

# The theory and practice of criminal justice in Africa

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# 1 Criminal justice in Africa

An introduction to the theory and  
practice of criminal justice

IRVIN KINNES<sup>1</sup>

In Africa, criminal justice systems remain rather fragile. This is not only because of the human rights practices of some African governments, but because the changes on the continent demand good governance and democracy. Criminal justice cannot be separated from democracy inasmuch as its effective implementation has become a barometer of democratic practices throughout the developed world. While it is no guarantor of democratic governance, the application and administration of human rights remains a useful measuring tool of basic democratic practices of any state in the world. Global practices of justice in postmodern democracies were redefined after the 9/11 attacks. The US created the Department of Homeland Security, and the UK opted to hold suspects for longer periods after the attacks on the London underground system in July 2005. The ability of the US – in its war on terror – to redefine what constitutes criminal justice and who qualifies for the recognition of prisoner of war status under the Geneva Convention, as it did with the Guantanamo Bay prisoners, illustrates this point. The British, French and other governments of the European Union made themselves guilty by participating in the rendition programme of the Central Intelligence Agency (CIA), in which Al-Qaeda suspects were routinely tortured by the militaries of these

countries and others contracted by the CIA (Human Rights Watch 2008). All of these countries violated the rights of individual citizens by illegally torturing them, hiding them from the public gaze, and declaring that they had no rights. All this happened in countries that essentially identify themselves as democratic with well-defined criminal justice practices and systems. The practice of democracy in the developed world cannot guarantee social justice. Nor is it an effective measure and guarantee of how good the criminal justice practices of such countries are.

The practice of criminal justice in developed countries, however, remains a useful indicator of how the state has been able to dispense justice to its people. Criminal justice theory provides a lens for scrutinising the practices and how much they adhere to laid-down principles and standards. Africa is not unique compared with the rest of the world, except that it is a recovering colonial addict that unfortunately has lived up to the dictates of the remnants of the colonial paradigm. In the face of failed states (Centre for Conflict Resolution 2004a) that are recovering from colonialism, dictatorships that are undergoing political transformation, tyrannies and unstable states, the theory and practice of criminal justice produce results that either threaten or confirm the political legitimacy of such states.

When regime change occurs as a result of intra-state conflicts, wars or coups d'état, this has consequences for criminal justice and democracy. Some authors argue that Africa has largely been the beneficiary of colonial justice administration systems, and this has impacted on the ability of many of the countries to merge the interests of the new political elites with those of their former colonial masters. The interests of political elites tend to dominate, as Rakodi (2002:50) observed of post-colonial regimes. He argues that post-colonial legal systems were designed to protect the interests of landowners and property owners.

In the colonial era, therefore, the political control necessary to ensure the viability of colonial enterprises, the financial self-sufficiency of (especially British) colonial administrations, the safety of colonial settler populations were inextricably linked to claims on land and property as well as European tenure and land administration systems considered necessary to promote enterprise, safeguard the interests of business, and protect the health and living standards of European urban residents.

One of the first governmental institutions to suffer when there is intra-state conflict or a coup d'état is always the criminal justice system. The normative rules, practices and processes expected of the criminal justice system are often short-circuited through political expediency when dealing with political opponents of the regimes that have usurped democratic power.

This has been no less obvious in Zimbabwe, where a plethora of charges have been laid against the leaders of the political opposition to Robert Mugabe's government. People are held in detention without trial; others are arrested for loitering; and leaders of opposition political parties are charged with high treason, only to have the charges dropped the next day (International Crisis Group 2008). The criminal justice system thus becomes a very useful and dangerous tool in the hands of regimes and governments that use it to deal with political opponents. In South Africa for example a crisis emerged after the judgment<sup>2</sup> that appears to have confirmed that the National Prosecution Authority (NPA) was not entirely independent and that there had possibly been some interference by the state president.

Practising criminal justice and democracy becomes expensive and inexpedient for ruling elites who prefer to remain in power. Africa has been synonymous with wars and conflicts and the displacement of thousands of people as a result. Countries recovering from wars and internal conflict, such as Sierra Leone, Kenya, the Democratic Republic of the Congo (DRC) and recently Zimbabwe, have demonstrated the dispensability of the criminal justice system in the process. Military leaders usurp the powers, roles and functions of the criminal justice system and in its place they usually substitute their own laws<sup>3</sup> with makeshift justice and policing systems: systems that are fundamentally dangerous and sometimes fatal to the victims of these regimes.<sup>4</sup>

These practices raise an important question. How do ruling elites interact with and use the criminal justice system to further their interest? Answering this question is not the purpose of this monograph, but the ways in which the ruling elites are created and perpetuated through tinkering with the criminal justice system remain a central theme of criminal justice studies in Africa.<sup>5</sup>

Legitimacy of the legal system in Africa has become fundamental to the establishment of the rule of law and the resultant efficacy of regimes and criminal justice systems in dispensing social justice. In states where there is no legitimacy of the state or its instruments of coercion, it cannot reasonably be expected that the criminal justice system will work for opponents of the state or its citizens.

The apartheid South African legal system was often open to challenges and had no legitimacy, as the records of the South African Truth and Reconciliation Commission (TRC) reflect (TRC Report 2003).

Afro-pessimists argue that Africa is unable to effectively bring about the changes that are required for upholding the rule of law. This, they argue, is because African governments do not have the capacity to change the legacy of colonialism. Instead, they perpetuate the conditions under which British, French, Belgian and Portuguese colonisers abused the people of Africa through colonial justice systems. As a result, the effective administration of justice in Africa remains elusive. To African governments, though, the challenges are huge. Traditional approaches to justice through restorative practices and the integration of such practices in the formal justice system have become such a challenge. Access to justice remains another, particularly for people in rural communities. This is something that is addressed by some of the authors in this monograph. A clear picture is emerging that African governments are beginning to grapple with governance issues in the criminal justice. The new initiative to challenge the Eurocentric governance of criminal justice can be achieved partly through the New Partnership for Africa's Development (NEPAD) (Centre for Conflict Resolution 2004b) and the African Union's Peer Review Mechanism (APRM).

In this monograph, four eminent critics and researchers examine the theory and practice of criminal justice in Africa. This monograph provides us with an important opportunity to engage in the debate through exploring various themes on the expression of democracy and justice through the workings of criminal justice systems of some countries in Africa.

Etannibi Alemika sets out the sources of criminal law in precise detail by drawing attention to the norms, politics, institutions, processes and constraints in the pursuit of criminal justice. Criminal justice is the handmaiden of politics and he makes it clear that politics determines the administration of criminal justice. His argument tells us that he is concerned because researchers pay scant attention to the political economy of the criminal justice system. In his contribution to the debate, he raises the important questions of values and the practices of the law. Reproducing laws as commodities as a product of the nation state serves to finally extend the rule of the colonial state and colonial laws. He thus argues, 'In a post-colonial society, criminal law remains one of the major tools for authoritarian governance.'<sup>6</sup>

Another critical theme from this contributor is the issue of equality and the criminal justice system. To what extent can criminal law be substantively applied equally to victims and perpetrators? This major theme emerges throughout the monograph. Alemika argues that the criminal code is the outcome of the values and interests embodied in the individuals and groups that make the criminal law. Equally important, the writer casts our eyes to the significant issue of whose values the law ultimately serves. He suggests that social justice is an outcome of a democratic justice system; and in view of the dominant and competing interests of economic and political elites, those excluded from such elites are usually unable to obtain criminal justice.<sup>7</sup>

It is a compelling argument and the colonial cliques and new emerging elites appear to complete the picture and therefore reinforce the perception and reality that criminal justice is a useful tool against opponents when other crises are unfolding.

Can we then safely assume that the state can be trusted to implement a jurisprudence that will be fair and equitable in Africa, despite its human rights practices?

In that spirit, colonialism and its aftermath provided many dilemmas for emerging elites in Africa. This theme is explored by Richard Bowd in his contribution.<sup>8</sup>

Bowd traces the development of English law as well as Roman Dutch law and argues that access to justice was never the aim of colonial justice systems. They remained strongly retributive, able to teach the local population that the justice of the coloniser was lethal and enduring. Colonial systems did not have access to justice for the accused as a fundamental human right. They reserved the right to mercilessly prosecute the offender when their interests were in any way threatened. The development of colonial systems aimed to keep the local population in subjugation, and the criminal justice system criminalised their behaviour. Bowd argues succinctly that the foundations of the criminal law as developed and espoused in colonial countries and in the colonies served the purpose of maintaining law and order. The vestiges of colonialism have left incumbent governments with a legacy of a retributive justice system that does not appear to serve the purposes of the African people. He traces the development of the urban/rural divide and the need for local rural people to participate in the criminal justice system. The move towards a more restorative approach that appears to be an indigenous African one is now on the horizon.

Bowd concurs with other scholars that the criminal justice practices of many African states are rooted in the previous colonial administrations. The extent of colonial justice and its practices influenced and further marginalised traditional practices of many of the indigenous peoples. Indigenous institutions and cultural practices suffered severely as a result of the administration of colonial justice. The creation of new criminal categories by the colonial administration and the resultant continuation of the practice by the new leaders deepened the dependency on what he calls 'Western-centric notions of criminal justice'. He emphasises that traditional justice systems were based on the restorative approach and that they are able to fill any gaps left by the Western or modern criminal justice systems. Because many rural areas have difficulty accessing government systems, the traditional and restorative approaches to criminal justice should thus be applied.

Questioning the purpose of criminal law is a function of scholars and Bowd leaves us with no doubt about the legacy of colonialism and the resultant damage inflicted on the colonised through retributive criminal justice systems.

Simon Robins provides us with a case study of Uganda and its emphasis on restorative justice processes. These processes have been a product of the European and North American states. Uganda has a dual system of criminal justice which encompasses formal law and informal law and their application. It incorporates the formal English system and local council courts.<sup>9</sup> Robins argues that language becomes an impediment to the practice of criminal justice in Uganda because of the colonial dominance of the criminal justice system and this in turn becomes an obstacle in ensuring access to justice because a small proportion of the population speak English.

He points out the disparities in Uganda, where the formal justice system makes people wait for up to nine years when it comes to dispensing justice. He also applauds the restorative practices that involve three stages of restorative justice practices, including mediation, restorative circles and restorative conferencing. He equally applauds the South African (TRC) and its approach to restorative justice. He questions, however, whether restorative justice practices in Africa can be a sustainable option in the face of massive trade-offs with local economies as a result of globalisation, which has a punishing effect on them. By their nature, restorative justice practices require more resources and time during the implementation phase.

In countries where a runaway crime picture is emerging, as in South Africa, the conventional wisdom of restorative justice as an approach that works is

questionable. For the policing agencies, certainly restorative justice is an option that is successful, given space, time and money, but this is a luxury that few countries, especially those undergoing some form of internal conflict, can afford to have.

The argument put forth by Robins suggests that the restorative process in Uganda is directly linked to the political system of government. While the restorative justice approach is integrated into the legal system of Uganda, a gap remains in the application of justice. The writer suggests that the local ceremony of *mato oput*<sup>10</sup> and its relation to the local court is a form of restorative justice in which the relationship between victim and perpetrator is restored. We are reminded that an agreement between the Lords' Resistance Army (LRA) and the government provides for the use of traditional justice systems. Unfortunately, mob justice as a form of popular justice is cited as the most extreme example of such justice. Robins quotes Mamdami<sup>11</sup> to illustrate the tension between rights-based and customary law.

In this article, Robins takes issue with what he perceives as a simplistic argument that Africans are 'more susceptible to restorative justice approaches, because they have an indigenous sense of restoration'. He states that to have such an approach is too simplistic. The state, he argues, has undermined social group identity and this in turn has strengthened other agenda such as social, political and economic issues. He contends that the project on traditional and restorative practices is challenged by coherence. That traditional law resists colonial law practices, and so 'resists being written down', is an indication of the extreme difficulty faced by the agreements negotiated between the government and the LRA.

Finally Robins argues that the Ugandan state inherited an under-resourced and inefficient justice system that emphasised retribution and deterrence. The peace deal with the LRA provided the state with an opportunity to merge local traditional justice and restorative practices with the formal court processes.

J Nnamdi Aduba and Emily Alemika discuss the administration of criminal justice and bail in Nigeria in their article.<sup>12</sup> Of crucial importance to them is the presumption of innocence that is a cornerstone to debates on bail throughout the modern world. It is a theme that has been raised elsewhere in this monograph. Nigeria has two penal codes, one for the nineteen states in the north, and one for the seventeen states of the south. The distinction between the two regions is that the customary courts and the court of appeal function and deliver judgements in the south, whereas the north has an area court and a Sharia court of appeal that applies the Islamic Code in its judgements.

The authors argue that bail plays a very important role in dispensing criminal justice and protecting human rights. They define the parameters of bail and when, why and how it is dispensed and defined in various countries in Africa. They argue that even in Nigeria, there are different interpretations (some deliberate and unethical)<sup>13</sup> of bail.

Quoting Alemika and Alemika, they argue that the criminal justice system in Nigeria is disjointed, and this has resulted in minimal concerns for the human rights of the accused person. They define the conditions under which the police are able to provide bail to suspects charged with less serious offences. According to the legislation, such suspects have to be brought before a magistrate or a justice of the peace within twenty-four hours. The authors argue that police were not complying with these provisions as they often kept suspects for longer periods, claiming the need to complete investigations.<sup>14</sup>

In contrast to other countries, where the arrest of a suspect is the culmination of an investigation, this is seldom true of Nigeria. Among the reasons the authors list poor training techniques and facilities; lack of adequate training of police members in the investigation; and poor methods of detection of crime. As a result of these inadequate human and material resources, confessions are often forced out of suspects, who are routinely interrogated and tortured as a means of extracting confessions. Courts also provide bail to accused persons. Bail has similar provisions when it comes to offences punishable by death. The authors indicate that differences in the consideration of bail exist for the northern and southern states and comment that many of the accused do not know their rights as far as bail is concerned. Access to justice is a major problem facing the legal fraternity in Nigeria.

Women in Nigeria are not viewed as equal in terms of the law, and are therefore discriminated against by the police when they want to pay their husbands' bail. The authors conclude that the social status of the accused determines bail. In addition, up to 64 per cent of inmates in audited prisons were awaiting trial, some for between 2 and 15 years. Up to 40 per cent of these inmates were being kept on a holding charge, something that does not exist in law, according to the authors.<sup>15</sup> Lastly they argue that the social conditions of prisons leave much to be desired. The buildings are old and dilapidated; the infrastructure has broken down; there are no recreational and transport facilities; quality food is not available to inmates; and they have incomplete clothing, uniforms and bedding.<sup>16</sup>

Through their essays the authors of this monograph have raised pivotal questions about the theory and practice of criminal justice in Africa. As researchers, we should note that criminal justice systems anywhere in the world are dependent on the resources that the state makes available to them. The efficacy of criminal justice systems has consequences for human rights practices and, by extension, democracy. Africa is no exception when it comes to putting in place, observing and practising human rights and democracy. The mere practice of democracy does not in any way guarantee effective and efficient access to justice. In Africa, the theory and practice of criminal justice requires radical transformation if we are to achieve access to justice for all.

## NOTES

- 1 Irvin Kinnes is a PhD student at the Centre of Criminology at the University of Cape Town.
- 2 Jacob Gedleyihlekisa Zuma vs National Director of Public Prosecutions, Natal Provincial Division, Case no 8652/08.
- 3 Uganda's president changed the constitution to allow him to serve multiple terms.
- 4 The Nigerian government of Sani Abacha executed Ken Saro-Wiwa in November 1995 because he remained a threat to the regime as a result of his activism in the Niger Delta region.
- 5 The Kenyan president swore himself in for a second term within an hour of the announcement of the contested election results. This fuelled widespread violence in December 2007.
- 6 See in this volume E Alemika, Criminal justice: Norms, politics, institutions, processes, constraints, p 3.
- 7 Alemika, Criminal justice, p 21.
- 8 R Bowd, Status quo or traditional resurgence: What is best for Africa's criminal justice systems?, p 9
- 9 See in this volume S Robins, Restorative approaches to criminal justice in Africa, p 3
- 10 Robins, Restorative approaches, p 10.
- 11 Robins, Restorative approaches, p 3.
- 12 See in this volume JN Aduba and E Alemika, Bail and criminal justice administration in Nigeria, p 1.
- 13 Aduba, and Alemika, Bail and criminal justice administration, p 2.
- 14 Aduba, and Alemika, Bail and criminal justice administration p 5.
- 15 Aduba, and Alemika, Bail and criminal justice administration, p 16.
- 16 Ibid,p16

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# 2 Criminal Justice

Norms, politics, institutions,  
processes and constraints

ETANNIBI E O ALEMIKA

## INTRODUCTION

Criminal justice, broadly, refers to the norms, processes and decisions pertaining to the enactment and enforcement of criminal laws, the determination of the guilt of crime suspects, and the allocation and administration of punishment and other sanctions. The norms, institutions and processes of criminal justice administration are politically determined, in the sense that their articulation and incorporation into the governance systems of society involve the exercise of political power through the legislative, executive and judicial organs of government. As Sumner (1979:267–268) observes, law ‘lies in the cradle of political practice and is therefore subject to the pressures and imperatives of politics’.

At the core of the concept of criminal justice are the normative ideas of transgression against criminal code: intention, responsibility or culpability, and desert. The term ‘desert’, which is a central focus of the criminal justice system, refers to what the criminal, victim and society deserve as a consequence of crime. The criminal processes, especially adjudication, are structured to allocate the punishments or corrections deserved by the offender, the restitution due to the victim and society. However, decisions on what the criminals,

victims and society deserve as a result of a given transgression against criminal code change over the time and vary across societies, reflecting prevailing social, economic and political structures and relations.

Much of the contemporary discourse on criminal justice tends to be dominated by concern with the efficiency and integrity of the institutions and officials within the criminal justice system. The discourse tends to focus more on the instrumentality of criminal justice agencies, while neglecting the important normative aspects of justice for the parties in a criminal process. Consequently, inadequate attention is paid to the philosophy, collective psychology, and the political economy that determine the administration of criminal justice. This deficiency in the criminal justice discourse is due to over-concentration on technical or formal dimensions of criminal justice administration, instead of the deeper determining role of political and economic ideologies that structure power relations and access to economic resources in society. Criminal justice raises not just technical legal issues, but also ethical questions. In this paper, the international norms, politics, institutions and processes of criminal justice are examined. A brief discussion of the features and constraints of criminal justice administration in Africa is also presented.

## **THEORETICAL PERSPECTIVES ON SUBSTANTIVE AND FORMAL ASPECTS OF CRIMINAL JUSTICE**

Criminal justice is often classified into substantive and formal (or procedural) dimensions. The substantive aspect of criminal justice pertains to the norms of law making; the requirements of desert; normative prescriptions of desert, equity and fairness in the distribution of socio-economic and political opportunities, and burdens as determinants of criminal motivations, inequality and deserved punishments. In this sense, criminal justice demands that conducts that cause similar consequences, irrespective of differences in form, must be subject to similar penalties or rewards, without discrimination because of class, religion, ethnicity and origin of those engaged in those actions. Nor must criminal law and procedure be loaded against any class, socio-economic stratum, religious group, ethnic nationality or gender group, or be contingent on other social and political differentiations. In reality, the substantive rules of criminal law are often inequitable, unjust and unfair.

The two broad sociological perspectives on the nature and functions of criminal law are the consensus-functionalist and the conflict-radical paradigms. The

consensus-conflict perspective approach in criminology and sociology of law conceives criminal law as aggregation or embodiments of the values and norms of the diverse groups in society regarding conducts that should be prohibited, so that peace, safety and security can be guaranteed. In the context, the goal of criminal justice is to ensure that violators of criminal law are punished, so that the prevailing values and norms of society are protected, and harmony among individuals and groups is guaranteed and sustained. The provisions of criminal law, undoubtedly, embody religious, political, economic and socio-cultural values shared by a very significant proportion of the population in society. According to Barlow (1970:15):

- Most laws are products of prevailing social, political and economic conditions
- Some laws articulate long-established customs and traditions, and can be thought of as formal restatements of existing mores
- Some laws reflect efforts to regulate and coordinate increasingly complex social relations and activities
- Some laws display prevailing ethical and moral standards and show close ties with religious ideas and sentiments

From the perspective of the consensus-functionalist, most of the provisions of the criminal laws are necessary, and are required for peaceful living and harmonious coexistence. For example, without a law prohibiting violent conducts such as murder and rape, social interaction and coexistence will be precarious. However, this perspective is widely criticised as being indifferent to the diversity of groups in society and their divergent interests. The coercive, exploitative and repressive feature of criminal law is generally absent in the discourse on law by the consensus-functionalists. This omission is a major deficiency. In Africa, colonial rulers enacted laws and established criminal justice agencies that coerced, repressed and exploited Africans (Sumner (ed) 1982; Shivji 1990; Alemika 1993a). Apartheid rulers enacted criminal laws to repress and exploit Africans. In post-colonial society, criminal law remains one of the major tools for authoritarian governance.

The repressive, coercive and exploitative characters of criminal law are not unique to Africa. They are universal features, though they vary in form, content and scope in different contexts and periods. Therefore, criminal law is not a neutral instrument that treats and serves all citizens and groups equally. Critics argue that criminal law embodies only selected concerns and values among the

universe of moral norms differentially valued by different groups. Consequently, criminal codes disproportionately embody the values and interests of the individuals and groups that make criminal law, influence the enactment of law, or enforce and administer the criminal codes. Therefore, criminal law does not equally represent the interests of the various groups in society.

Proponents of the radical-conflict paradigm in criminology and sociology of law focus on the unequal representation of the values and interests of the different groups in criminal law, and in the process and outcomes of the criminal justice system. They argue that 'the provision of criminal law seemingly has been structured so that the law enforcement practices, with the exception of traffic regulation, are directed at relatively low status segments of the population' (Hahn 1970:16; see also Chambliss 1969; Taylor, Walton and Young 1973; Sellin 1938). According to the proponents of this perspective, the criminal law is often structured, in content and enforcement, to exclude, tolerate, or punish lightly the harmful conducts of those at the helm of national political and economic affairs. According to Sellin (1938:21–22) 'the social values which receive protection of the criminal law are ultimately those which are treasured by dominant interest groups'. Criminal laws are predominantly used to control the behaviours of the poor and powerless, especially those behaviours considered offensive by lawmakers and rulers (Chambliss 1969; Bowden 1978; Blumberg 1979).

The proponents of the radical-conflict paradigm suggest that the biases in the enactment, content, enforcement and interpretation of criminal law account for the overrepresentation of the poor and powerless as suspects and convicts within the criminal justice system. Chambliss (1969:86) argued that the lower-class person is more likely:

- To be scrutinised, and therefore to be observed in any violation of the law
- To be arrested, if discovered under suspicious circumstances
- To spend the time between arrest and trial in jail
- To come to trial
- To be found guilty
- If found guilty, to receive a greater sentence than his or her middle- or upper-class counterpart

Each of the two perspectives focuses on different aspects of criminal law and provides useful insight. Functionalists focus on the integrative and meditative

roles of law, while the conflict theorists address the disempowering and repressive character of law. However, neither of them provides a complete picture of the features of criminal law. Both provide complementary accounts of law and produce richer understanding of the complementary, dialectical and even the contradictory features of criminal law. As Poulantzas (1982:90) observed, the law ‘does not only deceive and conceal ... nor does it merely repress people by compelling or forbidding them to act ... it also organises and sanctions certain real rights of the dominated class’. Even more explicitly, Nader and Yngvesson (1970:909) highlighted the multiplicity of the functions of the law. They noted

... the law does not function solely to control. It educates, it punishes, it harasses, it protects private and public interests, it provides entertainment, it serves as fund-raising institution, it distributes scarce resources, it maintains the status quo, it maintains class systems and cuts across class systems, it integrates and disintegrates – all these things in different places at different times, with different weighting ... It may encourage respect or disrespect for the law and so forth.

Theoretical and policy discourses on the substantive elements of criminal justice should focus on the impact of the distribution of political and economic power in society on the following decision and processes within the legal system:

- What and whose behaviours are criminalised?
- Who control the processes and institutions involved in the definition of crime, especially the legislature, police, judiciary, and prisons?
- Who frames and applies rules of criminal procedure?
- Whose conducts are most likely to be included in (or excluded from) the definition of crime and prohibited by criminal law?
- Who are those most likely to enjoy the constitutional rights and safeguards against oppressive methods of police surveillance, investigation and interrogation, as well as biased judicial proceedings and outcomes?
- Who are those likely to have access to the resources (for example competent and experienced legal representatives, bail bonds and security) necessary to effective legal defence in prosecution?

- Who are those more likely to be sieved out of the criminal justice process at the early stages as innocent persons who were wrongly accused or against whom there is insufficient evidence for prosecution?
- Who are those most likely to be processed through the criminal justice process and produced as convicts?
- Who are those most likely to receive the most severe sentences?

Criminal justice implies that citizens are equally affected by the provisions of criminal codes, and are treated equally in the process of making, enforcing, interpreting and administering criminal law. Therefore, if access to criminal justice within the legal system is mediated by class, education, income, gender, age, ethnicity or race, the outcome will inevitably be unjust, irrespective of whether due process (formal process of justice) has been followed.

The formal aspects of criminal justice prescribe the principles and procedures for making, enforcing and interpreting the criminal law in order to arrive at the impartial trial of a suspect. The principles and process are often summarised as due process. The essence of due process is to prevent coercion and persecution, rather than prosecution, of suspects. It also prohibits illegal arrest and detention; search and seizure; self-incrimination; double jeopardy; excessive bail and unduly long pre-trial detention, cruel and unusual punishment (Alemika 2006). Formal aspects of criminal justice demand:

- Prospective lawmaking, as opposed to enactment of laws with retroactive effects
- Uniformity in the distribution of punishment
- A determinate sentence which represents the deserved penal tariff proportional to the instant crime
- Openness, accountability and stringent control of discretion at the various stages of criminal justice administration
- Equal protection of all citizens under or by the law
- Judicial decisions, including penal and correctional sanctions, that are 'past-oriented', deserved, equitable, consistent, visible, certain and prompt

To fulfil these enumerated conditions, the police, prosecutors and judges are required to be professional and impartial in their decisions; independent of manipulation by political and economic power-holders or swayed by ethnic,

religious, political and other partisan sentiments; and accountable for their performance and conduct through democratic public scrutiny. The formal attributes of criminal justice do not in themselves constitute sufficient condition for effective, efficient and just administration of criminal justice.

## **NORMATIVE POLITICAL AND JURISPRUDENTIAL FOUNDATIONS OF CRIMINAL JUSTICE**

International norms have evolved for the administration of criminal justice, especially the treatment and rights of criminal suspects. Article 7 of the African Charter on Human and Peoples Rights<sup>1</sup> provides that 'every individual shall have the right to be presumed innocent until proven guilty by a competent court or tribunal'. Several UN declarations and conventions have also enjoined member states to guarantee and uphold certain rights of crime suspects and convicts. Article 11(1) of the United Nations Declaration of Human Rights (UNDHR) states that everyone 'charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantee necessary for his defence'. The importance of the idea of 'presumption of innocence' is that the deprivation of the human rights of and imposition of punishment on an innocent person constitutes criminal injustice. One of the main implications of the presumption is that suspects should be treated as if they were innocent, and accorded their rights until their guilt has been determined or established through due criminal process by a competent and impartial court or tribunal.

To give concrete expression to the doctrine of presumption of innocence, several rights were accorded persons suspected of crime or standing trial for violation of criminal law. Section 9 of the declaration provides that 'No one shall be subject to arbitrary arrest, detention or exile.' Further, section 10 states that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' Article 11(2) also provides that: 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.' This provision, commonly referred to as the prohibition of retroactivity of criminal provisions,

is particularly important during revolutionary and violent transitions, where new rulers may wish to hold previous rulers criminally liable for actions that were not criminal at the time they were taken.

The UN International Covenant on Civil and Political Rights (ICCPR) contains more explicit provisions aimed at protecting persons from criminal injustice. Sub-sections 1 and 2 of Article 6 of the Covenant provide as follows:

- Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life
- In countries which have not abolished the death penalty, sentence of death may be imposed only for most serious crimes in accordance with the law in force at the time of the commission of the offence ... This penalty can only be carried out pursuant to a final judgement rendered by a competent court

Article 9, in the following subsections, provides that:

- Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law
- Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement
- Anyone who is deprived of his liberty by arrest shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful
- Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation

Article 10 of the covenant addresses the conditions of persons held in custody and provides that:

- All persons deprived of their liberty shall be *treated with humanity and with respect for the inherent dignity of human persons* [emphasis added]
  - Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subjected to separate treatment appropriate to their status as unconvicted persons
  - Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication
- The penitentiary system shall comprise prisoners, the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status

The most pertinent provisions in article 14 of the covenant state that:

- All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...
- Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law
- In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him
  - To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing
  - To be tried without undue delay
  - To be tried in his presence, and to defend himself in person through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it

- To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
- To have the free assistance of an interpreter if he cannot understand or speak the language used in court
- Not to be compelled to testify against himself or to confess guilt
- In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation
- Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law
- When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him
- No one shall be liable to be tried or punished again for an offence for which he has been finally convicted or acquitted in accordance with the law and penal procedure of each country

Most of these provisions in the UNDHR and ICCPR have been entrenched in the constitutions of many member states, including sub-Saharan African countries. The rights recognised by the provisions are important to the attainment of *formal* criminal justice, and the serious attention given to them underscores them as normative rules of criminal justice, informed by the doctrines of rule of law and human rights. These norms of human rights are aimed at ensuring that innocent persons are not convicted or punished. They are also intended to ensure that the human dignity of a convicted person is not violated through cruel and degrading treatment.

Desirable and necessary as these provisions are, they do not eliminate the prospect of injustice in the criminal justice system, because they do not pay adequate attention to the social, economic and political inequalities that impact on access to justice by different classes and groups in society. Socio-economic and political inequalities impact on differential pressure to commit crime, to be arrested, denied bail, convicted and sentenced to

imprisonment or other forms of extreme punishment, including death penalty (Chambliss 1969).

## CRIMINAL JUSTICE AND PUNISHMENT

The criminal justice system is responsible for the dispensation of justice (allocation of entitlements and deprivations or disabilities) that is due to or deserved by the criminals, victims and society. The system is an amalgam of loosely coupled subsystems sequentially involved in law making, law enforcement and policing, prosecution, judgment and sentencing, administration of penal sanctions and correctional programmes. One of challenges of the criminal justice system is poor coordination of its numerous institutions, processes and actions. As a result, the various agencies often operate at cross-purposes and producing contradictory results. As Blumberg (1979:7) aptly observes:

... criminal justice system is hardly a system, considering the fact that the organisational components of which it is comprised are discrete entities, often with their own budgets, administrative apparatus, political constituencies, and professional organisations, and markedly different ideologies and worldviews.

The production or administration of criminal justice involves ideologies, processes, actions and experiences. It also involves diverse institutions and groups that are politically configured to achieve diverse social, economic and political goals.

Punishment for crime constitutes the core concern of the criminal justice system. It is often justified on the basis of retributive or utilitarian philosophy. According to the neo-Kantian retributionists, punishment is the right of the offender and means of restoring him to full contractual relationships with his fellow citizens and in accordance with the logic and contemplation of *social contract*. Thus, punishment is viewed as an inevitable consequence of criminality and the vindication and compensation of the law-abiding citizens. In the context, punishment is past-oriented, and directed towards the offending conduct of the criminal and should be graduated to fit the harm occasioned by the instant crime (von Hirsch 1976, 1993; Ashworth & Wasik 1998). Retributionists have been criticised for advocating vengeance.

However, retributionists argue that their concern is to do justice, which hinges on desert, according to which every criminal deserves or merits only such punishments that are proportional to the harms caused by their crime (von Hirsch 1976, 1993). These scholars assume that crimes are the result or expression of free will and that the actors must bear the responsibility for their conduct.

The utilitarian exponents justify punishment in terms of the goals of deterrence, social defence, incapacitation, crime prevention, reformation and rehabilitation. Hence, the focus of the utilitarian penologists is the probable future conduct of the offender and the benefits to be derived from punishments. The thrust of the utilitarian philosophy of punishment is that criminals ought to be punished if doing so will deter offenders and the population from crime, protect society or reform and rehabilitate convicts. The implicit and explicit assumptions of those who advocate treatment and rehabilitation are that criminals act out of compulsion by biological, psychological, socio-economic, political and cultural deficiencies or pressures. Such criminals are therefore not to be considered wholly liable for their criminal conducts. Invariably, in the same way that the sick are viewed by physicians, the criminal is seen as pathological or as a victim of bio-social pathologies.

In the past century, imprisonment has gained tremendous significance as a method for pursuing diverse penal goals: retribution, incapacitation, deterrence and reformation. However, the past four decades have witnessed increasing advocacy for other responses to the offenders. For instance, community service, probation, restitution and reparation to victims, and neighbourhood dispute settlement tribunals are being canvassed with more vigour. Imprisonment has recently come under criticism, while the death penalty or capital punishment is seen as state-sanctioned murder and barbaric vengeance, without significant general deterrent effect.<sup>2</sup> The implementation of the rehabilitative goal, particularly through imprisonment has been the object of criticism on the grounds that it:

- Produces high recidivism
- Legitimises extensive state control over and intrusion in the lives of citizens
- Disguises state repression and coercion with ‘rhetoric of humanitarianism’
- Undermines the dignity and freewill of the individual offenders
- Erodes respect for persons, and engenders forced therapy as a result of its deterministic premise

- Undermines due process, fairness and promotes inequities of criminal dispositions
- Enthrones the dominance of professional therapists in criminal justice administration, resulting in arbitrariness and indeterminacy in the length of treatment and institutionalisation of offenders
- Fails to address the social structural forces that determine the production of criminal law and criminals (Alemika 1988b; 1990 and 1993c; Alemika and Alemika 1994; Elsner 2006)

Penological norms and practices in different societies have been influenced by two diametrically opposed philosophical and scientific explanations of human behaviours, including criminality. They are the determinist and indeterminist (voluntarism or free will) perspectives. The proponents of determinism argue that crimes are caused by factors that are often beyond the control of individuals. Such factors may be biological, psychological, environmental and sociological, or a combination of these. For them, crime can be prevented, cured or treated by eliminating or controlling criminogenic factors. They also argue that offenders deserve treatment, reformation, rehabilitation and restoration to society more than punishment, because they are fundamentally 'acting under influence' of criminogenic factors. To stem crime, various types of programmes are recommended:

- Strengthening family and community wellbeing and ties to promote proper child socialisation and development
- Promoting access to educational, vocational, employment and health resources in order to eliminate or at least moderate the probability of poverty, sense of relative deprivation and injustices, producing crime and criminals
- Minimising opportunities for crime through environmental and architectural designs

The determinist perspective directs attention to the causes of crime beyond the individual offender, and pays more attention to the crime-causation factors in order to prevent or reduce crime to enhance security and safety in society. Proponents pay lesser attention to the philosophical, moral and legal discourse on the culpability of the offender. As a result, they propose treatment or cure of the offender, instead of punishment.

In contrast, proponents of indeterminism – voluntarism and the free will model of human behaviours, including criminal behaviour – argue that individuals are free agents who voluntarily chose to act in a particular way, after rational consideration of costs and benefits associated with their actions. According to them, individuals have control over their behaviours, and are therefore morally and legally responsible for their outcomes. A criminal, they argue, freely chose to commit crime and should be punished in order to deter him or her (specific deterrence) and members of the public at large (general deterrence) from committing such crimes in future. The proponents of behavioural voluntarism favour punishment on the grounds of retributive justice or to serve the instrumental value of deterrence at the specific and general levels.

Punitive and repressive strategies are influenced by the free will or voluntarism model of criminal behaviour. The model perceives offenders as rational agents who have control over their conducts and freely or voluntarily take to crime in order to gain advantage over others. Consequently, offenders should be made to pay for their criminality. To deter the offender, punishment must exceed the gain derived from crime. This perspective essentially adopted the economic rationality model of behaviour. Proponents of the ‘just desert’ model of punishment, like the classical penologists, are motivated by the need to mitigate the excessive penal regimes that drive utilitarian goals such as deterrence, rehabilitation and social defence. As a result, they seek to minimise the factors that should be taken into consideration in sentencing. However, by excluding bio-environmental, socio-political and economic factors that predispose the individual to criminality as mitigation, and diminished responsibility or culpability, proponents invariably endorse the inequality built into the legal systems through the influence of consequential unequal distribution of social, economic and political powers in society.

## **LEGAL ORDER AND CRIMINAL JUSTICE IN AFRICA**

The criminal justice system is a sub-sector of the wider legal order in society. Primarily, the legal system exists to prevent and resolve disputes among citizens, between citizens and the state, and among groups (socio-cultural, political, economic and governmental agencies). The legal system is established to operate in accordance with predetermined political and juridical values and

rules. In democratic societies, the values are captured by the doctrines of rule of law, due process and human rights. Legal order has dual relationships with these doctrines. First, the legal system is expected to secure and preserve safety and security, and protect human rights and the rule of law. It is also expected to ensure that those who violate the laws and thereby undermine security and safety and breach human rights and rule of law are held accountable for their misdeeds. In this respect, the legal order is the guarantor of order – security and safety in society. Second, the legal order is the means by which the state expresses its commands and coercive powers. As a result, the legal order may violate the principles and conditions entailed by the doctrine of the rule of law and human rights in order to preserve the prevailing order of economic and political privileges.

Several scholars have argued that African criminal justice institutions and officials are ineffective, corrupt, and repressive. They attribute these problems to the colonial origin of the institutions as partisan agencies for the protection of the interests of the colonial rulers; and the absence of fundamental transformation of inherited colonial legal order by the post-colonial rulers, who also became autocratic, repressive, corrupt and insensitive. In both colonial and post-colonial eras, the legal institutions and law enforcement officials functioned as instruments to be used by the rulers for the suppression of the citizens (Hills 2000; Joireman 2001; Sumner (ed) 1982; Alemika 2003a, 2000b; Deflem 1994; Baker, 2005; Shyllon 1980; Coldham 2000). As reports of international human rights agencies – especially Human Rights Watch and Amnesty International – repeatedly show, the rights of offenders are often violated by African governments and their law enforcement agencies.

Shivji (1990:383) offers a similar historical account of the character of legal order in colonial and post-colonial Africa. According to him, the legal order in colonial Africa:

... was exactly the opposite of that prescribed by constitutionalism. Power was concentrated in the executive, usually in the person of governor, while justice was dispensed by an administrator, often a district commissioner. The legislature, if one existed at all, was packed by the governor's appointees while fundamental human rights, particularly those which might have had any political impact, were conspicuous by their absence ... Forced labour and unlimited power of arrest by

administrators completed the armoury of an essentially quasi-military colonial state.

Shivji argues that post-colonial government has failed to transform the inherited legal order to advance development and human security, freedom and democracy in Africa. He contends that the ‘deeper structures of the colonial political and legal order were inherited or, in some cases, reorganised to reinforce despotism in the post-independence period’. In the colonial and post-colonial contexts, the legal institutions employed to preserve oppression could have earned neither the trust, nor the confidence of the public. nor appear legitimate to them (Alemika, 2003a, 2003b, 2004). This partly explains the mutual hostility between public and legal institutions, especially the police, in many African countries. Table 1 presents data on public perception of legal inequality and corruption among officials of the police and judicial system, and trust in police and judges and magistrates. The data showed variations across countries. However, legal inequality was reported to be relatively widespread. Corruption was also reported to be high among police officers in Benin, Ghana, Kenya, Mali, Nigeria, Uganda, Zambia and Zimbabwe. Similarly, relatively high levels of corruption among judges and magistrates were reported by the citizens in Benin, Mali, and Nigeria. Correspondingly, there was little public trust in the police in Benin, Kenya, Nigeria, Zambia and Zimbabwe. Public trust in the court was equally low in Benin, Madagascar, Nigeria and Zambia. These data indicate, to some significant extent, legitimisation crises for the core criminal justice institutions in Africa (table 1).

Several academic works and reports of several non-governmental organisations in the human rights and security sectors showed that access to criminal justice in Africa remains problematic, as the following pervasive conditions are observable (Odekunle 1979; Shaidi 1989; Nsereko 1998; Hatchard 1985; Baker 2005; Coldham 2000; Alemika and Alemika 194; Alemika 1988b, 1993c, 2003a, 2003b; 2006; Alemika and Chukwuma 2000; Kayode 1976; Nwankwo 1993; Milner 1969; Ibidapo-Obe 1995; Onoge 1993; Schonteich 1999 Berg, 2005; Hills 2000, CHRI 2006; CHRI/KHRC 2006) in most African countries:

- Partisan political control of the police and courts resulting in the oppression of the opposition, poor and powerless

**Table 1** Unequal treatment, trust and corruption in the police and judicial system

Country	Respondents that said people are often or always treated unequally (%)	Respondents that trust somewhat or a lot (%)		Respondents that said most or all officials are corrupt (%)	
		Police	Courts	Police	Judges and magistrates
Benin	62	43	40	58	58
Botswana	33	69	68	30	14
Cape Verde	44	61	67	6	4
Ghana	33	64	62	52	36
Kenya	55	37	55	64	29
Lesotho	48	67	74	35	12
Madagascar	27	56	42	32	25
Malawi	43	79	78	28	20
Mali	54	73	55	50	56
Mozambique	38	72	74	31	16
Namibia	35	64	66	44	32
Nigeria	63	16	36	75	42
Senegal	55	79	73	27	23
South Africa	38	48	68	47	21
Tanzania	42	84	85	33	24
Uganda	45	63	72	67	35
Zambia	51	31	49	70	31
Zimbabwe	62	39	53	62	25
<b>Average for all countries</b>	<b>46</b>	<b>56</b>	<b>62</b>	<b>47</b>	<b>28</b>

Source Computed from Afrobarometer Round 3 surveys conducted in 2005<sup>3</sup>

- Influence of wealth on the decisions of the criminal justice officials due to corruption
- Brutality or use of torture in the enforcement of law, especially during arrest, detention, and interrogation in police cells
- Extra-judicial killing of suspects and demonstrators
- Weak democratic civilian oversight because of illegitimate control by the executive organ. This entrenched a culture of impunity among criminal justice officials
- Ineffectiveness of agencies responsible for crime prevention and control as well as criminal investigation due to poor facilities (especially forensic, investigation, intelligence/surveillance, communication and transportation equipment), training, remuneration, supervision and discipline. The deficiencies in intelligence gathering and investigation often aggravate problems of the use of torture to obtain confession
- Delay in trials resulting in a very high population of persons awaiting trial in prisons. For example, persons remanded in prisons pending and during trials (awaiting trial inmates) constitute two-thirds of the inmate population of the Nigerian prisons
- Imposition of fines beyond the means of poor offenders, resulting in majority of convicts being fine defaulters, a reflection of the influence of poverty on access to criminal justice
- Punishments are unduly severe because of the authoritarian environment in the majority of African countries having recourse to draconian punishments as the 'weapon for war on crime'.
- Proliferation of militia and vigilante groups in communities to curb increasing crimes and as response to the ineffectiveness of the formal criminal justice agencies. The groups frequently precipitate insecurity through their lawlessness, lack of respect for human rights, resort to trial by ordeal and summary executions (Abrahams, 1987; Baker 2002, 2005; Anderson 2002; Harnischfeger 2002).

These problems are endemic in most African countries. However, recent developments – political liberalisation; justice sector reforms; the establishment of national human rights commissions; the growing vibrancy of human rights NGOs working towards police criminal justice sector reforms; and emerging plural and critical media – point to a brighter future in the struggle for access to criminal justice in Africa (Berg 2005; Alemika 2005).

## CONCLUSION

The primary duty of the criminal justice system is to dispense criminal justice in accordance with the due process or rule of law. In practical terms, criminal justice refers to the determination of the guilt or innocence of a suspect, and the allocation of punishment that is fair and proportional to the convict's offence. Substantive criminal justice requires equity and equality in the enforcement and interpretation of criminal justice, which, however, can only be realised with minimum disparities in political and socioeconomic power. Criminal justice (equity and equality) cannot be realised if there are wide economic and political inequities and inequalities in society. The formal rules of criminal justice – which are often the focus of attention by the legal technologists (lawyers and judges) – cannot produce criminal justice if the requisite political and economic conditions for substantive criminal justice are absent. Both formal and substantive preconditions must be satisfied for criminal justice to be realised.

Crime and criminality are embedded in the social, political and economic structures of society. Discourse of criminal justice should analyse:

- What conducts should be treated as crime?
- How is culpability to be determined?
- Who determines culpability and what factors are taken into consideration?
- Who determines what punishment an offender deserves?
- Who prescribes and calibrates the correspondence between crime and punishment and the desert for the various offences and offenders?
- What factors should count as aggravating, mitigating or exculpating considerations? Is penal desert a function of crime or of the character of the offender? In other words, should desert or justice be determined by the severity of the injury and losses associated with a crime or with the conduct and background of the offender? These questions are at the heart of the construction and administration of criminal justice. If political and economic power-holders make criminal laws, determine the scale of punishment, and control institutions and officials that make, enforce and interpret law and administer punishments, can those who are excluded from economic and political decision making and resources obtain criminal justice? Anyone concerned with criminal justice must reflect on these questions. In brief, can criminal justice be guaranteed and accessed by all citizens where political

and economic injustices are endemic and embedded in the very structure of the social system?

## NOTES

- 1 Adopted by the OAU in 1981 and came into force in October 1986.
- 2 Some criminologists have argued that rather than deter people from crime, the death penalty – especially when conducted in public or televised or publicised – has a brutalisation effect, resulting in the erosion of respect for the sanctity of human lives.
- 3 The data for this study were obtained from the Round 3 survey of the Afrobarometer, conducted in 18 African countries in 2005. Data were collected through interviews of a representative sample of adult population (those eighteen years and older) in each of the countries based on a multi-stage, stratified, clustered sampling approach. For details of sample and methodology please consult [www.afrobarometer.org](http://www.afrobarometer.org)

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# 3 Status quo or traditional resurgence

What is best for Africa's criminal justice systems?

RICHARD BOWD

## ABSTRACT

Capacity building of social, political and economic institutions in Africa has been high on the agenda of the international community, implicitly or explicitly, for decades. This is perhaps best exemplified by the last ten or fifteen years, during which the good-governance agenda has advocated the construction and strengthening of institutions that provide a pathway for development. One of the most prominent of these institutions is the criminal justice system, which is charged with the establishment and maintenance of law and order, at least in terms of the good-governance agenda and according to the Western notion of a criminal justice system. However, if the overarching purpose of a criminal justice system is to assist the development of society, then it is important to consider the environment in which such development is taking place. It is necessary, therefore, to pose the question: do the current criminal justice systems best serve the needs of African societies, and if not, what replacement systems are available? To answer this question, it is necessary to examine the incumbent criminal justice systems in Africa, the way in which they came into being, their aims, and whether such systems are the most beneficial for

African societies. Possible alternatives are then explored. In this chapter the societies of sub-Saharan Africa (SSA) are considered. The societies of SSA and North Africa differ substantially, at least in terms of their legal structures. While the judicial practices of North African societies deserve further study, it would be unwise to attempt a comprehensive analysis of sub-Saharan and North African societies within the scope of this chapter.

## **THE THEORY AND EVOLUTION OF CRIMINAL LAW IN FORMER COLONIAL POWERS**

The former colonial powers of Great Britain and France, over a relatively long period, evolved advanced and complex criminal justice systems in an attempt to meet the increasing demands of their society. The origins of criminal law in these countries are derived from Roman private law, which is based on determining the level of culpability for crimes against person and property, including libellous comments, assault and injury, theft of property and financial dishonesty. Within the practice of Roman private law, a high level of discretion was held by its administrators, and punishments were based very much on reparations. Roman law evolved over 1 000 years after the Law of the Twelve Tables in 449 BC. However, with the collapse of the Roman Empire, it was 'lost' to what now constitutes the Western world.

The 'rediscovery' of Roman law in the 11th century led to serious scholarship. By the 16th century, Roman law dominated the legal practice of most European countries and still provides the foundations for criminal justice systems across continental Europe to varying degrees. Each country has built upon these foundations to suit its requirements. The notable difference in Europe was England. Its legal system had become more advanced than that of its continental counterparts, and thus the benefits of following such a system were less obvious to the English. The English legal system, dominated by common law, developed along its own path in parallel with continental Europe. However, it too has borrowed from the principles of Roman law.

Criminal justice systems, like all social institutions, are born out of, and reformed through conflict of some kind. The very need for a criminal justice system presupposes a conflict between what those that constitute a society see as acceptable and unacceptable. Simply defined, the purpose of criminal law is to identify a set of rules that define the limits of socially acceptable behaviour

and, with suitably measured punishment, to prohibit behaviour that falls outside those limits. The creation and functioning of such a system indicates some form of consensus, at least at superficial level, as to what is deemed acceptable behaviour. However, subsequent modifications of this system imply shifting notions of the acceptable and unacceptable. While some aspects of human behaviour are governed by natural laws, they are not, as is apparent from criminal law reform, satisfactory as a sole guide to social behaviour. First attributed to Aristotle, but advanced by Hobbes and Bentham, among others, natural law is defined as

a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved (Hobbes 1651, in Wootton 1966:172).

This may include crimes such as murder or rape. Much of English common law is based on natural laws. However, with the challenges that land reform, the industrial revolution and globalisation have brought, the criminal legal system has had to adapt. This scenario is the same for continental Europe.

The way in which a criminal legal system evolves is in itself a process of conflict. In the earlier stages of the evolution of Europe's criminal justice systems, political and moral philosophy became the basis of such conflict. Debate over what constitutes a crime provides space for contestation. For example, is a speeding offence morally wrong? The answer, for most, is 'No, but it is a criminal offence'. Similarly, is adultery morally wrong? For most, the answer would be 'Yes'. However, breach of marital contract is not considered a criminal matter. This issue highlights the most important debate within the criminal justice system: what is the purpose of such a system? The answer will shape the emergence of the criminal justice system, and the finding of this answer will depend on the context of the state engaged in legal reform, and the lawmakers who debate it. Simply defined, the instrumental conception of criminal law states that

criminal law is a technique or instrument that can be used to serve various possible ends. We are justified in maintaining a system of criminal law if it is an efficient technique for achieving worthwhile ends; its structure

and content should then be determined by asking how it can serve those ends most efficiently (Duff 2008).

In this sense, the criminal justice system identifies various individual and public interests that, owing to their importance to human welfare, require protection, and provides such protection by forbidding behaviour that may threaten them. This is conceived through the belief that ‘the smooth functioning of society and the preservation of order requires that a number of activities should be regulated’ (Devlin 1965:5). In opposition to this view is that of legal moralism, which at a simplistic level posits the notion that the function of the criminal justice system is to pursue retributive justice through punishing ‘all and only those who are morally culpable in the doing of some morally wrongful action’ (Moore 1997:35). These are the two opposed schools of thought regarding the purpose of a criminal justice system, at least from European philosophical positions. Other alternatives exist. Nevertheless, it is not the function of this chapter to analyse these, and suffice it to note that modern European criminal justice systems operate somewhere between the two, and much of this will depend on the political direction of the government and the lawmakers. Essentially, however, criminal law can be regarded as

that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks on public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals, or upon rights annexed to their persons; (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property (Stephen 1883:3).

Its general purposes are therefore to protect the rights and interests of the individual and to maintain social cohesion.

A second area in which the construction of a criminal justice system meets conflict is the way in which it administers justice through its system of punishment. It is commonly accepted in modern European criminal justice systems that the objectives of punishment are retribution, deterrence, incapacitation, rehabilitation and restitution. This then brings further conflict, because the weighting applied to each of these objectives alters according to the political philosophy enshrined in the system.

For instance, the primary concern of the liberalist school lies with individual freedom. It is therefore the duty of the state to provide a secure framework through which individuals can pursue individual autonomy. Punishment, therefore, is required to protect such liberty from the threat of crime, and to that end, its purpose is to uphold norms of appropriate behaviour identified in criminal law. Punishment not only reinforces the notion that certain forms of behaviour are unacceptable, but acts as a deterrent against future violations. In this sense, liberals may be more in favour of deterrence, incapacitation and retribution.

In contrast, communitarianism views collective welfare as at least as important as individual liberty. Punishment based on the 'just deserts' model adopted by liberalism 'may [therefore] further rupture the social bonds already damaged by the offence, while imposing suffering on others who do not deserve it' (Sanders & Young 2005:6). Such a viewpoint is premised on the belief that 'no man is an island', and in fact functions as part of a society in which members pursue their objectives within a network of interdependency. Such a view, while not discounting free will, takes into account the ability of individuals to follow the requirements of the criminal law, given the way in which the social context and structure impact on one's existence. According to the communitarianist perspective, therefore, punishment should take into account the wider societal impact, and pursue a path that promotes collective welfare, even at cost to the individual. In this sense, a restorative element could be introduced to the criminal justice system.

## CRIMINAL JUSTICE SYSTEMS OF AFRICA

Much of contemporary SSA, as one might expect, is governed by criminal justice systems that are rooted in the judicial practices of their previous colonial rulers. Indeed, the majority of state institutions in SSA have their origins in the institutions of the colonialists, and are certainly influenced by states that dominate the current world order. Colonial powers, in their need to establish and retain control of large populations with relatively few administrators, imposed the institutions that served them in their own countries. In British-administered SSA, criminal justice systems were

concerned particularly with the maintenance of law and order; sentencing was based on the principles of retribution and general deterrence and

there was a marked reluctance to take into account customary notions of compensation and restitution (Coldham 2000:220).

To this end, sanctions employed in Britain were established in its African colonies, and the scope of customary criminal law was restricted, at least in a formal sense. With this came the distinction between criminal and civil law, the introduction of which conflicted with established legal doctrines in SSA. While British criminal law had been constructed around the behaviour of the individual, and sought to regulate how an individual behaved in isolation from the community, African customary law

comprises all those rules of conduct which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole ... our society and its laws are founded on an individualistic assumption; theirs on a collective organisation (Dreiberg 1934:231).

The law, rather than operating in the positive through providing guidelines on how to act, became negative with the issuance of instructions on how not to act. Similarly, those SSA countries governed by France introduced laws that individualised the conception of the law. The difference between British and French systems of criminal law lay in their procedural nature. Whereas the British system was confrontational and adversarial, with advocates for crown and defence stating their case before judge and jury or magistrate, the French system was more inquisitorial, whereby the role of the judges was 'to gather evidence and question witnesses in order to find truth' (Joireman 2001).

On independence, African governments did little to change from the legal systems they had inherited, other than to further institutionalise existing Western systems by replacing the dual court system with the development of a codified system that either abolished customary courts altogether or integrated them into the bottom rung of the judicial ladder. In certain circumstances, criminal law in some SSA states distinctly retained adherence to not only the principles of English law, but also its interpretation (Read 1963). Former French colonies engaged in similar practices, preserving the colonial structures that had been implemented to ensure the hegemony of the French colonialists at the

cost of failing to meet the needs of the majority of the population (Pie 1989). While it is perhaps understandable that on independence African governments did not engage in a complete redevelopment of the existing criminal justice system, effects of this may have been far-reaching in terms of the institutional development of African society.

Criminal justice systems in Africa today have developed somewhat from those in the immediate post-independence era in order to cope with the actual and perceived challenges faced by modern African society. The United Nations Office on Drugs and Crime (UNODC) has stated that Africa has a serious crime problem, caused mainly by high income inequality, rapid urbanisation, high youth unemployment and poorly resourced criminal justice systems, and that this has subsequent negative effects on investment, human and social capital, and development in general (UNODC 2005). Although this document was published in 2005, this trend had been developing since independence. With most, if not all, of the states that constitute SSA being directly or indirectly affected by conflict, the challenges faced by the criminal justice systems of SSA are great.

To manage this situation, SSA governments have sought to maintain or further institutionalise those criminal justice systems of Western genesis through legal and constitutional reform. Ugandan constitutional reform in 1995 retained 'an almost entirely retributive philosophy, consistent with its roots in English law' (Robins 2008:2), while in Mozambique the 2004 constitution (the third since independence from Portugal in 1975) included directives that further strengthened individual rights and the independence of the courts (Open Society Foundation 2006).

Across Africa, as governments change, peacefully or through conflict, new measures are taken to address development goals, secure the political position of new leaders, and enable a differentiation between the old and new regimes. These measures operate within the framework of the current system, and therefore reinforce the position of such a system: that is, a system that is based on Western-centric notions of criminal justice. However, are such systems the best for SSA?

## **PROBLEMS ASSOCIATED WITH WESTERN-CENTRIC SYSTEMS IN SSA**

In an analysis of the impact of the forced introduction of alien criminal justice systems into SSA, Shaiti formulates three very important arguments.

The process of transforming the social structure, through the imposition of capitalism, had three basic consequences. Firstly, it arrested and destroyed the natural development of the indigenous societies and their institutions ... Secondly, laws were introduced 'from above', clearly serving the interests of an alien ruling class and not reflecting the popular demands of the local inhabitants. Thirdly, the process of transformation witnessed the emergence of new forms of conduct defined as criminal by the ruling class. The colonial legal system was, therefore, at best, a pale reflection of what existed in the ex-colonial power' (Shaiti 1992:17–18).

Essentially, this had the effect of ensuring the dependency of these colonies on their colonial master, even in the event of independence. Because the evolution of indigenous societies and institutions was retarded, the ability of these newly independent countries to manage the significant challenges they were faced with was non-existent unless they retained the institutions left by the former colonial powers. It was not possible, given the clamour for power in the independence era, among other challenges, for African governments to resurrect and develop their indigenous institutions; nor would the retreating colonial powers allow it. The 'divide-and- rule' tactics employed by the colonial powers, coupled with the manipulation of patriarchal systems and imposition of alien institutions, ensured that even with independence these countries would be tied to their former masters.

On independence, in the ensuing scramble for power, set against the backdrop of the Cold War, with foreign aid being sold for political allegiance, the emergence of a new political elite became evident. Leaders of independence struggles against the colonial powers took over, only to be confronted with internal challenges to their hegemony. The criminal justice systems established in the colonial periods served a purpose for these leaders, the main aim of the majority of whom was to consolidate power. An important function of a Western criminal justice system is its independence and neutrality. Systems that are based on Western legal systems should represent institutions that are devoid of class or factional bias. While the transcendence of class and factional interests in Western states is in itself questionable, it is perhaps all the more questionable in some SSA states. Indeed, the patriarchal systems that grew organically in pre-colonial SSA – which were then supported and manipulated throughout

the colonial period to aid the divide-and-rule tactics employed by the colonial powers – had the effect of fragmenting society along power lines. The justice systems inherited by newly independent states were

found to be useful by the new ruling class, [however] the subordinate classes could only accept the arrangement from a position of weakness. Because post-colonial states are based on a very shaky foundation, coercion is more widely practiced compared to more stable developed countries (Shaidi 1992:16).

The continued application of colonial legal systems suited the new elite ruling class because throughout the period of colonialism it was often these elites who had been tasked with the management of the country under supervision of a semi-absent landlord. In maintaining the existing systems, such elites found themselves in an advantageous position from which they could, with relative ease, ensure their position and consolidate their power: not always for the benefit of the populations they were meant to be serving.

When power, status and wealth are unequally distributed along gender, race and class lines, it enables those in the dominant power position to maintain such a position. If the purpose of the criminal justice system is to maintain order and resolve disputes, it seems futile to put into place a system that can perpetuate such social problems. If we consider the retributive prosecution and punishment of a poor thief, this has the effect of upholding the value of private property, while reinforcing poverty. Although the maintenance of private property may be desirable in African society, because poverty remains such a prevalent issue, this perhaps indicates that a different approach may be required. The retention of criminal justice systems that originated from the West has probably provided elites in newly independent SSA countries with the ability to preserve their position through the control of systems that can contribute to structural and political violence.

Given the power imbalances that eventuate through the criminal justice systems of the former colonies, can we state that such systems meet the needs of Africa today? Crime in Africa is on the increase and

responding to rising crime levels, or at least to public concern about perceived rising crime levels, governments introduce harsher punishments

and reduce procedural safeguards in order to secure more convictions (Coldham 2000:218).

While this may meet with Western conceptions of criminal justice, it has important negative implications for African society. The effect of increasing the retributive element of the criminal justice systems in SSA follows the neoliberal agenda espoused by the West. However, an implication of this is to situate criminal justice with the referent being the individual, thus removing justice from the social. In pursuing an aggressive retributive criminal justice, there is a danger of undermining the social fabric of African communities. Criminal justice, rather than being held in the domain of the community in order to restore societal relations and protect social cohesion, becomes rooted in the ideals of individualism.

While this may be effective, and indeed desirable, in urban areas where rates of crime are higher, in rural areas the effects of such policies can be devastating. Although SSA is currently undergoing the highest rate of urbanisation in the world, rural population was 60% in 2007 (UN 2007), which indicates the requirement to address the needs of the rural population. Whereas urban areas may experience a greater prevalence of abject poverty, those in rural areas suffer greater levels of absolute and relative poverty. The survival of these populations in the face of such poverty is based on the social bonds and networks that are in place within these communities and the social capital that results from them. This is because 'persons bound together in dense social networks, infused with norms of reciprocity and trust are better able and more inclined to act collectively for mutual benefit and social purposes' (Krishna 2002:15). In addition, social capital is necessary for overall development and the development of institutions in particular:

Democratic institutions cannot be built from the top down ... They must be built up in the everyday traditions of trust and civic virtue among [their] citizens' (Laitin 1995:172).

Engaging in an overly retributive criminal justice system situates justice with the individual rather than the social. This ruptures social bonds through the removal of family members (by incarceration) who are often the primary providers, and transforms the structure of society. Rural society in SSA is by

nature communitarian. Therefore, by introducing a liberal, individual-based criminal justice system, retributive punishments serve to weaken social capital and impede development potential. Indeed, they can have the effect of reversing development in rural areas because poverty is reinforced, societal cohesion is diminished, and the structural integrity of the community is challenged.

Continuance with criminal justice systems from former colonial powers may also raise the question of identity. A legal system, as an institution, is an extension of identity: cultural, political and national. At the onset of independence, SSA states attempted nation-building programmes, key to which is the development of a national identity.

However, rather than leading to the development of a national identity, the social and political characteristics of many Third World countries – political repression, economic crisis, rapid social change, uneven industrialisation, swift urbanisation – often instead foster feelings of disappointment and an identity crisis, promoting people to question their social and political values (Haynes 1996:98).

With the destructive influence of the Cold War and the conflicts that occurred during it and afterwards, which have further fragmented already very diverse countries, the need to develop a national identity perhaps has never been greater. The role of institutions in this endeavour cannot be understated, as they are crucial to identity formation.

Collectivities and collective identifications are to be found, in the first instance, in the practices of the embodied individuals that generate or constitute them (Jenkins 2004:133).

Therefore institutions, whether formal or informal, provide a vital function in the creation of cultural, political and national identity through the rules, norms and values they establish. A criminal justice system based on retributive punishment contributes to the altering of identity from a communal-based one – in which the restoration of social bonds is primary – to an individual-based one. If one does not develop one's own identity through the building of institutions that reflect the choices of the population, it is difficult to build a national identity that will function effectively in uniting the population.

Criminal justice systems that are based on the former colonial models also face challenges in terms of their application. To be effective, the criminal justice systems of the former colonial masters require various logistical and financial considerations to be met. These include a physical legal infrastructure, such as courts, police stations and prisons, which, owing to severe financial constraints, is problematic to construct and maintain. Additionally, legal personnel such as judges, lawyers, court administrators and a police force are necessary to ensure the efficient functioning of the system. This leads to problems of access, because those in the population who do not have the resources to access this system, or are geographically isolated from it, find themselves in a position of disadvantage. In much of rural SSA, sections of the population are excluded from the systems for these reasons, and the unequal distribution of power is perpetuated, because they are unable to engage effectively with the institutions of the state. If we look at the example of the Democratic Republic of Congo (DRC), it is evident that governing such a country with a criminal justice system based on the French one is not practical, owing to the enormous logistical and financial constraints faced by that country. Commenting in the current situation facing the criminal justice system in the DRC, Koso (2005:59) states that

where infrastructure does exist, it is inadequate and in a state of advanced decay. Office furniture and equipment either do not exist or are barely functional. Staff, who are in short supply, live and work in miserable conditions, with inadequate training to address contemporary justice issues. Corruption, tribalism, and nepotism are ubiquitous.

In addition, the 1886 criminal code was last revised in 1940, and subsequently does not resemble the French criminal code on which it was modelled. Nor does it comply with several key international instruments signed by the DRC (Koso 2005). Much of the country therefore is not governed by the rule of law, at least in its formal sense.

The example of the DRC is not the only one in SSA, and many states experience similar problems. This represents a void between the state and the population, and between formal and informal institutions. The state, in such situations, does not usually have the ability to enforce the rule of law, and where it does, it runs the risk of undermining social cohesion. This can translate into a weakening of the relationship between the state and the population, or

vertical social capital, which has significant influence on the development potential of the country. While government may function in urban areas, in less accessible areas the gap widens. Within this gap informal institutions develop, based around the community, as they seek to provide the services that would normally be in the domain of the state. This, in a sense, develops civil society. However, the gap between the state and the population means that coordination between the two is extremely difficult and the formalisation of informal institutions is complicated, if not impossible. What this essentially translates into is a stagnation of the institutional evolutionary process that represents a particular problem, because a scenario in which informal institutions are strong and formal institutions are weak is not conducive to good governance or to Africa's development as a whole.

Formal institutions, generally, have evolved from locally owned informal institutions. This is when that they are at their most effective, because they have been internalised at the informal and formal levels of society, and have become embedded in the psychology of the population and the state. It is, perhaps, then necessary that the criminal justice system in Africa, to be fully effective, should evolve in such a way (as it did in former colonial powers).

Laws are really nothing other than the conditions on which civil society exists. A people, since it is subject to laws, ought to be the author of them. The right of laying down rules of society belongs only to those who form the society (Rousseau 1762:42).

Evidently there are a number of problems with the criminal justice systems in place in SSA. The huge power imbalances that arise from a continuation of the systems left from the colonial period contribute to structural violence and enable political violence, while the use of retributive sanctions serves to undermine societal cohesion and social capital, thus diminishing the potential for development. Institutional evolution based on the needs and demands of the population of the state is necessary, not only to help fill the gap between the state and the population, but to engender a national identity that could be instrumental in reducing the propensity for violent conflict, and thus enable the establishment of an environment conducive to development. In general, 'African republics have changed from white civil servants to black ones, but they have not changed the structure of their administration' (Devlavignette

1977:130). This needs to be addressed, and structures must be developed to meet the concerns of the African populations. The structures and systems put in place during the colonial period were deliberately divisive, exclusionary and extractive. What is necessary to ascertain is whether there are other systems that could better meet those needs?

## **TRADITIONAL AFRICAN CRIMINAL JUSTICE SYSTEMS AND THEIR POTENTIAL ROLE**

In a generalised sense, pre-colonial SSA had in place a set of complex and advanced legal institutions that best met the needs of African populations. In some cases, this survived in the colonial period. Indeed, when considering the Arusha of Tanzania, Carlston et al (1968:332) assert that ‘there is no process in Western society closely comparable to the dispute-settlement procedures utilised by the Arusha’. Traditional African legal systems were based around the resolution of disputes in such a way that community cohesion was restored, while individual needs were met.

Such institutions and procedures were set out by Africans because they placed a great emphasis on peaceful resolution of disputes which was always aimed at restoring social harmony; while at the same time, upholding the principles of fairness, equity and justice as engraved in their customs and traditions ... Emphasis was not on punishment, but on reconciliation and restoration of social harmony among the parties in conflict (Nwolise 2004:59–60).

This observation is crucial to the understanding of African society, as it indicates that while the individual’s needs are important, the needs of the community as a body take precedence. In this sense, African society adopts a communitarian philosophical position. This is evident through the concept of Ubuntu, whose ‘features included solidarity, unity, care for one another, compromise, and tolerance. It was a customary law, whose violations attracted sanctions ranging from fines to isolations’ (Nwolise 2004:61).

Holding such a position is important in shaping the institutions of the state and can be seen in the formation of traditional legal systems. Such systems, based

on the restoration of communal relationships and social cohesion, are particularly crucial, owing to the way in which group identity is conceived, because

in most African societies, legal rights and duties are primarily attached to a group rather than to individuals ... The individual plays a relatively subordinate role. Very often, the members of the group, as individuals, are only users of collective rights belonging to the family, lineage, clan, tribe or ethnic group as a whole. A law-breaking individual thus transforms his group into a law-breaking group, for in his dealings with others, he never stands alone. In the same vein, a disputing individual transforms his group into a disputing group and it follows that if he is wronged, he may depend upon his group for vengeance, for in some vicarious manner, they too have been wronged (Igbokwe 1998:449–450).

Therefore traditional systems that share

similar characteristics: voluntary participation, reliance on social pressure to ensure attendance and participation, informal process, basis in restorative justice, decisions based in compromise rather than rule of law, and the central role of the disputants and community in the process' (Connolly 2005:241)

may be most effective in 'restoring social cohesion within the community by promoting reconciliation between conflicting parties' (Penal Reform International 2000:9). That such traditional courts are based on restorative rather than retributive justice serves to augment the reconciliation process. Indeed, as Allott (1968:145) importantly advocates,

at the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community'.

From a Rousseauian perspective, the use of traditional justice systems should be encouraged, as they are very much owned by those they govern, and they

operate in accordance to the customs and norms of such communities. African social life is based on local social networks. When such communal ties are broken or damaged, their repair is reliant on an understanding of the specific local dynamics and interpersonal relationships. Traditional legal systems can probably utilise such local knowledge to better effect, thus leading to a more robust restoration of social cohesion.

What makes indigenous law so influential in the restoration of social relationships is village involvement in settlements (Richland 2005). Within tribally based society, there has typically existed a process of dispute settlement conducted by elders or accepted influential 'big men' who manage the process of arbitration and negotiation with an emphasis on conciliation (Cotran 1969). Such systems are often still pervasive in today's society, working in parallel with systems put in place by colonial overlords or amalgamating the two to create a hybrid legal system. A particular benefit of such 'tribal' courts regarding reconciliation is their public nature, as Schapera (1962:64) notes when writing on the Ngwato,

[A]ll trials are held in public, and any member of the tribe has the right to attend and take part in the proceedings, no matter in what court they are held ... the judge then throws the matter open for general discussion, and the merits of the case are publicly argued by those wishing to do so.

In conducting public trials or settlements, a communal focus is given to the process, thus facilitating the reconciliation process as, in cases involving the community, such involvement can enable the community to heal together.

Despite their apparent effectiveness and compatibility with African society, traditional justice systems are often criticised for violating human rights, lacking due process and undermining the state, which should hold the monopoly over criminal justice. However, there does not seem to be any terminal conflict between traditional African systems and Western systems. The philosophical groundings of traditional systems may differ from Western systems, but they do not necessarily forgo human rights. Although the procedures of traditional systems do not meet with the criteria set by criminal justice systems in the West, they are not obligated to do so, and, in the absence of any effectively functioning criminal justice system, are certainly better than nothing. The restorative nature of their system of sanctions ensures that social cohesion is not undermined in the same way that retributive systems from the West do. Indeed, UNODC

has identified priority policy options for the reform of African criminal justice systems which include the introduction of enhancement of restorative justice as appropriate (UNODC 2005). This would indicate a recognition that the current systems, based on the retributive systems of the former colonial powers, are not meeting the needs of African societies, and thus the employ of traditional legal systems may offer an alternative.

## CONCLUSION

Coldham (2000) contends that a great deal of policy on and academic attention to justice systems in Africa has been focused on the reform of land tenure, women's rights, court structures and constitution making, rather than ensuring the establishment of criminal justice systems that address the needs of developing African states. It is relatively clear that current criminal justice systems based on institutions of former colonial powers are not as effective as the populations of Africa require them to be. The main reasons are that these systems

- Contribute to the unequal distribution of power, creating elites that are able to secure their position, and perpetuate structural violence
- Undermine social cohesion through the rupturing of social bonds as a result of their retributive nature
- Reduce the capability for states to develop a national identity, because the building of indigenous institutions that are owned by the people is made more difficult
- Offer no practical application to vast proportions of the population who are in isolated areas of the country and distant from the state

The present criminal justice systems of Africa therefore play a part in the continued stagnation of its development.

Traditional justice systems based on the promotion of social cohesion can fill the gap that modern systems leave. Their restorative nature ensures that harmony can be restored through dialogue and mediation involving the community, instead of crime leading to social instability. Indeed, because these traditional mechanisms reinforce the 'social', they would possibly result in a decrease in crime. Urban crime rates are much higher than rural crime rates

(UNODC 2005), which would support the premise that restorative methods that are employed in rural areas that lack of government have greater effect, partially because communities in rural areas share stronger bonds than in urban areas, where individualism is greater.

Traditional justice systems do exist in many SSA countries, and are accepted by the state as part of the legal system. However, the benefits of such systems do not seem to have been fully realised, not only in terms of how they deal with crime, but in their ability to help shape a national identity. Formalising traditional systems may enable the development of such an identity that is forged through the collective development of indigenous institutions. The success of the West in terms of its development came about, in part, through the organic development of institutions and the adaptation of alien systems to suit the needs of their populations. If we really believe the best way forward is African solutions to African problems, does it not seem reasonable too for African governments and populations to develop institutions based on their collective goals and values? While the criminal justice systems put in place in the colonial period may have their uses, particularly in an era of unprecedented urbanisation, it is important for Africa's development that the continent construct its own institutions that work for its populations. African society, structured around the communal, has, in the past, developed highly effective institutions for the management of such society and the maintenance of social cohesion. It therefore seems appropriate to use these systems again. Robust support and political commitment to the formalisation of traditional criminal justice systems may have the effect of reducing crime through their prioritisation of collective and communal harmony.

## NOTES

- 1 NB. Scotland followed the principles of Roman law, similar to continental Europe.
- 2 The dual court system refers to the usage of having formal courts based on the colonial system and customary courts together, the customary courts having restricted jurisdiction and the formal courts having overall jurisdiction.
- 3 This line of thought will be developed in the section that examines the problems associated with current African criminal justice systems.
- 4 For a more in-depth discussion of Ubuntu, see K M'Baye (1974).

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# 4 Restorative approaches to criminal justice in Africa

The case of Uganda

SIMON ROBINS<sup>1</sup>

## ABSTRACT

Restorative justice in African states has gained a significant profile through transitional justice process, but remains very much at the fringes of mainstream practice in criminal justice systems. This article reviews the challenges faced by criminal justice systems in the contemporary African state and the promise of restorative justice from both theory and practice, using Uganda as an example. It is proposed that restorative justice as a concept and restorative customary practices specifically have the potential to address the issues facing justice systems in Africa today. In particular, a state such as Uganda can seek to legitimise restorative approaches through centralised legislation, but allow such practice to be interpreted in a way relevant to custom by the grassroots community courts that exist at the base of the formal legal system.

## INTRODUCTION

Restorative justice has been posited as the solution to many of the problems faced by contemporary criminal justice. However, despite referencing indigenous

systems of law, including those of Africa, as a source for modern conceptions of restorative justice, both the theory and the practice of restorative justice have been developed largely in Europe and North America.

The challenges faced by the Ugandan justice system mirror many of those in other African states, where the retributive colonial systems inherited at independence are increasingly in crisis. Here an effort is made to consider how restorative approaches can contribute to addressing the challenges to criminal justice in Africa, taking Uganda as an example. Traditional justice mechanisms are increasingly considered to have a role in addressing issues arising from conflict in the north of Uganda, and a commitment has been made by the government of Uganda to include largely restorative traditional mechanisms in processes to deal with offences committed during the conflict (Annexure to the Agreement on Accountability and Reconciliation 2007).

Here, the status of the Ugandan criminal justice system is reviewed, including the challenges it faces, and the efforts that have been made to introduce restorative approaches. The future of restorative process in Uganda is then discussed, on the basis of an integration of traditional justice mechanisms into the criminal justice system, and of an extension of the 'top-down' restorative approaches that have been developed in recent years.

## **THE UGANDAN CRIMINAL JUSTICE SYSTEM**

The Uganda state has the characteristics of many of the commonwealth nations of sub-Saharan Africa. It is multi-ethnic, containing four principal ethnic groups, divided into smaller groups, and speaking around 40 languages. The nation is 85 per cent Christian, with a significant Muslim minority. Its borders were defined in the colonial era with little respect for demographics. While the nation gained independence from Britain in 1962, Uganda retains the imprint of its colonial past, not least in its criminal justice system. Since independence, Uganda has seen six military coups, but never a peaceful change of government. Following the military victory of Yoweri Museveni's National Resistance Movement (NRM) over the regime of Milton Obote in 1986, Uganda has experienced a degree of stability and sustained economic development. The two-decade-long ethnically based insurgency of the Lord's Resistance Army (LRA) has continued to blight the north of the country, displacing a majority of the population of the region and killing thousands of civilians (Lomo & Hovil 2004).

At independence, Uganda continued to follow English common law as the basis of its legal system, re-enacting colonial provisions, with the only change being that the sovereignty of the Uganda parliament supplanted that of the British monarch (Nsereko 1996). The Judicature Act of 1996 replaced this as the source of law, with applicable law including statutory and case law, common law, doctrines of equity and customary law. Although the constitution of Uganda has been violated many times since independence, it remains the supreme law of the country. The constitution of 1995 (Uganda's third since independence) remains an important source of criminal law and vital to the concept of the rule of law. The Ugandan justice system retains an almost entirely retributive philosophy, consistent with its roots in English law.

The institutionalisation of customary law dates back to colonial times, when the British acknowledged the authority of 'native courts' to try indigenous Ugandans for non-capital offences (Hone 1939). The colonial authorities attempted to codify tribal courts, recognising the authority of local leaders in the territories considered theirs. In the instance of those ethnic groups perceived to have more developed judicial systems, namely the kingdoms of Buganda, Toro, Ankole and later Bunyoro (known as 'treaty areas'), this acknowledged a hierarchy of authority of chiefs, including the right of appeal from one court to a higher one, with the ultimate possibility of appeal to the ruler himself. For more serious cases, appeals could be made to the colonial high court, and death sentences could not be passed without reference to a British commissioner. In non-treaty areas British native courts supervised the indigenous native courts. The amount of independence that each court possessed depended on the colonial perception of the development of each system. Maximum punishments were set and appeals permitted to the colonial authorities as a way of acknowledging the lesser development of these judicial systems and indeed of these ethnic groups in colonial eyes. Colonial reports indicate that 'a number of chiefs and elders whose authority is supported by us hold courts of various grades' (Morris 1967:166). These were in practice courts of village elders and clan heads, with a rarely used appeal system to a hierarchy of sub-chiefs, chiefs and groups of chiefs. The recognition of such courts was based upon the colonial understanding of the strength of the authority of traditional leaders, and where this authority was perceived as absent, no effort was made to bring customary practice under colonial administration.

Generally, the native courts had jurisdiction over only one ethnic group, and law was thus tribal in nature for all natives. This system ignored the plurality of

customary African approaches, silencing age groups, clans, women's groups and religious groups, in deference to a single authority of tribal chiefs recognised as 'genuine' custom (Mamdani 2001) in which executive, legislative, judicial and administrative power was vested. The colonial regime constructed indigenous communities as self-regulating and not in need of the intervention of the colonial administration, which in turn reduced the potential load on the colonial justice system. The native courts permitted the colonial administration to judicially empower indigenous clients and created a two-tier, racially segregated system. For non-indigenous populations, British and otherwise, British-derived law in a national judicial system was applied. A Ugandan professor of law has made the point:

The common law legal system is an alien introduction into Uganda; alien in both substance and procedure. It was superimposed on the various legal, semi-legal and non-legal systems that ordered the various societies and resolved issues before colonization. From the very start it was attempted to run a dual system of native courts and regular courts; and administer a sanitised colonially customised customary law and English law. This in effect resulted in administering law that was alien to the people (Juuko 2004).

Although the dual structure has since been integrated into a single system exercising both criminal and civil jurisdiction, customary law continues to be part of the formal Ugandan legal system, through the local council courts. The Judicature Act limits customary law, in language almost identical to that of the colonial penal code: customary law cannot be enforced if it is repugnant to natural justice, equity or good conscience or if it is incompatible with the written law.<sup>2</sup> The judiciary consists of a hierarchy of courts: the supreme court, the court of appeal, and the high court, which hears all capital cases.<sup>3</sup> Below these are magistrates' courts, which handle the bulk of civil and criminal cases, and the local council courts that deal with minor civil matters and by-laws.

With the exception of murder, crime rates in Uganda are low,<sup>4</sup> but the criminal justice system nevertheless faces enormous challenges. Access to justice from a financial, physical and technical viewpoint is poor. In rural areas, police posts and higher courts are often far from many of the population, and in the conflict-affected north the situation is extreme. Nationally, over 10 per cent of

the population claim to have no access to a justice or law and order institution (JLOS 2007). The financial cost of accessing the institutions of justice can be expensive: in addition to the cost of travelling to courts, it is often necessary to make payments for administrative procedures that should be free. Language remains a barrier, since English is the language of the justice system, and is spoken well by only a minority of Ugandans. In addition to imposing a huge translation burden on all procedures, there is a suggestion that in some cases the judiciary themselves do not have sufficient proficiency in English to work effectively (Juuko 2004). While the number of high court circuits has recently been increased, there remain areas where there is no resident judge, resulting in infrequent sessions. There is one lawyer for every 12 000 people, and 88 per cent of lawyers are in Kampala, the capital, in exactly the reverse proportion to the distribution of the population in rural/urban terms (Juuko 2004). Staff and resourcing in the justice system are inadequate at every level, reducing the capacity of the system to operate. The net result of this is a backlog in cases that continues to increase: at the end of 2004, elimination of this backlog for criminal cases in the high court was not expected for 50 years (Ogoola 2006).

When sentencing does occur, the options have traditionally included only fines, imprisonment or the death penalty. Since endemic poverty reduces the capacity of most to pay fines, imprisonment is the most common sentence. Since a *de facto* moratorium on the death penalty (the last executions occurred in 1999) the number of prisoners on death row has continued to grow.<sup>5</sup> The sclerosis in the justice system leads to chronic problems for the prison service, notably concerning prisoners held on remand. Despite constitutional requirements to commit suspects within 60 days for petty offences and within 180 for capital offences, up to 32 per cent of offenders stay uncommitted beyond these limits (JLOS 2007). Additionally, there are reports that persons held on remand – who constitute a majority of the prison population – can wait in jail without trial for up to nine years (Juuko 2004), owing to the inefficiency of the courts. This has an impact on overcrowding and conditions: data from 1999 suggested that the nation's prisons held more than three times their nominal capacity (Bukurura 2003), while a more recent estimate is a factor of two (Penal Reform International 2008).

Although the judicial system remains largely independent, and retains the respect of the public and of those who have passed through it (JLOS 2007), it is teetering on the verge of collapse.

## RESTORATIVE JUSTICE

Restorative justice is a concept that attempts to reshape the way in which crime is seen and, as a result, the way in which justice is done. In most criminal justice systems crime is seen as an offence against the state that is punished by the state, with victims playing little role, if any, in the process. A restorative paradigm puts the victim at the centre of any process, rather than as witness or spectator, as in a purely punitive approach: restorative justice is often presented as an alternative to retributive justice. Restorative justice sees wrongdoing in terms of harms to relationships, and aims to restore relationships (in the broadest sense of restoring equality) between people and communities: doing justice means healing and putting right wrongs (Zehr 1997):

Restorative justice views crime primarily as harm to relationships and to the parties involved in them (including individuals, groups and communities). This differs from the understanding at the root of contemporary criminal justice systems, which view crime as a violation or breach of the law... No longer is the state viewed as the principal party harmed by crime. Restorative justice views the primary harm as experienced by the victim and one that extends through the web of relationships to include the victim's immediate community of support, the wrongdoer and her community of support, and the wider community. (Llewellyn 2006:93)

The most obvious relationship damaged by an offence is that between victim and offender, but a restorative justice process aims to restore all relationships damaged by wrongdoing. As such, restorative processes emphasise the role of communities, both as victims of crime and in the response to crime. Restorative justice seeks to involve communities by holding offenders directly accountable to communities that have been victimised and by promoting an emphasis on offenders accepting responsibility (Johnstone 2004). This understanding creates an immediate connection between what restorative justice aims to do and the commonly understood meaning of reconciliation. Such an approach to wrongdoing has a long history in the customary practice of many societies, not least in Africa (for example Nyamu-Msembi 2003; Oke Elechi, 2006; Honeyman et al 2004).

In practice, a contemporary restorative approach is likely to include 'apologies, restitution and acknowledgements of harm and injury, as well as ... other efforts

to provide healing and reintegration of offenders into their communities, with or without additional punishment' (Menkel-Meadow 2007:10.2) Experimentation with restorative justice began in North America in the 1970s, and a substantial body of both theory and practice of such approaches to criminal justice now exists (eg McCold 2006). Applying a strict definition would include as restorative only those processes where victims and offenders meet face to face and themselves determine the outcome of the process ('primary' restorative processes). Many other processes, including community service sanctions and community justice processes, contain restorative elements, however, and will be considered here.

So-called primary restorative processes are of three types:

- *Mediation*: Initially a dialogue between victim and offender, mediated by a neutral third party, mediation practice has evolved to include mediation by community members concerning offences committed within the community. Victim offender mediation (VOM) aims to create a dialogue driven process with restitution and reconciliation as the principal aim.
- *Restorative circles*: Restorative circles can be traced directly to indigenous concepts of dealing with wrongdoing, involving an engagement between victim and offender in the presence of respected community leaders. 'Sentencing circles' can use this principle in conjunction with the criminal justice system to use traditional process to reach an outcome acceptable to the community.
- *Restorative conferencing*: Conferencing approaches evolved in juvenile justice, and aim to involve all direct stakeholders in how best to repair the harm of crime. Typically, for juvenile offenders, this will include family members. 'Community conferencing' extends this concept to any community, and has been used in schools, workplaces and other communities.

While most work on restorative justice has been done in Europe and North America, traditional practice has contributed. The concept of restorative circles has been developed in indigenous American communities in the US, notably the Navajo (Dickson-Gilmore 1992; La Prairie 1995; La Prairie & Diamond 1992), and conferencing was pioneered in aboriginal Australian communities (Moore & McDonald 1995).

In Africa, restorative process gained the highest profile through the work of the South African Truth and Reconciliation Commission (TRC), which sought 'transitional justice' following the end of apartheid. The TRC explicitly adopted

a restorative approach, claiming to provide ‘another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation’ (Tutu 2000). The TRC used explicitly Christian language of forgiveness and reconciliation, but was widely criticised for the amnesty policy on which it was predicated. In the criminal justice arena in Africa some restorative initiatives have been taken, notably attempting to use elements of traditional practice (Bowd 2008, elsewhere in this volume).

## RESTORATIVE APPROACHES IN UGANDA

Restorative approaches in Uganda have been of two types: ‘top-down’ and based on Western models, and ‘bottom-up’, based on customary process and rooted in a popular justice system, the local council courts. Both will be reviewed here. A British colonial commentator, writing in 1939, made what is probably the earliest recorded reference to restorative justice practice in Uganda. While describing the indigenous (in this case, Baganda) concept of justice, it effectively summarises the aim of contemporary restorative approaches:

If my goat is stolen, I must find the wrongdoer and bring him to the chief; my remedy is then either to get the goat back or to be compensated in money or kind so that I am restored to my original position. In other words, the native conception of law extended only to restitution. When the existing balance of things is upset by a wrongful act, the justice of the case demands, and the machinery of the law is available to effect, a restoration of the balance (Hone 1939:181).

This was a reference to the ‘native courts’ that existed alongside the formal British system in colonial times, and were largely continued after independence. They have since been replaced by the local council courts (see below).

The 1995 constitution of Uganda stipulates that, ‘Reconciliation between parties shall be promoted and adequate compensation shall be awarded to victims of wrongs’. (Constitution of Uganda 1995). Restorative process is in this spirit, but remains largely absent from the criminal justice system.

The local council courts had their genesis in the creation of ‘resistance councils’ (RCs) by the NRM in areas they controlled. This reflected their Marxist

ideology in attempting to devolve power to popular committees at grassroots, and such committees administered justice in the place of the customary chiefs in NRM areas (Baker 2004). In 1988, after the NRM had seized power, formal judicial function was given to the RCs, later renamed local councils (LCs), covering minor civil matters, property offences where the value was limited, customary law and by-laws. The LC courts have become the lowest level of the criminal justice system, with judicial powers at three levels, village (LCI), parish (LCII) and sub-county (LCIII). They constitute the 'main civil courts in the country' (African Rights 2000:37), with links to the higher courts through appeals to the chief magistrate or the high court. Litigants initiate cases at the LCI level (although they can choose to use the concurrent jurisdiction of the magistrates' courts), and any appeals resulting will go to the LCII and later LCIII courts before reaching the chief magistrate, who can uphold or overturn decisions, or send cases for retrial.

The LCI executive committee is elected at village (LCI) level by the entire adult population, and these committees in turn elect the members of the higher LC structures. The LC committees then constitute themselves into a court as required. The LC courts operate in local languages, within the community, using indigenous approaches of conciliation and compromise, judging cases according to 'common sense and wisdom' (Khadiagala 2001). The LC courts are restorative in the sense that they operate at community level, and have the power to order reconciliation, compensation and apology, among other sanctions. The cost of the system to the state is low. Most members of the court work as volunteers, and the LC committee is funded as a local government structure. Initially popular (Baker 2004), the judicial function of the LCs has been increasingly criticised, the greatest problem being that groups that dominate the LCs enforce their own interests (Khadiagala 2001). In some areas the LC courts are seen as having justified the abandonment of rural areas by the institutions of more formal justice (African Rights 2000) and many of those administering justice in the LC courts are largely ignorant of the law (Juuko 2004). Since many posts are occupied on a voluntary basis and, like the rest of the justice system, they are underfunded, this leaves the courts open to corruption. Despite these criticisms, the LC courts do substantially increase access to justice: large majorities of those surveyed find them easily accessible, fast and cheap (JLOS 2007). The LC courts represent an effort to fuse customary justice, administered by elected officials who are trusted community leaders, with the formal criminal justice system.

The Children Statute of 1996 has been praised as ‘a radical piece of legislation ... more restorative than UK legislation’ (Liebmann 2007:273). It builds on the responsibility for children’s welfare given to the LCI courts, where a child (aged 12–17) found guilty of an offence can be subject to orders for reconciliation, compensation, restitution, apology, caution or a guidance order. All of these represent an exemplary restorative approach to juvenile offending. Additionally, for all non-capital offences (that is, typically heard in a magistrate’s court) a child will appear at a district family and children court. However, in practice this legislation has broadly failed to be implemented:

The Committee notes with concern that although the principles of the best interests of the child, respect for the views of the child, and the child’s right to participate in family, school and social life are incorporated fully in the Constitution and the Children’s Statute, they are not implemented in practice due to, *inter alia*, cultural norms, practices and attitudes (UN Committee on the Rights of the Child (UNCRC) 1997).

Alternative dispute resolution (ADR) has become more significant in common law jurisdictions in recent years, and Uganda has successfully used what might be called ‘court-based ADR’. ADR is an alternative to the adversarial approach of a court case: a structured negotiation process where a settlement is reached with the aid of a trained mediator. This concept resonates with customary process where settlement was often reached in the presence of a respected figure and implemented in good faith (Kiryabwire 2005). This approach has been enshrined in law through the Arbitration and Conciliation Act of 2000. ADR is integrated into the justice system through a pre-trial scheduling conference at which mediation can occur, and mediation has been made mandatory in the commercial court:

ADR has been applied extremely successfully in the Commercial Court for over 7 years now. It has been found to be an excellent and reliable tool for quick resolution of disputes ... It has tremendously increased the per capita volume of cases handled by the advocates. It has increased the litigants’ level of satisfaction with the end results of their disputes (Ogoola 2006:4).

ADR has also reduced the cost of litigation to both litigant and lawyers. Mediation is carried out under the auspices of the Centre for Arbitration and Dispute Resolution, a specialist statutory body that provides qualified and

certified mediators. While cost savings have not been enumerated by the government, it seems likely that the funding of mediators is more than offset by the savings in court time resulting from successful arbitration. Such an approach will now be taken in the high court and magistrates' courts (Ogoola 2006): this represents a top-down approach to achieving a true victim-offender mediation process.

In 2001 a community service programme was initiated, as an alternative to prison, intended to reduce prison overcrowding and rehabilitate. Magistrates are requested to consider the victim's attitudes and needs, as well as the offender's desire for community service or a custodial sentence. Work done by offenders should benefit communities and reconcile the offender and community, and is thus explicitly restorative. Additionally, some initiatives have been taken to introduce victim-offender mediation (Liebmann 2001). The initial community service programme was piloted in four districts and has been perceived to be a success, heralding the rolling out of the programme nationally. In 2006–7, the prison population fell by 5 per cent, partly owing to community service orders, of which 3 000 were issued (JLOS 2007). Weaknesses in the programme have been identified, including the length of time taken to administer a community service order and the fact that the public consider it a soft option and would prefer to see custodial sentences imposed (Biringi 2005).

Where customary practice has played a role in the formal criminal justice system, it has been at grassroots level, for minor offences, through the LC courts. More recently, the potential of traditional restorative practice has been emphasised by discussion of the Acholi practice of *mato oput*, in connection with serious crimes committed during the LRA insurgency in northern Uganda. Much has been written about the restorative nature of traditional Acholi justice, and the fact that traditional practice emphasises the restoration of relationships between individuals and clans affected by wrongdoing with the aim of promoting forgiveness and reconciliation (Afako 2002; Liu Institute 2005; Baines 2007). In conjunction with a formal government amnesty process, initiated by the 2000 Amnesty Act, local communities have used traditional ceremonies, including *mato oput*, a reconciliation rite to address the issue of murder, to welcome back to the community those who have been in the bush with the LRA (Ojera Latigo 2008). These ceremonies are public ways of bringing back into the community people who are often themselves victims (many LRA fighters were abducted and brutalised into fighting), who may have committed offences. They

constitute an indigenous restorative practice that uses the hierarchy of traditional structures and public ceremonies at clan level to legitimise a process of acceptance back into the community.

The international and academic communities have sometimes been guilty of romanticising such processes: they are certainly not a complete solution to the dilemma of peace and justice, and detailed consultations suggest that Acholi elders do not see *mato oput* as a solution to the issue of LRA crimes, but believe that the principles and values of *mato oput* can be used to rebuild Acholiland after the conflict (Liu Institute 2005). Indeed, many in the north desperately seek retributive justice (Pham et al 2005). *Mato oput* and similar indigenous practices, however, do offer the potential of an indigenous solution to the peace-versus-justice dilemma. Where such processes can give communities and individuals what they need, they can address the issue of justice in a far more relevant way than the indictments of the International Criminal Court, which were perceived by some local communities as an obstacle to peace.

The agreement of 29 June 2007 between the LRA and the Ugandan government includes a commitment to use traditional practice:

Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement ... The Traditional Justice Mechanisms referred to include: i. *Mato Oput* in Acholi, *Kayo Cuk* in Lango, *Ailuc* in Teso, *Tonu ci Koka* in Madi and *Okukaraba* in Ankole; and ii. Communal dispute settlement institutions such as family and clan courts (Annexure to the Agreement on Accountability and Reconciliation 2007, clause 19–21).

Ministers were reported as saying that this will involve modifying the penal code (IRIN 2007). While this has given rise to concern of an extension of amnesty to include all those accused of serious crimes, including those named in ICC indictments (Human Rights Watch 2008), this issue is beyond the remit of this paper. The implications of the agreement are that customary tribal practice will feature as part of the formal justice system.

In summary, to date Uganda has taken on board restorative elements that have been developed in Western systems, such as community service and alternative dispute resolution. It has also attempted to integrate customary practice through a democratic grassroots process that blurs the distinction between

traditional justice and the formal criminal justice system, and is intending to integrate some traditional practice into the formal justice system.

## **THE FUTURE OF RESTORATIVE JUSTICE IN UGANDA**

Despite the initiatives seen in Uganda and elsewhere, and the plethora of studies of the South African TRC and indigenous approaches to transitional justice in Acholiland, there remains a dearth of academic work on restorative processes in African criminal justice. The most relevant recent review of criminal justice systems in Commonwealth states (Coldham 2000) does not use the word 'restorative'. The concrete but modest steps taken in Uganda towards a restorative approach fall short of the 'primary' restorative processes discussed in section 3. They are additionally hampered by a lack of resources and of apparent commitment from concerned parties in the government and judiciary. Criminal justice is an issue that attracts little electoral interest, and so remains largely off the political agenda.

Efforts at introducing restorative approaches in Uganda have concerned popular justice at the grassroots (the LC courts), and adding restorative elements to the existing criminal justice system, often in specific sectors (community service, court-assisted ADR, the Children Statute). Here we will discuss the possibilities of a more comprehensive restorative approach that leverages the existing steps taken toward restorative process and the relevant elements of traditional practice.

### **Popular justice as restorative justice: The local council courts**

The machinery of a state is determined largely by the distinctive historical experience and cultural endowments of the society in which it is embedded. In Uganda this will lead us to discuss the colonial legacy and pre-colonial traditions that are increasingly being referenced in the justice arena. In Uganda, as in much of Africa, alienation from the institutions of criminal justice is compounded by colonisation and the historical import of a foreign justice system.

Fundamentally, justice is about controlling or managing social conflict, and one must ask whose justice a restorative approach will represent. Formal justice in Uganda has always been imposed from the top as a means of controlling

society, initially by a colonial regime that used local elites, and in the modern era by elites who maintain authority in a state that is democratic, but autocratic. Electorally, criminal justice policy remains largely irrelevant as long as crime levels are not increasing dramatically. While the consent of the people is a crucial aid to the legitimacy of a justice system, in Uganda that consent has never really been discussed. Given that restorative justice aims to involve communities in the issues that affect them, it seems natural that those same communities ought to play a role in determining whether and how restorative elements are introduced. In a society like that of Uganda, whose post-independence tradition is one of military regimes and non-democratic transitions, there are few precedents for such participation at national level. The existing model is that of the LC courts, which are accessible to communities and can engage stakeholders at the grassroots.

It has been suggested that efforts at popular or informal systems of justice are a response to the perceived failure of the centralised state (Khadiagala 2001) and are part of a trend of decentralisation that could increase pluralism and participation in institutions (Bratton 1989). Indeed Bratton suggests: 'Large areas of Africa have never experienced effective penetration by the transformative state, and rural folk there continue to grant allegiance to traditional institutions such as clan, age-set, or brotherhood' (Bratton 1989: 411). This supposes that such communities would be receptive to using these traditional institutions to deliver local justice.

The popular justice of the LC courts has prompted praise as well as criticism (for example Kane et al 2005), and such courts do at least offer a model for grassroots justice that melds customary process with the formal legal system. Such courts, notably the lowest village level court (the LC1) offer the prospect of justice that is more accessible in every sense (financial, physical and technical) than the formal system, and cheaper to administer. The LC courts have been found to be accessible and participatory, and promote reconciliation rather than punishment (Baker 2004; Kane et al 2005). However, not all expectations have been met. One detailed study has revealed how the property rights of women in Uganda have failed to be upheld by the LC courts (Khadiagala 2001). This is because popular justice does not challenge existing power relations in a community, but serves to reinforce them (Merry 1992). Indeed, the traditional hierarchies previously reinforced by the recognition of 'native courts' will overlap with those who succeed in being elected to the LC structures. The LC courts

consist of senior figures in the community, dominated by wealthier, older men, who use the courts to defend existing privileges. In this sense, where professionalism is absent and knowledge of the law poor, the LC courts are essentially a return to customary practice where community leaders drive the judicial process: rules of evidence are replaced by personal knowledge of the disputants (Khadiagala 2001). As with any less formal system, professionalism will be absent, corruption is a risk, and the law applied will be as much a product of common sense, local norms and social ties as of the penal code. Justice is not rights based, but prioritises social harmony, cooperation and compromise, and as a result

The disparity of power between litigants becomes relevant once again, and weak individuals find themselves not only without the effective protection of a clan but also without the protection of individual rights, this being the consideration that in theory they have received for giving up the group (Grande 1999:69).

As individuals, litigants have lost the protection of the formal justice system, but can fail to benefit from their membership of the community, because of agendas within it. The experience of the LC courts is that, while appropriate, and restorative justice can be delivered effectively at community level, they should not be idealised: power relations within the community will be imported into their decision making.

Despite the LC system, kinship-type processes with varying degrees of visibility and formality have continued to be used within clans and communities who seek to solve issues without recourse to officials. Indeed, the removal of formal authority from tribal chiefs through the replacement of the native courts with the LC structures does not necessarily end the engagement of such chiefs in local justice. Where consent of the concerned parties is obtained – either freely or through the exercise of the hierarchies of power that exist in the community – such local authorities will continue to play a role in dispute resolution. Participation and outcome in such processes will reflect internal power relations in the community. Where justice fails communities, or remains remote, they will continue to fall back on those customary processes that are completely beyond the formal system where even those modest guarantees that exist in the LC courts, particularly relevant for the marginal, are absent. Indeed, one

approach to enhance participation in any officially sanctioned process is to sanction the most-used non-formal systems, and the NGO sector has been involved in attempting to support and legitimise community-based dispute resolution systems (Nyamu-Musembi 2003).

The most extreme example of a process rooted in the community that is both highly retributive and beyond the control of the justice system is ‘mob justice’, a phenomenon that has become increasingly prevalent in African states, with thieves and others being summarily lynched on the street (Juuko 2004). Mob justice highlights the great challenge of rationalising customary process with a rights-based approach. If communities are empowered judicially, but choose to administer justice in ways that are alien to the concepts underlying the justice system, it becomes hugely challenging for the central authorities to intervene, even where the mechanisms to do so exist. The tension between rights-based law and traditional, customary law is summarised by Mamdani:

The language of rights bounded law. It claimed to set limits to power. For civic power was to be exercised within the rule of law, and had to observe the sanctity of the domain of rights. The language of custom, in contrast, did not circumscribe power, for custom was *enforced*. The language of custom *enabled* power instead of checking it by drawing boundaries around it (Mamdani 2001:654).

Because of the absence of expertise or oversight, any popular process decentralised to the level at which the LC courts operate will necessarily be customary: that is, it will operate according to local perceptions of justice and not to any penal code or other national guideline. The result is that while these courts are formally integrated into the justice system, in practice they are beyond its remit in many ways, ensuring that there is no coherence in how law is applied, or even what law is applied (see section 5.2 for more discussion). Most crucially, the challenge of ensuring the agency of all stakeholders in the creation and operation of such processes remains: ‘If custom is to have any meaning, its reproduction has to be more through consent than through coercion’ (Mamdani 2001:661–62). Ensuring accountability to the community can best be ensured by empowering those most marginalised by such systems. The use of elections to the LC committees has not ended questions over the LC courts’ legitimacy. McCold (2004) has cautioned against mistaking community justice for restorative justice.

While community engagement is part of many restorative approaches, popular justice that engages the community is not necessarily restorative, and can be as big a threat to a truly restorative approach as the formal punitive legal system. Involving the community in justice is not the same as bringing together those individuals most directly affected by the offence.

## Institutionalising traditional practice

The response of those favouring restorative justice is to point towards indigenous African practice that chimes with contemporary understanding of restorative process. However, behind the Western-driven interest in restorative and indigenous process in Africa, there seems to be an assumption that Africans somehow have an affinity with non-adversarial approaches (Khadiagala 2001). This simplistic approach is rarely supported by deep study of the concerned processes. Much has been written about the communal nature of traditional African society and how this privileges restorative approaches (for example on *ubuntu* in South Africa, see Louw 2006). However, traditional approaches to justice developed in the context of seeking protection within the group, from group members who transgress. Restorative processes, such as mediation and negotiation, test the power of the group: group cohesion (and potential exclusion) is the incentive to reach a settlement (Grande 1999). In this context, non-adversarial approaches depend on the nature of the relationship between the individual and the group. In the modern state, the power of the group has been devalued and the relationship between the group and the individual is transformed from the context that gave rise to traditional legal practice, not least in the sense that a litigant has the option of choosing to approach the formal legal system. With the erosion of group identity, other agendas – social, political and economic – have been strengthened within what is considered a single unit in traditional terms. The dissonance between a state that presumes a relationship with individuals and traditional societies with a group ethos has served as a background to the failure of the state to become more relevant to the lives of most of its citizens, in justice and other areas. Despite the failure of the criminal justice system of the modern state to be perceived as relevant, it can remain problematic to attempt to use traditional justice in societies that have evolved away from the organisational forms that led to its creation.

Within indigenous traditions, there have always been restorative and retributive approaches. Colonial-era reports of customary justice in Uganda discuss particular offences that led to imposition of the death penalty, flogging or fines, as well as those with a restitutive remedy (Hone 1939). Punishments in the native courts of kingdoms such as Buganda were exclusively retributive (Morris 1967). A commentator points out that: ‘Reverence for and romanticisation of an indigenous past slide over practices that the modern “civilized” western mind would object to, such as a variety of harsh physical (bodily) punishments and banishment’ (Daly 2002:62). Advocates of restorative justice risk identifying indigenous practices as exclusively restorative, and mythologise a need to recover these practices from a takeover by colonial powers that instituted retributive justice (Daly 2002). The result is what has been called the ‘idealisation of local spaces’ (Khadiagala 2001), which risks perpetuating the colonial stereotypes that justified separation of European and African law. In many cases where indigenous practice is used as a basis for a contemporary restorative process (largely those of aboriginal communities in developed states, for example Ross 1994; Yazzie 2000; Sivell-Ferri 1997), these are most often accommodations with tradition, rather than the wholesale adoption of customary practice. Experience with the LC courts in Uganda and elsewhere shows that using customary process as a basis to address lesser offences of a local nature with limited sanctions can be efficient and effective. This is particularly so where the community has an interest and an ability to intervene appropriately.

The principal challenges to the institutionalisation of customary practice are coherence, codification, scope, and conflict with national standards. The Ugandan state is a direct descendant of the colonial state that was imposed upon a diversity of ethnic groups and declared a unified political entity. As such, it seeks to exercise a coherent and unified criminal justice system over all communities in the nation. The greatest challenge to incorporating traditional practice – restorative or otherwise – into such a system is the threat to such a system’s coherence, though in practice since the colonial native courts, neither codification nor coherence of customary law has been attempted. Indeed, it is the nature of customary law that it is dynamic and so resists being written down. The Agreement on Accountability and Reconciliation (Annexure to the Agreement on Accountability and Reconciliation 2007) that aims to end the LRA war in the north commits to using five tribal ‘traditional justice mechanisms’, presumably in an effort to deliver justice that is relevant to these five

communities. If such a system is to be extended nationally, then many more such mechanisms (for other ethnic groups) will have to be identified and legitimised through such official recognition. That the judicial authority of the old kingdoms, whose role was elevated by the colonial system, has again become a political issue suggests that there remains a threat to a nationally coherent system from extending the use of customary law. This recalls exactly Mamdani's analysis of the colonial legal approach:

In the indirect-rule state, there was never a single customary law for all natives. For customary law was not racially specific; it was ethnically specific. It made a horizontal distinction, a distinction in law, between different ethnic groups. This was not a cultural but a legal distinction. The point is that each ethnic group had to have its *own* law (Mamdani 2001:654–5, emphasis in original).

The implication of the Agreement on Accountability and Reconciliation is a return not to the diversity of an authentic customary approach (with many complementary customary approaches used within each ethnic group), but to one law per tribe in the colonial tradition, and ethnicisation of the law. This raises the possibility that in a single jurisdiction, the applicable law will be a function of ethnicity, permitting an effective ethnic apartheid.

The suggestion of the Agreement on Accountability and Reconciliation that *serious* crimes will also be addressed through customary mechanisms articulates the challenge of determining the *scope* of customary law. For minor offences, popular and less formal processes, such as the LC courts, can deliver justice that is relevant and accessible. However, the customary treatment of offences traditionally handled by magistrates or the high courts will demand a greater integration of the traditional into the formal justice system, not least to reassure that this is not simply an effort to institutionalise impunity for LRA crimes. The competence and professionalism of those currently adjudicating at LCI level is unlikely to be adequate, and the issue of jurisdiction will be controversial. Many LRA crimes were committed against tribes other than the Acholi. Victim communities who should be involved in any restorative process will seek to use their own systems, while defendants will be largely Acholi. A broader issue will be when to apply traditional and potentially restorative justice, and when to use the retributive penal code, and at what level such decisions will be made. There

is a possibility that such decisions will be considered largely political rather than juridical.

## Furthering top-down restorative approaches

An alternative to integrating customary practice into the justice system is to extend and deepen existing restorative approaches nationally, in a 'top-down' way.

While the Children Statute represents a substantial legislative leap towards restorative process, in practice its changes have not been widely implemented. This is for a variety of reasons: training of concerned parties (including police, security forces, judiciary, magistrates and lawyers) is insufficient and unsystematic; and children continue to be detained with adults in inappropriate places (UNCRC 1997), despite sentencing being considered a last resort in the statute. In both cases the government points to a lack of resources for training and for the development of non-custodial alternatives for minors. In this respect at least, a restorative approach possibly does require an initial investment, in addition to existing spending on the justice system. However, in the longer term, with the avoidance of expensive incarceration and improved rehabilitation to reduce reoffending, savings could be made. More than this, Uganda is well poised to move towards more 'primary' restorative mechanisms of juvenile justice: the LC and family courts could be used to introduce more complete restorative approaches to juvenile crime, such as conferencing, and exploiting the local perspective of the courts, their accessibility to communities and their rooting in customary practice.

ADR has recently been introduced to all divisions of the high court and all high court circuits. However, it has been available to magistrates and has been underused (Ogoola 2006). It is, unfortunately, likely that the same problems will be seen in the higher courts unless a more proactive approach is taken. Beyond this, it has been suggested that ADR is in the tradition of customary African justice, where mediation is emphasised, and should resonate with both victims and offenders in the Ugandan justice system. However, the current wave of interest in ADR is very much a Western transplant into African societies that are currently suffering from a previous alien transplant, namely retributive European justice systems (Grande 199). That ADR as it is being implemented is remote from traditional Ugandan approaches is evident from its emphasis on victim and offender, independent of the broader group context in which customary mediation emerged.

The community service programme has also been extended nationally in recent years, but has still had only a small impact on the prison population. The reasons for this appear to be largely owing to resistance, or simply inertia, on the part of the judiciary and other stakeholders. There also remains public antipathy to the idea of community service as a ‘soft option’ (Buringi 2005). The most interesting development, from a restorative viewpoint, has been the introduction of efforts to educate communities in victim–offender mediation, and use community service as a way to bring victims, offenders and communities together in an alternative to the criminal justice system for minor offenders (Liebmann 2001). This was a brief and singular intervention, however, and does not appear to have been continued.

## Restorative justice: a way forward

There are two distinct, but not exclusive, paths towards integrating restorative justice into the criminal justice system in Uganda.

One route is to continue to add restorative elements to the formal system, and ensure that the restorative process already in place is allowed to perform. This would involve a commitment to ensuring that community service is used as widely as possible, and the judiciary is trained in its use; the extension of ADR throughout the justice system, which requires the training and provision of mediators on an appropriate scale; and the application of the restorative elements of the Children Statute to address all juvenile offences, which demands substantial efforts and resources to disseminate the statute to the lowest levels of the formal system and put relevant infrastructure in place. The second route is to introduce customary law on a broader scale.

Restorative justice reframes crime as an issue between victims and offenders, rather than offenders and the state. In customary practice and in much restorative theory, the community is the crucial intermediary between victim and offender. In a system that maintains the role of the state, the challenge for restorative justice is to formalise and systematise the role of the community, and in the African context to give traditional justice a place. The dilemma Uganda faces in choosing a restorative path forward is making choices between Western and customary approaches; between top-down and bottom-up approaches; and between recognising individual rights and allowing the group and interests within it to play a role. The existence of the highly decentralised and largely

customary LCI courts offers a compromise. As part of the formal justice system, there is a degree of oversight and accountability through elections and quotas for the disadvantaged, such as women. However, these bodies perform in a way that reflects local custom as much as written law. This ‘arms-length’ approach to the lower courts allows the authorities to set the frame, but the group, in a local context, will determine the details of law. As long as litigants have the right to appeal to a higher court, and are aware of this right, some safeguard against abuses of power can be maintained.

The LC courts provide a mechanism that can link the formal justice system with customary approaches, while blurring the line between the two. The top-down approach can be used to legislate to permit restorative processes, such as community service, juvenile conferencing and ADR, and LC courts encouraged to interpret these in a way that they, and their communities, perceive as relevant. In this way Western developed restorative processes can be made available for the lower courts to use in their own way, rather than being imposed. In this sense the ambiguity between the LC courts as formal bodies and community mechanisms for customary justice can be exploited to increase the degree of restoration in legal process, but in a way that remains relevant to communities. An example of this would be to legislate ADR as mandatory for all cases within the LCI courts, but not to specify in legislation the mechanism of such mediation. The community and the court would then determine for each case and according to local norms how mediation should operate in that context for any particular case. In this way the lower courts would be steered by legislation from above, but still maintain the autonomy to interpret both law and remedy according to custom.

While this may work for lesser offences, dealing with serious crimes – such as those in Acholiland during the LRA insurgency – in a restorative and customary way remains problematic. These challenges have been acknowledged by the Ugandan authorities:

The challenge is to bring all those advocating for only the cultural practices to appreciate the cross-cultural and international dimensions of the problem. We have to find a solution that will be satisfactory to the vast majority of the victims. The objective is to come up with a solution that will not only be acceptable to the victims, but also acceptable to the affected, the country and the international community (Rugunda 2007).

There is an additional concern that a new drive to institute a restorative approach from the top down may repeat the mistakes made when the colonial system first confronted traditional African justice. There is a danger that indigenous practice, restorative or not, that is considered relevant by people on the ground will be swept away by another wave from the West (Findlay 2000).

Uganda is currently living with a retributive system with restorative elements, and some sort of ‘spliced justice forms’ (Daly 1998) seem unavoidable. The discussion needs to be centred on the balance of restorative and retributive, traditional and ‘modern’ process. The LC courts have demonstrated that formal and informal systems can work together. The goal is likely to be a legal pluralism beyond the dual system of the colonial era and the current formal system. This has been described as a search for a ‘post-traditional solution’ that ‘may represent a profound departure from the more familiar’ (Juuko 2004:10). The current crisis in the justice system has provoked a realisation that a new approach must be found: ‘The old order must give way to a new order, yielding to a new judicial culture’ (Ogoola 2006:15).

## CONCLUSIONS

Independent Uganda has shown a continuity of penal policy with the colonial era, with an emphasis on retribution and deterrence through harsh punishment. This has resulted in a justice system that is under-resourced and inefficient and with little commitment to rehabilitation or addressing causes of crime. A grass-roots mechanism of popular justice has been instituted through the LC courts that attempt to deliver community justice. These represent the integration of a largely customary, community justice system at the bottom of the formal justice system. More recently, concrete initiatives that aim to introduce a restorative approach have been taken in specific sectors. The possibility of indigenous and largely restorative processes being integrated into the criminal justice system has been raised by the government’s commitment to addressing offences related to the LRA insurgency using traditional approaches.

Uganda and other African states in a similar position face several dilemmas. They seek to address the crisis in their justice systems, and have begun to look to restorative approaches, seeing an echo in these of the customary justice that colonial systems replaced. However, the systems that the state is trying to impose are also Western concepts, divorced from local tradition. It seems likely that the state

will fail to make these appear relevant to the people. An alternative is to attempt to build on existing customary practice from the bottom up, and use custom to build law that is meaningful to the people. The solution is likely to be a mix of top-down and bottom-up models. The LCI courts are the bottom of the formal judicial pyramid and already have a largely customary approach to lesser offences. By introducing the concepts of restorative process that underlie community service and mediation to the judiciary at this level, but leaving with them their flexibility to interpret these concepts in a way that is relevant for their communities, one can create a system that is restorative and relevant.

The issue of serious crimes, raised by the need to prosecute LRA offences, poses a far greater challenge. Communities must be involved, and customary process invoked, but in a way that does not challenge the need for a unitary and codified approach throughout the state or neglect the needs of the ethnic groups involved. This appears to be a dilemma that neither the community-based LC courts nor a top-down process can readily address.

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## NOTES

- 1 Post-war Reconstruction and Development Unit, University of York, UK.
- 2 Judicature Act S14(c).
- 3 Uganda's penal code provides for 15 capital offences: nine separate offences grouped under the collective heading 'treason' and offences against the state, rape, defilement, murder, aggravated robbery and aggravated kidnapping. A recent proposal will make counterfeiting a capital offence (Monitor 2008).
- 4 Rates for reported robbery and assault are less than 10% of those in the US and for murder double those of the US (Interpol 2001). However, studies indicate that only around 60% of crime is reported (JLOS, 2007).
- 5 At the end of 2006, 566 condemned prisoners were reportedly held in Uganda's jails (<http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=25&nome=uganda>). The prison that holds most of them, Luzira Upper Prison, built in 1927 to hold 664 inmates, has recently held as many as 2 500 (Wakabi, Wairagala 2004), 'Uganda's death row debate', *New Internationalist*, London, April 2004.

# 5 Bail and Criminal Justice Administration in Nigeria

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## ABSTRACT

One of the fundamental rules that guide decisions during criminal justice processes in common law countries is the presumption that a suspect is innocent until his or her guilt has been established by a court or tribunal of competent jurisdiction. This presumption is enshrined in the constitutions of many countries as a fundamental right or as a requirement of due process. Consequently, the rights of suspects remain largely protected during the process of criminal justice administration, from arrest to conviction. This chapter examines the jurisprudence, and constitutional, statutory and judicial significance of bail in criminal justice administration in democratic societies. It also analyses the factors that influence bail decisions and the socioeconomic obstacles to effective and just administration of bail in African societies, with emphasis on Nigeria.

## INTRODUCTION

In this chapter the key terms ‘bail’ and ‘criminal justice administration’ are defined. This is followed by an examination of the laws providing for bail,

their administration, their shortcomings, the effect of pre-trial detention, its features, observations and recommendations for bail reform, and, lastly, conclusions.

In Nigeria there are two broad jurisdictions with four main sets of statutes for the administration of the criminal justice system. The first two sets of statutes – the Penal Code and the Criminal Procedure Code – are applicable in northern Nigeria, which consists of nineteen states, including the Federal Capital Territory, which is the home of Abuja, the capital of Nigeria. The Criminal Code and the Criminal Procedure Act are applicable in the southern part, which consists of seventeen states. This duality occurred as part of the colonial administration which, until the amalgamation of the north and south in 1914, administered northern and southern Nigeria as relatively distinct entities. Even afterwards, the two parallel jurisdictions have been maintained. The two sets of statutes contain similar provisions.

The hierarchies of courts are similar across the country. However, at state level, customary courts and a customary court of appeal in the south operate under customary law, while area courts and a Sharia court of appeal in the north apply the Islamic Code with a mixture of customary rules. Magistrates and high courts also cut across the country, with distinctive applicable laws (above).

At federal level, there are federal high courts and courts of appeal, the Supreme Court being the apex of all the courts in the country. Nigeria also operates a federal policing system with jurisdiction over all parts of the country. However, each state has an area-command headquarters, and zonal and divisional offices for effective and efficient operation of police functions across the nation.

## **DEFINITION OF BAIL**

‘Bail’ refers to the release of a suspect from detention after arrest, pending the completion of the investigation and the trial. It is aimed at securing a balance between two competing interests. First, the state seeks to bring offenders to trial and to dispense justice. Second, the protection of the rights of citizens and the presumption of innocence dictate that no one, without justification, should be deprived of personal liberty, especially freedom of movement and association. Bail ensures that suspects are relieved of or released from detention after extracting guarantees from them (and their sureties) that they will not interfere

with the criminal investigation and will be available for investigation and trial. Therefore bail plays a critical role in the dispensation of criminal justice and the protection of human rights.

Black's law dictionary (2004) defines bail as

a security such as cash or a bond, especially security required by a court for the release of a prisoner who must appear at a future time. To obtain the release of [oneself or another] by providing security for future appearance.

Other authors have defined bail in similar terms. For instance, Senna and Siegel (1981) define bail as 'representing money or some other security provided to the court to ensure the appearance of the defendant at every subsequent stage of the criminal justice processes'. Alubo (2007) defines bail as 'setting at liberty a person arrested or imprisoned on security being taken for his appearance on a day, and a place certain'. He also states that: 'Bail is a written undertaking by an accused person and his surety or sureties, if any, conditional upon the appearance at a specified time and place to answer a criminal charge.' Doherty (1999) defines bail as 'the procedure by which a person arrested for an offence is released on security being taken for his appearance on a day and place certain'.

Although there is concurrence on the definitions on bail, its application in Africa varies a great deal within a country as well as across countries. Though bail is enshrined in the Nigerian constitution, different interpretations by the various levels of the judiciary system and deliberate manipulations – owing to unethical conduct – as well as resource constraints, affect its application.

## **PURPOSE OF BAIL**

Although the main objective of bail is ensuring the suspect's subsequent appearance at the place and time agreed on, it serves as protection against wrongful detention while investigation and trial are on course. Okagbue (1996:5) emphasises that

Bail serves to give life to the abstract concept of the right to liberty by acting as a reconciling mechanism whereby the defendant's interest in pre-trial liberty and security's interest in the defendant's presence at

trial are both accommodated. Bail also serves to give substance to the presumption of innocence under which every person who is charged with a criminal offence is presumed innocent until he is proved guilty.

The effect of this presumption is that persons should not be punished until they have been found guilty by due process of law.

Oshodi (1973) connects the question of bail with the liberty of the subject, and cautions that 'if nothing is done to improve the law and practice on bail, one of the basic principles of criminal justice, the presumption of innocence, will be defeated'. The Lord Chancellor of England (1971, cited in Oshodi 1973:197) also observed that,

It [bail] is important because it affects the liberty of the subject. It is the only example in peacetime where a man can be kept in confinement for an appreciable period of time without a proper sentence following conviction after a proper trial.<sup>1</sup>

## WHAT IS CRIMINAL JUSTICE?

Criminal justice is a field of study that deals with the nature of crime in society, and analyses the formal processes and social agencies that have been established for crime control (Senna and Siegel 1981). The criminal justice system encompasses several institutions and actors within the executive, legislative and judicial arms of government as well as private legal practitioners. However, the legislative, police courts and prisons are the core institutions of criminal justice administration in modern states' (Alemika & Alemika 2005:5). The authors argue that:

The Nigerian criminal justice system cannot be properly classified as a system. On the contrary it is more of an assemblage of uncoordinated institutions. Thus, the various institutions of criminal justice in the country are oriented towards the punishment of the offender and the control of the citizens. Consequently, there is minimal concern for the rights of the accused person at all levels of the system from the legislative to the prisons.

They conclude that the manifestations of the primitive philosophy in the system include the provision of harsh punishments (even for minor crimes), wide police powers, inhuman conditions of police and prison cells that were neither designed nor maintained with regard for human dignity and privacy (Alemika & Alemika 2005:197).

In the administration of the criminal justice system in Nigeria, bail arises at three points: a suspect may be granted bail by the police; the accused may be granted bail by the court; and a convict may be granted bail while awaiting his or her appeal.

## **BAIL BY POLICE**

The Criminal Procedure Act (South), section 17, provides that whenever a person is taken into police custody without a warrant for an offence other than one that is punishable by death, any officer in charge of a police station may bring such a person before a magistrate or justice of the peace who has jurisdiction over the offence charged, within twenty-four hours of being taken into custody. Unless the offence appears to be of a serious nature, the suspect may be discharged upon entering into a self-recognition, with or without sureties, for a reasonable amount, to appear before a court at a time and place to be agreed upon. But section 484 of this act provides that where such a person is retained in custody, he or she shall be brought before a court or justice of the peace who has jurisdiction over the offence or is empowered to deal with such persons as soon as practicable, whether or not the police inquiries have been completed.

These provisions presuppose that there should be no undue detention of suspects in police custody that would constitute a miscarriage of justice while undergoing investigation.

Under sections 35(3) and (4) of the 1999 constitution, provisions for the issuance of bail are stipulated:

- Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention
- Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of:

- two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail
- three months from the date of his arrest or detention in the case of a person who has been released on bail
- he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date<sup>2</sup>

'Reasonable time' is defined as follows: where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day is sufficient. However, for a more distant court of competent jurisdiction, a period of two days is allocated or such longer period as may be considered by the court to be reasonable.

Many accused persons are kept in custody without bail by the police, and in many instances they are not brought before a court within the constitutionally prescribed limit of 24 or 48 hours. A study by the Nigerian Institute of Advanced Legal Studies (NIALS)<sup>3</sup> revealed that, out of a respondent sample of 845 accused persons, only 11.5 per cent had been released from police custody within 24 hours of their arrest. The majority (55.5 per cent) spent longer periods in police custody, ranging from a few days to one month. Almost 9 per cent of the respondents were kept in police custody without bail for more than one month. It is difficult to understand why this should be so.

The usual explanation is that it is difficult to complete investigations within the 24-hour time limit. But the law requires that when investigations cannot be completed, the suspect should be released on bail or brought before a court that may authorise continued detention or a conditional release (Okagbue 1996).

In Nigeria an arrest apparently marks the beginning of an investigation, instead of the culmination.

The study attributed this to several reasons. First, there is a lack of modern techniques and facilities for the detection and investigation of crime. Second, members of the police force are inadequately trained. As a result, arrests are often based on unsubstantiated accusations, suspicions or hunches, and the police then rely on interrogation and intimidation of the suspect and witnesses to try to elicit confessions. Because of this approach, the torture of suspects in police custody has been reported with increasing frequency.

Third, the police lack resources to perform their duties efficiently. More than 30 per cent of the police stations surveyed in the study stated that they

had no transportation facilities. Even where vehicles were available, they were often broken down and in a state of disrepair. Often police officers had to pay for the servicing and repair of these vehicles from their own resources. It was not uncommon for a court to be informed by the prosecution that a scheduled arraignment cannot take place because there was no police vehicle with which to bring the suspect to the court premises (Ajomo & Okagbue 1991).

Lastly, corruption plays a large role in the denial of bail by the police. Although a notice that 'Bail is not for sale, it is your right' is conspicuously displayed in most police stations, accused persons fail to regard bail as a right. Worst still, in a country where the average adult literacy rate is 43 per cent, many accused persons cannot read this notice. Often they are told that the sum of money they are asked to pay the police is the bail required by law. They do not realise that they are paying a bribe (Ajomo & Okagbue 1991).

In addition, the police, in the guise of performing their duty, have devised a novel means of keeping suspects in custody beyond the constitutional reasonable time of one or two days. This notion, which has yet to be recognised by our criminal justice system, is called a 'holding charge'. Neither the constitution nor criminal law legislation provides for such a charge (Amadi 2000). It is brought about when the police are investigating a capital or other serious offence. In this situation the police are always faced with the constitutional provision of 'reasonable time within which to charge the matter to court' as well as their legal incapacity to grant bail to suspects when they could not be brought to court within the stipulated time. But since the police are intent on keeping suspects in detention pending investigation, the so-called holding charge is an apparent lawful response to a legal dilemma.

As a result, the police bring the suspect before a court of law, as required by the constitution. But the police tend to flock to the court of summary jurisdiction, that is, a magistrate's court, which in law is not competent to handle a capital crime. This approach has the dual function of removing suspects from police custody and putting them in prison through the instrumentality of a court of law, albeit a court of incompetent jurisdiction. By so doing, the police perceive that they are not violating the law.

A good example is the decision in the case of *Eda v the Commissioner of Police (1982)*,<sup>4</sup> which led to changes in the administration of bail in Nigeria. In this case, the justices of the court of appeal laid down the principles for the detention of suspects:

First, when a person is arrested or detained by the police on reasonable suspicion of a crime and they are actively pursuing investigation of the matter, the duty of the police is to offer bail to the suspect and bring him to court within one or two days, as the case may be, irrespective of the sections of the Criminal Procedure Act or Police Act that the police may purport to be acting on.

Second, whether a person under arrest/detention is granted bail or not, it is the duty of police to bring any such person in their custody before a court within one or two days, as the case may be, in compliance with the relevant constitutional provisions.

Third, once the police have offered bail to an arrested or detained person, any further stay in custody by that person until he satisfies the conditions for the bail and is taken out by someone on bail cannot properly be regarded as unlawful detention under the constitution. Again, in an appropriate case, the constitutional duty of the police ends when they offer bail to a person held in custody in connection with an allegation of a criminal offence. It is not part of the duty of the police to provide the suspect with a surety to enable him realise or effectuate the bail granted him. It is equally not their duty to join or assist the suspect to perfect conditions stipulated for the bail offered him.

Finally, the police may detain the suspect until the conditions for the bail are fulfilled. They have a legal obligation to retain that person until he procures a surety or satisfies the conditions prescribed by court for his bail (Amadi 2000).

## **Bail by courts**

Doherty (1999) states that the power of a court to admit an accused to bail depends on two factors: the court before which the accused is being charged; and the nature of the offence levelled against the accused.

Section 118 of the Criminal Procedure Act states that a person charged with any offence punishable by death shall not be admitted to bail except by a judge of the high court. Where a person is charged with a felony other than one that is punishable by death, the court may, if it thinks fit, admit him or her to bail. When a person is charged with any offence other than those referred to in the preceding subsections, the court shall admit him or her to bail, unless it sees good reason to the contrary.

The first provision stipulates the court that is to grant bail to a person accused of a capital offence. When the police arrest a suspect in this regard, they have a duty, within one or two days as the case may be, to charge him or her in the high court, which is a court of competent jurisdiction. But for inexplicable reasons, the police sometimes charge an accused in a magistrate's court. This is illegal, and if the magistrate deals with the matter, he does so without jurisdiction (Amadi 2000) (see box 1).

The Criminal Procedure Act does not expressly state the factors that must be considered by a court in granting bail. Section 118, which deals with granting bail to an accused, is silent on the issues governing admission to bail. Nonetheless, the courts in the southern states consider certain aspects in deciding whether to grant or withhold bail.<sup>8</sup> The first is the nature of the offence and the punishment prescribed for it. If the offence is a serious one, and carries a heavy penalty (for example a homicide case), the court may not exercise its discretion in favour of granting bail to the accused. Second, an accused person is presumed innocent until proved guilty.<sup>9</sup> Therefore, he or she should not be punished by being denied bail in the absence of cogent or compelling reasons.

Third, the criminal record of the accused must be taken into account. If the accused can show that he or she is a person of good character and has never been convicted of a criminal offence, the court ought to exercise its discretion in favour of the accused and admit him or her to bail.

### Box 1 Selected cases and allegations of corruption

Thus, in *Wabali & Others v Commissioner of Police (1985)*,<sup>5</sup> on 23 October 1980 the applicants were suspected of murder. The police arrested them and put them in custody until 11 December 1980. That day the applicants were formally charged before a senior magistrate's court. The magistrate ordered that the accused be detained in prison custody. In an action challenging the jurisdiction of the magistrate to entertain a charge of murder and the legality of the detention, it was held that the court was not competent to hear the charge and that the detention was unlawful.

In *Dogo v Commissioner of Police (1980)*<sup>6</sup> it was held that bail should not be denied as a form of punishment. Okadigbo J stated that: 'It has been well established that bail is not to be withheld merely as punishment, and furthermore that the requirements as to bail are primarily to secure the attendance of the accused person at the trial.'

In *Eyu v The State (1988)*,<sup>7</sup> after enumerating other factors in deciding to grant or withhold bail, Oguntade JCA stated: 'Another important factor to be borne in mind is the criminal record of the accused and the likelihood of the repetition of the offence.'

Fourth, the possibility of the accused committing further offences while on bail must be considered. If an accused is unlikely to commit further offences while on bail, the court should exercise its discretion and admit the accused to bail. In the case of *R v Jamal*,<sup>10</sup> Butler Lloyd, the acting chief justice, stated this principle:

I find that this offence is alleged to have been committed while he [the suspect] was on bail on another equally serious charge. I think that I am not putting it too strongly in saying that I should not be exercising my discretion judicially if I made an order, the effect of which would be to restore the accused for a second time to that liberty which, according to the depositions now before me, he has already abused so seriously.<sup>11</sup>

The fifth consideration is the possibility of interfering with the investigation of the offence. If the accused is likely to obstruct the investigation, bail will be refused. But if there is no evidence that the accused will hamper the investigation of the case, bail ought to be granted.<sup>12</sup>

Under the Criminal Procedure Code that applies in the northern states, the factors to be taken into consideration in deciding whether to grant or withhold bail are expressly stated in section 341(2), which provides that a court may release a person on bail if it considers that:

- By reason of granting bail, the proper investigation of the offence would not be prejudiced
- No serious risk of the accused escaping from justice would be occasioned
- No grounds exist for believing that the accused, if released, would commit an offence<sup>13</sup> (see box 2)

The magistrate must exercise his discretion in favour of the accused if he or she satisfies the conditions in section 341(2) of the Criminal Procedure Code. In some cases, these conditions are met because they are stated on oath before the magistrate. They are then repeated in the applicant's affidavit, which supports his or her application for bail in the high court. If the prosecution did not file a counter-affidavit, they are deemed uncontroversial. The courts should adopt a liberal approach in considering applications for bail in order not to frustrate the spirit of the constitution.

**Box 2 Case evidence**

In *Obekpa v Commissioner of Police (1980)*<sup>14</sup> the accused was charged before a magistrate's court with the offence of theft. He made an oral application for bail, and stated on oath that he would cooperate with the police and would not commit any further offences if admitted to bail, and would provide surety for his bail. On an application to the high court to be admitted to bail, the high court held that the offence committed by the accused was bail-able at the discretion of the magistrate, since it was punishable by five years' imprisonment. The applicant having met the conditions stipulated in section 341(2) of the Criminal Procedure Code, the application for bail was granted.

**GRANTING OF BAIL PENDING APPEAL**

In the southern states, the provisions for granting bail pending appeal are contained in the magistrate's and high court laws. For example, in Lagos State, section 58(2)(a) of the magistrate's court law of the state reads:

Where an appellant has been sentenced to imprisonment or sent to a Borstal institution [for young offenders who are not old enough to be sent to adult prison], the magistrate shall release him or her on bail from custody on self-recognition with or without sureties and in such reasonable sum as the magistrate thinks fit, or on such other conditions for the appearance of appellants for the hearing of the appeal. However, if the appellant has previously served a sentence of not less than six months imprisonment; or if there is evidence that the appellant has been convicted previously for any offence which may have been recorded against him, the magistrate may reasonably presume that if released from custody, the appellant is likely to commit a further offence, or evade or attempt to evade justice by absconding or otherwise disappearing.

Thus, the magistrate has discretion to release the appellant from custody or not.<sup>15</sup>

Section 342(2) of the Criminal Procedure Code (applicable in the northern parts of the country) states:

When a person is convicted of an offence in a court and an appeal from such court moves to the High Court; the High Court or a single judge

thereof may refer to section 341 and direct that such a person be granted bail.<sup>16</sup> However, persons accused of an offence punishable with death shall not be released on bail. And persons accused of an offence punishable with imprisonment for a term exceeding three years shall not ordinarily be released on bail. Nevertheless, the court may upon application release on bail a person accused as aforesaid if it considers that:

- Through granting bail the proper investigation of the offence would not be prejudiced
- There is no serious risk of the accused escaping from justice
- No grounds exist for believing that the accused, if released, would commit an offence

Despite these provisions, if it appears to the court that there are no reasonable grounds for believing that the accused person has committed the offence, and there are sufficient grounds for further inquiry, that person may be released on bail pending such an inquiry. An equivalent practice is provided for in the criminal code of the southern parts of the country.

In bail pending an appeal, an applicant must not have been convicted. Once convicted, bail is no longer a right (see box 3).

Apart from the statutory provisions guiding the conditions for granting bail pending appeal, the principles are to be gleaned from decisions by the courts.<sup>20</sup>

### Box 3 Case evidence

In *COP v Alamu (1986)*<sup>17</sup> the court said that the accused was now a convict and so the presumption of innocence as provided under section 36(5) of the constitution was no longer available to him. A similar decision was reached in *Said Jamal v the State (1996)*.<sup>18</sup> The accused had to prove special circumstances before he could be granted bail.

In *Kuti v Police (1958)*<sup>19</sup> the accused was convicted by a magistrate and sentenced to a term of imprisonment. He appealed against this conviction and applied for bail, pending the hearing of the appeal. The magistrate refused bail. On appeal against the order refusing bail, the appellate court held that since there was no evidence on record that the appellant fell within the provisos to section 58(2)(a) of the magistrate's court law, he was entitled to bail. Thus, the appeal was allowed, and bail was granted on a recognisance of N500 and one surety in the same sum.

The courts require that there should be clear evidence and that special circumstances warrant an appeal before they can grant application for bail on the subsisting appeal. In other words, proof must be submitted that a proper appeal has been filed, and not merely a notice of appeal. The applicant may be requested to prove that a proceeding record fee has been paid, grounds of appeal have been filed, and a filing fee has been remunerated.

The special circumstances that may warrant the granting of bail depend on the facts of each case. Bail pending appeal is granted for the ill health of the convict; the likelihood of the applicant serving a prison sentence; the prospects of the appeal succeeding; and the likelihood of the applicant serving a greater proportion of his or her term before the appeal is held. These constitute unusual circumstances in bail pending appeal. Courts also consider other situations, such as the length of sentence (Bwala 2004); the possibility of the applicant absconding, medical grounds; the applicant's conduct; and mistrial.<sup>21</sup>

## REASONS FOR COURTS REFUSING BAIL

In a study conducted by the Institute of Advanced Legal Studies, 40 per cent of the sample of judicial officers (police and other law enforcement agencies) stated that they refuse bail because of the nature and gravity of the offence. Another 31.3 per cent said that refusal is based on the likelihood of the accused jumping bail. About 7 per cent linked refusal to the fear that the accused might tamper with investigations. About 18 per cent refuse bail when there is no surety or if they find the surety unacceptable, while 2.2 per cent said that they refuse bail because of the risk that the suspect might commit other offences. The nature and gravity of the offence are meant to be only two of the factors that are relevant to the issue of whether the accused is likely to appear to stand trial.

By distinguishing between the nature and gravity of the offence and the likelihood of the accused jumping bail, the courts have in practice elevated the former consideration to one of primary importance on its own merits. In other words, the nature and gravity of the offence are often determinants in granting bail, no matter what other factors might preclude the likelihood of flight. It is also disturbing that bail is refused in the absence of a surety or where the surety is not considered suitable.

According to the suspects who were sampled in detention, other reasons for their non-release from custody included the magistrate being on leave at the

time of their arraignment and failure to request bail. Legal representation also seems to be an important factor in granting bail.

It is not correct to refuse to release an accused person or suspects on bail simply because the magistrate is on leave or there is no legal representation. After all, bail in some instances is a constitutional right. Also, legal representation is essential. Hence an accused person must be provided with legal representation by the state if he or she cannot afford it.<sup>22</sup> Therefore, the release on bail of an accused person should not be treated trivially.

Many defendants do not know what bail is, much less how to apply for it. Even when defendants do know, they are not familiar with the factors that the court takes into account in bail determination. They are ignorant of the arguments to use to convince the court to exercise its discretion in their favour. Indeed, many defendants are so intimidated by the court proceedings that they can barely open their mouths to take their plea.

Even when granting bail, many courts require that a formal recommendation of a 'fit and proper person' who may act as surety should be prepared and signed by a lawyer, although this is not required by law. Thus in the words of Ibidapo-Obe and Nwankwo (1992:page reference?), 'it is only suspects who use the services of lawyers ... that are able to "perfect" the conditions of bail, who can secure their release'.

Section 33(6)(c) of the 1979 constitution guarantees the right of every person who is charged with a criminal offence to defend him- or herself in person or to be defended by a legal practitioner of own choice. But few criminal defendants have access to legal representation. A total of 34.5 per cent of the accused persons surveyed in the study were not aware of this constitutional right. Another 65.3 per cent did not obtain the services of a lawyer before their first appearance in court, and of those whose cases had gone to trial, 67.9 per cent were not represented by a lawyer at the trial. Various reasons were offered for this lack of representation, but the most important was the financial inability of the defendant to pay for legal services. A rather high proportion, 25.6 per cent of the respondent sample, did not obtain legal representation before their first appearance for this reason. At the trial stage, when the cost of legal services is even higher, the proportion rose to 59.1 per cent. Lack of legal representation is probably the reason that it is rare for an action to be brought for the vindication of the constitutional rights of suspects, despite the many infringements that occur (Ajomo & Okagbue 1991).

## CONDITIONS OF BAIL

Bail is granted as a right in some instances. However, in some cases when a suspect is granted bail, he or she is not released because he or she is unable to comply with the conditions of bail. In the study, 20 per cent of the accused persons were granted bail by the courts, but were not released from custody for this reason (Ajomo & Okagbue 1991:68). In another study, conducted by the Constitutional Rights Project,<sup>23</sup> it was found that between 20 and 25 per cent of the populations in certain prisons had been granted bail, but were still being held in custody (Ibidapo-Obe & Nwankwo 1992).

The usual condition for bail is that the accused person must produce a surety or sureties who will execute a bond for the sum of money that the court or police think fit. The surety must be acceptable to the court or police. In considering the acceptability of sureties, the police and courts attach almost equal importance to the gender, age, and social standing of the proposed surety, as well as the relationship with the accused and financial standing.

Preference is almost exclusively for male sureties, although there is nothing in the law that states that a woman cannot act as a surety. Various explanations have been offered for this phenomenon. Police spokespersons have indicated that the apparent prejudice against female sureties is merely a reflection of the fact that traditionally women rarely own property, which is often required as evidence of financial standing. However, in many cases, a female surety is turned down before any inquiry is made as to whether she has property.

The police and courts are also reluctant to allow women to risk the consequences of a forfeited bond, which may include imprisonment. This paternalistic approach is unwelcome and unconstitutional. Although the inspector-general of police and the chief justice have publicly affirmed the right of women to act as sureties, the practice of denying them the chance to do so by the rank and file continues.<sup>24</sup>

The amount of the bail bond is also a factor in the ability of the accused to achieve release on the granting of bail. In the study conducted by the Constitutional Rights Project, it was observed that in 27 out of 30 felony cases handled in a particular magistrate's court, the average bail was set at ₦50 000 (naira) bonds for each surety. In non-felonious cases (that is, offences punishable by less than three years' imprisonment) bail was set at an average of ₦5 000 bonds for each surety.<sup>25</sup>

In *Eyu v State* (1988),<sup>26</sup> where the trial court set bail at ₦400 000, the Court of Appeal emphasised that excessive bail breaches the right to liberty contained

in section 32(1) of the 1979 constitution. While ₦400 000 was clearly disproportionate in this case, the courts have not had an opportunity to lay down clear guidelines about excessive bail, since many defendants do not go on appeal. In the absence of determination by appellate courts on the proper setting of bail amounts, 'self-restraint and personal ethics' are apparently the only real controls over the improper use of bail.

The circumstances of the arrest, coupled with inadequate communication facilities, militate against the immediate release of the accused on bail. Often the suspect is picked up in the streets by the police. In many cases his or her friends or relatives know nothing of the person's plight, and the accused is unable to contact them because most of police stations and court buildings lack working telephones. Unless the accused can find someone who will physically convey a message of his or her whereabouts, he or she is likely to be arraigned without contacting anybody who might be willing to stand surety. The problem is more acute for new arrivals in town. Even when an accused person knows of sureties who would be acceptable to the court, he or she may spend several days in custody while trying to contact them (Okagbue 1996:72). However, the introduction of cellphone technology has minimised this problem.

Owing to the difficulties in quickly securing acceptable sureties, so-called charge and bail lawyers tend to hang around the court premises. For a fee they offer to stand in surety for the accused person.

When the surety requires ownership of property in the form of land, these 'professional sureties' frequently produce forged documents of title to land. This only works with the collusion of the court staff, who take gratifications for the approval of sureties, and of the lawyers who recommend them as 'fit and proper persons' to act as sureties. Should the accused person abscond, the professional surety can no longer be found and is made to forfeit the bonded sum (Okagbue 1996).

In the study, roughly 65 per cent of the judicial officers stated that professional sureties are dishonest, mislead the court, and have an adverse effect on the course of justice.

The courts rarely dispense with the requirement of sureties in order to release the suspect on self-recognition. In the study only 2.6 per cent of the sample had enjoyed this privilege and only 13.5 per cent of the lawyer respondents had ever had clients released on their own recognisance (Ibidapo-Obe & Nwanko).

The Constitutional Rights Project study found a link between the status of the prisoner and release on recognisance. Only 6 per cent of a sample of 37

judicial officers stated that they would ordinarily grant bail on self-recognition for a non-felonious offence. However, 86 per cent would do so if the suspect was a prominent citizen. Social status thus determines access to bail.

The ordinary defendant, once arrested, therefore finds it extremely difficult to secure his or her release pending trial. More significantly, an impoverished defendant is seriously disadvantaged in the quest for pre-trial release. Corruption, ignorance, misapplication of the law, lack of legal aid and the conditions surrounding the granting of bail combine to ensure that the road to pre-trial release is arduous and ill defined, and is usually trodden successfully by the well-off, the well-informed and the well-connected. It would seem that the 'law grinds the poor and rich men rule the law' (Oshodi 1973:197).

## THE EFFECT OF PRE-TRIAL INCARCERATION

The National Working Group on Prison Reforms and Decongestion (2005) reported that an accused person who is not granted bail is possibly remanded in prison for months or years. Sixty four per cent of the inmates of the audited prisons were awaiting trial. Some had been waiting for between 2 and 15 years. They had been remanded for various reasons: 19 per cent of inmates awaiting trial were in prison because they could not post their bail. A small number, 3.7 per cent of awaiting-trial inmates, were there because their case files could not be found. Another 17.1 per cent were there because the investigation of their cases had supposedly not been completed. And 40 per cent were on a 'holding charge', a terminology which cannot be found in the constitution or the criminal or penal codes in Nigeria.

Inmates awaiting trial not only waste away in the prisons, but constitute the greater part of prison congestion in Nigeria. They are locked up at the expense of the government, which must maintain and sustain them while in prison.

During this period of incarceration, the accused person is supposedly not being punished. Punishment implies moral condemnation. It is an expression of society's disapproval for wrongdoing, as a result of which a person is made to undergo some form of loss of liberty or rights. However, pre-trial detainees are merely being restrained to ensure their appearance at trial. They have not yet been found guilty of wrongdoing. 'But while the purpose of this incarceration may not be punishment, the consequences to the individual may be indistinguishable from the consequences of imprisonment' (Okagbue 1996:87). As an American Supreme Court judge noted, 'Imprisonment awaiting determination of whether

that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic label is used to describe his plight' (Okagbue 1996:88). The judge summed up the consequences of pre-trial incarceration in America:

The imprisonment of an accused prior to trial is a rather awesome thing; it costs the taxpayers a tremendous amount of money; it deprives the affected individual of his most precious freedom, liberty; it deprives him of his ability to support himself and his family; it quite possibly costs him his job; it restricts his ability to participate in his own defense; it subjects him to the dehumanisation of prison and without a trial, it casts over him an aura of criminality and guilt (Okagbue 1996:75).

In Nigeria things are even worse. The reality of incarceration is daunting. Nigerian prisons are severely overcrowded. In a recent report the key findings were that:

- Sixty one per cent of the prisons in Nigeria were built before 1950. These buildings were made of mud blocks, and the structures are old and dilapidated. The sanitary facilities have broken down owing to the lack of renovation. The infrastructural facilities are poor, and fall below the minimum standards under international law
- Most Nigerian prisons lack basic recreational and transport facilities. Vocational and educational facilities, where they exist, are not optimally utilised, owing to the shortage of adequate and trained personnel
- Medical facilities are generally available, but inmates bear the cost of referrals or unavailable drugs through the assistance of prison officials or their relatives
- Although the quantity of food available to prison inmates is generally fair, its quality is below the minimum standard to meet their nutritional requirements
- Most of the inmates have incomplete bedding or none at all. Most inmates wear their own clothes because of inadequate uniforms
- Inmates are not separated according to offence, health or age
- Though most of the prisons in the cities are heavily overcrowded, the rest of the prisons are not so congested<sup>27</sup>

In these conditions, diseases such as tuberculosis, scabies, respiratory infections, malaria, typhoid, dysentery and severe malnutrition affect the inmates (Okagbue 1996:78). The 1985 Official Prison Report acknowledged an 'astronomical rise' in

the death rate, which was attributed to congestion, poor sanitation, malnutrition and the lack of decent facilities.

Currently, little has improved.<sup>28</sup> While these conditions apply to the prison population as a whole, the plight of pre-trial detainees in most respects is worse than that of convicted prisoners, because they are not part of the permanent population. No provision is made for them in the prison regulations. This explains why they are not classified, and are not provided with the basic needs to which convicted prisoners have access, such as uniforms.

Because pre-trial inmates spend long periods awaiting trial, their clothing often becomes so tattered and torn that they exist in a state of near nudity. It is not uncommon to see these inmates being brought to court for trial half naked, starved and emaciated.

Basic prison services such as health and exercise facilities are either not provided at all or are made available to pre-trial detainees only after the primary population, that is, convicted prisoners, have been taken care of. The only area in which pre-trial detainees have an advantage over convicted prisoners is in their right to receive visitors. This may be because prison officials depend on outside help to supplement the feeding, healthcare and clothing of pre-trial detainees. The plight of the pre-trial detainee with no nearby relatives or whose relatives are too poor to be of assistance is indeed pitiful.

## **EFFECT ON FAMILY AND EMPLOYMENT**

No matter how frequent the contact with friends and family through prison visits, pre-trial detainees suffer another consequence of incarceration: physical separation from their families. Prison visits are restricted and supervised, and conjugal visits are not allowed. The detainee's links with the community are also restricted during incarceration. Ultimately, both community and family ties may be severely affected and may disintegrate during the period of pre-trial incarceration.

If detainees were employed before arrest, a lengthy period of incarceration may result in the loss of their jobs. If they were self-employed, their businesses may fall apart. This in turn affects their ability to support their families or to pay for legal representation. While most of the accused persons in the study were low-income workers, the total loss of earnings, no matter how small, that is resultant upon incarceration has a devastating effect on the family, especially in a country

such as Nigeria, which has no welfare system. The family are left destitute unless some other family member takes on the burden of looking after them.

## **Effect on fair trial**

Incarceration deprives accused persons of the opportunity to participate in their own defence. The problems of locating witnesses, searching for evidence, and establishing a defence cannot be handled effectively from a jail cell. While defendants are guaranteed adequate time and facilities for the preparation of their defence, their detention often makes this guarantee meaningless. Thus pre-trial detention may effectively deny the accused of their right to a fair hearing under the constitution (Okagbue 1996:81).

## **STIGMATISATION AND EFFECT ON PERCEPTIONS OF JUSTICE**

Another consequence of pre-trial detention is the stigma attached to detention. The detainee's 'good name, reputation, honour and integrity' are all threatened by incarceration (Okagbue 1996:81). In Nigeria imprisonment carries an enormous stigma.

The 'combination of stigma and loss of liberty that is embodied in incarceration during the criminal process is viewed as being the heaviest deprivation that government can inflict on an individual' (Okagbue 1996:81). All too often this stigma and loss of liberty are part of the early stages of the criminal process before there has been an adjudication of guilt. To say that offenders are not being punished, but are merely being detained, appears to be an exercise in semantics, which is certainly not appreciated by the person who has to suffer the consequences (Okagbue 1996:83).

## **Effect on the presumption of innocence and the ultimate verdict**

The concept of the presumption of innocence operates to ensure that punishment is not inflicted before an accurate legal determination of guilt or innocence. Yet an accused person who is denied bail suffers consequences of incar-

ceration that are equal to, and in some respects greater than, those experienced by a convicted prisoner.

Okagbue (1996) argues that pre-trial detention, unless justified by 'overwhelming necessity', cannot realistically be viewed as other than a form of punishment. The hardships of pre-trial incarceration dictate that the operation of the presumption of innocence should play a role in the pre-trial process to the extent that the bail determination must be carefully regulated to accord both substantive and procedural due process to defendants before they are detained prior to trial.

The denial of bail may not only have the same consequences as punishment, but may also affect the ultimate question of guilt or innocence in the trial process, and the type of 'real' punishment that is imposed on the accused if they are found guilty. Studies reveal that those who are in jail prior to trial are much more likely to be convicted than those who are out on bail (Okagbue 1996:88).

In addition, many people who are denied bail are later convicted because of an inaccurate prediction during the bail process that the defendant is likely to be guilty of the offence charged and therefore to flee.

## CONCLUSIONS

This paper focused on operations of bail in the Nigerian criminal justice system, its purpose, conditions for granting it, weaknesses in its operations and the consequences of the lack of it. Certain observations were made:

- The laws guiding the granting of bail are scattered in various legislations, such as the Criminal Procedure Act, Criminal Procedure Code, magistrate's court laws, high court laws, court of appeal and supreme court laws, the Police Act, the Customs and Excise Act, the Immigration Act, judicial decisions and the 1999 Constitution of Federal Republic of Nigeria. These rules need to be harmonised for the effective operation of bail
- It cannot be asserted outright that the criminal justice system uses punitive approaches (which might have been some of the reasons for the problems of bail) as opposed to corrective, measures, and restoration or rehabilitation of offenders/criminals. But the legal system as received from English Common Law appears to have elements of coercion and punitive measures. The reforms and improvements that have taken place since independence in 1960 are not effective to curb the 'perils' associated with bail

- Bail is hampered by cultural and traditional practices and the discretionary nature of police powers. For example, culturally or traditionally, women are not allowed to stand as sureties, even though women by nature may be more willing to offer themselves as sureties for the release of suspects or convicts in the prisons than men. This gender discrimination issue, which is unconstitutional, subtly prevails when it came to the practical applicability of bail
- The discretionary powers of police as provided in statutes and the constitution are breeding grounds for factors that affect the granting of bail. For instance, 'holding charges' and gender issues in bail constitute police discretions which do not hold ground in law
- The granting of bail is open to the exercise of a great deal of discretion by police and courts of various jurisdictions. In many cases this has resulted in abuse as a result of ignorance, corruption and misapplication of the law
- The term 'excessive bail' is not properly clarified or statutorily defined by courts or legislation to avoid the vagueness that has characterised its usage
- The length of time spent in pre-trial detention is becoming scandalous. The usage of the 'holding charge', despite its judicial condemnation, is not helpful. That as much as 40 per cent of awaiting trial inmates are held on holding charges shows our contempt for human liberty (Okagbue 1996)
- Prison conditions for pre-trial detainee and convicts are very similar, making nonsense of the concept of presumption of innocence. Nigerian prisons may currently be described as 'hell on earth', with overcrowding being rife
- Irrational use of bail conditions is currently on the increase. For example, courts ask for a certificate of occupancy (C of O) in an area where most holdings are according to customary and family ownership. Insistence on wealthy sureties in the midst of mass poverty is equally short-sighted

## Recommendations

In view of these observations the authors recommend:

- There should be uniform and single legislation to deal with the granting and establishment of criteria for bail
- Men and women are equal before national and international law,<sup>29</sup> therefore discrimination against women in bail and other legal matters, based on

culture, tradition and gender sentiment, must be eradicated to allow for the free flow of justice

- More stringent criteria for bail and limitations of the enormous discretion currently enjoyed by the police and the courts are necessary. These imply that greater supervision of bail should routinely be granted to the police by senior police officers / the judiciary
- The term 'excessive bail' should be statutorily defined to avoid the vagueness that has characterised its usage
- Conditions of pre-trial detainees should be humane, enhance the dignity of the human being, and cater for the presumption of innocence
- There should be imaginative use of conditions for bail. Legal aid and speedy trials will go a long way towards reducing the number of pre-trial detainees
- Training and retraining of judicial and police operatives are essential

## NOTES

- 1 Lord Chancellor of England, September 1971, in an address to the Gloucestershire Branch of the Magistrates' Association.
- 2 The Constitution of the Federal Republic of Nigeria (annotated) 1999, Lagos: IO Smith, Ecowatch, pp 52–56.
- 3 The Nigerian Institute of Advanced Legal Studies conducted a study (coordinated by M Ayo Ajomo and Isabella Okagbue in Lagos in 1988) on human rights and the administration of criminal justice. The respondents' sample was 845, drawn from various backgrounds including suspect (accused) persons in police custody/prison, legal practitioners, judges in the various courts, police, prison warders and strata of the public for citizen awareness interviews (see pp 317–364). See M Ayo Ajomo and I E Okagbue 1991, Human rights and the administration of criminal justice in Nigeria, Lagos: NIALS.
- 4 Nigerian Commercial Law Report (1985) (6NCLR) 424.
- 5 Nigerian Commercial Law Report (1985), 424.
- 6 Nigerian Constitutional Report (1980), 14.
- 7 Nigerian Weekly Law Report (pt 78) (1988), 602.
- 8 See the state magistrate's court law, Laws of Lagos State 1973.
- 9 Constitution of the Federal Republic of Nigeria, 1999, section 36(5).
- 10 In *R v Jamal* the accused was refused bail because he committed the offence for which he was arraigned while he was on bail for another offence.

- 11 Ibid, p 55.
- 12 In *Dantata v Police*, bail was refused because the accused offered a bribe of ₦36 000 to the police in order to retrieve evidence of commission of the offence, which was in the custody of the police.
- 13 See Criminal Procedure Code, chapter 42, section 341.
- 14 Nigerian Constitutional Report (1980), 113.
- 15 See magistrate's court law, Laws of Lagos State, 1973.
- 16 See Criminal Procedure Code, chapter 42, section 342.
- 17 Quarterly Law Report of Nigeria (1986), 92.
- 18 Nigerian Weekly Law Report (pt 472) (1996), 352, at 366.
- 19 Northern Region Nigerian Law Report (1958), 3.
- 20 Refer to case on the *State v Onwuka* (1973), 11 ECLSR 118 at 119.
- 21 See also A O Alubo, Modern Nigerian criminal procedure law, 2007, Makurdi: Oracle (forthcoming), pp 68–70.
- 22 Criminal Procedure Act, section 17; Criminal Procedure Code, section 42. Section 33(6)(c) of the 1979 (now 1999) constitution of Nigeria.
- 23 The Constitutional Rights Project is a non-governmental organisation that is responsible for monitoring human rights activities in Nigeria.
- 24 See Ajomo and Okagbue, *Human rights and the administration of criminal justice in Nigeria*, pp 69–70. The practice has not changed to date.
- 25 A Ibidapo-Obe and C Nwankwo, *The bail process and human rights in Nigeria*, Lagos, Constitutional Rights Process, pp 57–58.
- 26 Nigerian Weekly Law Report (pt 78) (1988), 602.
- 27 See Report of the National Working Group 2005, p 6.
- 28 Ibid, p 6.
- 29 The Nigerian Constitution 1999 (chapter IV); Declaration of Human Rights (1948); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1979). These and many other relevant provisions abhor discrimination.

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- Republic of Nigeria Criminal Procedure Code, chapter 42.



# 6 Conclusion

## Closing the gap between theory and practice of criminal justice in Africa

ANNIE BARBARA CHIKWANHA

The chapters in this monograph have attempted to discuss and link theory and practice of criminal justice in Africa through an analysis of various themes on the administration of criminal justice in selected African countries. They have also demonstrated how the normative rules, practices and processes expected of criminal justice often become circumvented in Africa. Although the substantive aspects of criminal justice encompass normative prescriptions pertaining to equity and fairness in the distribution of socio-economic and political opportunities, the practice in Africa means that similar offences do not receive the same punishment, owing to variations in the administration of justice within and across countries. It is commendable, though, that the absence of strong theoretical and empirical evidence has not deterred African governments from formulating policies to tackle the ever-rising spectre of crime.

First, all of the articles reveal a major tension. African governments subscribe to the normative standards of criminal justice articulated by the UN, the AU and other regional organisations, and these are enshrined in their constitutions. However, in practice, these standards are not met for several reasons: authoritarian systems of government; ineffective procedures; under-equipped, unaccountable, inaccessible and irresponsive law enforcement and

justice institutions; and a general climate of helplessness among the population in relation to criminal justice officials. This sense of powerlessness arises partly because of powerlessness and poverty. Second, the articles reveal the gap between the normative standards of criminal justice, as enshrined in the constitutions, and the quality of criminal justice administration in several African countries. This has led to the demand for alternative or supplementary systems of criminal justice administration. While supplementary systems – such as alternative dispute resolution through local institutions and properly supervised customary policing and justice systems – are desirable, they cannot replace the formal state criminal justice administration system because of the increasing complexity of society and social relations among citizens. African countries therefore need to find a new system of governing the criminal justice system in order to deliver justice to the citizens. There is a need to mobilise and coordinate the mechanisms used by the citizens to resolve disputes among themselves; institutional capacity building is necessary; substantive laws and practice rules need to be reviewed; the accountability of law enforcement and justice institutions needs to be strengthened; and staff welfare and discipline need to be enhanced. These actions require comprehensive rather than piecemeal reforms of the substantive and procedural aspects of criminal law as well as the institutions, rules and processes of criminal justice administration in Africa.

The common thread running through all the articles in this monograph concerns the inequities found in criminal justice systems across the continent that have made access to justice elusive for the majority of Africans. The case of the administration of bail in chapter 5 demonstrated these inequities clearly. Technical incompetence, lack of knowledge of the administration of bail and a general failure to respect the rule of law affect the application of bail to accused offenders. Access to criminal justice within the legal system is mediated by too many factors that tend to favour the haves, those in the correct political camps and, at times, those from the ethnic group currently enjoying the benefits of incumbent government.

These observations compel us to revisit certain questions. Do current criminal justice systems serve the interests and needs of the African citizens? What alternatives would enhance the quality of justice that Africans currently experience? A number of studies have demonstrated that the formal justice system in most African countries struggles to meet the justice needs of the citizens as well as those of the business community. This inability can

be attributed to a number of reasons, among them the content of substantive law, as discussed by Alemika, and the prohibitive costs and procedural requirements discussed by the rest of the contributors to this monograph. A major setback is the failure to be innovative in adjusting the inherited criminal justice systems to suit contemporary justice demands, and this appears to be at the core of the problems, as illustrated by all of the authors. Although colonialism and the application of Roman Dutch Law have left an indelible mark on Africa's criminal justice systems, some originality and creativity in tweaking the key tenets at the core of the justice system has been Africa's bane. Many of the laws are not products of the prevailing socio-economic conditions of post-colonial states, and neither do they reflect long-established customs and traditions or the existing mores.

A major stumbling block concerns the different (and multiple) institutions administering different kinds of justice in the same country, as in Nigeria where Islamic law is applied in one part of the country (the north) and the standard international formal justice system runs in the southern parts. This exacerbates the challenges of coordinating numerous institutions that are often incompatible, and that can sometimes follow incongruous principles. This use of varied processes by the fragmented, independent, though complementary components of the criminal justice system across space results in differing qualities of justice. The criminal justice system in Africa thus struggles to dispense criminal justice in accordance with due process or rule of law and a large part of the problem is in the failure to fulfill both the substantive and procedural pre-conditions. The question of how Africa can redefine its values in a way that would be congruent with the contemporary international norms, values, standards and practices will remain a challenge for African regimes if the continent does not dig deep into its reservoirs of knowledge that can serve as a starting point for reforming the criminal justice system in a way that enhances human security. In many instances, laws have failed to tie religious ideas and sentiments into the ideals of largely secular states, hence contestation over what is ethical and moral continues to cripple the already low capacity of African governments. Poorly managed transitions, years of turmoil caused by bad governance practices, conflicts and flawed leadership have also contributed to the continuation of the inherited criminal justice systems. This is in stark contradiction to what the current crop of leaders emphasise: African solutions, African traditions, African values and African ideological inclinations.

It is thus quite evident that neglect of the normative aspects of justice has led to the obsession with the instrumentality of criminal justice agencies, hence the continued emphasis on the efficiency and integrity of the institutions, as well as on the officials. It is therefore essential for African governments to pay attention to the philosophy, collective psychology, and political economy that determine the administration of criminal justice, as Alemika argues in chapter 2.

Criminal justice systems, as do all social institutions, evolve out of, and are constantly reformed through conflict of some kind. Conflict theorists, in their emphasis on the disempowering and repressive character of law, tend to offer more explanatory power than functionalists who focus on the integrative and meditative roles of law, and the relevance of conflict theories for Africa cannot be underscored. Most African states lost the opportunity to embark on drastic reforms when they began the transition from colonial rule to democratic rule. The much-needed land reforms on the continent and globalisation are conflict-prone opportunities that offer a chance for reforming the criminal justice systems.

The dilemmas of addressing insurgencies, as in Uganda, and rebuilding and restoring confidence in the justice system in post-conflict societies, have increased the need for governments to be more accommodating of customary or community justice systems as a partial solution to the delays experienced in the formal justice system. Although such initiatives have come to the fore because of their application to horrendous crimes committed during civil strife, restorative approaches do appear to hold part of the panacea to Africa's ailing criminal justice systems. This explains Bowd's call (chapter 3) for a development of relevant justice systems through a meshing of the existing customary practices from the bottom up, and the formal laws that can be referred to as the top-down approach. Such an approach might provide a solution derived from both top-down and bottom-up models that would have relevance for Africans. Infusing restorative justice into mainstream criminal justice systems in particular is essential in articulating relevant systems. Its success in transitional justice processes does signal likely success in reforming the contemporary systems. Challenges of restorative justice are clearly demonstrated by the case of Uganda, which also shows the limitations in its application. Alternative dispute resolution mechanisms have been applied with some notable success, especially in enhancing access to justice for the majority. Such mechanisms are perceived to be non-adversarial and

Uganda has demonstrated innovation through its ‘court-based ADR’, that is, a structured negotiation process where a settlement is reached with the aid of a trained mediator. The concept appeals to the public in so far as it resonates with customary processes. Enshrinement of this approach in the law has made mediation mandatory in the commercial court.

Some of the courts that exist at a lower level in certain African countries have attempted to follow the Ugandan approach. Even though, the introduction of restorative concepts and processes that underlie community service and provide mediation to the judiciary has proved to be a difficult feat. Interpretation of these concepts in a way that is relevant to the various communities and the codification of practices and processes are thus likely to remain a challenge as well. The application of bail is one area that shows the hurdles of interpretation and this is despite widespread agreement on the meaning of the concept. The case of Nigeria illustrates this clearly. The mix of different kinds of courts can be interpreted as an attempt to appeal to the communities, yet the system is riddled with inequities, especially in the interpretation of bail, as discussed by Namdi and Alemika.

Bowd’s argument on whether contemporary justice systems in Africa serve the citizens’ needs is worth revisiting in the light of the themes discussed in this monograph. For instance, the failure to move from retributive justice to restorative justice has kept the continent’s citizens under subjugation, thus maintaining their status of subjects rather than citizens and this has served the interests of generations of Africa’s leaders. Criminal justice systems have thus remained a tool that largely serves their purposes of retaining power, and retribution has been extended to settling political scores as well as obliterating political opponents. Likewise, the penal systems continue to exhibit designs that are in line with indeterminism, which argues against some philosophical theories that individuals are rational beings who have a choice in how they act. This one-sided approach has led to the neglect of restorative justice in the formal justice system in Africa, yet many developed countries focus more on the restorative element than the retributive. The exclusion of all other factors – environmental, sociological and psychological – introduces a deficit in the quality of punishment administered to offenders. However, building a body of theory and practice of restorative approaches is a major feat for Africa, where the plurality of customs can complicate the development of a coherent theory.

This compels us to ask an essential question when we are supposed to be concluding the debate: How can Africa's democratic regimes fail to dispense social justice when they have had more than four decades to learn from their predecessors and their mistakes? Though political will lies at the heart of the problem, a dearth of skills is evident across key criminal justice institutions. This is compounded by the lack of adequate resources from which the relatively under-skilled staff can borrow and learn from techniques that have enhanced efficiency and effectiveness in justice delivery in some countries. Managing and administering dual systems of criminal justice that encompass English and customary law (in some cases religious – Islamic – law, as in Nigeria) is equally a challenge that can only benefit from a thorough scrutiny of exemplary case studies where such systems have been tested and integrated successfully. Africa's rather lethargic state of the criminal justice system can thus be blamed partly on the absence of strong theoretical underpinnings that are essential for keeping the systems in a state of flux.

Africa's deficiencies in the criminal justice system can thus benefit from a comprehensive scrutiny not just of the technical legal issues, but of the ethical issues too, as well as the dissection of international norms, institutions and criminal justice processes and their relevance for Africa. This monograph undoubtedly makes a significant contribution to the fledgling criminological writings on the African continent and all the articles reveal the challenges the criminal justice systems in Africa have to overcome in order to fulfill their commitments to international standards and norms.

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