



Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia

Background

The reconstruction of justice, both of its institutions, their functionality and of the population's trust in them, is a precondition for peace and sustainable development to take root after a conflict situation. Often, however, actors shy away from investing time and resources in this sector for a variety of reasons. It is a long and costly process, as it is likely to entail a complete change of governance culture, re-education of the personnel and improvements to existing infrastructure among other things. Building a new justice system more or less from nothing is an even more difficult and complex task, as the international community's experience in East Timor has shown. And, unfortunately, there are few convenient models available. Nevertheless, and precisely because of the complexity of the issue, justice sector reconstruction and an implantation of what we perceive as the rule of law should be undertaken in a consequent and locally appropriate manner as early as possible in the process.

Over the years, the international community has mainly been assisting in the reconstruction of justice by focusing its work on the formal structures, eg. court systems, police forces and penitentiaries, as well as legislative processes. This reflects our understanding of justice: formal, predictable, and equitable, with strict procedures and accountability at every level. Mostly, though, it does not reflect the prevailing conditions on the ground; the lack of resources, training, infrastructure, credibility and authority.

Against this background, the Centre for Humanitarian Dialogue (HD Centre) has studied the extent to which informal justice systems can play a role in post-conflict reconstruction of the rule of law, and the extent to which, and how, international donors can engage them. The case studies were chosen to cover a "pure" post-conflictual country, Burundi, as well as one which is also a failed state, Somalia. The reports on both case studies will be published by the Fletcher School at Tufts University, along with the reports on nine other case studies from a broad spectre of post-conflict situations.

This paper provides an overview of the central findings emerging from the two studies, *Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives* and *The Role of Informal Justice Systems in Reconstructing the Rule of Law in Post-Conflict Situations – The Case of Burundi*. On the basis of this overview, it also argues for why the international community should engage with the informal justice systems. Finally, and using recommendations contained in both reports, it points out certain specific fields in which this engagement might prove most useful.

Informal justice systems

Burundi and Somalia are two post-conflicts countries where the formal structures have either collapsed or are severely malfunctioning. In both countries, traditional justice systems were in use well before the colonial era and have survived until today. In Burundi, the *bashingantahe* system deals mainly with civil matters, whereas in Somalia, the *xeer* system is used to regulate inter-clan relationships. In both countries, these indigenous systems have come to complement or replace the formal system of justice in either certain specific areas of law, or completely. In Somalia, muslim *sharia* courts and, in certain cases, ad hoc civil society or private initiatives, plus warlord justice, have also taken the place of the formal system in areas where no centralised structures are in place. The informal mechanisms complement existing formal ones in areas where a modicum of state structures has re-emerged, such as Somaliland and Puntland.

The term “informal justice system” is contested in the sense that to some, it seems to implicitly accord a formal status to a mechanism that generally exists without official sanction. Different cultures also have a different understanding of what constitutes an “informal system”. Some, for example, consider the Ombudsman institution an informal mechanism, while elsewhere this is a highly institutionalised and certainly formal system of providing checks and balances. For the HD Centre’s projects, “informal justice system” was used to distinguish the systems based on customary or religious practices, as well as the parallel systems, from the formal state systems.

Any system based on tradition and religion without subsequent adjustment to legal requirements or “modern society” risks falling foul of international human rights standards. Indeed, when the *gacaca* courts in Rwanda were set up to deal with the remaining genocide cases, the international community was, as it should have been, concerned with transparency and due process. It seems now that these processes are being conducted reasonably well, even if some alleged perpetrators fear unfair treatment.¹ The situation obviously has to be monitored, but overall, it seems that the indigenous system has been successfully adapted to dealing with one of the serious obstacles to achieving healing in a post-conflict society.

¹ Some 2,000 Rwandans have fled across the border to Burundi for fear of unfair treatment in the *gacaca* courts. *Rwanda’s anger at Hutu ‘refugees’*, April 19, 2005; <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/4460741.stm>.

Different concept of justice: legitimacy through local use

External actors may feel that there are alien elements to these informal systems, especially in the way in which “justice” seems to be meted out². In many societies, there seems to be less focus on the formal process and on punishment than one would expect. Indeed, certain processes have as their objective cleansing and reconciliation. Hefty fines payable in livestock or other chattel are sometimes used to compensate even for killings. However, in Somalia, the objective of the traditional system is not to punish the perpetrator as much as it is to maintain the relationships between the clans.

In Burundi, the *bashingantahe* also aim to find an amicable solution to a dispute between parties. The formalised justice system is viewed as too focused on rendering a winner and a loser. This is perceived as conducive to injustice, rather than the opposite. In one example given, it is pointed out that if a land dispute were decided by a regular court, boundaries would be decided upon according to a strict interpretation of the law, but with little or no consideration given to other circumstances. Formal court decisions will also be immediately enforceable. The *bashingantahe*, on the other hand, might adjudicate on a more equitable basis, and also give a longer timeframe for implementation of their decision.

While the *bashingantahe*'s settling of land disputes might not serve as an example of fairness in a formal sense of the word, it illustrates how the local population perceive justice. If justice is not perceived as done through a sentence handed down in accordance with law, perhaps there is a case for accepting that the local perception of justice as equitable in more ways than just the strictly legal one. Justice is then done when everyone benefits. This argumentation also brings us to think about justice as acceptable to the local population. With increasing discussion about complementary efforts and local ownership of development efforts, should we not also take account of and accept what the local population wants? It would be logical to build on the local perception of justice, and thus on systems that are acceptable to the local population.

No justice vacuum

Interestingly, when we approach the subject of post-conflict reconstruction of justice, there seems to be a preconception that the conflict left a justice vacuum that now has to be filled. The Centre's research in Somalia especially demonstrates most pointedly that no such vacuum exists, even when the state structures have collapsed completely. People will always need ways of settling their disputes, and if there is no more formal way of doing so, they resort to other means. In Somalia, not only did the *xeer* system continue to exist up until and after the collapse, *sharia* courts as well as civil society initiatives and so-called warlord justice were also resorted to in this sense.

² In Uganda, for example, Lord's Resistance Army may be welcomed back into society through a cleansing ritual involving smearing your feet in raw egg and brushing against the branch of a *pobo* tree, after which they step over a pole. *Atrocity victims in Uganda choose to forgive*, New York Times, April 18, 2005.

The lack of a vacuum is also clear in Burundi. While this country did not suffer from state collapse, the formal justice system is malfunctioning to the extent that the informal system has become the *de facto* court of first instance for the vast majority of the population.³ The problems with the formal justice system are linked as much to structural and material problems as to the simple fact that the courts are mostly located in the cities, too far away for most ordinary Burundians to make use of them⁴. Equally, the lack of essentials such as petrol makes it difficult for magistrates to investigate any cases outside of the cities. Hence, only the existence of the informal system gives the majority of the population any access to justice at all.

Given this lack of justice vacuum, it seems clear that work undertaken with only the formal justice sector risks excluding mechanisms that are in common use and widely acceptable to the local population. In fact, the existence of functioning alternatives offers options for justice reconstruction in both Burundi and Somalia, and an opportunity to work with what is already present, rather than creating and promoting something from scratch. While the eventual objective might be to achieve one unified justice system, or potentially one with various complementary informal mechanisms, the harmonisation of the justice sector should not be the paramount or immediate goal. Making it immediate will most likely hamper the general effort of rebuilding a concept of rule of law, as it will work against bodies that the population perceives as legitimate.

Deriving from the historical role played by the informal institutions, there are several fields in which it would be useful to draw on their potential in the post-conflict setting. The *bashingantahe*, for example, are very well placed to deal with quarrels over land and boundaries, one of their traditional judicial domains. In a situation where land disputes have been at the heart of conflict since well before the last eruption of violence, and where 70 per cent of the cases submitted to the formal courts deal with land, it would seem obvious that measures whereby these disputes could be peacefully and permanently settled would be welcome. The land issue is important also in situations when a post-conflict society is faced with an influx of returning refugees. Where it will be necessary to resettle a large number of people, and potentially also to deal with property and restitution claims, there will be a role to play for any institution which deals with land.

In both Burundi and in Somalia, the traditional systems are also to a large degree associated with reconciliation and social harmony. Their healing potential in post-conflict settings should therefore not be dismissed. They could be engaged in the context of truth and reconciliation mechanisms, be it as members of any institutionalised bodies or simply as instigators of a social dialogue.

As discussed above, the Centre's research has shown that the informal systems in Burundi and Somalia have several things in common. The *bashingantahe* in Burundi and

³ There are estimates claiming that up to 80% of Burundians take their cases to the *bashingantahe* institution as a first or sometimes only instance.

⁴ In certain cases, some local NGO's (refer by name) in Burundi provide shuttle services for witnesses to be able to attend regular trials.

xeer in Somalia precede both the colonial era and the respective more recent conflicts, and are still widely used. In Somalia, we have also seen an emergence of ad hoc mechanisms, and a resort to *sharia* courts which is linked to the collapse of state structures and diverges from the traditional role of *sharia* in the local justice system⁵. When engaging in both these countries, these local informal justice systems cannot simply be disregarded. They exist, they are used and they are, for the most part, acceptable to the local population. Whether they are used because no other mechanism exists, or because they are a true reflection of acceptance from the population is not relevant as long as there is no alternative.

Informal systems are no panacea

It is clear that none of the mechanisms discussed correspond to what would constitute a justice system which meets international standards to the full. There are very rarely written records of the *bashingantahe* processes, and the fairness of the proceedings must by necessity be assumed to be down to the person or persons conducting them. Reports of corruption in this system that traditionally was free of charge are plentiful, as indeed they are with regard to the *xeer* elders. There is collective rather than individual responsibility for paying fines imposed following the *xeer* process. Women are not invested *bashingantahe* in their own right. They are not on par with men in the *sharia* courts. In Burundi, the traditional mechanism was until very recently not used by or applicable to the minority Twa tribe, who were also in other aspects largely marginalised in society. Minorities are also discriminated against in the application of *xeer* as a result of this process reflecting the power relations between clans and therefore not giving equal opportunity to everyone.

The traditional justice mechanisms in both Somalia and Burundi are also badly equipped to deal with modern and urban problems. In both countries, the elders or wise men used to render justice in small surroundings, where they would know the parties and the circumstances of the case. In cities, it will be impossible to know all the activities a party is undertaking. In the specific context of Somali cities, the defining lines between clans become blurred, and so *xeer* cannot cope. In addition, modern economies bring new challenges, like the recognition of private property or developing standards for commercial activities.

In addition, the traditional mechanisms in both countries seem to suffer a lack of authority, most notably in urban surroundings. While rural populations, who are the majority in both Somalia and Burundi, may not have any alternative but the traditional justice mechanisms, this is no longer true in the cities. There is access to a formal court system, and also to new influences and ideas. Higher levels of education are certainly a factor. So, too, is a general shift in the traditional way of life, where old practises fall into disuse and the role of the traditional adjudicators is no longer relevant in its old form. It is especially the younger members of society who are likely to be unwilling to resort to the

⁵ *Sharia* has been a traditional feature of Somali society, and was incorporated into the Somali state until the collapse of the Siad Barre government. In practice, however, it was always used at the level of courts of first instance and applied only in common civil cases.

traditional mechanism, or who choose to disregard it. Returning expatriates or refugees are also less likely to resubmit to the authority of their clan elders.

There are traditional requirements for the elevation of both *xeer* elders and the *bashingantahe* to that status. For the *bashingantahe*, these requirements include experience, wisdom and a sense of justice and equality, but no elements of formal qualifications or familiarity with existing legislation. The same lack of emphasis on formal qualities is present with regard to the Somali clan elders. Many *bashingantahe* are reportedly also illiterate, which accounts for the lack of written records of proceedings. There is an expectation that decisions will be made according to customary law, and that the individuals will be familiar with it.

Most *sharia* judges in Somalia were educated through informal religious studies in the country itself, and make decisions according to their understanding of the Koran, often also influenced by *xeer*. However, most *sharia* courts do not enjoy the support of religious leaders who think of the judges as uneducated and often illiterate. University graduates with strong backgrounds in pure *sharia* are also unlikely to find work in the *sharia* courts. This paradox is explained partly by a fear of competition, but also by the intricacies of clan relations and religious interests. It does, however, show that there is a possibility for change if all the elements can be brought in to play.

The lack of education is by no means limited to the informal structures in these two countries. Formal magistrates in Burundi are also accused of lacking in education, especially at the lower levels. For the population in general, this means that neither system is working as it should, but some aspects might work as well as can be expected. That is a condition in which it is hard to see any development of a functioning justice system, be it formal or otherwise.

The questions of authority and urban contexts raised above will also give rise to the more general reflection on the fact that a system will only be as good as the people working in and with it. With or without regards to international standards, those seeking justice should have a right to expect to be judged or have their cases heard by competent adjudicators in whom they and their peers can have confidence. The education levels of adjudicators and the quality of legal education in general can therefore be of as much concern as any other aspect of justice reconstruction.

To cap it all, there will generally not be any enforcement mechanism for decisions reached by the informal mechanisms. Enforcement will mostly be achieved through social control, or possibly through the knowledge that not complying will mean that no relief will be forthcoming from the same body in case of later need. However, relying on social control might also leave the victim in a difficult position with regard to a socially stronger perpetrator.

Should we support informal systems, and how?

Several factors, such as respect for and acceptance of local culture, could be invoked to support the locally rooted informal judicial systems. Our research has also shown that the informal justice mechanisms in Burundi and Somalia do not exist in competition with the formal structure. They are complementary in the sense that they cover the gaps left by it. They may overlap with the formal system in some cases. For the most part, though, they provide a modicum of justice and security to the population in areas where the formal system cannot. Furthermore, when other sectors are prioritised, and any given activity will only be allocated a small amount of resources, it would seem a waste not to take advantage of existing local structures. The fact that these may not correspond to our concept of justice, or fully comply with international standards, is in reality only another reason why we should engage them. If we are seeking to guarantee a quality of justice rather than just recreating a formal structure, work with the informal structures becomes an imperative.

On the basic level, authority and credibility are vital for any justice system. In peaceful societies, it could be argued that the resort to informal systems is an expression of the lack of trust in formal structures. Taken to the extreme, this lack of trust might even be a reason for the formal structures to collapse or for the society to slide into conflict. When we talk about reconstructing the rule of law in post-conflict settings, we therefore also envisage reconstructing the people's trust in the institutions involved in providing justice services – be they formal or informal.

Both reports provide certain basic recommendations for action. Whereas the Somalia report voices this in terms of a six-point package, the Burundi one makes several recommendations and targets three priority actions at various actors, national and international alike. Certain themes are contained in both sets of recommendations: the need for any action to be comprehensive, or at least complementary to other activities; the need to sustain assistance efforts; and to implement them on the scale that is needed.

The following summarises the recommendations particularly targeting international donors:

Somalia

1. Ground assistance in a broad-based dialogue to reach consensus between Somali political leaders and the Somali public on the need for harmonisation of Somalia's formal and informal legal codes, in accord with basic international human rights standards, and support to the drafting of new legislation.
2. Once consensus has been reached, support for the structural reform of Somalia's justice system in accord with the harmonised legal code will be needed.
3. Build the capacity of Somalia's judicial system with training and equipment (incl. judicial institutions, legal professionals, legal education institutions).

4. Empower the Somali public legally through ia. legal clinics, legal aid, translation and dissemination of laws and judicial procedures, and coordination with community-based justice initiatives.
5. Promote the establishment of a stable political environment for justice through a plan of action to address priority transitional justice issues.
6. Devote further efforts to mobilise prerequisite political and financial support for these efforts.

The package approach is underlined by the fact that assistance efforts currently may address any of the above points, but not with a single group of Somalis or in a single location. Large-scale implementation is also needed for any project to have meaningful impact. The report also notes the lack of political engagement by the international community to support development efforts in the justice sector, which in turn makes justice sector reform difficult to achieve.

Burundi (informal sector only, selected recommendations)

1. Provide training for the *bashingantahe* on positive law and its application, and literacy training where needed.
2. Promote collaboration opportunities between the administration, the judges and the *bashingantahe* through seminars on their legal powers and the modern laws.
3. Set up a framework for permanent dialogue between the magistrates, the *bashingantahe* and the administration so that each might be aware of its own role.
4. Train the *bashingantahe* along with the magistrates on questions relating to their field of competence.
5. Ensure that there is a good identification of the support to other informal justice mechanisms to ensure better synergy with the *bashingantahe*.
6. Support the *bashingantahe*'s efforts to seek economic self-reliance.
7. Provide intensive training to the *bashingantahe*, paralegals, local authorities and the population on the Land Code.
8. Sensitise the *bashingantahe* to the rights of women.

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November 2005