INTERNATIONAL ACTORS
AND TRADITIONAL JUSTICE
IN SUB-SAHARAN AFRICA

Policies and Interventions in Transitional Justice and Justice Sector Aid

Edited by
Eva Brems
Giselle Corradi
Martien Schotsmans

Intersentia
Cambridge – Antwerp – Portland
PREFACE

This book originates in a research project conducted by the Human Rights Centre of Ghent University (UG) in partnership with the University of Cape Town (UCT). The project ‘Addressing Traditional Law in Post-Conflict Judicial and Legal Development Aid in Sub-Sahara Africa’ (AFTRALAW) was funded by the Belgian Science Policy Office (BELSPO) from April 2008 to March 2011, and was carried out under the supervision of Professor Eva Brems (UG) and Professors Thomas Bennett and Christina Murray (UCT), with Martien Schotsmans as a researcher for the component on transitional justice (UG) and Giselle Corradi (UG) and Lia Nijzink (UCT) as researchers for the component on justice sector aid. An initial version of the results of this three-year policy-supportive research was published in Dutch in Bennett, Brems, Corradi, Nijzink and Schotsmans’ Internationale Actoren en Traditioneel Recht in Sub-Sahara Afrika: Beleid en Interventies op het Vlak van Transitional Justice en Ontwikkelingshulp aan de Justitiesector (Academia Press).
ACKNOWLEDGEMENTS

The editors of this book wish to thank the Belgian Science Policy Office for funding the AFTRALAW research project (Addressing Traditional Law in Legal and Judicial Development Aid in Sub-Saharan Africa) that gave rise to this book, and in particular Mrs Margarida Freire and her predecessor, Mrs Zakia Khattabi, for their enthusiasm and support throughout the course of the research. We are also grateful to the scientific committee that followed up the project from beginning to end for providing their input and advice: Mrs Lara Deramaix, Prof. Marie-Claire Foblets, Mr Renaud Galand, Prof. Em. Luc Huyse, Mr Robert Olbrechts, Prof. Barbara Oomen, Mr Dick Oosting, Prof. Stephan Parmentier, Prof. Filip Reyntjens, Dr Heidy Rombouts, Dr Stef Vandeginste, Mr Marc Van Wymeersch and Mr Pierre Vincke. We are also much indebted to Dr Marleen Renders who played a key role in the design of the AFTRALAW project and the acquisition of the funding that made the research possible, as well as to our South African partners, Prof. Tom Bennett, Prof. Christina Murray and Mrs Lia Nijzink from the University of Cape Town with whom we collaborated in the course of the research. Our thanks are also due to all the interviewees who dedicated their time and shared their views with us during the fieldwork. A word of thanks also goes out to the keynote speakers and participants in the focus group discussions held during the ‘Traditional Justice and the Role of External Actors in Africa’ international forum organised in Cape Town from 23 to 25 March 2010: Mrs Jane Frances Adongo, Prof. Joe Alie, Mr Littleton Braima, Mr Abdul Carimo, Mr Jacob Chibwe, Mr Peter Chinoko, Prof. Danwood Chirwa, Dr Aninka Claassens, Mrs Olayinka Creighton-Randall, Mr Custodio Dumas, Mrs Charlotte Duncan, Mr Gratien Dusingizimana, Mr Christian Eldon, Mr Anastase Gakire, Prof. Chuma Himonga, Mrs Urusaro Alice Karekezi, Mr Fergus Kerrigan, Mr Daniel Komakech, Mr Sheku A. Koroma, Mr Kenan Manda, Mr Greg Moran, Dr Sindiso Msisi, Mr Daniel Muwolobi, Mr Freddy Mutanguha, Mrs Annette Nhekairo, Mrs Frieda Nicolai, Mr Lino Owor Ogara, Mr Kenneth Akena Oketta, Mr Robert Olbrechts, Mr Benedict Sannoh, Mr Monfred Sesay, Ms Emily Sikazwe, Mrs Yasmin Sooka, Mrs Katja Taela, Mr Hugo Van der Merwe and Mr Charles Villa-Vicencio, as well as the keynote speakers and panel participants of the ‘International Actors and Traditional Justice in Sub-Sahara Africa: Policies and Practices in Justice Sector Aid and Transitional Justice’ international seminar held in Brussels on 14 February 2011: Dr Phil Clark, Dr Tanja Chopra, Mrs Jacky Devis, Mr Mark Freeman, Prof. Anne Griffiths, Mr Fergus Kerrigan, Mrs Kersty McCourt, Mr Robert Olbrechts, Mr Mark Salter, Mr Albrecht Stockmayer and
Acknowledgements

Dr Stef Vandeginste. Finally, we wish to thank Ms Martine Dewulf for her administrative support in the course of the project and her assistance with setting up the bibliography for this book.
CONTENTS

Preface ........................................................................... v
Acknowledgements ..................................................... vii
List of Abbreviations ................................................ xvi

PART I. GENERAL INTRODUCTION

Chapter 1. International Actors and Traditional Justice in Africa
   Giselle Corradi and Martien Schotsmans ......................... 3
1. Introduction .......................................................... 3
2. Methodological Choices ........................................... 8
3. Structure of the Book ............................................. 10
   Bibliography ....................................................... 11

PART II. INTERNATIONAL ACTORS AND TRADITIONAL JUSTICE
   IN TRANSITIONAL JUSTICE

Chapter 2. The Role of Tradition in Transitional Justice
   Martien Schotsmans .................................................. 19
1. Aim and Scope of the Research ................................. 19
2. Methodology ....................................................... 20
3. Conceptual Framework ........................................... 22
   3.1. Transitional Justice ........................................ 22
   3.2. Traditional and Tradition-Based Mechanisms in Transitional
        Justice .......................................................... 24
   3.3. Traditional Values .......................................... 26
   Bibliography ....................................................... 28
Chapter 3. The Policy of International Actors on Traditional Justice in Transitional Justice
Martien Schotsmans .................................................. 31

1. The Context of Policy Development ................................ 31
   1.1. Globalisation in International Criminal Law, Peacebuilding and Human Rights ......................... 31
   1.2. Localisation in Transitional Justice .............................. 33
   1.3. Local Ownership and Harmonisation in Development Cooperation .................................................. 33
2. Policies regarding Traditional Mechanisms in Transitional Justice .... 35
   2.1. Policies regarding Transitional Justice .......................... 35
   2.2. Policies regarding Traditional Mechanisms ..................... 37
3. Conclusion ........................................................ 39
Bibliography ............................................................ 40

Chapter 4. Non-Official Use of Tradition: A Case Study on Sierra Leone
Martien Schotsmans .................................................. 43

1. Background to the Conflict ......................................... 43
2. The Role of Tradition in Society ..................................... 44
3. Transitional Justice Landscape ...................................... 45
4. The Role of Tradition in Transitional Justice ....................... 46
5. Policies and Interventions of International Actors .................... 51
Bibliography ............................................................ 53

Chapter 5. Official Hybridisation of Tradition: A Case Study on Rwanda
Martien Schotsmans .................................................. 55

1. Background to the Conflict ......................................... 55
2. The Role of Tradition in Society ..................................... 56
3. Transitional Justice Landscape ...................................... 56
4. The Role of Tradition in Transitional Justice ....................... 57
   4.1. Gacaca Courts (Inkiko Gacaca) .................................. 58
   4.2. NURC: Traditional Values of Unity and Reconciliation ........ 61
5. Policies and Interventions of International Actors .................... 63
Bibliography ............................................................ 67
## Contents

### Chapter 6. Official Complementarity: A Case Study on Northern Uganda

Martien Schotsmans .............................................. 71

1. Background to the Conflict ......................................... 71
2. The Role of Tradition in Society ..................................... 72
3. Transitional Justice Landscape ...................................... 73
4. The Role of Tradition in Transitional Justice .................... 74
5. Policies and Interventions of International Actors ............ 77

Bibliography ............................................................ 82

### Chapter 7. Tradition in Transitional Justice: Between Localisation and Globalisation

Martien Schotsmans .............................................. 85

1. Introduction ....................................................... 85
2. Local Ownership ................................................... 85
   2.1. State Ownership .............................................. 86
   2.2. National Ownership ........................................... 88
3. Fragmented Approach to Tradition .................................. 91
4. Hybridisation ...................................................... 94

Bibliography ............................................................ 99

### PART III. INTERNATIONAL ACTORS AND TRADITIONAL JUSTICE IN JUSTICE SECTOR AID

### Chapter 8. At the Crossroads of Theory and Practice

Giselle Corradi................................................... 103

1. Introduction ...................................................... 103
2. Conceptual Framework ............................................ 106
3. Situating the Study within Broader Debates ......................... 107
4. Multi-Sited Qualitative Research Methods .......................... 112
5. Structure of Part III ............................................... 114

Bibliography ........................................................... 115
# Contents

## Chapter 9. Justice Sector Aid in Legally Plural Africa

Giselle Corradi ................................................... 121

1. Introduction ...................................................... 121
2. The Plural Justice Landscapes of Sub-Saharan Africa ................. 121
   2.1. Legal Pluralism in Historical Perspective ...................... 121
   2.2. Local Normative Orders and Dispute Processing Forums ...... 125
   2.3. Local Legal Orders and Human Rights ........................ 128
3. Justice Sector and Human Rights Aid in Sub-Saharan Africa: The Emergent Engagement with Local Legal Orders ................. 134
4. Conclusion ....................................................... 137
Bibliography ........................................................... 138

## Chapter 10. Linking Socio-Legal Theory and Justice Sector Aid

Giselle Corradi ................................................... 143

1. Introduction ...................................................... 143
2. Legal Pluralism and Justice Sector Aid ................................ 143
   2.1. Looking Beyond State Justice ..................................... 144
   2.2. Considering How Legal Orders Intersect Each Other ......... 145
   2.3. Assessing the Legal Nature of Normative Orders and the Distinctiveness of State Law ............................................. 147
   2.4. Understanding Legal Orders as Resources ..................... 148
   2.5. How ‘the Legal’ is Defined ..................................... 149
3. Advancing Human Rights Cross-Contextually .......................... 150
   3.1. Reconceptualising Human Rights’ Universality ............... 151
   3.2. Reconceptualising Culture and Customs ....................... 152
   3.3. Understanding and Supporting Local Dynamics of Change ... 154
4. Conclusion ....................................................... 157
Bibliography ........................................................... 158

## Chapter 11. Traditional Law through a State Lens: A Case Study on Malawi

Lia Nijzink ....................................................... 163

1. Introduction ...................................................... 163
2. Historical Background ............................................. 163
3. The Justice Landscape ............................................. 165
4. The Institutional Framework for Legal Pluralism .................... 165
5. The Human Rights Landscape ..................................... 167
6. International Actors and Local Legal Orders ........................ 167
7. Conclusion ....................................................... 170
Bibliography ........................................................... 172
Chapter 12. Polycentric Legal Landscapes: A Case Study on Mozambique
Giselle Corradi ................................................... 173

1. Introduction ...................................................... 173
2. Colonial and Post-Colonial Background of Legal Pluralism ...... 173
3. The Justice Landscape ............................................. 176
4. The Institutional Framework for Legal Pluralism .................. 178
5. The Human Rights Landscape ...................................... 180
6. International Actors and Local Legal Orders .................... 182
7. Conclusion ....................................................... 185
Bibliography ........................................................... 187

Chapter 13. Beyond Dichotomies: A Case Study on Sierra Leone
Giselle Corradi ................................................... 189

1. Introduction ...................................................... 189
2. Colonial and Post-Colonial Background of Legal Pluralism ...... 189
3. The Justice Landscape and Institutional Framework for Legal Pluralism ............................................. 190
4. The Human Rights Landscape ...................................... 193
5. International Actors and Local Legal Orders .................... 194
6. Conclusion ....................................................... 200
Bibliography ........................................................... 201

Chapter 14. Traditional Law through a State Lens: A Case Study on Zambia
Lia Nijzink ....................................................... 205

1. Introduction ...................................................... 205
2. Historical Background ............................................. 205
3. The Justice Landscape ............................................. 207
4. The Institutional Framework for Legal Pluralism and Proposed Reforms ............................................. 207
5. The Human Rights Landscape ...................................... 208
6. International Actors and Local Legal Orders .................... 209
7. Conclusion ....................................................... 212
Bibliography ........................................................... 213
# Contents

## Chapter 15. From Addressing Local Legal Orders to Embracing Legal Pluralism
Giselle Corradi and Lia Nijzink ................................... 215

1. **Introduction** ...................................................... 215
2. **The Context of Interventions** .................................... 215
3. **Trends in the Type of Interventions Supported** .............. 217
   3.1. **Law Reform** ............................................. 217
   3.2. **Institutional Support and Reform** ........................ 217
   3.3. **Strengthening the Capacity of Justice Providers** ......... 218
   3.4. **Empowering Justice Seekers** ............................. 219
4. **Analysing and Improving Strategies** ............................ 219
   4.1. **Addressing the Actors 'at the Tip of the Iceberg’** ....... 219
   4.2. **Human Rights within Different Modes of Dispute Processing** .... 220
   4.3. **Minimal Engagement with Local Knowledge** .............. 221
   4.4. **Approaching Human Rights in a Critical Way** ........... 222
   4.5. **Embracing a Legally Plural Perspective** .................. 222
5. **The Way Forward** .............................................. 222

**Bibliography** ................................................................ 225

## PART IV. GENERAL CONCLUSION

## Chapter 16. Embracing Legal Pluralism: General Conclusion
Giselle Corradi, Lia Nijzink and Martien Schotsmans ............. 229

1. **Introduction** ...................................................... 229
2. **Policies in the Field of Traditional Justice** ............... 230
3. **Trends in Interventions Addressing Traditional Justice** .... 231
4. **Strategies regarding the Tension between Traditional Justice and Human Rights** ................................. 232
5. **Recommendations** ............................................... 232
   5.1. **Recommendations regarding Transitional Justice** ........ 233
       5.1.1. **Refine the Concept of Local Ownership** ........... 233
       5.1.2. **Understand Transitional Justice Holistically** ... 234
       5.1.3. **Support Transitional Justice as a Hybridisation Process** ............................ 235
   5.2. **Recommendations regarding Justice Sector Aid** ......... 236
       5.2.1. **Adopt a Dynamic Perspective on Local Legal Orders and Human Rights** .................. 236
       5.2.2. **Adopt a Legally Plural Perspective** ............... 236
       5.2.3. **Adopt a Power-Informed Perspective** ............. 237

**Bibliography** ................................................................ 237
LIST OF ABBREVIATIONS

ASF  Avocats Sans Frontières
BTC  Belgische Technische Coöperatie
CDDH  Centre Danois des Droits de l’Homme
CFJJ  Centro de Formação Jurídica e Judiciaria
DANIDA  Danish International Development Agency
DFID  Department for International Development
DPKO  Department for Peace Keeping Operations
EU  European Union
FAO  Food and Agriculture Organization
GTZ  Gesellschaft für Technische Zusammenarbeit
ICC  International Criminal Court
ICTJ  International Center for Transitional Justice
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for the former Yugoslavia
INGO  international non-governmental organisation
IRCSL  Inter-Religious Council of Sierra Leone
NGO  non-governmental organisation
OECD  Organisation for Economic Cooperation and Development
OECD-DAC  Organisation for Economic Cooperation and Development – Development Assistance Committee
PRI  Penal Reform International
RCN Justice & Démocratie  Réseau des Citoyens – Citizens’ Network for Justice & Democracy
RPF  Rwandan Patriotic Front
SCSL  Special Court for Sierra Leone
TRC  truth and reconciliation commission
UNDP  United Nations Development Programme
UNICEF  United Nations Children’s Fund
UNIFEM  United Nations Development Fund for Women
UNOHCHR  United Nations Office of the High Commissioner for Human Rights
USAID  United States Agency for International Development
UN  United Nations
WLSA  Women and Law in Southern Africa