Chapter Eight

Reconstructing the Rule of Law in Plural Madagascar

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1. Introducing the Malagasy "Crisis"

Madagascar's fractured past has bred a fragile status quo of recurring institutional crises. Such crises are driven by a complicated state-building project, the fluid nature and set up of institutions as well as a distorted political space (Marcus, 2004, 2). This has resulted in clientelism, patronage and personalised politics. A key example is the 2009 political crisis which reflected and resulted from years of colonial and neo-colonial manipulation, institutional neglect, citizen isolation and competition involving elite politicians, the military and transnational Malagasy actors. The elections of 2013 and 2018 have equally continued to prop up fractured institutions and personalised politics.

One of the key features of Malagasy crises is protracted insecurity in rural or peripheral areas. Current state and non-state justice responses to cattle raiding (rustling) reflect the complexity of rights and justice challenges in rural areas. Predation and the lack of trust in a corrupt and weak justice system has led security forces and rural Malagasies to summarily and extrajudicially execute the *Dahalos* they apprehend, fuelling a complex web of conflict, rights violations and further banditry.[1] The above takes place within plural legal settings reflected through the use of a traditional justice system called *Dina*.[2] This system has heightened capital punishment and extrajudicial sentencing for *Dahalos*, thus violating rights,

[1] *Dahalos* are Zebu cattle bandits or thieves.

[2] *Dina* is a written collective localised traditional agreement, adopted by the majority of members of a *Fokonolona* (village), allowing them to adopt measures they deem necessary for their security.

but it is also the most accessible, reliable and familiar justice avenue in rural areas, and thus key for deescalating conflict.

This chapter argues that Madagascar's struggle to capitalise on navigating, or regulating its state and non-state justice systems, which is analysed through the *Dahalo* crisis, is underpinned by a narrow rule of law conceptualisation. In doing so, it employs a law and development approach to demonstrate that the convoluted matrix of conflict, rights violations and injustice created by institutional inefficiency and the overarching insecurity in the countryside, requires approaching rule of law restoration from a bottom-up and top-down social justice perspective. This should emphasise substantive justice within state and non-state institutions.

First, the chapter notes the fragility of the Malagasy state in engaging the above insecurity, justice complexity and rights violations. Its institutions are struggling, its political space is repressed, and its legal system is institutionally weak and not-well financed or staffed. Key institutional legal weaknesses include judicial and police corruption within vague overlapping mandates, inefficiency that has resulted in massive case backlogs, persistent pre-trial detention, and failure of legal due process. As a consequence of this context, rights and justice are understood and navigated differently in Madagascar.

Second, the chapter clarifies that rule of law restoration within the plural, post-crisis Madagascar, has failed to reconcile bottom-up and top-down approaches that are cognizant of Madagascar's pluralized normative realities. The chapter therefore emphasises the re-centering of Malagasy voices, choices and worldviews, highlighting Madagascar's need to promote deliberative localized justice whilst strengthening the inclusivity, accessibility and efficiency of state governance and justice institutions that should provide oversight and complementary forums. This encompasses acknowledging and addressing the limitations that

Malagasy state justice institutions face in delivering justice in plural and peripheral settings, whilst supporting the strengthening of democratic ideals within traditional justice institutions. This is meant to address the impunity, violence, and rights violations, including negative co-optation of these traditional institutions by corrupt officials and mobs seeking justice by any means.

This chapter will be divided into four sections including the introduction. The second section introduces central issues confronting fragile or post-conflict states, and the approach employed in attempts at reconstruction, including rule of law restoration. It also reflects on the meaning and scope of the concept within this context. The third section explores the anatomy of recurring crises in Madagascar. Institutional justice and administrative issues are analysed as part of a protracted and complicated state-building process in Madagascar, stemming primarily from consequences of colonial administration and neo-colonial manipulation, but also deeply embedded further within Malagasy kingdoms that preceded this period. The final section analyses consequences of fragile institutions of justice for rule of law restoration within plural settings by delving into the criminal justice system and highlighting setbacks and opportunities thereof through the *Dahalo* (cattle banditry) crisis and corresponding security sector and traditional justice (*Dina*) responses. The chapter concludes by recommending rule of law restoration that is contextualised and less centralist, where state and non-state normative systems can negotiate and lend legitimacy and authority to each other without pre-empting effectiveness of one system over the other.

2. Reconstruction and Rule of Law

This section looks at how the rule of law is conceptualised and what reconstruction entails within post-conflict African contexts. The section analyses the messages and methods of

reconstruction policies and rule of law restoration programmes in Africa. It critically situates this analysis within the reality of externally driven legal development assistance programmes. These rely on universalised conceptions of rule of law, which were not only a basis for the civilising colonial mission, but have also contributed to unnecessary impositions in pluralised post-colonial African states (Janse, 2013, 181; Mutua, 2016, 163-4; Okoye, 2004, 75, 76).

Post conflict reconstruction aims at the re-consolidation of peace and security as a basis for sustainable socio-economic development in post crisis. Such reconstruction does not happen in vacuum from the causes and drivers of conflict. It takes place whilst some of the causal factors are still inherent in societal dynamics (Janse, 2013, 184). Thus it is a complex, multidimensional and holistic process encompassing: Addressing military, political, economic and social issues such as the restoration of law and order, governance, economic rehabilitation and development, and attaining justice and reconciliation. Post conflict reconstruction is therefore aimed at legitimising the state and making it functional (Kotze, 2008, 113-114; Sannerholm, 2012, 39). These elements signify the liberal state, whose criteria most African states do not satisfy for various reasons: colonialism; neo-colonialism; racism; ethno-nationalism; and poverty (Humphreys, 2012, 475). Consequently, they are perpetual beneficiaries of reconstruction efforts which are highly dependent on international donors whose agendas consistently undermine the contextualisation of programmes, limiting reconstructive outcomes (Humphreys, 2010, xvi-xvii;).

Within the African region, relevant guidance on contextualising reconstruction is found in the African Union Policy on Post Conflict Reconstruction and Development (AU-PCRD). [3] This serves to clarify restoration approaches for an Africa specific context which is notable in post-conflict countries with fragile institutions, lack or have weak capacity, and also lack a

[3] The policy serves as a framework for the development of comprehensive policies and strategies spelling out measures necessary to consolidate peace, promote sustainable development and pave the way for reconstruction, growth and security in post conflict countries and regions.

democratic culture of good governance and respect for human rights, in addition to facing endemic poverty (Fombad, 2018, 214). The policy charts a path for breaking the cycle of fragility by identifying six constitutive elements of the reconstructive process that should be locally contextualised, including security, human rights, justice and reconciliation which are key for the Malagasy context being discussed (AU-PCRD, 2006).

The policy emphasises this contextualisation by embedding specific principles,[4] including local ownership and African leadership of reconstruction programmes, discouraging overreliance on external support. Whilst the policy is vague on the meaning of local ownership and African leadership, these elements present possibilities for redressing institutional fragility, including: prioritising employment of localised or hybrid approaches to conceptualising justice delivery, relying on non-state in addition to state justice institutions, as well as embracing regional mechanisms and resources for enforcement support (Mutua, 2016; Fombad, 2018, 230).[5] For instance, effective post conflict reconstruction is reflected as a peace and security issue in the African Union Peace and Security Council (PSC) Protocol, which in furtherance of article 5 (2) of the African Union (AU) Constitutive Act, reinforces the AU-PCRD (PSC, 2002, Art 3a and 6; AU, 2001).

The restoration of the rule of law, including the establishment and development of democratic institutions is a strong aspect of envisaged post conflict reconstruction activities, as a peace and security tool for redressing and preventing further conflict (PSC, 2002, Art 14(1)). Monitoring domestic compliance with rule of law through PSC organs or the African Peer Review Mechanism (APRM) could create impetus for curtailing violations domestically, but in practice political interference and lack of political has constantly limited the impact of

[4] African leadership, national and local ownership, inclusiveness, equity and non-discrimination, cooperation and cohesion, and capacity building for sustainability.

[5] The African Peer Review Mechanism (APRM) can provide oversight support for ensuring rule of law related values are adhered to domestically.

these two institutions (Fombad, 2018, 232). Specialised mechanisms of the African Commission on Human and People's Rights including the Special Rapporteurs on Prisons and Other Places of Detention in Africa and those on Arbitrary, Summary and Extra-Judicial Executions could also lend a layer of African regional oversight over domestic human rights violations that have implications for rule of law restoration (Fombad, 2018, 234).[6] Because the adoption of undigested liberal theories of state reconstruction has fared poorly in the past, the effective coordination and ownership of the process of reconstruction and peace consolidation is important for sustaining programmes and gains when external players pull out (Mutua, 2016, 166). It is also relevant because as we shall see later in Madagascar, norms relied on for reconstruction, including law do not operate in vacuum, they get transplanted into pre-existing systems (both regional and local), which must be acknowledged and incorporated in order to dispense justice effectively (Mutua, 2016, 163; Janse, 2013, 181; Okoye, 2004, 74,75).

On the other hand, the conception of rule of law referred to in the AU-PCRD and the PSC protocol remains a murky concept especially within the African context (Fombad, 2018, 215; Okoye, 2004, 72). Its effectiveness as a tool for preventing conflict and promoting development is subjective, normatively incomplete, culturally blind and dependent on domestic commitment and localisation. It is highly debatable whether it does address, much less reflect local social justice needs in developing post-conflict countries such as Madagascar (Bingham, 2011, 6; Mutua, 2016, 160). This is because such rule of law adaptation raises contestations between orthodoxic interpretations and newer more nuanced

[6] See related African Commission resolutions: the Dakar Declaration and Recommendations on the Right to Fair Trial (1999); the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003); and the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines on Torture) (2002).

ones. Notably, legal assistance programmes and international development projects have consistently influenced both conceptions (Faundez, 2011, 19).

Traditional understandings of rule of law reflect thin Diceyan conceptions on how law limits the power of the state at the instance of the public (Jewell, 2019, 3-5; Humphreys, 2010, xv; Dicey, 1985, 188).[7] It has been argued that the Diceyan conception is more idealistic and formalistic and is outdated in our modern global context (Jewell, 2019, 9; Fombad, 2018, 216; Okoye, 2004, 72). Bingham's conception has remained more relevant for our discussion, reflecting thicker framings of justice, including procedural and substantive aspects key to reconstruction, such as accessibility of the law; law not discretion; equality before the law; the exercise of power; human rights; dispute resolution; fair trial; and the rule of law in the international order (Jewell, 2019, 10; Humphreys, 2010, 4-5; Bingham, 2011, 3-10; Janse, 2013, 188). Within Bingham's definition are key elements of access to justice for all: inclusivity, accountability and empowerment through rights. These not only reiterate domestic, regional and international legal instruments, but also reflect developmental aspirations within the globally endorsed post-2015 Sustainable Development Goals (the SDGs), making the rule of law integral to human development (UNGA, 2015, Goal 16; AU, 2001, preamble, Art 4(m); Fombad, 2018, 215-6; AU, 2007, preamble, Art 2(2); Mutua 2016, 166).[8]

Yet, in today's rule of law restoration programmes, the substantive justice interpretation is emphasised in theory. In practice, emphasis reflects programmatic wishes for prioritising expedient procedural justice measures (including political human rights) over addressing

[7] Within this conception is emphasis on legality, certainty, equality and uniformity.

[8] See the African Union Commission. (2015) Agenda 2063: The Africa we want (popular version). Addis Ababa, Ethiopia; See United Nations Secretary-General's well-known 'thick' definition of the rule of law in the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004/616, Para. 6; and A/RES/67/97 (14 January 2013) *The rule of law at the national and international levels*.

social and substantive justice needs of beneficiary countries (Humphreys, 2010, xx, 4; Janse, 2013, 188; Mutua, 2016, 166; Okoye, 2004, 76).[9] For instance, there is less influence from local laws or norms and procedures which are considered ineffective or corrupt or lacking in modernity (Humphreys, 2010, xv, xvi, xvii; Mutua, 2016, 163-4; Adelman and Paliwala, 2021, 5). Instead, transplanted versions of legal and institutional forms continue to influence the field, much like earlier visions of colonial law and the law and development movement's legal instrumentalization (Trubek, 2006, 78; Tamanaha, 2004, 9; Twining; 2009, 326-329).

This is not to say relevant local forms of law have not been acknowledged in rule of law programming, with emphasis on bringing in the customary, but theory and practice differ entirely (Humphreys, 2010, xvii; Janse, 2013, 183). In practice the law and development doctrine has metamorphosed to preach chastened neoliberalism, more aptly reborn as rule of law intervention (Paliwala and Adelman, 2021, 2, 5, 24; Faundez, 2010, 23). This outlook to legal development assistance still centres the role of the market. It does encompass, but is not limited to conditionalities, policies and rules emphasising growth, investment and the effects of such on national economies and local communities. It also tactfully emphasises the importance of public law and state regulation, including access to justice, human rights and constitutional values, yet in practice it neglects non-state aspects and local needs, insisting on legal centralism (Janse, 2013, 183,185). Finally, it takes note of the failures to contextualise legal reform in the past, suggesting experimentation and innovation, including new forms of governance and law, without necessarily implementing such in practice (Trubek, 2006, 74; Adelman and Paliwala, 2021, 5).

Thus, the relationship between the rule of law and developmental reconstruction in post-conflict countries is reflected in combinations of transplanted institutional mechanisms and

[9] Lacking legitimacy, representation and often state-centric.

normative approaches that reflect 'western governance speak and tools': ensuring access to justice, addressing corruption, legal certainty, accountable government decision-making, administrative justice and the measurement of success in rule of law interventions (Kotze, 2008, 114; Jowell, 2019, 10-14; Humphreys, 2010, xvi; Merry, 2016; UNGA, 2015). Most of these factors are not tailored to local contexts in post-conflict developing countries such as Madagascar.[10]

For instance, the measurement of success for rule of law restoration, might lead to varying outcomes depending on context, who is measuring, what tools and methodologies they are using, but most importantly what rule of law means and entails within such context (UN, 2011; Davis et al, 2012; Merry, 2016; Fakuda Parr et al, 2014; Janse, 2013, 186; Adelman and Paliwala, 2021, 24). A narrower (procedural or formal) understanding of rule of law could limit success to the availability of commercial laws, contract enforcement and dispute resolution facilities for investors. A wider (fundamental rights) understanding of rule of law might demand more contextualised assumptions of success (Merry, 2019; Satterthwaite and Dhital, 2019). In plural contexts this should for instance entail how well the relationship between formal and informal legal systems is reconciled and regulated, and the extent to which access to justice and human rights within both, is or could be an instrument of empowerment and of more equal distribution of resources (Jowell, 2019, 10-14; Merry, 2016). This is more in line with the understanding that the promotion of wider and contextual rule of law is a necessary part of the process of empowerment and capability-enhancement that constitutes "development" which is not centred on growth, but freedom and human capacities (Sen, 2013).

[10] See S/2013/341 (11 June 2013) Measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations.

Despite transplantation, the facilitation of institutional development and capacity building for the judiciary, police and correctional services including revamping court and prison administration and management, and overall justice and security sector reform remains important. For instance, it ensures the establishment of an efficient justice and penal system that is accessible to all sectors of society, has functioning police, courts, prisons, as well as appropriate rehabilitation programmes (Santos and Trubek, 2006, 9). However, whilst governments are expected to provide or support the reform of the judiciary and associated institutions by guaranteeing their independence, professionalism and efficiency in the delivery of justice, the conceptualisation of such programs should take note of local social realities and not limit rule of law to criminal justice alone (Sage and Woolcock, 2012; Satterthwaite and Dhital, 2019). In some instances, and Madagascar is a notable example, the creation and, or bolstering of the capacity of the judicial system, through education, training and the provision of financial and technical resources will be important, but not adequate (AU-PCRD, Art 41 (b)). The successful provision of justice in such cases also requires accounting for socio-economic conditions impacting accessibility, reliability, legitimacy and acceptability of this formal system in hard to reach peripheries with vibrant and diverse legal pluralisms under limited resources. (Humphreys, 2010, xx; Santos and Trubek, 2006, 17; Mutua, 2016).

3. Anatomy of recurring Malagasy crises: Constituting Institutions

This section engages with the evolution of Malagasy crises by analysing colonial complexities and convoluted neo-colonial institutional systems linked to Malagasy political elites, transnational figures and metropolitan France. Then it takes a step further into Malagasy kingdoms past, linking precolonial Madagascar to colonial and post-colonial

institutional governance and justice. The judiciary and related institutions of justice are anaysed to reflect consequent institutional justice complexities that rule of law restoration has struggled to navigate over the years.

Madagascar's 2009 crisis led to the overthrow of Marc Ravalomanana and a subsequent intervention by the African Union (AU) and Southern African Development Community (SADC). The crisis and many before it have necessitated a reflection on how African states were fundamentally illegitimately formed and the impact of such formation on Africans (Ouédraogo, 2014, 1; Thompson and Fernandes, 2020, 880; Mutua, 2016, 161, 165, Kneitz, 2021, 322). Firstly, it compels an assessment of the viability of the post-colonial state as a vehicle for democratic institutional development in Africa, considering its illegitimacy, negotiated authority, repressive tactics and disdain of civil society. Secondly, it necessitates clarification of the role of communities in defining new pathways in which their relations with each other and the state can be redefined and anchored (Achu, 2020, 948).

The violent nature of the 2009 political crisis and the fact that a mutinous elite military unit and large sections of the Malagasy community were involved, suggested a weakness and fundamental fracture of social-institutional structures. It also reflected the stagnated nature in which such structures were, and are constructed in Madagascar. Whilst the immediate crisis in Madagascar started in 2009, its roots can be traced to a difficult state-building project, a contested transition to democracy and failure to consolidate democratic processes and structures (Achu, 2020, 948; Marcus, 2004, 1-2; Mutua, 2016, 161). Critical to this thinking is the argument that the post-colonial African state, including Madagascar, is a remnant of the colonial enterprise which is implicit in Madagascar's crises and calls for new forms of state-building, such as reconciling civil power with traditional authority (Marcus, 2004, 1; Mutua, 2016, 161; Kneitz, 2021).

Modern Madagascar is unique in this regard because it evolved differently from other African states that were predominantly created by colonial forces. The Merina King Andrianampoinimerina (1750-1809), initiated consolidation of the Kingdom of Madagascar. He started with the twelve sacred hills of Imerina and expanded towards the coasts (Randrianja and Ellis, 2009, 115-119; Marcus, 2016, 7; BTI, 2020, 11).[11] By 1896, when the French deposed the monarchy, it predominantly controlled most of the territory (Randrianja and Ellis, 2009, 155; Marcus, 2016, 7). The French relied on the monarchy's preexisting administrative system, including its personnel to colonise Madagascar (Marcus, 2004, 1). They issued a few changes including abolishing the monarchy's system of slavery, whilst maintaining its caste and taxation systems to ensure labour supply for new plantation systems and facilitate labor and infrastructural development (BTI, 2020, 11).

These factors have dictated the role of Merina power, privilege and influence in Madagascar for over two centuries. This narrative underpins the evolution of the current status quo, considering that the heart of the former Merina kingdom (Antananarivo) is the current capital of Madagascar. Key Merina families hold power in Malagasy political and economic decision-making, whilst influencing education and business. Merina dispersed all over Madagascar are highly influential in government, education and business. Peoples from other regions and ethnicities (grouped as *côtier*-coastal people) are predominantly excluded from these powerful networks built on social capital going back centuries (BTI, 2020, 3-4; Marcus, 2016, 7,4; Marcus 2004, 1).

By 1947 when the Malagasy anti-French revolt and corresponding brutal counter-insurgency started, the colonial system had struggled with nationalistic pushbacks for a while. The uprising was part of an anti-colonial tide in Francophone Africa and Indochina, resulting in

[11] Kingdom of Madagascar 1810-1896.

the French *Loi-Cadre* signing in 1956 (Jennings, 2017, 2; Randrianja, 2009, 176). Madagascar accordingly got independent on 26 June 1960. Its first republic was born out of a relationship between foreign interests and specific Malagasy political elites, and headed by Philibert Tsirinana. Most Malagasy view this first republic as an extension of the French colonial period (Ratsimbaharison, 2017, 63; Marcus, 2016, 8-9; Hauge, 2011, 517-523). The failing economy, youth and social movements as well as peasant uprisings that followed, resulted in the violent bloody demonstrations of 1972 which ended Tsirinana's government.[12]

The Military regimes that followed this period eventually produced Vice Admiral Didier Rantsiraka's government, establishing the second republic. His socialist policies and repressive tactics, crippled the Malagasy economy and psyche (Ratsimbaharison, 2021). During this time Rantsiraka revised the constitution and galvanised his power.[13] The third republic which introduced Marc Ravalomanana was a reaction to Rantsiraka's failures and Ravalomanana's ambitions. [14] Institutional failures and political mistakes carried through the independence government of Tsiranana eventually followed through to the Ravalomanana government, building a catalyst for the events that led to the 2009 crisis (Marcus, 2016, 10).

At the time of Ravalomanana's overthrow, in March 2009, part of the military had galvanized support for the young and upcoming Andry Rajoelina. The peaking of tensions between Marc Ravalomanana and Antananarivo's former mayor, Andry Rajoelina culminated in the forcible removal of Ravalomanana from office. This was preceded by a week of violent protests, followed by the military Directorate declaring Rajoelina president (Dewar et al, 2013, 4-5). The High Constitutional Court (HCC) later confirmed this decision, followed by his inauguration as President and head of the 'High Transitional Authority (Maunganidze, 2009;

[12] See Zatovo Western Andevo Malagasy (ZWAM).

[13] Ratsiraka became the longest serving president of Madagascar, having served two Republics.

[14] The post-election crisis of 2001-2002 underlay the outcome of the vote.

HCC, 2009).[15] Ironically, under provisions of the August 1992 Constitution of Madagascar, this was in contravention of several provisions including, the age limit (Art 46 (1)), electoral process (Art 45), or succession after incapacitation or resignation (Art 52(1).

Given the nature of the circumstances, and considering the failure of mediatory efforts, the coming into power of Rajoelina was considered to have possibly constituted a military coup d'état or an unconstitutional change of government (AU, 2001, Art 4 (h); Maunganidze, 2009). This was not new in Madagascar, since the now ousted Ravalomanana had come to power in 2001 under similar circumstances, and for possible reasons, unresolved issues from then, might have even triggered the 2009 '*coup de etat* or unconstitutional and undemocratic change of government' (Ratsimbaharison, 2017, 56; Marcus, 2016, 11; Marcus, 2004, 6-9).

These events immediately attracted a response from the South African Development Community (SADC) and the African Union (AU) which had prohibited coming to power under such terms (AU, 2001, Art 4(h, j); SADC, 1992, Art 10 (A); Lome Declaration, 2000, Art 3(10); ACDEG, 2007). They suspended Madagascar and offered guidance which eventually led to a constitutional referendum. The 2010 constitution and general elections in 2013 and 2018 are notable outcomes of the process. These outcomes have not changed the structure and nature of institutions in Madagascar. The country continues to labour under social, economic and political fallouts of the 2009 crisis and those preceding it.

Madagascar's governance and political crises are thus underpinned by recurring failure on the part of state institutions to function independently of the people that govern them. They are

[15] See HCC decision No. 03-HCC/D2 of 23 April 2009: The Higher Constitutional court ruled that President Ravalomanana acted in contradiction of Article 52.3 f the Constitution and transferred power to the military rather than the President of the Senate. Then the Chair of the Military Management, by Ordinance No 2009-002 of March 2009 transferred full power to Andry Rajoelina. Then in a strange twist of events, the Court ruled that even though such an approach was outside a Constitutional precedent, it would recognise Rajoelina for twenty four months in order to afford him the opportunity to organise the transition and take all necessary measures to that effect. This was presented as the public good interpretation of the organic law.

also underpinned by a weak civil society, co-opted by state machinery and a private sector that is essentially owned by public leaders, and where finances move between this public and private swiftly and easily (Marcus, 2016, 3). The 2009 unconstitutional change of government only contributed to weakening the state a fraction further, and garnered widespread international attention, but it was part of a long misgovernance cycle and not an individual event. Governance and institutional weaknesses have consequently shaped Madagascar's three arms of government creating impediments in governance reform (Marcus, 2004 1-10, Mutua, 2016, 161).

Madagascar has always had a very strong presidency, dominated by the Malagasy elite monarchic descendants. The presidency has limited accountability, with no proper checks and balances. Consequently, various presidents have changed the constitution, tied up political parties and religious elite as well as civil society within a form of neo-patrimonial and rent-seeking relationship blurring any possibility for accountability (Marcus, 2016, 3; Marcus 2004, 4, 14). The legislature has displayed incapacity in managing and constraining presidential powers. Most importantly, the judiciary, has not effectively played its role over the years, failing to act independently, constantly plagued by corruption and acting more as an extension of the presidency. This has in itself created appearances of bias and built lack of trust from the public (Mutua, 2016, 161, 168).

The constitutional system of Madagascar has garnered significant interest in literature and debates on the country's fragile institutions. The system was inherited at independence from the French, but it has also been strongly influenced by numerous unilateral amendments carried out at the instance of its presidents (Marcus, 2004, 2). This has had the effect of galvanising power in the presidency, leading to patrimonial relationships between arms of government and blurring the public and private dichotomy which have immensely contributed to violations of rule of law and Madagascar's political crises (VonDoepp , 2013,

45). Madagascar's Constitutions have thus been political compromises constantly failing to safeguard political excesses. This has limited their ability to maintain checks and balances, encouraged predatory personal networks, and failed to safeguard healthy political competition, thus favouring business and political elites. [16] These constitutions have also failed to protect the institutional independence of the institutions they set up, or represent the will and reality of the Malagasy people (Marcus, 2004, 3; Mutua, 2016, 161, 168). The Constitutions have been more or less used by those in power to galvanise their positions.

This would explain the politically motivated amendments with each new presidential reign. The 1992 Constitution got revised in 1995, 1998 and 2007, becoming a malleable document without power to address institutional imbalances or ensure political checks, eventually resulting in the 2009 crisis (Marcus, 2004, 3-5). A good illustration of the weaknesses within the Constitutions can be seen in the effort put in the negotiation for the 2010 constitution, and its results. The debates over this constitution, involved Malagasy from all walks of life: legal, policy experts, judges and judicial experts as well as academics and civil society. Yet, the document that was finally unveiled failed to reflect the inclusive and rich debates that had preceded it. It too became a political compromise, blurring roles and jurisdiction, and centralising power in the presidency once again (Marcus, 2016, xiii).[17]

Another illustration of constitutional weaknesses is the relationship between the presidency and the judiciary. While the juridical structure is relatively sound in writing, in practice it is subservient to political and economic exigencies (VonDoepp, 2013, 45- 46). When it comes to issues of judicial independence, the president of the Republic of Madagascar has a strong

[16] Cultural norms and fluid personal networks led to a limitation in who could politically compete. With the most powerful elites getting more opportunities than others.

[17] See art 107 of the 2010 Constitution which links the president's executive power to judicial oversight; Note that a revised Article 54 of the Constitution of the Fourth Republic of Madagascar now establishes a new semi-presidential system.

influence over the judiciary. The constitutional safeguard of an independent justice system is actually weakened by the same constitution giving the president so much power over the judiciary (Constitution, 2010, Art 107, 114, 216-232). The president appoints the head of the superior court, the overseer to the judiciary/magistrature, most of the higher court justices, and influences the appointment of remaining judges. This defeats the theory of separation of powers and completely dilutes the doctrine of judicial independence and fair trial standards (Marcus, 2016, 60). An analysis of decisions of the HCC in relation to presidential elections illustrates neopatrimonialism and lack of judicial independence. For instance, the court has always voted and decided in favour of the "sitting favourable president," drawing on common law to interpret constitutional provisions in a crafty manner and in favour of political opportunism (HCC, 2009; Marcus 2004, 7; Decree No 2001 – 1081, 2001).

Nevertheless, the Judiciary in Madagascar has tended to survive better than other institutions, even though tenure is problematic because judges are politically appointed. This is because the institutional framework of courts has remained unaltered by political changes. However, the biggest struggle for the judiciary and justice mechanisms is corruption which has resulted in poor public image and complete loss of trust by the public. The Judiciary is considered one of the most corrupt institutions in Madagascar. This has severely affected trust, with the general public being weary of judicial processes and decisions (VonDoepp, 2013, 46; Schatz, 2019, 1). According to reports linked to corruption surveys, Malagasy people believe that there is outright impunity from the perpetrators of corruption.[18] This is because even well-known cases never seem to get much traction. This is attributed to political interference in the interest of shielding perpetrators from investigation or prosecution. The judiciary is thought to be powerless against people who have either political connections or are wealthy enough

[18] 76 percent of Malagasy believed corruption had increased in Madagascar since 2018, according to the 2019 Global Corruption Barometer – Africa Survey; 44 percent of Malagasy believed that police and gendarmes were involved in corruption; 39 percent believed the same of judges and magistrates.

to bribe officials. These perceptions have undermined the application of law and the implementation of public policy (Pring and Vrushi, 2019, 41).

Levels of corruption are considered to be the same at higher and lower levels, but it is within the lower levels of courts where petty bribery is reported consistently and has often been investigated and prosecuted. This perception of extreme corruption within the judiciary, especially within the low level ranks of the judiciary has been linked to economic factors such as inadequate salaries, and sometimes just greed. This is thought to have created a complex web of wealthy litigants versus improperly remunerated civil servants. Consequently, there is a prevalent belief that justice is unevenly meted out in Madagascar (Marcus, 2016, 61; VonDoepp, 2013, 45-46) .

Inevitably, fatalism and public compliance have fuelled the cycle of corruption. Poor litigants routinely experience predation from state authorities with legal mandates and feel obliged to foot the bill in order to access justice in any form (VonDoepp, 2013, 45). Efforts put forward by the Ministry of Justice to address the status quo have failed to change this cycle. For instance, over the last few years, with the support of international donors, programs targeting to eliminate corruption have been introduced. These have included, improvements in physical and electronic infrastructure, training for judicial officers, neighbourhood justice initiatives and legal assistance for the poor. This has also been coupled with institutionalised anti-corruption efforts, through support or conditionalities for setting up anti-corruption bureaus, their staffing, training as well as policy overhaul and legislative solutions (Ravalomanda, 2005, 121; VonDoepp, 2013, 47; Schatz, 2019, 2).

The anti-Corruption Judiciary Unit (CPEAC) *Chaîne Pénale Economique et Anti-Corruption* was one of such programs. It was put in place in May 2004 in order to address institutional weaknesses identified above. It was constituted of seconded Magistrates (public prosecutors,

judges and investigating judges) from six provincial courts including the Tribunal and Court of Appeal of Antananarivo.[19] This composition was based on the level of competence and integrity of these justices. The justices were specially trained with respect to corruption and financial crimes. Some police, gendarme officers and clerks were also part of the institution, making it a one-stop anti-corruption judicial office (Schatz, 2019, 1). The mandate of CPEAC was to prosecute, investigate and make decisions in relation to corruption cases referred by various anti-corruption bodies, including the Independent Anti-Corruption Bureau (BIANCO).

The CPEAC struggled with corruption, funding, staffing and was seriously challenged in demanding accountability of the most powerful leading to low conviction. The unit could only review very few cases referred, limiting itself to investigating corruption within local tribunals in the capital (Ravalomanda, 2005, 123; Schatz, 2019, 1-2). In 2016, Law No. 2016-020 of August 22 on the Fight against Corruption, created specialised stand-alone Anti-Corruption Poles (Courts) (PACs) which replaced CPEAC. Underpinned by a stronger legal framework and covering all provincial capitals of Madagascar, these courts are meant to address the administrative and jurisdictional difficulties faced by CPEAC.[20]So far, adjudication and conviction rates have increased, however the recent establishment of the Higher Court of Justice in 2018 with parallel jurisdiction for prosecuting and convicting high-level politicians, undermines these courts. In addition, the question of financial autonomy in the absence of strict budgetary allocations could interfere with the independence of these anti-corruption courts (Schatz, 2019, 5-6).

[19] Created through Inter-ministerial Circular No. 001/MJ/MDN/SESP of July 2, 2004.

[20] The National Coordination Directorate of Anti-Corruption Poles (DCN) and The Anti-Corruption Poles: From the Criminal Economic Anti-Corruption Chain (CPEAC) to the Anti-corruption Poles (PAC) at https://www.dcn-pac.mg/historique.htm accessed on 06-02-2022.

BIANCO which was behind the reform of CPEAC, was also formed in 2004 with the intention of regularising institutional oversight and redressing the politics of self-aggrandization. The specific practice targeted was a common occurrence in Madagascar and in Malagasy communities called *hafaliam-po* (gratitude) (Schatz, 2019, 1). Low-level cases related to the practice were concentrated and resolved within investigative tribunals in the capital, the rest were predominantly sent for judicial review (Marcus, 2016, 37). BIANCO became active and effective at routing out low-level corruption, but failed to address all complaints, including Grande-corruption which was much more concerning. Several factors have limited its mandate including the fact that like CPEAC, it faces constraints in holding the powerful accountable. It is also housed in the President's office, making it impossible to hold those in executive office accountable because it accounts to them. Just like other oversight bodies struggling with executing their mandates in Madagascar, BIANCO prescribes accountability, but lacks the power to exercise mandate over those at higher level who are un-accountable. The organisation has also faced budgetary constraints, political interference, capacity constraints and limitations in accessing information. The result has been that the potential of this very necessary accountability institution has been curtailed, as it struggles with lack of trust from the public, credibility issues and appearance of nepotism in investigated cases (Marcus, 2016, 37). It is hoped that the overhaul of CPEAC into anti-corruption courts will address some of these issues.

Lastly, judicial corruption and perceptions about it are also fuelled by institutional issues related to lack of proper training, and extremely complex judicial procedures that are barely understood by functionaries at these levels.[21] For instance, the limitation or lack of properly

[21] The Malagasy legal system as inherited from the French is complex and outdated. This coupled with outdated court procedures and archaic texts, increases opportunities for corruption. Complex and burdensome prerequisites decrease the accessibility of justice and in order to come to a fast resolution of a case, bribes are solicited and offered. Judicial reforms would increase public access to legal information and make judicial procedures clearer and less complicated in order to encourage a speedy resolution of disputes.

trained staff results in overworked and undercompensated judicial functionaries (Ravalomanda, 2005, 123-124). The lack of transparency in the process of recruitment, as well as lack of continuous training, especially in judicial ethics, proper case reasoning and understanding of judicial procedures, also leaves these judicial functionaries open to manipulation. Most importantly, the limited transparency on the education, training and qualifications of people who take on these roles, as well as limited transparency in procedures of promotion and retainment, affects the conduct and mannerisms of judicial officers within all levels of the judiciary. Perhaps a better, systematic, transparent system, with checks and balances, offering proper security of tenure and salaries would strengthen the judicial system, ensuring that judicial functionaries are free and comfortable to perform their functions without fear or favour. Early special measures to safeguard the integrity and independence of the newly created anti-corruption courts offer noteworthy prospects (Ravalomanda, 2005, 123-124; Schatz, 2019, 4-5).

4. Justice Under Plurality

This section engages with the reality of plural normative systems in Madagascar and their consequent influence on how institutional justice is conceptualised within and across formal and informal justice institutions. It unpacks community rules (*Dina*). which have influenced how Malagasy justice institutions have worked in rural areas, crossing the formal and informal realms, predominantly personalising every aspect of public life. The section goes on to employ the *Dahalo* crisis to argue that the evolution of violent cattle theft in Madagascar and corresponding violent security sector responses (police, gendarmerie, military and special units), mirrors the anatomy and persistence of other crises of the Malagasy state and its institutions, including the justice sector. It reflects external misconceptions, competing

pluralised norms and the personalisation of power through judicial predation. The result is increased incidences of mob justice and overreliance on, or misuse of the unregulated *Dina* (traditional justice) which has increasingly meted out severe capital sentences violating rights at the expense of justice.

4.1. Gendarmerieing the *Dahalo*: Ritual, Rural Banditry and Rights

Cattle raiding has been a feature of Malagasy rural life for centuries (Randrianja and Ellis, 2009, 93; Kneitz, 2021, 325). Zebu cattle have been a source of capital and social status in the region, often influencing a 'local sport' of their theft among the male youth (Goetter, 2016, 13,15).[22] This earlier cultural trend has over the years transformed through foreign meat demand into the violent and organised armed gang crime of cattle rustling, often leading to the displacement of villagers, death, destruction of property and insecurity in affected regions (Goetter, 2016, 13).[23] Southern localities remain the most affected regions, constantly plagued by indiscriminate shootouts between *Dahalo* (Zebu thieves) and armed security forces or vigilante groups. These events escalated with operation "Tandroka" in 2012, followed by operation "Coup d'Arrêt" conducted by the National Gendarmerie in 2014 and finally operation "Fahalemena" conducted by the Armed Security Detachments (DAS) in 2015, all meant to restore security to the countryside (Pellerin, 2017, 19; CSO ICCPR Report, 2017, Art 64, 67 and 68).

The above forceful donor funded reassertion of the state's security capacity with regards to the *Dahalo* phenomenon, has resulted in a noticeable state presence within the countryside. However, it has not necessarily been effective due to widespread indifference, ethical

[22] Cattle rustling as a cultural practice, involved the stealing of one or two bulls as part of rites of passage or to provide for the bride's price.

[23] Affected regions include: Mahajanga, Toamasina, Toliara, Iakora and Vohemar.

incapacity and internal collaboration (Pellerin, 2017, 18; DCAF-ISSAT, 2017, 3). For instance, the anti-*Dahalo* special unit (Unité spéciale anti-DahaloUSAD) has been strongly equipped, yet, its operations like those of several other mushrooming special units with overlapping and vague mandates, have been marred by rights violations and impunity (Pellerin, 2017, 19; DCAF-ISSAT, 2017, 3).[24] The obvious links between some high-ranking state officials, security services and criminal groups contribute to this trend. It is public knowledge that *Dahalo* gangs are regularly headed, trained or armed by former members of the military, gendarmerie or other security forces (Pellerin, 2017, 17; DCAF-ISSAT, 2017, 3). Thus, when security forces are ordered to enforce the law and apprehend *Dahalo*, they tend to kill them rather than have them appear in court and potentially testify to those links (Pellerin, 2017, 15; DCAF-ISSAT, 2017, 3).

Accordingly, villagers in southern parts of the country have also organised themselves into armed security groups, or employed vigilantes, soldiers or gendarmes to protect their people and animals (Pellerin, 2017, 15; DCAF-ISSAT, 2017, 1; Faundez, 2011, 36; Kneitz, 2021, 321). Blame for the increase in cattle raids has been directed at government and state agencies for failing to combat the raiders due to idleness or corruption. However, consequences of the 2009 political crisis, including economic decline and weakened government institutions are underplayed. Consequent lack of accountability, leading to heightened impunity, combined with poverty that haunts the countryside, must be acknowledged as part of the crisis in order to find solutions. Other contributing factors include environmental change and social change which have diluted systems of cultural accountability as well. For instance, the recurrent crises have led to economic survival,

[24] Established in Mahabo, Betroka district; See Amnesty International, Annual Report for Madagascar 2015/16, which criticised operation “Fahalemena 2015”.

breaking down traditional values which were relevant for communal responsibility, security and resilience (DCAF-ISSAT, 2017, 2; Goetter, 2016, 15).

The right to life and fair trial have been the most compromised during cycles of crises in Madagascar, despite the country signing up to the International Covenant on civil and political rights (ICCPR, 1966, Art 2, 6, 14; OHCHR, 2017, Art 25-28 & 45). Failure of state machinery to address the impunity around indiscriminate loss of life for victims and perpetrators, or provide remedies for loss of property, has resulted in accepted violence, ill-treatment, torture and gruesome killings in Madagascar's countryside.[25] For instance, summary and extrajudicial execution by police, the military and Gendarmerie who are either hiding crimes they are complicit in, or seeking a shortcut to securing the countryside has been ignored. This is compounded by mob justice by Malagasy villagers who do not believe that justice would be served in a corrupt and ineffective justice system.

The criminal justice response is clearly inadequate and even ineffective. Most lawsuits end in dismissal, mistrial, or a verdict of innocence owing to various constraints: including failure to prove individual criminal responsibility, collective crime, lack of evidence, the difficulty of identifying perpetrators, and sometimes self-defence is falsely invoked (CSO ICCPR Report, 2017, 20). Key underlying hurdles are therefore judicial and police corruption, lack of adequate security, procedural mistakes and delays within the penal system. There is also lack of proper promotion and understanding of human rights within a criminal justice context, with the law against torture failing to be comprehensively linked to the justice and security sector training on, or reform of the Criminal Code and the Code of Criminal Procedure (CSO

[25] UNGA-HRC fourth periodic report of Madagascar (CCPR/C/MDG/4) 2017 at 15; See Amnesty International Report on Madagascar 18/19; UNGA-HRC CCPR 2017 Report, art 85-91; ICCPR Art 6, 7 and 24 on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, summary or extra judicial executions and enforced disappearance; See Madagascar's Law Against Torture Law No 2008-008 of 25 June 2008.

ICCPR Report, 2017, 29).[26] This is an important aspect to address in order to ensure that when justice is being served through the penal system, it is done fairly and in a manner that does not violate human rights. From a security point of view it becomes more about ensuring sustainable peace in the countryside and promoting human security, as opposed to just achieving security at any cost. This approach must not just end with the formal justice sector, but must be reflected in the informal justice systems (*Dina*) in order to curtail human rights violations, unfair trials, ensure due process or at least substantive justice and curtail mob justice, thus bringing the law back in and facilitating a proper rule of law environment (Mutua, 2016, 168).

4.2. The Dina, Rights and Criminal Justice

Traditional justice in Madagascar is governed by the *Dina*, ie localised traditional agreements. The *Dina* are collective agreements in writing or orally, freely adopted by the majority of members of the *Fokonolona* (community assembly) (Mclain *et al*, 2021, 17; Karpe *et al*, 2007). They allow them to adopt measures they deem necessary for their security in light of their local social and economic life. *Dina* can consequently introduce a system of collective discipline to keep order and maintain public safety. These *Dina* or rulemaking institutions have their origin in pre-colonial governance structures. *Dina* were traditionally adopted by the *fokonolona* and then consecrated through ritual oaths. The oaths were pacts among community members that involved *Zanahary* (God), the ancestors, and spirits of the locale (Mclain et al, 2021, 17; Karpe *et al*. 2007).

[26] See also Law No. 2016-17 of 22 August 2016 which amended and supplemented parts of the Code of Criminal Procedure without reflecting the above concerns.

They have been recovered in post-colonial contexts to reassert Malagasy cultural values, but also to support the judiciary. The *Dina* remains widely practiced and relevant in rural areas due to cultural affinity, justice inaccessibility and loss of trust in the judiciary (Francken and Minten, 2005, 5-6; Faundez, 2011, 36; Kneitz, 2021, 321). Due to limitations in dispensing justice arising from the low number of judges and lack of adequate judicial outposts in hard to reach areas, there has been effort to integrate these culturally embedded traditional courts (Humber *et al* 2015, 76). The *Dina* are officially regulated by Law No 2001-004 of 25 October 2001 (CSO ICCPR Report, 2017, Art 246, 247).[27] The *Dina* oversight law was passed as a compromise after acknowledging limitations in accessing formal institutional justice. It therefore bridges official justice with informal, or traditional justice (CSO ICCPR Report, 2017, Art 246; Karpe *et l*, 2007). However, the idea of a bridge strongly depends on having an effective justice and security sector apparatus within rural peripheries to oversee the process, which is currently lacking. Complications of a fragile country, with limited law and order mechanisms, have resulted in almost an absence of state justice apparatus within rural areas of Madagascar. Limitations in infrastructure as well as financial resources have also made it difficult for institutional justice systems found in urban areas to be quickly deployed to address justice issues in rural areas.[28] A further limitation emanates from the distrust levelled against law and order mechanisms, including courts which are considered highly corrupt and unfair (Faundez, 2011, 36).

Accordingly, the law provides for the *Dina* to be used only for the adjudication of civil disputes, and subjects related decisions to the approval of a competent official court before they are recognised (*Dina* Law, s 2, Art 7-9). This rarely happens. Whilst the content of the *Dina* law is meant to only validate local custom and clarify national legislation without

[27] Law No. 2001-004 on the General Regulation of *Dinas* in Terms of Public Security. Antananarivo, Madagascar. 25th October, 2001.

[28] Lack of adequate police vehicles, or inaccessible roads.

contradicting it, the cumbersome and ineffective process of formally approving the *Dina*, has led to an increase in non-official *Dina* which are adopted outside the legal frameworks (CSO ICCPR Report, 2017, Art 253; Kneitz, 2021 331).[29] In the absence of a functioning institutional justice system, including official police, gendarmeries or courts, the unregulated *Dina* remains the only predominant source of security and justice in rural Madagascar, including in cases involving cattle rustling (CSO ICCPR Report, 2017, Art 246; Francken and Mitten, 2005, 4; Kneitz, 2021, 321).

Due to this, it is argued that recourse to the *Dina* may in fact contribute less to security and justice, as the fairness, uniformity and success of the system is widely varied and therefore questioned. Yet, success of the *Dina* is of course greatly noted where they are developed through participatory approaches and linked to community aspirations for bottom up justice and governance, taking a less centralist approach (Huber *et al*, 2015 77). Nevertheless, increased efforts to use the *Dina* system for criminal cases in order to make up for justice shortages have been met with criticisms. This is because within this pluralist legal system and country, using the traditional legal system for civil disputes might not raise alarms if well regulated (Marcus, 2008, 85). It might even increase accessibility, yet it is easy to argue that criminal justice might require formalised state procedures especially where it offers capital sentences.

Alarmingly, criminal decisions through *Dina* issued by traditional courts are predominantly not subjected to the procedural oversight of formal court systems. Considering the hefty, inconsistent and excessive punishments imposed for criminal cases (including in *Dahalo* incidences), this is worrying (Marcus, 2016, 60). The indiscriminate passing of punitive sentences such as corporal and capital punishment without the necessary authorisation

[29] Concluding observations of the Committee against Torture, Madagascar, U.N. Doc. CA T/C/MDG/CO/1 (2011), Art 11; For instance the requirement to deliver seized bandits to corrupt state security forces and courts is considered counterproductive.

amounts to abuses and violations of national and international law. However, because communities have better recourse to the unauthorised *Dina* when offences are committed, the likelihood of enforcing such without taking valid laws into account is high (CSO ICCPR Report, 2017, 47).

Notably, Traditional systems such as the *Dina* which provide measures to address cattle rustling, through a community mode of judgement and also award reparations, are a resource for providing quick compensations to the owners of stolen cattle and addressing the question of remedies, which has bred impatience and contributed to mob justice (DCAF-ISSAT, 2017, 3, Faundez, 2011, 36; Karpe *et al*, 2007). Yet, because the *Dina* system also accounts for some forms of excessive self-defence and embodies popular militias that can quickly exceed legal limits, particularly where state control is weak, properly subjecting it to government oversight remains key. This can be through empowering and training more administrators that are required to formalise its decisions, including within local courts. This will not only ensure some level of regularisation and harmonisation in its diversity at different levels (from the village to the region), but also create an opportunity to benchmark traditional justice approaches against human rights principles and ensure rights violations do not occur (Toomey, 2010, 156; Ubink, 2011).

Of course the above suggestion has implications for the development of this legal pluralism. There is a danger of ossifying the traditional practices embedded within the *Dina*, as well as simplifying it, hollowing out its diversity or opening it up to elite capture, as has been the case in Madagascar. This centralist suggestion also presumes the centrality, and or effectiveness of state institutions and their priority in hierarchy, but since such is contested especially in rural Madagascar, non-state systems might remain key and will possibly self-regulate (Janse, 2013, 189; Faundez, 2011, 21, 27; Kneitz, 2021, 321). Because there are many decisions that are taken through unrecognised *Dinas*, in the absence of judicial

monitoring for all *Dina* agreements, human rights training could also be mainstreamed into all traditional justice mechanisms that are responsible for rendering criminal justice.[30]

The amnesty programmes for Dahalo (*Dahalo miova fo*) which attempted to integrate former *Dahalo* into communities by using them to support the security of *fokonolonas* (villages) and main roads, followed similar reasoning (Pellerin, 2017, 20; DCAF-ISSAT, 2017, 3). Their knowledge of gangs operational approaches, proved very useful for building security programmes and anticipating ambushes (Pellerin, 2017, 20).[31] However, the disorganisation and economic incapacity of the Malagasy state, could impact the maintenance of these programmes. With institutional weaknesses, corruption and lack of proper coordination centrally, these programmes, which have socio-economic implications for former *Dahalo* who participate, could fail (DCAF-ISSAT, 2017, 3). Such failure could affect integration, and lead to reactivation. Therefore, any programme intent on restoring the rule of law in Madagascar, must also consider upholding government commitments and consolidating these bottom-up amnesty processes (Pellerin, 2017, 20).

5. Conclusion

The rule of law as a concept has promised too much, and delivered too little, predominantly because it has been based on assumptions that systems that have worked in western parts of the world, will work and stabilise developing parts of the world where it is transplanted to. That is not to say there is no potential in such a wide and "do good" concept that preaches possibilities. The rule of law can be adopted as a reconstruction concept, to realities in post

[30] Concluding observations of the Committee against Torture, Madagascar, U.N. Doc. CA T/C/MDG/CO/1 (2011), Art 11.

[31] *Dina Melanky* which was led by a former *Dahalo* has provided security for the Fohara people. *Dina n'y melaky tsy mipoly*. (in the Melaky region) was approved by court once the death penalty it provided for was removed; CSO ICCPR Report, 2017, Art 251.

conflict and developing countries. Key though must be the role of these countries, their people, their civil society, their needs and their norms. Such participation must not be the propped up kind, where civil society and the public is invented through training and facilitation and suited to playing partners for western rule of law ideals.

Clearly, Madagascar needs a rule of law driven reconstruction, including the reform of its political and legal institutions to ensure inclusive justice and development. However, this will require development and reconstruction programmes initiated in Madagascar to reconcile the need for economic prosperity with the promotion of social justice, equity, and inclusive poverty-reduction strategies relevant for all Malagasies (World Bank, 2010, 10; Santos & Trubek, 2006, 7-9). This is because Madagascar is not different from other African post-conflict countries that have failed to consolidate political and civil will as a result of inequality and lack of trust in existing weak institutions. For instance, Madagascar's political landscape is represented by a few elite players who have over years failed to inspire credibility from the Malagasy community.[32] This is embedded in Madagascar's economic disparities which stem centuries back, with consequences of vast class and other inequalities, leaving the majority of Malagasies in rural poverty and insecurity.

Consequently, whilst there are no longer signs of violent all blown out conflict, the dissatisfaction and dispossession, including the insecurity, that most Malagasies live with, has led to apathy, fatigue and low level intensity crises that are widely distributed throughout the country. The lack of institutional structures or political will to address the above issues, has resulted in people losing the will to hold government accountable, or rely on, much less, trust government institutions, including those responsible for dispensing justice, or

[32] Interview conducted with Search for Common Ground Officer (SCG) Antananarivo, Madagascar in November 2015

maintaining order and accountability. Whilst legal frameworks providing for relevant issues do exist, there is disparity between the position of laws and what actually happens on the ground. In fact, the laws themselves at times conflict with one another, are outdated or improperly implemented. Most importantly, the institutional breakdown and impunity devalues confidence in implementation of such laws.

Incidentally, as a result of inaccessibility and broken trust between people and authorities, the accountability and justice vacuum has been replaced by localised justice approaches that are built into Malagasy traditional structures (*Dina*). The use and relevance of such institutions has increased with the rise of property insecurities such as violent cattle theft which plague rural communities. Such thefts have bred inequality, poverty and anger resulting from frustration with the obvious lack of institutional justice. The dissatisfaction thereof has in most instances led to mob justice, extra judicial and summary executions by complicit state actors and excessive capital punishments within traditional justice institutions that remain the only available and reliable forum for accessing justice. Key to this justice and accountability vacuum are human rights violations including, loss of life, destruction of property and villages, and population displacement as a result of the indiscriminate and violent exchanges between the *Dahalo* and security forces or vigilantes.

These events have an impact on the development of a proper rule of law environment in Madagascar. The injustice resulting from lack of access to formal legal institutions, improper implementation of legal mechanisms, and corruption that influences outcomes within formal institutions have an impact on how the rule of law is understood and viewed (Ouédraogo, 2014, 3-4). Lawlessness through mob justice, summary and extrajudicial execution by state actors, and unregulated and excessive punishments through traditional justice institutions also affect how rights are understood and protected. The complex matrix between rights and

justice in Madagascar has bred an unlawful rule by law, where "justice" is promoted at the expense of rights.

There is need for reconciling state and community institutions in order to deliberate on the indicators of, and most viable solutions to the national and local crises and rebuild trust and inclusion in formal institutions, whilst democratising the informal ones. [33] This could include rebuilding and re-enforcing institutions such parliament and courts, and ensuring reform and proper implementation of the constitution. Proper separation of powers within the constitution, and a form of government system that endorses oversight are lacking, but necessary. Strong, transparent and accountable institutions, including a strengthened and engaged civil society, can redress the personalised politics and clientelist approach to governance.

There is also need to redress the crisis of rights violations within informal institutions by perhaps appealing to their restorative frames which embed human rights values. This would forge a renewed justice system and legal order that advances internationally recognized human rights whilst respecting local norms, restores public confidence, and strengthens the character of civic society. The importance of these aspects and their role in triggering or limiting conflict cannot be overemphasised, since human rights violations, marginalisation, discrimination and injustice breed and fuel conflicts. Ensuring that a post crises environment limits and addresses lawlessness, injustice, institutional weakness, marginalisation and human rights abuses is important for the reconstruction project.

[33] Interview conducted with Search for Common Ground Officer (SCG) Antananarivo, Madagascar in November 2015

REFERENCES

Francken , N., & Minten, B. (2005). *Security And Perceptions On Justice In Rural Madagascar In Dynamics in Social Service Delivery and the Rural Economy of Madagascar: Descriptive Results of the 2004 Commune Survey* . Retrieved February 6, 2022, from http://www.ilo.cornell.edu/images/chapter5.pdf

Ouédraogo, É. (2014). (working paper). *National Security Strategy Development* (Ser. Madagascar Case Study Working Paper-Preliminary Draft). Washington D.C: Africa Center for Strategic Studies.

Ratsimbaharison, A. (2021, April 15). *Didier Ratsiraka: the legacy of Madagascar's "Red Admiral"*. The Conversation. Retrieved February 6, 2022, from https://theconversation.com/didier-ratsiraka-the-legacy-of-madagascars-red-admiral-143017

Achu, N. C. (2020). Mediating Nation-Building in Post-colonial Africa: Addressing the Security and Development Nexus on the Continent. In S. O. Oloruntoba & T. Falola (Eds.), *The Palgrave Handbook of African Political Economy* (pp. 947–961). Palgrave Macmillan.

Adelman, S., & Paliwala, A. (Eds.). (2021). Introduction . In *The limits of law and development: neoliberalism, governance and social justice* (pp. 1–12). Routledge, Taylor & Francis Group.

African Union (AU), African charter on democracy, elections and governance (ACDEG) (2007). Addis Ababa, Ethiopia; African Union .

African Union, Policy on post-conflict reconstruction and development. Adopted in Banjul, July 2006; As per EX.CL/191(VII) in Sirte, Libya, of July 2005 (2006). Addis Ababa, Ethiopia; Conflict Management Division, Peace and Security Dept., Commission of the African Union.

African Union, Protocol relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol), adopted at First Ordinary Session of African Union Assembly 9 July 2002, Durban, South Africa (2002). Addis Ababa, Ethiopia; African Union.

African Union, The African Union (AU) Constitutive Act, 2001 OAU Doc. CAB/LEG.23.15 adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government 11 July 2000, Lome, Togo (2000). Addis Ababa, Ethiopia; African Union .

Amnesty International Madagascar . (2018). *Punished for being poor: Pre-trial detention in Madagascar*. Punished for being poor: Pre-trial detention in Madagascar | Amnesty International. Retrieved February 6, 2022, from https://www.amnesty.org/en/latest/campaigns/2018/10/madagascar-prison/

Bertelsmann Stiftung (BTI). (2020). (rep.). *Madagascar Country Report*. Gütersloh: Bertelsmann Stiftung .

Bingham, T. H. (2011). *The rule of law*. Penguin Books.

Center for Civil and Political Rights (CCPR) Madagascar , ACAT Madagascar, & FIACAT . (2017). (rep.). *Civil society report on the implementation of the International Covenant on civil and political rights (ICCPR) (Responses to the CCPR / C / MDG / Q / 4 checklist). Submitted in consideration of Madagascar's 4th Periodic Report CCPR/C/MDG/4 at the 120th session of the Human Rights Committee (July 2017)*. Antananarivo, Madagascar: ACAT Madagascar .

Charlotte , H. (2020). The Judiciary and the Rule of Law in Africa. In N. Cheeseman (Ed.), *The Oxford Encyclopedia of African politics*. Oxford University Press.

Davis, K. E., Fisher, A., Kingsbury, B., & Merry, S. E. (2012). Introduction: Global Governance by Indicators . In *Governance by indicators: Global power through quantification and rankings* (pp. 3–28). Oxford University Press.

Decree No. 2001-1081 on Ratifying Higher Constitutional Court Appointments. Antananarivo, Madagascar. 22nd November, 2001.

Dewar, B., Massay, S., & Baker, B. (2013). (issue brief). *Madagascar: Time to Make a Fresh Start*. London: Chatham House .

Dicey, A. V. (1985). *Introduction to the study of the law of the Constitution* (10th ed.). Macmillan.

Faundez, J. (2011). Legal pluralism and international development agencies: State building or legal reform? *Hague Journal on the Rule of Law*, *3*(01), 18–38.

Faúndez Julio. (2010). International Economic Law and Development: Before and After Neo-Liberalism. In Faúndez Julio & C. Tan (Eds.), *International Economic Law, globalization and developing countries* (pp. 10–33). Edward Elgar.

Fernandes, T., & Thompson, O. P. (2020). Counting Lives: Colonial Institutions and Africa's Prevailing Conflicts. In S. O. Oloruntoba & T. Falola (Eds.), *The Palgrave Handbook of African Political Economy* (pp. 877–890). Springer International Publishing.

Fombad, C. M. (2018). An overview of the crisis of the rule of law in Africa. *African Human Rights Law Journal*, *18*(1), 213–143.

Fukuda-Parr, S., Yamin, A. E., & Greenstein, J. (2014). The Power of Numbers: A Critical Review of Millennium Development Goal Targets for Human Development and human rights. *Journal of Human Development and Capabilities*, *15*(2-3), 105–117.

Goetter, J. F. (2016). The cattle raiders leave us no choice: New transhumance in the Mahafaly Plateau region in Madagascar. *Madagascar Conservation & Development*, *11*(1), 12–22.

Hauge, W. (2011). Madagascar between peace and conflict—domestic capabilities for peaceful conflict management. *Conflict, Security & Development*, *11*(5), 509–531.

HCC decision No. 03-HCC/D2 of 23 April 2009 (Govt Printers April 23, 2009).

Humber, F., Andriamahefazafy, M., Godley, B. J., & Broderick, A. C. (2015). Endangered, essential and exploited: How extant laws are not enough to protect marine megafauna in Madagascar. *Marine Policy*, *60*, 70–83.

Humphreys, S. (2010). *Theatre of the rule of law: transnational legal intervention in theory and practice* (Ser. Cambridge Studies in International and Comparative Law). Cambridge University Press.

Humphreys, S. (2012). Laboratories of statehood: Legal intervention in Colonial Africa and today. *The Modern Law Review*, *75*(4), 475–510.

International Security Sector Advisory Team (ISSAT). (2017). *Cattle Rustling and Insecurity in Africa: A Comparative Perspective*. International Security Sector Advisory Team (ISSAT). Retrieved February 6, 2022, from https://issat.dcaf.ch/Learn/Resource-Library2/Policy-and-Research-Papers/Cattle-Rustling-and-Insecurity-in-Africa-A-Comparative-Perspective

Jackson, J., Hough , M., Bradford , B., Pooler , T., Hohl, K., & Kuha, J. (2011). Trust in Justice: Topline Results from Round 5 of the European Social Survey . *European Social Survey* , *1*, 1–11.

Janse, R. (2013). A turn to legal pluralism in rule of law promotion? *Erasmus Law Review*, *3*(4), 181–190.

Jennings, E. T. (2017). *Perspectives on French colonial Madagascar* (Ser. Palgrave Series in Indian Ocean World Studies). Palgrave Macmillan.

Jowell, J. L., O'Cinneide, C., & Jowell, J. (2019). The Rule of Law . In *The changing constitution* (9th ed.). essay, Oxford University Press.

Karpe, P., Randrianarison, M., Rambinintsaotra, S., & Aubert, S. (2007). Judicial practice in land matters in Madagascar. *Law and Cultures*, *54*, 213–239.

Kneitz, P. (2021). In A. S. Steinforth & S. Klocke-Daffa (Eds.), *Challenging authorities: Ethnographies of legitimacy and power in eastern and Southern Africa* (pp. 319–345). essay, Palgrave Macmillan.

Kotzé Dirk. (2008). Post conflict reconstruction: new discourse, old theories. In Kotzé Dirk & H. Solomon (Eds.), *The state of Africa: post-conflict reconstruction and development*. essay, Africa Institute of South Africa.

Law No. 2001-004 on the General Regulation of *Dinas* in Terms of Public Security. Antananarivo, Madagascar. 25th October, 2001.

Marcus, R. R. (2008). Tòkana: The Collapse of the Rural Malagasy Community. *African Studies Review*, *51*(1), 85–104.

Marcus, R. R. (2016). *The politics of institutional failure in Madagascar's Third Republic*. Lexington Books.

Maunganidze , O. (2009). (rep.). *Madagascar: An anatomy of a recurring crisis* (Ser. Situation Report). Pretoria: Institute for Security Studies .

McLain, R., Ranjatson, P., Heidenrich, T., Rakotonirina, J. M., Nomenjanahary, A. R. F., & Razafimbelo , N. T. R. (2021). An exploratory review of legal texts and literature on Living Tenure Systems in Madagascar. *CIFOR*.

Merry, S. E. (2016). *The seductions of quantification: Measuring human rights, gender violence, and sex trafficking*. The University of Chicago Press.

Merry, S. E. (2019). The Sustainable Development Goals Confront the infrastructure of measurement. *Global Policy*, *10* (S1), 146–148.

Merry, S. E., Davis, K. E., & Kingsbury, B. (2015). Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance. In *The Quiet Power of indicators: Measuring governance, corruption, and the rule of law* (pp. 1–24). Cambridge University Press.

Mutua, M. (2016). Africa and the Rule of Law. *SUR-International Journal on Human Rights* , *13*(23), 159–173.

OAU , Lomé Declaration of July 2000 on The Framework For an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI) (2000).

Okoye, A. O. (2004). The Rule of Law and Socio-Political Dynamics in Africa. In P. T. Zeleza & P. J. McConnaughay (Eds.), *Human rights, the rule of law, and development in Africa* (pp. 71–80). University of Pennsylvania Press.

Organization of African Unity (OAU)., The African Charter on Human and People's Rights (ACHPR), adopted 27 June 1981, Nairobi, Kenya, 18th Assembly of Heads of State and Government, OAU Doc. CAB/LEG/67/3, rev.5 (1981). Addis Ababa, Ethiopia; Organization of African Unity (OAU).

Pellerin, M., Madagascar Dealing with Multifaced Crime Notes de l'ifri (IFRI-SSA Program, 2017)

Pring, C., & Vrushi, J. (2019). *Global corruption Barometer Africa 2019 - citizens' views and experiences of corruption*. Transparency international, International Secretariat.

Randrianja, S., & Ellis, S. (2009). *Madagascar a short history*. Hurst.

Ratsimbaharison, A. M. (2017). *The political crisis of March 2009 in Madagascar: a case study of conflict and conflict mediation*. Rowman & Littlefield.

Ravalomanda , T. H. (2005). Corruption control in criminal justice: the Madagascar situation, problems and solutions and corruption cases. In *Eighth International Training Course On Corruption Control In Criminal Justice* (Vol. , Ser. Resource Material Series No.71 2PA , pp. 121–130). Retrieved from https://www.unafei.or.jp/publications/pdf/RS_No71/No71_21PA_Ravalomanda.pdf.

Republic of Madagascar. (2010). *Madagascar's Constitution* . Constitute Project . Retrieved February 6, 2022, from https://www.constituteproject.org/constitution/Madagascar_2010.pdf

Sage, C., & Woolcock, M. (2012). Introduction: Legal Pluralism and Development Policy; Scholars and Practitioners in Dialogue. In B. Z. Tamanaha, C. M. Sage, & M. Woolcock (Eds.), *Legal pluralism and development: Scholars and practitioners in dialogue* (pp. 1–18). Cambridge University Press.

Sannerholm, Z. R. (2012). *Rule of law after war and crisis: Ideologies, norms and methods*. Intersentia.

Satterthwaite, M. L., & Dhital, S. (2019). Measuring access to justice: Transformation and technicality in SDG 16.3. *Global Policy*, *10* (S1), 96–109.

Schatz, F. (2019). *Madagascar's specialised anti-corruption court: The quest to end impunity*. CMI Anti-Corruption Resource Center -Bergen: Chr. Michelsen Institute (U4 Brief 2019:2). Retrieved February 2, 2022, from https://www.u4.no/publications/madagascars-specialised-anti-corruption-court-the-quest-to-end-impunity.pdf

Southern African Development Community (SADC). (1992). *Southern African Development Community Treaty*. Southern African Development Community Treaty . Retrieved February

6, 2022, from https://www.sadc.int/documents-publications/show/Declaration__Treaty_of_SADC.pdf

Tamanaha, B. Z. (2004). *On the rule of law: History, politics, theory*. Cambridge University Press.

Toomey, L. T. (2010). A delicate balance: Building complementary customary and state legal systems. *The Law and Development Review*, *3*(1), 156–208.

Trubek , D. (2009). "Rule of Law" in Development Assistance: Past, Present, and Future. In D. Trubek & A. Santos (Eds.), *The new law and economic development: a critical appraisal* (pp. 74–94). Cambridge University Press.

Trubek, D., & Santos, A. (2009). *Introduction: The new law and economic development: a critical appraisal*. Cambridge University Press.

Twining, W. L. (2009). *General jurisprudence: Understanding law from a global perspective*. Cambridge University Press.

Ubink, J. (2011). *Research and Policy Note: Customary Justice Sector Reform*. The Van Vollenhoven Institute, Leiden University. Retrieved February 6, 2022, from https://scholarlypublications.universiteitleiden.nl/access/item%3A2885563/view

UNGA United Res 2200A (XXI) of 16 December 1966. (n.d.). *International Covenant on Civil and Political Rights*. OHCHR. Retrieved February 6, 2022, from https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

UNGA, Human Rights Council Working Group on the Universal Periodic Review. 34th session 4–15 November . (2019). (rep.). *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Madagascar*. A/HRC/WG.6/34/MDG/1.

United Nations General Assembly , Transforming our world: The 2030 agenda for sustainable development: A/RES/70/1 (2015). New York; UN.

United Nations Human Rights Office of the High Commissioner (OHCHR). (2017). (rep.). *Human Rights Committee Concluding observations on the fourth periodic report of Madagascar CCPR/C/MDG/CO/4. Adopted by the Committee at its 120th session 3-28 July* . OHCHR.

United Nations. (2011). The United Nations rule of law indicators: Implementation guide and project tools. Retrieved February 2, 2022, from https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

VonDoepp, P. (2013). The Rule of Law and the Courts . In N. Cheeseman, D. M. Anderson, & A. Scheibler (Eds.), *Routledge Handbook of African Politics*. essay, Routledge.

World Bank. (2010). (rep.). *Madagascar: Governance and Development Effectiveness Review: A Political Economy of Governance in Madagascar* . Washington D.C: World Bank.