

4 Restorative approaches to criminal justice in Africa

The case of Uganda

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ABSTRACT

Restorative justice in African states has gained a significant profile through transitional justice process, but remains very much at the fringes of mainstream practice in criminal justice systems. This article reviews the challenges faced by criminal justice systems in the contemporary African state and the promise of restorative justice from both theory and practice, using Uganda as an example. It is proposed that restorative justice as a concept and restorative customary practices specifically have the potential to address the issues facing justice systems in Africa today. In particular, a state such as Uganda can seek to legitimise restorative approaches through centralised legislation, but allow such practice to be interpreted in a way relevant to custom by the grassroots community courts that exist at the base of the formal legal system.

INTRODUCTION

Restorative justice has been posited as the solution to many of the problems faced by contemporary criminal justice. However, despite referencing indigenous

systems of law, including those of Africa, as a source for modern conceptions of restorative justice, both the theory and the practice of restorative justice have been developed largely in Europe and North America.

The challenges faced by the Ugandan justice system mirror many of those in other African states, where the retributive colonial systems inherited at independence are increasingly in crisis. Here an effort is made to consider how restorative approaches can contribute to addressing the challenges to criminal justice in Africa, taking Uganda as an example. Traditional justice mechanisms are increasingly considered to have a role in addressing issues arising from conflict in the north of Uganda, and a commitment has been made by the government of Uganda to include largely restorative traditional mechanisms in processes to deal with offences committed during the conflict (Annexure to the Agreement on Accountability and Reconciliation 2007).

Here, the status of the Ugandan criminal justice system is reviewed, including the challenges it faces, and the efforts that have been made to introduce restorative approaches. The future of restorative process in Uganda is then discussed, on the basis of an integration of traditional justice mechanisms into the criminal justice system, and of an extension of the 'top-down' restorative approaches that have been developed in recent years.

THE UGANDAN CRIMINAL JUSTICE SYSTEM

The Uganda state has the characteristics of many of the commonwealth nations of sub-Saharan Africa. It is multi-ethnic, containing four principal ethnic groups, divided into smaller groups, and speaking around 40 languages. The nation is 85 per cent Christian, with a significant Muslim minority. Its borders were defined in the colonial era with little respect for demographics. While the nation gained independence from Britain in 1962, Uganda retains the imprint of its colonial past, not least in its criminal justice system. Since independence, Uganda has seen six military coups, but never a peaceful change of government. Following the military victory of Yoweri Museveni's National Resistance Movement (NRM) over the regime of Milton Obote in 1986, Uganda has experienced a degree of stability and sustained economic development. The two-decade-long ethnically based insurgency of the Lord's Resistance Army (LRA) has continued to blight the north of the country, displacing a majority of the population of the region and killing thousands of civilians (Lomo & Hovil 2004).

At independence, Uganda continued to follow English common law as the basis of its legal system, re-enacting colonial provisions, with the only change being that the sovereignty of the Uganda parliament supplanted that of the British monarch (Nsereko 1996). The Judicature Act of 1996 replaced this as the source of law, with applicable law including statutory and case law, common law, doctrines of equity and customary law. Although the constitution of Uganda has been violated many times since independence, it remains the supreme law of the country. The constitution of 1995 (Uganda's third since independence) remains an important source of criminal law and vital to the concept of the rule of law. The Ugandan justice system retains an almost entirely retributive philosophy, consistent with its roots in English law.

The institutionalisation of customary law dates back to colonial times, when the British acknowledged the authority of 'native courts' to try indigenous Ugandans for non-capital offences (Hone 1939). The colonial authorities attempted to codify tribal courts, recognising the authority of local leaders in the territories considered theirs. In the instance of those ethnic groups perceived to have more developed judicial systems, namely the kingdoms of Buganda, Toro, Ankole and later Bunyoro (known as 'treaty areas'), this acknowledged a hierarchy of authority of chiefs, including the right of appeal from one court to a higher one, with the ultimate possibility of appeal to the ruler himself. For more serious cases, appeals could be made to the colonial high court, and death sentences could not be passed without reference to a British commissioner. In non-treaty areas British native courts supervised the indigenous native courts. The amount of independence that each court possessed depended on the colonial perception of the development of each system. Maximum punishments were set and appeals permitted to the colonial authorities as a way of acknowledging the lesser development of these judicial systems and indeed of these ethnic groups in colonial eyes. Colonial reports indicate that 'a number of chiefs and elders whose authority is supported by us hold courts of various grades' (Morris 1967:166). These were in practice courts of village elders and clan heads, with a rarely used appeal system to a hierarchy of sub-chiefs, chiefs and groups of chiefs. The recognition of such courts was based upon the colonial understanding of the strength of the authority of traditional leaders, and where this authority was perceived as absent, no effort was made to bring customary practice under colonial administration.

Generally, the native courts had jurisdiction over only one ethnic group, and law was thus tribal in nature for all natives. This system ignored the plurality of

customary African approaches, silencing age groups, clans, women's groups and religious groups, in deference to a single authority of tribal chiefs recognised as 'genuine' custom (Mamdani 2001) in which executive, legislative, judicial and administrative power was vested. The colonial regime constructed indigenous communities as self-regulating and not in need of the intervention of the colonial administration, which in turn reduced the potential load on the colonial justice system. The native courts permitted the colonial administration to judicially empower indigenous clients and created a two-tier, racially segregated system. For non-indigenous populations, British and otherwise, British-derived law in a national judicial system was applied. A Ugandan professor of law has made the point:

The common law legal system is an alien introduction into Uganda; alien in both substance and procedure. It was superimposed on the various legal, semi-legal and non-legal systems that ordered the various societies and resolved issues before colonization. From the very start it was attempted to run a dual system of native courts and regular courts; and administer a sanitised colonially customised customary law and English law. This in effect resulted in administering law that was alien to the people (Juuko 2004).

Although the dual structure has since been integrated into a single system exercising both criminal and civil jurisdiction, customary law continues to be part of the formal Ugandan legal system, through the local council courts. The Judicature Act limits customary law, in language almost identical to that of the colonial penal code: customary law cannot be enforced if it is repugnant to natural justice, equity or good conscience or if it is incompatible with the written law.² The judiciary consists of a hierarchy of courts: the supreme court, the court of appeal, and the high court, which hears all capital cases.³ Below these are magistrates' courts, which handle the bulk of civil and criminal cases, and the local council courts that deal with minor civil matters and by-laws.

With the exception of murder, crime rates in Uganda are low,⁴ but the criminal justice system nevertheless faces enormous challenges. Access to justice from a financial, physical and technical viewpoint is poor. In rural areas, police posts and higher courts are often far from many of the population, and in the conflict-affected north the situation is extreme. Nationally, over 10 per cent of

the population claim to have no access to a justice or law and order institution (JLOS 2007). The financial cost of accessing the institutions of justice can be expensive: in addition to the cost of travelling to courts, it is often necessary to make payments for administrative procedures that should be free. Language remains a barrier, since English is the language of the justice system, and is spoken well by only a minority of Ugandans. In addition to imposing a huge translation burden on all procedures, there is a suggestion that in some cases the judiciary themselves do not have sufficient proficiency in English to work effectively (Juuko 2004). While the number of high court circuits has recently been increased, there remain areas where there is no resident judge, resulting in infrequent sessions. There is one lawyer for every 12 000 people, and 88 per cent of lawyers are in Kampala, the capital, in exactly the reverse proportion to the distribution of the population in rural/urban terms (Juuko 2004). Staff and resourcing in the justice system are inadequate at every level, reducing the capacity of the system to operate. The net result of this is a backlog in cases that continues to increase: at the end of 2004, elimination of this backlog for criminal cases in the high court was not expected for 50 years (Ogoola 2006).

When sentencing does occur, the options have traditionally included only fines, imprisonment or the death penalty. Since endemic poverty reduces the capacity of most to pay fines, imprisonment is the most common sentence. Since a *de facto* moratorium on the death penalty (the last executions occurred in 1999) the number of prisoners on death row has continued to grow.⁵ The sclerosis in the justice system leads to chronic problems for the prison service, notably concerning prisoners held on remand. Despite constitutional requirements to commit suspects within 60 days for petty offences and within 180 for capital offences, up to 32 per cent of offenders stay uncommitted beyond these limits (JLOS 2007). Additionally, there are reports that persons held on remand – who constitute a majority of the prison population – can wait in jail without trial for up to nine years (Juuko 2004), owing to the inefficiency of the courts. This has an impact on overcrowding and conditions: data from 1999 suggested that the nation's prisons held more than three times their nominal capacity (Bukurura 2003), while a more recent estimate is a factor of two (Penal Reform International 2008).

Although the judicial system remains largely independent, and retains the respect of the public and of those who have passed through it (JLOS 2007), it is teetering on the verge of collapse.

RESTORATIVE JUSTICE

Restorative justice is a concept that attempts to reshape the way in which crime is seen and, as a result, the way in which justice is done. In most criminal justice systems crime is seen as an offence against the state that is punished by the state, with victims playing little role, if any, in the process. A restorative paradigm puts the victim at the centre of any process, rather than as witness or spectator, as in a purely punitive approach: restorative justice is often presented as an alternative to retributive justice. Restorative justice sees wrongdoing in terms of harms to relationships, and aims to restore relationships (in the broadest sense of restoring equality) between people and communities: doing justice means healing and putting right wrongs (Zehr 1997):

Restorative justice views crime primarily as harm to relationships and to the parties involved in them (including individuals, groups and communities). This differs from the understanding at the root of contemporary criminal justice systems, which view crime as a violation or breach of the law... No longer is the state viewed as the principal party harmed by crime. Restorative justice views the primary harm as experienced by the victim and one that extends through the web of relationships to include the victim's immediate community of support, the wrongdoer and her community of support, and the wider community. (Llewellyn 2006:93)

The most obvious relationship damaged by an offence is that between victim and offender, but a restorative justice process aims to restore all relationships damaged by wrongdoing. As such, restorative processes emphasise the role of communities, both as victims of crime and in the response to crime. Restorative justice seeks to involve communities by holding offenders directly accountable to communities that have been victimised and by promoting an emphasis on offenders accepting responsibility (Johnstone 2004). This understanding creates an immediate connection between what restorative justice aims to do and the commonly understood meaning of reconciliation. Such an approach to wrongdoing has a long history in the customary practice of many societies, not least in Africa (for example Nyamu-Msembi 2003; Oke Elechi, 2006; Honeyman et al 2004).

In practice, a contemporary restorative approach is likely to include 'apologies, restitution and acknowledgements of harm and injury, as well as ... other efforts

to provide healing and reintegration of offenders into their communities, with or without additional punishment' (Menkel-Meadow 2007:10.2) Experimentation with restorative justice began in North America in the 1970s, and a substantial body of both theory and practice of such approaches to criminal justice now exists (eg McCold 2006). Applying a strict definition would include as restorative only those processes where victims and offenders meet face to face and themselves determine the outcome of the process ('primary' restorative processes). Many other processes, including community service sanctions and community justice processes, contain restorative elements, however, and will be considered here.

So-called primary restorative processes are of three types:

- *Mediation*: Initially a dialogue between victim and offender, mediated by a neutral third party, mediation practice has evolved to include mediation by community members concerning offences committed within the community. Victim offender mediation (VOM) aims to create a dialogue driven process with restitution and reconciliation as the principal aim.
- *Restorative circles*: Restorative circles can be traced directly to indigenous concepts of dealing with wrongdoing, involving an engagement between victim and offender in the presence of respected community leaders. 'Sentencing circles' can use this principle in conjunction with the criminal justice system to use traditional process to reach an outcome acceptable to the community.
- *Restorative conferencing*: Conferencing approaches evolved in juvenile justice, and aim to involve all direct stakeholders in how best to repair the harm of crime. Typically, for juvenile offenders, this will include family members. 'Community conferencing' extends this concept to any community, and has been used in schools, workplaces and other communities.

While most work on restorative justice has been done in Europe and North America, traditional practice has contributed. The concept of restorative circles has been developed in indigenous American communities in the US, notably the Navajo (Dickson-Gilmore 1992; La Prairie 1995; La Prairie & Diamond 1992), and conferencing was pioneered in aboriginal Australian communities (Moore & McDonald 1995).

In Africa, restorative process gained the highest profile through the work of the South African Truth and Reconciliation Commission (TRC), which sought 'transitional justice' following the end of apartheid. The TRC explicitly adopted

a restorative approach, claiming to provide ‘another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation’ (Tutu 2000). The TRC used explicitly Christian language of forgiveness and reconciliation, but was widely criticised for the amnesty policy on which it was predicated. In the criminal justice arena in Africa some restorative initiatives have been taken, notably attempting to use elements of traditional practice (Bowd 2008, elsewhere in this volume).

RESTORATIVE APPROACHES IN UGANDA

Restorative approaches in Uganda have been of two types: ‘top-down’ and based on Western models, and ‘bottom-up’, based on customary process and rooted in a popular justice system, the local council courts. Both will be reviewed here. A British colonial commentator, writing in 1939, made what is probably the earliest recorded reference to restorative justice practice in Uganda. While describing the indigenous (in this case, Baganda) concept of justice, it effectively summarises the aim of contemporary restorative approaches:

If my goat is stolen, I must find the wrongdoer and bring him to the chief; my remedy is then either to get the goat back or to be compensated in money or kind so that I am restored to my original position. In other words, the native conception of law extended only to restitution. When the existing balance of things is upset by a wrongful act, the justice of the case demands, and the machinery of the law is available to effect, a restoration of the balance (Hone 1939:181).

This was a reference to the ‘native courts’ that existed alongside the formal British system in colonial times, and were largely continued after independence. They have since been replaced by the local council courts (see below).

The 1995 constitution of Uganda stipulates that, ‘Reconciliation between parties shall be promoted and adequate compensation shall be awarded to victims of wrongs’. (Constitution of Uganda 1995). Restorative process is in this spirit, but remains largely absent from the criminal justice system.

The local council courts had their genesis in the creation of ‘resistance councils’ (RCs) by the NRM in areas they controlled. This reflected their Marxist

ideology in attempting to devolve power to popular committees at grassroots, and such committees administered justice in the place of the customary chiefs in NRM areas (Baker 2004). In 1988, after the NRM had seized power, formal judicial function was given to the RCs, later renamed local councils (LCs), covering minor civil matters, property offences where the value was limited, customary law and by-laws. The LC courts have become the lowest level of the criminal justice system, with judicial powers at three levels, village (LCI), parish (LCII) and sub-county (LCIII). They constitute the 'main civil courts in the country' (African Rights 2000:37), with links to the higher courts through appeals to the chief magistrate or the high court. Litigants initiate cases at the LCI level (although they can choose to use the concurrent jurisdiction of the magistrates' courts), and any appeals resulting will go to the LCII and later LCIII courts before reaching the chief magistrate, who can uphold or overturn decisions, or send cases for retrial.

The LCI executive committee is elected at village (LCI) level by the entire adult population, and these committees in turn elect the members of the higher LC structures. The LC committees then constitute themselves into a court as required. The LC courts operate in local languages, within the community, using indigenous approaches of conciliation and compromise, judging cases according to 'common sense and wisdom' (Khadiagala 2001). The LC courts are restorative in the sense that they operate at community level, and have the power to order reconciliation, compensation and apology, among other sanctions. The cost of the system to the state is low. Most members of the court work as volunteers, and the LC committee is funded as a local government structure. Initially popular (Baker 2004), the judicial function of the LCs has been increasingly criticised, the greatest problem being that groups that dominate the LCs enforce their own interests (Khadiagala 2001). In some areas the LC courts are seen as having justified the abandonment of rural areas by the institutions of more formal justice (African Rights 2000) and many of those administering justice in the LC courts are largely ignorant of the law (Juuko 2004). Since many posts are occupied on a voluntary basis and, like the rest of the justice system, they are underfunded, this leaves the courts open to corruption. Despite these criticisms, the LC courts do substantially increase access to justice: large majorities of those surveyed find them easily accessible, fast and cheap (JLOS 2007). The LC courts represent an effort to fuse customary justice, administered by elected officials who are trusted community leaders, with the formal criminal justice system.

The Children Statute of 1996 has been praised as ‘a radical piece of legislation ... more restorative than UK legislation’ (Liebmann 2007:273). It builds on the responsibility for children’s welfare given to the LCI courts, where a child (aged 12–17) found guilty of an offence can be subject to orders for reconciliation, compensation, restitution, apology, caution or a guidance order. All of these represent an exemplary restorative approach to juvenile offending. Additionally, for all non-capital offences (that is, typically heard in a magistrate’s court) a child will appear at a district family and children court. However, in practice this legislation has broadly failed to be implemented:

The Committee notes with concern that although the principles of the best interests of the child, respect for the views of the child, and the child’s right to participate in family, school and social life are incorporated fully in the Constitution and the Children’s Statute, they are not implemented in practice due to, *inter alia*, cultural norms, practices and attitudes (UN Committee on the Rights of the Child (UNCRC) 1997).

Alternative dispute resolution (ADR) has become more significant in common law jurisdictions in recent years, and Uganda has successfully used what might be called ‘court-based ADR’. ADR is an alternative to the adversarial approach of a court case: a structured negotiation process where a settlement is reached with the aid of a trained mediator. This concept resonates with customary process where settlement was often reached in the presence of a respected figure and implemented in good faith (Kiryabwire 2005). This approach has been enshrined in law through the Arbitration and Conciliation Act of 2000. ADR is integrated into the justice system through a pre-trial scheduling conference at which mediation can occur, and mediation has been made mandatory in the commercial court:

ADR has been applied extremely successfully in the Commercial Court for over 7 years now. It has been found to be an excellent and reliable tool for quick resolution of disputes ... It has tremendously increased the per capita volume of cases handled by the advocates. It has increased the litigants’ level of satisfaction with the end results of their disputes (Ogoola 2006:4).

ADR has also reduced the cost of litigation to both litigant and lawyers. Mediation is carried out under the auspices of the Centre for Arbitration and Dispute Resolution, a specialist statutory body that provides qualified and

certified mediators. While cost savings have not been enumerated by the government, it seems likely that the funding of mediators is more than offset by the savings in court time resulting from successful arbitration. Such an approach will now be taken in the high court and magistrates' courts (Ogoola 2006): this represents a top-down approach to achieving a true victim-offender mediation process.

In 2001 a community service programme was initiated, as an alternative to prison, intended to reduce prison overcrowding and rehabilitate. Magistrates are requested to consider the victim's attitudes and needs, as well as the offender's desire for community service or a custodial sentence. Work done by offenders should benefit communities and reconcile the offender and community, and is thus explicitly restorative. Additionally, some initiatives have been taken to introduce victim-offender mediation (Liebmann 2001). The initial community service programme was piloted in four districts and has been perceived to be a success, heralding the rolling out of the programme nationally. In 2006–7, the prison population fell by 5 per cent, partly owing to community service orders, of which 3 000 were issued (JLOS 2007). Weaknesses in the programme have been identified, including the length of time taken to administer a community service order and the fact that the public consider it a soft option and would prefer to see custodial sentences imposed (Biringi 2005).

Where customary practice has played a role in the formal criminal justice system, it has been at grassroots level, for minor offences, through the LC courts. More recently, the potential of traditional restorative practice has been emphasised by discussion of the Acholi practice of *mato oput*, in connection with serious crimes committed during the LRA insurgency in northern Uganda. Much has been written about the restorative nature of traditional Acholi justice, and the fact that traditional practice emphasises the restoration of relationships between individuals and clans affected by wrongdoing with the aim of promoting forgiveness and reconciliation (Afako 2002; Liu Institute 2005; Baines 2007). In conjunction with a formal government amnesty process, initiated by the 2000 Amnesty Act, local communities have used traditional ceremonies, including *mato oput*, a reconciliation rite to address the issue of murder, to welcome back to the community those who have been in the bush with the LRA (Ojera Latigo 2008). These ceremonies are public ways of bringing back into the community people who are often themselves victims (many LRA fighters were abducted and brutalised into fighting), who may have committed offences. They

constitute an indigenous restorative practice that uses the hierarchy of traditional structures and public ceremonies at clan level to legitimise a process of acceptance back into the community.

The international and academic communities have sometimes been guilty of romanticising such processes: they are certainly not a complete solution to the dilemma of peace and justice, and detailed consultations suggest that Acholi elders do not see *mato oput* as a solution to the issue of LRA crimes, but believe that the principles and values of *mato oput* can be used to rebuild Acholiland after the conflict (Liu Institute 2005). Indeed, many in the north desperately seek retributive justice (Pham et al 2005). *Mato oput* and similar indigenous practices, however, do offer the potential of an indigenous solution to the peace-versus-justice dilemma. Where such processes can give communities and individuals what they need, they can address the issue of justice in a far more relevant way than the indictments of the International Criminal Court, which were perceived by some local communities as an obstacle to peace.

The agreement of 29 June 2007 between the LRA and the Ugandan government includes a commitment to use traditional practice:

Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement ... The Traditional Justice Mechanisms referred to include: i. *Mato Oput* in Acholi, *Kayo Cuk* in Lango, *Ailuc* in Teso, *Tonu ci Koka* in Madi and *Okukaraba* in Ankole; and ii. Communal dispute settlement institutions such as family and clan courts (Annexure to the Agreement on Accountability and Reconciliation 2007, clause 19–21).

Ministers were reported as saying that this will involve modifying the penal code (IRIN 2007). While this has given rise to concern of an extension of amnesty to include all those accused of serious crimes, including those named in ICC indictments (Human Rights Watch 2008), this issue is beyond the remit of this paper. The implications of the agreement are that customary tribal practice will feature as part of the formal justice system.

In summary, to date Uganda has taken on board restorative elements that have been developed in Western systems, such as community service and alternative dispute resolution. It has also attempted to integrate customary practice through a democratic grassroots process that blurs the distinction between

traditional justice and the formal criminal justice system, and is intending to integrate some traditional practice into the formal justice system.

THE FUTURE OF RESTORATIVE JUSTICE IN UGANDA

Despite the initiatives seen in Uganda and elsewhere, and the plethora of studies of the South African TRC and indigenous approaches to transitional justice in Acholiland, there remains a dearth of academic work on restorative processes in African criminal justice. The most relevant recent review of criminal justice systems in Commonwealth states (Coldham 2000) does not use the word ‘restorative’. The concrete but modest steps taken in Uganda towards a restorative approach fall short of the ‘primary’ restorative processes discussed in section 3. They are additionally hampered by a lack of resources and of apparent commitment from concerned parties in the government and judiciary. Criminal justice is an issue that attracts little electoral interest, and so remains largely off the political agenda.

Efforts at introducing restorative approaches in Uganda have concerned popular justice at the grassroots (the LC courts), and adding restorative elements to the existing criminal justice system, often in specific sectors (community service, court-assisted ADR, the Children Statute). Here we will discuss the possibilities of a more comprehensive restorative approach that leverages the existing steps taken toward restorative process and the relevant elements of traditional practice.

Popular justice as restorative justice: The local council courts

The machinery of a state is determined largely by the distinctive historical experience and cultural endowments of the society in which it is embedded. In Uganda this will lead us to discuss the colonial legacy and pre-colonial traditions that are increasingly being referenced in the justice arena. In Uganda, as in much of Africa, alienation from the institutions of criminal justice is compounded by colonisation and the historical import of a foreign justice system.

Fundamentally, justice is about controlling or managing social conflict, and one must ask whose justice a restorative approach will represent. Formal justice in Uganda has always been imposed from the top as a means of controlling

society, initially by a colonial regime that used local elites, and in the modern era by elites who maintain authority in a state that is democratic, but autocratic. Electorally, criminal justice policy remains largely irrelevant as long as crime levels are not increasing dramatically. While the consent of the people is a crucial aid to the legitimacy of a justice system, in Uganda that consent has never really been discussed. Given that restorative justice aims to involve communities in the issues that affect them, it seems natural that those same communities ought to play a role in determining whether and how restorative elements are introduced. In a society like that of Uganda, whose post-independence tradition is one of military regimes and non-democratic transitions, there are few precedents for such participation at national level. The existing model is that of the LC courts, which are accessible to communities and can engage stakeholders at the grassroots.

It has been suggested that efforts at popular or informal systems of justice are a response to the perceived failure of the centralised state (Khadiagala 2001) and are part of a trend of decentralisation that could increase pluralism and participation in institutions (Bratton 1989). Indeed Bratton suggests: 'Large areas of Africa have never experienced effective penetration by the transformative state, and rural folk there continue to grant allegiance to traditional institutions such as clan, age-set, or brotherhood' (Bratton 1989: 411). This supposes that such communities would be receptive to using these traditional institutions to deliver local justice.

The popular justice of the LC courts has prompted praise as well as criticism (for example Kane et al 2005), and such courts do at least offer a model for grassroots justice that melds customary process with the formal legal system. Such courts, notably the lowest village level court (the LC1) offer the prospect of justice that is more accessible in every sense (financial, physical and technical) than the formal system, and cheaper to administer. The LC courts have been found to be accessible and participatory, and promote reconciliation rather than punishment (Baker 2004; Kane et al 2005). However, not all expectations have been met. One detailed study has revealed how the property rights of women in Uganda have failed to be upheld by the LC courts (Khadiagala 2001). This is because popular justice does not challenge existing power relations in a community, but serves to reinforce them (Merry 1992). Indeed, the traditional hierarchies previously reinforced by the recognition of 'native courts' will overlap with those who succeed in being elected to the LC structures. The LC courts

consist of senior figures in the community, dominated by wealthier, older men, who use the courts to defend existing privileges. In this sense, where professionalism is absent and knowledge of the law poor, the LC courts are essentially a return to customary practice where community leaders drive the judicial process: rules of evidence are replaced by personal knowledge of the disputants (Khadiagala 2001). As with any less formal system, professionalism will be absent, corruption is a risk, and the law applied will be as much a product of common sense, local norms and social ties as of the penal code. Justice is not rights based, but prioritises social harmony, cooperation and compromise, and as a result

The disparity of power between litigants becomes relevant once again, and weak individuals find themselves not only without the effective protection of a clan but also without the protection of individual rights, this being the consideration that in theory they have received for giving up the group (Grande 1999:69).

As individuals, litigants have lost the protection of the formal justice system, but can fail to benefit from their membership of the community, because of agendas within it. The experience of the LC courts is that, while appropriate, and restorative justice can be delivered effectively at community level, they should not be idealised: power relations within the community will be imported into their decision making.

Despite the LC system, kinship-type processes with varying degrees of visibility and formality have continued to be used within clans and communities who seek to solve issues without recourse to officials. Indeed, the removal of formal authority from tribal chiefs through the replacement of the native courts with the LC structures does not necessarily end the engagement of such chiefs in local justice. Where consent of the concerned parties is obtained – either freely or through the exercise of the hierarchies of power that exist in the community – such local authorities will continue to play a role in dispute resolution. Participation and outcome in such processes will reflect internal power relations in the community. Where justice fails communities, or remains remote, they will continue to fall back on those customary processes that are completely beyond the formal system where even those modest guarantees that exist in the LC courts, particularly relevant for the marginal, are absent. Indeed, one

approach to enhance participation in any officially sanctioned process is to sanction the most-used non-formal systems, and the NGO sector has been involved in attempting to support and legitimise community-based dispute resolution systems (Nyamu-Musembi 2003).

The most extreme example of a process rooted in the community that is both highly retributive and beyond the control of the justice system is ‘mob justice’, a phenomenon that has become increasingly prevalent in African states, with thieves and others being summarily lynched on the street (Juuko 2004). Mob justice highlights the great challenge of rationalising customary process with a rights-based approach. If communities are empowered judicially, but choose to administer justice in ways that are alien to the concepts underlying the justice system, it becomes hugely challenging for the central authorities to intervene, even where the mechanisms to do so exist. The tension between rights-based law and traditional, customary law is summarised by Mamdani:

The language of rights bounded law. It claimed to set limits to power. For civic power was to be exercised within the rule of law, and had to observe the sanctity of the domain of rights. The language of custom, in contrast, did not circumscribe power, for custom was *enforced*. The language of custom *enabled* power instead of checking it by drawing boundaries around it (Mamdani 2001:654).

Because of the absence of expertise or oversight, any popular process decentralised to the level at which the LC courts operate will necessarily be customary: that is, it will operate according to local perceptions of justice and not to any penal code or other national guideline. The result is that while these courts are formally integrated into the justice system, in practice they are beyond its remit in many ways, ensuring that there is no coherence in how law is applied, or even what law is applied (see section 5.2 for more discussion). Most crucially, the challenge of ensuring the agency of all stakeholders in the creation and operation of such processes remains: ‘If custom is to have any meaning, its reproduction has to be more through consent than through coercion’ (Mamdani 2001:661–62). Ensuring accountability to the community can best be ensured by empowering those most marginalised by such systems. The use of elections to the LC committees has not ended questions over the LC courts’ legitimacy. McCold (2004) has cautioned against mistaking community justice for restorative justice.

While community engagement is part of many restorative approaches, popular justice that engages the community is not necessarily restorative, and can be as big a threat to a truly restorative approach as the formal punitive legal system. Involving the community in justice is not the same as bringing together those individuals most directly affected by the offence.

Institutionalising traditional practice

The response of those favouring restorative justice is to point towards indigenous African practice that chimes with contemporary understanding of restorative process. However, behind the Western-driven interest in restorative and indigenous process in Africa, there seems to be an assumption that Africans somehow have an affinity with non-adversarial approaches (Khadiagala 2001). This simplistic approach is rarely supported by deep study of the concerned processes. Much has been written about the communal nature of traditional African society and how this privileges restorative approaches (for example on *ubuntu* in South Africa, see Louw 2006). However, traditional approaches to justice developed in the context of seeking protection within the group, from group members who transgress. Restorative processes, such as mediation and negotiation, test the power of the group: group cohesion (and potential exclusion) is the incentive to reach a settlement (Grande 1999). In this context, non-adversarial approaches depend on the nature of the relationship between the individual and the group. In the modern state, the power of the group has been devalued and the relationship between the group and the individual is transformed from the context that gave rise to traditional legal practice, not least in the sense that a litigant has the option of choosing to approach the formal legal system. With the erosion of group identity, other agendas – social, political and economic – have been strengthened within what is considered a single unit in traditional terms. The dissonance between a state that presumes a relationship with individuals and traditional societies with a group ethos has served as a background to the failure of the state to become more relevant to the lives of most of its citizens, in justice and other areas. Despite the failure of the criminal justice system of the modern state to be perceived as relevant, it can remain problematic to attempt to use traditional justice in societies that have evolved away from the organisational forms that led to its creation.

Within indigenous traditions, there have always been restorative and retributive approaches. Colonial-era reports of customary justice in Uganda discuss particular offences that led to imposition of the death penalty, flogging or fines, as well as those with a restitutive remedy (Hone 1939). Punishments in the native courts of kingdoms such as Buganda were exclusively retributive (Morris 1967). A commentator points out that: ‘Reverence for and romanticisation of an indigenous past slide over practices that the modern “civilized” western mind would object to, such as a variety of harsh physical (bodily) punishments and banishment’ (Daly 2002:62). Advocates of restorative justice risk identifying indigenous practices as exclusively restorative, and mythologise a need to recover these practices from a takeover by colonial powers that instituted retributive justice (Daly 2002). The result is what has been called the ‘idealisation of local spaces’ (Khadiagala 2001), which risks perpetuating the colonial stereotypes that justified separation of European and African law. In many cases where indigenous practice is used as a basis for a contemporary restorative process (largely those of aboriginal communities in developed states, for example Ross 1994; Yazzie 2000; Sivell-Ferri 1997), these are most often accommodations with tradition, rather than the wholesale adoption of customary practice. Experience with the LC courts in Uganda and elsewhere shows that using customary process as a basis to address lesser offences of a local nature with limited sanctions can be efficient and effective. This is particularly so where the community has an interest and an ability to intervene appropriately.

The principal challenges to the institutionalisation of customary practice are coherence, codification, scope, and conflict with national standards. The Ugandan state is a direct descendant of the colonial state that was imposed upon a diversity of ethnic groups and declared a unified political entity. As such, it seeks to exercise a coherent and unified criminal justice system over all communities in the nation. The greatest challenge to incorporating traditional practice – restorative or otherwise – into such a system is the threat to such a system’s coherence, though in practice since the colonial native courts, neither codification nor coherence of customary law has been attempted. Indeed, it is the nature of customary law that it is dynamic and so resists being written down. The Agreement on Accountability and Reconciliation (Annexure to the Agreement on Accountability and Reconciliation 2007) that aims to end the LRA war in the north commits to using five tribal ‘traditional justice mechanisms’, presumably in an effort to deliver justice that is relevant to these five

communities. If such a system is to be extended nationally, then many more such mechanisms (for other ethnic groups) will have to be identified and legitimised through such official recognition. That the judicial authority of the old kingdoms, whose role was elevated by the colonial system, has again become a political issue suggests that there remains a threat to a nationally coherent system from extending the use of customary law. This recalls exactly Mamdani's analysis of the colonial legal approach:

In the indirect-rule state, there was never a single customary law for all natives. For customary law was not racially specific; it was ethnically specific. It made a horizontal distinction, a distinction in law, between different ethnic groups. This was not a cultural but a legal distinction. The point is that each ethnic group had to have its *own* law (Mamdani 2001:654–5, emphasis in original).

The implication of the Agreement on Accountability and Reconciliation is a return not to the diversity of an authentic customary approach (with many complementary customary approaches used within each ethnic group), but to one law per tribe in the colonial tradition, and ethnicisation of the law. This raises the possibility that in a single jurisdiction, the applicable law will be a function of ethnicity, permitting an effective ethnic apartheid.

The suggestion of the Agreement on Accountability and Reconciliation that *serious* crimes will also be addressed through customary mechanisms articulates the challenge of determining the *scope* of customary law. For minor offences, popular and less formal processes, such as the LC courts, can deliver justice that is relevant and accessible. However, the customary treatment of offences traditionally handled by magistrates or the high courts will demand a greater integration of the traditional into the formal justice system, not least to reassure that this is not simply an effort to institutionalise impunity for LRA crimes. The competence and professionalism of those currently adjudicating at LCI level is unlikely to be adequate, and the issue of jurisdiction will be controversial. Many LRA crimes were committed against tribes other than the Acholi. Victim communities who should be involved in any restorative process will seek to use their own systems, while defendants will be largely Acholi. A broader issue will be when to apply traditional and potentially restorative justice, and when to use the retributive penal code, and at what level such decisions will be made. There

is a possibility that such decisions will be considered largely political rather than juridical.

Furthering top-down restorative approaches

An alternative to integrating customary practice into the justice system is to extend and deepen existing restorative approaches nationally, in a 'top-down' way.

While the Children Statute represents a substantial legislative leap towards restorative process, in practice its changes have not been widely implemented. This is for a variety of reasons: training of concerned parties (including police, security forces, judiciary, magistrates and lawyers) is insufficient and unsystematic; and children continue to be detained with adults in inappropriate places (UNCRC 1997), despite sentencing being considered a last resort in the statute. In both cases the government points to a lack of resources for training and for the development of non-custodial alternatives for minors. In this respect at least, a restorative approach possibly does require an initial investment, in addition to existing spending on the justice system. However, in the longer term, with the avoidance of expensive incarceration and improved rehabilitation to reduce reoffending, savings could be made. More than this, Uganda is well poised to move towards more 'primary' restorative mechanisms of juvenile justice: the LC and family courts could be used to introduce more complete restorative approaches to juvenile crime, such as conferencing, and exploiting the local perspective of the courts, their accessibility to communities and their rooting in customary practice.

ADR has recently been introduced to all divisions of the high court and all high court circuits. However, it has been available to magistrates and has been underused (Ogoola 2006). It is, unfortunately, likely that the same problems will be seen in the higher courts unless a more proactive approach is taken. Beyond this, it has been suggested that ADR is in the tradition of customary African justice, where mediation is emphasised, and should resonate with both victims and offenders in the Ugandan justice system. However, the current wave of interest in ADR is very much a Western transplant into African societies that are currently suffering from a previous alien transplant, namely retributive European justice systems (Grande 199). That ADR as it is being implemented is remote from traditional Ugandan approaches is evident from its emphasis on victim and offender, independent of the broader group context in which customary mediation emerged.

The community service programme has also been extended nationally in recent years, but has still had only a small impact on the prison population. The reasons for this appear to be largely owing to resistance, or simply inertia, on the part of the judiciary and other stakeholders. There also remains public antipathy to the idea of community service as a ‘soft option’ (Buringi 2005). The most interesting development, from a restorative viewpoint, has been the introduction of efforts to educate communities in victim–offender mediation, and use community service as a way to bring victims, offenders and communities together in an alternative to the criminal justice system for minor offenders (Liebmann 2001). This was a brief and singular intervention, however, and does not appear to have been continued.

Restorative justice: a way forward

There are two distinct, but not exclusive, paths towards integrating restorative justice into the criminal justice system in Uganda.

One route is to continue to add restorative elements to the formal system, and ensure that the restorative process already in place is allowed to perform. This would involve a commitment to ensuring that community service is used as widely as possible, and the judiciary is trained in its use; the extension of ADR throughout the justice system, which requires the training and provision of mediators on an appropriate scale; and the application of the restorative elements of the Children Statute to address all juvenile offences, which demands substantial efforts and resources to disseminate the statute to the lowest levels of the formal system and put relevant infrastructure in place. The second route is to introduce customary law on a broader scale.

Restorative justice reframes crime as an issue between victims and offenders, rather than offenders and the state. In customary practice and in much restorative theory, the community is the crucial intermediary between victim and offender. In a system that maintains the role of the state, the challenge for restorative justice is to formalise and systematise the role of the community, and in the African context to give traditional justice a place. The dilemma Uganda faces in choosing a restorative path forward is making choices between Western and customary approaches; between top-down and bottom-up approaches; and between recognising individual rights and allowing the group and interests within it to play a role. The existence of the highly decentralised and largely

customary LCI courts offers a compromise. As part of the formal justice system, there is a degree of oversight and accountability through elections and quotas for the disadvantaged, such as women. However, these bodies perform in a way that reflects local custom as much as written law. This ‘arms-length’ approach to the lower courts allows the authorities to set the frame, but the group, in a local context, will determine the details of law. As long as litigants have the right to appeal to a higher court, and are aware of this right, some safeguard against abuses of power can be maintained.

The LC courts provide a mechanism that can link the formal justice system with customary approaches, while blurring the line between the two. The top-down approach can be used to legislate to permit restorative processes, such as community service, juvenile conferencing and ADR, and LC courts encouraged to interpret these in a way that they, and their communities, perceive as relevant. In this way Western developed restorative processes can be made available for the lower courts to use in their own way, rather than being imposed. In this sense the ambiguity between the LC courts as formal bodies and community mechanisms for customary justice can be exploited to increase the degree of restoration in legal process, but in a way that remains relevant to communities. An example of this would be to legislate ADR as mandatory for all cases within the LCI courts, but not to specify in legislation the mechanism of such mediation. The community and the court would then determine for each case and according to local norms how mediation should operate in that context for any particular case. In this way the lower courts would be steered by legislation from above, but still maintain the autonomy to interpret both law and remedy according to custom.

While this may work for lesser offences, dealing with serious crimes – such as those in Acholiland during the LRA insurgency – in a restorative and customary way remains problematic. These challenges have been acknowledged by the Ugandan authorities:

The challenge is to bring all those advocating for only the cultural practices to appreciate the cross-cultural and international dimensions of the problem. We have to find a solution that will be satisfactory to the vast majority of the victims. The objective is to come up with a solution that will not only be acceptable to the victims, but also acceptable to the affected, the country and the international community (Rugunda 2007).

There is an additional concern that a new drive to institute a restorative approach from the top down may repeat the mistakes made when the colonial system first confronted traditional African justice. There is a danger that indigenous practice, restorative or not, that is considered relevant by people on the ground will be swept away by another wave from the West (Findlay 2000).

Uganda is currently living with a retributive system with restorative elements, and some sort of ‘spliced justice forms’ (Daly 1998) seem unavoidable. The discussion needs to be centred on the balance of restorative and retributive, traditional and ‘modern’ process. The LC courts have demonstrated that formal and informal systems can work together. The goal is likely to be a legal pluralism beyond the dual system of the colonial era and the current formal system. This has been described as a search for a ‘post-traditional solution’ that ‘may represent a profound departure from the more familiar’ (Juuko 2004:10). The current crisis in the justice system has provoked a realisation that a new approach must be found: ‘The old order must give way to a new order, yielding to a new judicial culture’ (Ogoola 2006:15).

CONCLUSIONS

Independent Uganda has shown a continuity of penal policy with the colonial era, with an emphasis on retribution and deterrence through harsh punishment. This has resulted in a justice system that is under-resourced and inefficient and with little commitment to rehabilitation or addressing causes of crime. A grass-roots mechanism of popular justice has been instituted through the LC courts that attempt to deliver community justice. These represent the integration of a largely customary, community justice system at the bottom of the formal justice system. More recently, concrete initiatives that aim to introduce a restorative approach have been taken in specific sectors. The possibility of indigenous and largely restorative processes being integrated into the criminal justice system has been raised by the government’s commitment to addressing offences related to the LRA insurgency using traditional approaches.

Uganda and other African states in a similar position face several dilemmas. They seek to address the crisis in their justice systems, and have begun to look to restorative approaches, seeing an echo in these of the customary justice that colonial systems replaced. However, the systems that the state is trying to impose are also Western concepts, divorced from local tradition. It seems likely that the state

will fail to make these appear relevant to the people. An alternative is to attempt to build on existing customary practice from the bottom up, and use custom to build law that is meaningful to the people. The solution is likely to be a mix of top-down and bottom-up models. The LCI courts are the bottom of the formal judicial pyramid and already have a largely customary approach to lesser offences. By introducing the concepts of restorative process that underlie community service and mediation to the judiciary at this level, but leaving with them their flexibility to interpret these concepts in a way that is relevant for their communities, one can create a system that is restorative and relevant.

The issue of serious crimes, raised by the need to prosecute LRA offences, poses a far greater challenge. Communities must be involved, and customary process invoked, but in a way that does not challenge the need for a unitary and codified approach throughout the state or neglect the needs of the ethnic groups involved. This appears to be a dilemma that neither the community-based LC courts nor a top-down process can readily address.

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NOTES

- 1 Post-war Reconstruction and Development Unit, University of York, UK.
- 2 Judicature Act S14(c).
- 3 Uganda's penal code provides for 15 capital offences: nine separate offences grouped under the collective heading 'treason' and offences against the state, rape, defilement, murder, aggravated robbery and aggravated kidnapping. A recent proposal will make counterfeiting a capital offence (Monitor 2008).
- 4 Rates for reported robbery and assault are less than 10% of those in the US and for murder double those of the US (Interpol 2001). However, studies indicate that only around 60% of crime is reported (JLOS, 2007).
- 5 At the end of 2006, 566 condemned prisoners were reportedly held in Uganda's jails (<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=25&nome=uganda>). The prison that holds most of them, Luzira Upper Prison, built in 1927 to hold 664 inmates, has recently held as many as 2 500 (Wakabi, Wairagala 2004), 'Uganda's death row debate', *New Internationalist*, London, April 2004.