

Baseline Survey of the State of CUCs

Access to Justice and Public Participation in the Judicial Process:
An Analysis of Court User Committees in Kenya



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The Status of Court Users Committees (CUCs)

Report On the Findings



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REFERENCES

Reference 1

- **Site visit list**

Meru, Mukurweini, Kisumu, Nakuru, Kitui and Nyahururu

- **Cadre of institutions from which representatives were interrogated in the study**

Prisons, Police, Probation and After Care, Faith Based Organizations, Civil Society Organizations, Paralegals, Magistrates, Business Persons

Reference 2

- **Desk study information**

2-1 Address by the Chief Justice on the CUCs

2-2 Untitled internal analysis and reports of the state of CUCs conducted by the judiciary and KMJA

2-3 Transformation reports conducted by the judiciary such as the 'Ouko Report'

2-4 Constitution of Kenya

2-5 Judicial Service Act

2-6 Additional information

Reference 3

- **Additional References**

1. United Nations Development Programme's Commission on Legal Empowerment of the Poor, 'Making the law work for everyone' (2008) 1, 33.

2. C Parker, *Just Lawyers: Regulation and Access to Justice*, 1999, p 31

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Summary

This document represents the Baseline Study Report undertaken by ICJ Kenya with the support and partnership of Act Kenya and Pact as part of the judicial reform and transformation agenda to the KMJA for adoption and use as an advocacy for policy tool.

The history and application of Court User Committees (CUCs) vis a vis current analysis of the status of select user committees from different regions in the country together with the views of users of the justice system are reflected.

The information has been reviewed against international principles of access to justice as well as current needs of the users or stakeholders to determine possible the design and scope of a 'revamped' court users' program and, in particular, to identify the potential to achieve the intended objective: access to justice.

Pertinent barriers to the successful working of the CUCs have been summarized. The potential to apply the committees as currently constituted towards the realization and promotion of access to justice has also been analysed.

The conclusion of the study is that it is:

- Important that the CUCs be expanded to be more inclusive if they are to promote access to justice
- Important that the structure, objective and programs of the CUCs be standardized and formalized
- Imperative that the responsibility for ensuring frequency and regularity of meeting be shared
- Imperative that the outcomes of the meetings be documented

1.0 Introduction

The many years of frustration with the Kenyan justice system were attributed to a number of factors, including: a lack of faith and public confidence in the judiciary based on lengthy, complicated judicial processes; perceptions of comprised judicial officers; and a sense of mystery that shrouded the administration of justice. The Kenya Magistrates and Judges Association (henceforth 'KMJA') was convinced that involving the public in judicial processes through meeting with various stakeholders would foster mutual understanding, open the judiciary to public scrutiny and increase public participation in decision making. The intended outcome would be to help cure misconceived public perception of the judiciary, demystify judicial processes and change perceptions of judicial officers being unsuitable to serve the needs of their consumers. As a result, in 2006, the KMJA initiated the Court Users Committees (henceforth CUCs) aimed at mitigating frustrations that were being experienced by members of the public and judicial officers on judicial processes.

KMJA is a membership association concerned largely with issues pertaining to the welfare of its members. The formation of the CUCs outside the mainstream judicial structure naturally posed challenges of acceptance and application. It is in fact this formation history that has largely contributed to the uneven application and impact of the committees nationally as the form and direction it adopted was largely dependent on the drive and initiative of the Judge or Magistrate in charge.

The KMJA's objective is reflected in a reform agenda that aims to increase public accessibility to institutions as is mandated by the current Constitution of Kenya. The preamble recognizes the aspirations of all Kenyans for a government that is founded and based on the fundamental values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 159(1)¹ requires the judiciary, in the exercise of its judicial authority, to recognize that its mandate is wholly derived from the people.

The Constitution and the Judicial Service Act have now given credence to the CUCs by providing an opportunity to institutionalize them, clearly spelling out their membership composition, and having devolved the structures to the county level. Through the Council on

¹ Constitution of Kenya, 2010: 'Judicial Authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution'

the Administration of Justice, the judiciary has acknowledged the need to coordinate responses to criminal and other justice issues as well as implement reform initiatives in a collaborative and coherent manner.

Merely converting the CUCs as established and run under the KMJA initiative without determining the extent they meet the determinants set out in the Constitution and Judicial Service Act may prove counter productive. Information relating to their workings at the local level, which would inform strategic design and coordination mechanisms, is not readily available. The lack of or limited information among the key stakeholders who should participate in the CUCs, especially in the criminal justice system, has impacted the quick realization of the Constitution and Judicial Service Act requirements. In this context, stakeholders involved in the justice system include the Attorney General, the Director of Public Prosecution, the Inspector General of Police, the Commissioner of Prisons, the Law Society of the Kenya, the Public Service including officers responsible for women and children's affairs, associations dealing in legal aid, non-governmental organizations and the private sector².

At the same time, CUCs have no common agenda, no uniform curriculum, no uniform composition, no identified specific thematic needs nor capacity building initiatives that would strengthen the intended collaborative philosophy.

This baseline survey aims to strengthen the Kenyan judiciary as an avenue to realize human rights and access to justice by conducting stakeholder consultations and seeking their input and commitment to CUCs for increased functionality. The survey establishes the status of CUCs in the judiciary while tracking changing public demands of the justice system and making recommendations as to changes that need be incorporated in the scope and mandate of the CUCs for improved access to justice.

1.1. Scope and Methodology of the Study

The baseline constitutes of the following components:

² See Section 34 of Judicial Service Act, 2011 on the establishment and composition of the National Council on the Administration of Justice.

- Review of pertinent literature including legislation relating to Court Users Committees in particular the Judicial Transformative Framework.
- Solicited views from relevant stakeholders and, in particular, the judiciary, the Law Society of Kenya and civil society organizations including those that have worked and are members of CUCs such as FIDA Kenya, Kituo Cha Sheria, Kenya Human Rights Commission and Legal Resources Foundation.

The study was undertaken through a desk review of the available literature as well as through focus group discussions (FGDs). In addition individual interviews were conducted with specific groups of persons. The FGDs although initially intended to engage members of the various CUCs eventually targeted largely members of the ICJ Paralegal networks in select regions. The regions were selected on the basis of their levels of engagement with ICJ. Individual questionnaires were issued. One on one interviews were also conducted with some members of select CUCs. The one-on-one interviews largely targeted areas that were largely known to have functional CUCs.

1.2. Additional Focus Points

It is intended that other than presenting the findings the baseline will present insight on:

- The potential impact of CUCs as avenues for accessing justice
- Potential areas of policy advise that could impact on the judiciary's efforts to advance access to justice through Court Users Committees

2.0 Objectives

The objectives of this assessment report is to satisfy preparedness of converting the existing CUCs to those envisaged under the current legislative setup by:

- Identifying activities or processes applied by the CUCs that have promoted access to justice as well as those that have proved a hindrance;

- Identifying the strategies that have been applied that have promoted the functionality of the CUCs;
- Identifying and describing, if any, the limitations to use of the CUCs in promoting access to justice; and
- Assessing whether or not it is possible that the present structure of the CUCs will facilitate the realization of citizen participation in the judicial process as envisaged in the Constitution.

3.0 Desk Study Research Information

The following sections detail what emerged from the desk study information that was reviewed to determine the potential for CUCs to promote the realization of full participation as envisaged in the Constitution and the Judicial Service Act. It must, however, be noted that this is not an exhaustive outline and other sources of information may exist that have relevance.

3.1 History of the Establishment of CUCs

The voting in of the NARC government in 2003 saw revived interest in the push for judicial reform as the said coalition had sought election on a reform agenda. External push for such reform was equaled by internal endeavors within the judiciary to reform, albeit, under difficult circumstances. It is in line with these internal initiatives that the Kenya Magistrates and Judges Association (KMJA) in partnership with GTZ (now GIZ) conducted a study which revealed that integrity concerns amounted to less than 10% of the concerns of the citizenry on the delivery of justice. The most common concern was with backlogs and the inability of the courts to administer justice without undue delay. The study also revealed that the delays were caused not only by the judiciary but also by other actors in the court system. Following wide consultations, KMJA and GTZ developed three transparent and accountability mechanisms (TAM): Court Users Committees, Citizens Dialogue Cards, and Peer Review Mechanism.

It is through the passion and drive of the KMJA, with external pressure and support by various partners that led the judicial leadership to support the establishment of the CUCs. CUCs were established in most court stations in the country beginning in 2007.

3.2 History of the Implementation

The drive by KMJA to get its members to initiate and work with CUCs, together with the enthusiasm and support with which the initiative was met by partners, saw increased engagement of the judiciary in promoting the workings of the committees. The need to strengthen and establish CUCs is set out in the Judiciary Transformation Framework Programme that was initiated under the first Chief Justice (Hon. Willy Mutunga) under the current judiciary as established under the 2010 Constitution. The program saw the judiciary undertake a review of the status of the CUCs in all the court stations in the country. Out of the expected returns from 112 court stations, the Office of the Deputy Chief Justice received 86 CUCs status reports by December 2011. The reports indicated that more than 86% of court stations have established CUCs of which 75% were active.

For most of the court stations without an existing or active CUC, the major impediments to the formation and sustenance of the committees were financial constraints and lack of commitment from other justice sector stakeholders.

Other court stations cited different reasons for inactive CUCs such as newly formed stations and/or district (e.g. Mukurweini Law Court). In Kiambu District an early decision to form a single Committee for all stations precluded the formation of station level CUCs. However, most stations were in the process of forming CUCs in line with the transformation process.³

The interviews held with members of CUC in Kisumu and Nakuru as well as the interviews and focus group discussions held in Nyahururu, Meru and Kitui in the last quarter of 2012 indicate that the situation remains largely unchanged. Kisumu was more active than Meru where the workings and impact of the committee was yet to be felt. The Kitui discussions

³ The Judiciary Transformation Framework.

indicate that there was still a lot to be done if the local CUC was to realize its objective. For example, in Kitui 85% of the participants during the FGD were of the view that the CUC was only unknown in the region but needed to interact much more with the locals if the locals were to benefit from the CUC and if the CUC were to impact on the locals ability to access justice.

It is important to note that at the time of this study Mukurweini had an active CUC that included members of the provincial administration contrary to the information available from the literature review which included reports that highlighted the need to establish CUC in all courts including in Mukurweini.

3.3 Other Related Information on CUCs

There has been little attempt to standardize the operations of the CUCs to date. Although a number of studies had been commissioned to look into the current state of the CUCs, the existence of these studies remains largely within the knowledge and accessibility of a select few. The findings have yet to be widely disseminated.

A myriad of issues already identified by both the struggling and the functional CUCs for redress were yet to be addressed. These include:

- Lack of clear guidelines and law to govern CUC operations, including clarify of CUC composition, responsibilities of members and mechanism for interaction with other CUCs.
- Lack of resources to fund meetings and activities such as capacity building for members to enable them to own and internalize the concept and objective of the CUC programme.
- Inherent apathy and non-commitment by stakeholders who view the forum as a solely judiciary issue. There is thus a tendency to delegate to junior officers, which impedes

meaningful participation or results in non-compliance with Committee resolutions. In addition, the apathy has seen stakeholders fail to incorporate the Committee objectives into their department deliverables so as to ensure sustainability even in the face of transfers. The notion of it being a judiciary initiative affects commitment to attendance in the face of challenges such as workload and transport.

The interviews conducted under the current study revealed that most members of the CUCs relied solely on the magistrates to coordinate the meeting. None of the members indicated that meetings were convened at their initiative.

3.4 Records of Control/Formation and Implementation Techniques

The only available record of what is expected of a CUC is the composition and membership adopted from the Judicial Service Act in its reference to the establishment of the National Council for the Administration of Justice. The composition is also largely reflective of the findings in the July 2010, Final Report of The Task Force on Judicial Reforms that was chaired by Hon. Mr. Justice William Ouko (popularly referred to as the 'Ouko Report'), even though a number of magistrates confessed to not having read the report. As a result, the membership is 'traditionally' composed of: the senior-most judicial officer who is the chairperson; police, prisons, children's, and probation officers; and such other members as may have been determined by each CUC. In some locations, in addition to the aforementioned 'primary' members, faith based organizations, human rights organizations and provincial administration may be represented. In fact, the strong presence of the provincial administration was noted mainly in the Mukurweini CUC, which is one of the last to have been formed.

It is important to note that at the time of the study the development of guidelines for Court Users Committees was ongoing. The process spearheaded by the National Council on the Administration of Justice- NCAJ drew in a few stakeholders mainly from civil society (CSO) and the Commission on the Implementation of the Constitution (CIC). However, CSOs who had participated in the process were in agreement that the guidelines do not deviate from the older concept and still largely applied to criminal rather than the wider justice issues.

4.0 Stakeholder Consultation Findings

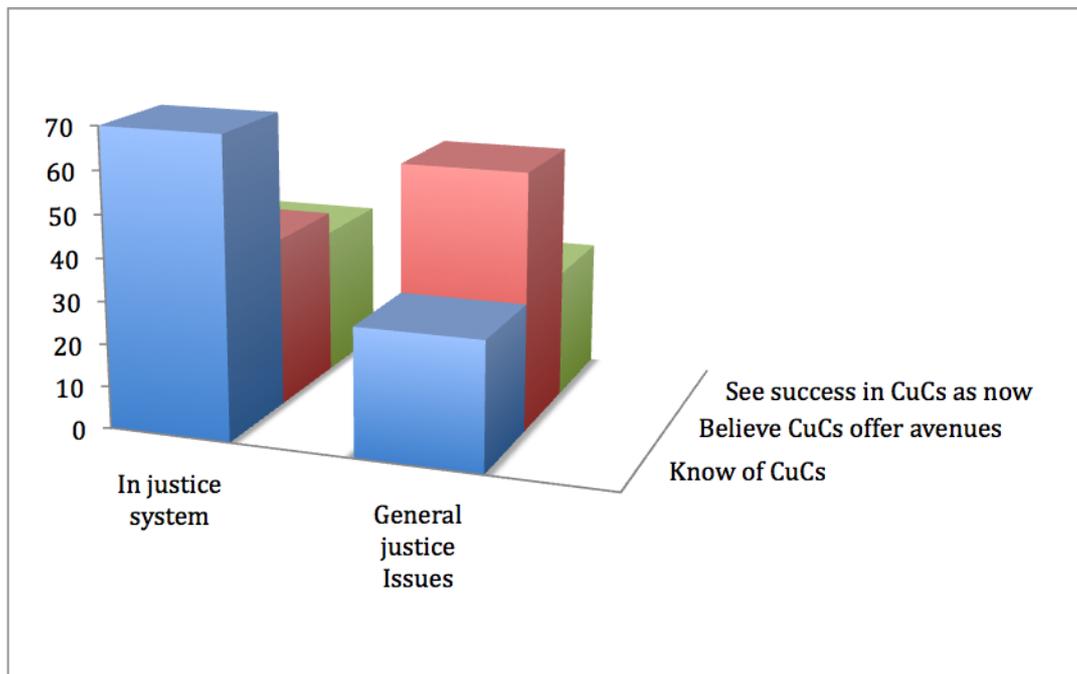
The information in this section presents the views of stakeholders on what they know of CUCs and what CUCs need to be.

4.1 Knowledge of CUCs and their Ability to Help Realize Access to Justice

The information was sought from the ICJ Kenya Paralegal Network members who interact with the justice system. The network is comprised of representatives drawn from the select regions and trained on paralegalism. In addition some representatives drawn from police, provincial administration, civil society, youth groups, media and faith-based organizations were included in the meetings.

The information was sourced through individual interviews, questionnaires and focus group discussions.

Figure 1: Extent of knowledge of existence of CUCs from those working within the criminal justice system

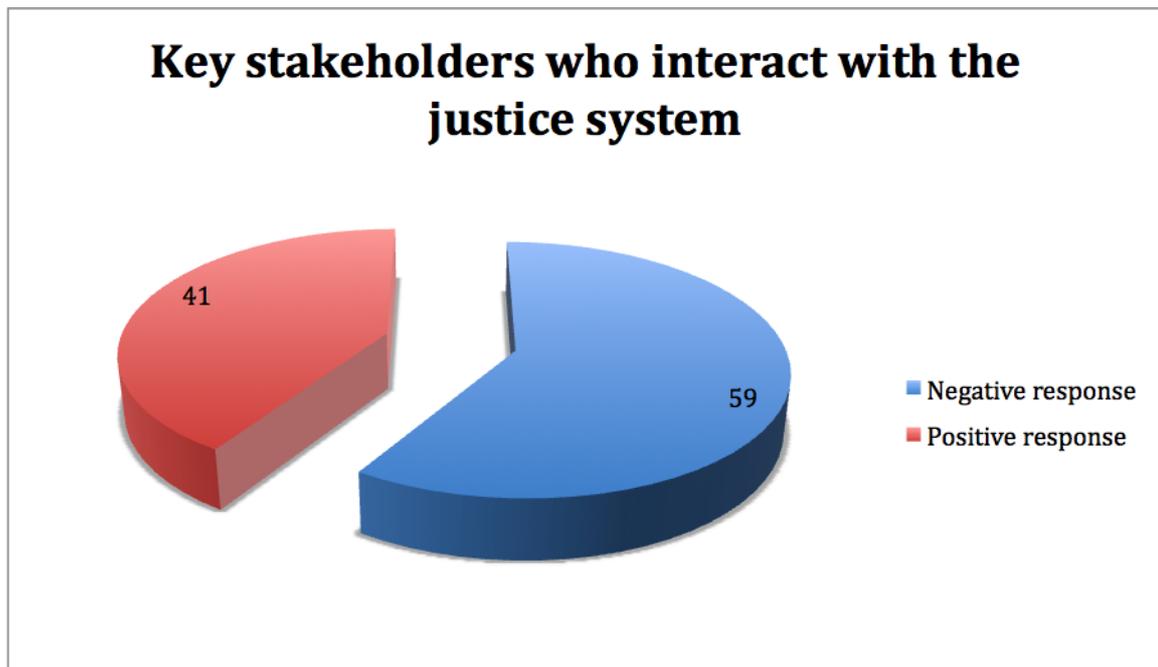


Figures represent maximum of the overall.

The left side data is indicative of those people interviewed who are currently working within the justice system, such as the police, probation officers, prison officers, paralegals who refer cases to the judicial system and have knowledge of the existence and working of the CUCs.

The right side is indicative of those interviewed who are not currently engaged with the CUCs nor do they work within the justice system but relate to issues that could end up within the justice system as civil cases. These include people such as the faith-based leaders, chiefs, media, businessmen and women.

Figure 2: General representation of the study group who have interacted with the CUCs in their localities

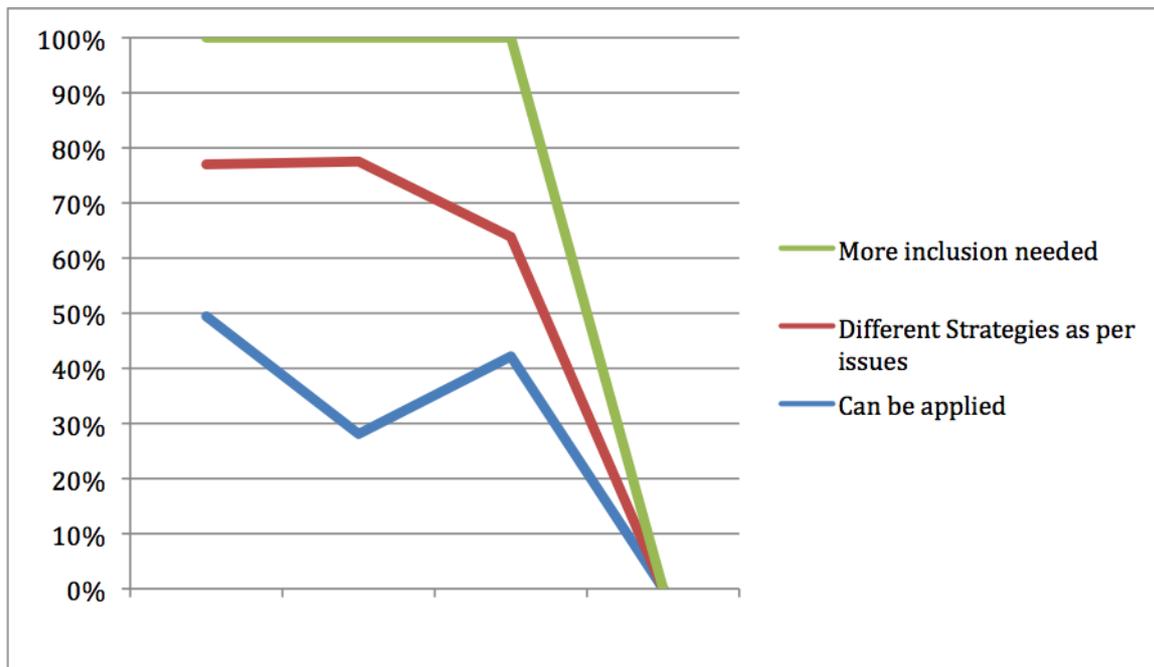


The data here is focused on the participants who filled in questionnaires and stated that they work within the criminal justice sector (such as the police, prison officers and paralegals who refer people to the judicial system) yet have no knowledge of the existence or workings of CUCs.

It is notable that most (59%) of those stakeholders who work within the criminal justice sector, for which the CUCs have largely been used, have never interacted or participated in them. The main reason for this was the manner in which CUC membership has been assigned. In instances where a junior officer had been assigned to attend the meeting the senior officer in the institution was unable to discuss anything related to the CUC.

The fact that meetings are convened by the judiciary and hosted by the judiciary adds to the misconception that it is a 'judiciary thing'. Most active users, when asked if they had ever noted the need to call for a meeting when there had been a delay, were unable to understand how it would be within their mandate to summon such a meeting.

Fig. 3 Indication of different views in different regions on potential of CUCs in the realization of access to justice



The FGDs held in Meru, Kitui and Nakuru as well as the interviews held with select persons in Nyahururu, Mukurweini and Kisumu formed the basis of the data reflected in this table. The data reflects both individual (questionnaire) as well as summarized group discussion views.

There are significant variations between the different regions. For example you find that whereas 50% of those who filled in questionnaires in Kitui felt that the CUC can be applied to increase access to justice, only 30% of those who filled questionnaires in Meru expressed the same view. Noteworthy, though, is the fact that though the percentages may differ the trend remains largely the same across regions. The differences in percentages were occasioned by facts such as the extent of knowledge already existing within the FGD of the existence of CUC and its work, the number of participants within each area who were already working within the justice system or outside.

In areas that have a strong alternative dispute resolution culture that involves elders and strong social support structures, the inclusion of these actors in the committees was very pronounced (e.g. in Meru). The need to link these non-judicial mechanisms to the structured justice system for greater impact was stressed. Whereas in other regions that rely more on

administrative structures (such as the provincial administration) and the faith leaders, the need to include the participation of these actors in the committees was underlined.

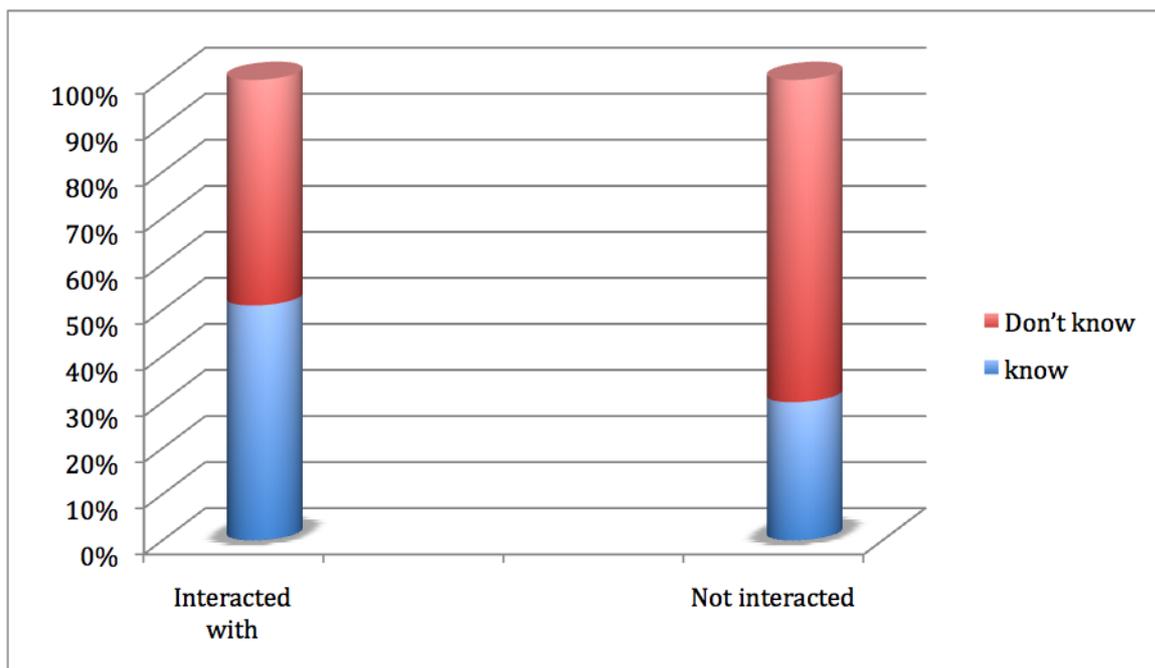
4.2 Realisation of the Key Objective for Formation

The CUCs were mainly meant to address the backlog issue. It was thus important to specifically determine the extent to which, if any, they have been seen to improve in this objective.

Most of those who participated in the study felt that the Committees had helped them improve working within the criminal justice system. However, most expressed concern that there was still a lot of work to be done if the proper management of cases was to happen.

In more cases than not what the program had achieved was to increase understanding among the players. In addition, the program enhanced members tolerance of each others' situation and increased their commitment in playing their part in the chain of service. These were contrary to the intended objective of actually impacting on the reduction of cases.

Fig. 4 Indication of the extent to which the mandate of CUCs currently is known or understood by those who use it and by those who know of it but have not used it



Focus in this figure is meant to display the extent to which CUCs (as currently constituted) has been able to realize its objective. The information is lifted from questionnaire responses drawn from all the sample regions, already indicated and is in reference to the objective for which CUCs were established and the interviewees perception as to the extent to which the objective has been or not been realized.

4.3 Other External Features That can be Applied to Improve the Functionality of CUCs

- Use of public forums where the work of the CUCs can be presented to the general public for comments.
- Allow a discreet way in which public can raise concerns of failings of the CUCs, for example a suggestion box or hotline.
- Apply a coordinated approach (in particular through the Judicial Review Think Tank⁴) to CSOs engaging CUCs, particularly in areas of research and information, capacity building and community outreach.

5.0 Analysis

This section interrogates the expressed needs of the study participants versus the legal framework within which the CUCs exist.

5.1. Current Needs of the Public

Those who participated in the study presented the following as key needs:

- The ability to link the quick solutions CUCs offer to *wanainchi* when dealing with minor disputes to the justice system in some way

⁴ The Think Tank comprises select civil society organizations working in the field of access to justice who have come together to better impact their partnership with the judiciary in trying to enforce rights of the people.

- The ability to link the work of the CUCs with the justice system so that they can ‘professionalize’ and improve their dispute handling skills so as to adhere more closely to the principles of the rule of law
- An increased use of and linkage of local dispute resolution mechanisms to the judicial system

5.2. Relevant Legal Provisions

As earlier stated the Constitution under Article 159 (2) (c) requires that the judiciary, in exercising judicial authority, be guided by the principles of alternative forms of dispute resolution including reconciliation.

The Judicial Service Act formalizes the establishment of the Court Users Committees in section 35 (2) (c) and gives the National Council on the Administration of Justice an oversight mandate over the Committees.

6.0 Synopsis of the Potential of the Programme to promote Access to Justice

CUCs offer an opportunity to find all relevant actors in the justice system in one place. It could include players who will offer links to alternative dispute resolution (including mediation, conciliation and negotiation), information providers, judicial officers, law enforcement officers, and faith based representatives.

The poor and marginalized are often unable to access the mainstream justice system. They, therefore, resolve their disputes through more accessible means such as the faith leaders, the provincial administration and paralegals working within their localities.

It has often been said that those who apply ADR overstep the legal boundaries and at times flout accepted human rights principles in the execution of their tasks. Inclusion of all these players into a system that will allow them to get training about and understanding of human rights principles and legal parameters within which they can work will allow for improved access to justice.

The key indicative standards that need be maintained to ensure the objective of access is realized are as follows:

- a) **Accessibility:** In order to realize justice, the initiative should reduce the complexity of the justice system.
- b) **Appropriateness:** The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level. Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.
- c) **Effectiveness:** The interaction of the various elements of the justice system should be designed to deliver the best outcomes for all users. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes.
- d) **Efficiency:** The justice system should deliver fair outcomes in the most efficient way possible. Greatest efficiency can often be achieved without resort to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.
- e) **Equity;** The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.

7.0 Draft Framework of the Scope of Revamped CUCs

A justice system based upon the Access to Justice Framework promotes access to appropriate mechanisms for the early resolution of problems and disputes, provides capacity for resources to be best directed to reflect where and how people access the justice system, and promotes social inclusion by targeting the resolution and identification of broader issues which may be the cause of specific legal problems.

In order to promote fair outcomes and empower individuals to resolve disputes between

themselves when appropriate, CUCs can be more systematically implemented. This will allow individuals to forgo recourse to the institutions of the justice system so as to enable the allocation of resources more efficiently thereby enabling every individual to have improved access to effective resolution opportunities, irrespective of how they make contact with the system.

A suggested scope of what the CUC programme should aim to achieve is presented in the table below.

Fig. 5 Outline of key aspects the program should aim to realise and how each will promote the realization of access to justice

Information	<p>Enabling people to understand their position, the options they have and deciding what to do</p> <p>Provision of information about the law or legal rights, including Government services, is a central means of influencing access to justice.</p>
Action	<p>Intervening early to prevent legal problems from occurring and escalating</p> <p>Early intervention will prevent legal problems from occurring and escalating. In many situations, early action can resolve a matter or identify the best course of action.</p>
Outcomes	<p>Providing a pathway to fair and equitable outcomes</p> <p>This includes:</p> <ul style="list-style-type: none"> • resolving disputes without going to court • when court is necessary, ensuring processes are accessible, fair, affordable and simple <p>The traditional adversarial system is no longer relevant or sustainable for most disputes.</p>
Proportionate Cost	<p>Ensuring that the cost of and method of resolving disputes is proportionate to the issues</p> <p>Cost can be a significant barrier to justice. The cost to disputants and the cost to the government of resolving disputes should be proportionate to the issues in dispute.</p>
Resilience	<p>Building resilience in individuals, the community and the justice system</p> <p>The focus is on helping to build resilience in individuals, the community and the justice system by reinforcing access to information and supporting the cultural changes necessary to ensure improvements in access to justice are continuing. This includes equipping people with the basic skills necessary to</p>

	resolve their own issues (including by accessing appropriate information and support services).
Inclusion	Directing attention to the real issues that people who experience legal events have Legal issues are often symptomatic of broader problems in people’s lives. The justice system needs to have the capacity to direct attention to the real issues that people might be facing, and what they need to do to address them. This may include a referral to support services outside of the justice system.