

**Key Issues:  
Traditional Authorities and Formal/Informal Systems of Justice in  
Africa**

1. Many aspects of the current relationship between traditional authorities and state judiciary bear the legacy of colonial policies of Indirect Rule. The colonial state guaranteed the existence of an official, modern legal system for citizens (i.e. for the colonizers and 'assimilated' Africans). Citizens were registered and could in turn register goods (e.g. land) under their names and appeal to state courts to resolve legal disputes. On the other hand, indigenous rights were administered on the basis of customary law and defended by 'Native Authorities' (i.e. chiefs and headmen). Indirect Rule was seen as a cheap and effective method of maintaining social order in what was in fact a period of rapid and far-reaching economic and social change. The fundamental idea was not to conserve custom for its own sake, but to use it as a means of regulating and ameliorating the effects of change (e.g. the spread of the cash economy, labour migration, modern education, Christianity, etc). As long as ordinary Africans continued to identify with their historic communities and remained loyal to their historic authorities, the costs of colonial administration could be kept to a minimum.

2. The norm in African colonies was for chiefs and headmen to administer customary justice to their subjects in Native Courts. The higher, state-administered courts retained jurisdiction over serious criminal cases and served as courts of appeal for 'native' cases (especially disputes between chiefs or between chiefs and their subjects). However, 'Native Courts' were also used to enforce rules and regulations introduced by the colonial state (in respect of taxation, property leasing, commercial licensing, sanitation, etc). In some colonial states, the distinction between 'citizen' and 'subject' generated tension from the very outset and the Native Courts became a focus of it. For example, a British District Commissioner's annual report from Sierra Leone for the year 1914 alleges that many Native Courts in the Protectorate...

*...exist purely and simply for the purpose of betting and for the extortion of outrageously high court fees from suitors of little influence and standing. The condition of these courts is exemplified by the fact that, during my first six weeks in this district, I received 160 complaints from natives, practically all appeals against Chiefs...apart from the corruption of the courts themselves, the spread of trade and education tends to disorganize their administration. Many natives, having acquired a smattering of English and a store licence, consider themselves on the same footing as a Sierra Leonean [citizen], and refuse to obey their Chief's orders or attend his court...*

3. The late colonial and early independence eras saw the first attempts to harmonize and modernize African justice systems. These attempts usually focussed on the codification of customary law and its incorporation into statutory law and the replacement of Native Courts by Local Courts

staffed either by professional magistrates or salaried paralegals. On the whole, these measures met with very limited success due to a lack of both human and material resources. For example, in the late 1960s, the government of Zaire (now the Democratic Republic of Congo) decreed that 'custom' would be incorporated into national law and that Courts of the Peace, presided over by professional magistrates, would replace customary courts. But even in the early 1990s, many areas of Zaire did not have a local court, as the government was unable to recruit people with legal training who were willing to work in the countryside, far from urban amenities. Much of the population remained at the mercy of customary justice, as administered by the chiefs and their courts. In many other African countries, the operational effectiveness of the state police and judiciary does not extend beyond urban areas.

**4.** Conflicts between chiefs and modernizers have a long history in Africa; yet chieftaincy and other forms of traditional authority continue to embody a sense of identity and community that the state, so far, has failed to replace. For example, in the later stages of the civil war in Sierra Leone, rural refugees encamped under the protection of United Nations peacekeeping forces were often unwilling to return to their home areas until their chiefs also returned. The refugees would point out that the state police and security forces served everybody, but chiefs were specifically responsible for, and beholden to, their particular communities. In many African countries, chiefs continue to serve their subjects as patrons, advisors and adjudicators of disputes regardless of whether or not their juridical authority continues to be harnessed to the formal court system or even authorized by the state. It is still common practice for African citizens to report offences to the police and judiciary merely as negotiating ploys in the informal process of dispute resolution. Community members who by-pass their chiefs in favour of the state police and judiciary may be seen as betrayers of the local moral order.

**5.** Several observers have detected a recent resurgence in the power, popularity and status of traditional authorities in Africa. With the exceptions of the Kamajors in Sierra Leone and the more ambiguous cases of secessionist Somaliland and Puntland, there are very few examples of resurgent indigenous structures in the context of failed or collapsed states. On the contrary, relatively strong states like South Africa and Uganda have so far provided the context for the furthest-reaching restorations of traditional authority. These developments have occurred in the wake of donor-driven political and economic restructuring programmes, and it has been suggested that the more disempowered African societies have become through the experience of economic restructuring and globalization, the more likely they have been to develop alternative modes of political identity, including traditional ones. From this perspective, the resurgence of tradition would be one facet of an ongoing exercise in the reconceptualization of the African state.

**6.** While globalization and economic disempowerment might help to explain the growing interest of elite Africans in chieftaincy and other aspects of traditional culture and identity, the African rural poor may have their own reasons for looking to traditional authorities as their primary

sources of justice and protection. Long experience of state corruption has left many rural Africans extremely distrustful of the modern political and bureaucratic classes. In this environment, chiefs and other customary authorities may emerge as a lesser evil, if not a good. Rural people look to chiefs to authorize and protect their customary rights (especially rights in land) because it is custom that also establishes the authority of chiefs. This equation - the authorization and protection of customary rights and properties by customary authorities - is extremely strong and durable. Chiefs continue to adjudicate over customary land rights throughout Africa despite the best efforts of some governments (most recently that of South Africa) to transfer that authority to the state or to elected local committees.

**7.** In spite of its relative cheapness, accessibility and moral attractiveness, customary justice in Africa always tends to benefit some sectors of society to the detriment of others. For example, African customary law tends to be strongly supportive of patriarchy, to the detriment of the rights and voices of women and young men. In particular, the payment of bride price, common throughout Africa, tends to foster an attitude among men that women are their personal property. For women, that attitude can mean that their scope for economic action, their mobility and their say in family matters are drastically impeded. Women's rights organisations, founded by academics and political activists in the wake of democratisation in many parts of Africa, are campaigning for change. Chiefs often vehemently oppose these campaigns, claiming that a collapse in traditional values would threaten the social order. Yet, it has long been observed that control over rights of sexual access to women is a source of conflict between African elders and male youths. It has even been suggested that this kind of generational conflict, exacerbated by a corrupt Local Court system, lies at the root of the recent civil war in Sierra Leone.

**8.** Recent donor-driven attempts to bridge the divide between customary and modern systems of justice in Africa continue to focus on bureaucratic capacity building: the enumeration and registration of citizens and their property rights (especially rights in land), expanded state policing orientated towards community needs, and training for magistrates and paralegals. A basic idea here is that better state bureaucracy will alleviate popular dependence on customary rights and upon chiefs as protectors and controllers of these rights. For example, the Ghana Land Administration Project seeks to harmonize customary and statutory land laws and develop a decentralized land administration system that aims to improve security of land tenure, simplify the process for accessing land, and foster prudent land management. The central endeavour here is to assist traditional authorities in maintaining systematic records of land transactions and devising formulae that ensure that poorer members of the community are not made landless when rural lands are converted into urban housing plots.

**9.** While initiatives like the Ghana Land Administration Project are promising, comprehensive institutional modernization of rights, justice and security in the African countryside is still a long way off. Traditional authority in Africa is a nexus of complex social forces that are both

'traditional' and 'modern'. The state judiciary is unlikely to gain headway against the increasingly informalized juridical authority of traditional authorities merely by obtaining better resources. Until the state police and judiciary manage to win the trust of the African populace, many are likely to stick with the devil they know. The potential here for intra-societal conflict is a serious concern.

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