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

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GLOSSARY OF TERMS AND ACRONYMS

ADMARC	Agricultural Development and Marketing Cooperation
CCAP	Church of Central African Presbyterian
CJF	Customary Justice Forum
DC	District Commissioner
DCHR	Danish Centre for Human Rights
DFID	Department for International Development
ESCOM	Electricity Supply Commission of Malawi
GVH	Group Village Headman
IOD	International Organisational Development
ISS	Institute for Security Studies
Malawi CARER	Malawi Centre for Advice, Research and Education on Rights
MCP	Malawi Congress Party
MHRRC	Malawi Human Rights Resource Centre
MNCPS	Malawi National Crime Prevention Strategy
MaSSAJ	Malawi Safety, Security and Access to Justice
MASSAF	Malawi Social Action Fund
MPRSP	Malawi Poverty Reduction Strategy Paper
NDI	National Democratic Institute
PC	Paramount Chief
PAC/NICE	Public Affairs Committee/ National Initiative for Civic Education
RC	Roman Catholic
SC	Senior Chief
TA OR T/A	Traditional Authorities

TRANSFORM	Through Rights to Needs for Marginalised Malawians
UDF	United Democratic Front
VDC	Village Development Committees
VH	Village Headman
WLSA-Malawi	Women and Law in Southern Africa- Malawi Chapter

EXECUTIVE SUMMARY

The Context of This Study

Malawi is a country attempting to cope with the challenges of consolidating the strutures and processes of democratic rule. That is a mammoth and daunting undertaking in a resources-deprived country. The focus of this study is access to justice for the poor people of Malawi. And when we say access to justice we mean access to both the (non-state) customary system of justice (applied by the customary justice forums of traditional leaders) and the state's justice system. The study examines the lived reality of poor people when they need to have their problems dealt with by institutions outside their immediate family.

Access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives. Other issues affecting access are distance, values, lay or professional decision-makers, accountability of court functionaries (in both systems).

Justice does not take place in a social or political vacuum. It is deeply affected by the difficulties of daily survival, seeing that desperation strategies may be adopted by people who have run out of legal options. Poverty and food insecurity create the environment for social conflict and crime. Access to land therefore becomes a topic of high tension and competition, which in turn impacts on the social fabric within rural villages and settlements as well as on the coping ability of the formal justice system. Food insecurity can also put strain on gender and family relationships, making vulnerable sectors of society even more vulnerable.

It is therefore imperative that justice strives to adjust to people's realities otherwise they will create extra-state institutions and remedies for their imemdiate needs.

The results of this study are aimed at assisting the Malawi Law Commission in its project on the structure of the courts. But we hope that the rich information gathered in this research process will also be of relevance in deciding how customary and state institutions could work in closer harmony for the benefit of poor Malawians.

An expansion of the key findings of the report follows.

THE SUBORDINATE COURTS

History and critique of the functioning of subordinate courts post 1994

The report provides a synopsis of the history of the subordinate courts culminating in the 1994/1995 reforms that saw the abolition of the regional Traditional Courts and the National Traditional Appeal Courts and the integration of all the lower level Traditional Courts into the Judiciary pursuant to section 204 of the Constitution of Malawi of 1995.

The integration process has been severely criticised on grounds that it was not carefully thought through and has created more problems than it intended to solve. Some of the major criticisms are:

- There was no legislation to harmonise the integration process. Consequently, it created uncertainty on the part of the litigants as to which court had jurisdiction over cases formerly handled by traditional courts.
- Practically traditional courts were abolished without replacing them as envisaged by section 103 of the Constitution.
- The implementers of the integration process misunderstood the effect of the transitional provisions of the Constitution. Consequently, the integration process wrongly assumed that the 1994 Constitution had abolished traditional courts, when in fact the spirit of the constitution was that these courts be preserved.
- There is disagreement on the bench as to whether there was any legislative mandate to implement the integration process.
- Similarly, the wholesale incorporation of untrained and incompetent traditional courts staff into the judiciary has raised serious problems for the rule of law and judicial competence.
- The abolition of traditional courts created a serious backlog of cases and brought a heavy strain on the already limited resources of the judiciary. This problem in turn resulted into the inefficiency of the judiciary generally.

Subordinate Courts have no appellate jurisdiction although on paper there is provision for an intermediate appeal court namely the District Civil Appeal Court which shall hear appeals from the Third and Fourth Grade Magistrate Courts. During our research we did not come across such a court and its existencewas unknown to any of the magistrates in the four research areas. Even a Resident Magistrate could not elaborate how this court would operate. Consequently, all appeals from all subordinate courts lie to the High Court. However, the study revealed that the civil appeal system does have serious problems in practice. It was observed that it takes too long to process records for appeal and it takes even longer to get feedback from the High Court. Most Magistrates claimed that they were not receiving any feedback from the High Court on civil appeals, due to the fact that most civil appeals were not even being heard. Consequently, they had serious doubts as to the usefulness of the appellate process. The delays in the process are attributed to stationery and communication problems and the fact that the High Court is clogged with its own backlog of civil and criminal cases. Some rural magistrates complained about unnecessary bottlenecks within the system, in that their mail had to go through the First Grade Magistrate. They claimed that this occasioned serious delays within the system because some First Grades Magistrates do not take the work of peripheral magistrates seriously.

The discontinuance of traditional courts has given rise to serious controversies as to whether magistrates can handle all the matters those courts used to handle. The integration process created a vacuum in the administration of customary law since most of the cases these courts used to handle did not ordinarily fall within the jurisdiction of magistrate courts. This was due to the fact that section 39(2) of the Courts Act specifically provided that magistrate courts had no jurisdiction over cases involving, title and ownership of land, injunctions, guardianship or custody of children, dissolution of marriages and declarations. The fusion of courts resulted into the unfortunate situation whereby courts which were closest to the people were left with no jurisdiction to handle the bulk of cases that concern them. They had to go to the expensive and inaccessible High Court to seek relief. Consequently, most of courts ignored the law and continued operating the way they used to operate in the past. Some of them even reported handling chieftaincy disputes when they are not entitled to do so. Parliament tried to rectify this problem by amending section 39(2) to extend the jurisdiction of magistrates to customary divorces and custody of children under customary law. This means that Magistrates have jurisdiction over customary law matrimonial cases and guardianship and custody cases. Unfortunately, they do not seem to be aware of the existence of these provisions. This was evidenced by the fact that most of the respondent could not provide any legal basis for their jurisdiction over customary marriages. Some, however, claimed to have seen a High Court ruling to that effect. None of the respondents knew that the law authorised them to assume jurisdiction over custody matters. Some magistrates argued that they had no authority to make custody orders unless the order was consequential to divorce. Others claimed that they inherited jurisdiction in matters of custody from traditional courts.

Similarly, the study revealed that there is no uniformity in terms of how the subordinate courts handle land matters. The following broad approaches however can be highlighted:

- Some magistrates believe that they have no jurisdiction over such matters, hence they transfer such cases to the High Court or refer them to the District Commissioner/Traditional leaders.
- Although they realise that they have no jurisdiction over land ownership matters, some magistrates are compelled by circumstances to handle such matters. This is especially so because sometimes they are closely linked with cases of trespass and encroachment. Some even illegally assumed jurisdiction because they felt that referring such matters to the High Court was a waste of time considering that the High Court took too long to hear the matters.
- Some former traditional court chairmen continue operating the way they used to operate in the past hence they preside over these claims as they used to do. Some of them even felt that the parties had no right to question their jurisdiction.

The other uncertainty that has resulted from integration is whether magistrates can handle matters of customary law other than those arising within their locality. This uncertainty arises from the fact that the courts that preceded the magistrate courts could only exercise the jurisdiction which was conferred upon them and only within the area specified within its warrant. Further still Traditional Courts would only apply customary law prevailing in the area of their jurisdiction. This therefore meant that traditional courts would only apply customs from within their locality and would

preside over persons who were governed by the law of the same. The question that arises therefore is whether the magistrate courts, which have succeeded them, should only apply customary laws of the area of the courts locality.

The study revealed that there are two major approaches to this issue:

- The first group of magistrates restricts its jurisdiction to customary issues arising from within the place of the locality of the court. Consequently, they do not deal with issues which would entail application of the laws of a different locality. They would for example only dissolve marriages celebrated according to the law of the area where the court is located. In practice, former traditional court chairpersons, who normally operate the way they were operating in the old system, mainly adopt this approach.
- The other group links the issue of choice of law to the question of jurisdiction. Their argument is that since section 35 of the Courts Act gives them territorial jurisdiction, they are perfectly entitled to handle any matter under any law. "In essence, this section authorises a Magistrate court to exercise its jurisdiction in any part of the country," so long it is properly constituted and the trial regularly conducted. The only thing they do is to ascertain the customary law of the parties that come before them. Consequently, they exercise jurisdiction over every customary law issue regardless of whether it is an issue of custom applicable to the area of the court's jurisdiction. In practice this approach is, primarily, adopted by urban magistrates.

It should be noted that the first approach is not good from the access to justice point of view because it restricts the resolution of customary disputes to matters and parties governed by the law of the locality. This means that people who are not governed by local customs are left without remedy. However, its major advantage is that courts only administer laws, which they are most familiar with. The second approach works well in urban areas where people from different backgrounds and different customs reside, except that it requires sound grounding of internal conflicts of laws.

The High Court has general supervisory powers of revision over all subordinate courts in civil and criminal matters. In practice the supervisory powers of the High Court are usually exercised after the determination of the matter. All the Magistrates are required to file their case returns every month. The case returns are supposed to show how many matters went before the magistrate in that month, a clear breakdown between civil and criminal cases, specific charges or causes of action and the final order of the court. These case returns are forwarded to the High Court, which may call for the record of a particular matter upon noticing any irregularities. Case returns from the lay magistrates are initially considered by the Resident Magistrate. The Magistrate is required to note any errors or irregularities he/she comes across and forward the file to the High Court. The Resident Magistrate Court is also required to send the correction note to the lay magistrate.

However, due to financial constraints and other problems within the system generally case returns are neither filed nor forwarded to the High Court. It is also not uncommon for the High Court to review a sentence in criminal cases long after the convict completes serving his sentence. Worse still, some magistrates even claimed that they do not get feedback from the High Court on cases they were forwarding up

the ladder for consideration. Others said they did receive feedback but not regularly. Others attributed delays in the system to the fact that some first grade magistrates were in the habit of opening their correspondences before forwarding the same to them.

Some magistrates were even worried about the quality of confirmation. This is due to the fact some judges who review the cases are not in tune with the current legal developments. Further still, most of the comments that are sent to the lower courts upon review are too brief to provide useful guidance to the magistrates. Even though the judges sometimes give reasons for reversing magistrate sentences, these judgements take years to reach the magistrates.

In practice the minimum supervision that is available is restricted to criminal cases. There is very little supervision, if any, as regards civil case despite the fact that the High Court powers of supervision in both civil and criminal cases. Consequently, great injustices are occasioned in civil proceedings. Some Resident Magistrates justified this anomaly on the basis that, unlike the Criminal Procedure and Evidence Code, the Subordinate Court rules do not lay down clear rules of supervision in civil cases. As a result serious procedural irregularities go unchecked in most magistrate courts.

Additionally, most magistrates claimed that they did not regularly receive general guidance from the High Court on changes of procedure and how to handle civil cases let alone customary law matters. More specifically, all the magistrates claimed that they did not receive sufficient practice guidance and orientation from the High Court on how to handle matters, which were formerly handled by traditional courts. Some claimed that the Chief Justice advised them that it would not be easy to come up with uniform customary law procedure considering the diversity of Malawian customs. Magistrates from the former Traditional Courts also observed that they were informed that they would start recording their own proceedings in English without being properly instructed as to how this was going to be done.

The above notwithstanding, the magistrates noted that they have, on rare occasions, received directions from the High Court on several issues including: the handling of third party money and small claims procedures. Remote magistrates, however, observed that updates from the High Court take long to reach them because they go through the First Grade Magistrate.

Similarly, senior Magistrates rarely visit their junior counterparts. The study revealed that most remote court magistrates had never been visited by any senior. However, some indicated having been visited by first grade magistrates albeit on rare occasions. This was confirmed by the Chief Resident Magistrates who said they do not visit the lower magistrates on a regular basis because of lack of funds and transport and time constraints.

Finally, Section 361 of the Criminal Procedure and Evidence Code gives power to a Resident Magistrate to call for and examine the record of any criminal proceedings before inferior magistrate courts for the purpose of satisfying himself/herself as to the

legality or correctness of any finding. The magistrate may, where he notices anything irregular make remarks on the file and forward it to the High Court.

However, the above provisions do not make it mandatory for the Resident Magistrates to call for files from the lower level courts. Indeed higher courts rarely call for files from lower courts, unless it is by way of confirmation. Additionally, the lay magistrates do not exercise supervisory powers over each other. Junior Magistrates are left mostly to their own devices. Consequently most of the irregularities in lower level courts remain unchecked.

Findings related to access to justice in the subordinate courts

This study revealed that the general state of access to justice in Malawi is not flattering. More specifically the field data indicates that there is limited access to quality justice for the rural poor and that the range of services that are delivered in remote areas is severely limited. From an access to justice point of view the critical areas of concern are as follows:

Access to popular education about laws and systems

Rural courts, in the absence of NGO's and legal representatives, are the best-placed institutions to provide litigants with an understanding of their legal rights,the appropriate means of resolving disputes and how to progress with their cases. In this regards it is necessary for court officials to routinely take the lead in providing popular education about laws and systems in the short term.

The study revealed that, despite their claims, most magistrates rarely seize the opportunities they have to educate people about the relationship between local customs and human rights. Even where they condemn the actions of the parties they rarely refer to human rights notions and the Constitution to support their condemnation.

Access to affordable advice and representation

The Malawi legal system leaves many without access to legal advice and representation.

Consequently, for many would-be applicants the initial hurdle on the way to courts is finding appropriate legal advice.

This study found that the Clerk of Court is the first point of contact between the litigant and the formal legal system. The duties of a clerk include preparing summons, warrants, acting as official interpreter and keeping records of proceedings. Since most of the litigants are unrepresented they get legal advice from the court clerks who are ill trained and under-qualified to perform the role of counsel. Indeed, most of these clerks are elevated court messengers who have never had any training in clerical work. The procedure in lower level magistrates is that the complainant does not have to lodge pleadings with the court clerk, s/he simply makes an oral statement to the clerk who determines whether the statement discloses a civil cause of action or a criminal offence. This has the advantage of speed and simplicity. However, the fact that the Clerks are ill-trained and lack the requisite qualifications to perform this task

leads to serious miscarriages of justice. This is partly a result of the fact that correct points of law are not timeously raised or raised at all. Consequently, magistrates operate on incorrect assumptions of the law.

Indeed some of the defendants do not know whether to file a defence despite the fact that some of them have good defences. Further still, the untrained clerks are not the best-placed persons to give advice on the collection and evaluation of evidence since they lack the requisite expertise to do so. The untrained Clerk is extremely powerful and a dangerous obstacle to access to justice. This study revealed that Clerks more often than not mislead the parties and even the court. This is due to the fact that most of them fail to solicit sufficient information from the litigant to establish the cause of action. This leads to serious miscarriages of justice.

But what if both parties need advice? Is it appropriate for the same person to advise the parties about their litigation strategy? The idea of paralegals at courts become an attractive option in this regard.

The judiciary must respond to the needs of the citizenry by providing court-based advice and assistance to the litigants. There is also the need to provide specialist training to law clerks. These can then double as advisers who can then help the litigants on how to progress with their cases. Provision of appropriate help to the litigant will result in better and more efficient use of court resources.

Access to courts

The constitution demands that Malawians should be given unimpeded access to court and this right is basic. However, the findings of this study are that there is limited access to courts in the rural areas and that the courts which are closest to the poor are poorly resourced, poorly managed and offer a limited range of services. It was also observed that most remote courts operate at the pleasure of the magistrate, who is in most cases hardly there to hear cases. Additionally, it was discovered that the further away from the urban, peri-urban setting the less the people use the subordinate courts, despite the population density. This is attributed to several factors including:

- the fact that magistrates in remote areas are largely unsupervised and operate independently, consequently they are rarely available to hear cases and even chose what type of cases to specialise in.
- Lack of legal awareness on the part of the community so that they do not know which cases to bring to the attention of the court. They do not regard the court as relevant to their needs.
- Lack of support services for example paralegal, police and prosecutors who can generate work for magistrates
- Lack of trust of the communities in those institutions.

Geographical inaccesiblity

The greatest major obstacle to access to the 'formal' system is the physical inaccessibility. One of the major findings of this study was that most of the lower level magistrates close to the people in rural areas are currently not operational. Those that are operational have severely limited jurisdiction due to the fact that the structure of the court and deployment of magistrates is not pro-poor. Most of the courts with sufficient jurisdiction are centralised in district headquarters and most magistrates

refuse to be deployed to rural areas. Poor people, consequently, have to travel long distances in order to access courts in the nearest growth centre. Even those with courts within their vicinity have to travel long distances to district centres to access courts with ample jurisdiction.

The road network in the rural areas is so poor or sometimes non-existent. Consequently, most people in the rural areas have no, or very limited access to public transport. As a result they have to walk on average 6-8 hours to access the nearest court. The only fortunate people are those who can afford bicycles. Parties also spend a lot of money paying transport costs of their witnesses.

Magistrates are, in theory, supposed to make use of circuit sessions in order to alleviate this problem. However, Magistrates hardly go on circuit because of lack of transport and public funding and accommodation. Those who take their own initiative to travel are not financially supported by the system. Moreover, it is not easy to travel to some areas because they are inaccessible by public transport.

Magistrates observed that it is not uncommon for parties to stop coming to court in the middle of their cases because of the distances. As a result of loss of trust and confidence in the system people turn to vigilantism because there is no structure to manage some of their conflicts. In some areas there have been reports of police and community police officers acting as judicial officers. The study also revealed that this problem even affects rural police officers who walk long distances with handcuffed suspects. It is submitted that this raises problems of respect for human dignity.

This study also established that the distinction between the First and Second Grade Magistrates was essentially cosmetic and status based, it is neither based on qualifications nor competence. Most of the Second Grade Magistrates have the same qualifications as their First Grade counterparts and sometimes, even better. A perusal of the records revealed that most second grade magistrates were far more competent and progressive than their first grade counterparts. Ironically there have more limited jurisdiction than the First Grade Magistrates despite the fact that they are based in localities that are more accessible to the poor.

Most magistrates believed that the cosmetic distinction between the first and second grade Magistrate did not make any practical sense or at any rate work to interest of the poor. They, therefore, recommended the abolition of this distinction. This would increase the number of first grade Magistrates and would make justice more accessible to the rural poor. Some magistrates felt that since this would have serious cost implications for government, in that the Government would have to recruit more police and prosecutors, a needs assessment exercise needed to be done to determine areas which required First Grade Magistrates.

Access to fair laws, in particular customary law

Since 1995 in that the bulk of customary cases has been left in the hands of lower level magistrates, who require very little training in law to qualify for appointment to these courts. Consequently, they do not possess skills to develop customary law jurisprudence. Worse still the traditional court chairmen have been integrated into the

judiciary and continue handling customary law cases unsupervised, using a language they are not comfortable with. Moreover the customary law that the magistrates apply is not genuine customary law, it is an unrefined concoction of notions of custom and the common law.

The very nature of customary law itself, unwritten, flexible and changing in response to new conditions and attitudes means that it is prone to being misrepresented. In Malawian courts this problem is aggravated by the fact that magistrates have never had academic orientation to customary law except in the context of family law. This therefore begs the question of whether the customary law that is applicable in these courts is authentic.

A perusal of the principles of customary law leads to the conclusion that the safest way to ascertain customary law is through the calling of witnesses and assessors to attend the proceedings.

This study revealed the following:

- Most of the magistrates do not come from a culture that is similar to the place they work. Even those who came from a culture similar to that from the place where they were based would sometimes be faced with the challenge of applying alien laws.
- Magistrates did not adopt a uniform approach to the ascertainment and application of customary law. Each magistrate was largely left to his/her own devices. More specifically, they adopted the following approaches to proving customary law:

  -The first category claimed that they summoned local Chiefs, Village Headmen, Group Village Headmen, ankhoswe or family elders to enlighten them on the customary law of the area.

  -The majority would consult staff members who were conversant with local customs to guide them. These would include; fellow magistrates, court clerks, court messengers/marshals. These people would normally be consulted out of the courtroom.

  -The former traditional court chairpersons claimed that they do not consult traditional leaders, either because they had lived in the area long enough or they came from the area of the courts' jurisdiction, hence they had a fair understanding of the local customs. They also observed that they could only consider calling elders in complex cases. It should be noted that magistrates operate on the dangerous assumption that in traditional courts, custom was assumed to be 'in the breast of the local justices'. One magistrate observed that, apart from summoning elders to court, she learns customary law through her interaction with chiefs and village elders during civic education outreaches.

The study revealed that there was growing interest towards recording or restating customary law in written form..

Finally, the study also revealed that there is growing opinion in favour of the introduction of assessors in magistrate courts to assist magistrates in the resolution of complex customary law questions. This was on the basis of the fact that assessors

were more conversant with local customs, hence they would provide useful guidance to the magistrates.

Procedural issues

Poor people in Malawi generally have low levels of education, if they are to access courts the procedures must be simple. Lack of education disables people from using the court. Complex procedures not appropriate for the needs of the poor. These procedures make it more difficult for the poor and the less enlightened to challenge their wealthier and more enlightened opponents who more often than not have a tactical advantage over them. The challenge of this project was, therefore, to find out whether in practice the conventional civil and criminal procedure was appropriate for the lower court and for the needs of the poor. It was also to find out how parties of limited means and education can be helped to be able to conduct litigation on a more equal footing.

The study found that even though procedures in lower courts are relatively simple they still prove to be too complicated for the poor and uneducated. More specifically, the procedures are formal and ape common law procedures. They also adopt a rather technical impersonal approach as opposed to the common sense approach, which is more suitable for lay people. The study found that the magistrates play too passive a role in the proceedings which is not appropriate in a situation where most of the parties are unrepresented. Consequently, unlike in complaints to the traditional forums, it is very difficult indeed for persons without legal representation to use the existing court procedures.

When called upon to evaluate the procedure in their courts all the recently trained Magistrates interviewed noted that the procedure applicable in the courts was too complicated for most people. They noted that most of the litigants did not appreciate the importance of cross-examination. Magistrates claim that they try to mitigate the problem by clearly explaining the procedure to the litigant.

Even though the magistrate we observed did not adopt a uniform approach to procedure, it was clear that all of them were driven by one consideration namely, the need to be seen to be impartial. This originates from the common law tradition where a judicial officer is not expected to descend onto the arena but remain aloof and passive. This, however, proceeds on the assumption that the parties before the court are evenly matched, and that both of them are able adversaries. The reality in the Malawian situation is, as it has repeatedly been observed different. The majority of the litigants are unsophisticated, uneducated and unrepresented. In this situation a magistrate needs to adopt a more proactive role to defend the rights of the weak. The role of the magistrate in such cases is to assist the parties in their pursuit to ascertain the truth. One needs to reconcile the needs to maintain fairness and impartiality with the need to protect the rights and interests of particular litigants.

Unfortunately this is not the case with an average Malawian magistrate. Trial observations revealed to us that most litigants fail to present their cases because of the complexity of procedure. The litigants go through court sessions unprepared and unguided. The system is too formal and oppressive. The atmosphere in court is intimidating especially for people who come for the first time. Worse still,

unsophisticated persons are often confronted with this unfriendly environment without representation and are called upon to examine, cross-examine and re-examine witnesses.

However, some magistrates claimed that that the procedure is relatively simple and at any rate they endeavour to simplify the procedure by clearly explaining it to the litigant. Trial observations, on the contrary, revealed that litigants miserably failed to conduct their cases even where magistrates explained the procedure to them. This seriously affects the delivery of justice.

The other worrying thing is that Magistrates have sometimes used failure to cross-examine as an indicator for liability.

Similarly, the Chief Resident Magistrate (East) noted that the current civil procedure was too technical for an average lay magistrate. Consequently, most magistrates handled civil cases as if they were criminal cases. He further noted that the process was wrong from inception in that the clerks who draft claims do not understand the procedure and have no skill to formulate proper civil claims. The magistrates on the other hand read these claims as if they were charge sheets and then they ask the defendant whether he pleads guilty or has a case to answer.

Recording of evidence

Any proper system of justice must therefore establish appropriate recording systems. Consequently, all magistrate courts in this country are obliged to keep records of their proceedings.

However the study revealed that the recording of evidence in the magistrates courts is in a pathetic states. Most cases are recorded in a summary fashion to the extent that they do not reflect what really transpired in court. Indeed a perusal of the records revealed how pathetic the situation had become. Most of the records we examined were illegible and unintelligible. This is dangerous because it creates a mockery of the process of appeal and review.

The above situation is attributed to the following factors:

- Magistrates record evidence in English using long hand. They have no recording clerks, as was the case with the Traditional Courts or stenographers as is the case with the High Court. This has its own problem because it is almost impossible for the magistrates to record the evidence and maintain eye contact with the witnesses at the same time. Consequently, it is difficult for them to properly assess the demeanour of the witness and to put the testimony in context.
- Magistrates lack the requisite educational qualifications and skills to enable them record court proceedings.

This study revealed that the problem is more critical on the part of the magistrates who came from the traditional courts. This was due to the fact that they had no recording experience in the old system, which correctly assumed that they were not qualified to record proceedings. In those days court clerks were in most cases better qualified and trained than the court chairmen. Consequently, they were used extensively in recording proceedings and mostly in vernacular. The Chairman would

orally deliver judgement and the clerk would record it. However, when the chairmen were incorporated into the lower judiciary they were directed to start recording evidence on their own in English. This created its own problems considering that these people were not properly qualified to take up the challenge that lay before them.

It should be noted that the requirement that magistrates should be recording their own evidence is justifiable on grounds that recording evidence and writing judgements is a judicial function which must not be usurped by clerks, who may distort the record. Unfortunately, it is based on the wrong assumption that judicial officers are well educated. The facts on the ground, however, indicate that most magistrates have not reached the level where they can simultaneously hear a case and record proceedings. Consequently, well-qualified clerks should be employed and entrusted with the task of recording evidence. The magistrate would then only be required to certify the record to avoid distortions.

Language

The Malawi system of justice is, however, failing to surmount one the major obstacles to access to justice for the poor namely the use of the English language in our courts. This was unlike in the former traditional courts where the proceedings in rural courts were in vernacular. The use of English was restricted to urban courts.

The language problems seriously prejudice the administration of justice because it affects how magistrates record and analyse evidence. Due to language problems the magistrates resort to writing brief judgements, which are unclear. Their analysis of the evidence is not thorough and customary principles cited do not seem to fall in place.

The use of English also hampers communication between the Magistrate and the litigants. Despite the fact that interpreters are made available, the question still remains as to whether substantive justice is done. This is because the standards of interpretation are generally very poor. This is especially so when it comes to interpreting technical words. This is attributable to the fact that the magistrates engage unqualified interpreters.

Nevertheless, it should be noted that the English language would still be part of court proceedings since most magistrates still preferred the use of English to vernacular because they did not understand the local languages or the local dialects. Nevertheless the use of the English language ought to be optional.

Reasonable cost

The study revealed that the cost of instituting a civil action ranges from K30–K70 which is considered perfectly reasonable by magistrates. They, however, observed that although the initial cost of litigation is not really prohibitive, the incidental costs and additional costs for enforcement make the whole process impossible to bear.

The greatest cost of litigation in rural areas is the distance the litigant covers to access the nearest court. Parties have to bear the cost of their own travel, those of their witnesses and additional costs of enforcement, service of documents and invitations to attend court. These costs are overwhelming for the poor and are multiplied by delays

and adjournments. It is, therefore, difficult to see how somebody who has already suffered financial loss or neglect can advance money for litigation.

Moreover, fact that the defendant might be condemned to pay costs at the end of the process does not make matters easier for the plaintiff because s/he has to advance money to get the process going. Since the enforcement machinery is so weak, the prospects of recovering the costs are slim. Consequently people are forced to drop claims for want of money.

Reasonable speed

What came out of the study is that, on average Magistrates dispose of their cases within a relatively short period of time. Civil cases on average take 2 to 3 days to complete, depending on the availability of witnesses. Judgement in complicated cases is usually delivered after a week.

Criminal cases are also dealt with expeditiously, the only hiccup being that prosecutors seem to control the flow of the case through applying for numerous adjournments. Most of these adjournments are occasioned by the absence of police officers who are frequently transferred from place to place.

This study revealed that magistrates do not realise that it is within their power to see to it that justice is dispensed expeditiously. Consequently, they are too lenient with police-prosecutors who apply for unnecessary adjournments.

Inappropriate orders

Magistrates more often than not make inappropriate orders. This can partly be attributed to fact that magistrates lack sufficient training to handle matters that come before them and that the clerks do not give adequate guidance to the litigants. More specifically, it was noted that very little effort is made by the clerk to establish sufficient background to the case in order to establish the correct cause of action.

For example, a close scrutiny of the majority of matrimonial cases that come before magistrates, reveal that most divorce claims are strictly speaking claims for maintenance, arising out of neglect of wife or children. Unfortunately most of the courts we visited claimed that they do not have jurisdiction to grant maintenance orders, save for affiliation proceedings. Consequently, women are either advised to reconcile or apply for divorce. This does not in anyway help the poor women. The majority of these divorces are granted without child maintenance orders. The customary law compensation orders that are awarded in some cases are also inadequate.

Unfortunately, most magistrates have not adopted the proactive approach to make such orders as would be appropriate for the needs of the poor and unrepresented litigant. Indeed some magistrates do not appreciate that they have to perform the role of both judge and counsel in cases of this nature and endeavour to achieve the best outcomes in the circumstances. As a result in some areas women have adopted coping strategies by either putting up with abusive relationships or engaging in promiscuity.

Failure to distinguish civil cases from criminal cases also occasions a great deal of injustice.

Magistrates also lack basic fact-finding, analytical and judgement writing skills. In most cases it is not uncommon to see them delivering one sentence or one paragraph judgements which hardly analyse the issues in contention. Sometimes judgements are even passed on the basis of insufficient information. Magistrates do not seem to appreciate that they have a duty to establish the truth of the matter, hence they do not fully inquire into the facts of the case.

Similarly, some of the orders the magistrates give evidence lack of appreciation of the law and the issues at stake. They also evidence lack of grounding in basic rules of evidence.

Sometimes the orders that magistrates make are so arbitrary and whimsical. Awards in most cases are very varied even within the same court. In most cases the quantum is not explained or outlined in their judgement giving the impression that they are not based on any sound legal principles.

It has been also been observed that some magistrates are quick to make reconciliation orders without thoroughly scrutinising the implications of such orders. Some magistrates also routinely send victims of domestic violence back to the marriage advocates for reconciliation without carefully evaluating the implications of such orders on the rights of the victim. This may create its own problems considering that most women have no bargaining power and may be forced to put up with abuse in the name of reconciliation.

Access to effective remedies

It was also noted that despite throughput being quite speedy, enforcement of compensation orders is very slow. Court officials and litigants alike expressed concern about the fact that the parties flout court orders and judgements are not routinely enforced. Orders are not complied with except where it suits the parties to do so. Worse still, as some litigants noted, the defendant is given the chance to determine how he would want to satisfy the judgement even where the said terms would not be satisfactory to the plaintiff. Most Magistrates felt that the law at present does not provide for an effective system of sanctions for non-compliance on the part of defaulters.

The study revealed that the problems can be attributed to several causes including:

- The requirement that parties should initiate the enforcement process, unlike in the traditional courts where the courts would automatically enforce its orders and appropriately punish the defaulters. Interviewees claimed that in that system defaulters knew that if they did not go to court the court would track them.
- Similarly the litigants who would want to use the services of court personnel to enforce judgements are required to advance to the court what is known as ‘conduct money.’ Apparently courts started demanding conduct money after receiving a directive from the Registrar of the High Court stating that the judiciary was spending too much money on civil cases, hence the litigants were supposed to

meet part of the cost. This money is meant to cater for travel and subsistence allowances for court marshals who are responsible for enforcing judgements. The cost is multiplied by the fact that perpetual defaulters force the plaintiff to advance extra money to the court officials. Consequently, most of the plaintiffs fail to sustain the process of enforcing judgements.

The requirement to advance 'conduct money' was sharply criticised by both court officials and litigants. It was observed that this requirement has been one of the most misunderstood by the poor. They do not understand why they should be doing the court's job. Indeed some of them believe that the court was deliberately failing to assist them. In some cases this requirement has reportedly been abused by the court marshals who have seen it as an opportunity for them to illegally grease their palms by demanding huge sums from the litigants. The Mangochi magistrates noted that they stopped demanding conduct money because it generated serious political conflicts. Consequently, their messengers only operate within a radius of 5 kilometres. Anything beyond that is the responsibility of the litigants who are advised to serve processs through their traditional leaders.

- The other reason why judgements were not routinely enforced was the lack of relevant and appropriate sanctions. It was noted that courts in the new constitutional dispensation had become virtually powerless in that they were reluctant to imprison people for failure to satisfy a civil obligation (save in contempt cases). They claimed that the new constitution took away the most effective tool of enforcement of judgements, namely prison, in debt cases without providing for a better alternative.

  The majority of court officials we interviewed claimed that it was not easy to enforce judgements within the rural setting if there was no fear of imprisonment. According to them, imprisonment orders were the most effective way of ensuring compliance with court orders in the rural setting considering that the parties were too poor to voluntarily satisfy monetary orders. Consequently, most of them still order the imprisonment of perpetual defaulters. This, they claim, is the most effective way of ensuring that the judgement is complied with. This appears perfectly in line with Small Claims Procedure Rules which authorise the imprisonment of 'any person who wilfully fails or neglects to comply with any order of payment.'
- The other concern from the point of view of the courts was that the courts had insufficient manpower to carry out the task of enforcement. The common story throughout the study was that it was difficult to enforce judgements because courts had too few messengers to enforce judgements over vast areas.

No victim and witness protection

One interesting issue that came out of this study was that people rarely came to court to lodge claims for domestic violence, property grabbing and other similar claims. However, it became evident during the study that these cases were a common occurrence in the village only that the victims were too scared to bring them into the open. Similarly, it became evident that attrition rates in cases of this nature were very high. Police officers and magistrates observed that it was not uncommon for victims of such offences to come back to them and request them to withdraw their cases

against the defendants on grounds that they reported the cases out of emotion, without carefully evaluating the consequences. In some cases victims would want to come to plead with the magistrate to withdraw the case against the accused after conviction on grounds that there was nobody to support them.

The study, however, revealed that the above problems were just a manifestation of deep-rooted problems within our system of justice. In other words, the law does not provide adequate mechanisms to minimise the discomfort of the victims and to protect them from intimidation and retaliation. It is also a reflection of the fact that the system imposes sanctions that are inappropriate for disputes involving people who live in closely knit societies.

Much as we do appreciate that criminal convictions generally deter people from perpetrating acts of domestic violence, we feel that they are not always appropriate in situations where the parties are likely to continue with their relationship after the dispute. Indeed they are much more inappropriate in a rural setting where the victim lives in the perpetrator's village and is completely dependent on the perpetrator for his/her livelihood. Courts in this situation must aim at redressive measures as well as, or in place of, penal sanctions. Consequently, it is high time our system of justice started employing the notions of restorative justice, which can readily be found in customary law. Moreover, these are occasions where the partnership between traditional leaders and the courts could be strengthened, and the traditional leaders be given watching briefs over implementation of court sentences.

Additionally, access to protection from abusers entails giving protection to intimidated and vulnerable witnesses in order to ensure access to justice. This is especially so with the weak and vulnerable. This study indicated that women suffered specific problems in this regard. One magistrate noted that younger rape victims had serious problems presenting their cases in open court. She observed that in one case she had to order people out of the courtroom before the girl opened up.

The study also revealed that cases of witness intimidation by vigilante groups and other powerful persons were prevalent within the system. Cases of vigilantism had been reported. One magistrate gave a suspended sentence to a criminal who had been seriously assaulted by vigilantes. Police attribute this to lack of knowledge about community policing. The public has not been properly sensitised.

How magistrates handle the clash between customary law and Constitutional provisions

The study sought to consider the extent to which the practical application of customary law reflects constitutional values and how magistrates handle conflicts between the two. Specifically, we asked the magistrates what they do when they discover that a particular customary law violates human rights.

Their responses were varied ranging from upholding or bypassing customary law to striking down the custom for unconstitutionality. Some said that they can only comment on the substantive provisions of the Constitution and all issues relating to the constitutionality of laws would be referred to the High Court. Worse still, some

magistrates said they did not know what to do in such a case. What was surprising however was that most magistrates who said they would strike down customary law for unconstitutionality claimed they did not have jurisdiction to do likewise with statutory law. This means that they regard customary law as inferior. It is our view, however, magistrates are not competent to decide questions of constitutional validity of laws. This view is supported by the constitution.

The study also revealed that in terms of application of constitutional principles to customary law three approaches could generally be isolated. These could be termed as the 'cautious', 'progressive' and 'retrogressive' approaches.

Some magistrates were of the view that customary law, unlike statutory law, was a way of life for most Malawians and hence it had to be respected. Some of them observed that they felt uncomfortable with undermining other people's customs just because they disagreed with them. They also noted that judicial officers were in the light of this fact supposed to exercise extreme caution when challenging customary law. They argued that even though they appreciated the fact that any unconstitutional custom should not be upheld, they felt they had to tactfully approach this issue in practice. Indiscriminate challenges to custom would lead to a situation where the parties would lose confidence in the formal court system and consequently they will start shunning it. This category would just deliver orders bypassing custom without commenting on its constitutionality.

The 'progressive approach' category of magistrates tries as far as possible to interpret the laws in line with the constitution. Some radical ones claimed that they even strike down unconstitutional customs.

Although the progressive approach of the magistrates deserves encouragement it raises fundamental questions as to the extent to which magistrates may impose values founded on certain individualistic assumptions to rural societies which are founded on community values. This is partly due to the fact that most of the constitutional values they apply are based on individualistic modes of life which might not be in line with rural modes of social life that are founded on interdependence. The non-individualistic way of life in rural communities even defines the nature of relationships members of the community enter into.

Interestingly, some magistrates observed that they did not personally believe in the norms they were enforcing. The study also established some kind of correlation between a magistrate's cultural background and the type of norms they were ready to challenge. This might explain why some communities have problems with the values the courts apply. Indeed some communities still insisted that as far as they were concerned they would never recognise marriages by permanent cohabitation. Others claimed that they had problems with the magistrates' conceptions of gender equality.

The preceding discussion demonstrates the problems of applying human rights values in practice and emphasises the fact that magistrates must be slow to arbitrarily impose their value systems on communities. Considering that customary law is a way of life for these people, modern values must be marketed to the people and they should be allowed to receive and embrace the values. One needs to explore how to transform

societal values in order to bring them in line with the constitution without necessarily disrupting the social fabric. It is also doubtful whether the type of magistrate on the ground is competent enough to handle this daunting task.

This study also revealed certain instances whereby magistrates have condoned or encouraged gross human rights violations through their judgements and women have particularly fallen victims of this approach.

Magistrates have for example made orders, which confirm negative gender based stereotypes and consolidate patriarchy.

The study found that the magistrates had a shallow understanding of constitutional rights provisions. At least two of the interviewees confessed that they had never read the constitution. One of them even alleged that he had received a copy of the constitution from the first grade magistrate two days before the research team came to visit him in June 2002.

When asked to mention the Constitutional provisions they applied, the respondents, normally mentioned bail provisions. The other constitutional provision which most magistrates seemed to know is the one that validates marriage by permanent cohabitation.

Resources and management of subordinate courts

One of the necessary conditions for ensuring access to justice is that a system must be adequately resourced and organised. This study, however, revealed that the judiciary lacks resources to extend the proper administration of justice to rural areas. More specifically the judiciary has inadequate and poor quality infrastructure.

These problems were said to be attributable to the following causes:

- Chronic under-funding of the judiciary. The following data exemplifies the problem. The approved monthly budget for the whole year is roughly K3 million to be shared between the High Court and magistrates. The Regional Magistrates budget fluctuates between K12000 to K100000 per month to cater for stationery, staff allowances, emergencies, funerals and transport.
- Centralised administration of funding: Funds from the treasury are forwarded to the Registrar who then transfers funds to the courts. Sometimes it takes time for funds to trickle down the system. The judiciary is treated like a small Ministry while it is a separate branch of government.
- A substantial amount of the judiciary's resources are absorbed by the higher courts and the administration sections of the judiciary. This is because court administrators do not seem to know what the core functions of the judiciary are, hence they spend much time pleasing the higher judiciary.
- The fact is that the judiciary does not have a political platform on which to table its demands because it is not represented at cabinet level. The Minister of Justice who represents the judiciary in parliament appears detached.
- The resource base of the judiciary has not expanded to cater for its additional responsibilities following integration. Marshalls have no uniforms, no form of transport.

- Poor organisation and management: There is no, or minimal supervision, limited training for clerks, messengers, prosecutors, magistrates and unqualified interpreters.

The poor funding and organisation lead to the following devastating effects:

- The study revealed that most court buildings inherited from the judiciary were on the verge of collapse. Additionally, some magistrates we visited were sharing offices with support staff.

- The study also revealed that magistrates' courts were in acute need of furniture, office equipment and stationery. Indeed the problem of shortage of stationery was so acute that some magistrates were forced to close shop for part of the month. Others resorted to getting donations from prosecutors and litigants. It was noted that this could in a way compromise their independence. Judgements were written on scrap paper or sometimes recorded in illegally obtained primary school notebooks. Peripheral magistrates also attributed it to the mode of delivery of paper, in that stationery would be delivered through district courts. Urban magistrates also considered lack of computers as a serious problem. They were still using manual typewriters.

- Some magistrate courts had no telephones and postal boxes, which meant that they could not easily communicate with the outside world.

- Most of the judgements we read made no reference to law or any legal literature. This was due to the fact that most magistrates do not have access to law textbooks, law reports and statutes. Unfortunately most of these books are out of date. Most of the magistrates consequently relied on classroom notes to determine their cases. Very few magistrates had access to higher court judgements, which came in irregularly. This problem is not unique to magistrate courts. High Court judges also have serious problems accessing their colleagues judgements. Some magistrates had a copy of the 1995 Edition of the Benchbook for Magistrates, which needs revision. Moreover, it is not very relevant to a 4th Grade Magistrate whose bulk of cases is customary law and civil cases. It also has very little constitutional law and human rights content.

- Another problem that was observed is that support staff are not given the facilities to enable them effectively carry out their duties. The Marshals we interviewed recounted stories of how difficult service of process had become after the integration of the courts. Most of them said they have to travel long distances to serve process without being given accommodation and subsistence allowances. In most cases they had to ask for accommodation at the local Village Headman's house. They also observed that the public would not take them seriously because they are not given uniforms as the case was in the past. Their view was that people do not trust plain-clothes messengers because they fear that they are imposters.

- Messengers also claimed that the system failed to compensate them if they were injured in the course of employment.

Human Resource and Management Issues

The preceding discussion has revealed that magistrates lack sufficient training in law to enable them to competently decide cases and that they also require the requisite training to be case managers, which ought to be the core function of a magistrate.

The study also revealed that some former traditional court chairmen were failing to cope with the demands of their new positions as magistrates because of questionable educational qualifications and insufficient training in their work as magistrates. In some extreme cases their judgements could not reflect what had transpired in the courtroom, hence some litigants suspected that there was foul play. One clerk observed that litigants had lodged so many complaints and appeals against his magistrate. Unfortunately there has been no feedback from the High Court since 1999. This scenario presents a situation of great potential abuse for individual human rights.

What also came out clearly during the study was that the one year lay magistracy training programme was insufficient to give the magistrates a thorough grounding of the law to enable them competently do the work of magistracy. All the recently trained Magistrates we interviewed, for instance, said they have had no formal training in customary law as such. The little exposure they have had to customary law was in the context of a one-semester family law course they did at the Staff Development Institute. This does not give them sufficient orientation to handle customary law cases. This deficiency could easily be seen in the quality of their judgements. Further still, despite the fact that customary law governs most of the civil cases they handle, magistrates noted that they had very little training in customary law except by way of family law.

In terms of exposure to contemporary legal issues, the majority recalled having attended workshops on bail, community service, and inheritance. A minority recalled having attended courses in constitutional law, human rights and customary law. These were mainly magistrates who had attended a four months induction course for lay magistrates in 1999.

Magistrates emphasised the need to give specialist training to court clerks so that they can give better services to magistrates and unrepresented litigants. Some magistrates recommended regional training workshops for court clerks.

It was also noted that most of the prosecutors lack the requisite training for their work. The three months training they undergo at the Police Training School is insufficient for their needs. Indeed magistrates observed that police prosecutors mishandle cases because of lack of skills and recommended more training for them to polish up their skills.

The study also revealed that although all the lay Magistrates admitted that they greatly liked their job they considered their career prospects as very bleak for the following reasons:

- They loathed the idea that the rank of the first grade was the ceiling. They claimed that this affects their intellectual development and motivation. Some magistrates

recommended that there is need to establish posts higher than First Grade Magistrate within the lay Magistracy structure, possibly the post of District Magistrate or any other posts higher than 1st Grade.

- They considered their salary structures as quite stagnant.
- The judiciary was not giving them a chance to further their education and was not giving any assistance to those who were taking personal initiatives to further their education. Similarly, they felt that the University of Malawi Law Faculty was not doing anything to enhance the capacity of lay magistrates.

Recently employed Second Grade Magistrates were particularly disgruntled with the way their appointments were made. They noted that the judicial service commission based their appointment on the rank they held in government prior to their lay magistracy training. Consequently, all those who previously held the ranks of Senior Executive Officer and Chief Executive Officer automatically became First Grade Magistrates. Those who held the ranks of Clerical Officer and Senior Clerical Officer automatically became Second Grade Magistrates.

All the lay magistrates we interviewed described this method of selection as absurd. They observed that the method of appointment should have taken into account academic or internship performance. Others felt that all of them would initially have been appointed as second grade magistrates subject to being promoted on the basis of satisfactory work performance.

It is our considered view that this system of appointment lacked merit and a better system of ranking magistrates should be devised in future.

Urban-based magistrates were also concerned with the problem of personal security. This problem is aggravated by the fact the magistrates are not given official houses and do not have official security guards. Most urban magistrates find cheap accommodation in locations where criminals live, since their housing allowances are lower than those of other civil servants. This according to them makes female magistrates particularly vulnerable. Similarly, junior magistrates are also rendered particularly vulnerable because they use public transport.

Related to the above was the fact that that lower level magistrates in rural areas are not given official accommodation. This is a remnant from the Traditional Courts where Court Chairmen would come from the locality and hence would not require official accommodation. The integration process inherited this system.

Related to the issue of security was the issue of harassment and intimidation. Some magistrates recounted of stories of how they were being harassed and victimised by their senior counterparts and how very little had been done about it despite sending numerous complaints to the High Court. Magistrates who handle sensitive cases have reported being harassed by police officers.

May 2002, statistics indicate that there were 293 established magisterial posts in Malawi. A total 201 of those posts had been filled and 92 posts were indicated as vacant.

Although this situation looks very good from an access to justice point of view, the situation on ground tells a different story. This study shockingly revealed most of these magistrates are based in the urban and peri-urban areas, very few of these magistrates are operating from rural areas despite the fact that they were posted there.

What we gathered from Ntchisi was that 3 courts were not functional because of shortage of staff. The Ntchisi Fourth Grade Magistrate has remained idle since 1997, because there has been no clerk. At Misonzi 4th Grade Magistrate Court, there has been no magistrate since 1994, but there is a clerk sitting idle. Masangano 3rd Grade Magistrate has had no Magistrate since 1996, but then there is a clerk. Unfortunately all these idle officers draw their monthly salaries from the judiciary. Mangochi has 11 courts but only four were functional. The Mangochi 2nd Grade Magistrate has two magistrates and 1 courtroom. The other magistrate is supposed to be posted to Chimwala, but there are no support staff.

The above can be contrasted with the urban Zomba Chief Resident Magistrate court has 4 resident magistrates, 1 first grade magistrate, and 3-second grade magistrates. However, the court has only three courtrooms. This according to the Chief Resident Magistrate encourages laziness considering that only three magistrates can sit at a time. Some magistrates do not even show up for work. The Zomba 1st Grade Magistrate Court, which is just 2 kilometres down the road has a first grade magistrate and 2 second grade magistrates.

Similarly, most courts that were serving the poor are no longer functional because only 52 of the 178 third and fourth grade magistrates' posts are filled. Surprisingly, the second grade magistrate rank has been over-subscribed in that there are 66 established posts but there are currently 112 second grade magistrates in the country. Unfortunately, most of these have refused to be deployed to remote areas.

The study revealed the following reasons for failure to deploy these magistrates namely;

- There is no money to transport the magistrates to the rural areas.
- There is no accommodation and security in those places, considering that the job of a magistrate is highly risky.
- Married magistrates argue that their spouses cannot easily find work in rural areas.
- There is no electricity in the rural areas.

It should be observed that the only genuine reason that has been advanced above is security, all the other reasons are in our view frivolous. Nevertheless, the above statistics reveal that the system at present is failing to provide access to the poor despite the fact that it trained so many magistrates on an extremely expensive donor funded training of magistrate programmes.

In 1999 the Rose Report, noting that the judiciary had limited management skills to institute reform, recommended that the Judiciary appoint the Chief Courts Administrator. This person would be entrusted with the task of planing and delivering administrative reforms to the courts. Pursuant to this an Act of Parliament was passed namely the Judicature Administration Act. The Act in its long title provides for the establishment of the office of the Chief Courts Administrator, the administration of

the judiciary, the funding of the judiciary and the conditions of service of members of staff.

A cursory reading of the Act would lead to the conclusion that this Act purports to provide solutions to the inefficient operation of the judiciary. However, it falls far short of that. The Chief Courts Administrator under this Act is not the one that was envisaged by the consultants. S/he can at any rate be described as the personnel manager of the judiciary. Section 3 of the Act stipulates that the Chief Courts Administrator shall oversee the general, financial and personnel administration of the judiciary. This does not in our view include the tasks envisaged by the consultants; namely planning and implementing administrative reforms in the judiciary. Additionally, it is not clear how this Act shall help eradicate the problems the judiciary is currently experiencing.

Links between the subordinate courts and customary justice forums

One of the key areas of debate in relation to access to justice for the poor is whether justice can be made more accessible by adopting or transforming some customary processes or facilitating a more collaborative approach between the customary justice system and the state's courts. This issue is highly relevant in the case of Malawi considering that the formal system is on the verge of collapse and is miserably failing to serve the interests of the people. Moreover, customary justice forums are already handling cases involving the majority of the rural people in places the formal system is failing to reach.

Additionally, it is idealistic and illusory to expect the judiciary to provide access to the rural masses when it is operating under a tight budget. This is due to the fact that the sheer cost on the part of government of bringing courts to the people is prohibitive. The judiciary does not at present, appear to have resources to extend the formal structures to the village level and to bear additional costs that this would require. The most practical thing, in the short term, is to strengthen the systems that are already functional and to explore the best way of consolidating the existing interaction between the formal and informal systems. Additionally, the system should provide ways of making the informal system more accountable than it is at present.

In this regard the system must seriously consider giving more power to traditional structures to facilitate access to justice at a more formalised level while at the same time ensuring that these leaders conform with human rights standards. The use of traditional leaders is in line with the will of the people as expressed in section 110 (3) of the constitution which provides that: *" Parliament may make provision for traditional or local courts to be presided over by chiefs and lay persons."* The section limits the jurisdiction of such courts exclusively "*to civil cases at customary law and minor common law and statutory offences."* How this should be done in practice is a matter requiring further investigation.

The whole process must be carefully planned and the qualifications of people to sit on these village panels need to be carefully considered to avoid duplication of problems at the formal level where we are seeing poor application of customary law. One also

needs to find ways of consolidating the role of the informal without jeopardising the enjoyment of basic human rights on the part of the poor.

The law must also create safeguards against abuse of power in the customary justice system. One way of doing this is to ensure that their decisions are subject to review by Resident Magistrates, who should send them regular feedback. Some magistrate suggested that cases should initially be heard by chiefs and should only come before magistrates by way of appeal. The other way is to ensure that the customary judicial officers have a code of conduct which among other things should require them to relinquish their judicial powers where they are actively involved in party politics. Others were of the view that chiefs should be given more formal powers to handle customary cases since they are more comfortable with such matters than magistrates. The parties could then appeal to the CRM. This will resolve the apparent conflict that is there.

A referral systems already exist between the formal and informal at different levels.

- Magistrates consult traditional leaders when they would seek clarification of customary law principles and noted that traditional leaders were very helpful when it came to disbursement of deceased estates because they were the most reliable witnesses.
- Magistrates also use the chiefs extensively in service of process and court orders. There seems to be established practice that court Marshals liaise with traditional leaders before service of process on villagers.
- Sometimes magistrates refer matters over which they have no jurisdiction to chiefs. This is especially so in land disputes.
- Additionally, Chiefs automatically refer cases of pregnancy, rape, maintenance and paternity disputes to the formal system. Sometimes traditional leaders are called upon to testify in estate distribution cases. Some of them refer these cases to the magistrate in writing.
- The study revealed that there is in existence a reference system between the formal and informal. What needs to be borne in mind is that the majority of the people initially access the informal system before going to the formal system which is considered expensive and slow. Most Magistrates observed that Chiefs and Village Headmen normally refer cases to them after they fail to reconcile the parties. This is mostly where they feel their advice is being challenged or at any rate not being complied with. The established practice in most villages is that the case is initially taken to the chief, who normally decides whether s/he has jurisdiction over it. It is only after they fail to resolve the issue that the Village Headman authorises one of the parties to take the matter to court. This process is in some areas known as ‘giving the name’. Parties generally consider this as a customary formality to be satisfied before the issue is brought before a court. Similarly, some people also come to the magistrates when they are aggrieved or dissatisfied with the traditional leaders’ ruling, hence they use a magistrate as a court of appeal.
- There seems to be an established practice in Mangochi that Magistrates merely formalise divorce orders that are granted by chiefs.
- Some magistrates also claimed that the civic education initiatives that work well are those that involve community leaders. The Mangochi Network for Gender-

based violence works extensively uses initiation counsellors, church leaders, religious leaders and traditional leaders in their civic education initiatives.

Some respondents also observed that the merit of consolidating the links between the formal and the informal lay in the fact that will simplify the task of ascertaining customary law and promote the cross-sharing of knowledge between the formal and informal. It was also observed that strengthening the link would also enhance enforcement of judgement in the formal system. This is due to the fact that Village Headmen, unlike court marshals, live with the people and are better understood by their subjects. Most people are skeptical of court officials and hold the view that they are just bent on victimising them. Consequently, joint enforcement of judgements will be more acceptable and effective.

Others however noted that there is need to draw a clear demarcation between the powers of the chiefs and those of magistrates to minimise conflicts, which sometimes arise between them. The study has revealed that magistrates do not always have good relationships with some chiefs due to apparent power struggles. Some chiefs believe their powers have been taken away and they refuse to assist courts. Some magistrates felt that they could not work with chiefs whom they consider illiterate. The majority of magistrates, however, thought that these were matters to be resolved by inviting traditional leaders to court user meetings.

In summary, it is our view that there is merit in strengthening the link between the formal and informal. However, we believe that the actual form this would take is a matter of detail. The only thing that should be avoided is to swallow the informal into the formal because it will kill the positive attributes of the informal and just place another financial burden on the state. The informal system should be left to operate independently subject to the supervision of Resident Magistrate. This necessarily means that the judiciary must facilitate the elevation of all district courts to Resident Magistrate Courts. These courts must be manned by a person who is well learned in law and whose primary responsibility shall be to supervise all dispute resolution forums in a particular district. The relationship between this magistrate and the chiefs will be akin to that presently enjoyed the District Commissioner and the Chiefs. This will not be strange because historically the District Commissioner doubled as a district magistrate.

A STATISTICAL ANALYSIS OF THE CASE-LOAD FOR THE YEAR 2001 IN THE SUBORDINATE COURTS IN THE NTCHISI, MZIMBA/MZUZU AND MANGOCHI DISTRICTS AS WELL AS OF THE LILONGWE DISTRICT COURTS.

The main purpose of the statistical analysis of the case-load for the year 2001 in the four geographic areas of research was:

- To ascertain the type of cases that were processed in these during a one-year period and to assess the volume of cases to these courts; and
- To ascertain the speed with which these cases were finalised in these courts.

The report provides detailed results of this empirical research, but a broad overview is best illustrated by way of the following Figures (numbered in the accordance with the numbering in the Report) that graphically represent the type and number of finalised cases in each of the four districts as well as the speed of throughput of cases:

Figure 1: Type and number of finalised criminal cases for the year 2001 in the Ntchisi district

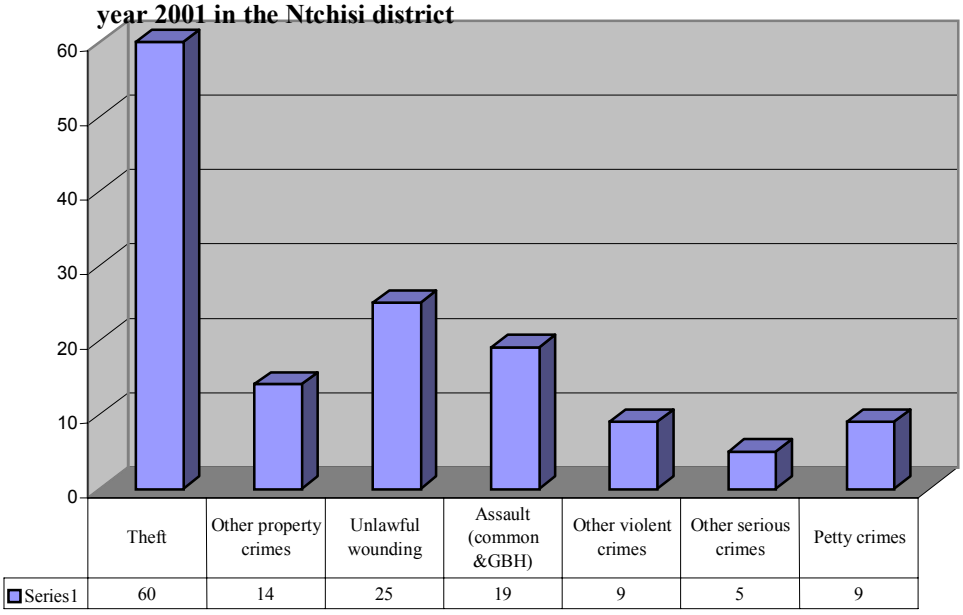


Figure 2: Throughput of finalised criminal cases for the year 2001 in the Ntchisi district

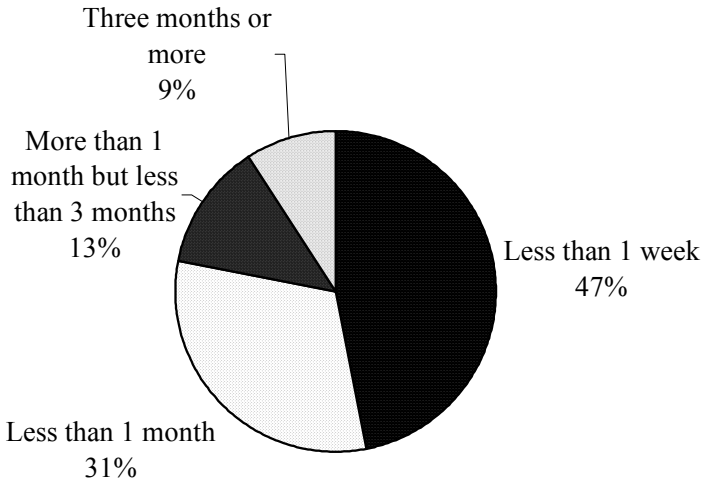


Figure 3: Type and umber of finalised civil cases for the year 2001 in the Ntchisi District

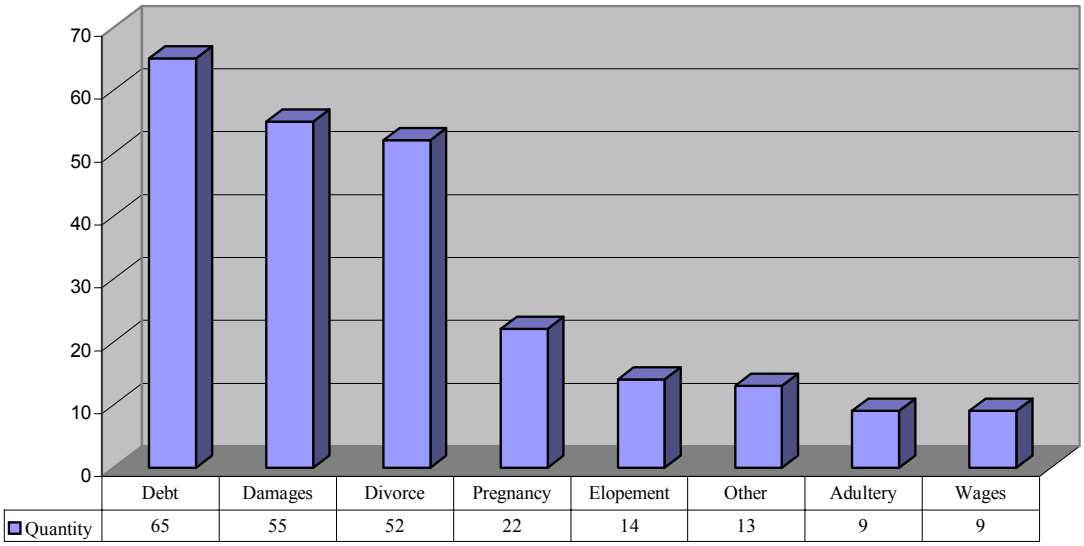


Figure 4: Throughput of finalised civil cases for the year 2001 in the Ntchisi district

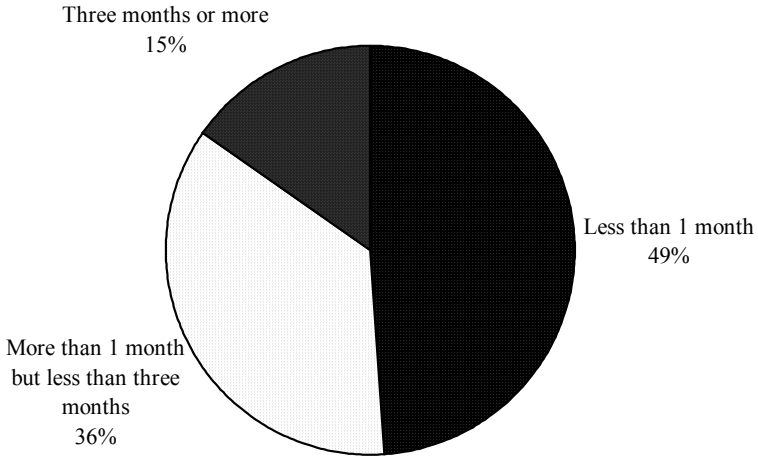
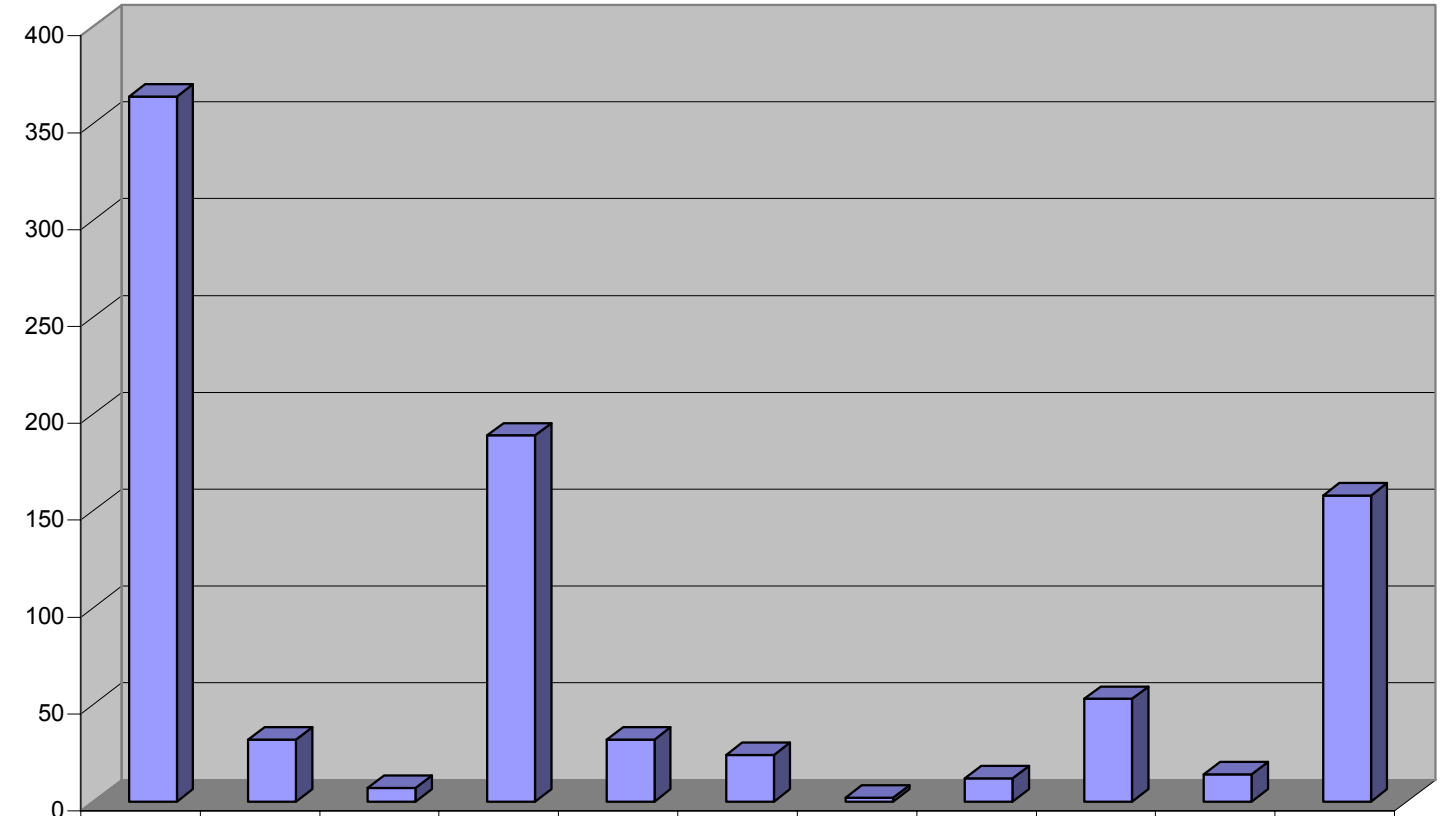
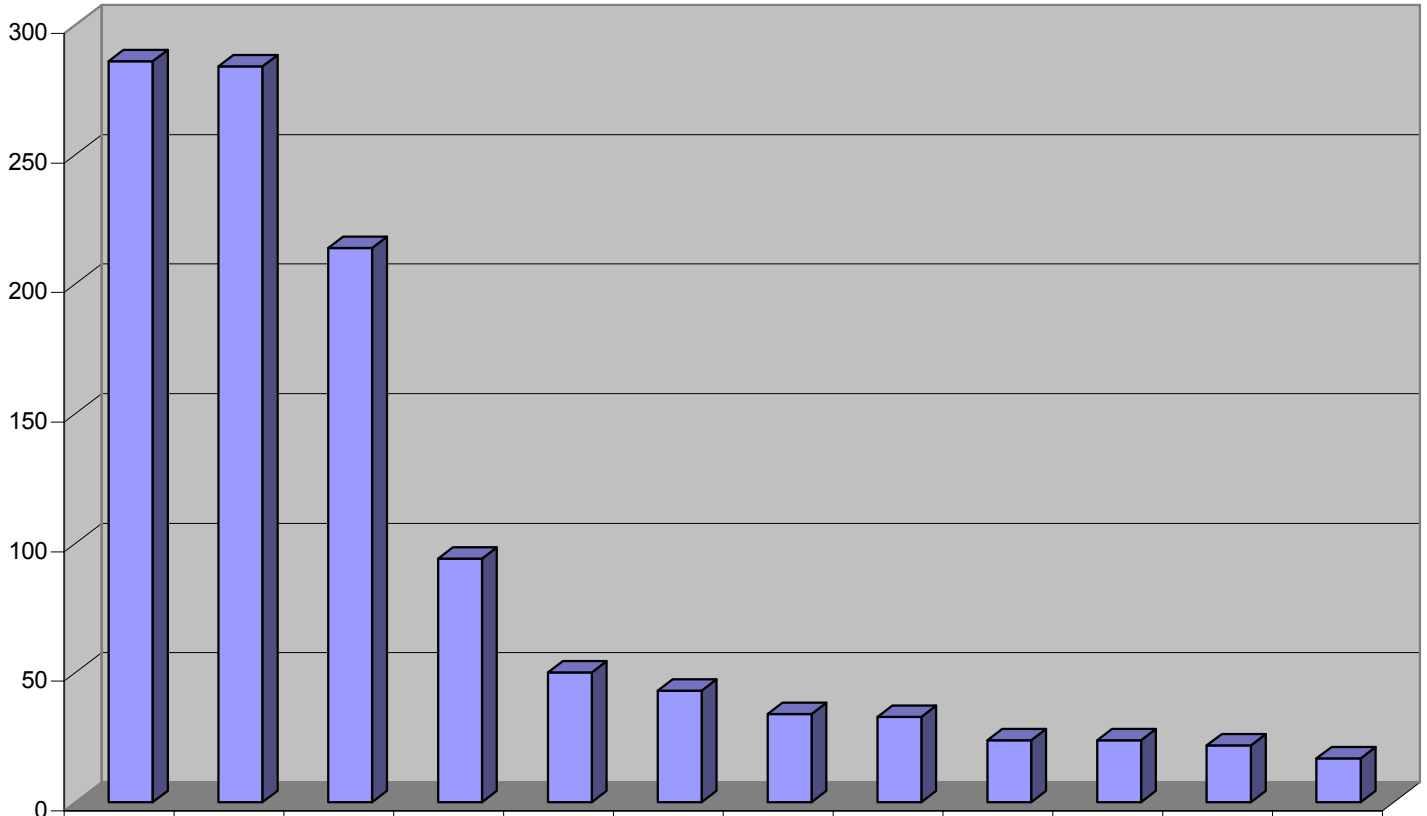


Figure 5: Type and number of finalised criminal cases for the year 2001 in the Mzimba/Mzuzu district



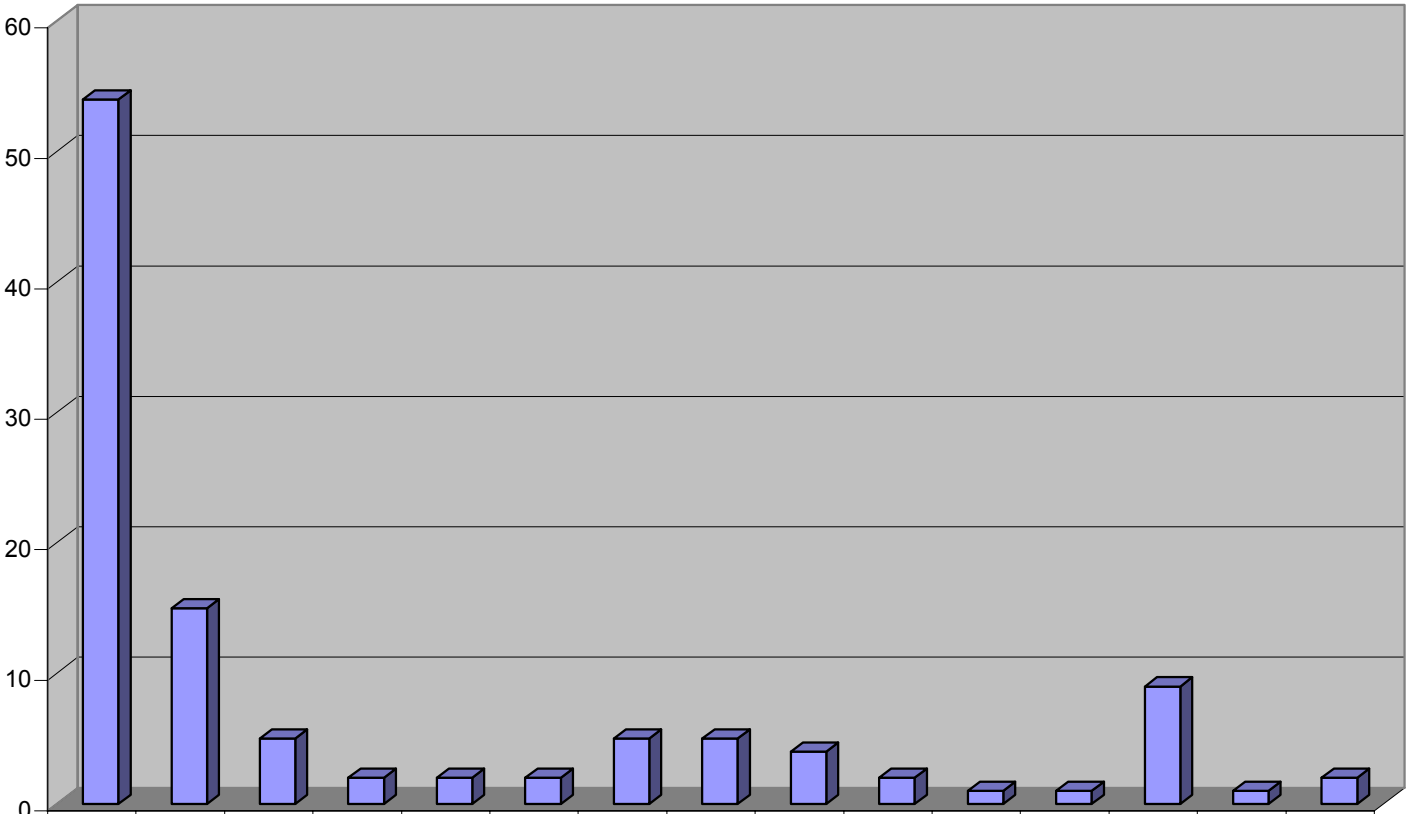
	Thefts/Burglary and Robbery	Arson/mal.damage property	Other property crimes	All forms of assault/unlawful wounding	Sexual offences	Murder (remand to the High	Manslaughter (remand to the High	Other violent crimes	Indian Hemp charges	Other serious crimes	Petty Crimes
Number	364	32	7	189	32	24	2	12	53	14	158

Figure 6: Type and number of finalised civil cases for the year 2001 in the Mzimba/Mzuzu district



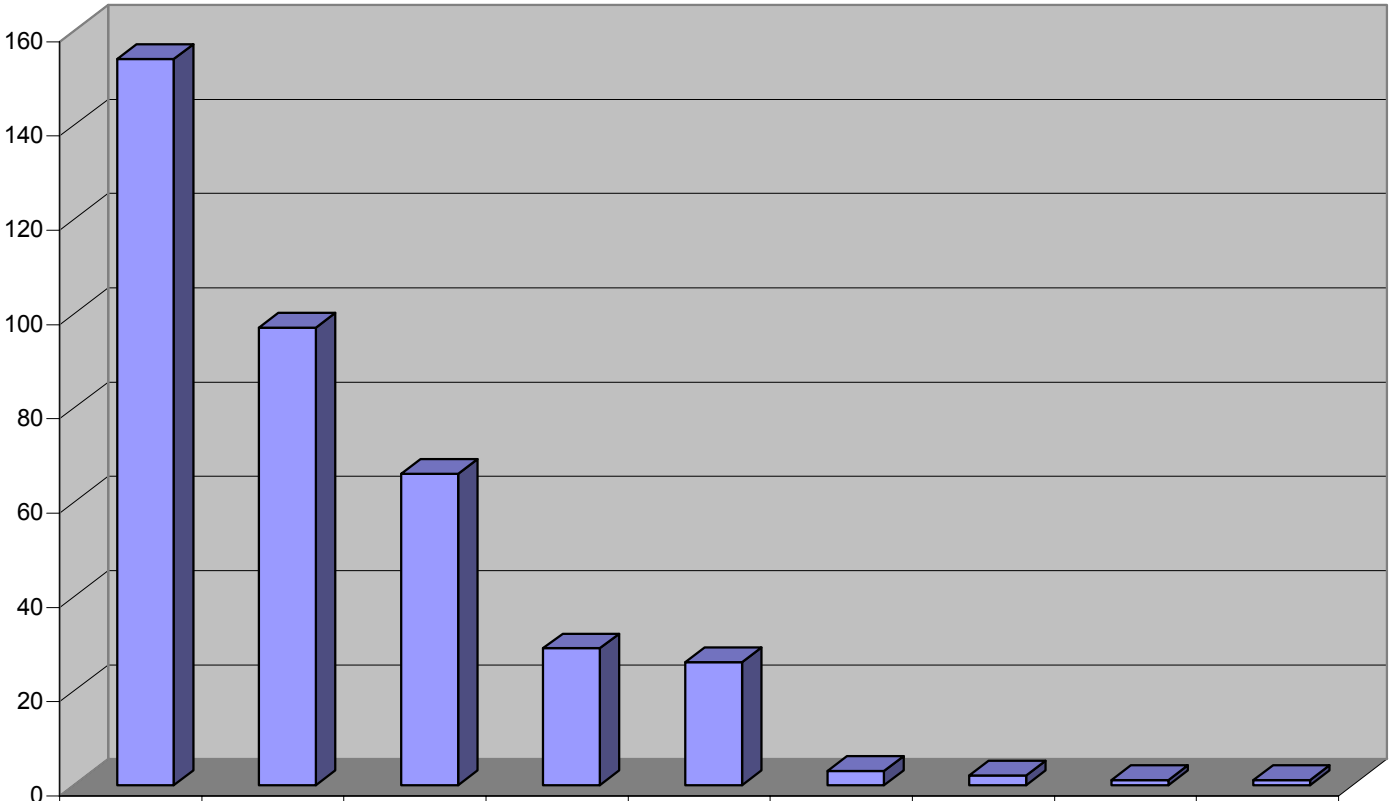
	Inheritance	Debt	Divorce	Elopement	Other	Impregnation	Damages	Return of Movable Property	Adultery	Defamation	Dowry	Wages
Number	286	284	214	94	50	43	34	33	24	24	22	17

Figure 7: Type and number of a sample of finalised criminal cases for the year 2001 in 12 of the 2nd gr. magistrates courts in Lilongwe



	Theft	Breaking &entry/Burglary	Mal.damage property	Car theft	Poss.stolen property	Forgery/fraud	Assault (both forms)	Unlawful wounding	Rape&attempted	Robbery	Poss. ammunition	Careless driving	Poss.Indian Hemp	Cultiv. Indian Hemp	Rogue&vagabond
Number	54	15	5	2	2	2	5	5	4	2	1	1	9	1	2

Figure 9: Type and number of finalised civil cases for the year 2001 in the 2nd grade courts of Lilongwe



	Inheritance order	Application for divorce	Claim for adultery	Debt	Claim for elopment	Claim for return of movable	Distribution of matrimonial property	Desertion with matrimonial	Breach of promise to marry
Number	154	97	66	29	26	3	2	1	1

Figure 10: Throughput of finalised civil cases for the year 2001 in the 2nd gr. magistrate's courts of Lilongwe

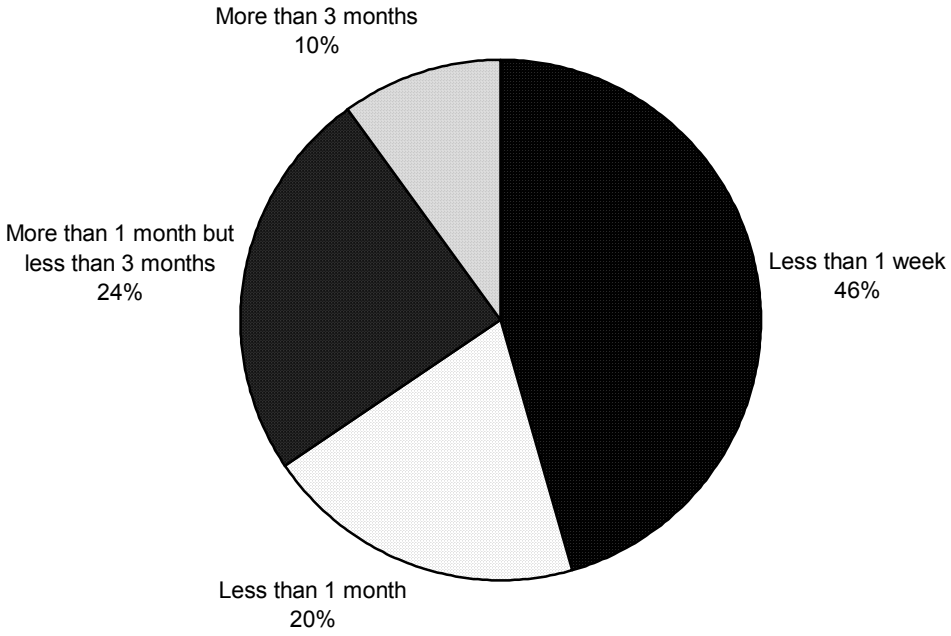


Figure 8: Throughput of a sample of finalised criminal cases
gr. magistrate's courts

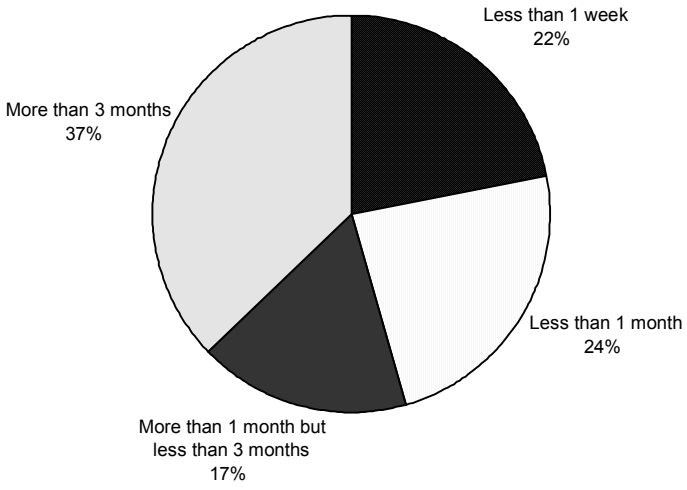
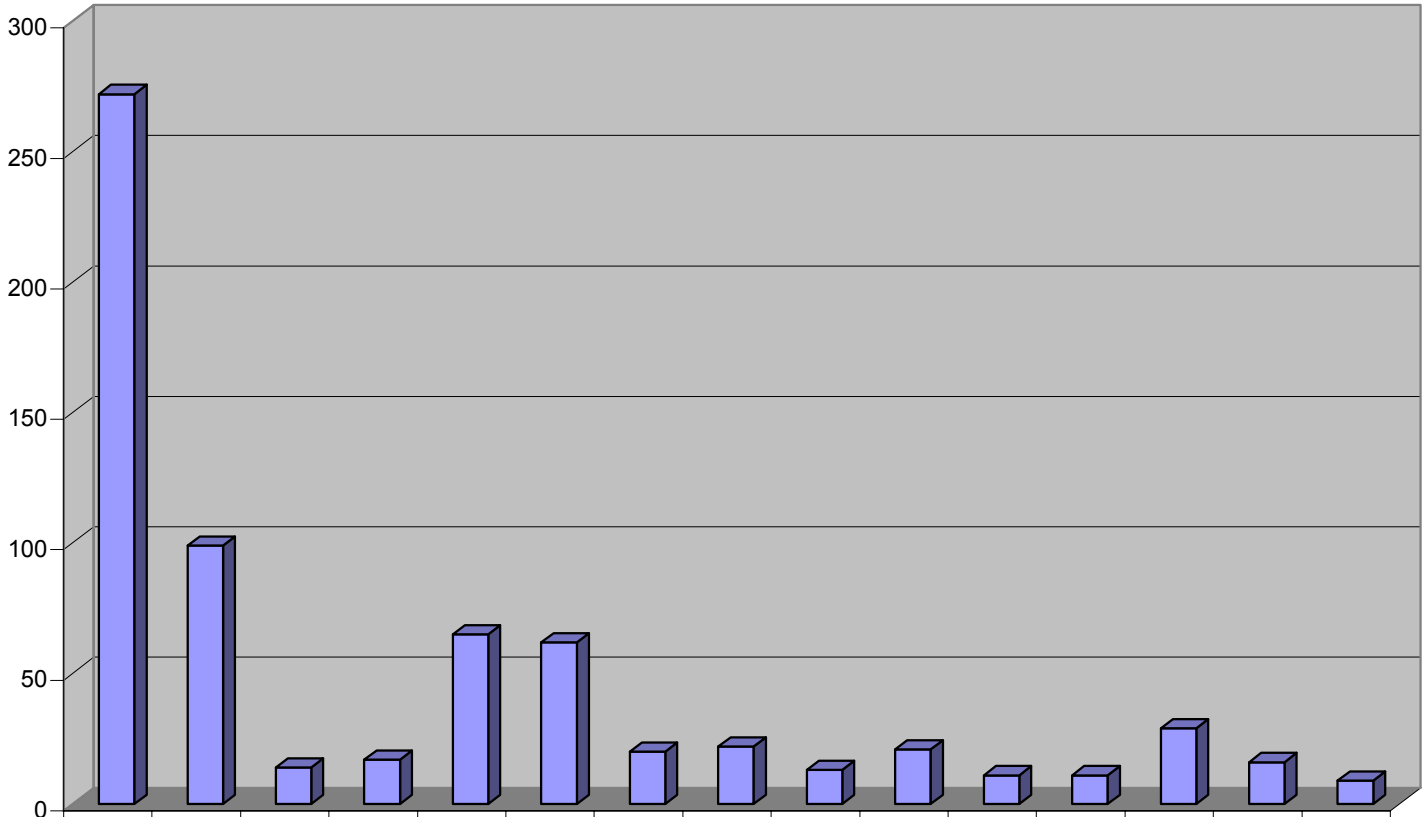
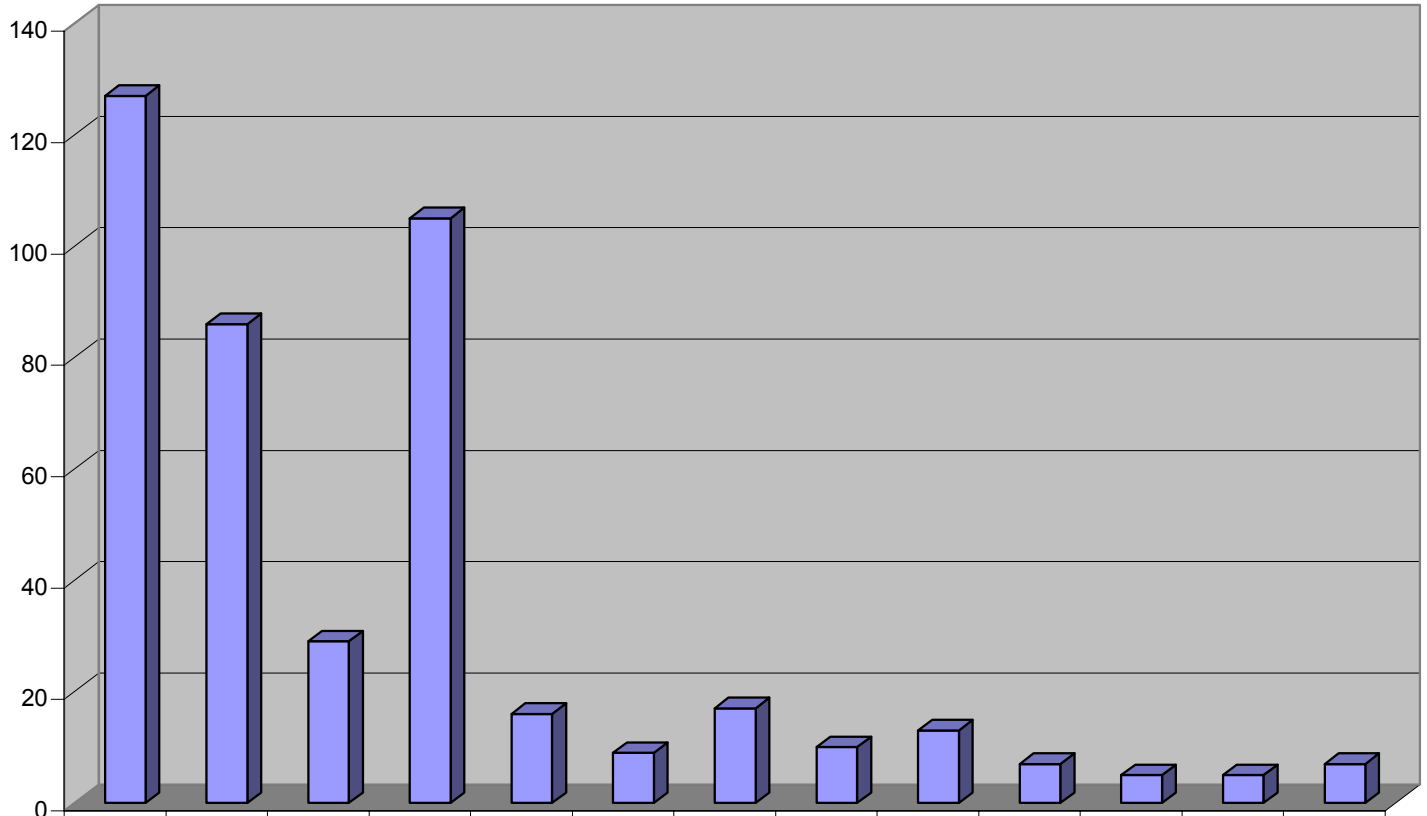


Figure 11: Type and number of finalised criminal cases for the year 2001 in the Mangochi district



	theft	housebreak./B&E/burg.	poss.stolen prop.	mal.damage to prop.	unlawful wounding	assault	robbery/attempt	sexual offences	Hemp charges	breach of peace	tresspass	other property crimes	other violent crimes	other serious crimes	other petty crimes
Number	272	99	14	17	65	62	20	22	13	21	11	11	29	16	9

Figure 13: Type and number of finalised civil cases for the year 2001 in the 2nd gr magistrates courts in the Mangochi district



	Inheritance Orders	Debt	Claim for Damages	Divorce	Pregnancy	Land Claim	Return of Movable Property	Breach of Contract	Adultery	Wages	Elopement	Breach of Promise to Marry	Other
Number	127	86	29	105	16	9	17	10	13	7	5	5	7

Figure 12: Throughput of finalised criminal cases for Mangochi

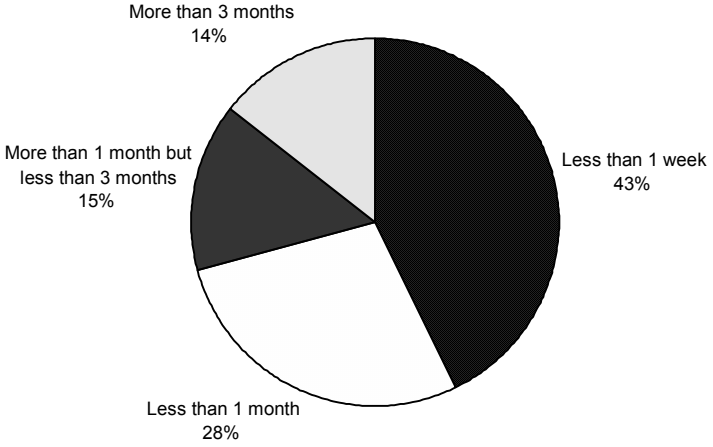
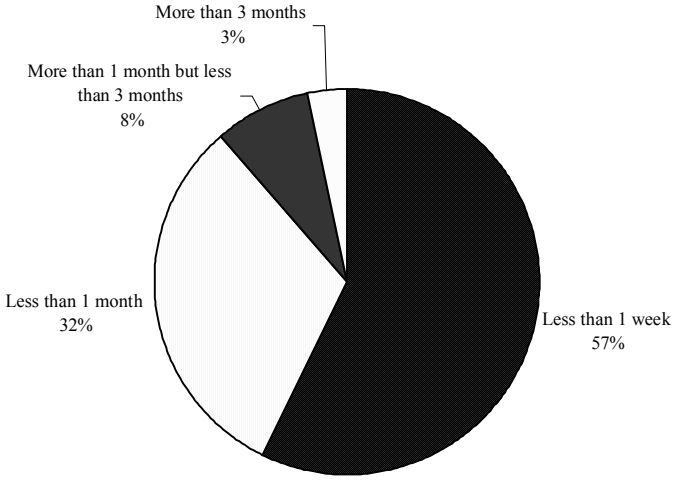


Figure 14: Throughput of finalised civil cases for the year 2001 in



THE CUSTOMARY JUSTICE FORUMS

Introduction

In Malawi the customary[1] justice system remains the type of justice with which most poor people are familiar. It is the system to which they have the most ready access given the high concentration of the population in the rural areas. There are roughly 24,000 villages in Malawi. The count of traditional leaders who process disputes in customary justice forums in the year 2000 was 20,984[2]. By comparison there are 217 court centres and 293 posts available to the state for the magistrate's courts, the level of the state justice system to which poor people would turn if the customary justice systems were not to assist them.

In rural areas the study found that customary justice forums handle some of the criminal cases as well as the vast majority of civil disputes occurring throughout the country. Proceedings are guided by locally-based customary rules. This despite the fact that since 1995 chiefs and traditional authorities have been stripped of their formal adjudicative powers by their exclusion from any formal judicial duties. Their only state-sponsored duties are in the sphere of local government although their (paltry) allowances are paid by the Office of the President and Cabinet (OPC). The link between the OPC and the chiefs is not a healthy sign for justice, democracy or good governance in Malawi.

Although chiefs continue to deliver justice in village-based customary justice forums, the chiefs whom we interviewed in all the four research districts acknowledged that they do this outside the current legal framework. They added that they are only able to do this due to the current weakness, both institutional and financial, of the formal system of justice. However, the chiefs lamented that because they function outside the constitutional and legal framework they find it difficult to have their judgements enforced. The chiefs demanded that they be given back their powers, particularly their former powers to order detention and the power to impose community service orders, since people are now often likely to ignore their decisions, advice and directives.

The customary justice forums in the study areas present largely similar characteristics in the sense that it is based on the principles of restorative justice and the need to maintain social harmony in the community. But there are serious violations of human rights in some instances, especially those of vulnerable and marginalized groups such as children and women. It is thus important to recognise that the system is undoubtedly more accessible in terms of distance, cost, language, values and outcomes. It also appears better able to respond to the needs of the poor as it is simpler, less time consuming, more accessible and better understood than the formal system. But it is not positive in every respect in its impact on vulnerable and

[1] We are using the term customary justice here in order that it is not confused with the term traditional justice and the traditional courts of the pre-1994 era. By customary justice, we mean the dispute resolution structures run by traditional leaders (the village headmen, the group village headmen, the traditional authorities and the principal chiefs). When we talk about customary justice forums it is these structures we are talking about. None of the customary justice forums are formally a part of the state legal system . The customary law that is administered in the state courts is a separate administrative system to the customary justice forums.

[2] Malawi Government Decentralisation Report, 2000.

marginalized groups. If the power structures in their domestic context allowed it, they would seek to find structures to which they can bring their disputes without having to suffer the disadvantage of bias caused by entrenched values that are presented as fair because the are customary.

What follows is a description of the main features of customary justice forums, followed an assessment of the strengths and weaknesses of both the customary justice systems and the state justice system.

Procedures

The customary justice system has a relatively standard and country-wide approach to the processing of cases. Depending on the nature and seriousness of the problem any person may participate in the dispute resolution process: chiefs, elders/*ndunas*, victims, offenders, State officials, party officials and neighbouring chiefs.

The system is characterized by its relaxed yet respectful atmosphere, an outdoor rural setting (often under a tree), informality of dress, common-sense language and a natural flow of story-telling and questioning. The dispute is dealt with in a holistic manner, taking into account interpersonal relationships, community status, local values and community perceptions. The entire context of the event which gave rise to the dispute is sketched and probed, rather than only looking at the precipitating act which brought the parties to the customary justice forum. A participatory or consensual approach to decision-making is adopted. What remains debatable, however, is to what extent other factors such as the need to protect his own authority and prestige finally influence the decision of the chief. Nonetheless, parties agree to the process as well as to all the other inter-personal dynamics at play. Chiefs seldom sit alone. They are accompanied by ndunas, respected elders whose status is mostly acquired through inheritance, as is that of the chieftaincy.

Victim, offender and family members or relatives are called to appear before the chief or elders.

Pressure is used to reach an agreement that satisfies the parties, social hierarchy, community expectations and the chief.

The aim is first to ascertain the facts, and to do this the forum may have to hear a large amount of testimony, some of which may be quite irrelevant to the case. Thereafter, the forum will reach a decision that satisfies the victim, and is considered reasonable by the chief and the wider community. Factors at play include the interests of the chief to promote his authority and prestige, political influences and pressure, and the current human rights and democratic changes that have influenced some members of certain communities. More factors are the respective status of the disputants, and the likelihood of the case being taken to the formal state courts.

Although counselling and advice may sometimes be given to the parties, the penalty is often in the form of payment of livestock. The nature of the offence, the age of the offender, the degree of outrage by the community, as well as other extra-judicial factors that may influence the chief and ndunas, determine the penalty or order.

Jurisdiction

Customary justice forums handle both criminal and civil cases. There is very little distinction between criminal and civil matters customary justice forums, the emphasis is on the ahrm that has been done. Standards of proof may thus be rudimentary. The maxim 'no smoke without fire' is adopted as opposed to proof beyond reasonable doubt and proof on the balance of probabilities. Although the customary justice system has no jurisdiction in law, it nonetheless continues to handle criminal cases. The primary consideration is that a wrong has been done that has upset the equilibrium of the community and thus amends must be made. A further two factors may provide reasons as to why the customary justice system deals with crime:

- The weakness of the formal justice system (lack of institutional capacity) provides an opening for traditional authorities to take control over community disputes and justice; and
- People may prefer the traditional approach to crime and punishment. This is because the traditional system will often focus on the damage done and the compensation to the victim (or reconciliation and restoration of harmony) while the formal system will emphasize the guilt and punishment of the offender. Rehabilitation of offenders through the state system remains an elusive dream.

Referral of cases to the police or the formal justice system is considered as a last resort.

The Lived Law

The customary justice system offers restorative rather than retributive justice. As such, its starting point is the assumption that a well-functioning society operates on a balance of rights and responsibilities. Justice therefore becomes a negotiated process of agreement between the parties, aided by social pressure from the local community. There is a fusion of governance and judicial powers.

The customary justice system is based on the following key principles:

- The constitution of the legal subject as an integral part of a community in which there are ongoing reciprocal dependencies. By contrast the state system constitutes the legal subject as a single social atom, separated from others and devoid of reciprocal depenedencies
- Reconciliation;
- Restoration of social harmony;
- The application of traditional and customary law;
- It is forward looking towards the maintenance of social harmony rather than backward-looking at the act which precipitated the dispute to be brought to the customary justice forums.

The question is to what extent the customary justice system applies **customary law** as opposed to **custom.** The law applied is uncodified and therefore more subject to flux from area to area, depending on historic and cultural factors such as whether an area

applies matrilineal (and -local) or patrilineal (and -local) private law. It also differs from area to area.

Efficiency and effectiveness

Social pressure is used to reach an agreement that satisfies the parties, the community and the chief. An inquisitorial as opposed to the adversarial approach is used, thus requiring no lawyers. Our observations of customary justice dispute resolution sessions gave us the impression that chiefs take every effort to resolve cases within the minimum period (usually during one day) to avoid having to convene the forum again at another time. It would also appear that although chiefs deal with community disputes all the time, most of them usually set aside one day in the week for customary justice forums.

Accountability

There are few rules and processes in which the chiefs are held accountable for their dispute-settling activities either to their own followers (although the nduna-system is in effect an accountability system within villages), or to the state system of justice that determine accountability. It would be a brave villager to report his/her chief to the chief's superiors.

Since the chief is often poor and uneducated and will often live in conditions similar to those of their subjects, the most frequent criticism against the chiefs was that they are easily bribed. Chiefs conceded that they work under extreme conditions, their monthly allowances from government are too small to provide a higher standard of living, and the farming ventures of those who still attempt to augment their state allowances from farming are unsuccessful. All this provides fertile ground for corruption. Accepting bribes is a way for chiefs to supplement their income as well as a way in which the chief maintains and extends his influence in the community thereby creating situations in which poor people become indebted to him.

The historic practice of paying tribute to the chief is not easy to distinguish from bribes. The 'chief's chicken' was historically intended to provide sustainance to the chief and ndunas during the day of court hearings.

In some instances customary leaders augmented their income by emulating the formal justice system's sanction of imposing a 'fine', which, in the absence of a system in which there is a separation of powers, would revert to the customary leader.

Education and training of traditional authorities

The profile of chiefs (see Appendix 8- Profiles of Traditional Authorities) confirms that many of the chiefs have not received any formal education or training to fulfil their chiefly functions. They are in their positions by bloodline and not necessarily by virtue of merit. The manner in which customary justice issues are settled perhaps does not require that they be specifically trained as they adopt a participatory approach and rely on community norms and values. Nonetheless, some of the chiefs did acknowledge the current pressures and demands placed on them by the recent

democratic environment. In this regard, they highly valued the assistance they obtain from village elders and *ndunas* in dispute settlement. They also called upon the government and NGOs to target them for training and sensitization. They suggested the following among other topics:

- Human rights;
- The Malawi constitution;
- Gender issues;
- Management (of court);
- Dispute resolution skills; and
- Sentencing principles.

Language

As opposed to the formal system that uses English as the official language of the court and relies on court interpreters, the customary justice system conducts its proceedings in the local language understood by the parties to the particular dispute. This promotes access to justice, as the parties, witnesses and all observers are easily able to follow and take part in the proceedings.

Records

Customary justice forums are by the very nature of their informality not courts of record. However, this depends, to a large extent on two main factors:

- The nature and gravity or seriousness of the offence; and
- The place of the particular forum in the hierarchy of the traditional justice system

Village headmen and chiefs expressed the view that if the case is considered serious and there is a high likelihood of appeal to a higher traditional authority, attempts will be made to have 'notes' taken of the proceedings and the outcome of the case. Chiefs (at traditional authority level) have clerks for such tasks. To what extent such notes are an accurate and complete reflection of the proceedings is questionable. It is more likely that much of the recording of cases take place at the highest level in the hierarchy, the T/A level. Indeed, at the court of Paramount Chief Mmbelwa there was evidence that at such level, much effort is made to keep records.

Gender Issues

Gender issues receive scant special attention in traditional forums. This could be ascribed to the fact that the role of women is delineated by custom within a patriarchal system and that only a minority of women are decision-makers within the system. Only four of the 42 traditional authority figures that were interviewed are women.

When women were given a platform to speak to the research team on their own they commented on the lack of freedom for women to express themselves at traditional forums, since the system favoured men. Women felt that, due to their economic

disempowerment, they fared worse in traditional forums of dispute resolution, since men were able to bribe the chief. Furthermore, women felt that domestic violence was not effectively dealt with by chiefs, particularly since chiefs were unable to enforce their directives. Women stated that their greatest difficulties were their economic dependence on men and the prevalence of domestic violence.

The views of the traditional authorities of the formal justice system

Most traditional authorities that were interviewed had negative views of the formal justice system and their objections to the formal system span both the criminal and civil justice system, as well as commentary on the impact of democracy.

Their views on the criminal justice system can be categorised as follows:

- Chiefs lamented that many matters that were formerly brought to their attention now simply bypass them and were taken directly to the police or the magistrate. Moreover, the criminal justice system did not refer petty matters back to them for adjudication or for information.
- Chiefs complained that there was no feedback to them when they referred a matter to the police. Police frequently granted bail without informing them and this often resulted in self-help justice by community members who were against the granting of bail.
- Chiefs wished for the days when they were given "returns" on the cases that they referred to other institutions, since this meant better communication. Chiefs felt that they now operate in a vacuum.
- Some were disparaging about the use of westernised concepts of criminal justice rather than the restorative justice approach of traditional forums.
- Community policing was sharply criticised by chiefs, stating that community policing groups had taken over the function of chiefs and that community policing groups were no more than vigilantes since they resorted to taking money from suspects. To circumvent this, they said these groups should get paid for the work they do.

In respect of civil matters, they expressed disapproval of the following matters:

- That magistrates courts bypass custom and rule in favour of women in inheritance matters;
- That magistrates issue divorce orders rather than encouraging reconciliation;
- That magistrates try matters in the absence of one of the parties; and
- Urban and Peri-urban Chiefs in Area 49 Sector 3 (*Dubai Area)* Lilongwe complained about the manner in which both the Lilongwe DC and the Lilongwe City Assembly Chief Executive (CE) dealt with their land matters. They observed and suspected a lot of political interference in the functions of the DC and CE.

Lastly, some chiefs linked their perception of a degeneration of law and order and traditional values, such as respect for traditional authority, with the citizenry's swing toward democracy.

Views of the informal justice system by State officials and NGO's

The interview team also had occasion to interview State officials, such as Police, Prison officials and DCs, as well as a few NGO's, such as PAC/NICE officers to solicit their views of the informal justice system. Most were of the view that Chiefs should be given back their powers and authority to preside over disputes, although they also expressed certain reservations.

The Police, Prison officials and DCs were of the view that Chiefs should be given back their powers to decided minor criminal issues and most civil cases at custom in order to reduce their case-loads. Prison officials at Mzimba Prison observed that most of the suspects on remand and some of those convicted and serving sentences ought not to be in prison as they were involved in cases or disputes which could have been easily resolved at the village level.

Although State officials were generally agreed that Chiefs should be given back their powers, their expressed caution about the following issues:

- Tendency for chiefs to be bribed or become corrupt;
- Tendency for nepotism, regionalism and favoritism;
- Political influence and interference of chiefs' judicial functions;
- Concern over Chiefs' lack of awareness of and respect for the respective jurisdictions of the formal and informal justice systems;
- The tendency of 'urban and peri-urban chiefs' to openly and sometimes deliberately violate city by-laws and regulations by allowing encroachments on land;
- Low levels of education and lack of civic education of chiefs; and
- Social Welfare officers expressed concern over the tendency of some chiefs to provide false information to DC offices with a view to cheating the system and unlawfully benefiting under deceased estates.

The NGO, PAC/NICE expressed concerns about the tendency of the customary justice system to discriminate against women and children, especially in inheritance and domestic disputes. Furthermore, they worried that chief's overtly or covertly sanctioned 'mob justice', due to limited understanding of the right to bail and other human rights and democratic principles.

RECOMMENDATIONS

1 The starting point should be for the law to clearly address the transition problems. To this end the law must harmonise all the laws having a bearing on the work of magistrates to clear uncertainties that have been created by the haphazard process of integration.

2 The structure and distribution of magistrate courts needs to be revisited. As we have observed above, the current structure and geographical distribution of the courts do not cater for the needs of the rural litigant. It is imperative, therefore, that lower level magistrates be gradually phased out in rural areas and be replaced by magistrate courts of ample jurisdiction, preferably first grade magistrates. Considering that the distinction between first grade magistrates is artificial, in that they hold the same qualifications and experience, we recommend that the distinction should be abolished or maintained for administrative purposes only. It should not limit the jurisdiction of the courts. Phasing out of lower magistrates necessarily entails amendment to the Courts Act. It also entails upgrading all third/ fourth grade magistrates. Alternatively, and in the short-term, 1st grade magistrates at the *bomas* should be provided with reliable transport and a fuel budget at cost to the State so that courts of assizes can be held regularly. This may be preferable since the monthly case-load of 3rd and 4th grade magistrates is very low. It may thus be more cost-effective to scrap the posts where the case-load does not merit a magistrate, since the State would save the cost of these magistrates' salaries. It would also circumvent the need and cost to establish prosecution services where they are not yet established. With this cost-saving in mind it would also make it feasible to upgrade all 2nd grade magistrates to 1st grade positions as rapidly as possible.

3 The above will require deliberate efforts to refurbish and reconstruct some rural courts and the provision of suitable facilities for the functioning of a higher-level magistrate court. The issue of security needs to be addressed as a matter of urgency.

4 There is need to conduct a needs-assessment survey to find out exactly how this should be done. There is need to establish what the requirements of particular areas are. To this end baseline data needs to be made available for planning and decision-making purposes. This data might *inter alia* include population density, geographical distances, incidences of crime, case returns, and number of reported cases at both the formal and informal level. This data may help the system to pool resources where they are needed most.

5 The deployment of magistrates should be seriously looked into. It is worrying to note that the system is currently employee driven in that the magistrates have the final say on whether they want to be posted to a particular place or not. This has resulted in the congestion of magistrates in urban areas, despite a shortage of court buildings. Alternatively, the Judiciary should devise a system where people applying for magistracy should be applying for specific vacant posts. Additionally, it should be made clear that the employer has the

prerogative of transferring them to any place where their services are required and failure to do so may constitute a breach of the conditions of service.

6 There is need to overhaul the operation of the system so that it is more user-friendly to the uneducated and unsophisticated litigant. Procedures should be made less complex. They must be simple and informal. Further, the role of the magistrate in cases where the parties are not represented must be redefined. The court must not encourage adversarial thinking at the expense of establishment of the truth. It should take positive action to protect individual rights. This necessarily demands reorienting the magistrate from being a passive judge to a more proactive trial manager. It also requires adopting innovative methods of blending the adversarial and inquisitorial styles of litigation. They should reflect some of the values of customary law procedure whose major objective is establishment of truth. Consequently, the Subordinate Court Rules must be amended to clarify the procedure in Magistrate Courts. They should clearly guide the magistrates on how procedures must be conducted in the lower courts.

7 The magistrates should be given discretion to conduct the matter in vernacular should language be a barrier.

8 Courts must take their civic education role seriously. Courts should also provide
information to litigants through leaflets and posters. Where possible, conduct public sensitisation programmes.

9 Government should train and deploy paralegal staff to rural areas who should provide advice to litigants on how to deal with their claims.

10 The courts Administration Act should be amended to enhance the powers of the Chief Courts Administrator to plan and reorganise the judiciary. There should be direct communication between the High Court/ regional magistrates and the rural magistrates. Going through the first grade magistrates creates unnecessarily serious bottlenecks within the system.

11 The law ought to put in place proper mechanisms to ensure that court orders are not flouted. One needs to explore the possibility of imposing more effective, appropriate and fair sanctions, including orders for costs. The party must not be allowed to ignore a court order unless he or she obtains an order for the extension of time within which the ruling must be complied with. The magistrate should as a matter of practice warn the party of the consequences of non-compliance with court orders in civil cases.

12 The law should also provide better incentives to those who are entrusted with the actual task of enforcement of judgements. Their crucial role should be recognised and adequately recompensed. Provision of facilities like bicycles, is a must. It should also be noted that even though the requirement to pay ‘conduct money’ makes sense in urban areas it is inappropriate and a major obstacle to access to justice in rural areas where the majority are in dire

poverty. The recommendation by court officials that we revert to the former position where the court would enforce its own judgements is pertinent in this regard. The clerk must be given powers to take the initiative to deal with defaulters.

13 Courts need to be staffed with more sophisticated personnel in order to effectively deal with the challenges of a plural and grossly under-resourced legal system. Additionally, courts need to train personnel who can provide court based assistance and advice to litigants who are not represented. There is consequently serious need for adequate training of both magistrates and court staff in order to improve the necessary skills. A magisterial training college would be ideal for this purpose. However, the Courts Act should clearly spell out the basic educational qualifications of law clerks and lay magistrates to guarantee quality of the people who enter into the system.

14 All serving magistrates should be required to attend continuing legal education seminars. The training should be intensive, with a focus on areas magistrates meet most in practice. Inheritance distribution orders, debt and divorce from the bulk of civil matters. Theft, breaking and entry and the various forms of assault make up the majority of criminal cases. Magistrates should receive priority training in these matters. This can however only take place once the procedural and legislative/Constitutional *lacunas* have been attended to.

15 The Chief Resident Magistrate should assume a greater oversight/ supervisory role of the lower magistrates. It should be mandatory upon him to review case files of lower magistrates. He should also act as an appellate judge in civil cases arising from lower magistrates. The law should also seriously consider providing for an elaborate procedure for the conduct of civil appeals.

16 It is also in the interest of justice that the Judiciary evaluates the performance of its staff members and terminate the services of those who are grossly incompetent. Similarly, Court Marshals who have been elevated to clerks should be sent for training or reassigned to their former duties.

17 The question of the ultimate place of customary law in the Malawian legal system has to be answered before any meaningful plans can be made regarding the ultimate shape of the Malawian judicial system. This study found that it was unlikely that customary law would disappear in the foreseeable future as a significant part of the Malawi legal system. But then modern conditions demand its modification. Retrograde features of customary law need to be eliminated. The challenge, therefore, becomes how does one eradicate these features without disrupting the social fabric of society. One way of developing the positive attributes of customary law is to encourage customary law to be part of the jurisprudence of the formal system. This can be done by consolidating the link between the formal and the informal system so that the application of customary law at the informal level ultimately finds its way to the formal system. The judiciary, therefore, needs to make a deliberate effort to promote the informal systems of justice. This may be by way of facilitating the establishment of constitutional traditional or local courts. They will have a

comparative advantage over existing customary forum in that, in theory, they will be more accountable since they will be subordinate to the High Court. Safeguards must, however, be put in place to avoid destroying the positive attributes of the informal justice systems in the process. This can be achieved by allowing these forums relative independence. The formal system should only come in by way of appeal or review. Although deliberate codification of customary law is an exciting idea, it should be approached cautiously. Attempts to codify customary law in other jurisdictions met with limited success regardless of the approach that was taken. What has been successful however have been attempts to restate in an authoritative form the customary laws of a given society. The object of these attempts has not been to prepare a code but to furnish to the courts a guide to the applicable laws. Nevertheless, whatever form it takes the reduction of customary law into writing would not fail to have a very important effect on the administration of law in that it will bring in more certainty to its application. However, it might have the disadvantage of rendering customary law less adaptable to changing social conditions. We would, therefore, concur with those who recommend the gradual development of customary law through court rulings. Scholars would only then be able to sift common customary law rules from them. We also recommend that higher courts must start sitting with assessors to guarantee the authenticity of customary law jurisprudence that will emanate from them.

18 The law must introduce mechanisms to ensure that victims and witnesses are protected from abuse. More specifically these programmes must be targeted at raising awareness of the needs of the vulnerable or intimidated witnesses. The system should also adopt legislation to co-ordinate victim support services. Additionally, courts must be given statutory power to exclude the public from the courtroom when vulnerable victims are giving evidence.

19 Case files are poorly kept. Record-keeping is sub-standard. This is predominantly due to a lack of stationery, official forms and storage facilities. However, it may also be due to low levels of meticulousness and training. It is therefore necessary to provide the necessary stationery, forms and storage facilities. Administration staff should also be trained. The use of meticulous and trained staff could be sent on circuit to train other administration staff, who seem not to understand the purpose of keeping files in good order or attaching a copy of the summons to the file of the court record.

20 The throughput of cases was surprisingly good. Problems seem to occur predominantly in the Lilongwe District Courts, especially where other criminal justice departments are tardy. An integrated criminal justice approach needs to be applied to minimise delays. Magistrates should urge other criminal justice department staff to ensure that they do not delay matters, and where dilatory practices continue should use their powers of dismissing the case.

21 There appears to be an uneven distribution of the workload among 2nd grade magistrates in Lilongwe District Courts. In addition, there are too few courtrooms, which means that many magistrates and their clerks are not optimally utilised. A needs and output analysis of these courts should be

undertaken. Based on the findings of such an analysis, excess staff should either be posted out to vacant posts or more courtrooms should be built. In the interim, magistrates should make more optimal use of the 'idle' time of courtrooms, e.g. postponements and summary judgements could be given before 9h00 or during the lunch break.

22 There appears to be an uneven distribution of the Justice budget between the High Court and Subordinate Courts and between Regional Magistrates Courts and the lowest subordinate courts, particularly in far-flung rural areas. Considering that a large percentage of cases are brought to the lowest subordinate courts, a more equitable distribution of the Justice budget should be formulated.

23 As a short-term measure and to ensure that traditional authorities become alive to the democratic and Constitutional landscape that they now have to operate in, pressure for change can be fostered both by an informed and mobilised citizenry and by providing traditional authorities with insights into the human rights and democratic principles that customary law frustrates. Such training and sensitization programmes will not overcome the fundamental legal obstacles of the absence of separation of powers that the role of chiefs currently represent, nor necessarily ensure accountability and fair trials that no doubt will continue to take place in customary justice forums, but it is essential for traditional authorities to see themselves as part of the solution rather than as an intractable problem. This means that sustained and inclusive training in human rights, gender rights, principles of democracy, the Malawian Consitution and the underlying principles and administrative practices of running a court, need to be provided both to communities as well as to traditional authorities.

24 The situation of chiefs in Area 19 sector 3 of Lilongwe is somewhat different from the traditional authorities in the rest of the country. We therefore recommend adoption of the following logical process in relation to urban and peri-urban chiefs:

- recognition of the role that urban and peri-urban chiefs play in their communities. This could be done at both policy and legislative levels. We recommend the adoption of a process similar to that adopted in relation to creation of community policing structures in urban and rural areas. There should therefore be specific policy framework and rules and regulations for the proper functioning of urban and peri-urban chiefs. Such a process should proceed to the extent of defining the transparency and accountability required of such chiefs and the possible implications and consequences of flouting such requirements. Their linkage to state institutions and officials should also be clearly defined to allow for independence of such urban and peri-urban chiefs. Consideration should be given to making them part of local government.
- The functioning of urban and per-urban chiefs should be regulated by linking such structures to the formal institutions such as the police, DC

offices and magistrates courts. These should provide guidance and regular follow-ups on matters handled by such chiefs.

- Alternative Dispute Resolution (ADR) mechanisms should be developed with the involvement of the chiefs and local communities. Such mechanisms should provide a basis for training urban and peri-urban chiefs in ADR. This should be complemented by guidance and supervision for institutions in the formal system. Where necessary, Police, DCs or Magistrates could sit in on some ADR cases as part of the hands-on training for such chiefs.
- Appropriate referral mechanisms should be developed for referring cases from urban and peri-urban chiefs to the formal system of justice and vice versa.
- The government, NGOs and donor agencies should support such institutions by providing them with regular training and sensitization sessions in such issues as human rights, the Constitution and gender. The urban chiefs should also, at minimum, be provided with resources and facilities such as stationery (paper and pens) and transport (bicycles).
- Appropriate incentives should be created for urban and peri-urban chiefs. The current system of "allowances" paid to traditional authorities may be considered with the necessary adjustments to make the allowances meaningful.

THE APPENDICES

The report provides, by way of appendices, a Literature Review, a Profile of Magistrates that were interviewed and a Profile of Traditional Authorities that were interviewed.