

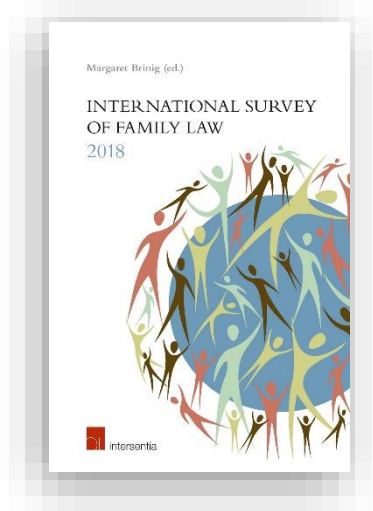


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AFRICA

CHILDREN AND INFORMAL JUSTICE SYSTEMS IN AFRICA

Julia SLOTH-NIELSEN

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Résumé

Ce chapitre s'inspire d'une étude plus vaste intitulée « Pour une justice adaptée aux enfants » en Afrique. L'étude visait à vérifier dans quelle mesure la justice tient compte des enfants en Afrique. Un volet du travail cherchait à vérifier si les enfants bénéficient de mécanismes de justice participative dans les domaines de la protection de la jeunesse, du droit de la famille et de la délinquance juvénile. Bien que tributaire de la rareté de la littérature disponible, le travail a été enrichi par des études menées parallèlement dans sept pays sur cette question. L'étude met en lumière les caractéristiques de ces processus de justice informelle, ainsi que les raisons pour lesquelles les communautés continuent de les préférer aux modes plus formels d'administration de la justice. Les défis de la mise en œuvre des principes des droits de l'enfant dans les processus de justice informelle sont examinés. Enfin, des conclusions et des recommandations visant à renforcer les

liens entre les systèmes de justice formels et informels et à donner plus d'orientation aux droits de l'enfant sont présentées.

This chapter draws from a larger study titled 'Achieving child-friendly justice' in Africa.¹ The study aimed to assess the state of child friendly justice in Africa. Part of the work sought to explore the extent to which children encounter informal justice systems in juvenile justice, child protection, family law matters, and as victims of criminal offences. Although reflecting mostly on the paucity of literature available, the work was bolstered by seven country studies which were undertaken in parallel with the preparation of the main work, which contribute to the understanding of children's contact with informal justice systems. The characteristics of informal justice processes are discussed, as well as the reasons for communities' continued reliance on them, in preference to formal justice systems. The challenges facing the implementation of children's rights principles in informal justice processes is scrutinised. Finally conclusions and recommendations for strengthening the linkages between formal and informal justice systems, and for infusing a more child rights orientation, are put forward.

1. INTRODUCTION

Africans perceive conflict as the motor and engine of relationships. This is because it is impossible to speak of a relationship without conflict and it is impossible to speak of conflict without a relationship. Being a social phenomenon, the general intention of conflict resolution ... is to mend broken or damaged relationships, rectify wrongs, and restore justice and harmony between individuals, families and the community at large. The traditional concept of conflict resolution is to reconcile and make peace between disputing parties, ensure the reintegration of the disputing parties into the society and to promote co-operation and harmony between them that may help improve their relationship.²

The continued use of informal justice mechanisms must be seen in both historical and contemporary contexts. Sidelined and regarded as backward during the

¹ The overarching study was commissioned by the African Child Policy Forum (www.africanchildforum.org). The study is one of the outputs prepared for the 2nd Global Conference on Child Justice in Africa, organised by the African Child Policy Forum (ACPF) and Defence for Children International (DCI), held in Addis Ababa in May 2018. The country studies were commissioned variously by the Defence for Children International (DCI) and by the African Child Policy Forum. The (as yet unpublished) country studies are referred to in this chapter as National Reports, and copies are available only with permission of the commissioning parties. The author is indebted to the African Child Policy Forum for permission to reproduce part of the work as this chapter.

² P.M. SONE, 'Relevance of Traditional Methods of Conflict Resolution in the Justice Systems in Africa' (2016) 46(3) *African Insight* 51 at 52.

colonial era,³ informal justice systems were regarded as an impediment to development. Upon liberation from colonial rule, it was thought that they would simply die out. However, for reasons set out below, this did not occur and they continued to form the backbone of access to justice for citizens in an estimated 70 per cent to 90 per cent of instances, according to some sources.⁴ That children are impacted goes without saying. However, recent studies indicate that there is surprisingly little research on the legal situation of children in informal justice systems, apart from their use for juvenile diversion programming.⁵ This chapter hopes to amplify what is already available in the children's rights sphere. Furthermore, the challenges of applying 'child friendly justice'⁶ approaches in informal justice systems will be interrogated.

2. AMBIT AND SCOPE OF THE STUDY

This study is based largely on available literature, with a bent towards literature that is no more than a decade old.⁷ The chapter also draws to an extent on field studies that were conducted in seven African countries (Mauritania, Ethiopia, Egypt, Tunisia, Liberia, Nigeria and Sierra Leone) on children and the justice system, including, where available, information on their contact with informal justice systems. The study also drew on some key informant interviews, especially with regard to southern and eastern Africa (as this region did not form part of the field studies).

According to the UN Office of the High Commissioner for Human Rights, there are different terms used to describe informal justice systems, including traditional and indigenous systems.⁸ In some countries, including in Africa, customary justice structures are recognised by law, which makes it inaccurate to refer to them as informal justice systems, but for the sake of brevity this chapter

³ E. MAINA AYIERA and DANISH INSTITUTE FOR HUMAN RIGHTS, *Justice be our Shield and Defender: Local Justice Mechanisms and Fair Trial Rights in Kenya*, Copenhagen, 2013, at p. 8.

⁴ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, 'Human Rights and Traditional Justice Systems in Africa', New York and Geneva (2016) at 17.

⁵ C. CAMPISTOL, K. HOPE, Y. COLLIOU and M.F. AEBI 'Customary justice for children in Egypt: an overview of the situation in the Governorate of Assyut' (2017) 5(1) *Restorative Justice* 29–52, DOI: 10.1080/20504721.2017.1294791.

⁶ 'Child Friendly Justice' principles are derived from the Council of Europe Guidelines on Child Friendly Justice (available at <<https://rm.coe.int/16804b2cf3>> (last accessed 3 July 2018)), supplemented by the Guidelines on Action for Children in Justice Systems in Africa (2011) (available at <www.kampalaconference.info> (last accessed 20 November 2017)); they include such principles as the necessity of child participation, minimal use of deprivation of liberty, a multi-disciplinary approach, protection of privacy and so forth.

⁷ The author was of the view that rapid urbanisation that has occurred and is occurring, agricultural and rural transformation, as well as technological and other developments mean that it would not necessarily be reliable to place too much emphasis on dated research.

⁸ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, above n. 4, at 8.

will use the term ‘informal justice systems’ for all the structures discussed. United Nations agencies, led by the United Nations Development Programme (UNDP), have chosen the term informal justice system (IJS). This is defined as every mechanism and process that exists separately from formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures.⁹ In many countries, however, the state recognises informal practices and structures their operations through laws, regulations and jurisprudence, leading to a grey area of semi-formal processes.

Religious justice systems, in Africa, are frequently bodies imbued with judicial authority derived from Islamic and other religious writings and texts. These may also be formally recognised in the legal system, with jurisdiction being granted to them to deal with specified disputes, e.g., related to personal and family law matters.¹⁰ Religious justice systems are not included in the scope of this chapter.

3. CHARACTERISTICS OF INFORMAL JUSTICE SYSTEMS

Characteristically, informal justice systems rely on customary law and oral traditions, which can vary widely across any one country or region. The oral tradition is one key reason for the lack of available information on children’s contact with informal justice systems, as records are not kept and accounts are necessarily anecdotal.

As Kariuki points out,¹¹ traditional justice systems are justice processes based on cooperation, communitarianism, strong group coherence, social obligations, consensus-based decision-making, social conformity and strong social sanctions. They are accessible by the rural poor and illiterate people; they are flexible, rely on voluntary participation, foster relationships, proffer restorative justice outcomes and give some level of autonomy to the parties in the process. Traditional systems regard justice processes as an integral part of social life – as such they are not intended to ‘set precedents’ or overrule or underscore previous determinations, as in the formal justice system. Rather, they are located in the specificities of the context and circumstances so as to arrive at an outcome.

So, too, the level of formalisation of informal justice systems, and their interaction with formal justice systems varies from place to place, even within

⁹ UN WOMEN, UNICEF AND UNDP, ‘Informal Justice Systems – Charting a Course for Human Rights- based Engagement’, New York, 2012, at pp. 8–9.

¹⁰ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, n. 4 above, at 11.

¹¹ F. KARIUKI, ‘African Traditional Justice Systems’, <<http://www.kmco.co.ke/index.php/publications/192-african-traditional-justice-systems>> (last accessed 12 November 2017) at 6.

countries. There are many examples of state recognition (through legislation or regulation) of informal justice structures. Legal pluralism is the term used to describe this interplay of formal, semi-formal and informal systems which operate along a continuum of integration with the formal justice system: from actually being part of the first tier justice system, to operating completely separately from, and parallel with, the formal justice system. Although terminology differs, the following ‘types’ of systems are usually included in the definition of informal justice systems:¹²

Traditional, indigenous and religious systems. These systems and mechanisms have typically existed since pre-colonial times and are conducted by hereditary or religious authorities. Examples include traditional authorities (Mozambique), traditional courts (Zambia and Ghana), religious courts (Kenya) and chiefs (Liberia).

Semi-formal systems. These systems have been created or endorsed by the state and are often integrated into the formal justice system but apply customary norms. Examples include: community courts (Mozambique), local council courts (Uganda) and local courts using informal procedures (Zambia).¹³ In Ethiopia, the *Kebele* courts (social courts) have become integrated into the formal system, yet some of them operate through the application of traditional norms (e.g. the *Shimglina* amongst the Tigray).¹⁴ In Malawi, too, traditional laws have been codified into by-laws, blurring the lines between their application as either informal or formal justice mechanisms.¹⁵ And Mauritania considers the mediation provided for in the child justice system as a traditional mechanism, even though it now forms part of the formal system.¹⁶

Alternative community-based systems. These are often initiated by the state or non-governmental organisations (NGOs). Many draw on community norms, adapted to include human rights, and use modern alternative dispute resolution procedures (such as negotiation and mediation). Examples include: community mediation centres, paralegals, justice committees, neighbourhood watch committees and community policing councils (Mozambique, Ghana, Uganda, Zambia).¹⁷

Many studies have shown that the perseverance of community, traditional and informal justice systems are fostered by the inaccessibility of the formal justice system, especially in rural areas.¹⁸ Furthermore, the type of justice offered by formal justice systems is often inappropriate for people living in

¹² DANIDA and MINISTRY OF FOREIGN AFFAIRS, DENMARK, ‘How To Note: Informal Justice Systems’, Copenhagen, 2010, at 4–5.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Mauritania National Report (2018) p. 10 (copy on file with the author).

¹⁷ DANIDA and MINISTRY OF FOREIGN AFFAIRS, above n. 12, at p. 5.

¹⁸ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, above n. 4, at pp. 18–19.

close-knit communities in which the breaking of social relationships can cause conflict in the community and possibly impact the economic interdependency on which inhabitants rely. In most African countries, state justice systems operate with extremely limited infrastructure and resources, and case resolution is characterised by long delays which is inimical to achieving justice for victims and those affected by disputes. Formal justice systems often appear to lack legitimacy, as cases are won by ‘clever’ lawyers who do the talking,¹⁹ as opposed to the truth – seeking approaches of the informal justice system.

There are often multiple informal justice systems within the borders of one country, depending on citizens’ tribal or community affiliations. The UN Office for the High Commissioner of Human Rights records that in Uganda, each ethnic group has its own customary law system; in Namibia, there are 49 recognised traditional authorities, each with its own system of governance and adjudication. In Ethiopia, there are 62 separate tribal groups, each using its own traditional justice system, including for criminal matters.²⁰ In some countries, disputants have the option of going to either the formal or informal system, whereas in others, traditional fora have been integrated into the system and serve as the port of first call (e.g., Mozambique, Burundi, Zambia and Ghana). In some places, the two systems operate in total isolation from each other.²¹

Liberia operates dual administrative and justice mechanisms: the formal mechanisms governed by the government institutions such as the Police, Magisterial Courts, Ministries and Commissions and the informal/traditional mechanisms mainly governed by Chiefs under the supervision of Commissioners. The main challenge here is lack of clear understanding about limitations, jurisdiction and referral pathways among both formal and traditional justice actors. Therefore, the Ministry of Justice in coordination with the MGCSP, the Ministry of Internal/interior Affairs and the Ministry of Justice will continue to invest in initiatives that strengthen and clarify working relationship between the formal and traditional justice mechanisms. This includes working with partners who provide services to intensify awareness raising on referral pathways particularly on child abuse and GBV [Gender based violence] issues, organizing community dialogue between the key actors of both the formal and traditional justice mechanisms, and in some cases even facilitating signing of memorandum of understanding among them in order to formalize such relationships.²²

Amongst the Tswana of Botswana it is documented that dispute resolution starts at the household (*lolwapa*) level.²³ If a dispute cannot be resolved at the household level, it is taken to the *kgotlana* (extended family level) where elders

¹⁹ MAINA AYIERA and DANISH INSTITUTE FOR HUMAN RIGHTS, above n. 3, at p. 34.

²⁰ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, above n. 4, at p. 11.

²¹ Ibid, at p. 19.

²² Liberia National Report (2018) p. 10.

²³ KARUIKI, above n. 11, at p. 4.

from the extended family sit and listen to the matter. The elders emphasise mediation of disputes.

If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court-like procedures. It consists of the chief at the village level and the paramount chief at the regional levels. The chiefs are public officials and handle both civil and criminal matters. The decision of the paramount chief is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the High Court.²⁴

In relation to the *Gacaca* system in Rwanda, it is reported that the initial conflict and problem resolvers were the

headmen of the lineages or the eldest male or patriarchs of families who resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts. The main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities.²⁵

Common characteristics of informal justice systems include that they approach dispute resolution from the perspective of the collective, rather than the individual (or in the case of criminal offences, from the vantage point of the interests of the state). They embrace informal modes of information gathering in contrast to the formal evidentiary rules of the state justice system. They are flexible and there is often a high degree of public participation. There is no provision for legal representation, and the process is voluntary. The focus is more often than not on reconciliation and the restoration of harmony. Proceedings are invariably oral, and written records are all but unheard of. Philosophically and methodically they are more accepted than formal state structures such as courts. Because they typically involve victim participation, they accord with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Other principles that aid in conflict resolution are social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility.²⁶

However, there are no formal enforcement mechanisms of any measures ordered, though community support often backs the measure and lends its weight by exerting social pressure.²⁷ Because of the legitimacy of traditional

²⁴ Ibid, at p. 5.

²⁵ Ibid, at p. 3.

²⁶ Ibid, at p. 7. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (G.A. Res 61/295, UN. Doc. A/61/295 (2007)) recognises the rights of indigenous peoples and requires these rights to be determined in accordance with their own indigenous decision-making institutions and customary laws.

²⁷ SONE, above n. 2, at. 8.

authorities, their rulings carry weight, and do not need to be enforced through fear or threats. Also contested decisions would lead to a breach of the community harmony that informal justice processes seek to restore. Most often, informal justice structures do not make a distinction between civil and criminal matters, although imprisonment is not an option open to informal justice structures. However, despite the claim to communitarianism, it has also been pointed out that the high level of flexibility of customary law, its unwritten nature and the lack of reliance on a formal system of precedent may at the same time render customary law outcomes uncertain, and susceptible to elite capture.²⁸

In contrast to the state justice system, which is perceived as inaccessible due to transportation costs, due to language barriers, and due to the costs of litigating (requiring recourse to legal assistance in an environment where legal aid is often very constrained), informal justice systems are speedy and give results (instead of long outstanding judgments). Customary justice hearings may take place over the weekend or at night, and are conducted in the local language. Actors in formal state systems often have little or no understanding of customary law, and do not receive training on it either. Judgments of the formal courts are frequently perceived as inadequate or even harmful (as when a perpetrator is imprisoned leaving the left behind family at risk).²⁹ Unfamiliarity with the formal system, especially among illiterate or uneducated communities, contributes to negative attitudes towards formal justice structures, even where the state system is performing well. Traditional courts are often perceived as less corrupt than the state court system.

Terre Des Hommes' recent research, based on fieldwork, shows

how customary justice in Upper Egypt follows unwritten rules and protocols at all stages of the proceedings. Such unwritten rules and protocols apply to the identification of the case, the selection of the arbitrator, the investigation, the judgement or the decision, the appeal and, if successful, the reconciliation (*sulh* in Arabic). In that perspective, customary proceedings can be initiated by the family of the victim or by the family of the alleged perpetrator. Either party to the dispute can approach a mediator (*waseet*) who will contact the other party to make sure of his/her willingness to engage in customary procedures. If that is the case, one or several arbitrators, approved by the parties, are chosen. Alternatively, customary proceedings can also be activated after the dispute has reached the police station, either upon the request of one of the disputing parties or of the police themselves.³⁰

²⁸ J. UBINK, 'Stating the customary: an innovative approach to the legally legitimate recoding of customary law in Namibia', in J. UBINK AND T. MACINERNY, *Customary Justice: Perspectives on Legal Empowerment* ILDO, Rome, 2011.

²⁹ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, above n. 4, pp. 24 and 36.

³⁰ CAMPISTOL ET AL., above n. 5, at 6.

In their study, the arbitrators dealt with 244 cases involving 296 children. The difference between the number of children and the number of cases is explained by the fact that several children could be implicated in one case. Among the 296 children, one third (33.4 per cent) were involved in civil cases. These include personal status cases (20.6 per cent of total number of children) and land disputes (12.8 per cent). Personal status disputes correspond to family law cases such as the custody of children, inheritance issues, or a potentially arranged marriage. There were 168 criminal cases involving 197 children, 101 of whom were offenders and 96 were victims. Only 38 were girls, hence 80 per cent of the sample were boys. Among the victims, 76 per cent were also boys.

As regards age, the average age of offenders was 13.4 years, with roughly 20 per cent being aged 11 years or younger, which is lower than data from Western countries, where research has suggested a predominant age of 16 or 17 years. However, the researchers point out that the lower age could be linked to the fact that more severe cases are dealt with in the formal justice system. Among the offenders, 79 per cent were involved in assault, 11 per cent in drug use, 6 per cent in robbery, 5 per cent in road traffic offences and the remaining 4 per cent in drug trafficking (2 per cent), sexual assault (1 per cent) and terrorism (1 per cent). There were no offenders accused of murder, which suggests prosecution for those cases takes place within the formal justice system. Almost all offenders (94, representing 93 per cent of the total) participated in the customary proceedings.

The average age of victims was 11.7 years. Among the victims, 79 per cent were victims of assault, 7 per cent of murder, 6 per cent of robbery and the remaining 7 per cent are distributed among road traffic offences (3 per cent), sexual assault (2 per cent), drug use (1 per cent) and drug trafficking. Roughly three quarters of the victims (74, representing 77 per cent) took part in the proceedings.

The researchers highlight the presence of two victims and one offender of sexual assault, as, according to the local social conventions, such cases seldom arrive at the justice system (formal or customary) because they compromise the reputation of the family.

Just over half the cases overall ended with an agreement between the parties, including two out the seven murder cases, and seven assault cases which lasted more than a month.

By way of comparison with the formal criminal justice system in the same region, the research notes that whereas 200 criminal cases were dealt with in the informal justice system, some 1,200 cases were processed by the two local child courts in one affected region. However, the disclaimer is also offered that comparable official statistics are difficult to come by. The observation is also made that, interestingly, property offences did not really feature in the sample, the exception being robbery.

In conclusion, the researchers point out that the majority of efforts to reform the formal juvenile justice sector in Egypt ignore the role of the actors and processes of the informal system.

The Concluding Observations of the Committee Rights of the Child (2011) list numerous recommendations (paragraph 87), yet none of these address the customary system. In turn, this lacuna is reflected in the policies of many non-governmental agencies active in juvenile justice reform, whose programmatic recommendations around diversion and alternatives to detention almost exclusively refer formal actors to key Ministries (Justice, Interior and Social Affairs).³¹

This research concludes that in order to reflect the lived realities of children in conflict with the law in Egypt, particularly in rural areas such as Assiut where the fieldwork was conducted, customary actors must be considered in policies for juvenile justice reform.

Decisions of informal justice systems are made by members of the community – chiefs, headmen or headwomen, elders or by a decision of the community en masse. In some systems in which there is semi-formal or more formal state involvement, positions as adjudicators are allocated upon recommendation by the chief (as in Zambia) or may even be the result of an electoral process.³² Typically, the most widely used method of dispute resolution is negotiation, which is controlled by the parties themselves, and which strives to achieve an outcome which satisfies both parties and which addresses the root causes of the conflict.³³ Mediation involves the presence of a third party. According to Sone, if the parties have tried negotiation and mediation and no positive result is achieved, they use the tribal court.³⁴ This is when the *mogji* or *bale* commonly used by the Yorubas and Ibos; *kgotlaor inkundla* used by the Zulus and Batswanas; *ntooh* for the Wimbumbas; and *wazee* or *kokwo* for the Pokot and Marakwet ethnic groups in Kenya, are very active in resolving conflicts. Hence, arbitration is considered an alternative dispute resolution method.³⁵ Reconciliation is done by an authority selected from the community who mediates between conflicting parties and is empowered to make binding judgments. The purpose is not to render a judgment or punishment in law but to reconcile the conflicting parties by following the norms of the community.³⁶ The reconciliation process often requires symbolic gestures and associated rituals, including the exchange of gifts and the slaughter of animals (chickens, goats,

³¹ Ibid, at 48–49.

³² UN WOMEN, UNICEF and UNDP, above n. 9, p. 56.

³³ SONE, above n. 2, at 55.

³⁴ UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, above n. 4 above, at p. 33.

³⁵ SONE, above n. 2, p. 55.

³⁶ Ibid.

sheep or cows) to be shared by the parties and those present in the reconciliation process.³⁷

Informal judicial decision-making powers are often intertwined with executive authority at the village or local authority level.³⁸ As regards jurisdiction, this has generally been confined to family matters, juvenile issues, inheritance and minor criminal matters. However, in practice traditional fora may exercise far more extensive jurisdiction, either because of confusion about their powers or because the litigants choose them above the state court systems. Other matters typically adjudicated in traditional systems include wrongful injury, liability for animals, land issues, contractual agreements such as related to the exchange of goods, and loans.

The Sierra Leone National Report describes how the traditional justice system supposedly interfaces with formal justice structures:

The traditional justice system is organised through different levels. Each Community/Town/Village has a Chief and a Chief Court that is supposed to address petty offences: this is the lowest level. The next level is called 'Section', which comprises a group of villages with well-defined geographical boundaries. The Section is governed by a Section Chief and has a Section Chief Court that receives referrals from Chief Courts, depending on the gravity of the matter according to 'traditional perspectives'. The third level is the 'Chieftdom' which is governed by the Paramount Chief, i.e. the highest level of chiefs. At Chieftdom level, there is an informal Paramount Chief Court that usually deals with land disputes and serious crimes referred by the Section Chief Court, and a Local Court that mostly deals with civil matters (e.g. family and marriage disputes, debts and fraud). Local Courts are under the political leadership of the Paramount Chief, but administratively placed under the Judiciary: Local Courts represent the linkage between the formal and traditional justice system. Technically, only Local Courts are supposed to arbitrate, while Chiefs operating in traditional courts must only mediate or facilitate disputes involving more petty crimes, in line with a restorative justice approach, and refer serious crimes to the police or higher-level courts. However, in practice, Chiefs also arbitrate cases, often because fines paid by community members represent a valuable financial income.³⁹

³⁷ "The vast majority of penalties issued by the customary justice system in Egypt are financial. They consist of an economic compensation for the harm done. For example, a stitch on the head is valued at 500 Egyptian Pounds (EGP), a multiple fracture is valued at 25,000 EGP. In murder cases, arbitrators involved in this research stated that Islamic thought and traditions are the main source for establishing the amount of compensation, known as *diyyah* in Arabic." CAMPISTOL ET AL., above n. 5, at 7.

³⁸ UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, above, n. 4, at p. 29.

³⁹ Sierra Leone National Report (2018) p. 8. The report records further that 'Meanwhile, the government, NGOs and other actors that have played a key role in training traditional authorities on children's rights, principles and best practices, including criminal proceedings involving children. Although this does not make them fully competent to handle cases involving children, it reduces the chances of injustice and further harm and human rights violations. In communities where CWCs [child welfare committees] exist and are functional, training has paved the way for effective advocacy and boosted the integration and application

4. HUMAN RIGHTS PRINCIPLES AND INFORMAL JUSTICE SYSTEMS: CHALLENGES AND PROMISING PRACTICES

That human rights issues can be implicated in informal justice processes has been widely recognised.⁴⁰ In particular, concerns are raised about the applicability of fair trial rights, including the right to an appeal; gender discrimination; and power imbalances in traditional societies generally.⁴¹ By way of example, the restorative nature of traditional justice processes and the need for an acceptance of responsibility may come into conflict with the right to be presumed innocent. So, too, the right to counsel, as legal representation is not allowed during informal justice system processes. These concerns are more evident in criminal than in civil type disputes. Some sanctions which violate human rights may continue to be practised, such as the imposition of corporal punishment or banishment. In some informal justice systems, trial by ordeal is permitted, which flies in the face of universal human rights principles.⁴² In one recent study, it was suggested that in customary justice, there is no minimum age for participation in the proceedings and the same arbitrators deal with children and adults, which infringes the concept of a minimum age of penal responsibility, and of specialised child justice systems.⁴³ One of the disadvantages of reliance on customary law with regard to children is that in many communities the age

of child rights principles by traditional justice actors when dealing with cases involving children. The presence of CWCs and NGO child protection programmes has helped the promotion of child friendly measures and accountability within the traditional justice system. However, in the absence of CWCs and/or NGOs in many communities, the reality can be very different.' (Report p. 10).

⁴⁰ The Dakar Declaration on the Right to a Fair Trial in Africa, adopted by the African Commission on Human and Peoples' Rights in 1999, addressed this question: 'Traditional courts are not exempt from the provisions of the African Charter relating to fair trial' (para. 4). The Human Rights Committee's General Comment No. 32 (2007) provides that Art. 14 dealing with fair trial rights is applicable only when a state has made customary courts part of its system of the administration of justice (UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, above n. 4, at p. 52).

⁴¹ 'Any unequal bargaining power of the parties may also undermine the process in less conspicuous ways. Distinctions along the lines of family, wealth or gender may play a greater role ...' UN OFFICE OF THE HIGH COMMISSION ON HUMAN RIGHTS, above n. 4, at p. 56.

⁴² <<http://allafrica.com/stories/201604040747.html>> (last accessed 16 March 2018). Trial by ordeal has been defined as 'a primitive method of determining a person's guilt or innocence by subjecting the accused person to dangerous or painful tests believed to be under divine control'. One method involves requiring the suspect to imbibe poisonous substance called 'sassywood' – a lethal potion made from the bark of a tree which many Liberians believe holds mystical powers. The brew is widely used in cases involving suspected witches and accusations of theft, adultery and murder: those who vomited it up and survived were deemed innocent. Other forms of trial by ordeal included burning the skin with a hot cutlass or dunking the hand in boiling oil. Although it has been formally outlawed for more than a century, instances continue to be reported.

⁴³ CAMPISTOL ET AL., above n. 5, at 8.

of maturity is 10 years or even younger, leading to the risk of such children being treated as adults at a very young age. It has also been argued that customary justice systems may support harmful traditional practices that directly affect children such as early and forced marriage. The lack of privacy of informal justice proceedings imperils universal principles relating to children's rights and privacy, even in sensitive cases.

In some (not all) informal justice systems, there is the risk of inhuman penalties which violate international human rights law. An example is provided next:

The Human Rights Committee has addressed the use of capital punishment by a traditional justice system in Madagascar in its concluding observations on the State party's report. The Committee was concerned about the existence of a system of customary justice (Dina) which did not always produce fair trials. It regretted that summary executions had been perpetrated on the strength of Dina decisions. It took note of the assurance by the State party that Dina could no longer intervene in anything other than minor offences, and under judicial supervision. The Committee recommended that the State party should ensure that the Dina administer a fair justice system under the supervision of the State courts and invited it to ensure that no further summary executions were perpetrated on the strength of Dina decisions and that every accused person benefited from all the safeguards set forth in the Covenant.⁴⁴

However, it has also been pointed out that a significant volume of the current literature on local justice mechanisms is commissioned by international development actors. A lot of the literature therefore presents detailed exposés of the deficiencies of local justice mechanisms in terms of human rights, and suggests how human rights assistance by development actors should engage local justice mechanisms towards incorporating key principles of human rights and the formal justice mechanisms.⁴⁵ This chapter proceeds from the standpoint that because children's rights are implicated in informal justice systems, a rights-based approach can and should infuse their contact with these justice systems. Nevertheless, it may be that *how* formal rights are infused into informal justice systems (such as the right to be heard, or to enjoy legal representation), requires a modified approach in the context of informal justice systems. For instance, the lack of access to legal representation might be mitigated by the fact that parties represent themselves directly in informal justice proceedings, which operate on a 'truth telling' basis;⁴⁶ and that children's interests and voices are represented by proxy adults such as parents.⁴⁷

⁴⁴ UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, above n. 4, at p. 37.

⁴⁵ MAINA AYIERA and DANISH INSTITUTE FOR HUMAN RIGHTS, above n. 3.

⁴⁶ Ibid, at p. 45.

⁴⁷ CAMPISTOL ET AL., above n. 5, at 17 record that the views of lawyers were sought in a measurable percentage of cases in their sample; however, they do not indicate whether the involvement of lawyers was as legal representatives (or as advisers to the arbitrators).

From the children's rights perspective, the four 'general pillars' of the CRC Committee⁴⁸ must be taken to apply to proceedings in informal justice systems. To recap, these are the right of the child to non-discrimination (Article 2 CRC), the right of the child to have his or her best interests taken into consideration (Article 3 CRC), the right to survival and development (Article 6 CRC) and the right of the child to express views and have these taken into consideration (Article 12 CRC). Especially the last-mentioned right may be imperilled in informal justice processes, as traditionally children were to be 'seen and not heard', nor were they engaged with in a participatory manner.⁴⁹ The CRC Committee has also expressed concern on occasions that respect for the views of the child remains limited, including in the courts and before administrative authorities, and in society at large, owing to traditional attitudes. In its consideration of the periodic report of Niger, the Committee recommended that the state party develop a systematic approach to increasing public awareness of the participatory rights of children in the best interests of the child, particularly at local levels and in traditional communities, with the involvement of community and religious leaders, and ensure that the views of children are heard and taken into consideration in accordance with their age and maturity. As regards the necessity of ensuring the application of children's best interests in custody disputes, customary and/or religious practices are sometimes applied to determine custody solely on the basis of the child's age or gender, without consideration of the views of the child and the child's best interests. For instance, women in Niger retain custody for children under the age of 7, but men may be entitled to custody of children after this age. This does not take adequate account of the best interests of the child principle, which should be a primary consideration.

UN Women, UNICEF and UNDP⁵⁰ point out that children and women are structurally disadvantaged in informal justice systems, which tend to be dominated by middle-aged and elderly men as adjudicators. They add that vulnerability increases when the best interests of the child do not coincide with those of his or her parents or guardians or close family. In fact, they are most at peril when the person purportedly representing the child is also the perpetrator of one or another violation of rights.⁵¹

Further, because customary justice operates according to the notion of collective rather than individual responsibility, children involved in customary

⁴⁸ This is the UN treaty body mandated to monitor the implementation of the UN Convention on the Rights of the Child (CRC) (1989).

⁴⁹ See UN WOMEN, UNICEF and UNDP, above n. 9, at p. 129. However, the research in Egypt discussed below found that arbitrators indicated that they took into account the point of view of the children in practically all the cases in which children participated, which goes against previous research (CAMPISTOL ET AL., above, n. 5, at 16).

⁵⁰ Ibid.

⁵¹ Ibid, at p. 122.

proceedings are not perceived as individuals in their own right, but as part of the wider social unit to which they belong: the family, clan or tribe. In practice, this means that the child is often treated as marginal and peripheral to the customary proceedings. Their agency might be denied, with their right to participate negated. Senior male family members (father, grandfather, uncle) tend to request the intervention of the customary justice system and they are the main interlocutors during the proceedings.⁵² This point is reinforced by Harper, who notes that customary systems often discriminate against vulnerable groups such as women, minorities, children and the poor.

In some contexts, participation in dispute resolution is restricted based on gender, social status and/or ethnicity. In Somalia, for example, women can only be represented by male relatives. In Northern Kenya, some tribes allow women to present evidence, but only 'while seated on the ground and while holding a grass reed above their heads'; men by contrast present evidence 'while standing and holding a long rod understood to be a symbol of respect'.⁵³

According to an informant interviewed for the study on which this chapter is based,

when something happens in which a child is implicated, it goes to the elders who conduct a conversation with the family as to why the child did it and what to do about it. The parents of the child would agree to compensation such as a cow or livestock. They would share a meal with the victim's family. Then the whole incident is forgotten, never to be spoken about again. There is no labelling, no lasting stigma – that is the child who did x or y – they never speak about it again. The child (and his or her behaviour) represents the family as a whole – that is why parents must come and explain what they can do to make things right. The child does not speak directly: the child would be represented by a family member such as an uncle. The family is therefore represented, and must make the amends.⁵⁴

In a positive vein, the Special Representative of the Secretary-General on Violence against Children has noted that customary justice systems tend to use more accessible language, have a greater potential for healing, are less costly and promote more direct involvement between the accused and the victim, as well as between their families and the community more generally. A child normally appears in a traditional justice proceeding with a member or members of his or her family, and the focus tends to be on reparation, reconciliation and ensuring

⁵² Ibid, at p. 14.

⁵³ E. HARPER, 'Customary Justice: from programme design to Impact 2011', in J. UBINK AND T. MACINERNY, *Customary Justice: Perspectives on Legal Empowerment ILDO*, Rome, 2011, at p. 23.

⁵⁴ Interview with Angela Mutema, Legal Practitioner, Kenya, October 2017.

the child remains part of the community. Customary justice processes do not normally involve the detention of children, either in the pre-trial stage or after judgment, avoiding the harmful effects of detention on children and the risk of violence to children in detention.⁵⁵ These conclusions point to a more child-friendly process for children before informal justice authorities than they may experience in formal justice systems.

A human rights concern raised in research and fieldwork is that intra-familial sexual offences, including rape, defilement and incest, where children are victims, are dealt with by mediation and offenders escape criminal liability – in effecting enjoy immunity. Thus, a recent study in Zambia, which explored this issue in relation to child sexual abuse or defilement, suggested that the majority of these cases in the study were in fact dealt with by the family or in the informal or traditional justice systems (Zambia has a system of traditional courts, though little has been written about them and how they operate).⁵⁶ Local courts also exist, and differ from state courts in that legal representation is not permitted, they apply African customary law, and the presiding officer is not legally trained. This study asserts that defilement is less of a wrong under the informal justice system, in which it is called deflowering rather than defilement. Moreover, it is not a crime in the informal justice system, but a civil wrong. Compensation may be awarded to the family of the child as virginity damages. It is the family who have been wronged, rather than the child. The study is inconclusive about whether the child actually appears before the informal justice system structure. Nevertheless a number of human rights concerns are raised by this research, not the least of which is the violation of the child's right to a remedy.

Finally, owing to their enduring appeal to the population, evidence exists that informal justice systems have breached the rural- urban divide, as the example below from urban Tanzania shows:

In the *Mtaa* mediation system in Tanzania, each *mtaa* has a dispute resolution committee that is empowered to resolve disputes, including those involving children. Because the primary mechanism for achieving this is mediation, the *mtaa* arguably retain some features of informal justice systems. According to Ifunya, *mtaa* can make orders in relation to certain criminal offences committed by children (theft, truancy, assault or injury, smoking marijuana and using abusive language); as regards civil matters, children can report child neglect, parents failing to provide basic needs or to pay school fees, abuse and maltreatment. Sanctions for minor offences include requiring the child to report to the *mtaa* daily, community service, ordering the imposition of corporal punishment, and ordering that compensation be paid by the

⁵⁵ UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, above n. 4, at p. 75.

⁵⁶ L. MAKATALA, *The legal and practical challenges of addressing the case of child sexual abuse through Zambia's informal and traditional justice system*, Danish Institute for Human Rights, 2012, at p. 12.

child's parent(s). Civil remedies include ordering parent(s) to fulfil their parental responsibilities. An appeal does lie from a *mtaa* committee finding to a ward committee.⁵⁷

5. PROPOSALS FOR ENGAGEMENT WITH INFORMAL JUSTICE SYSTEMS

UN Women, UNICEF and UNDP identify that to a large extent, the barriers children face in ensuring that their rights are upheld in informal justice processes are social, rather than formal, requiring a change in mentality rather than new rules.⁵⁸ They highlight that the quality and standing of the person representing the child is fundamental, and that the challenge begins with a recognition by the affected parties, including the arbitrator, that the legal rights of the child are at stake. In relation to child protection systems, the UN report highlights the need for capacity building and training programmes reaching local actors. Training should include applicable human rights norms, the impact, consequences and trauma experienced by child victims, child-appropriate interviewing techniques, and skills to deal with child victims and witnesses.⁵⁹

UN Women, UNICEF and UNDP make the important point that informal justice systems do not replace or substitute for a national legal system. Interventions to improve children's rights adherence in informal justice systems must at the same time take cognisance of the constant need to improve the reach of, and human rights standards applicable in, the formal justice system.⁶⁰

Equally important, they aver, are that interventions in informal justice systems should be premised on realistic solutions that envisage long-term improvements (and not short-term gains which are not sustainable and create dependency).⁶¹

The organisation *Terres des hommes* is engaged in projects exploring children's rights in informal justice systems in a range of countries, mostly in the Middle East. However, two African countries in which they have been working are Egypt and Burkina Faso. They have documented 700 cases involving children and the justice system in Egypt, as described earlier in this chapter. Their future work will be based on four pillars; the first pillar is data collection including documenting case studies of matters involving children dealt with in informal justice systems. *Terres des hommes* already have, at the time of writing,

⁵⁷ A.D. IFUNYA, *The challenges to children's rights in the mtaa mediation system, Tanzania: a case study of kombo mtaa mediation committee, Ilala municipality, Dar es Salaam region, Tanzania*, Danish Institute for Human Rights, 2013.

⁵⁸ UN WOMEN, UNICEF and UNDP, above n. 9, at p. 130.

⁵⁹ *Ibid.*, at p. 132.

⁶⁰ *Ibid.*, at p. 139.

⁶¹ *Ibid.*

a database of more than 2,000 cases involving both civil and criminal justice. A second component is advocating for improved coordination, especially between the formal and the informal justice systems. Thirdly, the organisation seeks to sensitise role players (on juvenile justice principles and children's rights); and finally, *Terres des hommes* envisions engaging with informal justice structures and bodies on child participation.⁶²

DANIDA and the Ministry of Foreign Affairs of Denmark released a 'How to Note' on informal justice systems to guide their responses to rule of law reform projects. The Note focuses on one particular aspect of the support to the realisation of human rights – enabling access to justice for the poor and marginalised through an increased focus on informal justice systems.⁶³

It is sometimes difficult to isolate the adjudicative function of informal justice mechanisms from the prevailing practices and norms within communities. The problems or human rights violations may indeed occur outside of or prior to any process of adjudication. From a programmatic point of view, it may thus be inadequate to address the adjudicative aspects of informal justice systems without addressing the norms and even the world-views that inform them. Tackling the social practices and beliefs themselves is outside the scope of this study. This recalls the treaty bodies' recommendations of using multi-pronged strategies over time to address these issues. In practice, the same community leaders – traditional or religious – who would be called upon to adjudicate disputes in the event of a conflict are those who are upholding the problematic practices – including, for example, child marriages, and discriminatory inheritance practices.

According to DANIDA, the following proposals underscore future interactions with informal justice systems (from the standpoint of an international cooperation agency):

Applying a people-centred and demand-driven approach to access to justice. Support for informal justice systems should begin with the needs of the poor to access justice that is non-discriminatory and inclusive, and that improves their livelihood. Specific attention should be paid to those who are excluded from or discriminated against in both informal and formal systems.⁶⁴

DANIDA also advises promoting local ownership and multiple stakeholder dialogue. Many stakeholders with potentially conflicting interests are affected by support to informal justice systems. National ownership is essential, but an inclusive process at the local level must inform reform of both formal and informal justice systems, it says.⁶⁵

⁶² Personal interview, Kristen Hope, Researcher, *Terres des Hommes*, 1 December 2017.

⁶³ DANIDA, above n. 12, at p. 6.

⁶⁴ Ibid.

⁶⁵ Ibid.

Furthermore, DANIDA advocates applying a holistic, integrated approach to justice sector reform. Support to informal justice systems should complement or be incorporated into support to the formal justice system to enable everyone to access justice regardless of their education, class, ethnicity, gender, sexual orientation or caste.⁶⁶ to this can be added, for the purposes of this chapter, age.

The 'How to Note' recommends that improving access to justice for poor and marginalised groups is likely to be slow and incremental, insofar as it requires not only legal and institutional reform, but also efforts to influence the cultural beliefs, social barriers and structural inequalities that limit or deny justice to these groups. It cautions that it is important to be realistic about what can be achieved in certain periods of time.⁶⁷

Additionally, it supports gradual adherence to human rights, including accountability, non-discrimination, fairness and physical integrity; and promotes building and strengthening monitoring mechanisms (which is a challenge given the lack of records kept in most informal justice systems).⁶⁸

Some of the above recommendations have informed the conclusions and recommendations set out in the final section of this chapter below. However, from the child rights perspective, harmful practices cannot be subject of gradual improvements (as DANIDA appears to advocate), and advocacy should be focused on ensuring that they be stopped immediately.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. RESEARCH

There is obviously a paucity of credible, detailed and up-to-date research on African children's experiences of informal justice systems, both in the criminal and civil dimensions. The recent research undertaken by *Terres de hommes* in Egypt shows that some old 'truths' contradict popular conceptions, such as the old 'truth' that children do not participate in informal justice system processes. Other myths or practices of old which are being transformed might also need to be subjected to further scrutiny, such as the patriarchal nature of informal structures and the absence of women as adjudicators. Some studies are indicating the gradual absorption of women into decision-making structures.⁶⁹

Hampering such ethnographic research, however, is the oral tradition of informal justice systems, with its characteristic lack of records, reliance on recall and memory, and resulting anecdotal character of any findings. Hence,

⁶⁶ Ibid.

⁶⁷ Ibid, at p. 7.

⁶⁸ Ibid, at p. 7.

⁶⁹ EVA MAINA AYIERA and DANISH INSTITUTE FOR HUMAN RIGHTS, above n. 3, at p. 31.

creative methodologies would need to be probed, in the absence of large-scale and potentially lengthy, grass roots research projects.

A further hurdle emanates from the multiplicity of informal justice systems, even within the borders of one country. It cannot be taken for granted the processes, practices and outcomes are similar even in communities that are fairly close together. Nor can it be assumed that the practice of informal justice is a rural phenomenon, as the example of the *mtaa* in urban Tanzania⁷⁰ and the findings from the Sierra Leone Report⁷¹ indicate (in relation to its occurrence in peri-urban areas).

Nonetheless, the need for further research is evident if the necessary interventions to infuse children's rights and universal principles in these structures are to be appropriately devised.

6.2. INVESTMENT IN THE POSITIVES

As the preceding work indicates, the positive features of informal justice systems – including for children – should not be underestimated. This includes their proximity to the people they serve (access to justice being one element of the child-friendly justice framework); their speedy nature (avoidance of delay being another core principle of child friendly justice); and their avoidance of deprivation of liberty (a third core principle). This does not mean that harmful practices (trials by ordeal, corporal punishment) should be overlooked, nor that children's experiences of injustice (when sexual offences against them are trivialised and perpetrators escape with impunity) be left unremedied. Glorifying custom and tradition stultifies the infusion of universally accepted principles in taking the 'child-friendly justice' agenda forward.

Rather, work should continue to flag the important benefits that people themselves realise when they prefer an informal system over the formal mechanisms instituted by the state. As the same time, these advantages should serve as a beacon to states to improve the extent, reach and accessibility of formal systems, in the service of their people.

6.3. TRAINING AND SENSITISATION

All stakeholders appear to agree on the need to sensitise all those who play a role in informal justice systems to child-friendly justice, and the basic elements of human rights and the rule of law. However, sensitisation efforts should be

⁷⁰ IFUNYA, above n. 57.

⁷¹ Sierra Leone National Report, above n. 39.

followed by robust monitoring and evaluation, to ensure that the training brings the desired changes at grass roots level.

6.4. INVOLVEMENT OF INFORMAL JUSTICE SYSTEMS IN RULE OF LAW PROGRAMMES

There is also support for the recognition of the functions played by informal justice systems in rule of law programmes, and to that end, there is a need to impress on African governments that they should include the informal justice sector (in whatever guise) in rule of law programmes and their engagements with donor communities.

6.5. ARTICULATION AND COORDINATION WITH FORMAL JUSTICE SYSTEMS

As highlighted in the preceding chapter, the level of coordination or infusion with formal justice system varies along a continuum from formal legal recognition of the customary or traditional justice system, with appeals lying to the formal justice system, to completely separate systems, isolated from one another and largely ignorant each other. A much more concerted effort to improve the articulation between formal and informal systems is recommended. Sexual offence cases, sometimes requiring skilled forensic services, sensitive witness preparation, and recompense for victims, should ideally be dealt with by formal systems where resources can be found to underpin these, and should not be mediated at community level, but referred to state justice systems. At the same time, the restorative and communitarian nature of informal justice systems could mean that appropriate mechanisms to divert matters involving children to these fora would provide better outcomes and avoid (for instance) deprivation of liberty of children for minor infringements.

The recommendations above should not be pursued on an ad hoc basis at the individual level, but should ideally form part of the national access to justice policy of African states. In other words, engagement with informal justice systems should be consciously driven and formulated in a participative way.