

LAW FOUNDATION OF SOUTH AUSTRALIA

LAW & JUSTICE ESSAY PRIZE FOR TERTIARY STUDENTS

Title: Enhancing 'Access To Justice': Recognition Of Informal Criminal
Justice Mechanisms In International Human Rights Law

Length: 4,963 words (excluding footnotes)

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ENHANCING 'ACCESS TO JUSTICE': RECOGNITION OF INFORMAL CRIMINAL JUSTICE MECHANISMS IN INTERNATIONAL HUMAN RIGHTS LAW

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When you look in the mirror you see a reflection of yourself. Similarly, when we look at laws we see not only words on a page but a picture of us as a society and the values by which we wish to be governed. If we look to the right to a fair trial under the *International Covenant on Civil and Political Rights* ('ICCPR') we reconstruct a criminal justice system based on a court and a lawyer² — a formal and resource-intensive concept of justice. Absent, therefore, is any reference to Alternative Dispute Resolution ('ADR') mechanisms that presently exist, including in the form of out-of-court and court-oriented mediation, which successfully aid formal systems in enhancing the accessibility and quality of justice in States throughout the world.

The paper explores this relationship between international human rights law and ADR in the context of the domestic criminal justice system by analysing the

¹ Law Graduate, University of Adelaide. This is a modified version of a paper submitted for assessment as part of the Human Rights Internship Programme undertaken over two months in 2010-11 at the Commonwealth Human Rights Initiative (CHRI) in Accra, Ghana. I would like to thank Emeritus Professor Judith Gardam, Dr Laura Grenfell, and UK law graduate and fellow intern at the CHRI Daniel Grütters for their ideas and considered opinions.

² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). This technique of constructing a criminal justice system from the rights afforded to one under human rights law is borrowed from the technique used by feminist theorists in drawing the picture of a woman from the protections afforded under international humanitarian law. See, eg, Judith Gardam and Michelle J Jarvis, *Women, Armed Conflict, and International Law* (Kluwer Law International, 2001), ch 4.

literature of these hitherto separate fields of study. Part one looks at informal justice mechanisms in the domestic domain, focusing on an under-developed State, Ghana, where the potential benefits from ADR are arguably greatest. First, it surveys the current failings of Ghana's formal criminal justice system. Secondly, it looks at how ADR has the potential to improve access to justice. Part two looks at informal justice in the international human rights domain. First, it surveys the current treatment of the criminal justice system in the human rights framework by focusing on the protections afforded to suspected criminals. Secondly, it analyses the viability of the recognition of informal justice in international human rights law by comparing the private nature and multifaceted approach to justice of ADR with the commonly portrayed state-centric and universalist human rights framework. The paper concludes by submitting that, as the above poses no obstacles, informal justice could and should be recognised within the human rights framework.

I THE CRIMINAL JUSTICE SYSTEM AT DOMESTIC LAW

'Access to justice' is a term often used when talking of improving domestic criminal justice systems. Despite the creation of the access to justice movement in the 1960s,³ and the introduction of the phrase into the lingua franca of the

³ See, eg: Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85, 85; Deborah L Rhode, 'Whatever Happened to Access to Justice?' (2009) 42 *Loyola of Los Angeles Law Review* 869.

development sector,⁴ the concept escapes any more precise definition than that it requires 'effective means of protecting [one's] rights or entitlements under the substantive law'.⁵ Fundamental is the ability of the mechanism to protect the people's rights or entitlements. The building block of enhanced access is therefore justice of an appropriate quality. Thus, whether there lacks the means of achieving justice or the mechanism delivers justice of an inappropriate standard, enhancing access to justice is a complex task requiring more nuance than a one-size-fits-all approach. This definition recognises that justice can be enhanced through resorting to, for example, out-of-court mechanisms where they are more effective than the court process. Of course, the default position for delivering justice remains the formal court-based mechanism.

A A Picture of Formal Criminal Justice

In the common law world the criminal justice system as we understand it today has its roots in the twelfth century. In an attempt to increase state funds through appropriating property forfeited by convicted suspects and also to regulate private retribution, King Henry I in 1116 declared certain intentional wrongs to be crimes.⁶ The State's intervention in what had hitherto been private disputes between the directly affected parties therefore created a list of wrongs with the

⁴ See, eg, United Nations Development Programme, 'Access to Justice Practice Note' (3 September 2004); Penal Reform International, 'Access to Justice in Africa and Beyond: Making the Rule of Law a Reality' (2007, Penal Reform International).

⁵ Sackville, above n 3, 85.

⁶ Ric Simmons, 'Private Criminal Justice' (2007) 42 *Wake Forest Law Review* 911, 922.

legal fiction that they had been committed against the State. Importantly, this sidelined the role of the victim as the State began to assume sole responsibility for prosecuting criminal suspects.⁷

Along with the increased role of the State, the resolution of criminal disputes occurred within the adversarial tradition of the British courts. The system was and is epitomised by the court, containing an independent and impartial judiciary who traditionally sits passively to hear the cases put before them by the parties, whilst adhering to rigid rules of evidence. The cornerstone of this adversarial system is therefore the assistance afforded to the court by the parties' guides through the system, their lawyers.⁸

The arrival of imperial British rule in the 1820s and subsequent colonisation in 1874 introduced into Ghana, like many other African colonies, this Western concept of justice.⁹ Yet today, the cornerstone has become the Achilles heel of the Ghanaian–British justice system as in many instances suspects in criminal matters are indigent and consequently unable to afford a lawyer.¹⁰ Consequently, there is the potential for police arrest and detention procedures

⁷ Ibid.

⁸ Human Rights Committee, *Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, General Comment No 32, 9th sess, UN Doc CCPR/C/GC/32 (23 August 2007), [10] ('General Comment 32').

⁹ For a general history of the former Gold Coast Colony and Ghana see F K Buah, *A History of Ghana* (MacMillan, 2nd ed, 1998). See also Renee Aku Sitsofe Morhe, *Access to Justice and Resolution of Criminal Cases at Informal Chiefs' Courts: The Ewe of Ghana* (unpublished PhD Thesis, Stanford University, May 2010) 56.

¹⁰ Bruce Baker, "He Must Buy What He Stole and Then We Forgive": Restorative Justice in Rwanda and Sierra Leone' in Elrena van der Spuy, Stephan Parmentier and Amanda Dissel (eds), *Restorative Justice: Politics, Policies and Prospects* (Juta, 2007) 191.

to go unchecked,¹¹ and respect for, inter alia, the right to be brought to a court within 48 hours¹² and the right to trial within a reasonable time¹³ to go unchallenged.

Fundamental to preventing the effects of this resource differential between an indigent defendant and government-funded prosecution is the right to free legal representation.¹⁴ However, in practice the impact of legal aid in Ghana is minimal¹⁵ — a situation observed throughout African criminal justice systems.¹⁶ As of 2009 the State-funded legal aid provider, the Legal Aid Scheme ('LAS'), provided legal aid services to merely 737 suspects, constituting 11.15% of all cases (civil and criminal) dealt with by the LAS.¹⁷ A number of interrelated reasons explain this poor outreach of legal aid services, chief amongst which is poor government funding. In 2011 the LAS expected to receive GHS 716,000 or AU\$ 471,000 in funding.¹⁸ Within this sum was to be included not only staff

¹¹ Articles 14(1), 14(2), 14(3), 15, 18(2), 19(2)(f) *Constitution of Ghana 1992*; ss 3, 4, 6–9, 10, 88–97 *Criminal and Other Offence (Procedure) Act 1960*; Instructions 166, 171, 173(4), 177, 184, 187, 191 *Police Service Instructions*.

¹² *Constitution of Ghana 1992* art 14(3); *Criminal and Other Offence (Procedure) Act 1960* s 15(1).

¹³ *Constitution of Ghana 1992* arts 15(3), 19(1).

¹⁴ *Constitution of Ghana 1992* art 294; *Legal Aid Scheme Act 1997* (Act 542).

¹⁵ In fact, in interviews undertaken by Stanford University PhD candidate, Renee Aku Sitsofe Morhe, in her thesis on legal aid in Ghana (the only available academic literature on the topic) 74.2% of private lawyers acknowledged that legal aid in Ghana was ineffective: Renee Aku Sitsofe Morhe, *Legal Aid in the Criminal Justice System*, (unpublished JSM thesis, Stanford Law School, 2007).

¹⁶ See, eg, Baker, above n 10.

¹⁷ Legal Aid Scheme, *Annual Report* (2009).

¹⁸ Interview with AY Seini, Director of Legal Aid Scheme, Ghana (Accra, 17 February 2011).

salaries, but also building expenses and maintenance.¹⁹ Consequently, the Scheme employs only 16 lawyers full-time and a further 27 private lawyers on a part-time basis across a country of almost 24.8 million people.²⁰ In fact, these figures are on a steady decline owing to the low pecuniary incentives, especially for the expenses of private lawyers contracted by the LAS.²¹ The failure of legal aid has necessitated a look at less costly alternatives.

B ADR: A Supplement to the Formal Criminal Justice System

1 ADR Defined

Since the late 1970s when ADR was seen as ‘nothing more than a hobbyhorse for a few offbeat scholars’,²² ADR has seen an exponential growth in support in the international community as a supplement to the formal justice system that seeks to provide equal access to justice.²³ At its simplest, ADR represents all dispute resolution mechanisms that are alternate to litigation whether or not they

¹⁹ Ibid.

²⁰ Ibid. For statistics on Ghana, including population, see Central intelligence Agency, *Ghana* (16 March 2011) World Fact book <<https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html>>.

²¹ Seini, above n 18. On the issue of inadequate government funding see Morhe, *Legal Aid*, above n 14, 39–44.

²² Harry T Edwards, ‘Alternative Dispute Resolution: Panacea or Anathema?’ (1986) 99 *Harvard Law Review* 668, 668. See also Mauro Cappelletti, ‘Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement’ (1993) 56 *Modern Law Review* 282, 289.

²³ Edwards, above n 22, 684. See also Cappelletti, above n 22, 294–5. This ought not to be taken as saying that ADR mechanisms have not been in existence well before this time.

involve court intervention.²⁴ Thus defined, ADR recognises that justice is a relative concept that is delivered not only by formal means but in a manner that accords with the particularities of the dispute.²⁵ ADR is therefore perhaps better defined as affording ‘appropriate’ rather than ‘alternative’ means of achieving justice.²⁶

More specifically under the criminal justice system, ADR has been discussed under a range of non-adversarial justice theories, and associated mechanisms, one such being mediation between victim and offender.²⁷ Here, the parties consent to come together in the presence of an independent and impartial third party who facilitates a settlement. Settlement can be in the form, for example, of compensation to the victim, an apology, but cannot include incarceration.²⁸ The participative process has the effect of placing the onus on the affected individuals to come together and take responsibility for ameliorating the effect of the wrong, rather than outsourcing the process to the State.

²⁴ Jack B Weinstein, ‘Some Benefits And Risks Of Privatization Of Justice Through ADR’ (1996) 11 *Ohio State Journal On Dispute Resolution* 241, 244–5, 247.

²⁵ Hans Kelsen, *What is Justice?: Justice, Law and Politics in the Mirror of Science* (Lawbook Exchange, 2000).

²⁶ See, eg, Arie Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205, 209.

²⁷ Note that another commonly discussed ADR mechanism is traditional or indigenous justice. Owing to the array of ethnic groups and their associated justice structures within Ghana (see Buah, above n 9, 8–42), discussion in this paper will be confined to mediation. For an example of traditional justice see Morhe, *Access to Justice*, above n 15.

²⁸ Simmons, above n 6.

2 ADR in Practice

Support for ADR can be found at the international, regional and domestic levels. In 1989 the United Nations ('UN') General Assembly recommended the *Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order* adopted by the 7th Congress on the Prevention of Crime and the Treatment of Offenders. These principles call for legal systems to provide 'less costly and non-cumbersome procedures for the peaceful settlement of disputes', increased community participation and 'alternatives to judicial intervention and institutionalisation procedures' in order to assist with crime prevention.²⁹ Similarly, the African Commission in 2006 urged State Parties to 'take into account ... when formulating policies and domestic legislation' the principles of the *Lilongwe Declaration On Accessing Legal Aid In The Criminal Justice System In Africa* adopted by the participants of the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and Other Service Providers in Africa.³⁰ The declaration reiterates the right to legal aid, which is defined broadly to include

²⁹ *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, GA Res, 96th mtg, UN Doc A/RES/40/32 (29 November 1985) [4]. The Guidelines can be found extracted in M Cherif Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (Transnational Publishers, 1994). Further, in relation to the work of the UN in supporting informal justice mechanisms see: United Nations Development Programme, 'Access to Justice Practice Note' (3 September 2004) 4.

³⁰ *Resolution on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System*, ACHPR/Res 100, 40th ord sess (15–29 November 2006) [2].

ADR mechanisms, and recognises the role of traditional and community-based alternatives to formal conflict resolution.³¹

At the domestic level, two forms of mediation are currently available in Ghana. Court-connected ADR is provided for under s 73 of the *Courts Act 1993* (Act 459) and requires any Ghanaian courts exercising criminal jurisdiction ‘to promote reconciliation, encourage and facilitate a settlement in an amicable manner’ but only in the case of misdemeanours. The matter is required first to be brought to court, after which the parties may consent to refer their matter to ADR (chiefly in the form of mediation).³² Where settlement is reached, the terms become an order of the court; otherwise the matter proceeds to trial.³³

Out-of-court mediation is similarly available. Community Mediation Centres (CMCs) were in operation between 2006 and 2010 and were attached to the LAS in each of the 10 regions. They provided free access to mediation services for civil but also misdemeanour criminal matters.³⁴ Further, albeit in a less formal and ad hoc guise, out-of-court mediation is undertaken in police stations, with

³¹ *Lilongwe Declaration On Accessing Legal Aid In The Criminal Justice System In Africa* [1], [5] cited in Penal Reform International, *Africa’s Recommendations for Penal Reform* (Penal Reform International, 2008) 52–3.

³² Judicial Service of Ghana, Uniform Practice Manual on Court-Connected ADR Practice; Judicial Service of Ghana, *Court-Connected ADR - Enhancing Access to Justice in our Communities* (9 February 2009) Judicial Service of Ghana <http://www.judicial.gov.gh/index.php?option=com_content&task=view&id=141&Itemid=158>; Interview with Alex Nartey, National ADR Coordinator (Accra, 25 January 2011).

³³ *Ibid.*

³⁴ Interview with S N Mends, Community Mediation Centres Coordinator and Legal Aid Scheme Administrator (Accra, 2 February 2011); Legal Aid Scheme Scheme and United Nations Development Programme, *Community Mediation Centres: Annual Report 2009*.

police officers acting as mediators.³⁵ When settlement is reached, the complainant formally withdraws the complaint and the police can then exercise their discretion to drop the charges.³⁶

3 The Effectiveness of ADR

From the outset it must be noted that an inherent limitation of ADR is the requirement of consent. Thus, an ADR procedure will prove useless where a suspect, rightly or wrongly, vigorously denies wrongdoing, or a victim remains embittered by the events and refuses to enter any dialogue with the suspect. Nevertheless this leaves open a large number of matters where an indigent offender steals from an indigent victim, the latter wants their money back, and the former is willing to pay it back if they would only be released and given time to earn the necessary money that is to be repaid.

ADR supplements the established formal justice system in two ways. First, ADR enhances one's access to justice as it reduces the role of courts and lawyers, and adherence to immutable procedures, resulting in proceedings that are inexpensive, flexible and speedier for those who use it.³⁷ Indigent offenders are therefore immunised from the need to acquire a lawyer, as a result of which the State is required to provide fewer people with legal aid. This reduces the strain

³⁵ Interview with Michael Teku, Superintendent, 7 Mile Police Station (Accra, 20 January 2011); interview with Paul Avuyi, Police Consultant and former police officer (Accra, 19 January 2011).

³⁶ Ibid.

³⁷ Morhe, *Access to Justice*, above n 15, 1–7.

on the formal justice system, enabling redistribution of available resources to indigent offenders involved in more serious matters. In short, whilst serious offenders gain enhanced access to justice via the formal justice system, minor offenders gain improved access via ADR.

Secondly, ADR improves the quality of justice enjoyed through partially restoring victims and rehabilitating offenders to their pre-wronged states.³⁸ From the victim's perspective it gives them a voice in the process, enabling them to identify solutions aimed at bringing about closure. From the offender's perspective, it brings them face-to-face with the victim, creating an opportunity to realise the precise impact of their actions and a greater chance of rehabilitation.

One of the obstacles to the introduction of ADR (whether court-oriented or out-of-court) is the unequal bargaining power of the parties which make an indigent victim or suspect and their lack of awareness of their rights more easily dominated by a better-healed victim or suspect, or even a partial mediator.³⁹

This is addressed in four ways.

First, the scope of the crimes are usually limited to petty crimes, including petty theft, minor assault, and certain types of fraud, thereby avoiding problems such as those associated with a rapist and victim having to resolve differences.

³⁸ See Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2008) 255; Simmons, above n 6, 944–45.

³⁹ Larry R Spain, 'Alternative Dispute Resolution for the Poor: Is it an Alternative?' (1994) 70 *North Dakota Law Review* 269, 273. Note that the same can be said of an indigent victim and a better-healed suspect.

Secondly, there is no recourse to incarceration – a privilege that would remain under control of the State.

Thirdly, ADR would only apply to *determinations* of the criminal charge. Thus, it would not overcome the need for formal court-based mechanisms where the suspect is detained and wishes to challenge the State in relation to their detention in circumstances where the State refuses to release the detainee. However, where a settlement is entered into between victim and offender, and the victim no longer wishes to press charges the police will be arguably more ready to let the detainee go as a means of lightening their own load.⁴⁰

Finally, the mediator must remain independent and impartial and therefore be capable of acting as a counter-weight to any power imbalances. Ideally, the repository would be a court with all the formal safeguards of independence and impartiality.⁴¹ Yet from an access to justice perspective, the courts are central to the problem as they are expensive and slow. The role of the police in Ghana's ad hoc out-of-court ADR provides a path forward. However, these arrangements are far from perfect. Indeed, Ghana Police act in a partial manner for their role in suggesting, mediating and monitoring adherence to a settlement conflicts with their prior decision to lock up the suspect which may or may not have been carried out lawfully. Whilst the presence of mediators in police stations may enhance justice accessibility, their independence and impartiality are vital to ensure the justice is of an appropriate quality.

⁴⁰ Cf where the charges are for crimes committed against no individual person, eg, treason.

⁴¹ Weinstein, above n 24, 259.

II THE CRIMINAL JUSTICE SYSTEM AT INTERNATIONAL HUMAN RIGHTS LAW

The international human rights instruments do not provide for any express right to justice. How they conceive of justice must therefore be deduced from the rights it affords suspected criminals, and, by corollary alleged victims.

A *The Right to a Fair Trial under the Human Rights Instruments*

Article 14 of the *ICCPR* sets out a number of rights ensuring the fair trial of persons charged with a criminal offence.⁴² All persons are entitled to have their criminal matters heard by a tribunal,⁴³ and to proceed to trial ‘without undue delay’.⁴⁴ Similarly, all persons have a right to communicate with counsel,⁴⁵ and to the provision of free legal aid.⁴⁶

⁴² See, similarly, the *African Charter on Human Rights and Peoples’ Rights*, opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 (entered into force 21 October 1986) art 7 (*‘African Charter’*). Similar requirements exist under *ICCPR* art 9, albeit in the context of where a person is in detention.

⁴³ *ICCPR* art 14(1); *African Charter* art 7(1).

⁴⁴ *ICCPR* art 14(3)(c). Special provision is made for arrested and detained persons at *ICCPR* art 9(3). *African Charter* art 7(1), which provides for the right to a fair trial. This has been defined by the African Commission on Human and Peoples’ Rights (*‘African Commission’*) as including the right to trial within a reasonable time: *Resolution on the Right to Recourse and Fair Trial*, ACHPR Res 4, 11th ord session, (1–9 March 1992) [2c], [2eii] (*‘Resolution on Right to Recourse and Fair Trial’*).

⁴⁵ *ICCPR* art 14(3)(b); *African Charter* art 7(1)(c) which provides for ‘the right to be defended by counsel of his choice’. This has been defined by the African Commission as including entitlement to ‘have adequate time and facilities ... to communicate in confidence with counsel of their choice’: *Resolution on Right to Recourse and Fair Trial* [2ei].

⁴⁶ *ICCPR* art 14(3)(d). From the right to equality before courts and tribunals the HC has also derived a right to equality of arms: General Comment No 32, UN Doc CCPR/C/GC/32, [8]. Note that the African Commission in further defining the right to a fair trial (art 7(1)) has recommended States parties ‘to provide the needy with legal aid’: *Resolution on Right to Recourse and Fair Trial* [4].

The underlying aim of art 14 is to provide the accused in the prosecution against them with access to a system based on fairness. This derives from two fundamental requirements under the *ICCPR*. First, is the right to equality before the courts and tribunals,⁴⁷ which the HRC has stressed requires equal access to these institutions.⁴⁸ Second, is that the trial be fair, which concerns the procedure used rather than the outcome arrived at by the tribunal.⁴⁹ On the one hand, fairness 'entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive'.⁵⁰ On the other, it requires an expeditious hearing, which, even where there is a 'lack of resources and chronic underfunding, must 'to the extent possible' be supplemented by 'budgetary resources'.⁵¹

Most telling of the understanding of justice at international human rights law is therefore that the protections of fairness are built on supply of a court or tribunal as the arbiter of disputes, and of lawyers as a necessary accompaniment. Where these safeguards are deficient, the solution under the *ICCPR* is to invest a greater number of resources into the system. Although some scope exists for courts based on customary law and religious courts to make binding decisions in relation to minor civil or criminal matters,⁵² the *ICCPR* nevertheless contemplates

⁴⁷ *ICCPR*, art 14(1).

⁴⁸ General Comment No 32, UN Doc CCPR/C/GC/32, [15]-[29].

⁴⁹ General Comment No 32, UN Doc CCPR/C/GC/32, [26].

⁵⁰ *Ibid*, [25].

⁵¹ General Comment No 32, UN Doc CCPR/C/GC/32, [27].

⁵² *Ibid*, [24].

the same resource-intensive and formal conception of justice as exists in the justice systems of Ghana and many other developed and under-developed States.

B A Place for Informal Justice under the Human Rights Instruments?

The justice conceived of under international human rights law reflects but one available mechanism used to administer criminal justice — the formal court-based mechanism. Importantly, the *ICCPR* sets out treaty obligations binding upon the States party. Its provisions are therefore intended to be more than merely aspirational.⁵³ Yet by not reflecting the multifaceted nature of justice set out in part one of this paper, the *ICCPR* fails to allow a determination of a criminal charge by means other than via a court, with lawyer in hand. A prima facie case therefore exists for an access to justice right. This would not do away with the fair trial rights already in existence. Rather, it accepts them but questions whether supplementary rights are required to match what is currently available on the ground in order to ensure an individual's ability to seek justice. Nevertheless a more nuanced examination of the nature of ADR and international human rights law is required.

⁵³ Cf *Universal Declaration of Human Rights*, GA res 217 (III) A, UN GAOR, 183rd plen mtg, UN Doc A/RES/217 A(III) (10 December 1948); Leonard Hoffman, 'The Universality of Human Rights' (2009) 125 *Law Quarterly Review* 416, 421.

1 *Human Rights and the Protection of Private Justice*

International human rights law has traditionally regulated *State* actions which affect *private* individuals.⁵⁴ This typical vertical conception of international human rights law construction is an extension of the domestic limitation on State power achieved by way of enacting State constitutions and bills of rights.⁵⁵ Human rights are therefore seen as preventing abuses of what for States would otherwise be, by virtue of their monopoly on political power, an 'absolute socio-economic and legal power'.⁵⁶ In circumstances where crimes have traditionally been viewed as wrongs against the State and where the State has played the lead role in their prosecution, it is perhaps unsurprising that international human rights law has focused on providing suspected criminals with certain fair trial rights exercisable against the State.

Fair trial rights exemplify this conception as they are addressed at limiting the State's power over criminal prosecutions,⁵⁷ and the administration of formal criminal justice in their relations with individuals.⁵⁸ These rights place an

⁵⁴ Jan Arno Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21, 25–6.

⁵⁵ John H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1, 20.

⁵⁶ Frances Radday, 'Privatising Human Rights and the Abuse of Power' (2000) 13 *Canadian Journal of Law and Jurisprudence* 103, 108–9.

⁵⁷ Interestingly, public prosecutions did not begin to appear in England until the eighteenth century, before which time most prosecutions were private: Simmons, above n 6, 951.

⁵⁸ In fact, in England it was not until 1116 when King Henry I, seeking to increase state funds through appropriating property forfeited by convicted suspects and to regulate private retribution, declared certain intentional wrongs to be crimes against the state that the state intervened in what had hitherto been private disputes between the directly affected parties: *Ibid*, 921–2.

obligation on the State to provide suspects with, inter alia, a court that is independent and impartial, a lawyer, and certain procedural rights.⁵⁹ The relationship between State and individual in criminal matters is also present in civil matters despite their seemingly private nature. Although starting out as being purely private in nature, as soon as one party refers a civil matter to court, the laws of the Legislature, the jurisdiction of the Judiciary and the enforcement mechanism of the Executive are invoked. As the matter is submitted to the power of the State, aspects of the fair trial rights become applicable, chief amongst which is the right to a fair hearing before an independent and impartial tribunal.⁶⁰

ADR and its broadening of justice to both formal and informal means shifts the relevant relationship from being that existing between State and individual to that existing between private individuals. The administration of justice is no longer meted out in public but in private, shifting power away from State hands. A direct regulation of the rights of the individuals in this relationship would require placing obligations on non-State actors.⁶¹ Although it recognises that non-state actors as well as States can abuse human rights,⁶² international human rights law would then assume a similar function to domestic law.

⁵⁹ See section 2 A above.

⁶⁰ ICCPR art 14(1); African Charter art 7(1)(d).

⁶¹ Hessbruegge, above n 58, 25.

⁶² Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, 2003) 384.

Aside from the paucity of horizontal human rights in the instruments,⁶³ more general problems with the extension of international human rights law into the private domain can be noted. First, with a monopoly on taxation the State has a more plentiful reserve of resources to use in attempting to fulfil their obligations owed toward individuals.⁶⁴ This is particularly problematic for indigents. For example, the apportioning of any cost of hiring a mediator on either the indigent victim or suspect is likely to make enjoyment of any proposed right to ADR prohibitive. Secondly, in contrast to State–individual relations, the balance of power between individuals changes according to social and economic circumstances of the parties.⁶⁵ Thus, identifying the appropriate duties counteracting any imbalances in socio-economic power will change from time to time as ‘[t]oday’s bully might become tomorrow’s victim’.⁶⁶ By contrast, domestic law permits such flexibility as legislation can be amended by simple majority of members of one Legislature.⁶⁷

⁶³ See, eg: *ICCPR* art 5(1) and *African Charter* art 27(2) which limit the scope of the enjoyment of an individual’s rights to the extent that it interferes with the enjoyment by other individuals of their rights; *ICCPR* preamble [5]; *African Charter* arts 27–9 — eg art 28(2) provides an individual duty ‘to respect and consider his fellow beings without discrimination’. For a criticism of *African Charter* art 28(2), see Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 357 which notes that the futility of the article which contains no grounds for discrimination nor any recognition of the delineation between the public and private spheres.

⁶⁴ Hessbruegge, above n 58, 26.

⁶⁵ Radday, above n 60, 108–10.

⁶⁶ Hessbruegge, above n 58, 26–7.

⁶⁷ Human rights law requires the coming together of different States some of whom may not even recognise the existence of any imbalance, and others who have different methods of rectifying it, with no State being bound by an amendment to which they do not agree: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 40(2); *ICCPR* art 51(2).

Although direct regulation of private actions does not usually fall within the scope of human rights instruments, they are commonly regulated in an indirect manner. This diagonal conception of human rights is a hybrid of the previous two conceptions, with private individual actions being regulated through a duty on the State to protect the rights of one private individual against another.⁶⁸ An obvious example is the right to life provided under art 6(1) of the *ICCPR*, which obliges States to ‘prevent and punish deprivation of life by criminal acts’ despite being carried out by private individuals against other private individuals.⁶⁹

Under this conception, informal justice would be accommodated through, for example, creation of an obligation on the State to make ADR freely available alongside formal justice mechanisms. Such an obligation would require States to provide alternate means to the rigid court-oriented mechanism. In the case of mediation, this would necessitate the provision of trained mediators who are independent and impartial and who, in the case of indigents, are subsidised by the State. Consequently, just as the right to life requires the State to protect individuals from threats to their life by others, any access to justice right would compel the State to protect individuals (whether they be victims who want a say in the process, or suspects who for longer periods of time are in or have the threat of being put in detention) from being denied access to justice. The exact types of ADR and a description of the manner in which it relates to formal justice

⁶⁸ Hessbruegge, above n 58, 25, 27.

⁶⁹ Human Rights Committee, *General Comment No 6: The Right to Life (art 6)*, 16th sess, UN Doc HRI/GEN/1/Rev1 (30 April 1982) art 6.

beyond that they are to coexist would be left to individual States (as discussed in the next section).

Recognising informal justice through the diagonal conception pays deference to the dominant vertical understanding of human rights through placing the obligation for action on the State. This acknowledges that States (rather than individuals) are more likely to respond to international pressure over violation of human rights obligations, and that the State has deeper pockets than most individuals from which it may draw in order to honour its obligations. True, it is the inadequate funding of the justice system by under-developed States that impedes access to justice and so further funding from international donors is required if a redistribution of funding away from the courts and legal aid is to be avoided. However, such a task is perhaps not unrealistic where the incremental increase in funding has the dual effect of enhancing access to justice for those both inside and outside the courtroom.

At the same time the diagonal conception hints at the horizontal understanding through regulation of what is otherwise a private activity. Requiring the State to provide ADR services necessarily requires regulation of the quality of the service provided. For example, for those indigent suspects that have left the formal justice system and therefore the protection of access to justice rights, the obligation on the State to provide ADR offers such suspects the protection against other individuals in the form of a regulated ADR forum with, for example, an independent and impartial decision-maker. In contrast to horizontal human rights, this diagonal obligation avoids the need to amend when the balance of

power between parties changes. It does so through affording States a margin of appreciation in terms of the manner in which it fulfils its obligation, an aspect which is characteristic of the diagonal conception.⁷⁰ Thus, out-of-court or court-oriented ADR would be equally permissible, so long as the method is effective in contributing to justice accessibility.

2 Human Rights and the Vernacularisation of Criminal Justice

ADR by its nature does not prescribe any particular justice mechanism. It is this flexibility that is its appeal. Any supplementary right would be phrased in terms less precise than the fair trial rights currently in existence. This degree of abstraction ensures universality of the underlying principle — justice acquired through effective means —, avoiding any clash with cultural relativists.⁷¹ Recognition of the right therefore treats as common to all States the problem of poor access to justice, permitting a sharing of experiences of the different mechanisms tried and tested in various parts of the international community.⁷² The level of generality in the right allows for difference in its application across States.⁷³ Differential application ensures the mechanism pursued by the State

⁷⁰ Hessbruegge, above n 58, 27–8.

⁷¹ In any case, the argument appears to have moved beyond universalism versus cultural relativism: Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates about "Values In Asia"' (2003) 14 *Indiana International & Comparative Law Review* 1; Aurora Bewicke, 'Asian Developments In Access To Counsel: A Comparative Study' (2011) 10 *Northwestern University Journal of International Human Rights* 27.

⁷² Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975, 992.

⁷³ Hoffman, above n 57, 419-20.

accords with the particularities of their society.⁷⁴ This localisation or vernacularisation of human rights,⁷⁵ affords States a margin of appreciation in the manner in which they fulfil the right.⁷⁶ Vernacularisation, if you will, is the universalist's realisation that cultural relativism by dint of societal complexity has its place.⁷⁷

Affording States a margin of appreciation in the application of human rights norms has received varied support at international law. In relation to the *ICCPR*, the Human Rights Council has expressly rejected the adoption of such a doctrine in relation to interpretation of the *ICCPR* generally,⁷⁸ and the fair trial rights more

⁷⁴ Ibid.

⁷⁵ Merry, above n 76, 990-2; Bewicke, above n 75, 27.

⁷⁶ Hoffman, above n 57, 423-4. The margin of appreciation doctrine has been used in many contexts, especially by the European Court of Human Rights. Used in the present context, margin of appreciation is intended to emphasise that State judicial officers are better placed than their international brothers and sisters to decide certain matters which derives, amongst other things, from the lack of consensus between States on the issue: see, eg, *Sunday Times v United Kingdom* (1979-80) 30 Eur Court HR (ser A), [59]. It is therefore distinct from the application of the doctrine on the basis of limitation or accommodation clauses and the balancing of substantive individual and collective rights that they imply: see, eg, *ICCPR* arts 14(1), 18(3), 19(3), 20, and 22(2). For a summary of the distinct approaches of the European Court of Human Rights see George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705. Letsas criticises this former, 'structural', approach, and argues for a more consistent, morally rooted approach, albeit never considering the doctrine in the context of vernacularism.

⁷⁷ Ariel Meyerstein, 'Between Law and Culture: Rwanda's Gacaca and Postcolonial Legacy' (2007) 32 *Law and Social Enquiry* 467.

⁷⁸ Human Rights Committee, *Views: Communication No 511/1992*, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.4] ('*Länsman v Finland*'). However, in *O'Neill and Quinn v Ireland* the HRC refused a complaint concerning art 26 discrimination on the basis of the political limits of the *ICCPR*, an approach commensurate with the margin of appreciation doctrine: Human Rights Committee, *Views: Communication No 1314/2004*, 87th sess, UN Doc CCPR/C/87/D/1314/2004 (14 September 2006) [8.4]. It has nevertheless been viewed as exceptional and seen as setting a dangerous precedent: Sarah Joseph, 'Human Rights Committee: Recent Jurisprudence' (2007) 7 *Human Rights Law Review* 567, 574-5.

specifically.⁷⁹ This has not prevented the drafting of treaties which expressly provide for the doctrine. For example, the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*,⁸⁰ provides the Committee on Economic, Social and Cultural Rights ('CESCR') a standard of review with respect to the rights under the *International Covenant on Economic, Social and Cultural Rights*.⁸¹ Under art 8(4), the CESCR 'shall consider the reasonableness of the steps taken' by each State Party in relation to a particular right under the Covenant, as part of which it 'shall bear in mind that the State Party may adopt a range of possible policy measures' for the implementation of these rights. Although not yet in force and subject to the reservation of a number of States recommending its adoption by the General Assembly,⁸² the need for a margin of appreciation in relation to a number of *ICESCR* rights has already been recognised.⁸³ Yet even where there has been no express provision to a State of a

⁷⁹ General Comment No 32, UN Doc CCPR/C/GC/32, [4]. Interestingly, the HRC also reasoned that the appropriateness of the outcome of a trial is to be largely left to the domain of the State ([26]), suggesting some margin of appreciation with respect to the quality of the outcome received. However, this is perhaps more a means of avoiding an international tribunal rehearing the facts of the matter and the problems this would cause in appellate proceedings, rather than a means of accommodating local circumstances.

⁸⁰ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 10 December 2008, UN Doc A/63/435 (not yet in force).

⁸¹ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) ('*ICESCR*').

⁸² At present, only 40 States are signatories and 8 States parties to the Protocol.

⁸³ See, eg, CESCR, *The Right to Adequate Food*, General Comment 12: 20th sess, UN Doc E/C.12/1999/5 (12 May 1999). For a summary of the use of the doctrine by the CESCR see Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 275, 298.

margin of appreciation, international⁸⁴ and regional courts,⁸⁵ as well as the legal publicists⁸⁶ have provided guarded support for its implication into existing law. Consequently, the express provision of a margin of appreciation would be unlikely to give rise to any impediments to the creation of an access to justice right.

In practice, States would be compelled to provide effective means of accessing justice by whatever means are appropriate to the 'religious frameworks and political and economic conditions' of the people.⁸⁷ The right does not compel the introduction of victim-offender mediation or the creation of traditional tribunals. Neither does it discriminate between out-of-court and court-orientated ADR mechanisms. Thus, in Ghana such a right to access justice might compel the continuation of the CMCs and their mediation process, the provision of appropriately trained personnel to police stations to ensure fair mediations, or a greater role for s 73 court-connected ADR.

The appeal of ADR is not only to under-developed but also developed States. ADR is used in developed countries such as Australia to varying extents to assist with access to, but most importantly, the quality of justice enjoyed by victims and offenders. A widespread initiative is the sentencing circle in which members

⁸⁴ *La Grand (Germany v US)* [2001] ICJ Rep 466, 514; *Avena (Mexico v US)* [2004] ICJ Rep, [122]. Cf *Oil Platforms (Iran v US)* [2003] ICJ Rep 90, [73]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep, 151-3.

⁸⁵ For an early example, see *Handyside v United Kingdom* (1976) 1 Eur Court HR (ser A).

⁸⁶ See, eg, Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907.

⁸⁷ Merry, above n 76, 990.

of the Aboriginal community are brought in to take part in an informal discussion on sentencing of an Aboriginal offender who has been found or has pleaded guilty.⁸⁸ The judge remains the final arbiter. The entire process is court-directed, which is indeed one way of achieving the independence and impartiality of the intermediary. Whilst the introduction of the access to justice rights would reflect to some extent the status quo in Australia, it would hold up to greater international scrutiny Australia's accommodation of the needs of indigenous Australians in the justice system. Although introducing a greater role for traditional justice mechanism or greater informality may be one such means of fulfilling its obligations,⁸⁹ clearing space for the wholesale insertion of a supplementary traditional criminal justice system may not be required where unfeasible.⁹⁰ Nevertheless the requirement that the Australian State search for ADR mechanisms that improve the quality of justice spurs on the enquiry in search of more effective justice mechanisms.

Far from creating a two-tiered criminal justice system in which developed States stick to the old system and undeveloped States are given an excuse to relax their efforts in favour of a less onerous target, recognition of informal justice would

⁸⁸ For a summary of the programmes across Australia see: Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (Paper No 277, Trends and Issues in Crime and Criminal Justice: Australian Institute of Criminology, 2004).

⁸⁹ See, eg, Judge Peggy Hora, *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* (Department of Premier and Cabinet, Government of South Australia, 2010).

⁹⁰ See, generally, Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture – Final Report Project 94* (September 2006), ch 5; Australia Law Reform Commission, *Report 31: The Recognition of Aboriginal Customary Laws* (1986), Pt IV.

accommodate the relativity of justice accessibility that exists in the international community. Whether a State has no additional resources to provide for a functioning court system and legal aid scheme, or whether even despite a lawyer and movement through the court process a State cannot deliver culturally appropriate 'justice', the right to access to justice reconciles international human rights law with domestic reality.

III THE FUTURE: A UNITED UNDERSTANDING OF 'JUSTICE' UNDER DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAW

Human rights are defined in the *ICCPR* as rights deriving from 'the inherent dignity of the human person', recognition of which is in turn acknowledged to be a 'foundation of justice'.⁹¹ Yet if the only way in which justice can be achieved is by way of a resource-intensive court system and legal profession, the foundations of justice under international human rights law are and will remain inadequate. Justice is multi-faceted as is evidenced by the rise of ADR. Justice accessibility and quality no longer depends purely on providing greater funds to the existing formal mechanisms. It requires more flexible and creative approaches.

Recognition of these mechanisms is possible within the existing human rights framework by placing a requirement on States to support ADR mechanisms. Such an obligation could be imposed by way of amendment to the *ICCPR*, or, more

⁹¹ *ICCPR* preamble [2]. See also *African Charter* preamble [5], which similarly provides that 'fundamental human rights stem from the attributes of human beings'.

realistically, through the creation of soft law instruments.⁹² This would urge governments to look at access to justice in a more flexible, multifaceted way, lightening the load of the already-strained formal justice system. Thus positioned, it would make the attainment by all States of a functioning criminal justice system more than merely 'a transcendent externality to the legal structure, an "ought" in contrast to the "is" of a legal reality'.⁹³

⁹² See, eg, Adrian Bradbrook and Judith Gardam, 'Energy and Poverty: A Proposal to Harness International Law to Advance Universal Access to Modern Energy Services' (2010) 57 *Netherlands International Law Review* 1, 11-12 (arguing for recognition of a new right to access modern energy services through adoption of a statement of principles, rather than amendment to the human rights treaties).

⁹³ W E Conklin, 'Whither Justice? The Common Problematic of Five Models of "Access to Justice"' (2001) 19 *Windsor Year Book of Access to Justice* 297, 309.