

2 Criminal Justice

Norms, politics, institutions,
processes and constraints

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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 Rights¹ 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.² 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 crimogenic 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 crimogenic 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 1994; 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
Average for all countries	46	56	62	47	28

Source Computed from Afrobarometer Round 3 surveys conducted in 2005³

- 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

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