

Programme «Society and Future»

Final Report – "Research Summary"¹

RESEARCH CONTRACT: [TA/02/017](#)

PROJECT ACRONYM: **AFTRALAW**

TITEL: **ADRESSING TRADITIONAL LAW IN POST-CONFLICT JUDICIAL AND LEGAL DEVELOPMENT AID IN SUB-SAHARAN AFRICA**

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DATE: 06/06/2011

The purpose of this summary is to disseminate the research findings via the internet.

¹ See Art. 5.5.2 of the research contract.

The objectives

This research project studied the way in which *international actors in sub-Saharan Africa* address *traditional justice institutions* and mechanisms of dispute resolution in the context of *transitional justice* and *justice sector aid*. Transitional justice refers to the way in which crimes and human rights violations committed by a previous regime or during an armed conflict are dealt with. Justice sector aid refers to different types of activities which aim at building or reforming the justice sector. The research focused on three aspects : the *policies* of international actors in this regard, their *interventions* regarding the use of tradition in the framework of transitional justice and justice sector aid and the relationship between *traditional justice and human rights*. Based on a revision of actual policies and interventions in six countries and field studies in these countries (*Malawi, Mozambique, Rwanda, Uganda, Sierra Leone and Zambia*), the final report provides an analysis of these actors' current approaches as well as a series of recommendations for future intervention.

The results obtained

Transitional Justice

The research learned that none of the donors has a specific policy regarding the use of traditional justice in the framework of transitional justice. Only the United Nations - with the 2004 report of the then Secretary General Kofi Annan - have developed a *policy regarding transitional justice* in general, in which the development of transitional justice strategies considering the context of the specific country and consideration of local views are promoted, as well as respect for international human rights standards. Traditional justice is mentioned as being part of the scope of mechanisms that can be considered.

Donors do *not seem to have any particular preference* for traditional or tradition-based mechanisms and are therefore not interested in the debate on the invented versus real nature of such mechanisms. If they support such mechanisms, they are mainly motivated by the principles of the *Paris Declaration on Aid Effectiveness*. First, alignment with the policy of the partner country is decisive: if the partner country suggests or supports tradition-based solutions, donors are likely to follow, as was the case with Rwanda's *gacaca courts*. Second, the need for local ownership is crucial. Local ownership was initially conceived as mainly state ownership, meaning that an activity would be supported because it was part of the state policy of the partner country (as opposed to being imposed or decided by donor countries or the broader international community).

The *downside of alignment* with state policies is that donors tend to support mainly those activities which are part of this state policy, leaving the support for small scale civil society initiatives to non-state donors, such as foundations, or to international NGOs, acting as intermediate donors. Whereas many of such small scale projects deal with issues of reintegration and reconciliation, the research shows that local communities where victims and offenders have to live together often struggle with a lack of accountability. While criminal prosecution is usually considered a state monopoly, more attention should go to alternative non-criminal ways of establishing accountability, among which tradition-based justice mechanisms. The fact that donors are not inclined to support such initiatives, if they are not part of the official transitional justice policy, creates a *de facto accountability gap* at the local level, which can lead to social exclusion and tensions. Even though some traditional practices are spontaneously revived without external support, such support remains crucial, first since post-war communities are often too poor to afford costly items, such as animals, to conduct rituals, second because external supports – usually through local NGOs - allows the integration of human rights and an overview to counter power abuse.

Gradually, the concept of local ownership was broadened from state ownership to *national and popular ownership*. Initially, 'localizing' transitional justice was conceived as the need to add some traditional elements to existing mechanisms, such as traditional cleansing in DDR-programmes in Sierra Leone and Uganda, or the involvement of traditional leaders in the work of the Truth and Reconciliation Commission in Sierra Leone. Donors supported these activities, emphasizing that they work with what they 'find on the ground'. They felt that the presentation of an activity as traditional or tradition-based increased the potential for local ownership and legitimacy, and therefore for its effectiveness. However, this led to a *superficial and selective use of traditional elements*, without questioning the impact of such use or the role of traditional leaders prior to or during the conflict, nor the legitimizing effect of their support.

While donors start to realize the importance of consulting and involving civil society and the population in the development of transitional justice policies and their implementation, this presents a number of challenges.

First, consulting civil society and the local population comes with questions on the *representativeness* of traditional, religious or civil society leaders, on gathering views that evolve over time and depend on the security context, on understanding people's opinion on justice and reconciliation as part of a complex cosmology, unfamiliar with western frameworks, and of understanding the various ways power relations impact on the use of various mechanisms by various stakeholders. Second, particularly with regard to criminal accountability for international crimes the local population and the partner country are not the only stakeholders, since the *international community* has an equal interest in seeing these crimes prosecuted. Third, the interaction between these levels needs to be considered, since the action or inaction at one level will undoubtedly influence what happens at another level. It is important not to reduce a conflict and the responsibility to respond to crimes to the local level, while overlooking or excluding national and international responsibility. In-depth research – both of an anthropological and a political nature – prior to any support is required to avoid these pitfalls. In this regard, particular attention needs to go to the way *sexual crimes* are dealt with, since traditional practices overly emphasize the need for reparation of the family of the victim and ritual cleansing of the victim itself, without sufficient consideration for the victims' views.

Donors have started to support various types of activities in this regard (participation in peace negotiations, conferences, capacity building, coalition building and more recently popular surveys). In other words: *a shift has taken place from donor support to mechanisms proposed by the international community, to support to transitional justice strategies developed by the partner country, to support for preliminary processes of consultation, dialogue and participation.* This is a positive evolution, which drew attention to locally proposed tradition-based mechanisms. Following, local stakeholders started to claim the debate and wanted their local, traditional practices to be accepted as alternatives for criminal prosecution, as the example of Northern Uganda shows. This was not really expected and confronted donors with the dilemma between the need for localization on the one hand, and the need to respect international standards on the other hand.

In this respect, a distinction can be made between *tensions with human rights*, and more in particular with women's and children's rights, and tensions with international criminal justice standards. As discrimination of women, youth and children is often a characteristic of African societies as a whole, focusing on discrimination in tradition-based mechanisms alone is not very useful. Human rights education is often part of larger peace building programmes, while justice sector reform will focus on the abolishment of discriminating legislation and on human rights capacity building for legal and paralegal professionals. Support to tradition-based mechanisms can involve requirements of inclusive procedures, the prohibition of corporal punishment and harmful truth seeking mechanisms, human rights training and the acceptance of oversight by local authorities or NGOs. *Tensions with international fair trial standards* - in case traditional mechanisms are proposed as alternatives for criminal prosecution - pose more challenges.

Donors usually address these by adding clauses that require respect for human rights or by setting priority rules (which consider the international criminal paradigm as the dominant legal order to which other legal orders – among which the local, traditional order - have to adjust). Such legal centralist – or ‘weak’ legal pluralist - approach ignores the fact that norms cannot be isolated from one order and transplanted to another, when the latter is based on an entirely different cosmopolitanism on how to deal with crimes (including requirements of partiality, community participation and the restoration of social harmony). Instead, such conflicts should be viewed as an occasion for an open, dynamic, dialectical process of interaction between various normative orders, which will require time and effort, but in the end will lead to *the creation of new, hybrid, tradition-based mechanisms*, adjusted and appropriate to the particular context, as proposed in ‘strong’ legal pluralism. Donors should support such processes (and already do) realizing this will require sustained efforts, as well as diplomatic interventions to maintain the transitional justice momentum. The outcome of such processes will not lead to new, transplantable hybrid transitional justice mechanisms, but may lead to a new transitional justice paradigm, based on ‘strong’ legal pluralism.

Justice Sector Aid

Despite the growing international attention for traditional justice that is reflected in various guidelines issued by development agencies, *traditional justice is not yet systematically considered as an area of intervention in justice sector aid*. Most interventions in the justice sector are directed at formal justice. The emerging interest in traditional justice is counter-balanced by a number of factors that contribute to the *perpetuation of a narrow focus on formal justice*. Current aid modalities, such as direct budget support and sector wide approaches (Swaps), force international actors to align themselves with the state, thus working according to a logic that reinforces the lack of attention to other forms of justice. Our field research in Malawi, Mozambique, Sierra Leone and Zambia clearly showed that state driven interventions tend to privilege formal justice. When they are directed at traditional justice the *engagement is limited to official customary structures*. Interventions directed at unofficial traditional justice primarily take place through civil society organizations.

Given the broader context of justice sector aid and its inherent state-centeredness, *most supported interventions* in the area of both official and unofficial traditional justice seem to take the form of *capacity building for traditional justice providers and users*. International actors tend to support the provision of training for traditional justice providers. In relation to justice users, they mainly support civil society organizations to raise *human rights awareness* or *provide paralegal services at the local level*. The latter are increasingly supported in view of their potential to bridge formal and traditional approaches to dispute resolution, thus mitigating the division between formal and traditional justice that characterizes most justice sector aid.

In view of the general trends in justice sector aid, it is clear that *the participation of traditional justice providers and users in policy development and decision making in the justice sector is limited*. To improve this situation and give traditional justice providers, and justice users in general a voice involves considerable challenges. Our research found that international actors are seldom proactive in ensuring that the views and experiences of traditional justice users and providers are taken into account and that they are represented in the process of decision making.

In addition, we observed that although the processual characteristics of traditional justice are often highlighted as a motivation to engage with them for the promotion of access to justice, most interventions rarely build on the negotiated, relational and processual features of traditional forms of dispute resolution. Most interventions, including law reform initiatives, training for justice providers and awareness raising for justice users, *emphasize the adoption and dissemination of ‘the right rules’*. Important as these interventions are, they seem to assume that a lack of information is the main obstacle for people who seek to access to justice and to

enforce their rights. However, a more grounded understanding of traditional justice and its negotiated, relational and processual features suggests that factors other than the adoption of and knowledge about the right rules are more important in dispute resolution on a local level and its compliance with human rights. For example, women may know that they are entitled to certain rights, and yet they may not have enough *power to press for solutions* that uphold them.

At the level of the strategies that are currently implemented for the promotion of human rights locally, we observed that international development actors' *human rights agendas focus on state performance rather than community relations*, while the latter is precisely the arena where traditional justice is most active. The kind of human rights abuses that are most frequently found at the grassroots revolve around *gender discrimination*, a high tolerance of domestic violence and a disregard for children's rights. The kind of interventions that international actors support to tackle these issues, such as civic education campaigns and human rights training for traditional justice providers, tend to be rather *disconnected from the structural factors* that lead to the violation of these rights in the first place. Furthermore, most human rights related interventions are limited in scope as there is *little follow up or monitoring* of the impact of education and training programmes. We also found that while state organized interventions are generally top down in nature, some civil society organisations adopt a more dialogic and participatory approach.

Concerning the degree of *legal pluralism awareness* of international development actors, our research reveals that the latter is *partial* and there is a great degree of variation from one actor to another. As already mentioned, most international development actors are guided by the *principle of country ownership* and thus align themselves with the state. Therefore, they tend to follow the government's position on traditional justice which at best addresses *only official traditional justice, ignores unofficial traditional justice providers and results in formal justice institutions receiving priority regardless of the views and preferences of justice users*. Thus, with most justice sector aid being channeled towards formal justice, international actors pay little attention to legal pluralism. When it is taken on board, it is in the form of 'weak legal pluralism' rather than 'strong legal pluralism'. In addition, interventions rarely focus on the interactions and linkages between various legal actors and normative orders. International actors seem to either support the formal justice sector or finance civil society organizations that give training to traditional justice providers and users. In other words, the justice sector is rarely viewed in a holistic way. Moreover, we found no interventions that are directed at how traditional justice actors influence the working of formal justice institutions. Interventions supporting paralegal organizations are the exception. They are the only interventions that display a fair degree of awareness of legal pluralism because they seek to arrive at progressive interpretations of customs in the light of state legislation and potentially bridge the formal and traditional systems.

Finally, we found that most international actors do not seem to take a power informed perspective in their interventions. Most interventions in justice sector aid *assume that formal justice operates as an enabling legal order and neglect how justice users draw on different normative orders as resources*. The focus of most justice sector aid on formal justice institutions is rarely questioned, whereas engagement with traditional structures is often viewed with suspicion. For example, despite the fact that both the police and chiefs in Sierra Leone have a poor human rights reputation, training the police is deemed a more straightforward task than training chiefs. In addition, where government policies towards traditional justice are in place, they do not necessarily reflect the views of the users. By aligning with the state, donors endorse a limited understanding of ownership. The *main rationale* of interventions that do engage with traditional justice is a *lack of access to formal justice*. In other words, international actors make a pragmatic choice that does not seem to take the perspectives and experiences of justice users with both formal and traditional justice as the point of departure. Our project found only a few examples that reflect a different approach, such as the program 'Justice for the Poor' in Sierra Leone, where *qualitative long term research* is conducted on how justice both formal and traditional is experienced at the grassroots with the purpose of informing interventions.

Conclusions and recommendations

Transitional Justice

The main recommendations for international actors in the field of transitional justice are the following. First, while policy makers in application of the Paris declaration rightly align their policies to the state policy of the partner country, they are encouraged to conceive local ownership not just as state ownership but as national ownership, i.e. to *include the views of non-state stakeholders* and to address the needs for transitional justice (and more in particular for non-criminal accountability) at the grassroots level. Since these views and needs evolve over time and since they are often more complex than the questions in surveys would suggest, methodologies for in-depth study need to be developed, considering both international standards and traditional values regarding justice and reconciliation, which can be the building blocks for the development of hybrid tradition-based mechanisms. This implies a more holistic approach of transitional justice, that considers the interconnectedness and equal importance of the local, national and international level, to develop and implement a coherent strategy.

Second, local ownership cannot be equaled with a selective use of traditional elements to 'localize' an already existing mechanism. While the attention for local ownership creates openness to consider local, traditional values on justice and reconciliation, these come as part of a complex, broader cosmivision, in a given political and social context and are influenced by power relations. Selective support for one of more elements, such as traditional cleansing, may lead to unexpected outcomes which violate the '*do no harm*' principle. Support to tradition-based justice requires preliminary political and anthropological analyses of the potentially conservative, discriminative or conflict-generating context, and the provision of the necessary *checks and balances* and oversight mechanisms. This applies particularly to the way gender based violence is dealt with, on the side of both offender and victim.

Third, while donors tend to deal with the tensions between traditional justice and human rights by adding a human rights clause in peace accords or funding agreements, these methodologies are insufficient, since they only transplant norms of one normative order (usually the international criminal justice order) to another (the traditional justice order) from a hierarchical top-down position. As legal pluralism learns, the overlapping coexistence of various interacting normative orders is an empiric reality which cannot be solved through a normative decision on which order should prevail. Donors need to be prepared to invest in the support of *preliminary dialectal, time-consuming process to create legitimate, hybrid transitional justice mechanisms*, orders and standards, combining the underlying, traditional values of a given society or context with international human rights and criminal justice standards. Such new hybrid mechanisms will be unique to each post-conflict setting and will not allow the creation of a new, transplantable international hybrid mechanism.

Justice Sector Aid

The main recommendations for international actors in the field of justice sector aid are the following:

First, our findings indicate that there is a *need to support local capacity building on legal pluralism*. This means a shift from dichotomous approaches that deal with either formal or traditional justice, towards an integrated understanding of the justice sector where both formal justice and other legal orders play an important role. International actors can support research that leads to a better understanding of these legally plural configurations, which can inform future interventions.

Secondly, international development actors could play *a more pro-active role in promoting that*

policies in the justice sector build on the experiences and preferences of justice users. In this context, it is important to bear in mind that actors, rules and practices associated with law and justice are not static. Their constant (re)definition is a contested process embedded in unequal power relations. International actors can *facilitate fair processes of decision making in the justice sector* by supporting capacity building of stakeholders and lobbying for inclusive and participatory approaches.

Finally, regarding the promotion of human rights locally, international development actors can provide *support for local capacity building at national and local level for dialogic and participatory methodologies.* This should be understood as a *long term process* of social and cultural change that goes much further than the reform of legal orders.

Common findings and recommendations

As the above mentioned recommendations for each of the research fields show, there are some common findings that apply to policy making in both justice sector aid and transitional justice. First, the alignment of donors with state policies of the partner country implies that *traditional justice will only be supported if it is part of the state policy*, unless – for as far as justice sector aid is concerned – the partner country is a weak state and traditional justice is part of the donor's own agenda. In general, this alignment creates a *lack of attention for the views and needs of the beneficiaries of both transitional justice and justice sector aid.* Consulting civil society and the general population poses several challenges of representativeness and timing, while *creating local ownership requires not only consulting but also considering local, sometimes complex or conflicting opinions.*

Second, the research shows that policy makers need to accept legal pluralism as an empiric reality, not as a normative choice. Since policy making often takes a top-down approach in deciding that traditional justice should conform to or be controlled by formal justice, i.e. that *the only accepted legal pluralism is 'weak' or state legal pluralism, justice mechanisms outside of the official scope – even though important for justice users – are rarely supported by donors.* Consequently, the mutual influence and interaction between legal orders within the scope of state policy and those outside that scope remain without consideration, while they may have a huge impact on the success of donor supported interventions regarding traditional justice and therefore should be considered.

Third and finally, since traditional justice operates in a social and political context, respect for human rights reflects the power relations and the values of those in power. *The question here is not whether a specific traditional mechanism respects human rights, but which factors in a given society can contribute to making it a more just society and what possibilities each legal order provides for each of the stakeholders in this regard.* By starting from the position of the stakeholders (local but also international) donors can support processes of change that grow from 'within'.

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