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GOVERNANCE AND LEGAL REFORM IN THE GAMBIA AND BEYOND: AN ANTHROPOLOGICAL CRITIQUE OF CURRENT DEVELOPMENT STRATEGIES

Governance and Legal Reform in The Gambia and Beyond:

an anthropological critique of current development strategies[1]

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Abstract

Using The Gambia as a case study, this paper suggests how the current development strategy of legal reform can be made more sustainable by drawing upon local institutions and exploring alternative dispute processing modalities. There have been innumerable projects aimed at advancing socio-political and economic development in Africa, yet the results have been disappointing. This lackluster record is largely due to the top-down imposition of Western models. At present, decentralization and legal reform have emerged as major donor priorities. Unfortunately, most programs have not lived up to expectations, often because they did not resonate with target populations.

The Gambian case illuminates flaws in current development approaches. Gambian legal reform plans are integrated with the decentralization effort and are based on the notion of modernizing and extending the court system. However, most rural Gambians find court adjudication to be counterproductive or ineffective in meeting their needs. In addition, international support for extending the rule of law allows the weak Gambian state to strengthen their control over the national periphery, in direct contrast to the stated aims of administrative devolution. The Gambian and comparative data suggest that a more fruitful strategy would move beyond simply reinforcing a Western style court system. The mobilizational potential of indigenous institutions can be used to provide arenas in which values, expectations, and local policies can be debated. To enable a robust devolution of power and enhance popular participation in development and governance, it may be best to support the establishment of dispute processing fora that can also be used for policymaking and implementation.

Introduction

Since the late 20th century the international development sector has prioritized legal reform and decentralization. This paper uses The Gambia as a lens for evaluating these projects. The discussion expands on insights from legal anthropology and the critical literature on development (e.g. Escobar 1994; Ferguson 1994) and offers suggestions for future scholarship and policymaking.

One might understandably wonder about the global relevance of a small country in West Africa. I contend that the Gambian case exemplifies a widespread problem in international development and assistance, namely the reliance on Western models with little participation by the target population in agenda setting. The legal-rational juridical system introduced into Africa during the colonial period is a poor match with the needs and preferences of many rural villagers. Unfortunately, donors continue to dedicate much attention to North Atlantic style courts. There is undeniable merit in the idea of making governmental legal systems more efficient and less corrupt. However, there has been insufficient exploration of other strategies, especially in regards to local institutions that may be more suited to the affected populations' needs. Courts can undoubtedly be useful in some cases. Nevertheless, in rural southwestern Gambia reinforcing the court system represents a continuation of the prevailing trend of development projects overlooking local conditions, views, and values.[3]

In early 21st century Gambia, legal reform is intertwined with the other aforementioned themes in development, governance and decentralization. Critiques of decentralization have increased in the scholarly literature, but the concept does have potential merit. Devolving power from urban bureaucrats and elites to empower rural residents is a compelling notion with particular resonance in African contexts with histories of bloated, inefficient, and often corrupt bureaucracies. Unfortunately, implementation of this noble idea has repeatedly left much to be desired (see, for example, Hessling and van Djik 2005; Ribot 2002).

In the Gambian case, as of 2005 the main plank of decentralization efforts was establishing more high courts outside the capital area. Legal reform should not simply be a matter of extending the institutions of the urban center to the rural periphery. Such a strategy may serve the interests of international and national elites, but it will not aid many rural Gambians. The extractive,

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[3] Untangling social patterning and heterogeneity has been an enduring challenge in social science. There is notable diversity across individuals in any given population; worldviews are socially transmitted yet modified by experience. Actor and agency perspectives have become fashionable and discussing widespread trends in social groups less so. Indeed, many scholars now argue against the concept of culture, sometimes propounding instead a strategic choice or political action perspective (e.g. Bayart 2005). Globalizing processes notwithstanding, markedly disparate lifeways associated with certain groups remain extant and many of them correlate with particular geographical locations and associated population flows. It is possible – and useful – to investigate intersocietal variance while also accounting for agency and recognizing that social groups are not bounded, static, or homogenous. The key issue is level of analysis. Differences can be identified at all levels; when comparing individuals discontinuities will be found, but that does not obviate significant variance between groups. In addition, the intergroup level can be expanded from intervillage to interethnic to international, and other categories can be added to the preceding three (Davidheiser 2005). The questions posed in this paper require a macro level analysis, but it is undergirded by multidimensional ethnographic and empirical research. The associated data sets illuminate statistically significant patterning across various groups in rural southwestern Gambia and qualitative data suggest similarities to other areas of the country. In addition, considerable variation was found between modal Gambian and Western or legal-rational type dispute processing preferences. In the synthetic analytical approach propounded here the strategic action perspective is useful in elucidating the significance of intersocietal variation in dispute processing. Various dispute management processes have different potential impacts and outcomes and the disparities between legal-rational adjudication and ADR can be particularly noteworthy in locations like southwestern Gambia. Many Gambians described the legal-rational approach as unsuitable for their needs and the relational worldview and social context they are accustomed to. More micro-level analyses of dispute processing choices can be found in Davidheiser 2005 and 2006c.

bureaucratic state does not benefit them, and they have long resisted its influence, seeing it as alien and exploitative. "Bringing justice to the people" by strengthening courts and other state institutions that many people do not appreciate is a questionable strategy.

The potential for sustainable development and stable governance will be greatly increased if reform is geared toward integrating national bureaucratic systems with local values and priorities. Rather than focusing simply on courts and other familiar fora, efforts could be made to draw on local practices that are potentially participatory in nature, providing a discursive arena for debate and dispute processing. Open and transparent dispute management procedures can supply a social space for residents to discuss their conflicts, plans, policy wishes, and strategies for policy implementation.

Invoking multiculturalism and local customs has become fashionable, although empty words praising indigenous traditions are far more common than robust dialogues with practical implications. The reaction against this trend is discussed in the conclusion, but here several cautionary points are appropriate. The constructs of 'tradition' and 'community' are not inevitably good, despite the positive view they are often given by anthropologists and others who juxtapose them against a dehumanizing, individualistic modernity. Emic (and other) conceptualizations of tradition and community can be repressive and/or exclusionary, and customary dispute settlement can be problematic in terms of minority rights and perspectives. However, as discussed later, hybrids of customary and Western alternative dispute resolution practices have been successful in some contexts. These models offer ideas for potential safeguards that can be applied to monitor for abuses and increase project success, and suggestions for replicating the hybrid approach are listed near the end of the paper.

The policy proposals and overall analysis are derived from extensive ethnographic materials collected between 1999 and 2005 in southwestern Gambia. Conclusions drawn from the Gambian context are bolstered by data drawn from a survey of the related literature, and selected examples of these secondary data are cited below. Prior to examining specific localities, it may be useful to briefly review salient trends in the development and assistance sector that have impacted various regions in the Global South such as southwestern Gambia.

Legal Reform, Governance, and Devolution

International assistance, economic development, governance, legal reform, and customary law are often addressed as separate topics. All of these areas of study present complex problems that deserve thorough analysis. My intention here is to identify some of the connections between these various domains and illuminate the value of synthesizing scholarly and applied literatures in order to inform policymaking. A more theoretical treatment of related topics can be found in Davidheiser 2006a and 2006b.

Legal reform is a top priority of the development sector in the early 21st century. Leading institutions have proclaimed good governance and 'extending the rule of law' as essential prerequisites for socio-economic development. Agencies such as the World Bank and non-governmental organizations (NGOs) are pouring resources into attempts to enhance the judicial systems of the Global South, seeing that as a means for enhancing economic growth, building civil society, promoting stability, and addressing a variety of social problems (cf. Dakolias 1999).

There has been a parallel interest in decentralization and trimming down centralized bureaucracies. Devolution, or transferring power from the center to the periphery, ties in nicely with structural adjustment programs (SAP) that reduce the power of the nation-state. In addition, discussing community empowerment provides a nice contrast to the bitter effects of currency devaluation and other SAP-related policies that have negatively impacted the living standards of rural populations in the global peripheries. The rise of the somewhat fuzzy concept of civil society has further fueled interest in local authorities.

Indeed, governance has emerged as a main theme of current assistance programs. Policy-makers have begun focusing more on peacebuilding and the rule of law. There has been increasing recognition that pumping in money is not enough; assistance should be linked with peacebuilding. Militarization drains precious resources from other sectors and sustainable development is hampered by instability. Investors do not want to pour resources into long-term projects in war zones and local initiatives can be stifled by corruption or destroyed in outbreaks of violence. 'Good governance' – often glossed as accountable authorities operating under a robust rule of law that is fairly enforced – has therefore become a major theme in the arena of international assistance. Both conflict prevention and peacebuilding require 'good governance,' and donors have been paying increasing attention to dispute settlement as a programmatic target area. An effective juridical apparatus is seen as vital to a proper governance system, and legal reform has become a top priority of international, governmental, and non-governmental agencies. Major organizations such as the World Bank, the United States Agency for International Development, and the European Union, have made legal reform a key goal.

Agencies are pouring resources into building up national legal infrastructures, and these efforts have been particularly prominent in Africa. The rationale is that African nations have been hampered by ineffective and corrupt judicial systems, and a robust and efficient legal sector will remove checks on productivity and provide a stable and peaceful environment conducive for business growth and investment. On the face of it, that seems a reasonable proposition, but it is premised upon a problematic assumption, namely that legal-rational, bureaucratic Western institutions can be transferred to other societies. In addition, donor funded decentralization programs often result only in deconcentration and sometimes actually increase the hegemony of the central state rather than promoting devolution of power and grassroots participation.[4] The following pages examine these issues using The Gambia, a small country in West Africa, as a case study to illustrate how assistance and reform programs can be enhanced.

Legal Pluralism in The Gambia: indirect rule and the colonial roots of The Gambian legal system

The Gambia is situated in the northwest of Africa, between the Sahelian grasslands below the Sahara and the tropical forests of the equatorial zone to the south. On maps it appears as a long, thin finger of land protruding into Senegal and dividing the northern part of that country from the Casamance. The country consists of a coastal zone thirty miles wide that narrows into two strips of

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[4] In a seminal work, Fesler (1949; cf. Wunsch 1998) distinguished between deconcentration and devolution. Devolution connotes a more robust decentralization when local authorities are given the capacity to set policy, whereas deconcentration implies the transference of implementation of policies set by the center to local administrations. The two terms are often used synonymously, but this paper argues that current decentralization efforts in The Gambia may best be described as deconcentration rather than devolution.

land that extend inland for 200 miles along both sides of the river from which Gambia derives its name.[5] More than 90% of its roughly one and a half million inhabitants identify themselves as Muslim, and there is also a significant Christian minority. There has been considerable religious syncretism in the area; local belief systems incorporate both elements of the Abrahamic faiths and regional influences.

The Gambia offers an intriguing case for analyzing contemporary efforts to implement the current mandate to 'extend the rule of law.' There is a pervasive tendency among Western analysts to privilege the notion of an orderly state monopoly of juridical regulation (cf. Woodman 1996). However, British colonial rule in Anglophone West Africa relied heavily an alternative model of governance.

British colonial authorities generally employed a system of indirect rule, particularly in colonies such as The Gambia, where there was no significant influx of European settlers. Indirect rule utilizes pliable local authorities as proxies, responsible for collecting taxes, supplying laborers, and implementing policies for the state. In other words, this model of governance relies upon local figures and authorities to manage affairs outside of urban centers and specific areas dominated by North Atlantic or other elites.

Colonial regimes therefore bypassed more democratic (but inconvenient) institutions for decision-making such as village moots and concentrated power in hierarchical institutions, granting particular personages greater authority. While officials attempted to drape the mantle of tradition over their subalterns, there was also much invention and modification as they established their version of aboriginal social systems and authority structures.[6] Essentially, in constructing the indirect rule system in The Gambia and elsewhere the British reinvented certain existing institutions and blended them with ones of their own creation. Some might call this decentralization (see Mamdani 1996), but the general trend was towards vertical power structures and in postcolonial Gambia at least, the urban bureaucratic center has inherited most of the responsibility for major decision-making.

For all its flaws, indirect rule, although fiscally convenient, did acknowledge the multiplicity of normative or moral frameworks present in colonial states and accordingly provided multiple fora for dispute settlement. However, litigants were usually not able to engage in forum-shopping or choosing where they wished to have their cases heard and decided. Instead, the state provided dispute processing fora according to certain criteria; legal domains were typically divided according to litigant identities, geography, and case type.

Customary law was accorded a limited role, being allowed only in certain regions and cases. Family matters and other areas of minor concern to colonial states were generally relegated to customary law, while Westernized adjudication was common in the urban areas – especially in relation to economic and contractual affairs – and was required for major offenses such as homicide. Adjudicatory systems were also linked to the identities of the litigants; British colonial

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[5] The Gambia's unusual shape is a product of the African colonial experience. The river Gambia was a strategic location in West Africa and a major trading center (Wright 1997). The Portuguese, French, and British vied for control of the area, and the British formally established a colony there in the 19th century. They used it as a base from which to conduct anti-slavery patrols and to disrupt the regional plans of their French rivals.

[6] See Chanock 1987 for a fine-grained analysis of colonial manipulation of customary law. In The Gambia, chiefs – a term that refers to the governmental post of the leader of the villages within a given district – are considered customary authorities, but the position was created by the British. Interestingly, while chiefs wield power as state officials and are publicly respected, rural residents frequently expressed negative views about them. Widespread conceptions of chiefs as preoccupied with their own financial gain rather than the needs of their constituents likely reflects the colonial origins of the post as a means of exploitative indirect rule (see Ribot 2002 for parallel findings from other countries).

regimes typically established 'Native Tribunals' for non-Muslim areas, and predominately Muslim regions were served by Islamic *Qadi* courts (Anderson 1970).

The colonial state was particularly limited in The Gambia. The British, who labeled the Guinean coast as "the White man's grave", preferred not to settle there. Instead, they brought educated Africans from other Anglophone West African nations such as Sierra Leone to serve as government bureaucrats.

The British did not establish a robust and widespread North Atlantic style, legal-rational governmental and judicial system. The Gambia was actually an economic liability for Great Britain. Therefore, the colonial regime made do with minimal infrastructure and centralization and delegated much responsibility to local officials. As was typical, they built up hierarchical, vertical power systems at the expense of more horizontal autochthonous institutions. In The Gambia, for example, the British appointed village headmen (*alkalos*) in Jola settlements that had historically been acephalous, relying for decision-making on councils of elders and village meetings rather than single persons.

During the colonial era, then, there was little direct governmental intervention in rural dispute management in The Gambia. The colonial experience codified the model of dispute management through local authorities and institutions. The legal-rational system of law never penetrated deeply into the fabric of Gambian society, which has relied primarily on folk systems of dispute management. Colonial patterns have been maintained in the postcolonial era. The postcolonial regimes of The Gambia have not been particularly extensive or powerful and formal Western style institutions for addressing disputes have remained concentrated in the capital area.

The Contemporary Gambian Judicial System

The Gambia is divided into five divisions and has two urban centers that together make up the greater capital region of Banjul, Kanifing, and Serekunda. The rural divisions are sub-divided into districts that are run by Chiefs and have a Tribunal in their capital towns. The Greater Banjul Area has always been the focus of government attention and spending. Although infrastructure and services are unevenly distributed, it is in that region that the state has concentrated its attempts at institution-building.

Colonial categories and perspectives have persisted in the urban center, and state officials continue to use terms such as 'the provinces' to refer to the rest of the country. The higher, more Westernized courts and the *Qadi* or Islamic courts recognized by the State have been located exclusively in the capital area. 'The provinces' contain Magistrate Courts in most divisional administrative centers, and more remote areas are served by District Tribunals.

Following the colonial model, the contemporary Gambian judicial system incorporates elements of English common law, Islamic law, and customary law.[7] The Gambia is therefore characterized by what scholars refer to as legal pluralism, meaning a diversity of normative moral systems. Thus there are a number of different forums available for addressing disputes, and these are listed below.

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[7] There are seven ethnolinguistic groups generally considered indigenous to The Gambia. While recognizing that their normative orders do contain variations, but there is also much overlapping, and Mandinka mores have been highly influential in most rural areas. Space considerations do not permit a detailed analysis of local patterns; the label "customary" is therefore used to refer to all contemporary manifestations of autochthonous systems. See Davidheiser 2005 for an examination of continuities and heterogeneities in local social systems and conflict management modalities.

There is a Bar Association in The Gambia, and judges and lawyers in the high courts wear British regalia such as the white powdered wig. The Gambia has a Supreme Court and recognizes the International Court of Justice. Gambians can and do also manage their disputes completely outside the governmental realm by seeking mediation from persons such as the heads of their families, residential compounds and wards or from religious leaders such as a *marabou*, Imam, or priest.[8] Disputants can also utilize the customary arenas recognized by the State – village headmen and District Tribunals. In addition, parties may attempt to forward their cases to the police, the divisional Magistrate courts, or the higher courts or the *Qadi* in the urban areas surrounding the capital Banjul.[9]

The bureaucratic apparatus of the nation-state has relatively little impact on the lives of citizens, particularly in the regions outside of the urban enclave around the capital. The juridical infrastructure in the interior is so minimal that some areas have no judges stationed in them; as in the colonial era, itinerant 'traveling judges' move between the rare magistrate courts of upriver Gambia. Many villages – even large ones with over 10,000 residents – do not have police stations, and some residents must travel to access the higher courts or even their District Tribunal.

One should note that there is interaction between normative orders and modes of dispute processing (Merry 1988); customary and formal law have a dialectical relationship. In terms of The Gambia, all of the extant normative systems – English common law, *sharia*, and custom – have impacted each other, and actors can blend them or select elements from each. The human experience is one of interaction, exchange, and synthesis. Folk systems in any social domain, no matter how 'traditional' they may be, do not exist in a vacuum and are not static. The degree and nature of the interaction between North Atlantic, Muslim, and indigenous legal models varies across Africa, but the customary domain has retained a particularly strong presence in The Gambia. The absence of a strong nation-state has reduced the influence of Western juridical models on rural Gambians, and local dispute management practices have continued to play a prominent role in social life.

Decentralization, Legal Reform and Alternative Dispute Resolution (ADR) in The Gambia

International agencies have long had a significant role in postcolonial Gambia, and with their encouragement and funding, The Gambia has developed a governance and legal reform program. These plans – funded by the United Nations Development Program, the World Bank, and other organizations – call for the extension of the court system and the strengthening of local administrative structures, through the establishment of High Courts in divisional centers and the strengthening of the Local Area Councils that are tasked with administering those regions. Ironically, these policies appear designed to increase state control over rural areas rather than transfer power to the periphery.

The Gambia's plan for decentralization is centered on building up the Local Area Councils (LAC) that are tasked with administering the country's five divisions. Recent media reports about pervasive corruption in the Brikama Area Council underline the questionable nature of this endeavor. Residents tend to view LAC officials as political appointees that concentrate on revenue

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[8] Elders and authority figures are commonly identified as mediators; however, disputants also turn to other figures including friends, neighbors, and other acquaintances.
[9] See Darboe (1982) for discussions of pre- and post-colonial forms of law and dispute settlement in The Gambia. Darboe also provides a somewhat dated but worthwhile analysis of The Gambian legal system.

and bribe collection rather than representing the interests of rural populations. In fact, strengthening the Area Councils would result in an extension of the bureaucratic state apparatus and not a devolution of power from the center to the periphery.[10]

In terms of judicial reform, the governments aims to set up High Courts in three of the five divisional headquarters – Brikama, Mansakonko, and Basse – in order to increase rural people's access to the formal legal system. Some of these areas had previously been served by itinerant traveling judges that would periodically visit and hear cases. The traveling judges are colonial artifacts, and the neo-colonial nature of the judicial system is underscored by the following quote from an editorial in The Daily Observer – the most prominent newspaper in the country, yet generally unavailable in rural locales. In welcoming the new high courts, the editorial declares, "Now that the bench is making its presence felt in the provinces, the lawyers should also be ready to pack their wigs and gowns to trek to hear cases, preferably at no extra cost to their client" ("Decentralizing Justice").

Discussion: peacebuilding and diversity in normative frameworks

Many international projects rest upon the assumption that establishing, extending, or building up juridical institutions will naturally lead to a robust "rule of law" (cf. Plunkett 2005). Unfortunately, they often fail to take the discontinuities between Western and autochthonous normative orders into account. When the 'law' that is being reinforced fails to resonate with much of the target population, endeavoring to strengthen the rule of law is a flawed project. To put it simply, much of the widespread dysfunctionality of postcolonial African states can be traced to their historical foundation as artificial creations foisted upon populaces that operate according to divergent normative frameworks. More effective international assistance programs require greater recognition and respect for recognize disparate worldviews.

The new High Courts are intended to provide rural residents with easier access to the judicial system. The fact that many villagers do not find courts to be relevant or useful is not considered. While issues of access and transaction costs should not be ignored, Gambians' reservations about the court system go far beyond such practical matters. This section examines the various limitations of the legal system from the perspective of Gambian villagers.

For one, most Gambians consider the courts an alien domain.[11] This is related to the history of the judiciary. As mentioned previously, the Gambian judicial system is a product of the colonial legacy of subjugation and extraction, and the contemporary system reflects, in large degree, the colonial model. For example, the structure of the current multi-tiered system and the various fora associated with it are essentially the same as those introduced by the British. The British-created position of Chief is still extant, for instance, and the courts that Chiefs preside over have merely undergone a name change from "Native Tribunal" to "District Tribunal."

The gap between the normative domains of government courts and of villages is symbolically expressed in villagers' discourse. Speaking in Mandinka, the trade language most prevalent in rural

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[10] The fact that Gambian policies appear designed to extend state control into rural areas relates to a problem in the usage of the term "decentralization." Institution building in weak or failed states without a strong presence in their peripheral areas is not so much a matter of devolving power, since there was little central control to begin with, than of creating new focal points for authority and structures for policy implementation (Schlee 2004).

[11] Data on Gambians' generally negative attitudes toward the court system were collected in over one hundred interviews and innumerable informal conversations.

Gambia, people referred to the state judicial system as "the White or Euro-American way" (*tubaaboo siloo*) and to local modes of restorative justice as "the Black or African way" (*moofingo siloo*). According to another local saying, Euro-Americans and Africans are not the same (*tubaaboo ning moofingo man kiling*).

The courts are in fact not responsive to the needs and desires of many Gambians. One reason for this can be found in the demographics of the state legal system's high-level personnel. Courts are typically led by urban elites – often from other countries – who do not share the perspectives of the rural population or represent their interests. The colonial pattern of elite intellectuals from Anglophone West Africa occupying key positions in the state bureaucracy has continued into the postcolonial era. Many judges, lawyers, Chief Justices, and other officials in the Ministry of Justice have come from Nigeria, Ghana, or Sierra Leone. Like their urban counterparts, villagers are highly aware of the divide between rural and urban areas. That divide is expressed when rural residents term the latter locales, including larger towns with Area Council headquarters and Western-style courts, as "the place of the White people" (*tubaaboo kunda*). This colloquial expression for towns illustrates respondents' perceptions of the urban – rural divide.

Gambian discourse also distinguishes between the local, relationship-oriented method of restorative justice, or "*hadamayaa siloo*" and the retributive, legal-rational approach of the central state ("*mansa kunda siloo*"). These terms signify two deeply divergent systems of logic. The regulations that courts uphold are derived from the very dissimilar social and physical landscape of Great Britain. As alluded to above, the state follows the colonial practice of relegating indigenous values to the 'customary arena' of village headmen and district tribunals.[12] Thus it is not surprising that the courts are not geared towards local priorities.

For example, the legal system does not provide tools for dealing with vital concerns such as witchcraft. As national law is derived from English common law, it does not recognize sorcery as legitimate, so officials cannot respond to such complaints from the populace. Gambians' low opinion of the juridical system thus has both utilitarian and ideological dimensions.

In addition to questions of cost, efficiency, and performance are the significant discontinuities between the legal-rational model of the post-industrial West and the values of the populations of many postcolonial nations. For example, while it is true that the direct monetary costs of using courts are prohibitive for many Gambians, accessing the state legal system is associated with other risks that development planners rarely consider. For one, villagers potentially face relational losses if they choose to utilize the state legal system, yet the social dimension of transaction costs are typically overlooked by development planners who do not comprehend non-Western economic strategies.

Gambians operate under a collectivist model of social organization in which interpersonal relationships are of primary significance. The legal system disrupts the social ties that Gambians draw upon in times of need; they use their network of contacts to access resources in times of need and as a buffer against disasters such as crops failing. The Sahelian region south of the Sahara has been described as a disequilibrial ecosystem; populations must function in an environment of ongoing weather fluctuations and cannot confidently predict whether crops and animals will survive or if disaster looms (Behnke and Scones 1992). The combination of ecological uncertainty

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[12] It bears repeating that some "traditional institutions" such as district tribunals were actually created by the British. Rural Gambians' attitude towards the "customary arena" is indicative of the state-society gap. While most villagers consider these arenas as superior to the more formal legal arena, they prefer, whenever possible, to manage their disputes informally without any recourse to the institutions of the state.

and the historical legacy of weak centralized states have reinforced a harmony model in which social ties are vital and conflict is dangerous and abhorrent.

West African harmony ideologies also have precolonial roots. Due to the demographic and techno-environmental conditions of the subregion – an abundance of land and labor-intensive production systems – wealth lay in controlling people rather than in land ownership (Bohannan 1968, 1989; Dalton 1967).[13] Maintaining a large labor force was of paramount significance; therefore, conflict was a destabilizing influence as it could lead to out-migration and a diminishment of the population. These conditions helped foster ideologies that stress cooperation and conflict avoidance.[14]

The colonial model of indirect rule, then, became intertwined with a pre-existing collectivist model of cooperation. Regional ecological conditions further enhanced the strategic value of social networks and heightened the dangers of disputes that could undermine such ties. This causal triangle has produced a deeply rooted societal orientation. Such *longue duree* orientations are not immutable, but they carry great force.

For Gambians, not all risks are strictly economic; the legal system is also hazardous because it disrupts the "*kaira*," or peace. *Kaira* is a foundational concept in local cosmologies that connotes prosperity, well-being, and a proper state of affairs. The Mandinka word "*kaira*" is ubiquitous in The Gambia, and other local language groups have parallel words and beliefs to this Mandinka term. Gambians place much emphasis on greetings centered around the question, "Are you in peace" with the response "Peace only" (in Mandinka, "*kaira bee*" and "*kaira dorong*"). Without *kaira* one cannot be secure and potential dangers are amplified.

The perils associated with conflict have both spiritual and temporal dimensions. Mankanding,[15] a Mandinka man in his sixties, expressed it this way:

> "When people to go police and courts the young ones will see this and feel that there are divisions among us, between families or whomever, and people will be separated and isolated. For example, if I have a problem with you [and I go to the legal system], and later you have something that I need, then I will not be able to come to you and borrow it and vice-versa. My going to police and courts could even cause separation between our families which would lead to more problems for everyone. Even if you happen to win in the courts, you will lose in the long run. That is why it is better to handle things in our local way here."

Mankanding's statement should not be dismissed as mere valorization of cultural ideals; his actions exemplify how his words express the lived realities of many rural Gambians. After Mankanding's eldest son was murdered in a stabbing, the police came and took Mustapha, the perpetrator, to the makeshift local holding cells, in preparation for transferring him to the urban prison in the urban region where he would await trial. Mankanding, a man described by area residents as having a hot temper, went to the police station and told them to let Mustapha go. He said that his son was already dead and jailing Mustapha would not help anyone. The police acceded to his request, Mustapha was released, and no charges were pressed. Later, Mustapha had a family quarrel that he could not resolve on his own. Although they had not had a prior relationship, he remembered how

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[13] For a critical review of the wealth-in-people concept see Guyer and Belinga (1995).

[14] See Guyer and Belinga (1995) for thoughtful discussions of the wealth in people concept associated with harmony ideologies. They assert that a comprehensive view of that social pattern must recognize that it transcends functional explanations of modes of productions and means of accumulation to embrace a simple delight in diversified knowledge and highly developed, yet somewhat esoteric, skill sets.

[15] To protect the identities of research participants, pseudonyms are substituted for informants' names.

Mankanding had interceded on his behalf, so he went and asked him to mediate. Mankanding agreed and was able to reconcile the parties.

The most sophisticated scholarship on legal pluralism (e.g. Merry 1988; Tamanaha 1993) correctly stresses that normative domains should not be seen as hermetically separated from one another; they do interact. The preceding anecdote illustrates that despite such mutual influence, in rural Gambia at least, significant discontinuities remain between the normative domains of the legal-rational judicial system and the worldviews of many residents. The example of a father extricating his son's murderer from the courts thereby allowing him to evade any punishment and then even mediating in a family dispute on the perpetrator's behalf underlines the strength of local harmony models and the deep distrust many Gambians feel toward the state legal system.

Greenhouse has described the aim of legal anthropology as "find[ing] the connectedness between what courts do and what people think" (Greenhouse 1986; cf. Bohannan 1989). The recognition of normative frameworks as dynamic and evolving has been a major step in moving studies of legal pluralism beyond the functionalist paradigms of the past. Due to social contact and exchange (including colonialism), the mores of various peoples are impacted by those of other social groups, yet the urge to embrace sophisticated models of sociocultural interaction can be misleading. Ethnographic data suggest that while contravene the idea of a normative 'melting pot,' marked heterogeneity and disjunctures between rural and state orders continue to exist in The Gambia and elsewhere. Two examples from other locales can be found in Uwazie's (2004) observations of Ghanaians' alienation from their legal system and the parallel findings from Callister and Wall's (2004) Thailand study.

The belief that courts are dangerous because they cause social ruptures was not limited to the villagers. The following statement of an urbanized Gambian intellectual reflects dominant values that are at their most hegemonic in rural areas: "Going to the courts with a dispute causes long-term enmity between the parties, and that is something that we always desperately seek to avoid." The fact that Sidia Jatta, a cosmopolitan former presidential candidate with degrees from European universities, shares this view of the judicial system illustrates its pervasiveness in Gambian society.

Even police officers questioned the value of the legal system and diverted cases away from the courts. Their tactics included creating delays in order to allow peacemakers to intercede, making their own attempts to reconcile the parties, and referring the cases to respected elders. In one example, a police officer mediated a dispute by invoking the special joking bond between his Fula ethnic group and the Jola ethnicity of the quarreling parties. He stressed to the disputants that his special responsibility to them obliged him to protect them from the debilitating effects of the legal system and proceeded to facilitate a successful negotiation of their differences.[16]

Development, Dispute Settlement, and Vulnerability

Sociologist Max Weber expanded our understanding of social cohesion and control by identifying three distinct types of authority – traditional, charismatic, and legal-rational. Weber proposed that rule-based, legal-rational authority facilitates capitalist expansion (Weber 1947, 2000). Courts are a key institution in such systems. Although decentralization and increasing grassroots participation are often discussed, the Gambian case illustrates how the contemporary agenda of legal reform frequently concentrates on reinforcing the bureaucratization of authority and society. Extending the

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[16] For more information on joking relationships, see Davidheiser 2006b.

rule of law (as defined in the mainstream, court-focused Eurocentric perspective) is thought to be necessary for conflict prevention and peacebuilding and for economic growth.

However, the notion of a robust court system being essential to business growth and economic development does not always resonate in the international commercial sector and is problematized by current business practices. A survey of Uruguayan businesspeople, for instance, found that they did not consider the court system an appropriate forum for dealing with disagreements (Cervenak et al 1998). In fact, companies in North America and elsewhere have increasingly turned to ADR as a cost-effective and efficient dispute settlement modality. By 1999, over 40% of the Fortune 500 businesses had used med-arb – a hybrid of mediation and arbitration – thereby demonstrating that the standard judicial process is not the only means by which contracts can be enforced (Mills and Brewer 1999).[17] ADR processes can also be valuable tools for use in a market economy.

In addition, industrialization and capitalist development can occur without the legalistic conditions considered as prerequisites. Brautigam (1997) has analyzed how regional and transnational social networks substituted for the state in bringing about industrialization in Igboland, for instance. The case of Eastern Nigeria demonstrates that, contrary to conventional wisdom, significant economic growth can occur in the absence of a strong centralized bureaucratic legal framework. These are merely a few examples of problems with the conceptual foundation of the development sector.

Although unaware of the debates in the social science literature, Gambians were highly conscious of the inadequacy of state courts. The statements of one informant – Ousman – highlight the connection between peacemaking and development, for instance, but he offers a very different view from the development perspective of enabling enforceable contracts and establishing the rule of (legal-rational) law. In discussing the drawbacks of the judicial system of retributive justice and the advantages of local, restorative modes of conflict management, Ousman expressed sentiments repeated by all of the over two hundred informants in this study, including legal officials like lawyers and magistrates. He said:

> "People should appeal to the government to let cases be settled in the communities because our local procedures are different from those of the government. In the local procedures there is pleading, persuasion, appealing to people, and forgiveness."

When asked, "Why is pleading and forgiving good," Ousman went on to explain,

> "That is the best way of ending the conflict and getting the disputants to reconcile. In any community where there is no reconciliation there will be no progress or development, regardless of how much money the government pumps into there. If there is no peace between the community members, people will not cooperate and any local projects will fail."

Oliver-Smith (1992) has elucidated how populations develop coping strategies that reduce their vulnerability to disaster. Similar research also delineates how interventions by development organizations can subvert aboriginal coping strategies. In the case of Bangladesh case described by Zaman (1999), for instance, NGO efforts to reduce flooding inadvertently produced problems for the very people they were supposed to help. Impoverished Bangladeshis were no longer able to

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[17] Readers may be able to make a personal connection to the commercial sector's burgeoning use of ADR by reading the terms and conditions agreements for their credit cards. Many companies have found the standard legal procedures to be inadequate for their needs.

collect the seafood that constituted the major protein source of their diets, and the productivity of their fields suffered when they were no longer enriched by the floodwaters. Zaman's work exemplifies the dangers of imposing etic models and the potential value of true devolution of power. Long-term residents of an area typically have extensive or expert knowledge of the prevailing environmental and social conditions. Giving them more control over decision- and policy-making heightens their ability to respond and adapt to the dynamic conditions they face, factors that can be critical in reducing vulnerability to disaster and enhancing well-being.

A further parallel may be drawn from agricultural extension work. As development officials have found to their chagrin, very poor populations are typically 'conservative.' Some agronomists characterized that as irrational adherence to tradition, failing to realize that subsistence farmers may simply be unable to risk using unproven techniques because they have a minimal margin of error and cannot afford to gamble with new crops or practices. To return to court adjudication, Gambians view the associated win/lose outcomes as high risk and linked to a variety of potential material, social, and spiritual costs. The most vulnerable Gambians often especially value the ease of access, generally faster speed, and low social and monetary costs associated with many grassroots dispute processing modalities.

Relative Advantages and Costs of the Courts

The prerequisites of a successful legal system include accessibility and fairness. One could debate to what extent these goals have been realized in the judicial system of North American and Europeans countries, as not all citizens feel that the judicial system is easily accessible to them, in particular, migrants, minorities, and the poor. Successful use of the court system generally requires a certain level of resources, including the material wealth necessary for hiring lawyers and so forth. Using the formal legal system carries high transaction costs in many countries, and studies have shown that ADR can provide many benefits in a more efficient manner.

Research indicates that despite the presumed protection of written laws, legal-rational courts by no means guarantee disputants fair or equal treatment.[18] The disadvantages of courts are not limited to any particular nation, yet due to the exogenous origins of their legal systems, judiciaries in postcolonial Africa may pose particular problems. Postcolonial African juridical frameworks are not social contracts generated through historical interaction between the state and the populace, and their artificiality and lack of depth undermines their ability to dispense justice according to both North Atlantic and local standards. Two brief examples from West African nations may help to illustrate this point.

For instance, Amnesty International recently published a report asserting that the Nigerian legal system fails to protect women from domestic violence. According to report contributor Eze-Anaba,

> The police and courts often dismiss domestic violence as a family matter and refuse to investigate or press charges. Furthermore, the few rape victims who summon up the courage to take their cases to court face humiliating rules of evidence, patronizing and discriminatory attitudes from police and court officials, and little chance of justice (Amnesty International 2005).

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[18] See Menkel-Meadow's (1996) and Rifkin's (1991) examinations of the shortcoming of the U.S. judicial system (cf. Conley and O'Barr 1990, 1998).

In contexts such as The Gambia, where there is little trust in the formal legal system, there is a particularly unfavorable balance of costs and benefits for those that forward their case to the courts. In an article on the implications of African peacemaking for social justice (Davidheiser 2006a), I discuss the case of a Gambian woman whose market garden was severely damaged by a male herder's domestic animals. She provided a lucid explanation of why she chose to seek compensation through mediation rather than tribunals or courts. After clarifying that this choice maximized her chances of receiving adequate compensation, she went on to describe common misgivings about the formal legal system, stating that adjudication "will bring misunderstanding between you and the other party. We do not like misunderstanding between us. We hate to see that. We do not want evil to come between us." Some readers might interpret her statement as a reflection of irrational harmony ideologies, a type of false consciousness prevalent among poor rural Africans. Nevertheless, she, like many other informants, also underlined that a pragmatic assessment of the situation indicated that the best chances for utility maximization lay in the informal realm of mediation rather than the judicial system.

According to the National Center for State Courts (Michael 2004), public trust is a key prerequisite of a strong juridical system, yet Gambians tend to be more confident in grassroots restorative justice than in the courts, and their doubts extend far beyond issues of access and corruption. Local restorative justice practices provide a vital forum for villagers to address their problems and seek compensation without violating social norms; in most cases, it serves their needs better than the judicial system. Human needs emerge from the complex interrelationship between society and biology; in other words, they are historically produced social responses to particular environments and are not homogenous in composition. The Gambian situation illustrates how the court system may not provide a forum that meets the requirements of specific populations.

The ease of access, rapidity of resolution, and low social and monetary costs associated with indigenous modes of dispute management can make them essential for the well-being of the most vulnerable sectors of the population.[19] Impoverished Gambians often cannot afford to pay for or wait for resolutions to their problems, and using the State judiciary carries high transaction costs.

Conflict Management, Courts, and the State-society Gap

As we know, many contemporary African nation-states have struggled with their legacy as artificial creations of the colonial powers, leading to various problems of governance. One of the most unfortunate colonial inheritances is the model of the rapacious, extractive state whose officials do not serve the local population (Bayart 1993, Mbembe 2001). Another area of historical continuity has been that many state officials and bureaucrats do not comprehend or respect rural ways of life. Decentralization is thus a reasonable policy approach, but an illusionary decentralization that extends state hegemony through an extended legal system is highly questionable. While admittedly optimistic, there should be exploration of whether African modes of dispute settlement could contribute to a reworking of the social contract between state and society.

There has been much analysis of the gap between African states and societies. To achieve a robust rule of law, the disjunctures between the normative orders of the state and those of the rural

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[19] "Well-being" is used here in reference to the standard socio-economic development perspective that emphasizes food security, life expectancies, and so forth. Many of these markers are valued by Gambians and members of other societies in the Global South, but there are, of course, variations in the composition and ranking of the variables various groups use to conceptualize high living standards.

populace must be addressed. Achieving such a goal requires the active participation of rural and other citizens who have generally had little voice in modern African nation-states. Colonial and post-independence recognition and use of customary law (as they envisioned it) and certain customary authorities generally did not provide such a voice – rather it constituted a means of exploitation and social control.

Van Binsbergen (2003: 41) argues that many precolonial African societies contained two disparate legal-normative orders. The first was a local-level one rooted in grassroots socio-political institutions such as clans, saints, and shrines. These cosmologies were associated with a restorative type of justice that emphasized reconciliation and ritualized restoration of balance and harmony. The second order occurred at the macro, interregional level and represented the arena of rulers who had subjugated various areas to forge larger political units. These "violence-based, tributary legal order[s]" were characterized by masculine, militaristic themes and promoted a retributive style of justice based on formal courts. While he somewhat oversimplifies a complex historical record, van Binsbergen usefully illuminates distinctive sociopolitical patterns that have played an integral role in the historicity of African governance. Colonial regimes generally considered the second type of system to be more advanced than the first and turned to its more hierarchical institutions when constructing their structures of indirect rule.

In The Gambia, for instance, the British imposed the Mandinka institution of *alkalo* (or village chief) on Jola villages. The Mandinka are a classic example of precolonial West African state-building, stratified societies, while the precolonial Jola were less hierarchical, and some sub-groups were acephalous, lacking a single leader. The British considered the Mandinka to be more civilized than the Jola, and vertical Mandinka authority structures met the desire of the British to have local proxy rulers to whom they could delegate tasks such as tax collection and labor mobilization. They therefore brought the office of *alkalo* to communities that had previously delegated decision-making to councils of elders that represented the various clans of the village. The position has been retained as it is part of the modernistic nation-state inherited from the colonial era. Thus, Gambian Jola villages in the early 21st century have *alkalos*, but they typically have less authority than their Mandinka counterparts and often work in conjunction with a group of male elders.

Addressing governance problems in Africa requires moving away from institutional structures that are not responsive to constituents. Van Binsbergen highlights how dispute processing is a key arena for attaining such a shift, and how conflict management is a key component of the institutional structure of a society. The court procedure is hierarchical and minimizes popular participation; decisions are reached by judges and juries, with little or no input from the disputants or from other stakeholders. Unlike many African practices, the legal-rational model is based on written law rather than dialogue and debate. Extending the rule of law by reinforcing the formal legal system is therefore antithetical to the goals of decentralization such as increasing popular participation and empowering communities. The reliance on formal court proceedings also matches the governance strategy employed by autocratic rulers, whether the precolonial ones described by van Binsbergen or the postcolonial ones by Bayart (1993).

In light of the large-scale failure of the transplantation of North Atlantic legal models, resources should not be poured only into expanding the court system; there should be more investigation of customary modes of dispute settlement. Many scholars take a negative view of customary law. They argue that the reproduction of social inequalities is enabled by its obvious malleability in which strict rule enforcement is frequently moderated by intensive negotiation (cf. Woodman

1996). However, interactive and flexible dispute management processes may offer a means for increasing citizen identification with the State.

Strengthening and harnessing the participatory potential of certain African social institutions offers one means by which the gap could be narrowed. Villagers should be provided with forums in which they can debate issues and formulate and carry out policies they designed to meet their needs. More participatory fora in which various voices can debate issues could operate as discursive arenas which would give a voice to previously marginalized sectors of the population that have had little input in policy-making. Drawing on supple social practices rooted in the precolonial era and geared more towards grassroots living standards and adaptability than central control could be a first step in reversing historical processes of domination and enabling the construction of a more participatory, responsive, and suitable set of rules and system of governance.

Although despotic and exploitative in nature, in some ways indirect rule created spaces for the reproduction of precolonial Gambian institutions, albeit with some modifications. The French assimilationist model did not apply to The Gambia; it was never intended to become a part of the United Kingdom, and there was little discussion of remaking Gambians in the British mold. The minimal state infrastructure made it easier for Gambians to resist the hegemony of the State and pressures from other outside interests. For all its flaws and colonial baggage, indirect rule enabled rural populations to maintain a relatively high level of influence and continuity in certain social arenas.

A record of resistance and domination is part of world history,[20] yet the rural populations of former British colonies that were not confronted by powerful state apparatuses have had more opportunities to maintain local orders and values than the citizens of more developed centralized states. It is ironic that the rubrics of decentralization and legal reform are supplying the Gambian State with a means to extend their control in rural areas.

Legal Pluralism, Peacebuilding, and Grassroots Empowerment

Legalistic Western models can also hamper the efficacy of peacebuilding projects. Although the idea of approaching development from the grassroots has been gaining popularity, international assistance is still conducted primarily in a vertical, top-down manner. Recent research on Truth and Reconciliation Commissions in Africa, for example, found that local capacities for peacebuilding were largely overlooked, and in some cases actually constrained, by planners, officials, and experts. In Sierra Leone and elsewhere, the (well-meaning) intervention of international organizations resulted in the sidelining of indigenous peacemaking efforts, and the progress of those efforts was undermined when new models were brought in by the new international power structure (Puechgirbal 2004).

Although there has been a blossoming of literature calling for bottom-up or grassroots development, such a goal has remained largely unrealized. 'Participatory development' has become

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[20] Cleavages between the central state and rural societies are not exclusive to postcolonial Africa; the dialectic of dominance and resistance pervades the historical record. Rural populations in many nations, including those of Western Europe, have resisted central control and sought to maintain some autonomy in the face of encroachment by legal-rational bureaucracies. However, the gap is particularly wide in the Global South due to the colonial experience in which structures that were developed in divergent socio-cultural milieus were forced upon populations that had few connections to the operating principles behind the new hegemonic order.

a watchword of the industry, but actual changes have been more cosmetic than substantial. Local participation is often restricted to the implementation stage; target populations remain largely uninvolved in planning and decision-making. Many agencies have made their projects 'participatory' by providing only the materials needed for a given project. Allocating the responsibility for supplying the labor to the community is intended to give villagers a sense of ownership since they will have worked to erect the new school buildings, hospitals, or courthouses.[21]

The elevation of legal reform as a major area of resource allocation exemplifies the limits of actual participation. Elites and prominent business-people in urban areas may be greatly concerned with retooling the legal sector, but villagers in southwestern Gambia have other concerns that supersede such an enterprise. Development should not be an elite-led enterprise; for sustainable improvements in the lifestyles of the poor, they must be given a voice in project design. Local institutions for conflict management can provide structures in which community members could determine their needs and priorities and forward them up the chain to national and international donors.

The new Gambian courts are intended to provide rural residents with easier access to the judicial system. The fact that many villagers do not find courts to be relevant or useful is not considered. While issues of access and transaction costs should not be ignored, Gambians' reservations about the court system go far beyond such practical matters.

Anthropological studies of legal pluralism (e.g. Fuller 1994; Woodman 1996) have identified multiple factors associated with the challenge of governance in African (and other) societies. These include 1) difficulties of accessing the legal system, 2) corruption, 3) inefficiency, 4) the widespread perception of the national juridical framework as alien, and 5) the various social costs and sanctions that can come from use of governmental fora. Policy-makers have concentrated heavily on the first three of the above factors and largely ignored the latter two. The idea that most problems stem from the uneven or imperfect institutionalization of Western models reflects how, despite calls for new approaches to development, ethnocentrism continues to impact policy-making. In addition, the Gambian case illustrates how the language of decentralization provides governments with the means to extend the influence of the state bureaucracy.

To move closer to the realization of development goals, the issue of socio-cultural patterning and the construction and interaction of divergent normative orders must be understood and addressed. The discipline of anthropology has been instrumental in building our understanding of how social systems produce varied cosmologies with particular sets of norms, values, and patterns of behavior. While the boundary between universal and context-specific social behavior has not been definitively identified, the ethnographic research record illuminates the remarkable diversity of human social repertoires and scripts.

Although we now know that cultural perspectives are both socially transmitted and modified by their receivers, the remarkable agency of human beings does not mean that actors are free or able to transcend the influences of their socialization. People are able to exercise agency and make choices, yet they do so through the lens of their cognitive structures, which emerge out of an

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[21] The shallowness of 'local consultation' is partly due to the lack of in-depth knowledge about the area of intervention. Donors want to rack up numerous successes in multiple different sites and therefore rely on etic formulae instead of taking the time to address the context-specific details necessary for designing effective projects.

individual's experience as a member of certain social groups.[22] Such interpretive frameworks are somewhat dynamic and idiosyncratic, but they also reflect societal norms.

Shared values are particularly highlighted in dispute settlement, as participants discuss normative expectations and debate what is right and what is wrong. The arena of conflict management thus offers a powerful means for effecting social change, but humans have also demonstrated a remarkable attachment to the familiar. Sociological research has underscored the significance of continuity in the human psyche. People experience a particular need for the familiar in times of rapid change and stress. For instance, see Watts' (1992) analysis of the Maitatsine religious movement during the Nigerian oil boom of the 1970s.

Studies of displaced people who strive to recreate familiar conditions in their new environment also underscore the social-psychological need to integrate new experiences into one's cognitive framework. If disaster survivors and refugees cannot meaningfully engage the changes they experience, they suffer negative social consequences such as higher rates of alcoholism and domestic violence (for examples, see Marris 1996; Oliver-Smith 1992).

The human desire for continuity underscores how incremental change tends to produce more lasting results than attempts to drastically reorder prevailing conditions. The most effective policies would recognize the significance of deeply-rooted societal patterns and build upon them. Humanity's conservative impulses give tradition and custom the legitimacy and force that underlies their mobilizational potential.

On the other hand, we also know that plasticity and dynamism are central features of any given ethnoscape. Dispute resolution processes illuminates the structure-agency relationship that is one of the central problems of social science. Such processes both reflect established beliefs and exhibit constitutive, meaning-making dimensions.

Peacemaking provides a potential means for groups to produce and adapt to change. Anthropological research on African populations adapting to major economic and socio-political shifts in the beginning of the postcolonial era revealed how societies use conflict management processes as coping strategies for taking in and responding to altering conditions. Turner (e.g. 1969) and Gluckman (e.g. 1967) also found that actors can use the ritual activities and social dramas that occur during dispute settlement to facilitate transformation of the status quo.[23]

The notion of empowering local people has a wide appeal, and there have been some relatively successful projects, such as the Campfire community wildlife conservation project in Zimbabwe. However, some recent studies (e.g. Ribot 2002; Watts 2004) suggest that local authorities can be as self-serving as urban bureaucrats, and there have long been concerns about human rights under customary law.

Scholars have also raised concerns about the recognition of folk law leading to the resurgence of collective identities. Revitalization movements can be dangerously exclusivist, but they are not intrinsically so. In addition, arguing that formal legitimization of local legal norms may aggravate intergroup polarization does not resolve the issue of how the reliance on Eurocentric models has undermined postcolonial African states. To take an example from southern Africa, Widlok (2005)

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[22] Avruch (1998) provides a ground-breaking discussion of socio-cultural perspectives and a detailed historical examination of how a failure to recognize the relevance of cultural pluralism has hampered the fields of international diplomacy and conflict resolution.

[23] Turner and Gluckman's later work was influential in moving anthropological analysis beyond the static perspective of the structural-functionalist paradigm into incorporating a more processual view.

incisively illustrates how a rejection of ethnic considerations, values, and rights can produce social problems and be used to marginalize certain groups.

Of course, one should not be overly idealistic about indigenous peacemaking. Autochthony is a contested construct, and communities are not inherently progressive. Social scientists have demonstrated how customary law is a historical construct that has been modified by numerous actors and influences. Studies of social control reveal that folk law can be a powerful tool for domination; Chanock's (1987) analysis of colonial manipulation of customary law in Malawi and Zambia provides a well-documented example. Custom can be a locus for subordination even in the absence of colonial manipulation, and communities are contested domains and can contain repressive forces (cf. Watts 2004).

However, dynamics of domination and opposition are inherent in all normative systems including formal, bureaucratic law, and the dialectic of control and resistance can be identified on all levels of analysis. Scaling down the mechanisms of control from a centralized, national hierarchy to smaller units opens up more possibilities for adjustment and modification. The discursive potential of dispute settlement is expressed most in the informal, flexible arena of micro-level "informal law." Strathern (1985) has pointed out how dispute settlement involves re-arranging relationships. The potential for reworking social structures and normative frameworks is greatest at the micro-level when the input of the participating actors can have the most impact.

Devolution that recognizes and supports local institution building opens up a space for bottom-up social change. Even if one leaves aside the question of whether the outsiders are able to accurately determine the needs of other peoples, the issue of the sustainability of project outcomes reinforces the need for transformations that percolate up from the grassroots. Even external interventions with the noblest intentions can have unforeseen negative consequences (see, for example, Minear 1991), and striving to impose new patterns upon a quiescent population can result in retrenchment rather than change.

ADR and The Gambia

The late 19th century witnessed a notable growth of interest in alternatives to the court system and the expansion of such programs into the international development sector. ADR can encompass public, private, and court-annex mediation, conciliation, arbitration, and negotiation. Well-designed ADR programs can provide essential services offered by Western judicial systems such as "access, timeliness, equality, fairness, integrity, and trust" (Michael 2004: 34).[24]

In fact, there have been efforts to introduce ADR into The Gambia. However, as with elsewhere in Africa, these donor-driven agendas adhere to the standard practice of exporting Western modalities and rely on expatriate consultants and urban elites. It is too early to assess the impact of ADR in The Gambia, but the current efforts have weaknesses that are outlined below.

The Gambian ADR project – funded by the World Bank and others – is an extension of the court modernization program that includes such items as plans for a new electronic case management system. As with other aspects of the program, the ADR component is intended to prevent a backlog of cases from building up. The project planners apparently anticipate a spike in cases if they

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[24] ADR fora tend to be more low-cost than their state sponsored counterparts, and they can even be more accessible for non-elites. Additionally, when such systems do not include lawyers they can be more equal than formal courts since there is no question of parties' ability to secure high-powered legal representation.

succeed in making the legal system more functional and accessible. ADR is considered a useful safety valve that will prevent the courts from becoming over-burdened.

   Examining evidence from ADR programs in other countries suggests that the limited scope of the Gambian project and its close integration with the court system may hinder its success. For example, ADR by legal professionals may lighten the case loads of the court system, but it does not help to transfer powers to local residents. Kassebaum's (1989) study of the *lok adalat* courts of India found that they had a very good reputation among the population in their initial format when there was little integration with the state legal system and they were used for disputes that never would have reached state courts. Indians' approval of *lok adalat* declined, however, when it was incorporated into the legal system and used to decrease the backlog of cases.

   At present, Western experts have conducted several training sessions of Gambian judicial personnel to prepare them for participation in a court-annex program. Given the backgrounds of legal personnel, the aforementioned problem of urban elites' lack of understanding of village concerns is also applicable here. Urban elites – whether from The Gambia or elsewhere – do not represent the interests and needs of villagers. A brief comparative discussion may help illustrate how ADR planning in The Gambia could be made more productive.

Two Examples of Promising ADR Programs: Navajo Peacemaker Courts and Bangladeshi *shalish*

There are a number of contemporary hybrid institutions that blend Western style conflict resolution practices and local customs and practices to provide participatory, transparent fora for addressing problems and disputes. However, the benefits that have come from using ADR in areas as diverse as Australia (Barnes 2001), China (Cloke 1990), Hawaii (Shook 1985), mainland North America, and Thailand (Callister and Wall 2004) suggest that legal reform projects should, at a minimum, incorporate local practices and values and practices into their overall strategy. The following section provides a brief summary of two of the above mentioned locales, namely, the *shalish* of Bangladesh and the Navajo Peacemaker Courts of North America.

   The experience of other peoples demonstrates that indigenous modes of peacemaking can be incorporated in the legal system and produce a valuable alternative to Western style courts. For example, the former Chief Justice of the Navajo Nation, the Honorable Robert Yazzie (1994), provides a North American analysis of the potential of customary restorative justice. Yazzie has eloquently outlined the drawbacks of the Anglo-Saxon "Law Way" and the benefits that Navajos have derived by incorporating the indigenous "Life Way" into their legal system (cf. Pinto 2000). According to Yazzie,

> In the vertical [Anglo] system the victim's role is very limited. Their needs and feelings are generally not considered, and thus not addressed. The wrong is to the 'state'. The vertical system does not seek to repair damaged relationships, families, or communities; instead the process promotes further conflict and disharmony (1994: 29).

The Navajo employ a participatory process based on a horizontal model of social organization; all the participants are given an equal opportunity to present their perspectives and no one is above anyone else (horizontal social organization). The Navajos have also addressed concerns about

power imbalances by having judges review all outcomes and agreements to make sure that they are appropriate to the Peacemaker Division values.

Bangladesh offers a promising example of sophisticated legal reform that incorporates ADR that builds on the legitimacy of indigenous institutions and values. In Bangladesh, as in The Gambia, the formal court system is highly unpopular among the populace. This has led to efforts to find alternatives, and the *shalish* system has been introduced as an alternative to state law. *Shalish* is independent of the national legal system, and preliminary reports suggest that it may offer a valuable alternative to the judiciary.[25] The contemporary *shalish* courts are hybridized institutions that build on customary law and local interpretations of Islamic law (*sharia*), yet they also contain safeguards to protect marginalized citizens and ensure equitable outcomes.

Bangladesh is an overwhelmingly Muslim nation, and the *shalish* courts are influenced by *sharia*. Concerns about women's rights have been addressed through specialized training of *shalish* participants, selective monitoring of *shalish* outcomes, and an emphasis on transparency and on the maximization of community participation. Legal training and aid have been used to raise awareness of human rights issues. Public legal education programs sensitized women and children about their rights and how they can be maintained. There has been a particular focus on gender concerns, and a specialized NGO provides program oversight and monitoring ("Gender and Social Justice" 2002). *Shalish* committee members and key community figures receive further training in gender rights and in legal precepts and legislation relating to family matters. Special diversity committees also regularly evaluate *shalish* performance and evaluate whether historically socially marginalized groups are participating actively.

Bangladesh and the Navajo Nation are not the only promising examples of contemporary hybrids of customary law and other mainstream or alternative legal modalities. Singapore, for instance, has established a court-annex mediation program. Extensive surveys of mediation participants have been carried out, and out of the 1300 responses, the overall approval rating was 84%. 94% of the respondents said that they would recommend the procedure to others (Onn 2005). These few examples show that indigenous institutions can be fruitfully integrated into the development framework. The following section provides a list of possibilities for potential incorporation into projects. These suggestions offer a useful starting point, but it must be emphasized that the appropriate strategy will depend on the context in question.

Policy Suggestions

Considering the negative attitudes towards the court system found in many locales,[26] ADR does deserve serious consideration by policy-makers. However, there should be a shift from the prevailing approach in which Western experts bring their knowledge to other peoples and impose their models on them (see Nader 1997 for a critique). There is a need for more localized approach that emphasizes self-design and consultation with all sectors of target populations. Donors should explore aiding communities in developing their own peacebuilding and development institutions.

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[25] Anecdotal data suggest that *shalish* has been well received by the population. I got this information from the internet. The most detailed info and data is available at: http://www.adb.org/documents/books/Investing_In_Ourselves/AN/part_two.pdf. The Canadian Bar Association is planning an evaluation study in 2005-2006 that will shed further light on the success of the *shalish*.

[26] Multiple cases of discomfort with the state legal system have already been cited. We might add the colorful Thai aphorism quoted by Engel (2005): "It is better to eat dog shit than to go to court."

Organizations could provide key political support like persuading governments to engage in more thorough decentralization and to allocate resources for local institution building. Donors could also provide financial assistance – seed money and continuing operational funds – and logistical help such as advice and training. However, the assumption that thorough training will be needed in development and peacebuilding interventions should be discarded in favor of a collaborative process that draws on local expertise. When training is conducted, there should be a bilateral transfer of knowledge and the host population should be encouraged to make their own decisions about selectively using and modifying the practice models.

Donors could also help set up monitoring systems and safeguards against potential human rights abuses. The following list suggests some possible ways for mitigating social justice concerns.

1. Parties could have a say in selecting who will hear their case (as is done in the Navajo Peacemaker Courts)
2. Judges could review all cases to control for problematic outcomes (also like the Navajo Peacemaker courts)
3. If independence from the judicial system is desirable, NGOs, elected officials, or other actors could provide supervision and/or monitor agreements
4. Community participation should be emphasized and transparency maintained (as in Bangladesh, India, and elsewhere)
5. Parties could also be given the option of choosing between court adjudication and other available modes of dispute processing (this is done in the U.S. and elsewhere)
6. There could be specialized training of key stakeholders and/or other interested parties (as in Bangladesh)
7. Legal education and self-help organizations could help to build awareness among marginalized social groups and/or the general population (as in Bangladesh and elsewhere)
8. Dissatisfied parties could be allowed to appeal decisions
   a) Following standard U.S. practice, equitable outcomes and participant satisfaction could be increased by permitting unhappy parties to continue to adjudication or other dispute management fora
   b) Appeals procedures could also be introduced into the ADR arena; for example, the procedure could be repeated with different mediators if one or more parties felt it necessary

The above list provides a number of techniques that have been useful in certain projects. Ultimately, no single model or recipe will be appropriate for all contexts. The generation of an effective strategy will depend on a thorough study of the target area and extensive input and collaboration with the involved population.

Conclusion

Some readers may perceive the preceding as a simplistic 'culturalist' argument that is naïve at best and perhaps patronizing or even potentially damaging. By arguing for respecting local traditions, they might say, you are contributing to the reproduction of a peripheral, underdeveloped rural Africa. Hopefully, even such critics would agree that populations should be allowed to determine their own development pathways and visions. Given what we know about the multifarious,

negotiated, and dynamic nature of tradition, participatory dispute processing fora may be a particularly effective means for negotiating how to proceed. Those interested in the development of others should consider redirecting their resources to foster such fora.

Nations such as The Gambia have now been independent for approximately four decades, yet despite all the resources that have been poured into 'development,' there has been insufficient progress in living standards and conditions have even worsened in some cases. Corrupt African officials have certainly been part of the problem, but if state system were better integrated with indigenous or rural institutions, corruption would likely be less endemic. Improvement has been hampered by neo-colonialism, the lack of consultation with grassroots populations, and the continued imposition of etic models which often do not fit well with local conditions.

According to Mpangala (2004: 10), effective peacebuilding in contemporary Africa requires a shift from bureaucratic or market-based states to ones that are 'society centered.' Africa's recent socio-political record suggests that achieving that goal may require a re-evaluation of customary forms of governance. Precolonial African states were by no means free from domination; in some cases social hierarchies were quite pronounced with certain groups occupying clearly subordinate positions. The spread of Islam in the Senegambia has been partly attributed to popular discontent with the arrogant behavior of the noble and warrior classes of precolonial Gambia, for example (Faal 1999; Wright 1997). Nevertheless, as Bayart (1993), Mamdani (1996), and others have elucidated, modern African nation-states are profoundly influenced by notions of governance rooted in the colonial era. It was during the colonial era that the model of a modern nation-state was introduced to the continent, and while there was variance across countries, the general approach was one of resource extraction and exploitation with minimal regard for the African inhabitants. The established model emphasized a firm style of rule characterized by absolute power over the inhabitants or the subjects. Postcolonial African states have been subverted by the reproduction of that learned model of power, rule, and governance. A bottom-up remaking of state institutions would certainly be challenging, but such a project may make possible the evolution of a more functional, responsive, and government. At the very least, rural and other populations dissatisfied with current socio-political and legal modalities should be given a say in determining what is best for them.

The normative dimensions of conflict management underscore how widespread Gambian reservations about the court system partly represent a desire to maintain local perspectives and lifestyles in the face of globalization and external pressures. Heyman (2004: 490) has elucidated how bureaucracies "form models of social life that compete with, erode, and exclude other models for human activity". Rural Gambians feared that building up the state legal system would result in challenges to cherished shared values and ways of life. As one put it, "bringing the police and the courts to this area would weaken our collective ties and bonds (*hadamayaa*) that are the foundation of our way of life." If the intention of development efforts is to westernize rural Gambians, then the current legal reform plan is appropriate. Leaving aside the question of efficacy, one might note that such a goal contravenes widely respected ideals of cultural pluralism and diversity.

A thorough reworking of the legal reform project is in order. Enhancing the dispute processing capacities of Southern nations is a worthy endeavor, but it should be done in an effective, context-appropriate manner that will transcend the dismal record of development projects. Legal reform should not just be a matter of reforming ineffective institutions and extending the rule of law;

projects should consider readjusting governance to integrate different lifeways and legal/normative frameworks.

In conclusion, it is worth repeating Ousman's assertion (see p. 23) that without peace and *hadamayaa*, no development project can succeed. In order to achieve better results, assistance programs must give more consideration to grassroots perspectives and worldviews. Given its social significance, the realm of legal reform represents an excellent arena in which to begin such an undertaking.

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Glossary

Alkalo: Village headman or headwoman

Autochthonous: Anthropological term meaning aboriginal, indigenous, local

Formal and informal: Imperfect but convenient labels for distinguishing between the legal-rational bureaucratic systems and the domain of customary law

Hadamayaa: The Mandinka term connotes a collectivist way of life in which persons are seen as connected to one another in relationships of mutual obligation and respect. Gambians often translate *hadamayaa* into English as "social living"

Kaira: Peace, also connotes well-being, prosperity, a proper state of affairs

Mandinka: The main trade language of rural Africa and a dialect of the widespread West African language group of Mande

Qadi: Islamic judge that operates according to interpretations of *sharia*

Sharia: Islamic law