Büro für Konfliktforschung in Entwicklungsländern
Office for Conflict Research in Developing Countries

The Primary Justice Pilot Project of Malawi

An assessment of selected problemfields
from a legal pluralistic viewpoint

commissioned by the GTZ-Forum for Dialogue and Peace, Lilongwe

and written by

Dr. Markus Weilenmann,
Office for Conflict Research in Developing Countries,
Zürich-Rüschlikon, Switzerland

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0 Introduction

In spring 2004 the GTZ-Forum for Dialogue and Peace won the tender for the management agency for the Primary Justice Pilot Project of MaSSAJ[1] / DFID[2] and on May 17th 2004 the Pilot Project officially started. For the implementation, this Pilot Project has a time frame of 18 months. Its objective is to improve access to justice for poor people through improving the quality and accessibility of primary justice systems in Malawi. GTZ opted for a legal pluralistic approach and addresses primary justice providers in four districts, namely in Chikwawa, Zomba, Lilongwe and Rumphi. The activities concentrate on capacity building measures. Additional research and learning components should complement the training activities. It is also expected that the lessons learnt as well as the development of best practices will form the basis for a future expansion up to the national level.

0.1 The Task

This report refers to a field trip in Malawi carried out for this Pilot Project from Saturday 20th November to Friday 10th December 2004. The overall purpose of the Consultant was to

- „assess the depth of District Implementing Agencies (DIA‘s) understanding of the primary justice concept and share (his) experiences in legal pluralism from (his) interaction with various justice systems in both other parts of Africa and beyond. More specifically, the consultant‘s role (...) is to ensure a deeper understanding of primary justice in comparison with other forms of plural justice systems as they are practiced in other parts of Africa or beyond.
- On the other hand, this experience is expected to help shape and project the Malawi primary justice perspective internationally.“ And finally „the consultant will also assess consistence in application of the concept and give technical advice to the implementation process“ (Terms of References, 2004:1).

To fulfil the given expectations, I had to participate in a „Legal Aid Conference“ in Lilongwe (22. – 24. 11. 2004) and to carry out the following activities:

- In collaboration with project staff to conduct field visits to all four pilot districts in order to assess the DIA’s understanding of the primary justice concepts and philosophies, its strength and weaknesses compared to other forms of justice and its linkages to the formal judicial systems.

[1] MaSSAJ = Malawi Safety, Security and Access to Justice Project
[2] (British) Department for International Development

- To plan and facilitate a session on „International Perspectives to Primary Justice“ during the first DIA review Meeting and
- To provide technical assistance as well as to advise the GTZ Management Agency.

0.2 Procedure

From all my discussion partners I expected answers to two sets of questions, firstly, answers related to the problem configuration covered by the Primary Justice Project and secondly answers related to the (often diverging) interests of the different stakeholders. The first set of questions referred to the thought that every development project is to see an institutionalised (or systematically organised) answer to a problem or a problem configuration as being potentially solvable by that development project. The starting point of each project has therefore to be a clear common understanding on the problems to be solved. Therefore, I wanted to know *why the project exists at all. What kind of problems should the project solve? Why do the actors think that there is a need to make the primary justice institution*[3] *a development project? What makes the difference? What kind of strategic advantage(s) do they see in and/or expect from such a step? What is the jumping point? But also: Who has the problem, i.e. are there some groups or persons, who have a particular problem? And so on.* The second set of questions referred to the fact that questions of law, legality and justice are always hotly disputed issues, since multiple political, ideological and economic interests are at stake and thus often the source of conflicts too. Therefore I also wanted to know how they deal with problems like *„forum shopping and shopping forums“ or „competing legal powers“. And what do they think about the danger of „quasi state-status“ of donor driven agencies? How do they interpret terms like „access“, „justice“, „legality“ and „control“? What kind of „Human Rights“ in particular*[4] *do they promote? And why? Are they aware of their own role and how do they define it within this contested field of action? What kind of images do they have of the „formal justice system“ (Do they compete with it? Do they see the different tasks and their consequences for conflict regulation or do they simply believe „primary justice ‚service providers‘“ are „better“ than „state-driven court systems“?) Where do they place the „access-problem“? And what kind of images do they have of the local customary law? How do they define and position the role of the traditional authorities (T.As.)? Do they think the T.As. are just backward? Who (and who not) should receive training? Why? Why and for whom is social harmony or litigation „a problem“? And so on.* The principal goal was to enter into a vivid discussion on the impact of legal pluralism and to question the pro-

[3] In Malawi, the primary justice institution exists since immemorial times.

[4] Most development agencies agitate strongly for the public recognition of political and civil rights whereas the economic, social and cultural rights (ecosoc) are left to eke out a miserable existence in the public human rights discourse. Such a one-sided orientation unfortunately promotes speculations on hidden agendas.

ject rationale. Of course, all these questions were also complemented by questions relating to the role of the discussion partners, their various backgrounds and the ways they got involved in the project.

0.3 Course of the Mission

After arriving on Sunday the 21st November 2004, I participated first in the „Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers and other Service Providers in Africa", organised by the NGO „Penal Reform International" (PRI) and held at the Capital Hotel in Lilongwe. Together with Justice John Wuol Makec (Supreme Court, Sudan) I was responsible for Session V, titled „The role of traditional authorities and community based organisations". There, I gave a speech on „Legal pluralism – a new challenge for development agencies. GTZ-experiences on the basis of the gender question" (see Appendix 1). Overall, the conference was very enriching. In particular, it emphasised the „access-to-justice problem" from a whole range of different standpoints, stressed the demand as well as the supply side and did not exclusively focus on state law alone. However, regrettably Session V was positioned just before the presentation of the draft Lilongwe Declaration. There was therefore not time enough to integrate all the thoughts and comments on the role of traditional authorities and community based organisations into the declaration. This lack is particularly regrettable because the role and impact of non-state justice systems have in most law conferences faded out, provided that they don't focus explicitly on folk law. I wondered also about the unanimity with which justice was discussed as a „service provider" only, whereas justice is also one of the most important governance instruments and therefore also closely linked to questions of political power, control, subjugation, integration and exclusion. During my subsequent trip to the pilot project areas some of the topics of that conference as well as the styles to think about resounded in my mind and raised many other questions too. But let me start step by step.
I had my first contacts with the GTZ-Project during the conference. Together with Ms. Stella Kalengamaliro (GTZ-Project Leader Primary Justice), Ms. Dorothy de Gabrielle (Primary Justice Project Consultant and Eastern Region Principal Resident Magistrate) and Mr. Joe de Gabrielle (MASSAJ Needs Assessment Consultant) I spent an informal evening where we discussed my trip to the pilot project areas Chikwawa, Zomba and Rumphi (25.11. – 04.12. 2004). I then tried to understand some basic elements of the project design and to position the approach within the field of other law projects. On Thursday the 25th we (Ms Kalengamaliro and I) travelled to Blantyre. On Friday the 26th I had talks first with Mr. Peter Chisi, Programme Coordinator for Malawi Carer in Blantyre on the critical role of paralegals as well as on his NGO as local management agency of the pilot project. The main topics together with the questions mentioned above were the land law, the role of traditional authorities and their ways of legal deci-

sion-making, local problems of „forum shopping“, the recruiting of local mediators and questions of the „quasi-state status“ of development agencies. Down in the plains of Chikwawa I then met Ms. Grace Muula (Social Welfare Officer), Mr. Katunga (Traditional Authority) and Mr. Nkhoma (Director of Planning and Development for the District Assembly) as well as a Magistrate of the Chikwawa Magistrate Court. With these discussion partners I tried again to figure out the central problem configuration. Furthermore, I wanted to know their capacity to properly analyse conflict configurations, their role understanding and their ways to position themselves in relation to an overall project goal. In particular we discussed problems of false or wrong accusations, questions how to deal with diverse forms of theft, esp. livestock thefts, working conflicts and the critical juridical-political role of a chief. On Saturday the 27th we met with the Primary Justice Pilot Project Officer of Malawi Carer, Mr. Dahitso Mipando in Blantyre. With him we discussed the critical role of Human Rights NGOs, in particular their tendency to compete with all kinds of other institutions such as traditional authorities, state agencies (courts, public administration, social welfare offices), religious dignitaries (moslems, catholics, portestants, african rel. leaders), bi- and multilateral development agencies, traditional healers, CBOs etc. etc. on the acquisition of conflicts that potentially could be to settled (shopping forums) and this often without any official mandate to do so (privatisation of core tasks of the public administration). Together with him we then travelled again down to the plains of Chikwawa. There I could visit a small hamlet, located some kilometers south-west of the center and talk about the role local customary law plays in the organisation of their daily life. Sunday was reserved for the study of documents and clarifying discussions with Ms. Kalengamaliro and on the following Monday the 29th, we travelled to Zomba, where I spoke with Ms. Olive Msyambuza (Social Welfare Officer) and then visited two Community Based Organisations, the „Domasi village to village“ and the „Lambulwira Aids Support Organisation“ (LASO), where we discussed problems of the stigmatizing of AIDS victims. On Tuesday morning I met Ms. de Gabrielle at the magistrate court, where I discussed the „access-to-justice problem“ from the angle of state courts. There I also checked for the first time the „litigation rate“[5]. With surprise I discovered however that the courts litigation rate is frightening high (sic.!) and that such figures do not confirm the access problem of state courts at all. On the contrary, they question the appropriateness of the whole problem understanding and indicate first of all *a problem of the dispute settlement capacity of the non-state justice sector* and not – as so often suggested, a problem of the official state courts which would not deliver and the like (see section 1 and 4).

[5] litigation rate = number of court cases per year divided by the number of the total population living in the area of the corresponding court. The litigation rate is one of the most important indicators for the identification of an „access-to-justice“ problem (for details see section 4).

On Tuesday afternoon we travelled back to Lilongwe. On Wednesday morning 1st December we visited the Programme Coordinator of the Catholic Commission Justice and Peace (CCJP) Mr. Peter Chinoko. I had a very vivid discussion with him on the possibilities of using folk law as a potential medium for social change (see section 5). In the afternoon we visited, together with Mr. Chinoko, a Community Meeting at Kanengo, Area 25 and later in the day we had a meeting with Mr. Olex Kamoma from MASSAJ. There we again discussed problems of competing legal powers and the MASSAJ approach towards questions like forum shopping, the quasi-state status of local NGOs and the „access-to-justice problem". Since some of these questions also have a strategic and a developmental political dimension, Mr. Kamoma advised me to also contact MASSAJ's Programme Manager, Ms. Lynn Keogh. On the morning of Thursday 2nd December I prepared the concept for my presentation at the workshop; at lunch I met the GTZ programme director Mr. Bodo Immink and told him my first impressions. Before travelling to Mzuzu I had finally to meet, together with Ms. Kalengamaliro (GTZ project leader), Ms. Keogh. There, my intensive questioning on MASSAJ's rationale of the „access-to-justice problem", in particular the question of whether MASSAJ ever checked the litigation rate of state courts, what kind of steering measures it envisages to prevent an overflow of court-cases at state courts and what the role of the primary justice service providers in the light of such a context could really be, did however not lead to the requested clarification. On the contrary, it unfortunately led to an unfruitful discussion with Ms. Koegh ending in a challenge of GTZs role as an employer of international consultants[6].

On Friday 3rd December we first met with the CCJP Programme Coordinator Mr. John Chawinga in Mzuzu and then travelled with him up to Rumphi. There we met Mr. Emmanuel Kaloa from the local CCJP section. With him we discussed the history of the CCJP activities in Rumphi, its main concerns in the area as well as its expectations from the primary justice pilot project. Then we drove some kilometers westwards to Kaiwales' village to visit a court hearing on a land dispute of the Traditional Authority Area Chikulamayembe. After lunch we travelled back to Mzuzu, where we had an appointment with Mr. Patrick Kamisa from the Mzuzu Magistrate Court. There I again checked the litigation rate and verified my supposition of an overloading of Malawi's magistrates from an overflow of court cases. On Saturday 4th December we travelled

[6] After that meeting, Ms Koegh requested my Terms of Reference and asked for another meeting with GTZs programme director, Mr Bodo Immink and the project leader Ms. Kalengamaliro. Unfortunately, I could not participate at that meeting, since I had already left Malawi. According to Ms. Kalengamaliro, Ms Koegh apologised and acknowledged *„that she was simply apprehensive that (I could) have been asking wrong questions because she had not seen (my) Terms of Reference. So she assured (the GTZ-Forum) that the Terms were ok and that (my) interaction with Olex Kamoma also assured them that (I would be) the right consultant for the kind of work that they want done"* (Email from Ms. Kalengamaliro, 10.01.05). Nevertheless, this intermezzo signals a role conflict that should be solved.

via Malawi Lake back to Lilongwe where I finished my preparations for the workshop. During the whole trip I had also many vivid and clarifying discussions with GTZ's Project leader Ms. Stella Kalengamaliro on questions of the role of the project, the supposed problem configuration the project should respond to as well as on the impact of legal pluralism. Her company was a great help for the success of my trip.

Given the difficulties of all discussion partners from the countryside to establish an appropriate and coherent problem description[7] to which the project could offer an organised answer, I proposed to make a project planning exercise at the workshop with all participants and to complement this exercise with some comments on the international perspectives on primary justice. The exercise left however the impression that the project design could perhaps contain some critical weaknesses that were confusing most actors. I thus also asked for access to preparative documents for the project and decided to discuss in this report the preparative MASSAJ report from 2003 as well.

0.4 Structure

The report has a topics centered approach. It links a selection of available legal pluralistic literature on the dispute management in different societies (Africa and beyond) with the project design, its problem understanding, and with the social settings in which the project has to act.

During the talks with my discussion partners I identified in addition to the crtical problem understanding, at least four other problem complexes that will be addressed. There is firstly the question of the role of legal pluralism in those countries that are subject to processes of state-building. Secondly the critical impact of „forum shopping and shopping forums" in the formation of a state-wide valid legal system is a topic, thirdly the „access-to-justice" question and fourthly the attitudes and statements vis-à-vis the Traditional Authorities. The conclusions finally will recapitulate the key-points and outline some new project activites that question also the actual project structure and suggest its reorientation.

[7] This is not to say that people do not have problems or that they are not committed or the like. Of course all these discussion partners mentioned many singular problems a possible development project could address. Until the end of my mission they remained however hardly in a position to bring the actual rationale of the project design together with the multitude of singular problems they have to deal with and they mentioned during the vivid discussions.

1 Competing problem understandings

The objective of the project, to improve the access to justice (also) for poor people through improving the quality and accessibility of primary justice systems in Malawi is indeed a very important goal, provided of course, that the poor actually and obviously want such a project and that such an objective refers at least to a coherent and consistent problem understanding including an analysis of the multiple interests of the different stakeholders, a critical needs assessment and a clear project structure. As already signaled, my questioning of the project rationale did not lead to the requested clarification. Most striking was the observation that the donors' descriptions of the needs, attitudes and styles of behaviour of the poor vis-à-vis the mobilisation of state courts did not fit very well into the District Implementing Agents (DIAs) descriptions: While MASSAJ argues the poor *could not* mobilise state courts because the courts were in most cases much too far away, too time consuming, prohibitive in respect to costs, language and styles of negotiation (f.i. fact oriented litigation vs consensus oriented mediation) as well as too difficult for all the illiterates (mostly women) and that therefore there would be a need to do something (else) for the poor, most of my discussion partners at the district level argued that the poor *would not want* to mobilise state courts because they were still very much attached to their traditional chiefs and that the core-problem would thus be that the traditional authorities would not apply human rights! While both statements, though controversial, let suggest that the state courts probably develop strategies to disguise their own unemployment, the Minister of Justice argued on the occasion of the official opening of the Legal Aid Conference that on the contrary *„the criminal justice systems in most countries are facing the danger of collapsing (...and that) our courts are backlogged with cases, due to various problems of inadequate resources (...)"*(2004:3/ emph. by MW). And in addition, he emphasized the importance of the primary justice system as a complementary legal service: *„It is a fact that, without them, our formal system would simply be swamped by petty cases that are easily resolved at a grass root level"*(same). I started thus to wonder what the case now really is and what role the primary justice project should play and I enquired about the issue of the project. Unfortunately it became unclear *who* really has the problem (the poor? the donors? the DIAs? the courts? the Ministry of Justice?), who the target group really is and what the objective of such a project in fact could be. Very different and at part even excluding interpretations were competing with each other. If for instance the poor do not want to mobilise state courts because they are very much attached at their traditional authorities, state-run institutions have a problem of power, influence and legitimacy in local settings. If the poor cannot mobilise state courts though they would like to do so, then of course one has to focus on the access-problem. But what, if the courts are already suffering under an overflow of court cases? Then the containment capacity of primary justice agencies is crucial.

These questions and doubts were accompanied by my notice that both the donor and the governmental side was much more able to describe some core-problems the project should or could address than the supposed profiteers of the project, the poor, as for instance the modest farmers I met in a hamlet south-westwards of Chikwawa. They articulated a far reaching consensus with the local Chief and his traditional ways of decision-making. Obviously they did not have any major problem and did not articulate any corresponding need! I started thus to wonder whether all this sounds logical and how it was with all the other projects I advised throughout my career. The rule is that the closer one comes to the target group the more accurate the problem descriptions usually are – but here? Here the DIAs asked me during the workshop in Lilongwe if I (sic!) could explain to them the „problem" the project ought to solve!

No matter the topic of such a project, it cannot work this way. From my viewpoint one has to reorient the project. I think, it would make much more sense to argue that the primary justice pilot project is not a grass-roots project but a *governance* project, just as are all the other projects on legal pluralism in Africa. However, I do not want to jump in ahead but to argue step by step. In addition, steering questions obviously touch also a very delicate issue, that is the conflicting relationship between GTZ and MASSAJ. While MASSAJ ought to act as umbrella organisation and GTZ as responsible implementing organisation of the project, MASSAJ obviously interferes directly, for instance by contracting (and selecting) the District Implementing Agents or by challenging GTZs role as contractor of international consultants. In my case, MASSAJs responsible programme manager put GTZs project rationale into question, particularly the legal pluralistic perspective that is pointing at an improved coordination (a) between primary justice providers and (b) between primary and formal justice providers[8]. Roles and responsibilities need therefore to be clarified and respected. In spite of these difficulties, I chose a frank language and address my recommendations to GTZs project management.

2 Legal pluralism, development projects and processes of state- and nation-building

It looks as if legal pluralism is becoming a new trigger within the development community. While a couple of years ago most of all development agents strictly rejected the idea of legal pluralism as a potential topic for development projects, at least partly because they reduced all law to western state law, this controversial key-word seems now to have become a common property.

[8] ..though this point has already been outlined in GTZs contract with MASSAJ (see Project Purpose and Rationale)

During my trip to Malawi I got however the impression that the power problem, linked to questions of legal pluralism, is widely faded out. I need therefore to stress that the recognition of legal pluralism does not necessarily mean that all the power conflicts which once led to a resolute rejection of each attempt to recognise legal pluralism as a social fact, have just evaporated. All the more important is to see that legal pluralism is not just a social fact. Legal pluralism is also an analytical concept. Legal pluralistic concepts are important analytical tools to investigate the multiple interests of conflicting parties that are classifying the normative orders according to categories of legality and illegality. Role and function of a legal pluralistic approach ***within*** development projects is thus to take these controversial viewpoints into consideration and to think about options, how one could ***mitigate*** the negative impact of the application of such conflicting, partially even competing normative orders without their „smothering" or their „sweeping under the carpet".

The role that legal pluralism plays as social fact in society, depends largely on processes of state- and nation-building[9]. In nation-states like Malawi, legal pluralism is ***a symptom of a power conflict*** between the centralised claim to power of the ruling class resp. the Government and all the other power-groups in society, who question this claim to power and who tend to ***compete*** with the political center in respect to the value of normative statements that stipulate how the world is and how it should be. The primary justice institutions for instance are not there just because the official state system would not deliver or the like. The primary justice institutions are there anyway and the role they play in Malawis society depends largely from their ***own*** social impact on the forming of a dominant value system. To continuously question the value of generalised standards, implemented by other political players, that are declaring what is right and wrong, what is just and unjust as well as what is legal and what is illegal is also a very common feature within such constellations. Whether a development project succeeds in mitigating the negative impact of conflicting, partially even competing normative orders, depends therefore largely on the question of whether its consulting services lead to a new legal order, usually state law, that deploys as much integrative power as possible in society. Preconditions are compromises and compromises are only possible if one does not always minimise rising contradictions. I have to confess, that I trouble insofar with the primary justice concept. To call the primary justice institutions a hybrid system being composed of elements of costumary law, modern human rights standards, formal law etc. requires a new identity. I was however unable to figure out such an identity. My impression was, that the term „primary justice" is rather a catch-all category for Malawi's diverse non-state justice systems and actors including

[9] Pre-industrial societies are marked by extremely different styles of social behaviour and an unmanageable multitude of different normative orders existing side by side without constituting any major problem. Problems „only" arise with attempts to support a growing market integration, with a growing mobility of people and their notions and with the corresponding needs for a political stratification and an overarching legal order. For more details see Appendix 5

donor driven NGOs and development projects and suggests homogeneity where there is in fact nothing else than heterogeneity.

2.1 Ambiguous ways to deal with power conflicts

Also I have to confess that I am troubled somewhat by the MASSAJ Report from 2003 on the Primary Justice Pilot Project. Though this report is very interesting and illustrative in substance, it has the unfortunate tendency to diminish out the power problem that lies behind the ongoing devalorisation of primary justice activities and to refer its own argumentation time and again to "misunderstandings", "lamentations" and "minimisations":

- **To the role of primary justice**: *"Primary justice is a concept widely misunderstood. Most studies assumed it to be 'informal', 'customary' or even 'community' justice, exercised outside the sphere of 'formal' legal systems"*(2003:10/emph. by MW).
  However, classifications such as distinctions in "formal law" vs "informal law", "customary (internalised) law" vs "deliberately planned law" or "community (based) justice" vs "universal justice" are not „misunderstandings". They refer to a distinct notion of law that suggests that all legal concepts, that do not belong to modern state administration (in most cases the Euro-American model) are either „no law" or just „informal law", „custom" or „local". For this notion of law is largely influenced by the current ideology of the legal decision-makers, and connects the existence of law only to a western-like state-controlled organisation of power. This implies certain characteristics such as the existence of official forces empowered to impose sanctions, a hierarchy of courts and administrative units, the separation of powers and a codified state constitution. Accordingly, outside of the centralised power of states there is only informality and in the strict sense of the word, no law. Those, who advocate such an interpretation want to unquestioningly accept the authoritative notion of (western) law.

- **To the views and fears of the chiefs**: *"The views of the Chiefs, not surprisingly, lament that many matters formerly brought to their attention are now taken directly to police/magistrate, without any feedback from them. (...) Chiefs are also disparaging of "westernised" concepts of justice (e.g. community police), which have taken away their own powers to administer their areas"* (2003:16/emph. by MW). Such fears are of course self-evident. But the quotation signals also the risk of the project becoming just simply a cue ball of a very fundamental power conflict between competing legal institutions (traditional authorities vs. human rights NGOs/donors vs state courts vs faith based institutions etc.). The report tables only some claims, it does not however refer to a corresponding risk assessment.

- **To the risk to delegitimise traditional authorities**: *"It is important to stress that these primary justice pilots do NOT undermine traditional leaders, but"* and then the report switches the level of the argumentation and the authors, instead of confirming an inclusive approach abruptly state that the primary justice pilots*"will seek to monitor the impact of traditional leaders' training, to evaluate course materials and to hold traditional leaders accountable by broadening access and informing their subjects of their rights"* (2003:28/emph. by MW). But in this way an obvious power conflict is swept under the

carpet and the primary justice pilots risk becoming partisan. Terms like "monitoring", "evaluation", "accountability" or the intention to broaden "access (to what?) and informing the subjects of their rights" are not domiciled in traditional settings but linked to very specific, development related values. They make part of project law (for details, see Appendix 3). The authors of course assume, though they are throughout the whole report very keen to stress the participative viewpoint, that the (donor-driven) project will in fact define the rules of this game.

I could cite mor examples, but think I have made this point.

- Task and goal of a primary justice project could therefore not be to smother all kind of existing contradictions with a nice catch-all category. I think it is imperative to table the different viewpoints of all the stakeholders (including the government, the donors, the NGOs and the public administration) and first to carry out an analysis of the multiple interests of the different parties including their expectations and fears. Only in this way will it be possible to clarify who really wishes what, who mainly suffers under the actual constellation and thus has a major problem that needs to be solved and who the target group really is.

2.2 Is justice only a "delivery service"?

Another critical point is the current wording of justice as a "delivery service". This image is actually very widespread within Malawi's legal aid discourse and the primary justice pilot project. It is however misleading, since it suggests, the justice would, like a post office or a travel agency, in the service of its clientele just respond to the requirements of its particular market.

This is however only the bright side of the coin. It is correct to note, on the one hand that the conflicting parties approach dispute settlement agencies such as courts by filing a lawsuit. Therewith they show their expectation, that the promise contained in the jurisdiction, to assure a settlement and the social balance, shall be redeemed. Therefore, the reasons of conflicts for possible legal proceedings can be sought in the socio-cultural surroundings, which in a way *"(constitute) the demand side of a potential market of legal services"* (Blankenburg, 1989:14). Herewith however there appears only the so-called passive, conflict receiving role of law agencies. If the legislator or – as in the case of the traditional authority the ruler – wants to exercise his function of leadership, he depends on the very fact, that the corresponding court receives a manageable quantity of cases which is relevant for his function of leadership. Only in this

way can the legal norms containing directives of appropriate behaviour and other measures of action get a chance to be implemented. This is why the ongoing fight between these agencies on the monopoly of political and legal power to settle legal conflicts as well as their intention to intrude themselves upon the disputing parties as the only institution being really able to redeem the promise inherent to the jurisdiction is so important.

- These processes result however in ambiguous institutions, anxiously acquiring as many conflicts *as manageable* (conflicts as a resource) and at the same time imposing their law as a particular view of the world by their claim to power (justice as instrument of command).

As illustration, I cite here from an interview with Peter Chisi (Malawi Carer):

(...) So you told that you are training local mediators .... how do you select this personnel?

- *This is done in consultation with a number of stakeholders (...). We want work with people who have a good name in the community, people who can actually provide objective awareness (...). We work with about 130 community workers and each of them is working in different communities. They are identified by the paralegal officers at each district. Those paralegals who are new in the districts, start first with a questioning of who is who and what they are doing. They are classified by age, employment, gender and so on. Then comes the next phase. Sometimes, we get very young people, they just finished the secondary education and because of problems of unemployment they try to start as mediators just for having a foot in the door of our NGO. But what can they do at grass-root level? We try to recrute other people, civil servants, like teachers or people who have served in banks or other jobs – and others who are just ordinary people, doing nothing but with some basic education, whose criteria is that somebody can just read and write. So we target this people. And what I am saying, we need to come back and asking, who is the best person, and looking at all these factors because each one of them has of course its own strengths as well as his weaknesses.*

And what are they learning in your programmes?

- *ADR. The process of the mediation itself. But that happens in the last two days. So we start with issues on human rights, gender, HIV-AIDS, land policy, land law, law, criminal law, civil law, and so on and once people take notice of this whole legal body, then we focus on processes of mediation, mediation is our final tool kit. So, let me tell you that emphasis is on awareness. We are an NGO that trys to accompany people so that people should know when something is going wrong and that therefore they should take action, either they go to court, they go to the chief or they come to us. That is the main job of these volounteers. The second job is to do as much as possible, to bring people together, to bring them to **us** and assist them in resolving their dispute, but this is like a secondary job.*

Why don't you, instead of taking action, just train traditional authorities?

- *We do not trust them.*

Does that mean: You do not trust the traditional authorities, therefore you try to rival them, you are looking for competing groups or alternative options such as people who would like to act as your volounteers, you train them in ADR and with their ADR-knowledge they should weaken the mediation capacity of these traditional authorities? Is it that way?

- *Exactly. Why are we doing that? The chiefs were one of the stakeholders we identified that the .... aah, in terms of levels of confidence that people have in the chiefs, sometimes it is there, sometimes it is not. For us, we wanted **destruction** so that we can lead them and have them under control ...so these led us to people we identified at the communities. But we also know that the traditional leader... that is a very **big problem** regardless whether we agree or not, this is a person we have to go to and to take into consideration .... and the people address still these authorities. **They are too popular, yes**. When we impose new people in the village, who.... have powers, may be to delegate or to do civic education, we are creating conflicts between the two. And where we agree is on the training of the CBEs[10], there the traditional authorities can participate and we said ok, let's see what we can do.*

So if you are competing the legal capacity of these traditional authorities with your own approach, then you are also favouring forum shopping? Is it this way?

- ***Yes***.

3 Forum Shopping and Shopping Forums

The term "forum shopping and shopping forums" refers to a legal pluralistic concept by which the legal, social and political impact of competing legal powers is analysed. More than 20 years ago, in 1981, Keebet von Benda-Beckmann first published an article on "forum shopping and shopping forums" in the "Journal of legal pluralism and unofficial law" (JLP). There she stated that the shopping qualities are very typical marks of community based dispute settlement agencies. She added that in such constellations it is very typical, that cases do not come to an end, since it is nearly impossible to reach a consensus (1981:44f). With one and the same dispute people mobilise several dispute settlement agencies and start moving around from one arena to the next. At the same time the dispute settlement agencies apply different, sometimes even mutually excluding value systems. And since there is no ordering structure, the different agencies need to reach political and legal legitimacy by competing with each other for the acquisition of as many cases as possible that they can settle. Only this way they can reach a political impact. Things become even more complicated by the very fact that the forum shopping reproduces its fragmenting power also *within* one and the same dispute settlement agency: *"(...Every agency) involved was concerned to emphasise that aspect of the dispute which justified the involvement of one forum rather than another. But once jurisdiction was assumed, competition between the functionaries was expressed in different terms. Everything a functionary did was scrutinized, every mistake was noticed. This in itself is not remarkable; what is remarkable is the kind of criticism used in this competition: the arguments concerned (...) procedure and hardly ever the norms of substantive law"*(K. von Benda-Beckmann, 1981:50). Consequently conflicts become a never ending story.

[10] CBE = Community Based Educator

During my trip to the 4 pilot districts of the project I made however the surprising (and remarkable because it was so curious) observation that forum shopping is widely presented as a kind of political progress, a step forward. All my discussion partners argued that *"since we are now living in a democracy, people have a choice. While under the former president Banda all and everything was controlled, people can now 'vote with their feet' and 'shop for justice'."* I have to confess that I was and still am very surprised: To shop for what? To shop for justice?? Here we are at an important crossroad: While from a legal pluralistic viewpoint it is very helpful to refer to the concept of "forum shopping and shopping forums" for the analysis of the local dynamics of competing legal powers and their impact on the local decision-making, it is certainly not advisable to apply such a concept as a politicised development programme! Justice is not comparable with medical health services as for instance Dr. Ott suggested in an Email[11]. While he negates the forum shopping as a problem of dispute settlement agencies, arguing that in case of a sickness people would also mobilise different medical health services, I need to stress that most of all conflicts could not be identified as a sickness like a psychotic delusion, malaria or yellow fever[12] since there is first and foremost a close connection between social order and dispute[13]. Quality and quantity of most of all disputes depends largely from the question how the social order can be maintained, how it handles and integrates the legal aspirations of most of all interest groups in society, what kind of social contribution the involved political and legal institutions can and do generate and certainly not from the question how the anyway existing competition between the multiple political and legal stakeholders could be improved. It will help neither the human rights NGOs nor the donors nor the traditional authorities nor the CBOs, the churches, the faith based organisations or other interest groups, if the overall order collapses. Forum shopping is a very, very serious problem, since it is only possible in contexts where it is backed by institutional constraints and – as is the case in Malawi – by a corresponding development related ideology[14]. To support forum shopping will probably only lead to a creolization of legal orders but it is pure speculations to what kind of creolization such a process might lead including the possibility of ending up with a "demand-driven" mafia-like law. I advise therefore all involved institutions including MASSAJ, GTZ as well as all involved NGOs, CBOs and FBOs to revise their approach.

[11] Email from the 9th march 2005

[12] ...though some folk concepts refer to such assumptions and though there are some parallelisms in respect of the client–therapist resp. litigant–mediator relationship (see Erdheim, 1988)

[13] See Simon Roberts (1979): Order and Dispute. An Introduction to Legal Anthropology

[14] In the above mentioned MASSAJ report the authors argue with reference to a PRI report that the building on existing initiatives such as primary justice institutions *„(will) broaden access (and) allow people to ‚shop for justice'"*(2003:29) and that the key-point of these pilots would be that they are *„demand driven by meeting demands for accessible justice through participatory development"*(same).

Some aspects of this problem can well be illustrated on the basis of some first hand data:

During the planning workshop held last december at the Kuka Lodge we invited all participants to work on the problem definition of the project. Based on my notices of the diverse talks during my field trip, I listed about 50 key-words which contained the most important statements relating to the individual problem understanding of the interviewees (see Appendix 4). The DIAs classified all the cards in problems relating to the precarious framework conditions and in problems the project should or could address directly. Then they selected the 8 most important points and tried to link the different key-words logically. Though the general attempt, to come up with a coherent problem desciption of the whole project failed, it was still striking to see how most DIAs identified the "forum shopping" as a very serious problem. Since the statements were put on tape, I cite now the clearest statement, the one of the "Zomba-Group":

(...)
So, ok we classified the cards in two sections, the section framework and the section project. We looked card by card and discussed if it is a problem or not. (...)

- *What is very high, that is the „competition between dispute settlement agencies". We have a lot of different structures already from the state side, the police, the courts and the public administration. And then there are also the chiefs. And now new actors are coming in, the CBOs, the FBOs, the NGOs – all these people, they want to work in these communities, and start each and every day to tell people, if there is a problem, that you have your rights and you can claim them at court. So, more and more petty cases as f.i. the theft of a chicken or an egg are coming up, since people insist now that they have their rights. And if they can not immediately get back the egg or the chicken, they start to tour around again and agian with one and the same story. I want to say that cases like this happen more and more...*

Dorothy De Gabrielle: What do you want to say, has this to do with the competition of the dispute settlement agencies or with other things?

- *Yes, what I want to say, is that there are two sides. On the one hand, you have the shopping forum, that is, people tour around with their cases, since there are so many opportunities to get a forum. And on the other hand the different dispute settlement agencies compete with each other, they want to get as many cases as possible and to go with them to court and asking for remedy.*

I want to clarify something. Each institution has its own profile. The problem is not so much that people address different institutions for different kind of problems, as f.i. the church for religious and ethical questions, NGOs who work in the medical sector for particular problems linked to AIDS, CBOs for problems of social stigmatisation and so on. That is not the point. It is however problematic, when they start to tour around with one and the same case, when they are not so much interested in the conflict settlement as such but in the question of getting a public forum, when the different solutions offered to the case are used as stakes to profit from the social confusion and when the different institutions are not so much interested, to have a distinct profile of their own but to copy each other for the purpose to attract as much cases as possible to the disadvantage of the others. Behind such forms of competition is a logic, f.i. that donors are not interested to subsidise an NGO, which has not at least 50 cases to settle a year and therefore such NGOs have to develop so-called „success indicators" and need at least a certain number of cases for their own survival...

- *...That's very true. And there is a lot of confusion in the community, people do not know, where they should address themselves and this has a lot to do with a lack of declaration from the service provider-side. So if you take the land law. Until now, the chiefs are responsible for that, but they don't use the land law. The courts use the land law. But now the NGOs start to tell you that the chiefs do not respect the human rights either and that you should therefore not go to the chiefs, but the NGOs are not competent on land law at all. So where to go – ha, Dorothy, ha – and finally people become angry of all this confusion and they commit a crime and are put to the police and the court! And all these things.. (...) What we need immediately, is a system of referrals between these different local agencies and the courts....and this confusion produced by the*

local actors is also a tremendous political issue. Critical is always the question where to get money, and this fits very well in this concept of forum shopping. Another point is, that we should learn to handle the problem before it ends in an open conflict. We should learn to analyse these problems and contradictions as it is the case with this forum shopping.

3.1 The supply side: Problems of the "quasi-state status"

Also critical are questions of the „quasi-state status" of many development agencies. In many developing countries the maintenance of social security and the rule of law is not only threatened by conflicts arising at the critical interface between state law and folk law but also by a growing influx of law coming from across the borders[15]. The term *"Parastaatlichkeit",* or quasi-state status refers to a particular problem linked to that observation, namely the growing *"referral of sovereignty rights and fundamental administrative tasks (to) groups and institutions"*(Rösel and von Trotha, 1999:10) that compete with the post-colonial state for political leadership in rural areas. Both authors stress the unconstitutionality of such a power-sharing, since this cession of sovereignty rights and principal tasks of the public administration happens stealthily by processes of "informal decentralisation" and "privatisation". Typically, those groups, institutions or organisations who are involved in such processes, are often lobbying for the advantages of competitive development patterns such as forum shopping.

During my stay in Malawi I wanted thus to know, how far the project is involved in such processes. All my discussion partners confirmed, that conflicts are also regarded as a resource and that their subsidies depend heavily on the question whether and if so how many conflicts they could get to settle. Unfortunately, this strategy fits well in the problem of "quasi-state status", since it is also backed by one of the actual success indicators of the pilot project. This indicator stresses the question of whether the forums collaborating with the project get more cases than state courts do and it regards this as a sign of success![16] Project law[17] thus supports the forming of "quasi-state status" of its implementing agencies, since the subsidies they get do not come from the local population but from foreign multi- or bilateral development agencies (resp. Euro-American tax payers), to which these agencies are – in contrast to the traditional authorities – accountable. It is therefore no feat to always blame the traditional authorities for their so-called "backwardness" and their reluctance vis-à-vis western defined

[15] Not only the UN-conventions of indigenous peoples or international human rights but also economic regulations (lex mercatoria) and international agencies such as the WTO, the World Bank, the Asian Development agency, bilateral development organisations or transnationally operating NGOs play an increasingly important role in social and economic relations in small-scale settings within non-western nation-states.

[16] For questions of success, such an indicator is however irrelevant, since primary justice agencies all over the world anyway get more cases than the formal system does (see Blankenburg and Rogowski, 1983; Blankenburg, 1989). Nevertheless such an indicator has a critical impact, at least at a symbolic and a mental level.

[17] For details see Appendix 3

standards of "accountability", but an ongoing undermining of their local legitimacy via a Euro-American remote control.

According to my discussion partners, many Human Rights NGOs, particularly those engaged in gender questions, are especially keen to compete with traditional authorities, because the consensus oriented approach, applied by these authorities and referring to old customs, seems to conflict with the constitutional claim for gender equality. After Mr. Chisi, Programme Coordinator of Malawi Carer, such an approach is however difficult to keep in Chikwawa, since the traditional authorities are there still "too popular". Malawi Carer remains therefore in a watching position and applies a slightly different approach by training and encouraging paralegals to collaborate pragmatically, at least in a first phase. But for the future also Malawi Carer is keeping all doors open. With such an option, things change however fundamentally. I thus wondered whether they would get in Malawi a political mandate to do so, since questions of conflict management are usually regarded as core tasks of the public administration and in western states not out-sourced to privat agencies without any regulatory framework and any political mandate.

Thus, I asked Mr. Olex Kamoma from MASSAJ who replied, that (...) *"all our projects are relating to the national council and to the ‚poverty reduction strategic paper'. This paper outlines what kind of issues we have to outline under the gouvernance pillar. All our interventions arise from there, theses are the sectors and theses are our interventions, all and everything is linked to there. (...) The agenda is set in the PRS-Paper. DFID takes that from the governance-paper. If you would go to that question of regulation, I think this goes to the higher policy making level, because in coordination with MASSAJ there is a national policy framework and this national policy framework, as it is coming out now, is still in a way designed that it is feasible by the donor and it is permissible towards all the players, so that they can play what they want, it is free for all and everybody. Everybody is pleased – and to change that, we have to go back to the policy level and say..., because the policy-makers have to start putting their foot down and to say, this is what we would allow and this is not what we want. Up to now – I can say to you they just allow all the players to do what they think is good, what ever the meaning of „good" here is."*[18] In other words, everything goes and Malawi risks to becoming a "project country".

- The primary justice pilot project cannot promote "the shopping for justice" and it cannot participate at the ongoing process of political delegitimisation of distinct legal concepts such as the "fact finding - approach" applied by state courts or the "reaching for consensus - approach" as practised by the traditional authorities. On the contrary, it needs to find ways to mitigate the negative impact of competing legal powers and to improve the search for an overarching, inclusive and accessible legal order for improving the access to "just" justice.

[18] Transcript from tape.

3.2 The demand side: naming, blaming, claiming

If we now turn the perspective and regard the demand side, things become much more complicated, since questions on the interpretations (and manipulations) of the incidence have to be put in the center. According to the statements of the DIAs from Chikwawa, Lilongwe and Zomba, wrong accusations are for instance a very common feature within their local settings:

„(...)
Are there particular regions where the crime rate is climbing up, for instance in the outer side of this district?

- *Yes, for instance in ‚Kujakuja'(?) the crime rate is actually rising.*

And what kind of crimes are rising?

- *Theft cases.*

Do you know whether there are market places which started to run recently so that new goods are now floading in this region such as radios, cigarettes, bycicles, sun glasses or beer?

- *It's about cattle. People start missing their cattle. And in most cases it has been stolen by the thieves.*

Did you ever catch the thieves? Do you know something about their motives? Do you know where they are coming from?

- *They are coming from outside. Yes, sometimes they are coming all the way down from Blantyre just to take away our cattle. May be, additionally I would say that now in Malawi we don't have as much cattle anywhere of Malawi than we have here. In the northern region, in the west all over the country they have less cattle than here, so they come all the way down to Chikwawa to take our cattle away.* (...)

Are people also becoming more violent because of these live-stock thefts?

- *Yeah, this actually happens in almost all the communities. But the biggest problem are wrong accusations. Sometimes you point at the wrong person. And people take the law in their hands and claim for revenge. This is a real problem. And at the end of the day, one realises that one caught the wrong person. So this is what is actually happening.*

And these wrong accusations, do they refer to whitchcraft?
I think whitchcraft is everywhere. Wrong accusations might refer to whitchcraft too, yes. But the problem is, that the thieves are coming from the outside.
(...)" (Excerpt form an Interview with Mr. Nkhoma, Director of Planning and Development for the District Assembly in Chikwawa)

In order to investigate the value and the validity of such an excerpt, one should link the statement to the three-phase structure, the so-called naming-blaming-claiming sequence outlined by Felstiner, Abel and Sarat (1980-81: 631-654), since this model is a very helpful tool to analyse the labyrinthine paths of the ways how claims are formulated, fabricated and constructed[19]. However, I do not have the required local knowledge to classify such a statement. Is the statement a (correct?) naming, is it a blaming or even a claim? I don't know. Nor do I know what role the interviewee takes, whether he is an insider or an outsider, an important political player or a critical observer, what position public officers in the region of Chikwawa usually have etc. Furthermore, I ought to know what kind of interests such a statement contains and what kind of ex-

[19] For details see the example in Appendix 6

pectations were associated to my role as international consultant and so on. Otherwise it is not possible to handle the reliability of such a statement.
Striking for instance is, that the interviewee obviously links live-stock thefts categoricaly to unknown strangers, coming from very far away, while in the legal anthropological literature live-stock thefts are regarded as one of the most significative sign of conflicting relationships ***within*** local settings. A frequently observed phenomenon in rural Africa is also the tendency of the "*smothering"* or "*sweeping under the carpet*" of local conflicts (cf. for example, Bierschenk and Olivier de Sardan, 1998:19) and to keep a brilliant image of perfect harmony, that usually is presented to outsiders while of course also many farmers dislike each other. In the rural everyday routine in contrast the smothering or sweeping under the carpet of local conflicts leads to ubiquitous concealed misrepresentation, curses, suspicions, and uncounted accusations of witchcraft.

- So – what to do? Behind each reported case are hundreds of unreported cases. Significant are thus not only the reported facts as such but also the ways they have been selected. Therefore, as long as one does not have more and particularly more reliable information about the concrete problems in local communities, it seems to me not abvisible to base a whole project design on such stories. The risk to simply become a cue ball of diverging but uncontroled local interests seems to me as much to high.

4 The "access-to-justice question"

The actual legal aid rationale emphasizes the (social, political and cultural) gap between the official state courts and the rural population. In particular it stresses the need of „access-to-justice-programmes", stipulating that the existing constraints such as the geographical distance to the courts, the level of the court fees, or the length of a legal procedure might be prohibitive for the majority of the population. Thus, problems of the safeguarding of the rule of law in pluralistic legal contexts as well as the importance of applying systematically the human rights add so much weight to these arguments. And since Malawi has institutionalised the rule of law and human rights in the Constitution, so that human rights is now state law, it is also imperative to focus not only on human rights abuses but also to improve the access to formal justice in remote areas by shifting as many cases as possible to official state courts.

However, it is very important to verify the real dimensions of such a gap and this not only for Good Governance programmes or programmes relating to the promotion of the rule of law or human rights. Such a verification is also imperative for the primary justice pilot project, since its problem description is firstly directly linked to this "access-to-justice" question[20]. And secondly, litigation rates of state courts are also excellent indicators for measuring the dispute settlement (in-)capacity of primary justice agencies: If they remain mainly unsuccessful, then of course people become more violent and/or mobilise in addition very often state courts. Are they however successful in settling as much disputes as possible, then there is no reason to mobilise other institutions such as state courts.

4.1 Litigation rate

The best (and simplest) possibility to check all these questions is to start with a verification of the litigation rate at state courts:

$$\text{Litigation rate} = \frac{\text{Number of civil cases and offences requiring an application for prosecution at a 1. Instance court per year}}{\text{Number of the total population living in the area of the corresponding 1. Instance court}}$$

Litigation rates are highly significant and stable figures for the measuring of the social distance (closeness/farness) of dispute settlement agencies to the local population, since they *measure the intensity of the* ***demand side*** (see Abel, 1979, F. von Benda-Beckmann, 1985; Ch. Wollschläger, 1989; M. Weilenmann, 1997, 2004). They depend on a series of strong indicators[21] and do not change from one year to the other. For assessing the value of such figures, many studies on court statistics and inter-cultural comparison of mobilisation behaviour in general (state and non-state justice systems) have been done. They all show that in the long the containment capacity of non-state justice systems as well as the ways how the corresponding governments regulate the legal thresholds to mobilise state courts (registration rules)[22] have always a decisive

[20] Following the MASSAJ report 2003, *"(...) Malawian society benefits from primary justice, particularly those with restricted access to formal justice. (...) formal justice agencies benefit from primary justice as it enhances both their capacity and relevance"*(2003:11). And according to my terms the main objective of the pilot project should thus be *"to improve access to justice for poor people through improving the quality and accessibility of primary justice systems in Malawi"*(2004:1).
[21] See chapter 4.2
[22] See E. Blankenburg, 1989

impact on that figure. Moreover it is common knowledge that a good mobilisation rating of state courts varies between 1 case of 200 persons up to 1 case of 2000 persons. An access-to-justice problem exists in countries with an average litigation rate that is significantly higher than 1: 2000 per year. State court rates *below* 1 case : 200 persons per year have very weak pre-trial institutions and require high personal and financial resources. Otherwise they are good indicators for the risk of high backlog rates, an overflow of court cases including a possible collapsing of justice services. A list of a selection of countries shows the following picture:

1. Instance state court		**Primary justice dispute settlement agency** (mostly customary court)
West Sumatra	1 : 10'000	1 : 892
Botswana	1 : 3‘000	1 : 720
Nord Togo	1 : 2‘700	1 : 360
Rwanda	1 : 510	1 : 20
Kenya	1 : 345	1 : 150
Burundi	1 : 342	unchecked
West-Cameroon	1 : 220	unchecked
Switzerland	1 : 200	unchecked

During my field trip in Malawi, I was only able to hold discussions with one judge at the Magistrate Court of Mzuzu, Mr. Patrick Kamisa and with the Eastern Region Principal Resident Magistrate of the Magistrate Court in Zomba, Ms. Dorothy de Gabrielle and refer to some rough estimations. For Zomba we calculated 4000 court cases per year for a total population of about 80'000 people and for Mzuzu 2000 court cases per year for a total population of about 120'000 persons. Both judges agreed that about 50% of all court cases were criminal cases. For the calculation of the exact litigation rate one should take all civil cases and add to this figure all those criminal cases relating to offences requiring an application for prosecution. This was not possible during my short visits, since for that work one needs to go into the dockets and control each and every criminal case. Nevertheless, it is useful to remember the position of the Ministry of Justice, who emphasized the high backlog rates of state courts and their corresponding risk of collapsing under the burden of *far too many cases*, since the diagnosis is now clear:

- **For Malawi, the „access problem“ of state courts – at least in its actual and very generalised form – cannot be confirmed!**

The estimated, general figures (all criminal and civil cases together) are the following (in brackets the civil case ratio):

Malawi (appraisal values)

Mzuzu	1 :	60	(1:120)	unchecked
Zomba	1 :	20	(1: 40)	unchecked

Even if we refer only to the civil cases, Mzuzu's and Zomba's litigation rates remain amazingly high and this in particular, since in Malawi the magistrate courts are not the primary justice courts. From the primary justice courts in former British African colonies it is known, that they *"have a comparatively very high (litigation rate/MW) of one case to 100-300 persons per year*[23]*"* (F. von Benda-Beckmann, 1985:195), but comparative figures from an official state court in contexts where we have an already working primary justice institution are very frightening and do not confirm an access problem at all. On the contrary, what they indicate, is a serious problem on the PJ-side. Obviously, there are some serious dysfunctionalities that hamper primary justice institutions to contain disputes successfully. One of these dysfunctionalities is of course the outlined forum shopping (see chapter 3) including the institutional backed ideology of the "shopping for justice" and the carefully protected picture of an "access-to-justice" problem[24]. And another dysfunctionality is certainly the observed ambiguity of the primary justice agents in how to deal with traditional authorities and customary law (see chapter 5). In addition I need to stress again that primary justice institutions are not there just because the official state courts would not deliver or the like. The primary justice institutions are there anyway[25]. Litigation rates measure the intensity of the demand side. Therefore they are very typical interface indicators that point in two directions, in the direction of the social requirements of a well working judiciary as well as in the direction of the containment capacity of non-state justice systems.

My rough approaches to the problem recommend thus an **in-depth study of the mobilisation behaviour** containing the following elements:

[23] See Canter (1978) for Zambia (Lenje); Lowy 1978:191 for Ghana; Abel, 1970:48 for Kenya; F. von Benda-Beckmann, 1970:70 and Chimango, 1977:48 for Malawi.
[24] According to Ms Koegh MASSAJ unfortunately never verified its „access-to-ustice" diagnosis by calculating the litigation rate of state courts, before the primary justice pilot was launched. That should be now made good.
[25] They exist also in countries where officially they have been „abolished".

- A clarification of the real litigation rate at each Magistrate Court of the country;
- A classification of the litigation rate by the corresponding law (civil law resp. criminal law) and type of conflict (depts, family cases, land disputes, succession rights, honour cases, rape, frays, thefts, etc.).

On the basis of these data it will at least be possible to map geographically the varying mobilisation behaviour of Malawi's citizens towards state courts and to correlate the litigation rate with data from the last population census. This way it will be possible to locate geographical and social variations. For the primary justice project such data are very helpful and important, since they could locate its containment (**in-**)capacities, clarify its role, and inform where, if ever, it really has to address an access-problem. It is f.i. possible that the containment incapacity of PJ-institutions is urging in peri-urban areas such as greater Zomba or Mzuzu, but not so thronging in Rumphi and Chikwawa or that the litigation rate is linked to social indicators such as the literacy rate, gender, access to cash-money, the locally variable degree of market integration and so on. The same might of course be important for qualifying a possible access-to-justice problem. Further on, the following points should also be checked:

- The proportion of all the aborted processes after 1. inscription to the total number of first inscriptions per year. This ratio informs about the probability, that cases return to primary justice agencies before a final decision at a state court is made.
- The appeal rate. It informs about the varying containment (in-)capacity of disputes by 1. Instance courts.
- Implementation capacity of state courts: Is the judiciary and/or the executive branch informed about what is happening with the cases *after* the final judgment has been rendered? Are data available on the number of enforced judgments? If so, what does this proportion look like?

All these process related data inform of course about the degree of satisfaction/dissatisfaction with state courts. It would however be very short-sighted to argue that such data would not bother a primary justice project. The contrary is the case. Primary justice agencies are acting in a whole net of dispute settlement agencies and for supporting the primary justice agencies, it is very important to coordinate its efforts with potential difficulties of the formal justice side and to identify exactly what the problem of dissatisfaction with the formal side looks like. Those for instance, who abort a process might still have other options such as mobilising another agency, set-

tling their dispute privately or just simply abandoning the dispute whatever the reason might be. Those, who go to appeal are not necessarily dissatisfied with the system as such. Perhaps they want to get a reversal or to postpone an unwelcome final decision. Those however, who become the subject of an enforced implementation of a final decision are reluctant to accept it and will probably cause other problems in the communities.

- For primary justice agencies, such information is very important since it allows to identify its own problem of the containment incapacity, the subdivision of its target group into different risk-groups and the design of a very precise picture of the localities of concern. And at the same time, systematised information about the mobilisation and process behaviour at courts are also crucial for a government which wants to keep leadership.

In addition I need to stress that primary justice agencies have no documentary system at all and instead of complaining about the missing data and outlining a problem understanding that obviously refers to all sorts of ideas and beliefs, it is – at least at the actual stage of the project – strongly recommended to take hard data into consideration and to go there, where a rich research basis already is and where we really can measure, calculate, compare and interpret. Reported cases for instance can be linked to such data too. That is also a method to qualify their validity. Otherwise it is up to speculations to assess their reliability as long as we do not know in how far such general trends are locally noticed and appreciated and what kind of interests and expectations are linked to their reporting. I think, a primary justice project referring to such a clear profile of the mobilisation and containment capacity of the formal system accomplishes a much more complementary task and would be able to keep its promise that *"Malawian society (will) benefit from primary justice, particularly for those with restricted access to formal justice"* (MASSAJ report, 2003:11).

4.2 List of indicators for the mobilisation of state– or folk law institutions

Though it is certainly much to early to explain the reasons why at least some Magistrate Courts of Malawi might have a frightening high litigation rate, it is still possible to point to the legal anthropological research on *indicators of the mobilisation* of state courts or folk law agencies:

From the **demand side** four indicators have to be mentioned:

- Disputants related to each other by permanent many-stranded (multiplex) relationships tend to bring disputes to folk (mediating, arbitrating) institutions, whereas disputants not so related rather tend to go to state institutions (adjudicative, legalistic) (see. F. von Benda-Beckmann, 1985:191);
- Critical is the disputants' social, economic and political status and actual strength (Rothenberger, 1978);
- The subject-matter of the dispute (Abel, 1973; Starr, 1978; Starr and Yngvesson, 1975; Nader, 1964; Collier, 1973);
- The goal of the disputants (Lowy, 1978) and the degree to which inter-individual disputes are transformed into inter-group or inter-faction disputes (Rothenberger, 1978; K. von Benda-Beckmann, 1981)

From the **supply side** three indicators are crucial, namely

- The question of the entrance rules: what kind of legal thresholds exist at the interface between state and folk law institutions? Entrance rules are an important political steering instrument and have a prohibitive or permissive impact (E. Blankenburg, 1989; Ch. Wollschläger, 1989).
- Containment capacity of non-state justice agencies: In how far are non-state justice agencies able or unable to settle conflicts permanently?
- Forum shopping: Is the forum shopping in local settings very popular, primary justice agencies have a lot of difficulties in reaching a consensus and risk becoming simple boilers. Sooner or later, most cases end up therefore in a state institution such as a court (K. von Benda-Beckmann, 1981).

Irrespective of the demand- and the supply side, there are also some **structural indicators of the whole society** such as:

- Economic growth: Economic growth correlates strongly with the number of economic transactions (dependent on the degree of market integration) and the density of contracts. And the higher the contract density, the more disputes come up to state courts (Wollschläger, 1989);
- Population density: population density, in particular if it correlates with a growing degree of urbanisation and monetarisation of social relationships, is a good indicator for the mobilisation of state courts. Growing population density *within* the rural setting (subsistant economies) correlates however with the mobilisation of primary justice institutions (M. Weilenmann, 1997);
- Degree of literacy: The degree of literacy is not a significant indicator for the mobilisation or non-mobilisation of state courts. It has only an impact, if it correlates with economic growth (Ch. Wollschläger, 1989; M. Weilenmann, 1997);
- Gender: Critical is the question of whether the access to cash money is regulated by gender patterns. Those who have access to cash tend rather to mobilise state courts, while those with a restricted access mobilise rather primary justice institutions (M. Weilenmann, 1997). In addition, women *"are frequently more closely bound to the*

family and/or kinsfolk than are men, a fact which is particularly important in terms of modernisation plans, because the extended family is generally deemed to be one of the most conservative groups in society (...)" (Weilenmann, Becker and Diaby-Pentzlin, 2000:7-8). Modern legal systems can thus be made more effective if the local legal reality is accorded greater recognition in modern law and in the application of that law.

In addition, one can also suppose a link between the numerous access-to-justice programmes of various development agencies and the number of disputes mobilising public institutions. ***Conflicts are rampant*** and uncountable since each and every action or phantasy might cause, contain or hide a conflict (see the banana-case, Appendix 6). Moreover, conflicts are supply sided insofar as their quantity depends also from the number of institutional arenas and opportunities to settled conflicts (see Comaroff and Roberts, 1981; Wollschläger and Blankenburg, 1989).

- While the indicators of the demand side as well as those relating to structural factors of the whole society rely on questions of cultural mentality, the variable degree of market integration and other economic developments at the long run and are difficult to influence by such a project, the project could still focus on the supply side, mainly on questions of the forum shopping and the containment (in-)capacity of primary justice agencies and initiate, together with the law reform commission, a reflection process on adequate entrance rules.

4.3 The backlog rate

Another facet of the access-question is the backlog rate of state courts. High backlog-rates are very unfavourable. They result in a growing number of dissatisfied people, who return to the communities, where they often become disenchanted troublemakers and occupy this way the primary justice agencies again. While the Vision 2008 of the Malawian Judiciary promises inter alia a "low case-backlog", a "high throughput of cases", the "maintenance of high performance standards", and the "availability of courts", I have to come back to my figures and warn against such expectations: The actual personal resources of state courts will Malawi not allow the achievement of this goal. Burundi, as everybody knows is politically a particularly difficult country, also has problems with its backlog rates, since one judge has to adjudicate about 200 court cases a year or nearly one per working day. But in Mzuzu four magistrates have to adjudicate 2000 (!) court cases a year, what means that one judge has to conclude 500 cases a year (1:500) or 2 per working day and in Zomba this rate climbs even up to

about 1:800[26]. In other words, if the backlog rate is to be prevented from rising (sic.), a Malawian magistrate must at least conclude between 2 and 3 court cases per working day!

It is obvious, Malawi's Magistrate Courts are completely overcharged and the risk of their collapsing is hard to dismiss. But how could that happen? Perhaps the access-side of the problem is also emphasized so much, because it is not so tricky as the justice-side. To work on the justice-question requires complicated discussions on options of how to bring different, partly even competing and/or mutually excluding positions and value orientations together, a process by the way, that is always closely linked as well to questions of power, (fears of losing) control and legitimacy as well as to more general processes of market integration and shifting identities (f.i. shifting gender roles due to modernisation processes). Discourses on the limited access to dispute settlement agencies on the other hand are not so conflicting since they are more closely linked to pure technical and organisational measures. In the center then are considerations on securing access to legal decision-making agencies, on strengthening weak communication structures or on speeding up legal processes and/or dodgy procedures etc. And finally to stress the access question has also the advantage of covering up the conflicting goals and role understandings and to diffuse a spirit of "harmony". The fight against the limited access to state courts is regarded as always "good" and it seems to bother nobody, regardless of whether human rights activists, faith and/or community based organisations, NGOs, bi- or multilateral donor agencies, the church or whoever are engaged in that question. But what is the situation with the Traditional Authorities?

5 How to deal with Traditional Authorities and Customary Law?

The ambiguity of the project, already outlined by a competing problem understanding and politicised key-words such as "justice as a delivery service", "shopping for justice" and "voting by the feet", is also reflected in an ambivalent relationship vis-à-vis the Traditional Authorities (T.As.) and the values of customary law and tradition:

5.2 The popularity of the Traditional Authorities

All discussion partners confirmed the unbroken popularity of the T.As. and signaled the will and vivid interest in knowing more about the various customary rules, the T.As. apply. To illustrate this point, I refer to the interview I had with Emmanuel Kaloa, Catholic Commission for Justice and Peace (CCJP), in Rumphi:

[26] In Switzerland, the ratio varies between 1:40 and 1:80

With how many TAs are you collaborating?

- *We are working with one Traditional Authority, Kurawayembe. There are several subchiefs.* How many? ...*murmering/undertone...more than 50s...*How many...*one principal chief, one subchief and more than 50 regional chiefs and abaut 67 village headmen.*

Do you observe that some village headmen have more troubles than others?

- *Its true. In some areas around Wazizu(?), in the National Park and just here in our area we have a lot of problems with property grabbing.*

In how far is this question of land disputes linked to the growing urbanisation? And than this question with the National Park: Are people cultivating in the National Park? Are people, after having comitted a crime, hiding themselves in the National Park?

- *Yes, that is a good point. There are here displaced people and when they see what the others have so they also want land. Those living here since long time say they have to go back where they are coming from but they say that there, where they are coming from, is now the National Park...*Yes so you have a chain of conflicts...*yes, there is a chain, there are conflicts between the villagers, the new settlers and the government.*

Do you suppose that the conflicts you are already described are also linked to the capacity resp. incapacity of CCJP and the villagers to settle conflicts?

- *We, we certainly not and most villagers not and...but.. the chiefs, the chiefs are able to content that situation, because of their background and because the people are respecting and listening to them.*

The chiefs are here since when? Since two, three, four, five years?

- *Ooh. They are here since very long time, longer than all of us. I think they are here since about 200 years. One has not to forget that most of all the cases go to the Chief, most of all and then we have the police and the state courts.*

Do you observe forms of abuse of power on the side of the chiefs?

- *No, there are some people around the chiefs who are arbitrary, but the chiefs themselves are not. Perhaps in some cases they are not very competent because they do not know the human rights standards, but they are not more arbitrary than all of us. And there are always also consultations between the chiefs, so if one chief decides arbitrarily, he will immediately be corrected by his collegues.*

(...)

Do you know something about their ways of decision making? Do you know something about the „reasonable man", that means about general patterns of behaviour that are regarded as good and honest and that are common in your village and direct the decisions of your chiefs? Patterns for instance of reasonable behaviour in case of a land or family dispute? ...*murmering...*Look, if there is a land conflict and then property grabbing. The chief, I suppose, would refer in such a case to general standards of what is a normal behaviour and ask for instance: ‚Why did you start with property grabbing instead of doing everything to settle the conflict, why did you escalate the conflict since you know that I am here and could be addressed in case of troubles and solve that dispute in a much earlier stage? Why are you coming so late?' So, he has an image in mind that tells him how a reasonable man would behave himself in case of a land dispute. This figure of thought is than contrasted by the facts of the concrete case. This way, the chief comes to a judgement. Do you know something about that figure of thought?

- *Yes, that is a very interesting point.... it is a difficult question....(..pause, thinking...) I don't know. Its culturally. They know the culture and they share the culture with us. They decide on the basis of our culture, they know what that means and they decide on the basis of consensus....(...).*

Though the dominant role of the T.As. remain undisputed, customary law is also regarded as a very important medium to promote social change in small scale settings. According to Mr. Chinoko from the CCJP Lilongwe, it won't be possible to reorient the rural population without any (close) collaboration with the T.As.. Customary law is also deemed to be an important resource for questions of cultural identity in rural ar-

eas. For the project it is thus imperative to deepen its knowledge on content and working methods of customary rules and processes. Such a proceeding is also recommended, since most conflicts such as land disputes, property grabbing, chieftaincy cases, questions of succession rights or family disputes happen within the normative settings of local folk law and thus require a firm grasp of customary law.

5.2 Traditional Authorities as barrier for social change

But in face of the required modernisation process, the T.As. are regarded as an important barrier for social change. Scepticism is energised by several sources. There is *firstly* the Human Rights position, who repeatedly emphasised their missing knowledge on human rights[27], usually combined with the suggestion to train the T.As. in ADR[28] or other development related conflict mediation techniques[29]. This is a very burning issue that became also clear during the session on the problem understanding at the Kuka Lodge Workshop last december (12.2004). There the participants were particularly keen to discuss at length the statement that "traditional authorities do not recognise human rights":

- *The next card is the one that „traditional authorities do not recognise human rights". Yes, this one is another issue, which we have to consider. Especially when it comes to issues of cultural practices. If you argue with the human rights, (the chiefs) do not see all these rights, they do not understand what's wrong. So, there are several other cases which are happening, so this is our way to deal with.*
- *De Gabriele: The last one, „traditional authorities do not recognise humn rights" – „do not recognise"? Is that true?*
- *May be the wording is wrong but it is the way we are considering the problem.*
- *De Gabriele: Don't they just have a limited understanding of the concept of human rights?*

[27] I remind of the statement of Peter Chisi from Malawi Carer (page 15). He argued that he wanted destruction of the traditional structure so that Malawi Carer can then control the Chiefs. This is also a typical hint for the problem of the quasi-state status of development agencies as outlined in chapter 3.1

[28] ADR = Alternative Dispute Resolution. The term refers to a distinct technique once mainly applied in the US as exit option during court trials. The technique refers i.e. to psychological concepts and stresses alternative options to compromise (see Blankenburg, 1996; Weilenmann, 1999).

[29] To illustrate the point, I quote again Emmanuel Kaloa (Rumphi): *"Now, most people are coming to us reporting their cases. They are very well aware that CCJP has an eye on HR-violations. They are coming with their (complaints? uncomprehensible) and are reporting what is happening in their surroundings, they are observing and telling us what they see....* ...Are you also campaigning for their rights, printing papers that you are distributing for an awareness rising?... *We are also doing a social analysis of the circumstances.* ..What does it contain?...*We are motivating people to observe well the circumstances of HR-violations so that we get the facts for making the case at court and could start with appropriate action.* You try to shift as many cases as possible to the courts? *Exactly* Ok. And in addition you train the people to spy on each other? .....*That is not... what we want to do....., but I see the risk. But now, people are well aware of the importance of HR and we are only strenghening their awareness. (...) Now, this project, primary justice, is bringing up issues of human rights. Now we are trying to say: once you are accepting that the chiefs are deciding on the basis of culture, tradition, you see that they neglect this issue of human rights and now we are trying to bring this issue to the chiefs.(...)"*

- *Ok. This was our understanding but let us say appreciation of the human rights.*

(...)

- *De Gabriele: It is also the role of the government that makes me very angry: First they say the chiefs abuse human rights, second they are corrupt, third they are very backward...and fourth .... we need the chiefs!! Now they say, we have people they do not what we would like, but we have the chiefs, they could help us! That is to say that only if the government approaches the chiefs we have a problem that can be solved and they can get very eager about this. So one of the issues we have under this programme is not to have them always in the negative, because especially they have done some things which are good and some things which are even very bad but you can not make it as a general aspect, so when we come dealing with the probable planning of the function of the project, we should not use the word „do not recognise". May be that there is something we feel that they do not recognise about human rights. Perhaps that is because the concept of human rights presented to them is sounding very alien. When you remember our session at „Kalibuti(?)" Dr. Ott has been talking quite a long time about acculturation, have we acculturated of these rights, these concepts, within what they understand? No. If I am going to a chief and tell him that ... a child of 16 years old can not be employed, he looks me, ‚ajj, its an offer! he needs food and I am simply offering him a job and you are telling me, I should not do that?? What sort of „right" is that?? I am protecting the child but also want to be the child self-sufficient!' We are talking about the same issue but I am presenting it from the human rights perspective and he from another point and because I am superior because I am from the state law system I say, oh, he is ignorant, he does not respect human rights– so sometimes we should be careful about such remarks - that's bullshit. You see?* (quotation from the presentation of group 2, Zomba)

Secondly there is the gender position, blaming the consensus orientation of local decision making, since it is feared – whether justified or not – that this would automatically occur at the expense of women[30]. Those who are familiar with written texts trouble *thirdly* with the orality of folk law, arguing that the orality would certainly deliberate processes of decision making and exclude any option for legal control[31]. In addition there are *fourthly* the respresentatives of particular Community Based Organisations such as LASO[32] or the "Domasi village to village" group, who hade particular problematic experiences with the widespread tendency of T.As. to stigmatise AIDS victims.

All these critical arguments, experiences and thoughts hamper however the required collaboration with the T.As.. In fact, they unfortunately dominate largely the insight in the need for a closer collaboration and culminate finally in the non-invitation of the T.As. to participate at the projects planning workshops, though it was also in the MASSAJ report 2003 out of question to <u>*exclude*</u> the T.As. from any equal participation at the learning process of the project. It is however striking to see that MASSAJ, who

[30] „*And also there is the „discrimination against women". In most communities, where we are working, most cases are against the interest of women so (...) most women, when they have a case they can not deal with it because they are shy. The limited access to justice is in most communities, where we are working, mostly against women so that what they need is a particular support to defend them"* (Quotation from group 1 (Chikwawa) of the Kuka Lodge Workshop, 2004).

[31] One needs however to add, that the primary justice actors too are abandoning any documentary of dispute cases though they do not refer to ritualised tradition.

[32] LASO = Lambulwira Aids Support Organisation

contracted the District Implementing Agents, did not contract any singular T.A. Consequently some D.I.As. considered even that the T.As. would most probably not be an equal partner of the project but its target group, since they should be trained in Human Rights and ADR.

5.3 Requirements for a role clarification

This requires a role clarification: Have the Primary Justice agents act a) as change agents and to promote in the local settings the application of the Human Rights standards – or have they b) to contain as many conflicts as possible?

- If a) is in the center, it is to consider that the promotion of Human Rights standards such as gender equality leads also to a particular set of conflicts, since it disturbs the social harmony. In such a case the project itself could be regarded in the local setting as a problem since it produces conflicts[33]. Concerned in such a case is mainly the relationship between the project and the T.As., since the project undermines the value of local norms and with it the power position of the chiefs.
  - Common for instance are lamentations against the T.As. that are referring on „reportet cases" of H-R violations only[34]. However, *cases* of human rights violations happen all over the world. Thus, to make an argument against the T.As., one needs to prove the systematic character of the violation, i.e. to show, what kind of norms are valid within the traditional setting and in how far they violate obviously human rights provisions. Conflict studies are very illustrative, but nevertheless they are not always a reliable source for figuring out a general pattern of behaviour. Moreover, it is incorrect to blame the T.As. of human rights abuse as long as one does not exactly know the local norms, they are systematically applying. The widespread argument within the development community, namely that one cannot know these norms just because they are unwritten, is pure demagogy and has nothing lost here.
    Such a rationale weakens rather the containment capacity of the primary justice agencies vis-à-vis the local population, since it looks and argues partisan.

- If b) is in the center, the containment capacity has to be improved. Conflict settlement requires impartiality, trustbuilding and confidence in dispute settlement agencies (for details see section 7, para. 2). This is however only possible, if the agencies are empowered to compromise on each and every issue including a pragmatic approach vis-à-vis human rights. Thus, the project cannot at the same time be part of a (competitive oriented) human rights approach and mediator.

[33] see the statement of Peter Chisi at page 14ff
[34] see for instance the statement of Emmanuel Kaola at page 30

For a more pragmatic human rights approach, Max Gluckman's "Reasonable Man" concept (1955) could serve as a door opener. In folk law settings the "reasonable man" was in imaginary figure of reference of the traditional lawyers, which serves as standard of evaluation for them and allowes to determine the cultural effective legal norms. At the same time, the cultural related "reasonable man" is a figure of reference of the disputing parties too. They refer in their arguments to him, develop on the basis of specific, cultural directions of behaviour argumentative causal claims and offer prospective lines of thinking, which however have often hardly something to do with the legal provisions of state law. Therefore, the interlinking of cultural proposals of behaviour and the models of conflict settlement related with them must be detached from the legal provisions of state law.
An illustrative example for the practical use of the "reasonable man" within development projects is the "Hundee-case", that I presented at the legal aid conference (see Appendix 2).

6 Conclusions and recommendations: Where could the project-trip go?

To address primary justice agencies for the launching of a project on justice is a very interesting and challenging idea, because it opens up new vistas for Malawi to unblock the all-commanding bipolarity between the official representants of the modern nation-state and the Traditional Authorities. GTZs approach to improve coordination (a) between primary justice providers and (b) between primary and formal justice providers is particular important, since the actual parallelism seems to boost an unfruitful competition between both legal cultures and is even attracting other (political and/or legal) players. The concept of the project, as it has been outlined by MASSAJ, contains however some weaknesses that should being addressed.

1 *There is firstly the question of the target group.* Whether I design a project from the perspective of the social disadvantaged as are the poor or whether I identify the poor as direct target group (consumer of the service) are different kettle of fish, since in the second case the direct concerned should at least be able to name their problem the project should address. During my field trip, I got however a confusing impression. On the one hand, there were conflicting interpretations concerning the access question (i.e. the motives of the poor to mobilise state or folk courts; see section 1); on the other hand, many D.I.As. reported a particular wish of the poor, namely their request for a significant reduction of their live-stock thefts. Thefts are however criminal cases and require a close collaboration with the police, the public prosecution service, the criminal courts

and the public administration[35]. The structure of the project correspnds however not at all to this requirement. Moreover, I am wondering whether (civil) primary justice agencies (such as CBOs or NGOs) should deal with criminal cases, though I admit their general concern. I consider however the respect vis-à-vis the separation of powers as much more important, particularly in weak states such as Malawi. Therefore, it is not very much surprising that the "live-stock – thefts" 'mutated' into a nice trigger for the project and that it turned quickly to new and much more general topics such as the "access-to-justice" question. Though primary justice agencies are closely connected with the poor, the project should however readjust its target group orientation. To do this, I identified the following points:

1.1 The project should identify the different viewpoints and interest of the different stakeholders and carry out a *stakeholder analysis*. Projects on justice, regardless whether they address state law or folk law institutions or both have to keep an eye on both sides, on conflicts related to the access-side as well as on conflicts related to the fight for leadership and control. Therefore, the project should table the different viewpoints of all the stakeholders (including the government, the donors, the NGOs and the public administration) and to carry out an analysis of the multiple interests of the different parties including their expectations and fears. *Only in this way will it be possible to clarify who really wishes what, who mainly suffers under the actual constellation and thus has a major problem that needs to be solved and who the target group really is*.

1.2 For improving the coordination between primary justice and formal justice, the project needs to revise its competitve approach. In particular it has to address all *problems related to forum shopping and shopping forums.* The primary justice pilot project cannot promote "the shopping for justice" and it cannot participate at the ongoing process of political delegitimisation of distinct legal concepts such as the "fact finding - approach" applied by state courts or the "reaching for consensus - approach" as practised by the traditional authorities. On the contrary, it needs to find ways to mitigate the negative impact of competing legal powers and to improve the search for an overarching, inclusive and accessible legal order for improving the access to "just" justice.

[35] Moreover, one needs to remember that development agencies have to support economic growth. Economic growth per locality (in particular its monetarisation of social relationships and its market integration) and the number of thefts and debts correlate however significantly positive. That is not to say a justice-related development project should not address the problem of law and order – of course not. But the more income-related projects in the concerned area are successful, the less a law and order programme focusing mainly on the reduction of thefts will attain its goal.

1.3 The project should *revise its actual problem understanding*: For Malawi, the „access problem“ of state courts – at least in its actual and very generalised form – cannot be confirmed (see section 4)! The project should subdivide the mass of poor into different risk-groups and clarify in which districts a real „access-to-state court“ problem exists and where the primary justice agencies themselves trouble with their containment capacity. Such information is very important for a more strategic appraoch. In particular I advise to carry out an *in-depth study of the mobilisation behaviour* containing the following elements:

- A clarification of the real litigation rate at each District of the country; this ratio informs about the containment (in-)capacity of primary justice agencies.
- A classification of the litigation rate by the corresponding law (civil law resp. criminal law) and type of conflict (depts, family cases, land disputes, succession rights, honour cases, rape, frays, thefts, etc.). Such a classification allows the development of a case-profile.
- The proportion of all the aborted processes after 1. inscription to the total number of first inscriptions per year. This ratio informs about the probability, that cases return to primary justice agencies before a final decision is made.
- The appeal rate. It informs about the varying containment (in-)capacity of disputes by 1. Instance courts.
- Implementation capacity of state courts: Is the judiciary and/or the executive branch informed about what is happening with the cases *after* the final judgment has been rendered? Are data available on the number of enforced judgments? If so, what does this proportion look like?

2 In addition, the project should *shift its basic orientation from the "access-" to the "justice-question".* For the success of the project, competitive indicators should be avoided. *Instead, the success indicators of the dispute settlement agencies should relate to their containment capacity.* Crucial for its success is the question of whether primary justice agencies will be able *to settle* as much cases as possible so that only a manageable number come up to state courts. The following three critieria should be taken into consideration:

2.1 Criteria for the containment capacity are *firstly* the question whether the project succeeds in reducing and controlling the forum shopping. To be clear: My resistance against forum shopping is not a resistance against any forms of free choice of a preferred dispute settlement agency. It is a resistance against the competition, a resistance against the instrumentalisation of

free choice by manipulating the cases as well as the forums (see section 3). This goal can best be achieved a) by a *strengthening of the communicative links between the different dispute settlement agencies and the exchange of process related data*[36] *as well as by a simple clarification of the mobilisation behaviour vis-à-vis the litigant parties*: Did you already go to another dispute settlement agency to claim? What was the conclusion there? Did you there abort the process or has it just been put on hold? Why? Etc. In case of parallel mobilisation behaviour, the concerned agencies should refuse any *additional* hearing. For complaints relating to problems of the (in-)capacity of other dispute settlement agencies to mediate conflicts, the project should b) *create local forums for the professional exchange*. Such complaints should be noticed. Any discussions with the litigant parties however on the professional competence of the other dispute settlement agencies including the Traditional Authorities or the Magistrate Courts should be avoided, since any claim might also be part of the litigants plot to manipulate the case including the mediating agency. And c) finally one should look into ways of *cross-referring cases between the two systems, the state law and the folk law system* for reducing the risk of arriving at competing solutions. However, also this point is closely linked to the quality and capacity of consistant documentation of cases and procedures.

2.2 Relevant for the containment capacity is *secondly* the *degree of satisfaction/ dissatisfaction with the mediation capacity of primary justice agencies.* Here, one can apply very much the same criteria as for measuring the containment capacity of state courts such as a) the *proportion of all the aborted processes in relation to the total number of cases dealt with* in one and the same dispute settlement agency. Abortion can be linked to other options such as finding a private agreement/compromise/solution with the litigant party, touring around (forum shopping), mobility of the disputants (f.i. they moved away from the community) etc. but it can also be an indicator of disinterest in the mediating instance or it can even indicate a dissatisfaction, for instance if aborted cases are regularly mobilising state courts afterwards. Also relevant for the interpretation are the figures, the question of how high the ratio is. Though the circumstances might well vary from place to place, abortion rates beyond 50% are very critical. In addition b) one needs to refer to *the appeal rate*. In respect to mediation agencies, which should arrive at a consensus, appeal rates have another significance than in face of state

[36] The *sine qua non* for the success is the development of a **documentation system.** Of near equal importance is the development of a **referral system**.

courts where the parties might want to postpone an unwelcome judgement. Here, appeal rates clearly indicate dissatisfaction. And c) one has to take *the implementation capacity* of primary justice agencies into consideration: Of course, the question of implementation of a mediated solution cannot mean the same as at state courts. Nevertheless, it matters, what is happening with the case *after mediation*. Has the dispute been really solved - or were the parties just tired? Did the relations between the litigant parties significantly change – or did they come back with another case? If so, are very much the same people involved in the dispute or did the new case attract even more people? Did one of the disputing parties just move away, or has it even been stigmatised? And so on. Based on the lessons learnt, the project could finally develop a curriculum of all sorts of conflict mediators.

2.3 And *thirdly* and finally the containment capacity of legal decisions, regardless whether they refer to state or folk law, depends on the question of *how far or close the applied norms relate to the local living conditions of the litigant parties*. Since the project intends to address in particular the poor, who are closely bound to customary law, it is also imperative for the primary justice agents to be experienced in the application of that law. This implicates another approach vis-à-vis the Traditional Authorities (T.As.). Since all District Implementing Agents (D.I.As) confirmed their limited knowledge on customary law, it could perhaps be helpful to address the T.As. to train them – and not the reverse, as so often suggested by some D.I.As. In this regard, one could for instance refer to the concept of the "Reasonable Man" as figured out by Max Gluckman during his field studies on the legal decision making of the Barotse (1955).

3 In addition, *the project should not exclusively focus on litigation*. Access-related questions – and here it makes sense – are not only related to the question whether people get access to courts or other dispute settlement agencies. Most legal provisions regulate the organisation of the daily life and the access to (scarce) goods. Many provisions refer only to planning purposes and do not inform what is happening in case of conflicts. And one needs to keep in mind firstly that people do not only have their rights, they have also their obligations and secondly that most of all citizens abide the law without any resistance. Conflicts are still the exception. *Access-related questions refer thus also to positive law such as to command-related provisions governing entrance to water rights, to land rights, to simple commercial treaties, they regulate the access to sanitarian equipment etc. Furthermore they also state the corresponding obligations*. All these topics are of course also closely linked to the interests of the

poor. It is thus an advantage of the project to have some actors such as Malawi Carer or the Catholic Commission on Justice and Peace, who are already active in the field of civic education and legal literacy. Their input could however be improved if their focus does not only refer to modern state law such as questions of the promotion of human rights, democracy, civic education and gender equality.

4 The move to the justice-question suggests a *reorientation of the project design.* With regard to the competing problem understandings and in particular the observed passivity of the supposed target group, the poor (see section 1), such a reorientation is recommended anyway. In addition do access-related questions to positive law recommend a direct link to the legislative branch[37]**.** Critical in particular is thus the *institutional location of the project***.** Though I do not know the hisotry of all the political decisions lying behind the actual location of the project, I regard the actual constellation as very unfortunate. On the one hand, the Malawian Judiciary and with it also Malawi's Government are highly dependent on a well working primary justice system, in particular in respect to its containment capacity in case of disputes. On the other hand requires the focus on potential reforms of positive law *a direct link to the law reform commission* so that the project can regularly feed the commission with appropriate first hand data on local issues and consult the commission on possible consequences of identified steps[38] on law reform. For an exchange of experiencies with such a concept, it would probably be helpful to contact the GTZ-Programme officer of the GTZ-Programme "women in pluralistic legal systems", actually implemented in Ghana (additional details are in Appendix 7).

Email contact: mechthild.ruenger@gtz.de

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[37] Actually, the project has no link at all to legal and political decision makers. It is regarded as a „grass-roots" project, working for the benefits of the poor and only linked to MASSAJ as the principal donor.

[38] In his opening speech at the Legal Aid Conference, Malawi's Minister of Justice named a whole list of very important questions on the future role of the primary justice agencies:

- „Do we view these structures as an opportunity – or as a threat?
- Do we seek to incorporate these fora in the formal justice system – so that every case starts there?
- Do we allow them to continue in parallel – without regulation not knowing whether the constitutional guarantees we accord all Malawians are being flouted?
- Do we simply look the other way? or
- Do we recognise their existence and look into ways of cross-referring cases between the two systems?"(2004:5).

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Appendix

Appendix 1