citizens may be able to know of, assert and enforce their rights and obligations. Improving access to justice usually implies the need to increase knowledge of how the law may be properly used, to increase the mechanisms for applying the law effectively and to expand the range of citizens who actually benefit from their legal system. Reform or change projects funded by donors and governments typically attempt to produce these kinds of improvements, either by helping to educate the general community about the law or by strengthening justice sector institutions, including non-government or civil society organisations (CSOs) that participate in the workings of the justice system.

In 2008 the World Bank and the UK Department for International Development (DFID) agreed to collaborate in identifying examples that could inform donor agencies and governments alike, while contributing to the work of legal scholars and other academics, students and CSOs active in rule of law reform in Africa. This collection of case studies or stories in the following eight chapters was compiled to support the development of such learning by examining examples of notable justice sector change programs that appear to offer useful lessons. Below is a summary of each of each chapter:

First Aid in Justice – Alternative Legal Aid in Africa

This chapter reviews the development of community-based and corrections-based paralegals in sub-Saharan Africa and the roles they can fulfil in countries that lack effective systems for legal aid. It defines the special contribution of paralegal projects, particularly in Malawi and Sierra Leone. It also puts forward the case for the adoption of paralegals as a viable means of overcoming the dearth of affordable access to legal representation in developing countries.

The chapter explores the success of the Paralegal Advisory Service Institute (PASI) of Malawi, which is among the most extensive paralegal development programs so far employed in Africa.

Chiefly as a consequence of PASI's work, the proportion of the prison population on remand (i.e. awaiting trial) in Malawi stands at below 20 per cent as of this writing, in keeping with rates typically achieved in countries that have well-funded criminal justice systems.

The chapter also reviews the work of the *Timap for Justice* Project in Sierra Leone, which deployed paralegals in a range of chiefdoms that are distant from established institutions of the formal justice system. These paralegals operate largely as advocates for human rights in the traditional village courts where qualified lawyers are barred from appearing.

Despite the manifest benefits and economy of using paralegal development programs to improve access to justice for the poor, this chapter concludes that no sub-Saharan African country, other than South Africa, as yet uses paralegals apart from exceptional circumstances. Elsewhere, paralegal services are still treated as experimental and tentative, even with guarded suspicion among the leadership of judiciaries and the practising bar. And yet, properly construed, paralegal services ought to be viewed as especially necessary in Africa because of the general lack of access to justice available to most Africans and because of general deficiencies in services provided by justice agencies.

Getting the Record Straight – Improving Court Record Management and Court Administration in Ethiopia

This chapter describes the importance of donor programs that are aimed at supporting the development of information management systems in courts, particularly systems that seek to improve the reliability and utility of court records by using new information technology (IT). It reviews the factors that make it particularly difficult to successfully introduce IT in courts of developing countries that are affected by common deficiencies in infrastructure, public funding and access to technical expertise.

The chapter examines the achievements of the Canadian-sponsored Court Administration Reform (CAR II) Project in Ethiopia. Operating between 2001 and 2005, CAR II set out to achieve direct and enduring improvements in managerial systems in Ethiopian courts in ways aimed at impacting case outcomes, faster adjudication and enhanced access to justice. It describes how CAR II's objectives were aimed at successfully securing local participation in project management and in placing heavy emphasis on the development of local competencies using new management systems and technologies. These achievements included the introduction and sustained use of colour-coding in paper records management, audio recording of court proceedings, computerised case tracking, interactive voice response telephone technology, electronic information kiosks, electronic document filing and video links between courts situated in different regions. The experience of CAR II offers lessons in project design and

implementation that are relevant to other countries that may pursue similar programs, especially in sub-Saharan Africa.

Trusting the Court – The Judicial Transparency and Accountability Mechanism for Magistrate Court Stations

This chapter profiles the introduction to magistrates' courts in Kenya of procedures designed to offer a structured means of providing feedback between courts and court users. Known as TAM, the transparency and accountability mechanism entails the issuing to the public of standard feedback cards that court users may lodge with a court, either anonymously or as a formal complaint. Each card received is processed by a court user committee comprising representatives of the judiciary, the prosecutor, the legal profession and other institutional stakeholders. The committee collectively decides what is to be done in response to each complaint. Where a feedback card complains of judicial misbehaviour or corruption, it is referred instead to a peer review committee, comprising all magistrates based at the court station. The decision of the user committee that processes the feedback card is then recorded and published on a public bulletin board in the court precinct for public viewing. The simplicity of the system ensures that it may be introduced to any court station with a minimum of financial expense or training.

A benefit of TAM revealed during its piloting phase was that it provided a means by which first instance courts may deal in a practical and transparent way with perceptions of corruption or mismanagement within courts. Complaints based on a belief that a magistrate was corrupt were often found to be due to other causes that could be remedied in a way that satisfied the complainant. TAM is of special interest because it harnesses ideas that in themselves are modest successes in other systems, but draw out those successes in ways that could prove to be revolutionary if applied routinely to all courts in a developing court system.

Taking Care of Business – More Business-Friendly Justice Systems in Africa

This chapter considers efforts by donors and law reformers to facilitate economic growth by fostering the adoption of modernised business and commercial laws and processes, by the adoption of international standards in business law regulation and by facilitating special commercial dispute resolution and enforcement mechanisms.

The chapter reviews the history and objectives of the Organisation for the Harmonization of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* –

known as OHADA) and describes the capacity constraints affecting that organisation in Francophone countries. It concludes that OHADA deserves to be classified as a valuable process for extending a unifying system of commercial laws across a significant part of Africa. This value, however, is somewhat qualified by the extent of the poverty of all fourteen of its signatory countries and their limited progress so far in addressing the implementation and enforcement of their uniform commercial laws.

The chapter also reviews measures aimed at developing commercial courts as the means of facilitating special dispute resolution and enforcement mechanisms for commercial matters. The concept of a special court process for business essentially entails isolating a part of the judicial system and making it available only for processing high value commercial disputes. The chapter reviews the recent history of commercial court development in Tanzania as an example of the problems they can pose in judicial systems that are otherwise deprived of resources for processing general court disputes. The chapter concludes that while the concept of specialised commercial courts may be sound, success in establishing them needs to be judged by their measured achievements in actually disposing of commercial disputes, something that often proves to be elusive.

Home Spun Justice – State Administered Mediation Services in Nigeria

This chapter describes the development of the Citizens' Mediation Centre (CMC) of Lagos State. A government initiative for resolving disputes for those who are too poor to obtain legal representation, since 1999 the CMC has provided a no cost mediation service in Lagos as an alternative to litigation in the courts. The chapter reviews the systems established to administer the CMC's caseload, which exceeds 8,000 cases per year, chiefly in the areas of urban landlord and tenant and family disputes. It also describes the development and adoption by the CMC of a strategic planning process and the performance measures it uses to evaluate its effectiveness in resolving legal disputes. These planning and measurement methodologies concerning case management are world class and may be readily applied, not only to other mediation organisations in Africa, but also by courts of justice.

The chapter concludes that the CMC initiative is a special example of an alternative dispute resolution process that was developed and implemented as a Nigerian initiative. It is a concept that was also designed to be wholly government-funded, rather than by reliance on resources that might have been provided by NGOs or donors. It has not only endured and grown for some ten years, but has also been introduced in several other states of Nigeria. Given its success as a model, the prognosis for expanding the CMC concept across Nigeria is good. It offers equally

attractive advantages for justice systems in other African countries that have large populations of poor people and other groups who have no practical access to courts.

Knowing the Law – Publishing Laws and Court Case Outcomes

This chapter considers the factors that facilitate or impede access to legal information in sub-Saharan Africa, including access to statutes, court judgments, court guideline directions and academic articles. The chapter reviews the special problems of developing countries in relying on commercial law publishers as a primary source of legal information and considers the new opportunities offered where there is access to the Internet. The objectives of the Free Access to Law Movement are considered, including the development of a range of public websites that are dedicated to providing free of charge access to African legal information.

The chapter describes the success of the National Council of Law Reporting (NCLR) of Kenya, which publishes the Kenya Law Reports in both paper and online versions, as a possible model for African countries. Since it began operations in 2001, the NCLR has overcome a 20-year backlog in the publication of official law reports and has also published a large range of other legal information, including a full online version of the statutory laws of Kenya. The factors that have led to this success are considered, such as the adequacy of its resources, the extent of high-level patronage it is given, the qualifications of its personnel and its commitment to applying the principles of the Free Access to Law Movement.

Courts of Last Resort – Open Sky Trials in the Aftermath of Genocide

This chapter examines the attempts to bring to account those responsible for the Rwandan genocide of 1994. It describes the difficulties of both the international community and the Rwandan government in establishing a working system of tribunals able to process extraordinarily large volumes of criminal trials in a country deprived of a functional judiciary. Almost ten years after the genocide, and in the context of Rwandan government's dissatisfaction with the effectiveness of the International Criminal Tribunal for Rwanda (ICTR) located in Tanzania, it established a system of courts based on a traditional form of village-based dispute resolution known as *gacaca* courts. Over 9,000 of these courts were established and presided over by some 169,000 judges sitting in groups in each village in the open air. Few of the judges had legal qualifications and many were illiterate, though elected from the affected communities. These courts disposed of 1.1 million cases between 2005 and 2007, effectively clearing the backlog of genocide offences. This exceptional result was achieved by relaxing the rights of accused persons to legal representation, the right to be tried by a qualified and independent court

of justice or the right to appeal. However, the sentencing powers of *gacaca* courts, not available in the conventional courts, offered significant incentives to accused persons to admit their offence and gain substantially reduced sentences, often resulting in immediate release from detention. Vast numbers of accused genocide offenders were processed and released in this way.

The chapter also contrasts the defects of the *gacaca* system with the comparable failure of the ICTR to process more than a small number of high profile offenders awaiting trial many years after the genocide. It considers the practical dilemma of having to choose between using conventional courts of justice or less satisfactory alternatives when conventional means prove to be impractical. Although rightly criticised by the international community concerned for the maintenance of human rights and adherence to international conventions, the *gacaca* courts enjoyed widespread acceptance among Rwandan society and produced outcomes that allowed many offenders to be released with reduced sentences after up to a decade in detention without trial.

Lessons for Future Development Programming

This concluding chapter considers how the lessons described in prior chapters might be translated into improved programmatic responses by donors and governments. In summary, suggested options are offered, including recommendations aimed at:

- Mainstreaming the use of paralegals and other alternative legal aid mechanisms across Africa;
- Placing more emphasis on programs aimed at improving court administration by nurturing local expertise and participation and by focusing on measuring outcomes, rather than inputs in evaluating their success;
- Incorporating into judicial improvement programs features that facilitate increased transparency and accountability of the judiciary at the level of court stations;
- Revitalising cooperation between African countries in adopting standard business laws and associated improvements in compliance and enforcement;
- Expanding the use of non-court mediation services and similar dispute resolution processes that may forestall the need for civil litigation in the courts, especially in cases where the parties lack practical access to legal representation;
- Helping government agencies, court or other judicial institutions and NGOs in publishing laws by sponsoring projects that establish capacities to compile and publish law materials in both printed and electronic form;
- Leveraging greater transparency and accountability from justice sector institutions in Africa by requiring the implementation of public reporting standards;

- Developing a design and implementation plan for courts incorporating restorative justice elements that are capable of being applied effectively in a fragile situation such as a post-genocide environment in ways that do not offend fundamental standards of due process; and,
- Developing new models for donor assistance in justice sector development that can extend the successes of a project in one country to the justice sectors of neighbouring countries in Africa.

1. First Aid in Justice – Alternative Legal Aid in Africa

Poverty vs. Access to Justice

Having access to legal aid services in most developed countries implies a kind of safety net for the poor. An implicit goal of effective legal aid schemes, including public defender services, is that those who are charged with serious criminal offences and who cannot afford a lawyer will be given state-subsidised legal representation. It might also be a goal that those charged with less serious offences will have access to a range of government services aimed at rehabilitation, alternative sentencing such as community service and possibly reduced recidivism. Another goal may be that in most disputes that reach the civil courts in developed economies, most of the disputants will have access to some resources to enable them to at least get legal advice, if not representation as well. And for those who cannot afford legal representation in civil cases, they may often be given access to government subsidised legal aid or *pro bono* (free of charge) options that may be available from the private legal profession. In almost every African country, however, this range of available legal aid options is simply not realistic.

In contrast with the most developed countries in Europe, Asia and the Americas, every African country has a large percentage of its population living below the poverty line. Almost every African country also has sub-optimal criminal justice systems and major obstacles, both geographic and economic, in access to civil court systems. African justice systems consistently suffer from very lengthy delays in criminal trials, limited entitlements to bail or a limited ability to meet bail conditions. Some African countries also permit the detention of suspects while under investigation for criminal offences and before a formal charge. Large numbers of the prison populations in African countries are consequently made up of unconvicted defendants who are too poor or inadequately advised to qualify for release on bail. In contrast, Africans who have access to family and financial support can readily meet bail conditions or, in some cases, bribe their way to freedom. Private lawyers tend to be based in the capital or large cities and are generally reluctant or unable to provide services *pro bono*. Correctional facilities in Africa are also generally poorly managed and suffer from inadequate resources, both which reinforce the already deep divide between rich and poor.

Compounding the problems of high rates of detention of unconvicted persons is the state of African prisons. With few exceptions across Africa, time in prison can entail enormous jeopardy in terms of the health and safety of those detained. Consistently inadequate budgets of prison agencies produces typical prison conditions that seldom surpass the levels of the destitute. Overcrowding, dietary deprivation, gastro-intestinal and skin diseases, malaria, HIV and violence from fellow prisoners and prison guards is the norm, even in relatively well-managed African prisons. Correspondingly, the detention of young, poor, males in Africa often entails

denying families a major or sole means of economic support, thereby driving spouses, children and aged and disabled dependants deeper into poverty.

To the extent that progress has been made in more developed economies to address their own problems of court delays and prison overcrowding, improvements have been typically achieved by increasing public sector resources and reforming public policies. More resources help to address prison overcrowding and inadequate conditions of detention, and improved public policies help to remove from detention those who do not need to be imprisoned or who are detained for too long. However, in Africa, the twin remedies of more resources and better policies are typically not viable in the short term. Limited public funds are more likely to be spent on health, education and other public infrastructure than on responding to the shortcomings of criminal justice systems. African legislatures and civil services themselves tend to suffer from limited capacity to do more than serve the immediate demands of the political leadership. The capacity for measured, long-range improvements in prisons, police authorities or the general courts is typically qualified.

Another factor which often affects prison overcrowding is that many put into detention are the product of inadequate policing. For under-resourced police agencies, arrest and the prospect of detention offers opportunities for an arresting officer to demand bribes and minimise paperwork. In the knowledge that indigent accused persons will not have access to a lawyer, their detention also gives arresting officers confidence that their job is done, passing the care of the prisoner to prosecutors, the courts and prison authorities with relatively little effort or accountability. If the arrested person is young, then overburdened arresting officers often claim to be too busy to render assistance to a person they believe to be a criminal, such as notifying a detainee's family or village leaders. In the absence of institutional arrangements aimed at assisting arrested persons, particularly youth, to pursue their rights to bail and representation, it is often a policy of arrest and move on.

In processing newly arrested indigent defendants, most basic level criminal courts in Africa do not have practical access to lawyers able and willing to provide free of charge legal representation to those brought before a remand hearing. A defendant, particularly if he matches the common profile of being uneducated and away from his family or village, will normally receive no legal advice or representation at a first hearing or even subsequent hearings. Basic or first level courts are also typically burdened with large criminal caseloads and may have to process dozens of newly arrested defendants each day, usually by adjourning for weeks or months at a time. Seldom are magistrates or judges of criminal courts able to devote more than a few minutes to the needs of each defendant who appears. Prosecutors are similarly burdened with large case dockets, too many hearings to attend and limited inclination to assist a defendant.

Developing Conventional Legal Aid Systems

Donors have responded to the problems of inadequate justice systems by funding projects aimed at strengthening the institutional capacities of the courts, police and prison agencies or by programs that focus on community legal education, the development of the legal profession, alternative dispute resolution (ADR) processes and programs for directly providing legal aid to the poor. The prospects of success for these projects are predicated on the often unlikely willingness or ability of beneficiary governments to provide additional resources to sustain improvements that donor projects typically introduce. Unless a donor-funded reform program offers the prospect of saving money in some way, at least over the longer term, the likelihood of its benefits being sustained will diminish or lack sustainability.

Legal aid schemes seldom save money if they are applied in the fashion that is common in developed economies. In fact, they are typically expensive if they are realistically targeted to meet the goal of providing effective assistance to those who are truly in need. Several institutional and programming options are usually considered in designing a legal aid scheme that meets the full range of needs in any civil and criminal justice system. These may include¹:

- A *public defence or legal aid agency* where the government employs full time lawyers to advise and represent indigent criminal defendants or other eligible categories of civil litigants.
- A *judicare system* where public funding is used to pay private lawyers to represent indigent defendants or civil litigants on a case-by-case basis. Sometimes a *judicare* system may be administered for criminal defendants by a public defender agency or other legal aid agency as a means of subcontracting part of its work.
- A *contracting fund* where, in lieu of establishing a public defender office or legal aid agency, the government enters into a contract with a private law firm to provide legal representation in a negotiated number of cases for a fixed price. In cases where there is a public defender or legal aid lawyer based in a capital city, this option may be used in a region that is beyond the practical reach of government agencies to provide full time legal services.
- *Pro bono schemes* where the private bar agrees or the court obligates members of the bar to provide a portion of their services free of charge to indigent litigants. While very commonly advocated and applied in developed economies, *pro bono* schemes usually either suffer from deficiencies in the quality of service or from limited

¹ Access to Justice: Challenges, Models and the Participation of Non-Lawyers in Justice Delivery, Geraghty et. al at page 59, Access to Justice in Africa and Beyond, Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law, Chicago, Illinois, 2007

impact, that is, where only a small proportion of worthy cases actually receive *pro bono* assistance.

The downside of all of these options for developing countries is that the cost to a government is usually too high if the aim is to provide adequate legal aid in every case that qualifies for it. Public defender and legal aid agencies typically need to employ large numbers of lawyers and make them practically available in all criminal and civil court locations. Even if *judicare* systems are used, they require a substantial government budget, often at higher fee rates than for a similar level of services provided by public defender lawyers. In addition, a consistent problem of *pro bono* schemes, even in developed economies, is that it is seldom possible to reliably assure the quality of services provided by a private lawyer, especially in systems in Africa where there are generally few private lawyers available in proportion to the number and distribution of litigants.

Developing and Using Paralegals

The public funding of lawyer services in any country will usually be costly because of the high-income expectations of trained and skilled lawyers. Lower cost alternatives to providing legal aid schemes to fund the employment of lawyers consequently imply placing more reliance on using non-lawyers. Non-lawyers, or persons who have only limited legal training, who assist litigants are generally known as paralegals. In some developed economies, such as the United States, a “paralegal” describes an assistant to a practising lawyer who is often employed by that lawyer or, in the case of public defender organisations, a person employed by that agency. In the context of a developing country, however, a paralegal may often be someone who typically assists in understanding the legal system where no lawyers are available. Due to the high levels poverty of those in need of legal assistance, paralegals generally serve to assist and do not appear in court as practising lawyers do. Nonetheless, proposals that justice sector institutions make use of paralegals to meet gaps in services have often been resisted by practising lawyers, bar associations and law schools on the grounds that paralegals would either compete with lawyers or lower the standards of services that qualified lawyers provide. The validity of these objections, of course, may only apply in circumstances in which private or government lawyers are available and where standards of services provided by paid lawyers are effectively enforced. In some African countries, both the number and the distribution of lawyers is consistently far below the levels of developed economies. And the systems for assuring the quality of private legal services are often absent or not enforced. Where a litigant cannot afford to pay for legal advice or representation, the choice is often between using non-lawyers or going without the benefit of legal counsel.

What do paralegals do that lawyers are not available to do? Generally, the answer is that a paralegal trained with relatively basic skills can do many of the tasks that lawyers might do, especially in criminal cases. These include:²

- *At time of arrest.* A paralegal who attends a busy police station is able to assist in the identification of children and other young persons arrested, particularly in verifying the identities and locations of relatives and others who might assist the detainee. The value offered by paralegals at this point is to help overcome a detainee's lack of maturity, literacy or familiarity with essential police obligations to record factual details that are required to be presented in court. The presence of a paralegal in a police station, particularly one who attends the station regularly, is also likely to moderate any tendency of police officers to mistreat a detainee or to demand a bribe in lieu of processing the detainee as an offender. Police stations are also the most effective points for identifying and diverting juvenile offenders who might otherwise be classified and processed as adults.
- *At a first court appearance.* A trained paralegal who has interviewed an unrepresented detainee before a court hearing is able to advise the detainee about the right to apply for bail (if applicable in the legal system) and to gather facts that are relevant to such an application, such as the names of relatives who may be able to raise bail deposits or act as sureties. In cases where a magistrate will not allow a non-lawyer to speak for a bail applicant, a paralegal can train a detainee on how to ask the court for bail and help identify the types of information the detainee can offer a magistrate to support the granting of bail. Even in systems that do not generally permit non-lawyers to speak for litigants in court, pragmatic magistrates or judges may often allow a paralegal to speak for an indigent defendant on matters of bail, being ordinarily an administrative matter preliminary to the taking of a plea or, when relevant, formal admission.
- *Between adjournments.* Where an indigent accused person has not been given or offered bail and is in detention awaiting the next hearing, paralegals can assist them in preparing and lodging bail applications. Paralegals who work in prisons can either train prisoners individually on preparing bail applications or offer group workshops to inform remand prisoners generally about court procedures, court etiquette and their options for gaining representation by a lawyer or acting for themselves (*pro se*). In some situations, such as in Kenya, prison guards have been trained as paralegals and provide paralegal services as part of their responsibilities for prisoner welfare. In addition to advisory assistance offered in the prison, paralegals will also spend time searching for relatives of detainees to inform them of the whereabouts of the detainee and to ascertain who may assist the

² Ibid. (Geraghty t pages 67 to 71).

detainee to obtain release on bail. Prison officials who are motivated to improve prison administration will ordinarily welcome the role of paralegals in prisons because they tend to have the effect of aiding the lawful release on bail of defendants, thereby lowering prisoner numbers and the costs of running prisons. The incentives of police to incarcerate alleged offenders awaiting trial can, to some extent, be counterbalanced institutionally by the incentives of prison keepers to lawfully release them.

- *Before a plea is taken.* A desirable situation would be for *pro bono* lawyers to be available to attend prisons to at least advise indigent prisoners on remand about the consequences of pleading guilty or making a formal admission. In many African countries the extent of criminal court delays is measured in years, such that those held for minor offences can remain in detention awaiting trial for longer than the likely prison sentence for that offence on conviction. In these circumstances, a plea of guilty or admission of guilt and contrition by an innocent detainee may result in earlier release than if he or she awaits the trial. The void of *pro bono* private lawyers or public defenders in prisons can be filled by paralegals, often via group workshops followed by one-to-one interviews to either screen prisoners for referral to a lawyer, or to coach a prisoner on entering a plea or making formal admissions without legal representation.
- *At trial.* In many African countries the state will provide a lawyer to defend an indigent accused person where the charge is murder or for other serious offences as defined by a country's laws. But this option is often not available for other offences. Where a lawyer is provided, a paralegal can assist a *pro bono* lawyer in gathering facts relevant to the case. Where no lawyer is provided, a paralegal can either be available as a witness to a self-represented accused person or may even be allowed by a pragmatic magistrate or judge to address the court directly.
- *Before sentencing.* Paralegals can also substitute for the role often performed by parole officers in preparing pre-sentence reports. A pre-sentence report is often prepared by officials who have spoken to the convict's relatives, teachers and others who can offer information about the prospect of a non-custodial sentence or a reduced sentence that may be followed by non-custodial supervision such as community service. In giving information for courts about sentencing factors, paralegals can leverage much of their prior effort in assisting detainees in getting in touch with relatives and community supporters.
- *During a sentencing hearing.* During the sentencing hearing, a *pro bono* lawyer or a self represented defendant may call a paralegal as a witness, either by answering questions or by also tendering a written report.

- *Post conviction proceedings.* Any possibility of the government or a *pro bono* lawyer assisting an indigent litigant often evaporates after that person is convicted, even if convicted without legal representation. In these circumstances paralegals in prisons can either screen convicts for referral to a *pro bono* lawyer or guide them directly on the procedure for lodging an appeal. In some cases, particularly at regional court levels, judges may allow paralegals to at least answer questions relevant to the convict's appeal, especially when no lawyer attends.

Although the use of paralegals in the justice systems of developing countries might be considered especially useful in comparison with more traditional forms of legal aid, so far few systems have embraced them. South Africa probably stands as the only country in sub-Saharan Africa to have developed an integrated legal aid model in which paralegals play an important supplementary role. In other African countries the development of paralegal programs as a systematic means of providing legal aid to the poor remains tentative, experimental and yet to be made sustainable. Yet paralegals remain an indisputably powerful tool in meeting the immediate needs of poor Africans in gaining practical access to justice. Proof of the value of donors in fostering the acceptance of paralegals as an institutional solution is offered in two recent examples – in Malawi and Sierra Leone.

A Nation-Wide Paralegal Advisory Service in Malawi

Malawi is a landlocked country of over 14 million people in southern Africa between Tanzania, Mozambique and Zambia. Formerly administered by Britain as the colonial power, Malawi has had relatively stable government since it became independent in 1964. Its economy is predominantly agricultural and it has few natural resources. It ranks among the poorest countries in Africa.

With principal support from the UK Department for International Development (DFID) and in collaboration with four NGOs, the Paralegal Advisory Service has operated continuously in Malawi since it began as a pilot scheme in 2000³. The pilot provided eight paralegals to support four prisons, which then accounted for some 62 per cent of Malawi's prison population. By early 2009 the project had developed into the Paralegal Advisory Service Institute (PASI) and employed 39 paralegals covering all the prisons in Malawi. PASI had been institutionalised so that it would be no longer guided or directly funded through donor contractors, but through the Malawi Ministry of Justice. It has a board of trustees and is operationally guided by an advisory council that includes senior officers of the main criminal justice institutions in Malawi, including

³ DFID appointed Penal Reform International (PRI) as its managing contractor to establish PAS and guide its operations until 2007 when, at the end of the DFID's program of support to PAS, it transitioned into an independent institute.

the public prosecutor, senior prison officials and the Ministry of Justice and Constitutional Affairs.

PASI has three objectives:

- *Linking justice agencies.* It seeks to improve communication, co-operation and co-ordination between prisons, courts and police.
- *Legal literacy.* It helps prisoners to understand the law and how it affects them.
- *Legal advice and assistance.* It enables prisoners to apply the law and to help themselves.⁴

PASI's wide range of activities is aimed at offering solutions to address the problems of congestion in prisons, prosecution delays, the rights of prisoners to receive advice and assistance, prison conditions and the protection of vulnerable groups. Here is an outline of what PASI has been able to achieve:

Prison decongestion. PASI screens juveniles entering the criminal justice system and identifies those suitable for release. It supports the speedy consideration of bail applications for those remanded in detention and by bringing the attention of magistrates to cases where the detainee is suitable for discharge or release. PASI will also assist prisoners in lodging appeals against the severity of a prison sentence.

Reducing delays. PASI paralegals monitor cases where legal time limits have been exceeded, such as holding prisoners without charge for longer than 48 hours or the failure to issue remand warrants to keep prisoners in legal detention. Paralegals will trace family members, witnesses and sureties whose absence may otherwise delay court proceedings. They will also liaise actively between the prisons, courts and prosecutors to address errors and omissions of due process affecting the rights of detainees by attending meetings of court user groups and remand hearings held in prisons, known as *camp courts*.

Prisoners' rights to advice and assistance. PASI has made information available for the majority of Malawi's prison population such as the right to bail, the right to cross-examine in the prosecution case, the implications of pleas including mitigation and the right of appeal against conviction and sentence. PASI paralegals contact families, witnesses and sureties to explain the legal processes they can expect to face. They will also refer cases that are suitable for representation by the Malawi government's legal aid department or by private practitioners willing to act *pro bono* for a detainee.

⁴ Martin Pierce, The Paralegal Advisory Service, Malawi 'Changing the Landscape', Evaluation Report, March 2007

Prison conditions. PASI paralegals collaborate with prison service officials in lodging formal reports to the Malawi Prisons Inspectorate on the state of prison living conditions. They also make special representations and reports on behalf of vulnerable prisoners, including the terminally ill, foreigners and mothers with babies who may be eligible for release on humanitarian grounds.

PASI paralegals, 40% of whom are women, are deployed to regularly attend all prisons covering some 150,000 prisoners since 2000. They also regularly attend 18 police stations, eleven court locations and four child justice courts. Their activities are formalised by a cooperation agreement with the Ministry of Justice and Constitutional Affairs and similar agreements with the prison service, the director of public prosecutions and the largely under-resourced legal aid department of Malawi. Since its services were first established, PASI estimates that they have facilitated the proper release of more than 4,500 detainees who may have otherwise languished in prison. The prison remand population (i.e. unconvicted defendants awaiting trial) has now stabilised at around 17 per cent and on a par with rates in many developed countries. And three quarters of juvenile offenders are diverted out of the criminal justice system at the police station, largely as a consequence of the vigilance and advocacy of paralegals.⁵

Community Paralegals in Sierra Leone

Sierra Leone is a small West African country south and west of Guinea and north of Liberia. Its population of about six million people endured eleven years of civil war, which ended in 2002 only after foreign intervention. Over 70 per cent of Sierra Leoneans are classified by their own government as living below the poverty line.

A project known as *Timap for Justice*⁶ in Sierra Leone was established in 2003. The project, financed with seed funding by the Open Society Institute (OSI)'s Justice Initiative and the World Bank's Japanese Social Development Fund (JSDF) trained and deployed 13 paralegals in five chiefdoms over the three-year project duration. Each paralegal had at least a secondary education and was recruited from within one of the chiefdoms in which they would work. Before beginning their work, they were trained in law, the workings of government and paralegal skills by the directors who also provided on-going supervision. The directors and cofounders, a Sierra Leonean and US lawyer, spent at least half of their time directly visiting the project's eight offices, reviewing paralegals' handling of cases, working directly with selected clients and providing training in selected areas of law or government procedure.

⁵ Figures provided in a PowerPoint presentation by Clifford Msiska, Director of PASI, at the World Bank Demand Side of Justice Workshop, Dar Es Salaam, Tanzania, 4-6 February, 2009

⁶ See *Provision of Primary Justice Services in Sierra Leone*, Open Society Justice Initiative, 2006. A similar article was also published in the Yale Journal of International Law, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, Vol. 31 pp. 427-476.

In contrast to the criminal justice system focus of the PASI paralegals of Malawi, *Timap* paralegals are village-based and are concerned with dispute resolution generally in each chiefdom. Its methods place particular emphasis on reconciling and improving the interfaces between traditional justice and formal justice systems from a human rights perspective. It addresses intra-community breaches of rights, such as domestic violence and land disputes, as well as justice issues between people and governing authorities, such as corruption, abuse of authority and failures in service delivery. As in most other countries of Africa, traditional dispute resolution in the villages of each chiefdom is the dominant means relied on by the poor in Sierra Leone, a largely disempowered post-war majority of the population. While the formal justice system of the state has been seen as officially paramount, the practical impact of that system at the village level is for the most part irrelevant. *Timap* consequently aims to assist the population in each chiefdom by offering not only advice pertinent to formal justice system processes, but it also participates in enforcing and advocating for traditional dispute resolution processes that are consistent with international standards of human rights. The effectiveness of *Timap* paralegals is thereby enhanced by their prior knowledge and experience of traditional justice within their home chiefdoms.

While there is a public defender office operating in the capital, Freetown, *Timap's* work is largely limited to the capital and provincial headquarter towns. Under Sierra Leone's dualist legal structure, which facilitates reliance on traditional dispute resolution, lawyers are barred from practising in the customary courts and are not available for trials outside the capital in most cases.

Village paralegals use various methods to resolve individual and community problems. They provide information on rights and procedures, mediate conflicts and assist clients in dealing with government and chiefdom authorities. They offer community education and dialogue, advocate for change with both traditional and formal authorities and organise community members to undertake collective action. In some cases the *Timap* Director provides legal representation or high-level advocacy in cases where the parties cannot reach a negotiated agreement. This has strengthened the work of paralegals as community advocates and mediators by the tacit or overt pursuit of unresolved disputes later in the formal court system.

By June 2005 each of *Timap's* eight offices was handling around 20 new cases per month including both individual and community-level problems. Eighty per cent of cases were being successfully resolved at an average rate of 10 cases per month per paralegal and at an average cost to the donor of under US\$200 per resolved case. This cost was around 10 per cent of the likely cost of resolving a case using a salaried lawyer in Freetown. The cost per capita of the *Timap* service averaged at a rate of US\$0.23 for each person of population within each covered chiefdom. Based on these figures, it is easy to conclude that in terms of value for money, *Timap* holds up well against more conventional systems for providing legal aid.

Timap's receipt of grant funds from the World Bank-administered Japan Social Development Fund allowed it to double in scope. By 2008 *Timap* employed 26 paralegals in 13 offices in the northern and southern provinces, as well as a headquarter office in the capital. *Timap* has been recognised by independent institutions including the International Crisis Group and the UN Commission on Legal Empowerment for developing a creative and effective methodology for providing justice services in the challenging and complex context of Sierra Leone. The Government of Sierra Leone, through its 2008 Justice Sector Reform Strategy, recognised *Timap* and explicitly noted that it is committed to exploring the possibility of scaling up the provision of *Timap*-style justice services. By early 2009 there was a commitment from the Sierra Leonean government to build a national approach to justice services based on the *Timap* model.

Conclusions

Despite the manifest benefits and economy of using paralegal development programs to improve access to justice for the poor, no African country other than South Africa yet uses them in more than a nominal way. Even in Malawi, the only other African country with a nationwide system, the government was just beginning in early 2009 to normalise its processes for regularly funding the operations of PASI and it is yet to fund that commitment from non-donor sources. Elsewhere paralegal services are still treated as experimental and tentative, even with guarded suspicion among the leadership of judiciaries and the bar. And yet, properly construed, paralegal services should be viewed as especially necessary in sub-Saharan Africa because of the poor extent of access to justice available to most Africans. In systems suffering from high prisoner remand populations and extensive court delays, there can be little or no case for bolstering the private legal profession or even the government public defender offices while the more urgent need for paralegal services is neglected. Paralegals should be viewed as a priority in building credible systems of justice in Africa. In developing the justice sector in Africa, they truly deserve the recognition of “first aid” in access to justice.

2. Getting the Record Straight – Improving Court Record Management and Court Administration in Ethiopia

The Court Record and New Technology

The core processes of courts of justice are akin to the workings of an information-processing machine. Much like a machine might be expected to do, courts receive information, process it according to agreed and consistently applied rules and then announce the outcome. The first step in a typical court case is the formal filing of documents. The next step is that oral evidence and submissions are made during a court hearing. And finally a court is meant to produce a written judgment that publicly announces the outcome to the disputants. The key difference between information processing machines and what courts do under this analogy is that the final step must be performed by a human, that is, by a judge or, when a case is settled by negotiation, the parties or their representatives. Almost every step that is usually taken in litigation or in criminal prosecutions entails the provision, selective summarisation and presentation of information, either as a paper document or in some other recorded form. Viewed from this perspective it is not surprising that courts the world over place great emphasis on what is often called the *court record*. In any given court case, the court record is normally a paper file that contains the documents judges require the parties to lodge with the court registry and to deliver to each other or documents that are created to record either what the court itself may order or what happens during a court hearing. After a judgment is given, it is the court record that is the subject of any further argument on appeal. And it is the court record that determines precisely what court decisions will later be enforceable.

There is a natural connection between the court record and the efficiencies that new information technology can potentially offer. New technology such as computers or improved paper file storage systems can help courts perform better in four distinct ways. Firstly, new technology can process information faster than is generally practicable using old paper systems. Secondly, well-designed new technology systems can significantly improve the completeness, accessibility and accuracy of the information that is processed. Thirdly, new technology can expand the range of uses and users of information. Fourthly, while it is still possible to improve the speed, completeness, accessibility, utility and accuracy of paper based systems *without* using new technology, this is not normally possible without significantly higher cost. New technology can be substantially cheaper as a means of improving the speed and quality of information processing in courts.

Courts in many countries around the world have generally taken up the advantages of new technology with predictable results. Not only do well resourced courts use computers for better

general court management, but they also deliver the benefits in the form of accessible, reliable and well presented information about each court case. This in turn enables judges to more readily prioritise their casework, assure equity in the priority given to different cases and keep track of cases that may be pending for too long. In a similar fashion the accuracy and completeness of information that is brought about by new technology also results in fewer of the problems that normally beset purely paper-based systems, such as the phenomenon of lost files or improper interference with documents that may be stored in files. It is harder to alter a paper file when there is also a duplicate electronic record that cannot be so readily altered. In addition courts are still often able to process a case by relying on the electronic record even when the paper record may be temporarily misplaced. Computerised courts consequently also tend to be more secure in terms of the accuracy, accessibility and ultimate transparency of information placed on the court record. In short, a well-computerised court record system can offer higher integrity of the court record.

In many developing countries few courts have been able to fully automate their information systems. This is despite the fact that the costs of installing and using computers have been consistently dropping and continue to fall, even in Africa. In 2009, for example, several international computer vendors were developing internet connectable, battery powered laptop technology for school children of developing countries between US\$100 and \$200 a piece.⁷ In tandem with the exponential growth of mobile telephones across all developing countries in recent years, the cost of low bandwidth wireless internet access is also falling as its geographic coverage expands. Purely in terms of the cost of hardware and access to the Internet, the cost is significantly lower in real terms now than it was ten years ago. As a proportion of the total costs of installing new technology, the cost of hardware and connectivity to the Internet has consistently shrunk and continues to, even in the poorest countries. Similarly, the cost of software has also fallen and become more accessible to those on low incomes. Developing countries that cannot afford the high licensing fees that used to apply to major word processing and spreadsheet applications now have access to low cost or no cost alternatives.⁸ Also, the bandwidth needs of network database programs that used to demand dedicated telephone lines are now capable of operating on the thinnest of bandwidths over the Internet. In short,

⁷ This has become known as the One Laptop Per Child Initiative, launched by UN General Secretary, Kofi Annan at a conference in Tunis on November 2005 (see www.laptop.org). Although then estimated to cost USD\$100 per laptop, the cost of various models produced since then are falling in price but remain closer to USD\$200 each.

⁸ In addition to concessional licence fees that may be negotiated with Microsoft to use MS Office, its word processing, spreadsheet and presentation software, Sun Microsystems offers *OpenOffice*, a free of charge alternative. *OpenOffice* can be used offline for word processing, spreadsheets and presentation software on any computer. Google offers an online-only alternative called *Google Docs*, i.e. it only works when the user is connected to the Internet. Google Docs has the advantage of securely storing all documents produced on Google web servers, thereby bypassing the need for users to store their documents on hard drives or backup servers. Apple produces a similar web-based software product called *iWork* that may be used on any Internet-connected computer.

developing countries now have the technology and are challenged by the need to focus on building their capacity to use it.

A feature of donor-funded programs that have been concerned with the automation of court systems in Africa is that few donor programs have so far attempted to fund more than a minimal portion of the start-up infrastructure required. Although a range of donor and government sponsored change programs have been concerned with providing new technology to courts in Africa, the absolute level of funding has been proportionately small, often limited to supporting pilot courts as only a representative sample. Furthermore, much of the cost is actually absorbed on things other than off-the-shelf hardware and software or the cost of connectivity to the Internet. The major cost has been in developing sustainable ways in which the technology can be brought into use in the context of a particular court system and in developing the skills of people who are to use that technology. The real challenge is not in procuring and installing affordable technology, but in giving the people who are to use those systems the methods and competencies to sustain their use. Thus, using technology ought to be a means to an end, rather than an end in itself.

Using New Court Technology in Ethiopia

Courts in Ethiopia have used technology in quite exceptional ways. In March 2000 the Canadian government, through its development aid agency, CIDA, reached an agreement with Ethiopia to participate in a project to support court administration reform. With an emphasis on the federal courts and in the regional courts of two Ethiopian states, the project had a coverage representing some forty per cent of all courts in the country. The agreed overall project objective was to reduce the administrative inefficiencies and delays of Ethiopian courts, which at first were considered to be struggling as much as any other developing country in Africa. This agreement was preceded by a six month feasibility study in 1996 that was then followed by an eight month project known as the Court Administration Reform Project (phase I), known as CAR I. Based on the modest successes of the first project, a new project, CAR II, ran for four and a half years from 2001 to 2005 at a cost of five million Canadian dollars (US\$3.88 million). Although CAR II finished three and a half years prior to the time of this writing, its benefits were still being sustained. Those who participated in the project have rated it as an enduring success in reducing administrative inefficiencies of Ethiopian courts by using technology and in helping in the promotion of better management practices, greater equity and judicial independence. Since the completion of CAR II the Ethiopian Government committed a further US\$20 million in financial assistance to the Ethiopian court system in general, supplemented by more modest continuing support from a range of donors.

The intended outcomes of CAR II can be described by reference to its four formal components that were set in motion via the 2000 agreement. These were concerned with:

1. *Improving court efficiency* by developing better court record keeping, an efficient system of recording and transcribing evidence, an efficient case tracking system, improved means of case scheduling, improved judgment enforcement processes, caseload reduction and improved standards of document processing in the court registries.
2. *Enhancing management capacity* by improving the management skills of court personnel, the quality of management information to support better case management, improved capacity to measure court performance, improved performance of support staff and generally strengthening the independence of the judiciary.
3. *Positively affecting the equity and quality of justice* by strengthening the Ethiopian bar, providing a capacity to analyse gender-sensitive cases, providing courts and the public with access to key court decisions and improving the gender representation of judges at the basic court levels.
4. *Some quick impacts*, chiefly through improvements in buildings and service facilities, aimed at enhancing the dignity and functionality of the court environment, improving the satisfaction of court users, improving quality and timeliness in producing court documents and judgments, enhancing production of appeal documents, improving communications between different levels of courts and developing plans for future construction of courthouses.⁹

These objectives are quite common for projects that are concerned with improving the administrative efficiency of courts throughout the developing world. What is particular about this CAR II is that, according to senior members of the Ethiopian judiciary who had participated in the project, most of its explicit objectives were both realised and sustained.¹⁰ This contrasts with similar donor or government sponsored change projects in Africa and elsewhere, the proponents of which often have difficulties in asserting the achievement of intended goals, even before those projects were completed. So what were the sustained successes that CAR II was able to achieve? The following are some of the major results:

Colour-coded paper records. A system of colour-coding court file numbers was introduced to provide improved file control and greater immediate access. The system allocates a different colour for each numeral of a court file number label. Each file number is thereby represented in colour as well as in numerals so that when many files are placed together in correct numerical sequence, regular patterns of colour form across the file folders. This makes it easy to spot misfiles at points where there is a visual break in the sequencing of colour. The system's design

⁹ The full title of the project was Court Administration Reform Project, Ethiopia (7010298) August 31, 2005.

¹⁰ Those consulted included Justice Menberetsehai Tadesse, who, in 2009, was Vice President of the Federal Supreme Court of Ethiopia.

was partly aimed at minimising the prospect of a file being misplaced, thereby reducing the risk that some court staff may lose a file. The phenomenon of lost files somewhat euphemistically refers to a form of corruption, which is common to courts and other government agencies throughout the world. The ability of an employee, usually administrative personnel, to temporarily or permanently lose a court or government record often empowers that employee to lose it deliberately and then ask for a fee to find it again. This is sometimes called low-level corruption or *rent seeking*, as the fee is usually affordable for busy lawyers to pay. Creating systems that deny rent seeking opportunities by neutralising the effect of losing a court file is consequently a major objective of court administration reform. It is part of making the court record secure. Under the new system facilitated by CAR II there are fewer case adjournments attributed to lost files and misplaced files are rediscovered more quickly. The new system, based largely on systems used successfully in Canada and elsewhere, was introduced to 44 courts via CAR II. By early 2009 colour-coding was in use in 696 courts in Ethiopia.

Audio recording of court proceedings. The CAR I project pioneered the use of audio recording of court hearings in Ethiopian courts and the consequential production of transcripts in lieu of the presiding judge making hand notes in pen and ink. Most countries in Africa are yet to replace pen and ink notations by judges with audio recording of trial court proceedings and later transcript production. When effectively used, audio recorded courts facilitate faster hearings of oral evidence and a greater prospect of accuracy in what is recorded. In systems in which all evidence is recorded by hand in pen and ink, it is often alleged that the record is incomplete or is at odds with what was actually said in court. Audio recording thus serves to act as a check on abuses or mistakes, particularly in those systems where court records may be later corruptly interfered with by court officials. In Ethiopia the use of audio recording and other courtroom technology has accelerated beyond the 44 courts equipped since CAR II finished. In 2009 audio recording was used extensively in 90 courts and the technology in use was being upgraded by the introduction of digital recording devices in lieu of the older tape recording systems.

Computerised case tracking. Early development of case tracking software in 31 courts under CAR I was improved upon during CAR II and continues to be expanded. In early 2009 there were 251 trial and superior courts that routinely used and relied on electronic case tracking to manage their caseloads. This has allowed the courts that have access to the system to ensure equity in both the priority given to each case and the time taken to finalise them. Each version of software developed for case tracking has been designed and maintained using predominantly Ethiopian information technology contractors and staff. The software has been progressively developed to the point where other low cost uses and services can be leveraged from it, such as separate initiatives in using telephone services, information kiosks and electronic filing.

Interactive voice response (IVR) technology. As a consequence of the CAR II program the Federal Supreme Court of Ethiopia has developed a system that relies on telephone calls to

provide lawyers and other parties with information about individual cases. A computerised call centre operator is connected to the court case tracking system database and uses a synthetic voice over a telephone line to provide structured public information about many thousands of Supreme Court case records. The system uses keypad numerical responses made by the caller to identify the case and the type of information the caller is seeking. In early 2009 this system was responding to over 400 telephone inquiries per day. The Supreme Court is extending the system to all other federal courts using a combination of its own funds and small grant support from donors.

Electronic information kiosks. The Federal Supreme Court used local IT contractors to construct electronic information kiosks for use by the public in court registry offices. The kiosks effectively provide the public with controlled access to the court's case management databases via touch-screen computers. Inquirers can use the system to check the status of a case, a particular process, which in earlier times would have been performed by registry staff after retrieving the court file. As with the telephone service, kiosks enable court users to obtain case information directly with minimal delays and in ways that are not dependent on the user having private access to the Internet.

Electronic filing. The Federal Supreme Court has licensed a range of private agents in all regions of Ethiopia to administer electronic filing of court documents. Each agent processes paper documents received from lawyers, converts them into electronic form and then lodges them with the Supreme Court's database using internet connections. In early 2009 five per cent of Supreme Court case filings had been filed electronically in this way, a significant proportion when compared to many superior courts across the world.

Video links to regions. The Supreme Court and the Court of Appeal of Ethiopia have access to video conferencing facilities for the taking of evidence and submissions from the major cities of all states and most regions. This system makes use of video conferencing facilities that are shared by state, regional and city governments. The court uses this option regularly because of the poor condition of Ethiopia's roads and, in many cases, the personal safety risks to parties in travelling from remote locations to the capital in Addis Ababa.

ICT development capacity. Although not highlighted as a direct benefit, the CAR II project encouraged the Ethiopian judiciary to allocate a budget for and appoint specialist staff dedicated to developing and supporting new information and communications technology systems. Those staff along with the Ethiopian contractors they supervise, continue to maintain systems developed during CAR II and they have helped maintain the momentum of new system development since 2005.

Case management expertise. A less overt outcome of CAR II has been a change in the ways in which the court leadership and judges in general perceive their responsibilities, priorities and options in case management. Prior to the introduction of systems sponsored under CAR II, courts that lacked new technology options struggled as they do in many other countries under a burden of massive case delays and rising numbers of pending cases. The reforms not only helped the courts keep track of their caseloads and account for the ways in which cases are disposed, but provided them the means of processing cases more effectively. Instead of being overwhelmed by the rising volumes of pending cases, many Ethiopian judges are now focused on other more useful indicators of case management effectiveness. For example, the dominant focus of case management reports, which the judicial leadership now routinely use, are concerned with such things as case clearance rates, adjournment rates and compliance with case disposal timeliness standards. Better standards of new technology have enabled judges to focus on what matters most, rather than the narrow range of what could previously be measured. The shift in the practical focus from case arrears to cases actually disposed has energised the Federal Supreme Court to account for its achievements rather than its problems. In early 2009, for example, Supreme Court case database reports were confirming that the court has been able to achieve case clearance rates close to or exceeding 100 per cent,¹¹ progressively faster case disposal times and lower levels of average case adjournments for most of its active caseload. All of these considerations correspond with the priorities of the well-managed courts.¹²

Associated process reform. Another less direct outcome of the CAR II project was that new technology options facilitated quite comprehensive re-evaluation of the paper-based systems and services, which participating courts had previously assumed to be immutable. Processes administered in court registries as well as courtrooms were subjected to practical process re-engineering. This resulted in the reduction of processing steps (from 19 to only four in one case), often as a consequence of available new technology that allowed new processes to happen faster and with less effort.

Success Factors of CAR II

How is it that the Ethiopian CAR II project has reportedly done so well? The most useful aspect of the results observed is probably not so much the degree of success achieved, but the means used to achieve such generally positive results. CAR II appears to have applied means that have not necessarily been applied in other less successful projects, or at least not to the same degree.

¹¹ Over a given month, the courts were disposing of as many pending cases as there were new cases being registered in the same month. A case clearance rate is calculated by dividing case disposals over a period by new cases registered in the same period e.g. $100 / 100 = 1$ or 100% rate of clearance.

¹² See the range of court performance measurement best practice material available via the website of the National Center for State Courts, USA www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm and via the International Framework for Court Excellence www.courtexcellence.com

Based on feedback from the personnel interviewed who worked on the CAR II Project over its four and a half year duration,¹³ here are some explanations of that success.

Goals were set locally. The processes of CAR II and the preceding project activities were aimed heavily at involving Ethiopians, particularly the leadership of the courts. In preparing for the design of the project, the question was asked: “What are the problems of ineffective court administration that need fixing?”. They then relied on the answers given by informed Ethiopians to guide the project design. This may seem an obvious methodology, yet it is sometimes suggested in relation to other donor projects that projects are too often designed in the capital cities of donor countries and later put forward for approval by recipient governments with minimal negotiation.

Thoroughness of design processes. A relatively large degree of international support was dedicated to project and activity design. Even after CAR II began there was a thoroughly funded and administered inception mission, thus ensuring a solid link between the design and implementation stages.

Systematic design methodology. An effect of the thoroughness of the CAR II design was that each element of its work plan was advanced by an open process of identifying problems, ascertaining consensus about the root causes of the problems and designing activities that adequately addressed them. Ample time was spent on diagnostics that entailed a substantial interview program and associated surveying aimed at building a documented matrix of related activities, each of which logically addressed the root causes of identified problems.

Truly bilateral collaboration. There was a balanced combination of both Canadian and Ethiopian experts and other participants, including the senior judiciary. Although donor-funded, the essential staff hired to lead each phase of activities were Ethiopians. The donor pursued this despite perceptions at the time that lesser expatriate participation in project leadership may have weakened the donor’s ability to ensure that project goals were achieved. This concern was managed by the use of strong and sustained off-site support to the project via a Canada-based project director who made regular visits throughout the full duration of the project. At the same time, study tours by Ethiopians to see the operations of Canadian courts helped engender a better understanding of project goals among Ethiopian participants, which enabled them later to essentially take the lead.

Merit based recruitment. High standards of care were applied in the selection of participants, including those drawn from the courts themselves. Merit-based selection was used, a requirement that often demanded more time and negotiation to secure the most appropriate

¹³ The range of people interviewed and consulted including the Canadian project director, Donald Rose, and officers of the managing contractor for CAR II, the Office of the Commissioner for Federal Judicial Affairs of Canada.

appointments. CAR II avoided making appointments or selecting participants whose nomination was based on rank (seniority) or perceived bureaucratic or political affiliations.

Commitment to gaining judicial trust. The CAR II leadership needed to devote energy and time toward proposing the acceptance of quite radically different ways of doing things, such as reengineering of court registry processes. This need had to be pursued against the usually impatient expectations of donor agencies. Many donor agencies, themselves departments or state agencies, are largely driven by their government's annual project funding cycles, a factor that often results in projects of short duration. Development projects like CAR II are often programmed to last only two or three years before measurable gains are expected to be demonstrated, despite the independence that judiciaries typically seek to assert. Given the need to demonstrate patience and understanding in dealing with the independent proclivities of judiciaries, and the slower pace of reforms they normally pursue, the decision to allow CAR II to run for almost five years probably contributed to the extent of its success. Taking CAR I and other preparations into account, the whole process was closer to ten years overall.

Comprehensive approach to change programming. The project pursued change management activities on several fronts in recognition of the fact that the impact of any technological change was not likely to be one-dimensional. Audio recording of court proceedings, for example, demanded not just new courtroom hardware and training requirements, but also a wholesale reassessment of the definition of what constitutes a "record" of each hearing, how the record would be produced and how it would subsequently be used in both a legal and a practical sense. For almost every improvement proposed, a whole range of legal, resource and human management consequences needed to be negotiated, implemented and sustained.

Merging judicial administration and project management. Reform programs in court administration can sometimes be hampered by attempts to apply routine judicial administration processes and management hierarchies to the implementation of project activities. The use of existing high level boards, such as judicial committees, can hamper project management unless structured to preserve the planning and financial control that project management normally demands. CAR II overcame this risk by facilitating judicial leadership of project management committees, rather than the project manager's participation on judicial or government committees. Also, the need for judicial accountability and control of the reform process was a theme that was applied to every aspect of CAR II planning. To that end, the CAR II project ensured that the consultants appointed to interact with the judicial leadership were sufficiently experienced and qualified to ensure respect from that leadership.

Change piloting. CAR II change initiatives were systematically tried out as pilots, often for long periods, prior to being endorsed and extended for general use. This approach contrasts with other projects where the solutions may be imposed by project work plans for general

implementation, whether or not they are proven to be worth implementing. CAR II participants found that a trial or pilot not only tested a new concept, but also expanded the experience and understanding of those who would eventually apply the concept more extensively. A further factor is that completing a pilot of any kind was not an explicit objective of CAR II, although other donor projects are often limited to administering a pilot. Instead, CAR II objectives were described as requiring the development of a solution, rather than merely piloting a possible solution.

Training and more training. Years after its completion, among the most intangible yet significant features of CAR II activities was the extent and scope of management training and associated structured discussions offered to Ethiopian court personnel. While many donor funded court reform programs devote considerable resources to training, that training is often limited to judges on how to be better judges, rather than on training judges and staff about how to be better court managers. Management training was offered on a large scale and very early under CAR II using qualified Ethiopian trainers. It had the subsidiary effect of giving trainees the requisite project management and process analysis skills that would later help drive each process reform activity under CAR II. The training programs also coincided with the early workshops that were concerned with refining the project design. CAR II effectively leveraged its training objectives to accelerate its other objectives. It thereby produced a broad range of well informed and motivated participants attached to the Ethiopian court system, who would not only make the project a success, but would also remain with the courts long afterwards to sustain that success.

Conclusions

What can be learned from CAR II that may help achieve similar results in other parts of sub-Saharan Africa? Two general answers might be offered.

Firstly, CAR II seems to demonstrate the value of court improvement processes that are aimed at making the court record more accurate, complete, secure and accessible using new technology. Related to this, it confirms that those kinds of improvements can reduce low-level corruption, which often applies to purely paper-based systems for administering the court record. They also provide proof that the use of new technology in courts can give the court leadership and judges in general the information they need to manage cases more effectively.

Secondly, CAR II seems to offer evidence of project design and implementation features that explain its successes. These features, strongly characterised by high levels of transparency and local participation in project design, offer lessons that could well be applied elsewhere in Africa.

3. Trusting the Court – A Judicial Transparency and Accountability Mechanism for Magistrate Court Stations

Kenya holds no special place among African countries for the transparency of its court case management processes. It does not publish court case statistics. Nor are there particularly strong mechanisms for sharing information about how courts work with the public or processes for assuring the integrity of magistrates, judges or administrative staff. Like most judiciaries in Africa, the Kenyan judiciary has for many years been burdened by sustained domestic media allegations of widespread judicial corruption and an institutional reluctance to expose itself to external scrutiny. Since 2007, however, an experiment in improving judicial transparency has advanced with positive results on the initiative of the Kenya Magistrates and Judges Association (KMJA). This was done by advancing a small-scale project called TAM, the Transparency and Accountability Mechanism.

If viewed purely as a donor funded and executed project, TAM would be considered a dubious success by any conventional standard of measurement or evaluation. Progress of the project was erratic and proceeded largely on the initiative of individual magistrates of the eleven pilot court stations that participated and there are few people who can readily attest to its achievements other than the direct participants. One of the factors that inspired the development of TAM was the judicial purge of 2003. Following a high level government-initiated inquiry that year into allegations of judicial corruption, more than a third of judges and magistrates were summarily removed from office. The effect of the purge, widely criticised at the time for deficiencies in due process, was to instil in the minds of many members of the judiciary the belief that similar purges may occur in future if the means is not developed by which the judiciary may somehow purge itself. Sensitivity to this concern has been most pronounced among the magistrates through the KMJA. Originally established in the 1970s as a welfare group for members of the Kenya judiciary, it has since extended its activities to include programs concerned with uniting and empowering judicial officers in ways intended to enforce judicial integrity and independence. While the chief justice and the senior judiciary are all members of the KMJA, the association stands outside the normal structures of the judicial hierarchy and enjoys the advantage of relative trust among judicial officers.

With financial support from several sponsors during 2006 and 2007, the KMJA developed TAM as a means by which each court station could survey its clients about court performance and respond meaningfully to the feedback it receives. The development of this idea sprung from concerns about the shortcomings of court open days, an initiative first used in Kenya in early 2006. An open day is an annual showcase event to which the public is invited to meet with

members of the judiciary and learn more about the operation of courts. A limitation on open days, however, is that they are normally intended to occur only on a single day in any year and to focus on providing promotional information, usually lacking a structured means of receiving information that is offered to the public. Many people who attended an open day sought to ventilate grievances about their personal experiences in courts, something that the judges and magistrates who attended had no proper means of responding to on the day or even afterwards. While the organisers of the first open days used to issue survey questionnaires to attendees about their experiences with the courts, the means of processing the responses and providing feedback to the public had not been developed, at least not until the KMJA launched TAM.

TAM was designed to produce a better standard of communication with court users by introducing four distinct, but inter-related elements – judiciary dialogue cards, court user committees, peer review committees and judiciary dialogue boards. Each is explained below:

Judiciary Dialogue Cards

A judiciary dialogue card is a small survey card containing a structured questionnaire with multiple-choice answers. It also has space to allow a respondent to make suggestions or complaints about specific cases. Respondents have a choice between remaining anonymous or identifying themselves or the relevant cases. The questionnaire form seeks various kinds of feedback from each respondent, in particular:

- the distance the respondent had travelled to reach the court;
- the extent to which respondents were aware of their rights under the court Litigants Charter;
- the capacity in which the respondent attended court, e.g. whether they were a litigant, advocate and the reason for attending;
- the type of court hearing the respondent came to attend and whether the case was adjourned;
- how long the case had been in court and the number of times it had been adjourned previously;
- whether the respondent believed there had been unreasonable delay and the apparent cause of the delay;
- whether the respondent was asked for a bribe at the court and, if so, the identity of the official who asked for it;
- whether the respondent had confidence in the integrity and competence of the magistrate;
- the respondent's opinion about the general efficiency of justice administration;

- whether the respondent intended to pursue other ways of resolving the case (such as by using traditional justice options).

Each judiciary dialogue card bears a unique printed number. That number is also printed a second time on a tear-off strip at the top of the card, called a *card number slip*. The instructions on the card recommend that the respondent tear off and retain the card number slip for later reference before placing the rest of the completed dialogue card in a secure box at the court.

The KMJA also developed a simple computer spreadsheet program, which can be used by staff at a court station to collect and collate the data provided on each dialogue card.¹⁴ The spreadsheet program produces a simple statistical report on data extracted from cards received at each court station. In that way each station has ready access to both numerical and case level information from its client base.

Court User Committees

A court user committee ordinarily comprises the magistrates at a court station along with representatives of court stakeholders, such as the police, prosecutors, the private bar, prison authorities and NGOs that are active in supporting litigants in courts. The concept of court user committees has been used in various ways in Kenya independently of its adoption by the KMJA.¹⁵ TAM adopted the court user committee concept as an essential means of processing and reacting to the information provided in judiciary dialogue cards. The special role of the committees is to review each dialogue card, to discuss what may be done in response to it and to decide what feedback is to be given to each respondent. In that way the magistrates at the station have a means of directly involving other committee members in resolving both systemic and individual case problems. In effect they operate as high-level complaints committees with an explicit and written agenda, using the dialogue cards, and an agreed obligation to provide a written response to each complaint or suggestion. In court stations, where many of the systemic problems are due to agencies or officers other than magistrates, this forum provides a powerful means of bringing to account all court participants in the resolution of shared problems.

Peer Review Committees

In some cases a judiciary dialogue card may allege that a magistrate has personally misbehaved or engaged in corrupt practices. In those cases the allegation is referred by the court user

¹⁴ Much of the technical assistance for TAM was provided by GTZ, whose program office in Nairobi played a major role in supporting the KMJA.

¹⁵ The Legal Resources Foundation Trust of Kenya, for example, has advocated and financially supported the establishment of several court user committees as a means of advocating for the rights of detainees and indigents in the criminal justice system. The court user committees or groups are also a standard feature of many court systems throughout the world.

committee to a separate peer review committee that is made up only of the magistrates at that court station. This enables an allegation against any one magistrate to be discussed confidentially with his or her peers before a peer review committee determines a collective response.

Judiciary Dialogue Boards

After each judiciary dialogue card is considered by the court user committee or by the peer review committee, a record is made of the feedback that is to be offered to the respondent. The feedback is then displayed in writing on a notice board in a public area of the court station building, known as a judiciary dialogue board. Each entry placed on the board also specifies the dialogue card number. Respondents who had earlier chosen to remain anonymous when filling in their judiciary dialogue cards are thereby still able to find out what happened to their complaints by using the number appearing on their retained card number slips.

Although many courts in other systems use court user committees and user surveying, TAM leverages other advantages. It provides a means by which courts can respond effectively to individual complaints and suggestions. It provides both public and private feedback, even when the complaint or suggestion is anonymous. It incorporates a record system that permanently collects both statistical and case level information at relatively low cost. It also provides a relatively transparent and appropriate means of dealing with corruption allegations, including allegations against magistrates themselves. Most significantly, the cost of TAM is low. It is not dependent on elaborate training programs, the availability of information technology or significant funding. The main cost is for the printing of the judiciary dialogue cards. Also, its introduction is not dependent on direction from the higher judiciary, as are most initiatives that apply to magistrates in the centrally administered justice system in Kenya.

One of the reasons why participating magistrates became enthusiastic about TAM is because it provided information they can use to make genuine improvements to court services. Dialogue cards tended to indicate, for example, that the majority of complaints were about unsatisfactory service standards, rather than allegations of corruption. Of the corruption complaints made, most tended to allege corruption by police and officers other than magistrates – useful for magistrates who may be fearful of future judicial purges. This information, provided in written form to the court user committees, has strengthened the hand of the presiding magistrates in negotiating and implementing service improvements, which may be dependent on the cooperation of police and others. It has thereby helped magistrates assert greater control over judicial services at their stations, contributing to higher and better levels of communication overall with other sector actors within a court precinct.

Another significant effect of TAM is that while it tended to empower magistrates who were keen to improve their courts, it has also had an effect on magistrates who were not so diligent. Some magistrate stations were found to be less than enthusiastic about issuing and collecting judiciary dialogue scorecards or convening user or peer group meetings. If it is true that some magistrates and staff are corrupt, then it would hardly be surprising if some manoeuvred to avoid allowing TAM to work in their courts. If the judiciary acts on its plans to extend TAM to all courts, it seems likely that the jeopardy for corrupt magistrates will become sharper, since a failure to introduce it accurately is likely to draw the attention of judicial inspectors.

Conclusions

TAM is of special interest because it harnesses ideas that in themselves are modest successes in other systems, but draws out those successes in ways that could prove to be truly innovative if applied to all courts in developing systems. From the perspective of donors, support to the TAM initiative also offers a low cost and comparatively low risk option compared with, for example, the procurement challenges posed by the funding of office automation or court records systems development programs. It does not offer direct solutions to all court administration problems, but is more likely to shine the light of transparency on the true problems of court administration, at least from the perspective of court users.

4. Taking Care of Business – Strengthening Commercial Justice Systems in Africa

A common goal of justice sector development projects in Africa is to provide assistance that helps countries develop their commerce and trade. The reasons behind these types of projects reflect a belief that investment is impeded by poor laws or where relevant legislation is not effectively enforced. Increased investment, commerce and trade are considered to be essential in reducing poverty and raising living standards in any country. So it goes that pursuing better standards of justice for business is considered a high priority in helping poor countries enhance their prospects for economic development. This, in turn, is seen as the path to better public services and more accountable government through increased tax revenues and lower levels of unemployment. The counterpoint to this is the effect of poor laws or poor law enforcement, which tends to discourage legitimate business investment and can facilitate theft of public and private resources.

In recent years the main avenues of donor support in developing business friendly justice systems has focused either on drafting commercial laws or on developing more effective commercial dispute resolution mechanisms. In sub-Saharan Africa these efforts have generally fallen into three categories of reform programming:

- *National statutory reform.* Donors will usually assist state institutions to modernise their laws, taking into account the successes of other, generally more prosperous economies. This is often done by hiring law experts with specialist expertise in a particular field of business law. The draft law may then be scrutinised by a range of national law institutions, such as universities or law reform commissions, before formal consideration by the executive, judicial or legislative branches. This approach is common in Anglophone countries in Africa because it is essentially the approach that the United Kingdom continues to use in reviewing its own laws.
- *Adoption of international law standards.* Some countries may treat national statutory law reform as an opportunity to adopt a law that other countries already use. Francophone countries in Africa have pursued this approach. This means that for certain defined classes of business law, some African countries adopt an international, uniform law by treaty, rather than one that is customised to a particular country. The appeal of this approach is reinforced by the application in Francophone countries of civil law codes, which were largely inherited from France as a former colonial power.

- *Special commercial dispute processes.* Some countries will apply dispute resolution programs aimed at granting additional resources and defining priorities to include the resolution of commercial disputes. This may take the form of enhanced options for commercial arbitration and for establishing specialised commercial courts capable of fast tracking the adjudication of such disputes. It may also include special laws aimed at making more readily enforceable the legal obligations that arise under contract or other litigation. This approach usually focuses on the processes of the judiciary of a country and may be applied in any African country irrespective of its languages or colonial history.

Each of these techniques is capable of being more effectively applied in sub-Saharan Africa. The first usually entails the least cost, but is often vulnerable to the concerns of the government of the day, which may choose to reject a new draft law or refuse to put it up for consideration by the legislature. The second and third require greater costs, but offer a greater prospect of measurable gains. Whether or not those techniques may be considered worthwhile, however, is a question that needs to be examined. The following evaluates a representative example of the second and third options - the OHADA Treaty and the experience of special commercial courts.

The Organisation for the Harmonisation of Business Law in Africa

The idea of harmonising national laws in French speaking African countries was first officially debated at a meeting of justice ministers in 1963. The concept sprang from a growing political desire in post-colonial Africa to strengthen individual legal systems by enacting a secure legal framework for economic development. That idea, however, did not coalesce into action until the Franco-African summit in Libreville in October 1992 when the President of Senegal officially presented a proposal to establish a multinational organisation for the harmonisation of business laws between African countries. A committee of three jurists was appointed to draft an international treaty to identify areas of law that might be harmonised. A treaty was signed the following year to establish the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organisation for the Harmonisation of Business Law in Africa) or *OHADA*, as it is known by its French acronym. The treaty was signed in October 1993 by fourteen countries: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal and Togo. Later on, Guinea (Conakry) and Guinea Bissau joined the agreement, which became binding on signatory states from September 1995. Since then Cape Verde, Sao Tome & Principe, Rwanda and the Democratic Republic of Congo have indicated formal interest in joining OHADA. So far, nearly a quarter of sub-Saharan African countries have joined OHADA with considerable potential for others to follow.

OHADA was established under the treaty as a regional organisation to develop a single modern legal framework for signatory states to govern their economic activities and to promote arbitration as a means of settling commercial disputes. When the treaty was signed a large part of the legal framework within each signatory state was considered obsolete and essentially insufficient to meet contemporary needs. Some of the problems of African judicial systems, many of which became independent of colonial powers only since the 1960s, included the coexistence of contradictory legal texts, slow judicial procedures, a lack of predictability of court decisions, institutional corruption and weak contractual enforcement processes. It was expected that through the harmonisation of business laws legal differences would be reduced by the consistent adoption of common statutory laws in French.

The institutional framework established to implement OHADA was established around four elements:

- A *Council of Ministers*, which is the highest decision-making body, the main function of which is to adopt new legislation on behalf of signatory states, known under the treaty as uniform acts (*actes uniformes*). The council is composed of ministers of justice and ministers of finance of all signatory states.
- A *Common Court of Justice and Arbitration* (CCJA) composed of seven judges and located in Abidjan, Côte d'Ivoire. Each judge of the court is elected for a seven-year term, renewable only once. The main three functions of the court are to: (i) interpret OHADA laws including the treaty itself, the uniform acts and any other regulations that may be adopted; (ii) administer original jurisdiction over all matters arising from the application of uniform acts; and (iii) act as a supreme court of cassation.
- A *Permanent Secretariat* headquartered in Yaoundé, Cameroon, to perform a technical and coordination role; to prepare drafts of uniform acts and to disseminate information about OHADA laws.
- A *Regional School for the Training of Legal Officers* (ERSUMA) located at Porto Novo, Benin, and established to provide training for judges and court officers in the areas covered by OHADA legislation.

The mechanism for adopting and applying uniform acts under the OHADA treaty is relatively unique. In the European Union, its closest comparable system, common laws of member states are approved by the European Parliament, which sets certain objectives to be achieved. Member states in Europe retain substantial latitude as to how each law is implemented. In agreeing to the OHADA system, however, signatory states preferred a mechanism that is more direct and simple. When the OHADA Council of Ministers adopts a new uniform act, in contrast to the process in the European Union, it becomes directly applicable and enforceable in each member

state as if locally enacted. No further local or enacting legislation is required before a uniform act becomes fully in force.

Until early 2009, eight uniform acts had been adopted by the OHADA Council of Ministers. These acts operated to immediately supersede laws in each signatory state covering the same area of regulation. The uniform acts in place are:

- a *general commercial law* governing commercial transactions;
- a *company law* governing the establishment and operation of commercial companies and economic interest groups;
- a *securities law* for secured transactions;
- a *debt recovery and enforcement law* concerned with simplified recovery proceedings and enforcement measures;
- a *bankruptcy law* governing insolvency;
- an *arbitration law* regulating alternative dispute resolution mechanisms for commercial disputes;
- an *accounting law* governing corporate accounting;
- a law governing contracts for the *carriage of goods by road*.

So far OHADA has proven to be effective in adopting the eight uniform acts, which offer substantial coverage of business law issues. The pace of the adoption of new uniform acts is slow, however, moving at an average rate of only one new act every two years. And so far, none of those laws has yet been amended to incorporate improvements. Implementation of the new laws across the signatory states has also struck a range of practical problems including continuing conflicts with local laws, difficulties in disseminating and promoting new uniform acts and persistent difficulties with enforcement. A general problem is that there have only been limited processes of participation by national institutions in developing new draft uniform law proposals. The Permanent Secretariat has also suffered from capacity problems, a factor that has resulted in few new uniform acts being issued in recent years. These problems seem to reveal shortcomings in OHADA's institutional capacities, rather than in any defect with the OHADA concept of offering standardised and consistent laws across many countries.

Another factor that could strengthen the potential impact of the OHADA concept is to include signatories from Anglophone Africa with common law legal traditions. Similar benefits might also accrue to Lusophone Africa. The adoption of civil law codes by Anglophone countries would be unlikely to offer any significant practical difficulties other than the problem of there being no official English translations. Membership by some Anglophone countries, such as

those in eastern and southern Africa, would be likely to reinforce OHADA processes for national participation in the development of new uniform act proposals and opportunities to collaborate with other members in developing better enforcement mechanisms.

Conclusions about OHADA

OHADA warrants classification as a valuable process for extending a unifying system of commercial laws across a significant part of sub-Saharan Africa, although this value is somewhat qualified by the extent of the poverty of all fourteen of its signatory countries and their limited progress in addressing the implementation and enforcement of uniform acts. There would be value in donors supporting programs aimed at using the OHADA treaty as a mechanism for developing truly pan-African laws governing business and commerce.

Special Commercial Courts

Various donor-sponsored projects have been explicitly aimed at supporting the development of specialised courts, or special processes within general courts, to give priority attention to the resolution of commercial disputes. The essential justification for special processes is that delay in resolving commercial disputes by the general courts can result in delayed or frustrated investments that impact on national development, employment and wealth creation.

The concept of a special court process for business essentially entails isolating a part of the judicial system by making it available only to a defined class of cases. Usually the class is defined by reference to the type of civil dispute to be preferred, such as disputes about high value development projects or the enforcement of high value commercial contracts, such as those affecting international trade, mining, agriculture, banking, transport systems and general civil construction. The class of cases processed can also be defined by reference to other factors, such as where a court is established for cases filed in the capital or where most of the likely litigants may be based. Cases can also be limited by the filing fees that a specialised court charges, which can sometimes be so high as to be unaffordable for anyone other than a large commercial or government organisation.

The value of these initiatives, which are often referred to generically by donors as *commercial courts*, is often dependent on the extent to which there may be a desire to adhere to objective, but preferably predetermined, judicial productivity goals. In a developed economy the productivity of new commercial courts can be assured by increased resources and a steady flow of preferential government funding. In a poor country, such as most in Africa, the productivity of commercial courts may be less assured by reason of the limited resources that are actually

provided. An illustrative example of the pitfalls is the experience of the commercial court established in Tanzania:

Commercial Courts in Tanzania

The Commercial Division of the High Court of Tanzania was established in 1999. The essential model for the new division was to appoint three justices from among Tanzania's existing 15 High Court judicial positions and establish them as a specialised division for commercial work with a non-exclusive jurisdiction. A building for the new court was acquired with donor assistance near the main building of the High Court in Dar Es Salaam, Tanzania's capital. A building was also established in the city of Arusha and plans were advanced to establish a third regional seat for the court at Mwaza so that it could sit close to where its cases were likely to arise.

While donors helped the new court in a range of ways to acquire adequate facilities for its operations, they played no part in helping to overcome the consequences of effectively isolating around 20 per cent of the High Court to process nothing but commercial cases. In order to ensure that the new court would not be overwhelmed with comparable volumes of cases to those that bedevilled the general courts, very high filing fees were imposed and litigants were given the option of filing their claims in the court they could afford. This achieved its intended purpose of giving the commercial division judges a manageable number of the mostly high value commercial cases on their dockets. But it also had the effect of sending back to the general courts a large range of cases that might have been considered commercial in nature. While the new commercial division was able to achieve relatively better clearance rates and disposal times, the problems of the general court system, including its own share of commercial caseloads, remained mired in chronic delay.

From 2000 to 2007 average delays in the issuing of judgments in the Commercial Division were 25 months, compared with 42 months in the other divisions of the High Court.¹⁶ The overall effect of the Commercial Division's experience since 1999 is that, in terms of the case processing times, it was an outstanding success, at least by the standards of the general courts of Tanzania (see the table below). This success loses its lustre, however, when considering that it was produced at the cost of diverting to other courts cases that the Commercial Division might otherwise have accepted, and by compounding the already deep shortages of judicial resources for the general courts. Moreover, even the speed and quality of cases disposed by the Commercial Division proved to be disappointing when those cases were appealed. The Tanzania

¹⁶ Felix G. Kibodya, Advocate, Head of Legal Dept. NBC Ltd and Chairman, In-house Legal Counsel Committee, Tanzania Bankers Association, *Resolution of Commercial Disputes and the Establishment of the Commercial Division of the High Court*, presented at the Round Table Discussion organised by the Commercial Division of the High Court of Tanzania, Dar es Salaam, 30 June 2008.

Court of Appeal remained just as burdened by low clearance rates and long case delays as the general courts. A factor that further weakened prospects of success was the limitation of the Commercial Division to only three judges. By the promotion or transfer of serving Commercial Division judges in later years, the Commercial Division suffered from sustained shortages of judges, a fact demonstrated in the case disposal rates as shown in the table. Consequently, as an exercise in fast tracking the effective disposal of high value commercial cases, the success of commercial courts in Tanzania could only be described as mixed.

Commercial Division of the High Court of Tanzania

Year	Cases filed	Cases disposed	Case Clearance rate %
2000	32	26	81%
2001	77	76	99%
2002	67	66	99%
2003	23	26	113%
2004	9	6	67%
2005	22	19	86%
2006	9	9	100%
2007	14	3	21%
Total	253	231	

Source: Felix G. Kibodya's paper published in 2008¹⁷

There are numerous other instances where donor sponsored projects have been aimed at developing the establishment and operation of commercial courts across the world, including Africa. In Kenya, for example, improvements flowing from establishing its specialised commercial court (the Milimani Commercial Court in Nairobi) are barely perceptible in terms of the official figures. Commercial cases continue to be as much affected by systemic court delays as any other parts of the judicial system. In many countries where commercial courts have been developed, donor support seems not to have much impact other than in areas of physical facilities and the training that might be provided to commercial judges. In terms of outcomes that can be related to the reasons offered for establishing preferential treatment of commercial cases, the successes tend to be few and short lived.

¹⁷ Ibid.

Conclusions about Commercial Courts

Can the concept of commercial courts be considered a beneficial means of advancing justice sector development and reducing the cost of doing business with the aim of helping African countries reduce poverty? The answer should be a qualified one. If the objective in establishing a commercial court is to isolate judges and resources in order to assure preferential treatment for high value commercial dispute resolution, then success should be judged by what those courts actually achieve. The establishment of a new court by legislation, administrative resources and judicial resources may be a prelude to success or to failure, depending on whether those resources are both sustained and well used. If donors and African governments are serious about taking care of business, the focus ought to be on sustaining commercial court models, rather than merely establishing them with donor support.

5. Home Spun Justice – State Administered Mediation Services in Nigeria

The year 1999 marked the end of a prolonged period of military governments in Nigeria. In that year, those appointed to the Office of President and as the governors of the 36 Nigerian states were each elected democratically for the first time since 1976. For most of Nigeria's history since independence from Britain in 1960, its governance has been tumultuous, characterised by accusations of corruption at the highest levels and largely bereft of opportunities to develop public services that aspire to democratic standards of accountability. From 1999 onwards, however, Nigeria has remained at least nominally democratic and its institutions have been gradually moving toward greater operational transparency and an increasing awareness of the need to render effective services.¹⁸

Among the promises made during the 1999 election campaign in the State of Lagos¹⁹ was a commitment by its new governor to help people, particularly poor people, gain better access to the justice system in that state. Unlike its predecessor, the new government did not have the option of merely issuing fresh edicts that would bind the judiciary. The new constitutional arrangements that had mandated democratic elections also enshrined the independence of the judiciary at both state and federal levels, so that judicial reforms and the administration of justice would no longer be entirely dependent on the approval or patronage of the head of state. Improving access to courts of justice was consequently a goal that a new democratic government could not have much direct influence over unless it collaborated with the judiciary itself, a process that was likely to be slow and not necessarily effective in the early post-military period. Something that was wholly within the government's prerogative, however, was to reform those parts of the civil service that were concerned with legal services provision, specifically, those within the Lagos State Ministry of Justice.

During the military period the role of the Ministry of Justice in Lagos State was essentially limited to providing legal services to government, chiefly through the provision of prosecutors in criminal proceedings and government advocates whenever the state was a civil litigant. The new government consequently substituted the concept of providing *justice for all* in place of prior militaristic notions of providing *justice for the government*. This new policy implied that the

¹⁸ The 2007 election, for example, was the first in Nigeria's history that produced an ordered transition of power from an elected president to his elected successor.

¹⁹ Lagos State is the smallest state in land area in Nigeria but accounts for 5% of Nigeria's population of approximately 150 million. Lagos city, which was the capital city of Nigeria from 1914 to 1991, is the capital of Lagos State. http://www.lagosstate.gov.ng/c/portal/layout?p_1_id=PUB.1095.7 (viewed March 2009)

government would not only support the framework of justice and the government's role in it, but it would also develop and support ways for ordinary citizens to pursue their legal rights within that framework.

Soon after his election, the new governor appointed Professor Yemi Osinbajo²⁰ as Attorney General and Commissioner for Justice, authorising him to implement several initiatives concerned with increasing access to justice in Lagos. At that time the only civil service office within the Ministry was one concerned with citizens' legal rights known as the *Complaints Office*. It was established only two years previously to relieve the workload of new rent tribunals created under the Rent Control and Recovery of Premises Edict of 1997. By 1999 the Complaints Office was already under-resourced and largely failing to cope with the demand for a non-adversarial means of resolving complaints between tenants and landlords in a city in which housing for the poor, or the lack of it, was a dominant and enduring issue of public controversy. In addition to problems in the landlord and tenant jurisdiction, various studies at the time revealed widespread negative perceptions of the formal and adversarial justice system in Lagos, especially among the poor and other vulnerable groups. In recognition of these problems, Attorney General Osinbajo remodelled the Complaints Office into a new Directorate of Citizens' Rights (DCR) for the purpose of providing comprehensive legal assistance and mediation services for indigent members of the public. The DCR advanced several initiatives, one of which was the Citizens' Mediation Centre (CMC).²¹

Citizens' Mediation Centre

The first CMC was created administratively in 1999 as a unit of the DCR. Although there was initially no legislation to advance its operations, it had the benefit of a modest salaries budget, an office in the ministry's headquarters and personnel who were officers of the Ministry of Justice. Then as now, the ministry applied organised career paths for its officers that enabled it to rotate or advance its career legal officers through various branches, such as the prosecutions office, the public defender's office and the DCR. Using this resource base, the DCR developed the CMC concept as a public sector managed unit for processing legal disputes by offering salaried mediators to resolve disputes outside the courts of justice. The concept of mediation had been developed and applied by non-government organisations in Nigeria and elsewhere for many years, but the notion that it might be applied by a government agency was novel in Nigeria.²²

²⁰ Professor Osinbajo is of the Faculty of Law, University of Lagos and is also Director of the Justice Research Institute in the University of Lagos.

²¹ The other initiatives were the Human Rights Unit and the Consumer Protection Unit. Also established was the Office of the Public Defender (OPD) and the Multi-Door Courthouse (which provides court-annexed mediation services).

²² It was also novel that courts of justice might offer court-annexed mediation, a practice that was also widespread in court systems outside Africa in 1999.

Furthermore, this concept was developed in Lagos as an essentially home grown solution to its problems, without foreign influence or significant donor support outside Lagos State.

The CMC concept entailed the establishment of a public complaints office and associated publicity aimed at receiving complaints. The attraction for potential complainants is that the service was developed specifically for the benefit of people who could not afford to go to court and is provided completely without charge. Each complaint is first assessed as suitable for mediation and then referred to a mediator employed at the CMC. A complaint is ordinarily processed after one or two mediation sessions, the aim being to complete all mediation activity in each case within three months of receipt of the complaint.

The service provided by CMC was expanded to a wider range of citizens by the gradual establishment of four more branch offices of the CMC across Lagos State.²³ In 2003 the role and structure of the CMC was formalised by legislative enactment of the Lagos State Citizens' Mediation Centre Law (2003). As well as clarifying the role and responsibility of the CMC, the new law established an appointed governing council to guide its administration. Since that time, the five CMC offices have employed more than 30 salaried mediators to manage a growing caseload. In 2005, for example, CMC disposal rates had risen to over 8,000 cases. But this success was not without its managerial and resource problems, a reality recognised in 2006 when the Ministry of Justice entered into an agreement with the UK Department for International Development (DFID) to provide a program to support the CMC through its Security Justice and Growth Programme. The purpose of the DFID supported project was to help the CMC develop and implement more efficient procedures, and more relevant and structured data management systems. The intention was to help the CMC to produce more accurate and relevant information that could be used to inform decision-making and enhance the prospect of improved services. A further purpose was to build the capacity of the members of the CMC's governing council in order to fulfil their new role. The expectation was that with assistance from the DFID project, improvements in these areas were achievable by improving CMC procedures for handling mediation cases, developing an effective case record system, developing a management information system and enhancing the associated competencies of CMC staff. In supporting members of the CMC's governing council, the project was also expected to support improvements in member competencies, assisting in the design of the CMC strategic plan and monitoring its implementation, and helping council members generally in assessing CMC performance.

In February 2006 the DFID project completed an evaluation of operational issues affecting the CMC, which concluded that many procedures and records systems were working poorly. There were also resource shortages and limitations on the range of competencies and experience of

²³ The central CMC office is in Alausa Ikeja and the additional offices are at Allen, Ikorodu, Onikan and Yaba.

CMC staff. Existing information systems seemed to offer only a limited range of management information. Basic data about the number of citizens using the service was available, but information on the background of users, including economic and social data, was not captured. Although the legislation that established the CMC governing council became operative in 2004, appointments of its first six members were not made until May 2006. Project preparatory work entailed working with the new governing council members to identify broad areas in which DFID project activities might assist them. Members of the governing council include representatives of the attorney general and commissioner for justice, the director of citizens' rights, two representatives from NGOs and two other persons nominated by the governor of Lagos. The head of the CMC is also a *de facto* member.

Donor Support to Mediation Administrative Systems Development

The DFID-funded project began in November 2006 and was completed in September 2008. Over that period the project largely focused on developing the systems by which the CMC could gather and use better management information. This was achieved by the design and testing of new paper forms and by designing a basic electronic case management system. A standard *complaint form* was initially introduced to gather information about each new case, including the background details of complainants and respondents. The same form was designed for use throughout the life of the case to capture data on case processing up to final case closure. A *diary form* was also introduced to enable better scheduling of mediation sessions and more efficient use of resources and facilities. An *electronic spreadsheet database* (using Microsoft Excel software) was devised to record and process information collected via the complaint and diary forms. Support was also provided to enable CMC staff to use the spreadsheet to produce performance statistics and to guide senior CMC managers in interpreting the results. The data included demographic information on complainants and respondents, information about where complainants first heard about the CMC and whether they had used CMC services before, information on case outcomes and the outcomes of mediation sessions, and information on the performance of individual mediators. The standard report shows this information each month for each CMC office as well as a consolidation of data from all five offices.

Performance Measurement of Mediation Services

The development of improved means of measuring the performance of the CMC in turn assisted the governing council to design and adopt its strategic plan for the period 2007-2009. That plan outlines a strategic methodology that mirrors plans of other public sector organisations in Africa. It offers a range of objectives, tasks and performance indicators that are relevant to any service organisation concerned with case management, such as other alternative dispute resolution services including courts. The plan describes the CMC *objectives* as being:

- to provide an efficient mediation service that enables disputes to be resolved quickly and agreeably;
- to encourage more citizens to use mediation as a means to resolve disputes;
- to provide a conducive and peaceful (friendly) environment for the conduct of mediation services (settlement of disputes);
- to establish a credible and effective system of record keeping that enables the production of useful and relevant management data.

The strategic plan describes the general objectives as requiring *outputs* that are intended to facilitate CMC objectives, such as:

- efficient and effectively delivered mediation services;
- quicker resolution of disputes;
- increased numbers of citizens using mediation services;
- increased public awareness of mediation as a means of dispute resolution;
- adequate facilities available in all CMC offices;
- staff that are polite, competent, unbiased and professional;
- structured systems for keeping records;
- useful and adequate gathering of management information.

These statements are extended by the plan into a description of the *performance indicators* that may be used to assess how successfully the CMC meets its objectives and outputs. The plan identifies ten ways the CMC can measure its performance. These are:

1. *Satisfaction with service* - by counting the proportion of users who report their satisfaction with mediation services. The plan nominates a target of sixty per cent customer satisfaction with the mediation process among those who reach a mediation agreement (by means of the signing by all parties of a memorandum of understanding or MoU). The standard means of measuring user satisfaction is by asking parties to complete a user survey form after the mediation session is completed, effectively an exit poll survey.
2. *Successful case clearance rate* - by counting the number of cases resolved to the point of entering a MoU compared to the total number of cases received.

3. *Successful case disposal times* - by counting the average time from beginning to end of successful mediation cases. The target of the CMC under its strategic plan is that at least 50 per cent of cases should end in settlement of the dispute by means of agreement by a MoU. Under the plan a target rate of at least 90 per cent of cases should be completed (i.e. by the entering of a MoU) within three months after the complaint is received.
4. *New complaints registration rates* - by counting the number of new cases received compared to previous years. A target set under the strategic plan is that there should be a 10 per cent increase in the number of new cases from one year to the next.
5. *Citizen awareness* - by counting the number of citizens that are aware of, or are prepared to use, mediation services. Essentially the means of counting would be by some kind of community or user survey.
6. *Facilities upgrade* – by counting or otherwise indicating the size of the financial value of completed upgrades to CMC facilities. The method of counting is implicitly imprecise but measuring and reporting even modest expenditures on facilities improvement can offer useful information about the extent to which the maintenance of facilities may be considered adequate or improving.
7. *Satisfaction with facilities* – by counting the proportion of users who express satisfaction with facilities provided by the CMC such as waiting areas and mediation conference venues. A target rate of 75 per cent of CMC visitors being satisfied with the facilities is indicated in the strategic plan.
8. *Satisfaction with staff* – by counting the proportion of users who express satisfaction with the performance of CMC staff. A target proportion of 75 per cent among CMC visitors is proposed in the strategic plan.
9. *Effective records system* – by verifying the existence of, and consistent use of, a structured and comprehensive records system. Prior to the DFID supported project, the records system was assessed as poorly defined, inconsistently used and generally impeding efficiency.
10. *Availability of management information* – by the regular and consistent presentation to management of the CMC and the governing council of performance indicator information extracted from improved forms, the spreadsheet database and user surveys. The aim of the reporting system was that reports be compiled monthly and quarterly from the perspective of each CMC office as well as all offices counted together.

The DFID project was successful in introducing the new forms and a new spreadsheet database. Surveys conducted by project officers of staff in 2008²⁴ revealed that there was a high level of staff understanding of the new forms, along with a belief that they offered significant improvements over the prior records systems. All forms continue to be used to produce a rich range of information about complainants, respondents and the disputes themselves. For example, the CMC management information system reported that over a three month period to November 2008, a combined total of 2,990 cases were registered at all of the five CMC offices. Consistent with trends since CMC offices were first established, in that period over 90 per cent of cases filed related to landlord and tenant disputes, three per cent related to family disputes and two per cent to compensation claims. Other statistically significant categories of disputes each account for no more than one per cent of claims, such as employment, juvenile, estates and property inheritance disputes.²⁵ In the same period 1,960 cases were closed, a case clearance rate for that quarter of 65 per cent. A large proportion of closed cases were abandoned prior to any mediation session occurring. For example, 53 per cent of case closures were actually cases regarded as *abandoned*; that is, where no parties attended the scheduled mediation. Of the cases that actually went to a mediation session, 92 per cent settled, one per cent partly settled and seven per cent failed to settle. This example suggests that high rates of settlement are the norm. They also indicate a propensity for cases to settle themselves before mediation, either by the parties reaching a private settlement or by the complainant electing not to proceed with it. The available figures do not reveal much about what the parties thought about the ways in which their cases were processed. The fact that more than half of closed cases were classified as abandoned, for example, leaves doubt as to whether the parties genuinely settled their dispute privately and satisfactorily, or whether the complainant withdrew dissatisfied with the process.

While the CMC embraced the new complaint forms, mediation scheduling forms and the new spreadsheet database, the project did not succeed in persuading CMC personnel to consistently survey user satisfaction or outcomes, which were not formally recorded on the complaint form. Also, but for the adoption of the strategic plan, the project made little progress in supporting the development of the new governing council in monitoring CMC performance and service improvement. It seems that success in developing more robust and useful methods of collecting management information has so far failed to spur official interest in using that information for new improvements in service delivery.

Government agencies seldom enjoy unbroken policy priority from the government of the day. Like other public sector agencies, justice institutions are vulnerable to budget cutbacks and

²⁴ See DFID project staff survey – Security Justice and Growth Programme, CMC Improvements Staff Survey Report, 13 November 2008.

²⁵ The percentages used differ from those appearing in the official report provided by the CMC for the three months to November 2008. This is because the official report counts cases adjourned as a category of cases closed. In calculating clearance rates and settlement rates only cases that were closed during the three-month period have been counted.

fluctuations in managerial competencies at many levels. A new culture of proactive service improvement based on assessing user opinion is novel for mainstream civil service agencies in Nigeria. The transparency and accountability processes of the Nigerian civil service are yet to catch up with the public sector reform aspirations presaged by the post-military era. The civil service remains largely hierarchical and reluctant to submit to scrutiny from outside. Yet the managerial reforms supported by the DFID project in the CMC were aimed at enabling such scrutiny within a more enlightened civil service culture. The challenge for the CMC is to extend its success to a point where it is not only excelling as a mediation service, but also excelling as a civil service agency.

Conclusions

Setting aside the difficulties in sustaining a proactive management improvement culture in the Lagos civil service, it may be said that lessons offered by the experience of the CMC are several and immediate.

Firstly, unlike other comparable innovations in mediation service provision in Africa, the CMC is a predominantly home grown concept, which was devised, funded and implemented well before donor assistance was contemplated.²⁶ That concept, which is similar to the concept of court-annexed mediation used in many countries across the world,²⁷ confirms that mediation of legal disputes is a reliably effective alternative to pursuing the adjudication of legal claims in courts, especially when offered to those who are denied practical access to courts.

Secondly, the CMC is a wholly government-sponsored initiative, a factor that is likely to offer a greater prospect that as an institutional concept, it is sustainable. This compares with similar institutions developed by NGOs that are often wholly dependent on financial support from foreign donors. The concept of giving access to the poor through mediation services would fail if the service provider charged fees for its services. This suggests that a government-administered institution, founded as a subsidised public service, is an appropriate model. The downside is the risk that the same factors that impede the effectiveness of civil service agencies, such as general problems of requiring high level official support or fluctuations in policy priorities, may also impede a mediation service's ability to assist the poor. It is notable, however, that the CMC has survived for ten years and expanded its services over that period.

²⁶ Without diminishing the originality of the CMC concept in Nigeria, similar institutions were established in other countries prior to 1999. An example is the community justice sectors introduced in several Australian states in the 1980s, which were themselves based on programs successfully introduced in the USA in the late 1970s. In the case of Lagos, the Ford Foundation provided donor support to the Ministry of Justice in developing the CMC concept, such as by providing some training and office equipment.

²⁷ The Multi-door Courthouse that was also developed with courts in Lagos includes court-annexed mediation.

There is little reason to expect its services may be curtailed. As a concept in sustaining access to justice for the poor, it is well proven.

Thirdly, the CMC has been used as a model in other Nigerian states. Government participation in providing mediation services has been introduced by various donor-assisted projects in Ekiti, Enugu and Jigawa states. While some of those projects had other elements, such as collaborations between both government and NGO agencies, each has demonstrated success in establishing a government role in providing or subsidising community mediation services.²⁸

Given its success as a model, the prognosis for expanding the CMC concept across Nigeria is good. It offers equally attractive advantages for justice systems in other African countries that have large populations of poor people and other groups who have no practical access to their courts of justice.

²⁸ Professor Ayodele V. Atsenuwa, *Main Report, Case study of selected ADR interventions in Lagos, Ekiti, Enugu and Jigawa States*, 2008 (not yet published). DFID has also supported the creation of the Citizens' Rights Departments in 2 other states (Ogun and Plateau States).

6. Knowing the Law – Publishing Laws and Case Outcomes

It is a common adage among judicial and law enforcement authorities that ignorance of the law is no excuse for its violation. This flows from a tenet of jurisprudence applied in many countries that citizens are presumed to know the law before they breach it. And yet, perhaps in most countries of the world, it is not easy to know the law, even if one tries. Sub-Saharan Africa in particular suffers from a poverty of legal information that directly erodes the access to justice available to most citizens. Not only are ordinary citizens largely deprived of sources of legal advice and information about the law, but judges, magistrates and lawyers are also often denied ready access to the statutes and case law that are essential for their work.

A judge who cannot readily ascertain the law and apply it in a courtroom may well preside over gradually diminishing standards of justice. Effective justice systems are dependent on effective ways of promoting understanding of the law, its consistent application and the acceptance of the rule of law by the general citizenry. A key function of the justice system in any country is consequently to provide a mechanism for publishing and disseminating legal information, chiefly statutes and the judgments and other pronouncements of the courts.

Codified law

Developing countries commonly fail to adequately finance their legal drafting offices, legislative committees and other offices concerned with publishing contemporary law. While the fundamental law-making requirements are usually complied with out of necessity, such as the publication of new laws through official government gazettes, the subsequent consolidation and re-publication of official statute laws in paper form can be neglected for years or even decades.

The making of delegated legislation also suffers a similar fate in many countries. The power to make regulations or issue executive orders is often exercised by presidents, cabinet ministers and administrative officials at various levels of government. These pronouncements, which often carry as much force as legislative decrees, can be similarly affected by the inadequacy of publication services. Unless a regulation or order is regularly consolidated and republished, it can quickly fade among the archival record systems of under-funded government ministries and public libraries.

The difficulty in accessing paper copies of laws, including the consolidation of laws over time, is perhaps the product of the traditional practise of most governments in treating the role of law publishing as a function of the lawmaker, rather than of the law user. The civil service officials who support the legislatures, legal drafting offices or government printers do not necessarily see

their roles as being primarily concerned with promoting the law, as distinct from making law. This can lead to the law publication services of most countries being given lower practical priorities in time and resources than the usually more prestigious priorities of lawmaking. Some countries have resolved these problems of limited access to laws in ways that are typically not available to countries that have poorly resourced public sectors. Well-resourced and usually well-managed public sector agencies can ensure the publication of laws as readily as any other government service. On the other hand, where financial and managerial skills are in short supply, the timely publication of laws may falter or fail entirely.

Case law

Another dimension of the problem of limited access to printed law is the need of law practitioners in most systems to read and use the decisions of superior courts. In legal systems that incorporate the principle of judge-made law that developed under the common law of England, the need to gain access to court judgments can be almost as important as the statutory codes themselves. This is particularly so in legal systems where the legislature may be slow to revise and update their statutory codes in line with the more contemporary perspective of judicial reasoning. Well-reasoned recommendations for statutory law reform, often made by judges through their judgments, can go unanswered for years. Even in those countries that use the civil code legal systems derived from France, Portugal and other European countries, the pronouncements of superior courts by means of formal directions or published essays on legal principles still carry weight as influential guidelines for legal practitioners. They too qualify as valuable parts of the collection of published materials in any country that describe the law and guide its application.

As with the re-publication of laws, the publication of judge-made law or case law is often the charge of those who are least disposed to achieve it. Case law publishing has, until the advent of computers at least, been a process of printing and distributing bound paper books and periodicals. Law publishing has traditionally been something which courts have done as only an incidental to their primary roles, usually demanding different skill sets and priorities from their normal activities.

In some common law systems the need to ensure publication of authoritative case law was achieved by following the approach developed initially by English courts. This entailed the appointment by the superior court or by special statute of a standing committee tasked to edit and publish selections of case law (i.e. case law reports committees). These committees thereby produced authorised case reports in a fashion comparable to the publication of authorised statutes. As with processes for publishing statutes, however, these committees are also

vulnerable to the weakening effects of poor funding and skewed managerial priorities that can affect any public sector agency.

Commercial Law Publishing

In countries that have been able to commit resources to case law publishing the capacity of courts to ensure timely publication of their decisions has been augmented by private publishers. These publishers are sometimes contracted by case law reports committees to produce authorised law reports. The publishers aim to make a commercial profit via the commissions they earn on the sale of authorised reports to the legal profession, law schools and the general public. Courts benefit from these arrangements by ensuring that their judges can receive copies of the official reports from the publishers at low cost or at no cost. This is essentially achieved by pricing the sale of authorised law reports in a way that allows their supply to judges to be subsidised by purchasers. Over time these kinds of sub-contracting arrangements have given rise to a perception, among some judges at least, that the publication of their judgments carries commercial value, which may be used to raise revenue. This expectation is usually based on two incorrect assumptions - firstly, that courts of justice should be entitled to treat their judgments as something to be sold for profit; and, secondly, that courts should be entitled to maintain the commercial price of authorised reports by restricting access to free of charge copies of their judgments. Both assumptions are based on the faulty notion that courts can or should behave as vendors of legal information, rather than as agents of access to legal information, and public education about the law.

While commercial publishers have been able to establish solidly profitable businesses in the developed economies, the opportunities are less lucrative in the developing world. This is largely due to there being much less commercial demand for legal information in systems that have numerically smaller legal professions and judiciaries. Countries in Africa, for example, are affected by typically high levels of poverty and correspondingly small numbers of lawyers and judges able or willing to purchase published law materials. The high cost of producing legal information in Africa, combined with low levels of commercial demand, suggest that relying on purely commercial means of providing legal information is not yet viable in Africa.

Internet Access to Law

The advent of the Internet has significantly expanded the options for those concerned with making laws more accessible. Before the Internet was available, court judgments and statutory laws could only be obtained by acquiring a copy of an authorised paper version. The Internet provides the means of not only publishing authorised reports electronically, but also judgments that law reports committees generally do not publish. Courts around the developed and

developing world are publishing their judgments on websites, often on the day each judgment is given, effectively by-passing the much slower processes of editing and printing authorised law reports.

The judgments and statutes of many African countries are now available via internet websites that are affiliated to the Free Access to Law Movement, which is concerned with providing not-for-profit access to public legal information. According to signatories to the Montreal Declaration on Free Access to Law,²⁹ public legal information in this sense means:

“...legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.”

The Free Access to Law Movement is facilitated by a federation of not-for-profit legal information institutes affiliated under the banner of WorldLII or the World Legal Information Institute. Organisations that are part of this federation and concerned with legal information in African countries include: Droit Francophone, CommonLII, JuriBurkina, Legal Information Institute of Cornell University (USA), JuriNiger, the Southern Africa Legal Information Institute (SAFLII) and the Kenya Law Reports (eKLR).

In the context of overstretched public sectors of many African countries, internet publication avoids the daunting challenges of printing and distributing legal information in paper form. It is true that electronic publication does not directly assist people who are poor and unable to access the Internet. But the major advantage of online accessibility to legal information is that it facilitates necessary information to private lawyers, prosecutors, judges and other professionals who are concerned with the administration of the justice and who have only limited access to printed legal information. These agents are able to access online information in most countries of Africa, where internet and mobile telephone infrastructure is rapidly expanding.

Notwithstanding the availability of the Internet, one major problem remains to be resolved in pursuing the wider publication of legal information in Africa. A close examination of the range of material available online via legal information institutes covering Africa shows that relatively little material is actually published. Many of the available databases are incomplete and, in some cases, are as out of date as some of the published paper materials. In most cases this seems to be due to the fact that much of the material available on the Internet is merely a rendering into electronic form of materials that have already been published on paper as official publications. Legal information institutes commonly need to scan or even re-type published paper documents

²⁹ See the website of the Free Access to Law Movement: <http://www.worldlii.org/worldlii/declaration/>

in order to publish them online. Even Internet publishing does not make up for the editorial challenges associated with paper publishing. This contrasts with systems in better resourced courts in some developed economies, which are commonly designed to publish court judgments only by electronic means. This is achieved where a judge drafts a judgment or a legislature produces a new statutory code purely by electronic means, which is later conveyed in its original electronic form to a website for publication. Few if any African superior courts, or even statute publishing offices, have yet acquired this capacity. In order to achieve it in any one system, there remains a continuing need to systematically compile and edit works for publication. This is something that computerised systems can certainly facilitate, but cannot substitute entirely. There is still a need for a human editorial capacity; a need which necessarily leads back to the question of the role of agencies that are officially concerned with publishing statutes and court case law.

National Council of Law Reporting of Kenya

A conspicuous achiever in this area - of both paper and online publishing of legal information - in Africa is the National Council of Law Reporting of Kenya (NCLR). Under the banner of the Kenya Law Reports (KLR), the council is perhaps the first of such institutions in East Africa (or even in sub-Saharan Africa) other than South Africa, which has been able to rapidly update its case law paper publishing and, at the same time, provide free online access to its published materials.

The National Council of Law Reporting was established as a statutory corporation in 1994 and comprises a board of management chaired by the chief justice of Kenya. Board members include other Kenyan judges, representatives of the attorney general, the Kenya Law Society, the dean of the Law School of the University of Nairobi, the government printer and other officials. It benefits from a discrete budget allocated by the government of Kenya that allows for the employment of an editor, deputy editor and administrative staff. Under its enabling statute, the council is exclusively empowered to:

"...(publish) reports to be known as the Kenya Law Reports which shall contain judgments, rulings and opinions of the Superior Courts of record and also undertake such other publications as in the opinion of the Council are reasonably related to or connected with the preparation and publication of the Kenya Law Reports".

Although established in mid-90s, the NCLR was initially poorly resourced and could not start substantive operations until 2001. By that time there was a 20 year backlog of cases that had not been officially reported in paper volumes (1981 to 2001). By 2009 this gap in law reporting had been significantly reduced through the publication of bound volume reports for the years ranging 1981 to 1994 and 2000 to 2007, leaving a gap of only five years from 1995 to 1999. In that

period the NCLR was also able to produce online versions of published reports from 1992 onwards. At current rates of editorial work the NCLR is likely to eliminate its law report publishing backlog within the next three years.

Progress made by NCLR since 2001 was achieved by establishing systems and routines for collecting and editing which had not been put in place before. The new legislative and resourced framework permitted the NCLR to appoint a full time editor who then supervised the establishment of various systems. This included systems for collecting and cataloguing judgments manually, which were then copied and compiled into a physical library of cases for the use of the editorial staff. The enormous effort required to process such a large volume of paper cases was alleviated later by the introduction of computerised systems for indexing and storing original versions of cases in electronic form. Now all NCLR editorial work is done using computers rather than paper and ink.

The achievements of the NCLR were not limited purely to publishing back copies of the authorised law reports. In addition to the mainstream publishing function, which is funded from the state budget, the NCLR also attracted donor funding to further its work. Donor funding was used to pursue more cost effective ways of carrying out the NCLR's work, such as by the use of new computer systems. It was also used to undertake additional activities that were aimed at extending the range of legal information available to the judiciary, the legal profession and the general public. These activities include publication of the:

- *Grey Book*, a companion handbook for judges, magistrates and legal practitioners comprising a selection of statutes that govern the substance and procedure that commonly arises in criminal and civil litigation;
- *Kenya Law Review*, an official annual law journal that features research papers and peer-reviewed articles from legal scholars, judicial officers, legal practitioners, students, law and society scholars as well as articles on finance and economics;
- *Bench Bulletin*, a definitive monthly digest of recent developments in law for judicial officers, law practitioners, managers and other business people;
- *Laws of Kenya and Law Reports Online* which from 2004 has produced free of charge³⁰ online versions, not only of searchable case law, but also:
 - Complete collections of the statutes of Kenya (the first collection of its kind in Africa);
 - Hansard reports of the Kenyan parliament;
 - Bills pending before the Kenyan parliament;
 - *Legal and Gazette Notices* issued by the government printer;

³⁰ NCLR is a member of the Free Access to Law Movement.

- *Daily Cause Lists* of the Kenyan courts – a schedule of cases for hearing before the courts which are updated daily;
- Articles and commentaries on contemporary legal issues submitted by judicial officers, lawyers, academics and students;
- *Bench Update* reports and *Case of the Week* reports – presentations on particular court rulings that attract public interest and;
- *Practice Notes* and *Practice Directions* issued under court rules.

Conclusions

In terms of its contribution to the goal of increasing access to law, the NCLR has been very effective. Using the Internet, any person can now access any Kenyan statute and a vast collection of Kenyan case law via the website of the Kenya Law Reports.³¹ This result has not yet been achieved in any other country in East Africa despite the similarity of legal and governance systems in that sub-region. One might ask: how has the NCLR has been able to do this when other systems are yet to catch up? It is often easier to explain why something fails than why it succeeds. In the case of the NCLR, the reasons why it is succeeding may be due to the absence of factors that commonly lead to failure. During interviews with those familiar with the development of the NCLR, these factors were suggested as part of the explanation:

Adequate resources. The NCLR did not operate effectively at all until it was established by statute and it did not begin to embrace its new statutory role until government resources were allocated to it that were sufficient to provide an office and to appoint full time staff, in particular, an editor.

High-level sponsorship. The editor who was appointed in 2002 as the first full time editor insists that the NCLR could not have achieved what it has without solid support from its governing board, and from its chairman, the chief justice of Kenya. This suggests that sponsorship and encouragement at the highest levels is an important success factor, arguably the most important.

Independence of operations. Although donor funds were provided from a range of donors (all of which are currently mentioned on the KLR website), no single donor contributed either to the establishment of the NCLR or to the salaries of its staff. The NCLR was able to assert a high degree of independence in what it chose to do and the degree of support from donors that it was decided to accept. This factor probably reinforced the sense of ownership and control, and associated credit that the NCLR board members may be entitled to for what has been achieved.

Full-time leadership. Based on accounts from a number of informed sources, it also seems clear that the NCLR benefited from the exceptional drive and commitment of its editor, a former legal

³¹ www.kenyalaw.org

scholar, who personally negotiated and supervised the development of each product and service that the NCLR has introduced. This suggests that the presence of full-time managerial know-how and technical stewardship is also an important factor.

Finally, it seems significant that NCLR embraced the Free Access to Law Movement and was not distracted by the temptation to treat its exclusive statutory role as an opportunity to engage in the business of commercial law publishing. While it subcontracted to commercial publishers in producing paper bound materials, the sale of which must necessarily at least cover paper production costs, it has not attempted to charge fees on online access to primary legal materials. In that respect, it has offered a model example that other countries in sub-Saharan Africa could readily follow.

7. Courts of Last Resort – Open Sky Trials in the Aftermath of Genocide

The Rwandan Genocide occurred between April and July 1994, a period in which between 800,000 and 1 million, mostly ethnic Tutsi and moderate Hutu civilians were killed at the behest of a government dominated by ethnic Hutus. An untold further number of victims were maimed or sexually assaulted in the course of a terror campaign that also resulted in theft and destruction of property on a massive scale. It stopped only when a Tutsi dominated armed rebel group invaded from Uganda, captured the capital Kigali and finally supplanted the genocidal Hutu regime. Among the many immediate challenges faced by the new government was the need to bring genocide offenders to account for what they had done. In the chaotic months that followed, many thousands of suspects were denounced by survivors, arrested and put in detention for trial.

The impact of the genocide on the Rwandan criminal justice system, as with most institutions of the state, was effectively terminal. Over 80 per cent of judges, magistrates and prosecutors had been killed or fled during the genocide. The ranks of the Rwandan judiciary shrank from over 750 to fewer than 250. Some perished as victims or fled to neighbouring countries.³² The number of surviving court administrators also plunged to only a few dozen, leaving many courts completely without staff. The number of surviving prosecutions and investigators fell to 15 per cent and 20 per cent respectively of their prior numbers. Fewer than 20 private attorneys were accounted for after the genocide, gradually rising to nearly 280 by 2007. Of the detainees held in custody in 2001, the Rwandan government estimated that one-third did not have case files, due to the lack of functioning police, prosecutors or courts at the time they were locked up.³³ Up to 135,000 prisoners had been put in detention at various stages from 1994. According to Amnesty International, in 2002 there were approximately 112,000 individuals still in detention in Rwanda.³⁴ For a country with a current population around 10 million people, its post-genocide prison population had risen to between four and five times the average for other countries in southern and eastern Africa.³⁵

³² Goldstein Bolocan, Maya. *Rwandan Gacaca. An Experiment in Transitional Justice*, at page 372

³³ Markus Zimmer, *Recovering From the Legacy of Genocide: Building the Rule of Law in Rwanda*, conference paper, Kigali, June 2008.

³⁴ *Gacaca: A question of justice*, Amnesty International, December 2002, at page 1

³⁵ According to Walmsley, typical prison population rates for southern Africa in 2005 were 261 per 100,000 of population. Roy Walmsley, *World Prison Population List*, Seventh Edition, International Center for Prison Studies, Kings College London, 2006 – see <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> This suggests that the prison population of Rwanda following the genocide was between four and five times the average for southern Africa.

International Criminal Tribunal for Rwanda ... in Tanzania

The international community moved in the months following the genocide to support the establishment of the International Criminal Tribunal for Rwanda (ICTR), which was conceived to bring to justice the most serious genocide offenders and others who committed mass human rights violations. The United Nations Security Council authorised the creation of the ICTR in November 1994 and it began operations in July 1995 in Arusha, Tanzania. Its annual budget for 1996 was US\$40 million rising to US\$86 million in 2000. In 2002 the Security Council approved further support of approximately US\$96 million. Within six years of its creation the ICTR had spent over US\$400 million, equivalent to more than half the revenue of the Rwandan Government in 2007. In contrast, the resources that the Rwandan Government was able to commit to rebuilding its domestic criminal justice system were only a small fraction of ICTR expenditures. By the end of 2001 the ICTR had completed only three trials up to the appellate level. The total number of convictions at the end of 2001 was eight, an average of slightly more than one per year. Charges of systemic corruption in the administration and operations of the ICTR during these years led to managerial reforms to curb costs and increase trial output. Considering the results over the twelve years during which the Arusha tribunal conducted criminal proceedings against the most serious offenders up to 2007, it gave only 32 definitive judgments. This was an average of just three per year at an overall cost exceeding one billion US dollars. For all the outcomes the ICTR was able to achieve, such as the development of the first ever international legal principles governing the jurisprudence of genocide, it was not able to make an impact on the need to process the vast majority of genocide offences under the domestic laws of Rwanda.³⁶

Re-establishing Justice in Rwanda

In Rwanda the effective reinstatement of the domestic court system did not begin until some two years after the genocide. The process required the government to start from a zero base by enacting foundation legislation and appointing new judges and magistrates.³⁷ To support the new judicial structure, 324 magistrates, 100 deputy prosecutors and 298 judicial police officers and inspectors were appointed and trained. A new supreme court was also established which, before the genocide, had not previously functioned since 1978.³⁸ Most significantly, in 1996 special legislation was also enacted to “bring about justice, retribution, and the end of impunity” by empowering the re-establishment of first instance courts to try genocide cases.³⁹ These laws

³⁶ Zimmer, *supra* 42.

³⁷ Organic Law No. 08/96 on the Organization of Prosecution for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990 was passed.

Available at <http://preventgenocide.org/edu/pastgenocides/rwanda/resources/>

³⁸ Amnesty International, *supra* 43 at page 12.

³⁹ Goldstein Bolocan, *supra* 41 at page 372.

created four categories of genocide offences, the first being punishable by death, the second by life imprisonment, the third by other custodial sentences (i.e. imprisonment) and the fourth by monetary compensation, in the case of property crimes. Other than those who were charged with death penalty offences, the laws provided incentives to defendants to admit their guilt. Substantial sentence reductions were offered if a defendant gave a full detailed confession, a guilty plea and an apology to the victims or the families of victims. The penalty reduction was greater if the confession was made before prosecution proceedings commenced. Despite these provisions, this new genocide jurisdiction proved to be quite inadequate for the challenge at hand.

Since Rwanda achieved independence in 1961, its courts had never been able to speedily process serious criminal offences. Yet under the new 1996 law they were expected to dispose of a crushing volume of urgent cases under the supervision of judges and magistrates, most of who had no prior trial experience and only minimal training. By the end of 2001 less than six per cent of detainees held for genocide offences had been tried.⁴⁰ By 2002 approximately 7,331 defendants had been processed for genocide related offences, mostly via group trials. This glacial pace of prosecutions was aggravated by usually low levels of guilty pleas, despite the formal incentives on offer. It was also the product of a revived judicial system that from 1996 continued to suffer from a shortage of resources, inefficient procedures, alleged corruption and executive interference.⁴¹ The result, given such case clearance rates, was that the likely processing time to dispose of the backlog in 2002 was then expected to take at least several decades. Furthermore, the cost to the Rwandan government of holding the defendants in detention was then running at approximately US\$20 million per year. By 1998, in the face of these realities, the Rwandan government foreshadowed that it had no choice but to consider a radically different way of processing the genocide-related caseload.

The *Gacaca* Courts Initiative

The establishment of a new system of highly decentralised *gacaca courts* was first announced by the Rwandan government in January 1998 and, after passing the necessary legislation, set into motion by a pilot scheme in early 2001. Their essential purpose was to rapidly reduce the backlog of criminal trials for genocide-related offences in ways that might facilitate reconciliation and to give Rwandan society a greater role in bringing practical closure to the genocide.

⁴⁰ Amnesty International, *supra* 43 at page 16.

⁴¹ Goldstein Bolocan, *supra* 41 at page 374.

The term *gacaca courts*⁴² was derived from a form of traditional village justice already well known in Rwanda. Originally the *gacaca* system was a community-based traditional model of conflict resolution that settled village or familial disputes by informal means, usually concerning disputes about theft, marital conflicts, land rights, and property damage. Traditional *gacacas* were presided over by well-respected elders appointed by the people of the affected community. Their activities were intended to promote reconciliation and to impose justice on wrongdoers in the presence of family and neighbours. Traditional *gacaca* practices had never before been considered appropriate under national laws for determining genocide offences or even serious crime.

The new concept of *gacaca* courts was to establish court-like structures at the village level that could convene literally under the open sky using non-salaried judges. Elected by the communities in which they served, *gacaca* judges were chosen for their impartiality rather than their knowledge of the law and were empowered to adjudicate and punish all genocide related cases other than those that carried the death penalty. *Gacaca* courts operated distinctly from the mainstream courts to the point of excluding state prosecutors or legally qualified advocates. Yet *gacacas* were also conferred powers of conviction and punishment, including the power to impose very long prison sentences. There were only limited rights of appeal and then only to other *gacaca* courts of appeal.

The main objective in establishing *gacaca* courts was to elicit the participation of ordinary citizens in the processes of adjudicating genocide-related offences because those offences were, in the words of the statute, “publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators.”⁴³ In contrast to truth commissions used in such countries as South Africa, Sierra Leone and Timor Leste, the new *gacaca* concept incorporated retributive as well as restorative elements. A chief motivator of the reforms was the belief that a sense of impunity among genocidal offenders needed to be met with measures that would assure their being brought to account for their crimes.

Following initial legislation in 2001, the first *gacaca* courts began in 2002 as a pilot program

⁴² “Etymologically, the word “*Gacaca*” derives from “*agacaca*”, “*urucaca*” or “*umucaca*”. This word means a kind of pretty and clean grass where people in the rural Rwanda are used to sit after their land labour in order to chat. *Gacaca* can be literally translated in *English* to “*lawn*”. From an investigation conducted in 1998 by some academicians from the National University of Rwanda, old Rwandans affirmed that as people liked to chat on *Gacaca*, it was even the reason why this place was preferred for society problem solving. Therefore, people started saying that “the case was solved through *Gacaca*”. This expression then evolved to mean a justice organ or structure sitting in open-sky, even though actually the case was addressed in a place where lawn is not planted.” - from Elvis Mbmbe Binda, *Gacaca Courts, An Inspiration From the Rwandan Customary Law*, (not published at time of this writing).

⁴³ Preamble to the Organic Law on *Gacaca* Courts as cited by Goldstein Bolocan, *supra* 41 at page 377.

over two years which then covered some 751 out of Rwanda's 9,010 *gacaca* jurisdictions.⁴⁴ During the pilot there were 19 judges to each *gacaca* court. This number was reduced at the end of the pilot to 9 per court in 2004 when new legislation extended the system nationwide. The extended scheme established *gacaca* courts in each of Rwanda's two lowest administrative units – the cell and the sector; and it introduced a *gacaca* court of appeal in each sector. Also established was a *National Gacaca Service*, an administrative office concerned with the “supervision and coordination of *Gacaca* Courts.”⁴⁵ The structure in each of the 1,545 *sectors* in the country consisted of two *gacaca* tribunals, one with a first instance jurisdiction and another with appellate jurisdiction.⁴⁶ This nationwide rollout of *gacaca* courts resulted in the election of 169,400 judges to administer the wider scheme, although *gacaca* courts were not fully in place in all regions until 2005 (i.e. ten years after the genocide). The intention in 2004 was to use the *gacaca* system to process genocide-related prosecutions for some five or more years, by which time it was expected the backlog of cases might be exhausted. As it turned out, this is exactly what happened.

The first administrative task of each *gacaca* court at the cell level was to undertake a door-to-door survey of all households in the cell in order to compile lists of genocide victims and witnesses. These lists were correlated to records that had been handed over by prosecutors and prison officials, a process that also required the classification of each case into one of the three criminal offence categories that *gacaca* courts had jurisdiction to determine. The *gacaca* courts law in 2001 had created three categories of genocide offences after merging two of the categories first described in the 1996 law: category 1 offences entailing death penalty options that would continue to be processed by the normal courts; category 2 offences that entailed other offences punishable by imprisonment, and; category 3 offences that involved non-custodial punishments for offences against property. Under the 2004 law offences that were classified by a cell-level *gacaca* court as category 3 offences were determined by that court. Those classified as category 2 offences were required to be referred to the applicable sector-level *gacaca* court.

Each cell-level *gacaca* court was convened by a general assembly that necessarily gathered in an open sky location and comprised the judges and adult members of the affected community. Nine persons of integrity were to be elected from each community to serve as judges, two of whom were to be substitute judges. There were also another five persons elected as deputies. Of the nine judges elected, five were required by the 2004 law to be literate and those five constituted a *coordination committee* of the court. Judges elected to cells would also convene as an assembly for the purpose of electing judges of the relevant sector-level *gacaca* trial court and sector level *gacaca* appeal court. None of the judges or other participants was entitled to be paid any salary

⁴⁴ Goldstein Bolocan, *supra* 41 at pages 378 and 380.

⁴⁵ Articles 40 and 50 of Organic Law 2004.

⁴⁶ Articles 7 and 8 of Organic Law of 2007.

or allowances. Through its judges, deputies and coordination committee, all functions of a *gacaca* court were to be performed without the direct participation of government prosecutors, private lawyers or, in most cases, others who could read and write.

Despite the deficiencies in resources, remuneration, experience and legal skills of their officials, the *gacaca* courts had the coercive powers and functions of state prosecutors and the ordinary courts, including the power to convict and imprison an accused person for life.⁴⁷ But as with the 1996 laws affecting courts, the new law offered provisions that enabled *gacaca* courts every opportunity to consider the means for minimising the length of custodial sentences. Significant sentence reductions were available for guilty pleas. There was also the prospect of the accused serving only half of a sentence by agreeing to perform community service in lieu of detention. A confession was permitted at any stage of the *gacaca* proceedings, but the sentencing discounts were structured to have greatest impact if a confession was made before a defendant was identified for prosecution by a *gacaca* court. For the most serious category 2 offences, the incentive to confess was probably high for defendants who, at the beginning of the full *gacaca* scheme in 2002, had been in detention awaiting trial for up to six years. Even in a case of murder, an early confession may have reduced a sentence of perhaps 30 years to as low as 12 years, half of which may have been taken as community service.⁴⁸ Juvenile offenders were also entitled to have their sentences reduced to half of what might have been imposed on an adult offender. No doubt these incentives induced many accused persons to admit guilt to take advantage of the prospect of near immediate release.

Rights of appeal from *gacaca* courts offered few practical opportunities for convicts to gain access to the normal courts of justice. They even carried risks over and above what might be expected in normal courts. In category 2 matters, only one appeal as of right was permitted and then only to the sector-level *gacaca* court of appeal. There was no right of appeal against a decision in a category 3 matter. Even appeals against punitive actions by *gacaca* courts, such as contempt proceedings, were appellable only to the relevant *gacaca* court of appeal where the decision would be final. Unlike appellants in the first instance courts who were protected by the Rwandan Criminal Procedure Code from the prospect of having their sentences increased on appeal, *gacaca* courts of appeal were not so constrained. In effect, the *gacaca* courts were sealed off procedurally from the ordinary courts of Rwanda, much like the traditional *gacaca* courts had been prior to the genocide.

The extensive network of *gacaca* courts established throughout the country made it possible to hold trials and dispose of cases at an extraordinary rate. In sharp contrast to the doubtful output

⁴⁷ Goldstein Bolocan, *supra* 41 at page 379.

⁴⁸ Goldstein Bolocan, *supra* 41 at page 380.

of the ICTR, *gacaca* courts disposed of 1.1 million cases between 2005 and 2007, as shown in the table below:

Completed *Gacaca* Genocide Cases - 2005 to 2007

Level	Number of trials	Pronounced judgments	Remaining cases
<i>Gacaca</i> trials conducted from 10 March 2005 to 14 July 2006			
All	7,015	6,502	Not available
<i>Gacaca</i> trials conducted from 15 July 2006 to 31 December 2007			
Cell level (cat. 3 only)	612,151	557,607	54,544 (9%)
Sector level	444,455	434,827	9,628 (2.1%)
Appeal level	71,100	66,864	4,236 (5.9%)
TOTAL	1,127,706	1,059,298	68,408 (6%)

Source: National Service of Genocide Courts (2008), *The Gacaca Courts Process: Implementation and Achievements*, Pamphlet published February 2008 taken from the Joint Governance Assessment (JGR) report.

By the beginning of 2008 the number of pending category 2 and 3 prosecution offences in *gacaca* courts had been almost exhausted, while the processing of category 1 offences in the ordinary courts continued to suffer from large backlogs. In June 2008 a new law consequently transferred all category 1 offences to *gacaca* courts, except those cases in which the defendant was accused of being a planner or an organiser of genocide offences and those who occupied positions of authority (i.e. cases within the jurisdiction of the ICTR). The role of *gacaca* courts in dealing with the aftermath of the Rwandan Genocide was expected to be completed during 2009.⁴⁹

Delay and Rapid Case Clearance

On the one hand the *gacaca* courts can be considered extraordinarily effective when taking into account the daunting setbacks and hardships endured by the criminal justice system since Rwanda's independence in 1961. This contrasts sharply with the parallel experience of the ICTR in the years since the genocide. In as little as six years the *gacaca* court system processed cases which, if pursued by the normal courts, may have never been processed.

At another level, however, it may be said that the efficiency of the *gacaca* courts was assured by the extent to which normal standards of juridical practices were abandoned. Various tenets of

⁴⁹ Rwanda Organic Law 2008, Article 1.

international law did not apply to *gacaca* processes, such as the right to early access to independent and competent courts, the right to legal representation and the right to appeal. What appears to have largely muted those criticisms is the timing of it, i.e. the large delay between the genocide and the process by which its alleged perpetrators were brought to account via the *gacaca* court system. There are at least three dimensions to this delay factor.

The first dimension of delay is the perspective of the accused. At the time the *gacaca* system began to gather momentum in disposing of the massive genocide-related case backlogs, most of the defendants concerned had already been in detention for as long as 12 years. Given such an extreme delay, no guarantees of a fair hearing and due process would have been as attractive to most prisoners as a process that enabled them to be released at the earliest possible time. The *gacaca* process achieved this outcome by relaxing standards that would have likely prolonged the trial process further. By the passage of time in detention the question of the guilt or innocence of the prisoner had already been rendered largely academic well before the *gacaca* system was established. In a sense, the *gacaca* hearings were more akin to early release parole board hearings than criminal trials. Even the innocent would have already endured long periods of imprisonment.

The second dimension is the perspective of the victims and their families. Consistent with the expected outcomes, the *gacaca* courts ensured that victims and their relatives in a large proportion of cases had an opportunity to participate in or observe the public exposure, shaming and punishment of those who had wronged them, albeit belatedly. It also provided a public means of demonstrating the willingness of some offenders to offer compensation to surviving communities in cases of property offences. In some cases the process led to confessions, apologies and even forgiveness and reconciliation over the worst kinds of genocide atrocities, many years after the genocide. The benefits in terms of rebuilding community trust and cohesion are intangible but probably substantial. It has been suggested that processes that focus on the accusation and public shaming of offenders by the communities they offended may induce reconciliation and deter recidivism.⁵⁰ As noted by Goldstein Bolocan, these kinds of restorative processes...

“...may still be more effective than ordinary criminal trials, the main result of which seems to be to encourage prisoners’ persecutory feelings, far from creating any remorse or shame for what they have done. Instilling shame on offenders, rather than imposing guilt on them, may in turn fortify communities, favouring peace and reconciliation in the long term.”⁵¹

There is some evidence that the *gacaca* process contributed to social cohesion in Rwanda.⁵²

⁵⁰ Goldstein Bolocan, *supra* 41 at page 383.

⁵¹ Goldstein Bolocan, *supra* 41 at page 384.

⁵² Social Cohesion in Rwanda. An Opinion Survey Results 2005-2007, National Unity and Reconciliation Commission.

According to the results of the last social cohesion survey carried out by the Rwandan Government's National Unity and Reconciliation Commission in 2007, 98 per cent of general respondents, 96 per cent of survivor respondents and 83 per cent of prisoner respondents believed the *gacaca* system was a more effective way to deal with the large numbers of pending genocide cases than the formal courts. Nevertheless, opinions are more mixed when looking at specific issues. The survey results suggested with regard to the integrity of processes applied that both survivors' and prisoners' trust in the *gacaca* courts had dropped significantly since its nationwide introduction in 2005. The survey also identified a widespread lack of trust by respondents in the prospect of *gacaca* court witnesses telling the truth. There was also a strong belief among genocide survivor respondents that a genocidal ideology lives on in Rwanda. At the same time, 92 per cent of the survivor respondents believed that *gacaca* courts was an essential step towards peace and reconciliation by reason of the peace of mind and the sense of personal safety that *gacaca* participants experience once the process is over. Of course, in other cases differences may have sharpened and aggravated on-going ethnic, political and economic tensions among many communities. Certainly from the perspective of victims, continuing delay in bringing offenders to account would have been as much a psychological torment as the prospect of offenders being released publicly after confessing their crimes at a *gacaca* trial.

The third dimension of delay in processing genocide-related offences is the perspective of the government. Since the genocide the government of Rwanda has been focused on the need to relieve the nation of the burden of holding such large numbers of prisoners in detention for so long and under unavoidably appalling conditions. In detention the guilty could avoid public exposure and the cost of compensating victims, while at the same time drawing on scarce state resources. But the prisoners were also suffering from the inhumane conditions of detention. The advantages of the *gacaca* courts in lowering prisoner numbers was likely to be more compelling for the government than keeping them locked up. It would be quite understandable for a government to relax the rights of defendants in detention when its main objective was to release and reintegrate those willing to confess and make amends. This argument, however, hardly seems to explain why the *gacaca* laws denied defendants who claimed to be innocent the option of electing to be judged in the ordinary courts after trial by a *gacaca* court. Rights of appeal to the courts of justice were not likely to disturb the incentives that defendants had to confess in a *gacaca* court. Given the persistent delays in the ordinary courts, the effect of lodging an appeal against a *gacaca* court conviction would have been to send defendants back into custody for a much longer time before their cases would be finalised.

There is still little consensus among donors, the international community, particularly human rights groups, or African states about the goals of restorative justice mechanisms that ought to be supported in fragile or conflict-affected countries. The role of the *gacaca* system in restoring rights in Rwanda was, by reason of the preference for open sky courts with minimal participation of the state, essentially a process intended to provide restorative justice options. Its retributive

feature, however, though emphasised under the enabling law, largely served in practice to do no more than release those who had already suffered retribution through long detention without trial. As the term implies, *restorative* justice is often limited to restoring rights and obligations that existed before hostilities began, rather than necessarily altering them. Land rights, the poverty divide, the role of traditional justice mechanisms (such as the original *gacacas*) and political rights have, in most post-conflict situations, been left largely undisturbed in those countries that have used restorative justice interventions. Oftentimes the only legacy of these interventions is a persistently dysfunctional formal justice system.

Conclusions

What lessons might the experience of the *gacaca* courts offer in dealing with the consequences of future conflicts in Africa? The answer may be that the *gacaca* system was able to definitively, legally and swiftly neutralise an intractable justice administration problem in the aftermath of a near complete breakdown of the state and civil communities. It was unable to do this adequately, however, when judged against the obligations of all states to assure their citizens' rights to a fair trial, to legal representation and to avenues of appeal. It belatedly met an overdue need to provide Rwandans with restorative justice options in the aftermath of genocide. It also brought into sharp relief the failures of the international community to offer assistance in the form of technical and financial options that might have helped, rather than frustrated, the urgency of reviving the rule of law in Rwanda. Had it been possible to apply the *gacaca* system in Rwanda in 1995, instead of ten years later, its effects may have been far more beneficial for victims and for the general process of national reconstruction and security. And it may have been easier to convince the government that normal rights of representation, due process and avenues of appeal need not have been abandoned as a response to a lack of prosecutors, judges or lawyers. Similarly, had the resources invested in the ICTR been used instead to establish and reinforce the Rwandan courts of justice, many more category 1 offences may have been processed without resorting to the denial of rights of accused persons that was applied under the *gacaca* system. After suffering events of the sort Rwandans endured, fragile, post-conflict and conflict-affected states need access to justice mechanisms that respond quickly, even in countries lacking a functioning justice system. The Rwandan experience demanded a better solution than either the government or the international community were able or willing to provide. Until that better solution is found, the use elsewhere of the *gacaca* system, or other systems that may discard formal human rights safeguards, could only be regarded as an option for courts of last resort.

8. Lessons for Future Justice Sector Development

The examples of the initiatives in justice sector development described in the preceding chapters suggest a diverse range of possibilities for future action. The typical mindset of many of the justice sector development professionals consulted in compiling these case studies was generally sceptical of the prospects of finding examples of tangible progress in justice sector services and reform outcomes in sub-Saharan Africa. It seemed to many practitioners in the field that their efforts would ultimately be judged as well-intentioned, but limited contributions to reform efforts in promoting the rule of law. Yet some positive examples were found, not just on their own terms, but also in terms of their relevance to future projects in other parts of sub-Saharan Africa and beyond. And many were found in the poorest parts of Africa, in countries suffering from the least optimal standards of governance or judicial independence.

This final chapter considers how the lessons described in the studies in this collection might be translated into improved programmatic responses by donors and governments in sub-Saharan Africa and elsewhere. The implications of each give rise to at least the following options and possibly many more:

Normalising Country-Wide Use of Alternative Legal aid in Africa

Based on the study about alternative legal aid, it is not difficult to argue that conventional legal aid structures seldom prove satisfactory in impoverished Africa. Non-traditional elements, such as the consistent deployment of paralegals across justice sector institutions, can offer effective, immediate and relatively low cost benefits. This suggests that if donors wish to render first aid in justice services to impoverished Africa, then these are the kinds of options they might consider:

1. *Institutionalising paralegal service standards and practices.* Sponsor the development, promotion and adoption of an Africa-wide standard for paralegal recruitment, training, deployment and recurrent funding. The standard may be readily developed from the proven experience in Malawi, Sierra Leone, Kenya, Benin, South Africa and other countries. This may be done by funding existing paralegal development projects to gear their operations towards helping neighbouring countries to develop similar systems.
2. *Developing legal aid system financial models.* Develop a financial model for establishing and sustaining countrywide paralegal services in a fashion that realistically applies to the under-funded justice sectors of Africa. It is not enough to expect a beneficiary

government to take over funding a non-conventional service when conventional services are likely to continue to be underfunded. Given that the need for providing paralegals is a factor of poverty levels, it follows that funding models used should assume some degree of subsidy being applied to the provision of that service, implicitly from development partners or the international donor community.

3. *Extending legal aid in court projects.* In designing donor projects concerned with either civil or criminal justice system development, governments and donors should seek to include the role of paralegals in meeting gaps in access to justice as a substantive component or programmatic element. For example, funds provided to train judges, magistrates and prosecutors should also be prioritised to train paralegals and institutions that provide paralegal services and other kinds of legal aid, such as non-court mediation services.
4. *Extending legal aid in prison and police projects.* In designing projects concerned with prison systems and assistance to police, governments and donors should ensure that the need for paralegal services and other legal aid elements is allowed for within those institutions. This might embrace the funding of prison-based lawyers as well as prison officers carrying paralegal qualifications and whose efforts are supplemented by independently employed paralegals who may also operate in the villages and courts.
5. *Bridging traditional and formal justice interfaces.* Programs that are aimed at supporting traditional dispute resolution in villages should include elements that consider the interfaces between traditional and formal dispute resolution processes, particularly in criminal justice. As demonstrated by the case studies in Malawi and Sierra Leone, a village-based intervention is unlikely to be effective unless supported by the capacity to also render assistance to those who are obligated to participate in the formal legal system (usually after being taken into detention).

A Stronger Focus on Results in Court Administration Reform

Based on the study about court administration reform in Ethiopia, progress can be expected to flow from a commitment to nurturing local expertise and participation and in focusing on results, rather than on donor-driven procurement or similar activities. The study also highlights the importance of measuring outcomes, rather than inputs as a means of demonstrating the successful achievement of court administration projects. When governments, judiciaries and donors seek to design and implement future court administration improvements, they might also consider these options:

6. *Avoiding mere procurement.* Programs aimed at supporting court administration should not be labelled or treated as procurement or even training, but rather based on a need to develop systems and competencies that produce proven benefits. Proposals to computerise court systems, for example, should not be assessed as successful when the computer systems are installed, but when their impact is measured in the form of higher rates of case processing, reduced levels of court delays or other improvement in case disposal outcomes. Similarly, proposals to train judges and prosecutors should not be evaluated once the training is provided, but when the new competencies result in measurable improvements in judicial system performance.
7. *Applying court performance evaluation standards.* Few court administration improvement projects in sub-Saharan Africa or elsewhere have been able to demonstrate measurable improvements in terms of internationally accepted standards. This is partly because standards do not always exist in a form that can be readily and consistently applied to court systems in developing countries. International agencies can help bridge this deficiency by developing standards based on experiences in multiple systems that may be adopted objectively in any system, irrespective of the language or historical factors of any one system.
8. *Institutionalising a public dimension of court service.* In developing performance measures for courts, governments and donors should place as much emphasis on the identification of service standards as to formal notions of the need for courts to dispose of cases. Service standards are the means of indicating and maintaining the quality of what courts do. This implies that courts should, as of necessity, rather than an option, be committed as recipients of support to introducing and sustaining greater transparency about their activities. This includes a genuine responsiveness to the opinions of court users, as distinct from the judicial leadership, justice ministries or even donors themselves.

Strengthening Judicial Accountability and Service Delivery

Based on the case study about transparency and accountability mechanisms, judicial reform projects are more likely to achieve their objectives if they incorporate features that facilitate accountability in court stations. There is no reason to expect that resources made available at the central level will always have an impact on other points of a system unless specifically aimed at the governance structures and the way in which services are delivered. Transparency and accountability mechanisms need to rank highly in the design of such interventions and might include these features:

9. *Formalising user committees.* The concept of court user committees as an instrument for court improvement, which is commonplace in many courts around the world, should be developed as a generic concept for use in justice development projects that are concerned with court improvement in sub-Saharan Africa. Court station user committees have been an important element of the acceptance by courts of the role of paralegals in courts, as well as greater accountability through such experiences as the TAM (Transparency and Accountability Mechanism) project in Kenya. Such an emphasis is likely to help court systems develop better ways of ensuring internal judicial accountability and public transparency, especially in those countries with highly centralised and poorly managed systems of judicial governance.
10. *Committing to standards of judicial independence.* As a means of assuring some level of success in the development of Africa's justice sectors, decentralisation should be seen as an important element to measure results. Judicial independence means that each judge or magistrate is protected from undue influences that may come from other judges as much as from litigants or other sources, most often at the central level. Governments and donors can compromise this independence by supporting judicial governance systems that enable some judges to suborn others or enable central bureaucracies to assert dominance over the management of regional or local court stations. This requires specific efforts to ensure real and unqualified participation by judges and magistrates within each court station that provides justice services.

Pan-African Commercial Laws and Dispute Resolution

There is a wide range of potential opportunities to help revitalise cooperation between African countries in adopting standard business laws and associated improvements in compliance and enforcement. These include:

11. *Expanding the reach of OHADA.* The case for extending OHADA to all developing African countries is yet to be pursued with any vigour. On the contrary, the case for creating a multi-lingual set of standard commercial regulations appropriate for African developing countries is particularly strong, especially given OHADA's faltering momentum in recent years. International organizations, academic institutes or universities might facilitate this process by sponsoring official translations of OHADA laws and court decisions into English or Portuguese. This would enable non-Francophone countries to consider the advantage of either joining OHADA or independently adopting the uniform acts that OHADA issues.
12. *Measuring the performance of commercial courts.* Consistent and adequate criteria should be developed to evaluate the performance of commercial courts. It should not be

sufficient for success to be judged merely by reference to case disposal times of cases that are disposed by commercial courts. Such a narrow focus is too often limiting or even misleading and neglects the impact on cases that were intended to be processed by a commercial court, such as those diverted to other courts or processes. The effect on general court caseloads should also be measured as a means of demonstrating that resources provided specifically for commercial case processing do not result in declining standards of processing other types of cases.

Expansion of Non-Court Mediation Services

The study on the Lagos State Citizens' Mediation Centre (CMC) offers proof of the viability of the concept of a state-funded, free of charge mediation service for disputes that have not been filed in courts or are not likely to be filed, by reason of the poverty of the parties. The case for extending this model is strong. Some of the activities which could facilitate this expansion include:

13. *Pursuing pre-litigation diversion options.* Support for court dispute resolution services should include pre-litigation mediation, as distinct from court-annexed mediation, which typically applies to cases that have already been initiated in a court. Pre-litigation dispute resolution has a greater prospect of being economically and effectively employed, either through a state ministry, local government or via local NGOs and without the need to directly secure the cooperation of the judiciary or the legal profession.
14. *Applying mediation standards and costs models.* Based on their past project experience in Africa, governments and donors can assist the development of pre-litigation dispute mechanisms by designing funding models for new mediation systems as well as the competencies that mediators will need to provide services. The standards of pre-litigation mediation will generally be different from those applied in court-annexed mediation, which typically involves qualified lawyers or even judges. The concept of developing non-lawyers as mediators in this way can have a considerable impact on the overall cost of such services.

Broader Accessibility of Legal Information in Africa

The case study about the Kenyan National Council of Law Reporting (NCLR) demonstrates how each country in Africa might develop the means of compiling its current statutory and case law with state resources and with some donor assistance. Donors can help government agencies, court institutions and NGOs in publishing laws through projects that establish a capacity to compile and publish legal materials in both printed and electronic form. Projects of this kind

should incorporate the principles of the Free Access to Law Movement to ensure that the development of information products or services for public use should not be subsequently appropriated for private use or profit. Some specific actions that states and donors can pursue include:

15. *Supporting the re-publication of legal information.* A service may be established for African legislatures by which the statutory laws and other legal information of every country in sub-Saharan Africa are published via the Internet. This would directly facilitate improved governance and the rule of law through increased transparency and accountability. An arrangement by which new laws are immediately published would also provide the means by which improved transparency can be specifically assured in accordance with the principles of the free access to law movement.
16. *Establishing an information clearing house for sub-Saharan African justice sectors.* If donors are able to use Internet publishing as a means of assuring access to laws, the same approach may be used to advance access to other categories of information relevant to the development of justice systems in sub-Saharan Africa. The free access to law principles already enshrine the principle that where public funds are used to produce an item of information, such as a consultant's report, then that information ought to be considered to be in the public domain and should be made available to anyone free of charge. If applied to donor-sponsored activities in Africa, this would mean that every evaluation report, court statistical report or other item of information produced with donor or government support should be published at least on the Internet. In applying this principle it may be feasible for donors to require as a condition of their support that a whole range of information items and systems produced with donor assistance be routinely published on websites. This would include information items such as statistics that may be compiled by courts, prisons, police and legal aid institutions and annual reports that many justice institutions in sub-Saharan Africa often fail to publish in any form.

Restoring Civil Justice in Failed States

The study about the *gacaca* courts in Rwanda was aimed at putting their achievements in context, rather than to necessarily commend or question them. In the study it was suggested that by passage of time, the beneficial aspects of the *gacaca* courts initiative was dissipated as a form of retributive justice. It was also suggested that the more odious features of the *gacaca* courts that relaxed the due process guarantees of accused persons were also dulled by the passage of time. As suggested in the discussion, to invoke an open sky court process soon after a genocidal cataclysm would probably produce new dynamics that the Rwandan experience perhaps by-

passed. Certainly, the diversion of a few hundred cases to an international tribunal at such great expense is not an experience that many would be inclined to repeat. Developing a design and implementation plan for a court of last resort at the ready and pre-approved by the international community, and which does not offend fundamental human rights standards, may be a worthy legacy of the Rwandan experience.

For these reasons, governments and donors may consider including these options:

17. *Justice planning in fragile and conflict-affected situations.* One lesson of the Rwandan genocide is the need for a contingency plan in failed or failing states for re-establishing the rule of law and courts of justice that meet international standards of human rights. Such planning should draw from the experience of numerous African states that have endured conflict and its aftermath over the last 20 years, including Sierra Leone, Liberia, Democratic Republic of Congo, Rwanda, Somalia and others that may be on the verge of being considered fragile or failed states. While there is little doubt that a great deal of planning is applied to military, medical and physical needs after hostilities initially cease, plans for restoring non-military justice systems barely exist. Non-military support should be ready with a rapid and realistic response to deterring genocide and dealing emphatically and promptly with its consequences.
18. *Applying new, long-term restorative justice models.* The international community can also develop and promote the adoption of models for transitional justice which connect post-conflict restorative justice processes with necessary mechanisms for domestic political and social change. The *gacaca* courts initiative was a legislative solution to a problem that might otherwise have been administered by independent courts of justice. The role of traditional *gacacas*, along with other traditional justice mechanisms in Africa, still remains to find its place alongside the formal courts of justice. Governments and donors should help develop models for funding that may be consistently based on a balance between traditional and formal justice mechanisms. Thus, in designing justice sector interventions, governments and donors should broaden their objectives beyond the scope of purely formal courts or associated agencies of the state.

Final Conclusions

Considering this range of options for future action, a common thread emerges; that is, most justice sector reform projects in sub-Saharan Africa seem to have been largely insular in their design, the expected outcomes and their overall impact. There is little evidence of an intention, even among multilaterally funded projects, to leverage the achievements of a project in one country to help make gains in another. It is as if each country-based project is not expected to apply elsewhere, even within the same sub-region. There are natural associations between many African countries and their neighbours, such as in the East African Community, Southern Africa,

Anglophone West Africa and, of course, Francophone Africa. These associations can be recognised and further strengthened, not only because they offer potential economies and practical advantages for the countries, but because these groups of countries usually care about what their neighbours have achieved and seek to work with them. This gives rise to a concluding suggestion:

19. *Pursuing parallel justice system development for regional benefit.* The design of donor-assisted justice sector improvement programs is often predicated on a desire by a single donor agency to help a particular country attain higher levels of access to justice in comparison with standards established elsewhere. An extension of this approach would be for several donors to pursue a similar multi-faceted justice change program in several African countries at the same time so that each recipient country can participate indirectly in the development of neighbouring systems within the region. By this means it is possible, for example, for one country to develop a judicial academy, another to develop court automation systems, and another to develop legal aid systems, with a view to each new system being eventually introduced to each participating country. As each system is successfully developed in one country, then that country's personnel will become qualified and enabled as a source of expertise to later extend comparable systems to neighbouring countries. Using this approach, donors can minimise the high cost of establishing similar best practice systems in each of the dozens of African countries that are in need of them across the continent. It also demands high levels of interaction between the governments and judiciaries of each country to collaborate with their neighbours, a process that all governments and judiciaries in sub-Saharan Africa consider to be desirable.

It is only recently that national justice sector institutions in Africa have begun to call on each other in the region for collaboration and mutual support, often as a result of international conferences or study tours sponsored by donors. The motivations for regional development and cooperation in sub-Saharan Africa might be tapped as a means of more effectively driving the process of justice sector improvement programming across the continent.

This collection of studies identified only a sampling of country-based reform programs. Nonetheless, those samples offer useful lessons about what may constitute success in justice sector improvement projects and the possible directions for improving the design and delivery of future projects in sub-Saharan Africa.



THE WORLD BANK



NORWEGIAN MINISTRY
OF FOREIGN AFFAIRS