

1 Criminal justice in Africa

An introduction to the theory and practice of criminal justice

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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 judgment² 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 laws³ with makeshift justice and policing systems: systems that are fundamentally dangerous and sometimes fatal to the victims of these regimes.⁴

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.⁵

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.'⁶

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.⁷

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.⁸

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.⁹ 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*¹⁰ 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 Mamdami¹¹ 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.¹² 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)¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

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 J N 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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