DEVELOPMENTS

Conference Report - Administration of Justice in Africa – Effectiveness, Acceptance and Assistance: Impressions from the Joint Conference of the Protestant Academy Loccum and the African Law Association (2007)

By Caroline S. Rupp[*]

A. Introduction

"When a stone is put in your way, you can view it either as an obstacle – or as a stepping stone." This well-known phrase was quoted in one of the opening speeches at the Joint Conference of the Protestant Academy Loccum and the African Law Association in Rehburg-Loccum, Germany, on 30 November 2007. It set the tone for a three-day conference on African law which explored the "Administration of Justice in Africa – Effectiveness, Acceptance and Assistance" in many facets, focusing on different countries and various approaches ranging from women's rights to development cooperation. The African Law Association (Gesellschaft für afrikanisches Recht e.V.), founded in 1973, aims at promoting and furthering the knowledge of the African legal systems.[1] In keeping with the African Law Association's focus on different aspects of law in Africa – not only legal aspects, but also points of view from politics, history, development cooperation and ethnology – the conference participants came from various backgrounds: professors and lecturers from Germany and various African states were present as well as other members of the African Law Association and undergraduate and PhD students from several universities. A large student group, of which the author was a member, came from the University of Würzburg, their interest in African law awakened by a series of lectures in their home university and a cooperation project of the Faculty of Law of the University of Würzburg, the Namibian Ministry of Justice and the Legal Assistance Centre in Windhoek, Namibia.[2]

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[1] More information about the African Law Association can be found at www.rechtinafrika.de.

[2] For further information visit http://www.jura.uni-wuerzburg.de/lehrstuehle/professoren/linhart/projekte/namlex/

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Unifying the lectures and the opinions and lingering even long after the conference participants have returned to their homes all around the globe, is the sense that although the administration of justice in Africa may still be posing various problems, there is a readiness to view them as challenges to be tackled with joint force. The key issues of the conference were the various steps that many African states have already taken to further the access to justice, incorporating both Western ideals and traditional African methods of conflict resolution into practical and problem-oriented approaches. The presentation of these approaches, often by those who were part of their development, served as a stocktaking of what has been done and a forum of ideas for what can be done to further develop African legal systems. But to a German law student with previously only little contact with Africa and its legal systems they offered far more: a whole new perspective on law and legal systems and on the core elements of justice – sometimes, shame at Western arrogance, but more often awe at the courage with which many African lawyers tackle their countries' problems, and at the practicability and success of "simple" systems.

In his opening speech, Dr. Kurt Madlener, MCL, former Research Fellow (Africa), Max Planck Institute for Foreign and International Criminal Law and legal practitioner, gave an overview of African legal culture. Starting with the historical roots of colonialism, he explained how most African legal systems stem from a pluralistic tradition, with indigenous religious and tribal courts existing alongside the legal systems implanted by the colonialists and modern African approaches to uniform state legal systems. This plurality of legal cultures is a double-edged sword: on the one hand, traditional forms of dispute resolution tend to be more accepted especially by the illiterate lower classes; on the other hand they may clash with modern notions of justice, (gender) equality, and human rights. On the one hand, a pluralistic tradition is more adaptable to specific situations and regional problems; on the other hand, a definitive system is needed especially in the sector of private international law to offer legal security for foreign investors. Finally, the implementation of new state legal systems often leads to a lack of trained personnel, and to the question where and in which legal systems Africa's lawyers can and should be trained. Dr. Madlener pointed to various approaches merging traditional and modern forms of finding and applying justice, such as the system of "paralegals" or the "palaver" as an African form of what the Western world terms "mediation".

B. Effectiveness of State Justice

Dr. Madlener's speech offered a comprehensive background for the first part of the conference, entitled "Effectiveness of State Justice", which explored some of the problems encountered and solutions found by African states in applying effective state justice. Prof. Dr. Ulrike Wanitzek (University of Bayreuth) focused on Tanzanian approaches to human rights in courts, especially women's and children's rights. Her lecture, based on her own research studies in Tanzania, used several cases to illustrate how women's and children's rights are an issue in Tanzanian courts and how, even though it is still a long road towards a full appreciation of women's and children's rights in the context of human rights, the first confident steps on this road have been taken. The various African charters on women's and children's rights, although far from being universally ratified, can be seen as an example of this progress.

In a panel discussion led by Dipl.-Jur. Hatem Elliesie (University of Malta/Free University of Berlin), "Different Approaches to Genocide Trials under National Jurisdiction in East Africa", Dr. Urs Behrendt, a legal practitioner, and Niway Zergie Aynalem, LL.M. (federal first instance court judge in Addis Abeba, Ethiopia/PhD student, University of Hamburg), explained the approaches taken in Rwanda and Ethiopia. In both countries, the genocide trials were at least partly left under national jurisdiction (as opposed to, for example, Sierra Leone or former Yugoslavia). A UN tribunal for Rwanda was established in 1994 for the prosecution of the leaders and organizers of the genocide; however, the huge percentage of the population involved at a lower level was left under national jurisdiction, to determine who had been involved in the genocides and to what extent, and to be punished. State justice was called on to provide an effective and speedy administration of justice to prevent acts of retaliation, to foster trust in the state as a dispenser of justice, and to allow the torn-apart population to find a way to coexist and build a future. As Dr. Behrendt pointed out, traditional Western methods of trial were unsuitable due to the lack of trained legal personnel, the difficulties of providing evidence and testimony, the large percentage of the population involved in the trials and the need for speed – even if working at their full power, the existing courts would have needed decades for all trials, posing the additional problems of pre-trial and post-trial confinement possibilities and effectively preventing the country from moving towards a peaceful future. Instead, so-called gachacha trials, based on a traditional model of the administration of law through a panel of lay judges, were installed at village level, allowing the conflicts to be resolved within the communities. The ensuing discussion about the pros and cons of such a system (the speedy and direct access to justice versus the possibility of personal revenge motivating decisions and the difficulty of state control of the individual gachacha trials) did not reach a unanimous verdict, but offered a keen

sense of the potential and the dangers of this traditional African way of administrating justice, and of the difficulty of approaching African genocide trials with Western notions only. Most hotly debated were the questions of whether ideas of personal revenge could interfere with the verdicts of the gachacha trial, and of how to prevent the prosecution of innocent people. [As far as I remember, reconciliation was not debated much, as unfortunately the discussion centered on these issues.] On the next morning, Mr. Niway presented an outline of the Ethiopian Federal Courts. Influenced by Continental European legal systems and the adversarial system, the Ethiopian legal system guarantees rights like the right to legal counsel and public trials. However, there is a need to reform the Ethiopian court system: the 1994 Constitution established the courts as independent from government, but in practice, commissions have extensive powers and judges are appointed by the State Council. Shari'a courts are established on a federal level although Article 11 of the Constitution proclaims the separation of religion and state. Practical problems like a backlog of cases and the lack of modern technical facilities leading to records being handwritten and not published add to the growing imperative for reform. First steps have been taken: the right of every citizen to use his or her own language in court, with the provision of an interpreter as the court's duty, is being put into practice, for example. However, extensive reform plans are awaited and expected in the years to come.

Justice Dr. Kofi S. K. Date-Bah then spoke from his own experience as a judge in the Supreme Court of Ghana. His speech "Judging in Ghana: Some Reflections" offered an insight into the present-day situation of judges in Ghana. Influenced largely by the English legal system introduced in colonial times, with common law implemented and a court equivalent to the English High Court established by the British Colonial Statute in 1874, Ghana looks back at a long legal tradition. From the "harassed advocates" of colonial times when Ghanians could appear in courts as litigants only, an independent legal profession has arisen which has formed a unique Ghanian legal system. Today's approach to law is pluralistic, incorporating customary rules from Ghana's African heritage and the English common law introduced in colonial times to which Ghana offers its own perspective. Justice Date-Bah explained the Ghanian court structure of lower courts and superior courts, the most important of which is the Supreme Court which also acts as constitutional court. In recent years, reform processes inspired by the Woolf Reforms[3] opened up the legal system to allow for methods of ADR (alternative dispute resolution) and reconciliation; one important development is that proceedings may be stayed during reconciliation, thus offering the parties the

[3] The new Civil Procedure Rules (CPR), also called „Woolf Reforms", were introduced in England in 1999. They reformed the rules for the pursuit of civil claims, aiming at a clearer system of litigation with a focus on reducing costs and speeding up procedure (especially pre-trial procedure).

chance for an unhurried and mutually satisfactory reconciliation process. Remaining difficulties to be tackled are the *stare decisis* question of how diverging precedents in judge-made and customary law are to be treated by the courts and how the two jurisdictional systems can be unified, and of how the verdicts of tribal chiefs who are not part of the official system of courts can be recognized. The approach to this challenge is to recognize the important role of the tribal chiefs by treating their decisions as arbitral awards which allows courts to recognize such decisions which are still often sought by the people. This solution illustrates how the Ghanian legal system is oriented towards a Western-influenced future, but incorporates its African heritage. The emerging pluralistic legal system reflects Ghana's multi-faceted identity far better than any "imported" Western system could have, while still allowing for the importance of Western and colonial influence. Building a system out of various elements not pressed to fit into a certain form, but incorporated in the way that they are, is an approach that should be kept in mind for reform processes elsewhere in the world – for incorporating traditional and modern conflict resolution, but also for merging religious and state law, or the laws of various regions into a unified but adaptable code.

C. Acceptance and Access to Justice

The second part of the conference, "Acceptance and Access to Justice", consisted of a panel session of three speakers, each dealing with an aspect of how justice can be made more accessible to the African people in the present social and economic context. In his paper "Local Ownership and the Rule of Law in Liberia", Leopold von Carlowitz, MPhil (Cantab.), from the Centre for International Peace Operations (Berlin) described the problems of implementing an effective legal system in Liberia after the civil war. Although a state legal system exists, long distances prevent the rural population from seeking out the official state courts. Also, the official legal system is regarded with scepticism and mistrust by a large part of the population who choose to have recourse to traditional methods of conflict resolution. In order to uphold and implement the principles of the Rule of Law and to avoid a "culture of impunity" resulting from the lack of access to formal courts, it is necessary to provide access to justice and to create trust in the state legal system. Integrating existing local structures and traditions of conflict resolution is an essential part of this process both for providing access and for creating a legal culture accepted by the people.

An example of how traditional means of conflict resolution were successfully integrated into African state legal systems is paralegals. They were the topic of a paper "Access to Justice: Creating a Role for Paralegals in the Administration of Justice in Africa", presented by Prof. Dr. Chris Maina Peter (University of Dar es

Salaam, Tanzania). Originally developed in Malawi, Tanzania out of the need for dealing with the lack of trained lawyers and local access to justice, the system of paralegals has spread to various African countries. Not as formal as a court but more closely connected with the local communities, paralegals offer advice on legal problems and settle disputes using ADR methods. They are chosen as respected and literate members of the local communities, hence their verdict is usually accepted, similar to the former role tribal chiefs or elders played in dispute resolution; however, the paralegal's position is not connected to age or tribal position. The problem to be tackled is rather that paralegals are often treated with little respect by legal professionals, as they have little formal training and are considered less prestigious. Ensuring recognition of the important role of the so-called "barefoot lawyers" in dispute resolution by the legal profession and establishing the role more firmly in the context of the formal legal systems is a mission for the years to come.

In Nigeria, the concept of ADR has already been integrated in the state legal system. Olusegun E. Oguyannwo, CEDR Accredited Mediator from the Mediation Training Institute in Abuja, Nigeria, presented the concept of "Alternative Dispute Resolution in Nigeria – Multi Door Courthouses" which combines ADR and court methods of dispute resolution. Instead of bringing a case straight to trial, in a multi door courthouse, different strategies to deal with the dispute are possible, for example mediation. The best strategy for the specific problem is then chosen and followed – this may involve a formal court trial but often, ADR methods prove more efficient and speedy. Although some Nigerian legal professionals are sceptical about this system, it has already shown many successes: especially with business disputes, both parties often prefer a conciliatory ADR solution leaving the business relation intact and smoothing out problems. In fact, the method of ADR has already been dubbed "EDR" (Effective Dispute Resolution), and it is hoped that the possibilities offered by the multi door courthouses will make Nigeria more attractive for foreign investors. Eventually, a similar concept might be worth trying, in a form adapted to Western needs, in Western courthouses – in commerce courts, but also in family courts, there is a need for more solution-oriented approaches which spare the participants the costs and the duress of a formal trial.

D. Development Cooperation and Assistance of Justice: The Way Forward

The last part of the conference, "Development Cooperation and Assistance of Justice: The Way Forward" was devoted to exploring methods of furthering the access to justice in Africa and possible ways of assistance. First, Prof. Dr. Patricia Donli (University of Maiduguri, Nigeria) gave an introduction to the situation of women in Borno State in the Northeast of Nigeria, where high maternal mortality

and HIV rates, low education levels and political under representation make women's situation poor compared to other Nigerian areas. However, developments towards an awareness and enforcement of women's rights are under way, especially by way of intervention programmes and education. The University of Maiduguri Law Clinic is an example of a successful intervention programme.

This Law Clinic project was then presented by the Law Faculty's Dean Prof. Dr. Isa Chiroma (University of Maiduguri, Nigeria). It tackles the problem of access to justice at its core: especially the poor inhabitants of the Northeast of Nigeria often cannot afford professional legal help. The international judicial reform initiative in Nigeria had the objective of providing access to timely justice, ensuring the judiciary's independence, reducing corruption and building up public trust in the judiciary. In the course of this initiative, Borno State was chosen as a pilot state for GTZ[4] support for the work of NGOs, and the Law Clinic project was developed with support by the UN and the GTZ.

In 2005, the Law Clinic opened its doors: 20 out of 180 students from the University of Maiduguri Law School are chosen in each year to work in the Law Clinic, supervised by lecturers (fully trained lawyers), mediators and paralegals. They provide free legal services to citizens in need as an alternative to litigation in court, promoting ADR methods. Additionally, the Law Clinic serves as clinical training for law students, and instils in them a sense of serving the community in their capacity as lawyers. Over the past two years, the success of the programme has been considerable: a full ADR centre has been established within the Law Clinic, there are now more trained ADR providers in Borno State, and ADR has become more popular, especially with women. The Law Clinic also contributes to enhanced gender sensitivity and an amelioration of the women's situation.

However, challenges still remain for the project: in its promotion of ADR, it is not accepted by many conventional lawyers, and illiteracy and socio-cultural and religious barriers still bar the way to the Law Clinic for many citizens. Also, the potential withdrawal of funding and the question of sustainability endanger the project's long-term perspective, while the question remains open if and how far Western ideas can be transplanted into Nigeria against growing resentment within the population. In order to tackle these challenges, Prof. Dr. Chiroma proposed further cooperation to strengthen judicial integrity, mainstreaming ADR to make it a more accepted method of solving disputes, establishing an ADR network at African universities for the development and exchange of ideas, and founding

[4] The GTZ (*Deutsche Gesellschaft für Technische Zusammenarbeit*), founded in 1975, works to support processes of reform and change in developing countries, often in cooperation with the German Federal Ministry for Economic Cooperation and Development. More information can be found at www.gtz.de.

programmes combining ADR and gender studies. The establishment of more mediation centres and Law Clinics would also propel the ideas of ADR and allow for more access to justice. He was optimistic that with continued monetary help, the Law Clinic will thrive further and inspire and facilitate access to justice in Borno State and beyond.

Another perspective on development help and GTZ work was presented by Christian Grünhagen (Federal Ministry for Economic Cooperation and Development, Bonn) in a paper entitled "Experiences and Perspectives of the German Federal Ministry for Economic Cooperation and Development". Outlining the successes of development work and stressing that democratic notions like the separation of powers and the Rule of Law have been established in many developing countries, Mr. Grünhagen noted that development cooperation can be regarded as positive for all involved. However, he pointed out that the importance of cultural individuality and the complexity of customary law should not be underestimated. Especially when involved in reform processes, the situation must be carefully regarded in order to avoid directly implanting Western notions and concepts in systems demanding different approaches. Development cooperation should instead offer assistance to developing countries for determining their own approaches and finding their own way towards an encompassing system of justice.

All in all, the conference offered an insight into various challenges, but more importantly, into many possible ways of dealing with them in the context of Justice in Africa. As projects like the Law Clinic and the multi door courthouses show, African law scholars and practitioners are well aware of the stones that still lie on their path to justice – and this conference demonstrated their readiness to transform obstacles into stepping stones. Equipped with a devotion to justice, a sense for the people's needs, and a willingness to combine and adapt Western and African approaches to create modern and effective ways of dispute resolution, some remarkable stepping stones have already been laid down with admirable daring and inventiveness. Some of these have been implemented with the help of the Western world, but more often than not, the incentive for change and the ideas for reform have been born from the African countries themselves.

There is still a need for development, and need for help – but as this conference showed, with the development of law in Africa, the Western concept of help needs to change too. As many African states are developing their own legal systems with immense courage and confidence, they combine approaches and ideas in a manner they see fit for their situations. What the West could and should do in this situation is to offer help for these projects in the way the GTZ does – help to develop, plan and bring to fruition the ideas born in Africa. Africa is a diverse continent with a long and multi-faceted legal history. Instead of measuring them by Western

standards only, we should regard the current processes of reform asking ourselves what we can learn from them. The incorporation of ADR methods into state legal systems is one of these reform processes that is by far not complete in the Western world either – Africa often offers practical solutions which would be worth adapting for use in the West. Methods like the Law Clinic are unheard of in Europe – but they could serve to lessen the number of cases brought to court and the cost of litigation, and to provide a new edge to legal education. Similarly, the possibility of the coexistence of legal cultures in systems of plurality is a model that might well be worth taking a closer look at in the context of the unification of law, be it in the E.U. or elsewhere. At the conference, a gust of fresh wind from Africa was blown into the participants' minds, bringing with it tales of courage and daring, humour and success. Over the course of the next few years, this wind of change may well become a storm – and it is up to the West to recognize the fertility that it brings with it.

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