

3 Status quo or traditional resurgence

What is best for Africa's criminal justice systems?

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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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