



Policy Brief

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The theory and practice of criminal justice in Africa

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INTRODUCTION

The rule of law symbolizes a significant aspect of the development process as it enables the establishment and strengthening of institutions, stimulates confidence in governance, engenders an environment of stability and security and provides a benchmark for social and economic interaction; in short it is pivotal to the construction of the durable foundations necessary for effective development. Criminal justice systems play a considerable role in the establishment of the rule of law however; criminal justice systems across Africa suffer from chronic funding and personnel shortages and are oft times utilised by elites as a tool through which to maintain their positions of power.¹

The result of this is to deliver a form of justice that undermines the development process rather than reinforces it. Criminal justice reform is necessary across Africa in order to develop society in such a way that it reflects the needs and wants of the population and establishes a mechanism that can meet the challenges of society and support pathways to development.

CRIMINAL JUSTICE: A PHILOSOPHICAL OVERVIEW

Criminal justice systems, through their philosophical origins, serve to manage societal conflict of one form or another. Like all social institutions they are born out of, and reformed through conflict. The very need for a criminal justice system presupposes a conflict between what those that constitute a society, or those that hold power in 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 consensus-functionalist school, perhaps vulnerable to charges of idealism and naivety, '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'.² This perspective of criminal law champions the equity of judicial practice and distribution, whilst simultaneously recognizing its function as a reflection of the contextual needs of a society.

Herein lies the challenge posited by the radical-conflict paradigm of criminal justice. Claims that criminal justice systems protect and sustain the interests of dominant power groups in society abound with the implication that the social values serving as a bastion for communal peace, as espoused by the consensus-functionalist school, do not adequately reflect the diversity of societal groups, nor their divergent interests and thus do not accurately comprehend power structures and struggles. Rather, the radical-conflict school suggests that criminal justice systems represent elite bias thus disempowering the already disempowered and perpetuating the status quo. Whilst it may seem apparent that the consensus-functionalist and the radical-conflict perspectives occupy diametrically opposite ends of the philosophical continuum in regard to criminal law, it is in fact possible for criminal justice policy to benefit from an elaborate consideration and appreciation of both accounts. Taking either viewpoint it remains the case that the criminal justice system *is* a conflict management system; either it manages conflict in an equitable manner

for the betterment of society (consensus-functionalist) or it manages conflict to the advantage of the power elites (radical-conflict). The former advocates how things *should* be while the latter suggests the way things *are*. The latter position, therefore, can inform policy formation so as to navigate a path to the former but only if it is the aim of policy to reach that goal.

AFRICAN CRIMINAL JUSTICE SYSTEMS: ORIGINS AND TODAY

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 which was to consolidate power; thus such systems reflect the radical-conflict perspective. Systems based on Western legal systems theoretically 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.

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.³ 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.

The retention of criminal justice systems that originated from the West has arguably provided elites 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 it is questionable that such systems meet the needs of Africa today; the function of a criminal justice system according to the consensus-functionalist doctrine. 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.⁴ 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. 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. Engaging in an overly retributive criminal justice system ruptures social bonds through the removal of family members (by incarceration) who are often the primary providers and transforms the structure of society, specifically disadvantaging those in the lower strata of society. Rural society in SSA is by nature communitarian. Therefore, the implementation of a liberal, individual-based criminal justice system utilising retributive punishment serves 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.

WHAT HOPE FOR THE FUTURE? POLICY RECOMMENDATIONS FOR CRIMINAL JUSTICE SYSTEMS IN AFRICA

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.*⁵

The rule of law represents a fundamental component in the development of a state; without the equitable rule of law all other aspects of development are undermined: corruption remains unchecked, freedom of movement is limited, and investment is unsustainable or predatory. 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'.⁶ This needs to be addressed and structures must be developed to adequately meet the concerns of the African populations.

Reform of criminal justice systems in Africa ought to be informed by comprehensive analysis of societal needs, reflecting not only the insight of lawmakers but also those of professionals such as legal anthropologists, criminologists and social workers and acknowledging the issues previously raised. Additionally, reform enlightened through consultation with communities may better identify the key challenges to existing systems of criminal justice and potential solutions to these challenges. Legal reform processes involving community consultation are more likely to be effective in developing criminal justice systems that reflect societal needs and bridge gaps between society and government. By bringing more stakeholders to the table, and engaging in consultative process, legal reform can maximise the expertise and contributions of relevant community actors and develop systems that not only reflect societal needs, but that are better internalized and are thus adhered to.

Consultative processes should be used to feed into the design of criminal justice systems utilizing retributive measures in keeping with the socio-cultural features of the society. However, criminal justice reforms that are based on the consensus-functionalist notion of equity are however, for the very arguments espoused by the radical-conflict school, difficult to achieve. They are based on the redistribution of power and attempt

to level the playing field thus removing privilege from the elite. The paradox here is that it is those very elites who have the power to obstruct or facilitate such reform processes. More, therefore, needs to be done to engage with elites to garner their support for these processes. Whilst the international community can take steps to influence elite decision-making processes, reform, for it to be effective in terms of targeting societal needs and achieving durable outcomes, needs to be driven by bottom-up pressures. Formal institutions generally, such as the criminal justice system, 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. Institutional and civil society strengthening, therefore, can play a key role in enhancing the capacity of society to advocate and lobby for these reforms.

A key way in which criminal justice systems of Africa would benefit from reform is through a renewed consideration of alternatives. Specifically, this should involve the adoption and formalization of restorative justice systems and Alternative Dispute Resolution (ADR) mechanisms where appropriate and applicable. Restorative justice and ADR offer a chance for African societies to utilize traditions that serve to strengthen communities through placing the focus on community negotiation and mediation rather than seemingly external deliberations that do little to resolve the original problem, whilst at the same time exacerbating the position of those affected by penal measures and therefore perpetuating the cycle of structural violence. Consultation with communities and a wider range of professionals would reveal context-specific possibilities for restorative approaches.

In cases where retributive measures are necessary and/or appropriate it is apparent that reform is particularly necessary, for example, in issues of access to justice, the granting and conditions of bail and 'desert' – what the victim, criminal and society deserve as a consequence of crime. Technical dimensions have significant impact on the administration of criminal justice and context-specific reform, and the financial and technical support of that process, focusing on these is important in the delivery of a more efficient and just system. Nevertheless, those economic and political ideologies that structure power relations and access to economic resources in society are of vital importance to any legal reform process and as such consideration of the normative aspects of criminal justice is crucial. Therefore, linking legal reform to other reform processes, for example, economic, land or

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political reform, could prove to be valuable in synergizing these mutually connected.

CONCLUSION

Reforms of African criminal justice systems need to focus on a number of key issues: first, they need to be based on a commitment to develop a justice system that seeks to deliver an efficient and equitable form of justice rather than one which maintains position of power for elites; second, they need to reflect the needs of the society of which they are set down to govern and therefore should engage mechanisms to enable that process to take place, for instance through community consultation; third, they need to incorporate restorative measures and focus on the communal effects of the process, both in terms of negative effects associated with retributive systems and positive effects associated with restorative systems; fourth, they should develop the technical ability of the criminal justice system to dispense justice in an efficient

and equitable manner when needed; and fifth, they should link to other societal reform processes in order to synergize initiatives and reduce the patterns of structural violence that exacerbate levels of crime.

NOTES

- 1 This policy brief is based on ISS monograph 161, *The theory and practice of criminal justice in Africa*.
- 2 Ibid.
- 3 United Nations Office on Drugs and Crime, *Crime and development in Africa*, available online at http://www.unodc.org/pdf/African_report.pdf (accessed 6 April 2008).
- 4 S Coldham, *Criminal justice policies in Commonwealth Africa: Trends and prospects*, *Journal of African Law* 44 (2000), 218-238.
- 5 JJ Rousseau, *The social contract*, London: Penguin, 2000, 42.
- 6 R Delavignette, *Robert Delavignette on the French Empire: Selected writings* (ed W B Cohen), Chicago: University of Chicago Press, 1977.