

6 Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES

- 1 Winnie Sithole Mwenda, *Paradigms of alternative dispute resolution and justice delivery in Zambia*, PhD thesis, University of South Africa, 2006.
- 2 G W M Kiryabwire, *Alternative dispute resolution: A Ugandan judicial perspective*, paper delivered at a continuation seminar for magistrates, grade I, Colline Hotel, Mukono, 1 April 2005.
- 3 Mahmood Mamdani, *Citizen and subject*, New Jersey: Princeton University Press, 1996.