

## Justice for the people: Strengthening primary justice in Malawi<sup>1</sup>

*Joseph DeGabriele\**

Freelance consultant, based in Zomba, Malawi, specialising in participatory development issues

*Jeff Handmaker\*\**

PhD researcher at the Netherlands Institute of Human Rights (SIM), Law Faculty, of Utrecht University and freelance consultant in The Hague, The Netherlands

### Summary

*In Africa, primary justice, or the way people resolve disputes and access justice within their own social and cultural contexts, has, perhaps by default, been wrongly perceived as exclusively comprising 'customary justice', upheld and administered by traditional leaders. These perceptions are, however, changing with a growing realisation that people are questioning the roles of traditional leaders and developing their own community-based justice mechanisms. Primary justice involves a much broader set of stake-*

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\* BSc (Hons), STB, MA (Leuven); degabriele@sdnp.org.mw

\*\* LLB (Newcastle), LLM (SOAS, London); j.handmaker@law.uu.nl

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holders, including faith-based organisations and institutions, community-based organisations and non-governmental organisations. Extending the scope of primary justice and supporting capacity-building among primary justice organisations can enable communities to reclaim justice for themselves in ways that respect human rights, reach far more people than formal justice systems, and have the potential to be powerful and peaceful mobilising forces for social change.

## 1 Introduction

If you plan together, you can come up with solutions . . . We are not after money, but to see change!<sup>2</sup>

Fumbanane mungabayana waka: 'Ask one another or reason together, lest you kill one another.'<sup>3</sup>

Primary justice, alternatively referred to as 'legal empowerment'<sup>4</sup> or 'non-state justice',<sup>5</sup> is a misunderstood concept. Studies have assumed it to be 'informal', 'customary' or even 'community' justice, exercised outside the sphere of formal legal systems. Most studies have assessed normative systems of dispute resolution (systems that subscribe to predictable rules and standards) against a backdrop of formal justice systems only.

Furthermore, there has been a long-standing, strong association between primary justice and customary systems, drawing on studies of the historical roots of existing justice systems and administrative systems in colonial and post-colonialist governments.<sup>6</sup> Such forms of government adopted some of the mechanisms of enforcement existing at the customary level, while at the same time dismantling and/or

<sup>2</sup> Interview with Alfred Mandalawe, Director of Domasi Village to Village, a community-based organisation in Zomba District, 8 July 2003.

<sup>3</sup> DK Mphande *Tonga proverbs from Malawi* (2001) 114; <http://www.afriprov.org> (accessed 28 February 2005).

<sup>4</sup> S Golub 'Beyond rule of orthodoxy: The legal empowerment alternative' (2003) Paper No 41 *Carnegie Rule of Law Series*.

<sup>5</sup> For a bibliography of non-state justice systems in Africa, see <http://web.uct.ac.za/depts/criminology/ajap/afribibl.htm> (accessed 28 February 2005).

<sup>6</sup> Studies of this field in the context of Malawi before recent constitutional dispensations in 1994 have been undertaken by, amongst others, M Chanock 'Neotraditionalism and customary law in Malawi' (1978) 16 *African Law Studies* 80-91 and M Chanock *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985). However, there has been no major study since then that takes account of the considerable social and political changes, not least the establishment of multi-party democracy, significant improvements in transport and communications and extensive external donor investment, notably in the country's justice system. Chanock's work has therefore not lost its relevance, but must be measured against a range of new developments. See JK van Donge & L Pherani 'Law and order as a development issue: Land conflicts and the creation of social order in Southern Malawi' (1999) 36(2) *Journal of Development Studies* 48-70.

ignoring indigenous and alternative methods of dispute resolution that were inconsistent with colonialist policy.<sup>7</sup>

Lacking alternative explanations, donor interventions have assumed that primary or informal dispute resolution mechanisms represent a second-best alternative to the formal system.<sup>8</sup> Stephen Golub refers to this as the 'dominant paradigm', based on 'rule of law orthodoxy', which is state-centred, top-down and principally administered by multi-lateral and bilateral (donor) agencies.<sup>9</sup> Golub considers this approach to be problematic for a variety of reasons, as it is based on 'ill-defined' and 'questionable' goals, assumptions and strategies and presupposing institutionalisation and the central role of the judiciary as the most effective means of serving the needs of society. He further criticises the tendency of donor agencies to 'underestimate the obstacles and overestimate the potential' of the institutions they aim to support.<sup>10</sup>

For various reasons,<sup>11</sup> this 'dominant paradigm' has proved to be very persuasive in forming donor agencies' policies, assuming that non-formal justice falls into the single, broad category of traditional justice mechanisms, such as traditional courts enforcing customary law<sup>12</sup> and local administrations run by traditional leaders. Consequently, these same assumptions are reflected in interventions by donor organisations, which have placed considerable emphasis on traditional institutions while ignoring or only tacitly recognising other (non-formal) justice components. A recent programme in Malawi, in which the present authors were involved, described primary justice as containing:<sup>13</sup>

... a range of traditional and non-traditional elements. Historically, traditional justice institutions have been used (and to some extent manipulated) by the colonial and post-colonial state. But, in spite of this, these institutions retain a significant degree of legitimacy and may be preferred by users.

<sup>7</sup> L White *Magomero: Portrait of an African village* (1989) 164-165 refers to customs that, while having changed and developed over time, are nevertheless rooted in ancient practice.

<sup>8</sup> The implication is that a fully functioning formal system would dispense with the need for primary justice.

<sup>9</sup> Golub (n 5 above).

<sup>10</sup> n 10 above, 9-21.

<sup>11</sup> Golub (n 5 above) 21-25 describes some of these reasons as the central role of lawyers, the providing of improper incentives (rewards) to local institutions, inbuilt structural biases within donor agencies and a lack of applied research.

<sup>12</sup> In Malawi, 'customary law', as applied by traditional leaders, is rarely consistent and often *ad hoc*. Schärf *et al* 'Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums' unpublished report by DFID-Malawi (2002) (Schärf report) 12 describe it as 'unwritten, flexible and changing in response to new conditions and attitudes', when compared to written law. By comparison, B Oomen *Chiefs! Law, power and culture in contemporary South Africa* (2003) 82 writes of the distinction in South Africa between 'living customary law [which] relates to the social practices of communities living all over' and 'official' customary law.

<sup>13</sup> DFID-Malawi 'Terms of reference, design of primary justice pilots' unpublished (2003).

As this programme served to further emphasise, few have recognised the importance of the role of hundreds of community-based organisations (CBOs), faith-based groups, marriage counsellors (*ankhoswe*) and the combined administrative and quasi-judicial roles played by traditional leaders.<sup>14</sup> We therefore distinguish between formal and primary justice;<sup>15</sup> the latter might be informal on occasion, and at times customary, but in most cases, it is resolved within the community. However, it also involves an inter-relationship with formal justice.

Where formal justice systems, in particular courts, are not accessible to the majority of the population, primary justice systems offer encouraging alternatives and, in many cases, more appropriate solutions. They should not be viewed as a substitute for the formal system, but as a dynamic complement to it. At the same time, there is a need to improve primary justice provision through capacity building, improved co-ordination and enhanced knowledge of potential legal remedies. CBOs, faith-based groups and other stakeholders involved in delivering primary justice can assist the formal sector by documenting transfers and referrals. Such collaboration will not, however, turn primary justice systems into formal systems.

## 2 Identifying primary justice issues

Being principally concerned with broadening access so that individuals and communities can make their own choices, primary justice interventions focus on issues where accessibility is particularly limited. These include the security of the person, security of property, land disputes and political violence.

Most Malawians access justice at the primary rather than the formal level. The kinds of issues handled by primary justice providers indicate that primary justice mechanisms provide both an appropriate entry point and a hierarchy of appeal or referral systems. Those most likely to use primary justice are the poor, in particular orphans and widows, women, school children, children in conflict with the law and people

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<sup>14</sup> Although they are somewhat trivialised, M Vaughan 'Recent social historical perspective' unpublished (1999) 9 nevertheless observes that the roles of such institutions ('self-help groups, credit unions, churches') represent a 'starting point' in identifying primary justice mechanisms.

<sup>15</sup> Similar distinctions have been made in E Ehrlich *Fundamental principles of the sociology of law* (1936) 493; S Roberts 'Introduction: Some notes on "African customary law"' (1984) 28 *Journal of African Law* 1; M D'Engelbronner-Kolff *A web of legal cultures: Dispute resolution processes amongst the Sambyu of Northern Namibia* (2001) 298; B Oomen 'Legal syncretism in Sekhukhune: Local law and the power of traditional leaders in northern South Africa' in WMJ van Binsbergen & R Pelgrim (eds) *The dynamics of power and the rule of law: Essays on Africa and beyond* (2003) and A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe* (1999).

with HIV/AIDS. The types of disputes that most commonly affect Malawians include land issues, theft of crops or livestock and household goods, marriage and family problems, inheritance, property-grabbing and a breakdown in social harmony.

Those affected by such disputes may approach a range of structures involved in delivering justice at the primary level. Traditionally these have been marriage counsellors, family or clan heads and traditional leaders (village headmen and chiefs). However, changing social contexts mean that more people are accessing other institutions, including the churches, elements within civil society (especially CBOs and non-governmental organisations (NGOs)).

Furthermore, people use formal structures, such as the Anti-Corruption Bureau, Human Rights Commission and Ombudsman, as primary justice structures. Formalised structures, such as the Community Policing and Crime Prevention Committees, are also used for primary justice remedies. For example, the work of the police has been reshaped by the public's use of victim support units, where victims of spousal abuse reported to us that they do not want to press charges but do want the police to frighten the husband a bit. In this way, they are gradually reshaping these institutions to their own needs.

## 2.1 Security of the person

In the absence of alternatives, and in spite of various difficulties (highlighted below), people have traditionally relied on chiefs to resolve problems affecting their personal security. This has been complemented by the mediation and reconciliation role of *ankhoswe*, who are mainly tasked with ensuring that contentious issues in marriages (which can have an impact on the broader community) are resolved wherever possible. This conciliatory function is reinforced by traditional authorities, who have the power to impose fines and maintenance. Some of the primary justice issues they handle relate to the concept of *nkhanza*.

A key starting point for addressing issues relating to the security of the person is the concept of *nkhanza*, popularly understood as a lack of harmony and inevitable part of the human condition. With it goes the assumption that all try to restore harmony (at a meta-level) in themselves and their families, and (at a broader level) within their community or nation. A key finding of gender research conducted by GTZ-Malawi<sup>16</sup> is that *nkhanza*, strictly defined in English as violence, has a much wider meaning. Violence has the connotation of physical abuse, while *nkhanza* reflects broader social tensions. Examples of *nkhanza* include lack of respect and placing unreasonable demands on a spouse (such as requiring the wife to wake up in the middle of the night to cook after

<sup>16</sup> GTZ-Malawi Gender Programme unpublished presentation in Lilongwe (2003).

the husband has been drinking beer, rudeness, unreasonable temper and being unloving). It can also refer to punishing a person before they have been found to have made a mistake, or putting them under constant stress. In short, *nkhanza* issues encompass a much broader spectrum than physical abuse alone, and can adequately and appropriately be handled at the primary justice level.

*Nkhanza* can also relate to people's lack of security in their relationship with the government. Examples of the ways in which the government is perceived as perpetrating abuse include urban bias in development, politicisation of development, heavy taxation, poor health and education services, nepotism and corruption, and abuse of girls at schools.

## 2.2 Security of property

Primary justice issues involving security of property include principally land disputes (see below), property-grabbing and unlawful disposal of communal land by chiefs. Theft and destruction of property are particularly serious problems in rural agricultural districts and manifest in two main ways. Firstly, small amounts of maize and livestock (particularly during a food crisis) are stolen within the community. Secondly, large amounts of maize and livestock are stolen by criminal organisations, believed to be operating from across the border.

Proposed primary justice solutions have included banning the sale of green maize or insisting on a certificate from a village committee. Communities have also organised themselves (often together with the community policing fora) into 'crime prevention committees'.<sup>17</sup>

The themes of security of the person and property often overlap. For example, popular understanding in Malawi seldom distinguishes between security of property and security of the person. If someone steals another's maize, the injured party may feel entitled to kill the thief in self defence, as such a theft can easily lead to the family starving. Another obvious link occurs in the context of family disputes after a landowner or subsistence farmer has died and his or her relatives claim their property and/or land for themselves. Here forcible dispossession of land or property (especially crops and livestock) by family members of the deceased, otherwise known as property-grabbing, is regarded by many not only as theft, but equivalent to 'killing the entire household',<sup>18</sup> as it particularly affects widows and orphans.

<sup>17</sup> Interview with GTZ in Mulanje, 12 July 2003.

<sup>18</sup> C Msukwa 'Early harvesting — A serious threat to food security: Developing a community-based extension process against theft and its consequences in the impact area of the IFSP' unpublished report (2003) 9.

### 2.3 Land disputes

Creating legal security through registration of individual title to land has long been a prominent aspect of land and law issues in Africa. Some attempts have been made to approach the subject of land disputes from the point of view of local political and legal structures, where the requirement of group consensus creates legal insecurity.<sup>19</sup>

Disputes that relate to land mostly involve land dispossession following the death of the owner; landlessness (resulting in land encroachments) due to the establishment of national parks and reserves (as has occurred in Chikwawa and Rumphu); conflicts over land ownership; and relocation without compensation for improvements, such as houses and trees. People accused of witchcraft and other outsiders are particularly vulnerable in such a legal culture. The chiefs and the District Assembly Secretariat mainly handle these matters. However, magistrate's courts also sometimes handle cases concerning land disputes, especially if the dispute also raises issues of public order.

Following a consultative process with traditional leaders, a National Land Policy has been developed to ensure that land title ownership is made more secure, and that all citizens are able to access land by fair and equitable means.<sup>20</sup> This policy is particularly relevant to the issue of customary land ownership; firstly, because such ownership will now be legally recognised, and secondly, because mechanisms have been put in place to ensure that customary land disputes are addressed in a more systematic way.<sup>21</sup> The land policy reaffirms the jurisdiction of chiefs over customary land matters by creating structures that include chiefs and community members whose interests are affected (and exclude the courts), in the settlement of customary land disputes. However, some traditional leaders feel that this multi-stakeholder process represents a weakening of their powers and jurisdiction.<sup>22</sup>

These provisions of land policy are commendable, but can only become operational if a new land law is enacted and all the necessary

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<sup>19</sup> Van Donge & Pherani (n 6 above).

<sup>20</sup> Interview with Shaun Williams, DFID Consultant to the Malawi Ministry of Lands, June 2003.

<sup>21</sup> Until the development of the land policy, the roles and responsibilities of chiefs in relation to customary land ownership remained unclear. As a result, conflicts still arise among both primary and formal justice service providers in relation to land issues. The magistrate's courts continue to be reluctant to recognise the jurisdiction of chiefs to hear land-related conflicts. On the other hand, chiefs feel that as custodians of customary land, they should be the ones to resolve land-related conflicts.

<sup>22</sup> During the Zomba traditional leaders' training at the Staff Development Institute (14-25 July 2003), chiefs were divided. Some felt that the consultative process did not give sufficient weight to their views, while another group complained that 'taking away' their capacity to decide on land issues would deprive them of income. Another group of leaders from Rumphu expressed general satisfaction with the proposed Act.

institutional arrangements<sup>23</sup> are put in place to support implementation. These steps would require immense resources, which Malawi does not currently have. In the meantime, primary service providers continue to decide land dispossession cases in an *ad hoc* way.

An interim solution would be for primary justice service providers to ensure that training programmes for traditional leaders take due consideration of the proposed land policy implementation strategies which promote fair inheritance practices among both users and providers of primary justice (through existing CBOs and NGOs). The traditional leaders' training programmes and a course on Land Administration and Land Use Planning<sup>24</sup> address these complex issues.

## 2.4 Political violence

There have been several incidents of political violence that have been responded to by primary justice service providers, including the GTZ-sponsored Forum for Dialogue and Peace.<sup>25</sup> These incidents tend to be linked to elections in the country, in particular national elections, and conflicts often take place when political rallies are held. Primary justice organisations expected political violence to take place during the national elections in 2004.

Much of the political violence in the country is attributed to the fact that non-ruling parties are not always given access to certain areas to hold meetings. There are also reports that traditional leaders have been forced to join specific political parties and to subscribe to those parties' agendas, and are threatened with intimidation and/or dismissal if they do not comply.<sup>26</sup> There have also been allegations of violence and intimidation against opposition political party members. Several faith-based organisations and civil society organisations are involved in the resolution of conflicts arising out of political violence.<sup>27</sup>

## 3 Sources of primary justice protection

As highlighted above, there are several existing sources of primary jus-

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<sup>23</sup> These would need to include District Land Registries, Traditional Land Management Areas, Village Land Committees and Land Tribunals.

<sup>24</sup> Both are supported through the DFID-MaSSAJ programme. See DFID-MaSSAJ Report (n 1 above) Annex M.

<sup>25</sup> GTZ is a programme of the German government for channelling official development assistance. This particular initiative has been very active in the run-up to general elections in the country.

<sup>26</sup> The Schärf Report (n 12 above) noted that the payment of chiefs by the President's office was one of the most unacceptable compromises concerning access to justice in Malawi.

<sup>27</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with CCJP & PAC, Annex E.



tice protection that bode well for the future of primary justice, both as a means of accessing justice at a community level, and promoting greater access to formal justice.

### 3.1 The community

Members of the community, notably marriage counsellors, family, guardians, neighbours and so on, represent the first source of primary justice protection, which is often overlooked by those assessing access to primary justice. The community is where a primary justice complaint is generally first reported, even though the reporting of matters is problematic.<sup>28</sup> In some districts, communities have organised themselves in School Management Committees (SMCs) and Parent Teacher Associations (PTAs), which can provide useful fora in which to raise issues and seek advice, assistance and (if necessary) referrals, particularly on issues affecting children in school.

The latter can be usefully illustrated by the challenges associated with ensuring that Malawian children living in dire poverty attend school. Instead of attending school, poor children are often sent to the grinding mill, or to pick cotton, herd cattle or to perform other activities to support their family.<sup>29</sup> Furthermore, older children are often expected to look after their siblings. Other reasons for not attending school include loss of interest due to the poor quality of education or persistent absence of the teacher 'without genuine reason'.<sup>30</sup> The lack of security in school latrines is also of concern, and can lead to sexual harassment or abuse, especially of girls. Through community participation in school management committees, most of the direct and associated problems concerning school non-attendance can be deliberately confronted and dealt with far more effectively, and sustainably, than through a formal justice structure.

### 3.2 Community-based organisations

Communities have also set up CBOs, although so far they have been overlooked as a source of primary justice protection.<sup>31</sup> Their core activ-

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<sup>28</sup> There are many reasons why people are reluctant to report matters to local primary justice mechanisms or formal justice mechanisms (notably the police). These range from fear that a matter will not be handled impartially, to fear of the consequences (eg, removing an abusive husband from a household where he represents the only source of family income).

<sup>29</sup> This also raises concerns over child labour.

<sup>30</sup> Reasons suggested by school committees include the 'running of businesses' and 'beer drinking'. See DFID-MaSSAJ Report (n 1 above) Annex E, file note on meeting with School Management Committee, Chikwawa.

<sup>31</sup> They were not mentioned in the 1999 Primary Justice Study, were referred to only briefly in the 2002 Schärf report (n 12 above) and were omitted from the list of participants in the February 2003 workshop.

ities tend to be in relief and development (for example, they work in areas such as orphan care, HIV/AIDS and home-based care). However, they have increasingly found themselves handling primary justice issues associated with their core work. Examples include property-grabbing<sup>32</sup> and other land disputes, discrimination against orphans, discrimination against people with HIV/AIDS and other issues where there is dissatisfaction with other local mechanisms, especially chiefs or headmen. Other CBOs include groups of refugees and migrants, as well as groups of disabled persons.<sup>33</sup>

### 3.3 Non-governmental organisations

NGOs working in communities, as opposed to simply advocating on their behalf, have provided a range of important primary justice services to communities. These include training and capacity building to handle primary justice issues, civic education to raise awareness on primary justice issues, advice and assistance to persons with a primary justice complaint, and advocacy on primary justice issues. NGOs that work closely with CBOs have been particularly instrumental in promoting access to primary justice, and helping to facilitate access to formal justice mechanisms in a range of issues, such as labour disputes, property dispossession, discrimination and other areas.

### 3.4 Traditional leaders

Traditional leaders, especially village headmen, traditionally have been a principal source of primary justice, although their reputation and influence within communities is reported to have waned in recent years, resulting in decisions that are not accepted. While acknowledging that considerable problems exist with their role as agents of primary justice, it is nevertheless very important that they not be excluded as a potential source of primary justice protection.<sup>34</sup>

### 3.5 Faith-based organisations

Faith-based organisations, churches and mosques working in communities are actively involved in the same kinds of services and issues as NGOs and CBOs, providing advice or assistance, civic education and human rights advocacy. As with CBOs, they are also frequently overlooked. Faith-based organisations handle numerous primary justice

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<sup>32</sup> An amendment to the Wills and Inheritance Act has actually criminalised this type of conduct.

<sup>33</sup> The disabled are identified as 'most vulnerable' in DFID *Malawi country assistance plan* (2003) 5.

<sup>34</sup> C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in AA An-N'aim (ed) *Cultural transformation and human rights in Africa* (2002).

complaints, including reports of political violence, especially between ruling and opposition party members, but also directed against NGOs. Faith-based organisations have also been called upon to respond to other violent clashes, including incidents associated with growing religious tensions in the country. Complaints of domestic violence, labour disputes, land and property-grabbing, and land encroachment (including the tea estates in Thyolo and Mulanje) have also received attention.<sup>35</sup> A deep understanding of *nkhanza* places primary justice within the mandate of faith-based organisations, especially those that actively follow a social policy doctrine.

### 3.6 Community policing fora and victim support units

Two broad types of community policing were identified during the process of consultation. These were projects that had been introduced by the police to facilitate greater communication and interaction with the public; and projects that had been introduced by the public to demand greater interaction with the police. Examples of the former include numerous initiatives supported by the DFID-MaSSAJ programme, notably the Community Policing Forum and Victim's Support Unit, both operating under the auspices of the (model) Lilongwe Police Station. An example of the latter type is a project run by GTZ-Malawi as part of its Integrated Food Security Programme, which operates in Mulanje District.

Further examples include Natural Resource Committees (NRCs), which were established in Rumphi District to informally police the border zone area of Vwaza and Nyika wildlife parks, and to regulate the harvesting of resources through a permit system. The NRCs are consulting with the Community Policing Forum in Rumphi to develop strategies for co-ordinating their efforts.<sup>36</sup> In addition, many Malawian NGOs, such as the Public Affairs Committee (PAC), have considerable experience in community policing and crime prevention issues.

These initiatives were created to extend the reach of the police and provide structure to unregulated (vigilante) groups that had been formed by communities in response to a marked lack of concern and/or capacity on the part of the police serving especially outlying rural areas.<sup>37</sup> As such, their legitimacy depends on the degree to which the community is meaningfully engaged.

However, these structures face numerous challenges. Firstly, community-policing facilitators are seldom trained in participatory extension

<sup>35</sup> DFID-MaSSAJ Report (n 1 above) Annex E, file note on CCJP.

<sup>36</sup> Interview with Vwaza Park Extension Officer, 21 July 2003.

<sup>37</sup> It was unfortunately beyond the scope of the consultancy's terms of reference to examine the origins and functions of these 'vigilante' groups, even though they are an important source of primary justice.

and facilitation skills, and members are not clear about their exact role and mandate. Secondly, parallel structures exist in some cases, or the village community fails to accept the community policing structure. Thirdly, CBOs have observed that the police supply limited feedback, a situation that creates an information gap, particularly on issues such as bail.

### 3.7 Local government

Local government offers a potential source of primary justice protection through district social welfare officers (especially on matters relating to children). The District Assembly is often approached for assistance, although it lacks the capacity to respond. There has nevertheless been some co-ordination of relief and development activities (including those that focus on primary justice issues) at District Assembly level, through Development and Planning sections. District education officers have also involved themselves in primary justice issues, notably through the support to the SMCs (as explained above).

### 3.8 The Anti-Corruption Bureau

The Anti-Corruption Bureau (ACB)<sup>38</sup> has three regional offices: in Lilongwe, Blantyre and Mzuzu. Most clients access the ACB through correspondence; examples of cases relate to unfair dismissal,<sup>39</sup> cheating in examinations,<sup>40</sup> relief<sup>41</sup> and other justice issues.<sup>42</sup> In some instances the ACB refers written complaints to the appropriate agencies, with the complaint attached. The reason for referring cases is because a case involving, for example, cheating in examinations may involve both a lesser charge (corruption) and a more serious charge (defilement). Corruption would fall under the jurisdiction of the ACB, whereas the latter charge should be referred to the police and Ministry of Education. The ACB requests feedback from the referral agency, and if none is forthcoming, further follow-up is done. A key advantage of the ACB is that all complaints (written and verbal) are reportedly registered and documented.<sup>43</sup>

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<sup>38</sup> Established by the Corrupt Practices Act 18 of 1995.

<sup>39</sup> Eg, allegedly to give a post to someone who has paid a bribe.

<sup>40</sup> Eg, where examination centre supervisors are alleged to demand bribes in cash or sex in exchange for allowing cheating.

<sup>41</sup> Eg, where chiefs are alleged to demand bribes in order to register a household as a beneficiary.

<sup>42</sup> Eg, where traditional leaders are alleged to favour those who have paid a bribe.

<sup>43</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with the Anti-Corruption Bureau, Mr Liwonde (Investigation Officer) and Mrs Phombeya (Corruption Prevention Research and Intelligence Officer), 22 July 2003.

### 3.9 The Malawi Human Rights Commission

The Malawi Human Rights Commission (MHRC)<sup>44</sup> operates from Lilongwe, with most people accessing it through correspondence.<sup>45</sup> Cases brought to the MHRC include labour issues, domestic violence and property dispossession. More serious cases include police brutality, non-compliance with the 48-hour detention rule, delays in hearing the cases of persons detained,<sup>46</sup> religious intolerance and political violence. The MHRC has also received complaints on educational matters, including refusing to allow school children to write examinations.<sup>47</sup>

Cases not within the MHRC's mandate are referred to other institutions. For example, domestic violence issues are referred to the police. The MHRC also conducts public hearings, which the public and the media are encouraged to attend. The rulings of the MHRC are not enforceable.<sup>48</sup>

### 3.10 The Ombudsman

The offices of the Ombudsman<sup>49</sup> are in Blantyre, Lilongwe and Mzuzu. These offices render assistance to those who have complaints against public agents. As with the MHRC and ACB, the Ombudsman is accessed mainly through correspondence.<sup>50</sup> Primary justice issues that have been uncovered in rural communities include widows being cheated out of their husbands' death benefits (including unnecessary delays in processing payment at district level) and workers who wish to retire having the correct information withheld from them.<sup>51</sup>

## 4 Analysis of the primary justice sector in Malawi

'Chiefs believe that these new things are taking away their power.'<sup>52</sup>  
 'In the past, primary justice was with *ankhoswe* and the chiefs . . . Things have

<sup>44</sup> Established by ch XI of the Republic of Malawi (Constitution) Act 20 of 1994.

<sup>45</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with the Malawi Human Rights Commission (MHRC): Mr E Konzakapansi (Deputy Director of Investigations) and Mr H Migochi (Principal Investigations Officer), 22 July 2003.

<sup>46</sup> Persons held on remand make up about 18-25% of the prison population at any given moment. Interview with MaSSAJ Prisons Advisor, June 2003.

<sup>47</sup> File notes on meetings with MHRC (n 46 above).

<sup>48</sup> As above. The Constitution of the Republic of Malawi (n 45 above) states that the MHRC has powers to investigate and make recommendations necessary for the effective promotion of human rights, but does not have judicial or legislative powers.

<sup>49</sup> Established by ch X of the Republic of Malawi (Constitution) Act 20 of 1994.

<sup>50</sup> DFID-MaSSAJ Report (n 1 above); file notes on meeting with the Office of the Ombudsman, Mr A Msosa (Research and Education Officer, Head of Department), 22 July 2003.

<sup>51</sup> Meeting with the Office of the Ombudsman (n 50 above).

<sup>52</sup> Interview with Group Village Headman Vyalema in Rumphid District, 21 July 2003.

changed, customs and traditions have changed . . . you must march with the times!<sup>53</sup>

#### 4.1 Broadening views of primary justice

As mentioned earlier, most studies on primary justice have excluded major components of primary justice, focusing overwhelmingly on normative systems and failing to take into account the complex roles of traditional leaders, CBOs, NGOs, faith-based groups and local government institutions. Primary justice mechanisms tend to be trivialised, and perceived as 'second best' by those working within formal justice structures.<sup>54</sup> This might be broadly reflective of a widely held perception in the donor community (described by Golub as the 'rule of law orthodoxy'),<sup>55</sup> that by enhancing the rule of law, a country will attract (foreign) investment and, consequently, reduce poverty. In fact, as we explain later, in poor countries such as Malawi, the biggest threat to security is theft of crops and livestock.<sup>56</sup>

In most societies, disputes go through a number of stages for potential settlement before formal systems are resorted to. Disputants may first call upon family members, neighbours or faith institutions to try to resolve a problem.<sup>57</sup> In most cases, the primary justice system provides a solution at this level, as it is generally better suited to conflicts between people living in the same community, who will have to live and work together in future.

Locally-based solutions, including interventions by traditional leaders, can be effective forums for resolving disputes for a variety of ways. As Nyamu-Musembi writes, they:<sup>58</sup>

. . . may grant recognition to claims that the formal legal system does not entertain, or moral claims not acknowledged as 'rights' in the formal legal system.

However, Nyamu-Musembi goes on to say that, in the context of primary justice, it is important to be pragmatic:<sup>59</sup>

<sup>53</sup> Interview with JB Makwandire, former District Commissioner, 21 July 2003.

<sup>54</sup> This was a frequently heard observation in our consultations and meetings with magistrates, judges, heads of prison, police station commanders, national government officials and others working within formal structures. Some staff at DFID-MaSSAJ called for a broader understanding of primary justice, while others were more sceptical. Up until our involvement, donor concern had almost exclusively been confined to reinforcing formal justice structures of the courts, police and prisons. Similar sentiments exist with regard to traditional medicine and its relationship with modern medicine; J deGabriele 'When pills don't work — African illnesses, misfortune and *Mdulo*' Christian Engagement with African Cultural Dynamics: Theology Conference at the University of Malawi (1997).

<sup>55</sup> Golub (n 4 above) 7.

<sup>56</sup> This was also the conclusion of NSO-Malawi *Crime and victimisation survey* (2003).

<sup>57</sup> Penal Reform International *Access to justice in sub-Saharan Africa* (2000) 21.

<sup>58</sup> Nyamu-Musembi (n 34 above) 127.

<sup>59</sup> n 58 above, 143.

[A]s long as the reality of poor access to formal judicial institutions . . . persists, people will need some kind of fora to resort to when interpersonal negotiations fail.

It is also generally assumed that people resort to primary justice because of their difficulty with logistical access to the formal system: a lack of money, long distances, and limited resources and capacity on the part of formal justice structures. In fact, formal justice systems are inaccessible for more complex reasons as well, including poor cultural and social access, complex legal procedures, incomprehensible legal jargon and language difficulties. This is compounded by the fact that the language of the court is usually English, with translation generally limited to Chichewa.

#### 4.2 Primary justice and a changing social context

Primary justice is mistakenly perceived by many of those working in the formal system as subservient to the formal system.<sup>60</sup> Primary justice forms part of an ever-changing social context, both operating outside of, and in relation to, formal justice systems. People choose primary justice mechanisms for a variety of reasons, and not only because of their lack of access to the formal system. Like other social constructs, such as culture, custom and tradition, primary justice is dynamic. Underlying the pressure to change is the call by both society at large and affected communities to make primary justice more accessible and more relevant to their needs.

The forces involved in the reshaping of primary justice operate at multiple levels and involve, firstly, changing the social and cultural context. There is considerable fear that primary justice systems will suffer the same fate as the traditional courts, which were abused by the government during the Banda regime.<sup>61</sup> Secondly, laws and human rights issues need to be translated into more accessible language, and placed in an appropriate social and cultural context. (Such a process would involve much more than merely simplifying issues.) Thirdly, conflicts between tradition and modernism are frequent in rural communities in Malawi, especially where members of the younger generation are diverging from their elders' value systems and aspirations. Fourthly, there is a marked loss of confidence in traditional leaders, as a result of allegations of corruption, the deliberate politicisation of chiefs, conflicts of interest, and quasi-judicial conflicts between tradition, customary law, and human rights law.

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<sup>60</sup> Referring to people involved in making policies and drafting laws, Vilakazi is quoted as saying that 'most of them are city people who do not have an idea of what is going on in the rural areas' in B Oomen 'Tradition on the move: Chiefs, democracy and change in rural South Africa' (2000) 6 *NiZA-Cahier*.

<sup>61</sup> In this case, traditional leaders were replaced by party chairmen as leaders of the courts.

Finally, other factors limiting access to justice include a lack of mechanisms for recording decisions,<sup>62</sup> poor knowledge of referral mechanisms (within the primary system itself and between the primary system and the formal system) and an attempt to formalise primary justice mechanisms.<sup>63</sup> The latter, while in some respects understandable, nevertheless threatens to undermine such structures, precisely because they derive their legitimacy from the fact that they are managed and regulated by the communities themselves.

### 4.3 Enhancing access to formal and primary justice

The 2002 Schärf Report,<sup>64</sup> which appraised 'access to justice by the poor' in Malawi, addressed a range of issues that hamper access to formal and primary justice in Malawi. In particular, the report addressed the role that facilitative mechanisms play in enhancing links and access to formal justice, as well as customary (primary justice) fora. While by no means exhaustive,<sup>65</sup> its 330 pages nevertheless represent the single biggest attempt so far to document the current availability of primary justice in Malawi.

Schärf and his colleagues determined that complainants might be unable or unwilling to approach formal and primary justice mechanisms, for reasons ranging from a lack of awareness as to what the most appropriate forum was, to a lack of confidence that these institutions would hear their complaint. They also observed that inadequate legislation existed to harmonise the integration of subordinate and traditional courts,<sup>66</sup> and that this had resulted in several problems, ranging from disputed jurisdiction to simple incompetence.<sup>67</sup>

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<sup>62</sup> The fact that most primary justice providers do not document their cases makes it difficult to measure how many and what kinds of cases are being handled or referred to other agencies. This information has obvious relevance for co-ordination with other providers, as well as monitoring and evaluation.

<sup>63</sup> Eg, the Ministry of Gender and Community Services, which is responsible for monitoring the activities of CBOs, is developing guidelines for their operations.

<sup>64</sup> Schärf *et al* (n 12 above).

<sup>65</sup> In particular, the report did not mention the substantial role played by CBOs or faith-based organisations. It also was unclear about the precise roles and capacities of lower grade magistrates.

<sup>66</sup> There has been no replacement (as provided for in Malawi's 1994 Constitution) for traditional courts. These notorious instruments of the previous government had jurisdiction to try a range of cases, notably those of political opponents, with sweeping sentencing powers, including the capacity to issue the death sentence.

<sup>67</sup> Eg, it was reported that untrained magistrates, together with similarly untrained staff, have been handling a range of issues (not all of which they have jurisdiction over). At best, this has led to case backlogs and a lack of uniformity in decision-making and, at worst, to serious violations of human rights. The issue of the integration of subordinate courts and traditional courts remains a hotly debated and contentious theme.



The report found that little distinction exists between civil and criminal cases decided by customary structures, where the role of the chiefs or village headmen involves a fusion of their governance and judicial powers. The report also observed that the emphasis in these fora is on the harm done and compensation to the victim, with the focus on restorative rather than retributive justice. Being a negotiated process, the standards of establishing facts are handled differently. However, the report also acknowledged that these fora tend to be idealised<sup>68</sup> and that gender issues received scant attention. Furthermore, the allowance paid to chiefs (by the state) was raised as a particular area of concern. It is believed that this seriously undermines the chiefs' impartiality, as well as their availability to serve the poor, who cannot pay for their services.

Chiefs, on the other hand, lament that many matters formerly brought to their attention are now taken directly to the police or magistrates, without any opportunity for them to intervene or provide feedback. The report notes that some chiefs openly disparage *westernised* concepts of justice (for example, community police), which have diminished their own administrative powers. Many demand that they be given back their powers, especially regarding matters of detention and community service. In general, chiefs complain that their subjects often ignore their decisions and advice.<sup>69</sup>

The report also speaks of potential 'jurisdictional conflicts' between primary justice (community) justice systems and formal (state) systems, including interventions by the police, judiciary and other justice mechanisms.<sup>70</sup> A further distinction between the two systems included the criteria for identifying jurisdiction.<sup>71</sup> The report observed that these

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<sup>68</sup> One example of the deficiencies in traditional courts is that instead of the common law standards applied by the formal courts (ie burden of proof or balance of probabilities), customary justice fora regularly apply the principle of 'no smoke without fire'. Such a standard may be appropriate in most civil disputes, but (as explained later) in disputes concerning matters such as sexual harassment, defilement or property-grabbing disputes, it is highly problematic.

<sup>69</sup> Feedback to the authors from facilitators in a workshop entitled 'Traditional Leaders Training Course', held at Mpembe Institute, Malawi, July 2003. The workshop involved traditional leaders from five districts in Malawi (Lilonge, Rumphu, Chikwawa, Zomba and Ntcheu).

<sup>70</sup> It should be noted that many crimes go unreported because the affected community (rightly or wrongly) feels that it is capable of resolving the matter on its own, or because there is simply no access to formal systems. Furthermore, the most common crimes in Malawi are theft of crops and theft of livestock. In view of the fact that most of these crimes are said to have been committed by a relative, a friend or a neighbour, there is indeed internal (family) pressure for the victim not to seek recourse within the formal system; NSO-Malawi (n 56 above).

<sup>71</sup> The first test is to identify where the conflict lies. In most disputes, this will be at the community level, and will therefore initially be addressed as a primary justice issue. The second test is to identify the issue at stake and determine whether it constitutes a civil dispute or a criminal offence. In the case of the former, primary justice mechanisms are often the most appropriate fora, whereas criminal offences are required by law to be reported to formal mechanisms (such as the police).

distinctions are often unclear, depending on the type of complaint involved.<sup>72</sup>

#### 4.4 Avoiding idealisation of traditional dispute-resolution mechanisms

It is important not to idealise traditional dispute-resolution mechanisms.<sup>73</sup> Numerous training programmes notwithstanding, some providers of primary justice (notably chiefs) may not deliver better solutions, for reasons ranging from prejudice (against women and modern practices in general) and allegations of corruption to lack of capacity. Consequently, people are increasingly seeking alternative solutions by approaching other primary justice providers, notably faith-based organisations, CBOs and NGOs.

This can be usefully illustrated by the case of a church and society programme that was established in Mzuzu.<sup>74</sup> It is important to distinguish this kind of programme from an NGO programme. Churches, in fact, refuse government pressure to register and regulate these types of activities under the auspices of an NGO, as they consider justice issues to be part of their ministry. The types of cases the programme handles are interesting from a primary justice point of view; out of 92 cases handled in a 12-month period, 23% involved employment issues, 17% involved complaints about police or courts, 13% involved property-grabbing and inheritance issues and the remaining 13% concerned family and marriage issues.

While the central role of traditional leaders cannot be ignored, a greater awareness of human rights must be indicated by marked changes in behaviour. At the same time, communities ought to be empowered through greater access to information. They should be able to *claim* rights for themselves or rely on the comparative strength of CBOs, NGOs and other independent legal service providers to assist them in claiming their rights.

#### 4.5 Weaknesses in the primary justice delivery sector

While the Schärf report investigated the relationship between custom-

<sup>72</sup> Eg, in juvenile justice cases, (state) district welfare officers ought to be involved from the start as primary justice service providers. Alternatively, a magistrate might more appropriately handle issues such as property grabbing, either in situations where the chief/headman (who ought to be handling such matters impartially) displays obvious bias or favouritism, or where a simple dispute begins to lead to more widespread conflict.

<sup>73</sup> DFID *Safety, security and accessible justice: Putting policy into practice* (2000) 65 notes that stereotypes that either idealise or demonise traditional justice systems can be countered by solid empirical information. Vaughan (n 14 above) 8 rightly observes that 'people everywhere have an astounding tendency to romanticise the past'.

<sup>74</sup> Other church programmes deal with similar issues, but documentation is not always easy to come by.

ary legal systems and formal justice structures, its brief did not include a comprehensive examination of the numerous other primary justice actors. As we concluded in our consultations with organisations in June and July of 2003, there is a lack of co-ordination between providers, lack of confidence in justice providers across the spectrum, and a lack of legal knowledge, especially on the part of primary justice service providers. These factors compound the problems already described above, such as the lack of mechanisms to record decisions and refer matters appropriately.

Where co-ordination does exist (for example, in the areas of relief assistance and development), issues of primary justice are rarely taken into account. Primary justice activities that do take place are often carried out in isolation from other similar initiatives, with the inevitable consequences of duplication of efforts, competition for limited resources and/or not learning from each other's experiences. Co-ordination, however, is no easy task.

Compounding these challenges is a lack of confidence in both primary justice agencies and the formal justice system. This lack of confidence has several sources, including fear or experience of bias, intimidation, and lack of concern on the part of the primary justice provider or decision-making mechanism. Further, lack of legal knowledge among primary justice service providers means that they are not always aware of sources of legal protection. Finally, several members of the judiciary have acknowledged that there is a poor flow of information from the formal system to primary justice systems.

#### 4.6 Strengths in the primary justice delivery sector

In spite of the flaws listed above, primary justice fora have much to offer in Malawi. First and foremost, they are located within the cultural context of the community. This means that they are accessible at an intellectual and emotional level, as they are based on shared values and meanings, as well as language and procedures.<sup>75</sup> Such fora are also accessible because of their physical proximity to poor people, who have little time or money to waste. Because it is rooted in communities, primary justice delivery in Malawi can lead to the restoration of social harmony. However, it is important not to idealise the process, as the preservation of social harmony can sometimes lead to serious injustices and human rights abuses.<sup>76</sup>

<sup>75</sup> The strengths of primary justice structures have been observed by Nyamu-Musembi (n 34 above) 127, who argues that such fora are enhanced by their affordability, the fact that they are in constant motion (ie a constant state of change), that they recognise people as agents of cultural transformation, and 'may grant recognition to claims that the formal legal system does not entertain'.

<sup>76</sup> Eg, in cases where a schoolgirl is made pregnant by her teacher, the parents may drop the charge if the teacher decides to 'marry' the girl, notwithstanding Ministry of Education policy.

A key strategy for enhancing the effectiveness of primary justice structures might be to train leaders and other persons in positions of power in human rights awareness and alternative dispute-resolution mechanisms. However, it is not enough to train only the powerful. It is also essential to educate the powerless to act and to demand justice on their own behalf. In this sense, broadening access to justice and widening the range of options available to the poor might well put pressure on traditional leaders to improve their service delivery.

## 5 Social and cultural context

Culture and tradition<sup>77</sup> play a significant part in the construction and implementation of primary justice systems. Society's understanding of what is just and unjust is culturally conditioned and is determined by context and time. For example, a woman might initially consider being beaten by her husband as something normal and nothing to complain about, but might change this view after becoming aware of her rights. A custom such as inheritance can also take on new meaning. What was once considered an obligation to look after a widow and her children is now considered a right to the widow's property. Even adapting customs to suit modern times can cause problems. For example, the payment of *lobola* (so-called bride-price) in instalments has apparently contributed to the fragility of marriages in the north of Malawi.<sup>78</sup>

The impact of culture and tradition on primary justice also differs according to the nature and perspective of the service delivery organisation. For example, if we consider defilement (sex with a minor) of a schoolgirl by a teacher, responses differ dramatically. According to the formal justice system, this would constitute a serious crime, which in Malawi carries the possibility of a capital sentence. In the primary justice system, various stakeholders might respond very differently. The church might see the matter as a sin, an NGO might see it as an abuse of human rights, the affected parents might consider it to be a form of corruption, and a traditional leader might contend that nothing was wrong, countering 'That's normal, just marry the girl'.

This dynamism within the culture naturally creates tension between *progressives* (also known as modernists) and *traditionalists*. In the case of primary justice, the domain of *nkhanza* has expanded to address issues such as lack of love between spouses, lack of care, and the practice of

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<sup>77</sup> Culture in this sense is described as learnt social behaviour, as well as learnt ways of interpreting events and constructing social reality. Tradition means quite literally handing down (eg, customs or rituals). Customs are modes of behaviour that are handed on, but which may take on new meanings as circumstances change.

<sup>78</sup> It was reported by Catholic Commission on Justice and Peace (CCJP) in Malawi that only 10% of marriages in Rumphu District are monogamous. DFID-MaSSAJ Report (n 1 above), Annex E. This obviously has serious implications for the spread of HIV/AIDS.

traditions that would have been considered as *normal* only a few years ago, but which through the emergence of human rights and civic education<sup>79</sup> are increasingly being challenged. The root of these injustices can be described both as stemming from the failure to follow traditions, and as a result of following outdated practices.

Primary justice, therefore, provides a potential means of solving ordinary people's conflicts, particularly for those with restricted access to formal justice. However, access needs to be improved to serve particularly vulnerable groups, including (but by no means limited to) children in school, children in conflict with the law, orphans and widows, women and those living with HIV/AIDS.

Furthermore, the capacity and relevance of formal justice agencies are enhanced by primary justice interventions. The police service benefits from the active participation of communities in community-policing fora and victim support units.<sup>80</sup> The prison service benefits from primary justice service providers through their enhancement of the administration<sup>81</sup> of community service orders and involvement of the community in prison lay visitors schemes, while the judiciary benefits through broadening participation in the Court Users' Committees.<sup>82</sup>

## 6 Building on existing initiatives

In designing appropriate primary justice interventions, rather than initiating new activities, it is important to build on what already exists. As we discovered during our consultation process, there are numerous existing (and incipient) initiatives where primary justice can be supported and strengthened. Some of the principal structures included Community Policing Fora, Court Users' Committees, Traditional Leaders' Training and School Management Committees. Other structures that showed potential for implementing primary justice included Com-

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<sup>79</sup> Two of the most important initiatives in Malawi are the NGOs Malawi Centre for Advice and Education on Rights (CAREER) and National Initiative for Civic Education (NICE).

<sup>80</sup> These play a valuable role in addressing the anxieties that people have about approaching the police.

<sup>81</sup> Here we refer to the role of CBOs in particular in (i) identifying relevant subjects and development target areas for the implementation of community service; (ii) providing relevant information for the community service report; and (iii) promoting community awareness about the purpose of community service orders. Similar comparisons can be made with rural South Africa; J Handmaker 'Legal and socio-economic difficulties associated with the introduction of community service orders in southern Africa (with particular reference to Transkei)', unpublished LLM dissertation (1993).

<sup>82</sup> Participation in Court Users' Committees remains erratic, with limited participation from non-state agencies, which are well placed to offer perspectives on primary justice and relevant information for social enquiry reports.

munity Service Structures and Prison Lay Visitors Schemes. Finally, we observed that supporting good co-ordination between local government, faith-based organisations, NGOs and CBOs can prove critical to the success of primary justice schemes.<sup>83</sup>

It must also be stressed that these kinds of primary justice interventions should not deliberately undermine the roles of traditional leaders, but rather seek to hold them more accountable. This could be done by evaluating the impact of traditional leaders' training, evaluating training course materials and informing people of their rights. Nor should such interventions undermine efforts by the district assembly and district social welfare; rather, they should build on existing relationships.

Such interventions can strengthen the role of magistrates by providing a link with the community, as well as information on primary justice issues through Court Users' Committees and Juvenile Justice Fora. The prison service can also be strengthened by efforts to alleviate overcrowding through the promotion of community service and/or limited release mechanisms, as well as participation in emerging lay visitors schemes.

In short, broadening access through primary justice interventions allows people to 'shop for justice',<sup>84</sup> without undermining formal justice systems. Such interventions are driven (and measured) by the extent to which they meet the demands of civil society for accessible justice, through participatory development methodologies.

## 7 Conclusion: Legal empowerment

As we have tried to illustrate in this article, a broader understanding of primary justice is needed, especially on the part of donor agencies seeking to enhance these structures through direct interventions. What donors have so far been missing in developing appropriate interventions are more recent, country-specific sociological analyses of existing primary justice mechanisms that engage with communities through participatory methodologies. This particular study represents an attempt to address this gap, though caution must be taken; our study refers to a specific programme in a particular socio-economic and political context. Therefore it cannot be seen as a model simply

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<sup>83</sup> Depending on the conditions in a particular district, this will involve identifying key stakeholders, existing primary justice activities and areas for potential feedback and follow-up. The latter might include capacity building, applied participatory research and participatory monitoring and evaluation. In some districts, organisations are already well co-ordinated on relief and development activities, but co-ordination on primary justice issues might remain elusive. In order to promote better co-operation between stakeholders, at this level (ie as an emerging service), it will be necessary to identify why this is so.

<sup>84</sup> Penal Reform International (n 57 above) 167.

to duplicate elsewhere, without engaging in a further study using participatory methodologies that engage with community structures.

What we concluded in our study is that primary justice is a useful concept, being the principal means by which people resolve disputes, address issues and access justice within their own social and cultural context, using their own resources. It enables communities to take control of their own lives and is closely related to poverty alleviation.

Primary justice involves, first and foremost, enhancing access to justice by Malawian individuals, families, groups or communities. It also principally affects the poor, since in most cases a person's resources will determine whether or not they have access to formal justice systems.<sup>85</sup>

Secondly, primary justice tends to focus more closely on the process that is followed than the strict letter of the law. Most primary justice issues will in fact never reach the formal justice authorities (the police, judiciary and prison system). As it is rooted in community structures, the language of dispute resolution is generally more relaxed and relevant to primary justice issues and the majority of Malawian citizens.

Thirdly, primary justice aims to enhance the capacity of facilitative mechanisms or sources of primary justice — civic organisations, district officials, traditional leaders, faith-based organisations and others — to provide access to justice at community level, and ensure better access to formal justice.

As primary justice is in fact based on a far broader range of stakeholders than traditionally has been assumed, an alternative to the 'dominant paradigm' of the rule of law orthodoxy could be Golub's 'legal empowerment alternative'. Such an approach would focus more on the *underlying reasons* why people lack access to justice, rather than on the under-resourced and inefficient institutions that struggle to provide formal justice. In particular, a legal empowerment approach would recognise the 'central role' of civil society and form part and parcel of a broader policy of poverty alleviation.<sup>86</sup>

Finally, while formal justice systems stand to benefit from a strengthened primary justice system, it should be emphasised that the primary system exists autonomously, having arisen to meet the needs of the community. It does not exist simply because of flaws in the formal system of justice delivery. Primary justice is where most access to justice issues arise, and where they are resolved. By recognising the wide range of organisations involved in providing primary justice and supporting them, access to justice can be broadened and strengthened for ordinary Malawians, thus responding to their concerns and promoting social change.

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<sup>85</sup> Eg, rather than relying on the police, wealthier citizens can hire private security agencies to protect their interests. They are also able to hire lawyers to represent their interests.

<sup>86</sup> See Golub (n 4 above) 27-29.