

CRIMINAL JUSTICE POLICIES IN COMMONWEALTH AFRICA: TRENDS AND PROSPECTS

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INTRODUCTION

While many areas of law reform in Africa (for example, land tenure, women's rights, the courts structure and constitution-making) have attracted the attention of policy-makers and academics alike, the need to establish a criminal justice system that meets the requirements of a developing African state has seldom generated much interest. In particular, little work has been done on the causes of crime, on the effects of crime, or on people's definition of crime. However, independent African governments have not felt constrained by the absence of empirical research from embarking on a variety of policies designed to tackle rising crime levels nor indeed from using the criminal law to promote development. It is the purpose of this article to chart and compare the nature of these interventions, and, as much as the paucity of empirical material will allow, to assess their effect. A broad overview of this kind is justified by the fact that the Commonwealth African states under consideration not only share common legal traditions and face similar developmental imperatives, but they have adopted the same approach to penal policy.¹ They are autocratic states (like their colonial predecessors) which largely fail to separate law from political administration, and rather than thinking imaginatively about devising a criminal justice system appropriate to the needs of a developing African country, governments have continued to rely on penal policies based on retribution and general deterrence. Responding to rising crime levels, or at least to public concern about perceived rising crime levels, governments introduce yet harsher punishments and reduce procedural safeguards in order to secure more convictions. At the same time, an increase in state crime (for example political corruption or police violence) undermines the very concept of criminality.² An overview of this kind will raise more questions than it answers, but whereas criminal justice is a highly contested area in many parts of the world, in the countries under consideration the debate has hardly begun.

COLONIAL PERIOD

The history of the Penal Codes of Africa has been well-documented elsewhere,³ and it is sufficient to point out here that all the countries under discussion have codes of criminal law and procedure inherited from the colonial period

¹ The Commonwealth countries of Southern Africa have a rather different history and legal tradition from Commonwealth countries elsewhere on the continent and this article will, therefore, concentrate largely on Nigeria, Ghana, Kenya, Tanzania, Uganda, Zambia and Malawi.

² See C. Sumner in Sumner (ed.), *Criminal Justice and Underdevelopment*, Heinemann, 1982, 1ff., for a critique of how orthodox criminological theory has ignored crimes of the state in Africa.

³ H.F. Morris, "A history of the adoption of criminal law and procedure in British Colonial Africa, 1876–1935", [1974] *J.A.L.* 6. In some territories the codes were known as Penal Codes, in others as Criminal Codes. General references in the text to Penal Codes can be taken to apply to Criminal Codes.

and that these codes derive from the same model, the Penal Codes from the 1899 Queensland Code⁴ and the Procedure Codes from the 1877 Gold Coast Criminal Procedure Ordinance. The Penal Codes were, of course, based closely on nineteenth-century English criminal law, and the principles of criminal liability, the definition of offences and the type and scale of penalties that they contained made no concession to the African context,⁵ nor was any attempt made to amend the codes in line with changes in the substantive law and in criminological thinking that occurred in England and elsewhere during the first half of the twentieth century.

The Penal Codes did not, of course, represent an exhaustive statement of the criminal law. A wide variety of legislation was introduced to deal with specific issues, and it was the strict enforcement of these laws that most affected Africans in their everyday lives and represented for them the harshest aspect of colonial rule. In some countries the criminal law was used to promote government policies relating to land and labour, like the Master and Servant, Resident Labourers, Trespass, and Employment of Natives Ordinances of Kenya. Moreover, some legislation, like that relating to intoxicating liquors, firearms, and the protection of natural resources (forests, game etc.), frequently operated to criminalize traditional practices. Finally, Witchcraft Ordinances were introduced, creating a number of offences carrying severe penalties, in an attempt to eradicate both the belief in and the practice of "witchcraft". The large majority of convictions was for statutory offences of this kind rather than for offences against the Penal Code.⁶

Customary criminal law was recognized by the colonial authorities in so far as it was not repugnant to natural justice, equity and good conscience, and not inconsistent with the written law. The nature of "customary criminal law" has been widely discussed and it seems clear that most African societies, particularly those with a centralized, hierarchical structure, regarded certain forms of misconduct as public wrongs deserving of (often severe) punishment, while regarding others as giving rise to personal redress; the majority of wrongs (including many forms of conduct that would be considered criminal under most Western systems of law) fell into the latter category and would be addressed by the payment of compensation and the reconciliation of the parties. Conduct considered as criminal under customary law would generally be an offence under the Penal Codes or other written laws (for example intentional homicide, witchcraft)⁷ and customary punishments (including trials by ordeal) were outlawed and replaced

⁴ In 1964 Botswana introduced a Penal Code based on the Queensland model, replacing the Roman-Dutch common law. The Penal Code introduced into Northern Nigeria in 1959 derives from the Sudan Penal Code and ultimately from the Indian Penal Code; it makes certain concessions to Islamic Law.

⁵ Some provisions in the Codes refer directly to English law and, in particular, many Codes provided that they should be interpreted according to English principles of legal interpretation. See J.S. Read, "Criminal law in the Africa of today and tomorrow", [1963] *J.A.L.* 5, at 7.

⁶ See the discussion of crime and the native courts of Nyasaland and Northern Rhodesia in M. Chanock, *Law, Custom and Social Order*, Cambridge, 1985, at 103ff. and 229ff. In the 1950s only 15 per cent of criminal cases in Nyasaland involved crime in the ordinary sense of the word, the remainder involved infringements of the tax laws and other disciplinary or regulatory offences.

⁷ An investigation in Kenya found only a handful of customary criminal offences that were not also offences under the Penal Code. See E. Cotran, *Report on Customary Criminal Offences in Kenya*, Government Printer, Nairobi, 1963.

by Western sanctions. The formal scope of customary criminal law during the colonial period was thus relatively limited.⁸

The dual system of laws (written versus customary) was reflected in the dual system of courts. On the one hand there was a hierarchy of magistrates courts and it was there that most of the more serious offences were tried, with provision for appeal to the higher courts. The practice and procedure of these courts were governed by the Criminal Procedure Codes which provided modes of trial closely based on those in England, one important and interesting difference being the use of assessors to advise the judge.⁹ Parallel to these courts was established a system of Native or African Courts. These courts were presided over by chiefs and other "traditional" authorities and constituted the enforcement wing of the local administration. They not only had jurisdiction over customary law matters, including customary criminal law, but they were also empowered to try minor offences under the Penal Code, statutory offences and offences under local bye-laws. These courts were not bound by rules of evidence and procedure; they were expected to follow customary practice. Appeals would lie, directly or indirectly, to the English-style courts.

Just as the Penal Codes embodied Western concepts of criminality, and just as the Criminal Procedure Codes introduced rules relating to arrest, detention and trial which derived closely from English law, so also was English penal theory and practice of the time reflected in the Codes and in the sentencing patterns of the courts. Indeed the paradox was that, while the imposed penal system gave little weight to the individualization of penalty (a concept that is widespread in African societies), important twentieth-century changes in Western penological thinking that stress the rehabilitative role of punishment had little impact in British colonial Africa. These were authoritarian states, 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. Even the African courts tended to rely increasingly on those two unAfrican forms of punishment, imprisonment and the fine.¹⁰

The British colonial penal system rested on the foundation of the prison. Although little stigma attached to imprisonment and it is not clear that it had any deterrent effect,¹¹ it was popular with the courts, which tended to sentence to longer terms than would have been the case in Britain.¹² Prisons suffered from severe overcrowding and, while it was usually possible to separate male from female prisoners, remand prisoners (who often constituted a relatively high

⁸ For Nigeria, see generally A. Milner, "The sanctions of customary criminal law: a study in social control", [1965] *Nigerian Law Journal* 173. Milner argues that it is the attitudes and the ideas of customary criminal law, rather than specific rules or sanctions, that may be relevant to a modern penal system, *ibid.*, 176.

⁹ Trial by jury was confined to West African colonies and to Kenya (where it was further confined to Europeans). See generally J.H. Jearey, "Trial by jury and trial with the aid of assessors in the superior courts of British African territories", [1960] *J.A.L.* 133 and [1961] *J.A.L.* 36.

¹⁰ It was only in certain highly centralized states (for example in Buganda and in parts of Nigeria) that imprisonment was an established sanction in pre-colonial Africa.

¹¹ In many instances an African prisoner, convicted, say, of stock-theft or of a breach of the conservation laws, would not see himself as a "criminal". See R.E.S. Tanner, "The East African experience of punishment", in A. Milner (ed.), *African Penal Systems*, London, 1969, 315.

¹² R.E.S. Tanner, "Penal practices in Africa: some restrictions on the possibility of reform", (1972) 10(3) *Journal of Modern African Studies* 447, at 451.

proportion of the prison population)¹³ were seldom segregated from convicted prisoners, nor was special provision always made either for juveniles¹⁴ or for the mentally ill.¹⁵ Prison regimes were generally harsh and it was only towards the end of the colonial period that some steps were taken to train and rehabilitate prisoners.¹⁶

The imposition of a fine was probably the most common penalty in British colonial Africa,¹⁷ the courts seeing the fine as an effective deterrent as well as being an inexpensive sanction to administer. However, the imposition of a fine on a poor offender could cause hardship and, when s/he was unable to pay, could result in imprisonment. Indeed, a sizeable proportion of the prison population consisted of fine-defaulters.¹⁸

Broadly speaking, murder was the only capital offence in respect of which death sentences were carried out, and executive clemency was exercised fairly frequently.¹⁹ Corporal punishment, on the other hand, was widely used as a discretionary penalty in lieu of or in addition to any other penalty. It was, however, much more frequently applied to juvenile offenders than to adults, and in 1955 the corporal punishment of adults was totally abolished in the Eastern Region of Nigeria.²⁰

The colonial courts were permitted to promote reconciliation between the parties, to order restitution to be made and to assign the whole or part of a fine to the compensation of the victim. However, it appears that little use was made of these remedial sanctions. Where a restitution order was made, it was invariably in combination with some other (penal) measure. In spite of the emphasis placed on compensation in African societies, the reluctance of English-trained magistrates and judges to mix criminal and civil business meant that the criminal com-

¹³ The figure tended to vary between 40 per cent and 60 per cent: see figures in Milner (ed.), op. cit., at 78 and 129–130.

¹⁴ The establishment of special custodial institutions for juveniles was very slow. In most countries the provision of remand homes, approved schools and borstals was minimal at independence. For Nigeria, for example, see A. Milner in Milner (ed.), op. cit., 355–373, and for Ghana see R. Seidman in Milner (ed.), op. cit., 455. Clifford forcefully makes the point that in countries where many law-abiding children are denied formal education, it may seem unjust to place juvenile offenders in a more favourable position for employment. W. Clifford, *An Introduction to African Criminology*, Oxford, 1974, 197.

¹⁵ A lack of psychiatrists and of special institutions for the mentally ill meant that mentally ill offenders ordered to be detained during pleasure were in fact committed to prison. Indeed, evidence from Nigeria indicated that well over half of the mentally ill accommodated within the prison system were *civil* committals for whom places could not be found in hospital. A. Milner, *The Nigerian Penal System*, London, 1972, 263–4.

¹⁶ An exception was the Gold Coast where trade education formed an essential component of Prisons Department policy from the 1920s onward; see Seidman, in Milner (ed.), op. cit., 429, at 451. In most territories the prison system was seriously under-resourced.

¹⁷ In pre-colonial Africa it was only in centralized societies that the fine, in the sense of the forfeiture of property to the state, was to be found. It was much more common for a wrong-doer to be ordered to make restitution or pay compensation to the victim or the victim's family.

¹⁸ In Ghana, for example, 45 per cent of those committed to prison in 1961 were fine-defaulters. Milner (ed.), op. cit., at 76.

¹⁹ Treason and piracy were also capital offences. During the Kenyan State of Emergency (1952–1960) there was a marked increase in the number of capital crimes and death sentences.

²⁰ It remained, however, an extremely popular punishment for juveniles. In the period 1958–1963, 79 per cent of juvenile offenders in the region were sentenced to corporal punishment. Milner, op. cit. (1972), 99.

pensation provisions remained largely a dead letter.²¹ The African Courts, by contrast, were much more ready to promote reconciliation and order compensation, although, as has been pointed out in relation to Kenya, they “were moved to conform more and more to the practices of the English-oriented courts . . .”²²

It was not until after the Second World War that much thought was given to the rehabilitation of offenders, and the introduction of probation, in particular, provided the courts with a method of dealing with offenders in cases where punitive sentences were inappropriate, notably with the increasing number of juvenile offenders coming before the urban courts. The system of probation was based on the English model and it seems never to have been asked whether that model was particularly suited to the African context. The courts continued to show a general preference for penal sanctions²³ and, in any case, a shortage of resources both limited the operation of the service to the main urban centres and undermined the effectiveness of such juvenile courts as were set up.

Mention should finally be made of the Collective Punishment Laws whose primary objective was to fix responsibility on a group which had failed to preserve order or had been a “party” to the breaking of the law by one (or more) of its members who could not be traced. It was a type of crime control particularly suited to the remoter areas where police services were inadequate, and to an extent it reflected the customary concept of group responsibility for the wrongs of its members.²⁴ However, the laws could operate very harshly, punishing innocent people for the crimes of a member of their “group”. The punishment, ordered as the result of an administrative enquiry, would take the form of a fine (either in cash or cattle), all or part of which might be used to compensate any victims.²⁵

This brief and rather general survey has identified the main features of penal policy in British colonial Africa. The Codes and other criminal legislation that were introduced, the system of courts that was established, the ideology that underpinned the prosecution, sentencing and treatment of offenders, the almost total failure to take African concepts of criminality and punishment into account, and the extreme tardiness with which developments in penological theory and practice in England made themselves felt within Africa—in all these respects the British territories under discussion shared a common experience. During a period when colonial social and economic policies were causing severe dislocation within

²¹ See D. Brown, “The award of compensation in criminal cases in East Africa”, [1966] *J.A.L.* 33 at 35. Also see J.S. Read in Milner (ed.), *op. cit.*, at 155, and L.C. Kercher, *The Kenya Penal System*, University Press of America, 1981, 71. For the discussion of an instance where the East African Court of Appeal was prepared to award “blood money” in a manslaughter case, see H.F. Morris, “The award of blood money in East African manslaughter cases”, [1974] *J.A.L.* 104.

²² Kercher, *op. cit.*, 7.

²³ The basic attitudes of the English-type courts in Nigeria were “repressive and oriented towards deterrence”; Milner in Milner (ed.), *op. cit.*, 268. In the Gold Coast the British saw in “harsh, exemplary deterrence the central objective of the law”; Seidman, *ibid.*, 433.

²⁴ The Collective Punishment Laws were often used to deal with stock-theft. However, where traditional cattle raids were transformed during the colonial period into multi-ethnic gangs organized to drive cattle long distances and across borders, the laws ceased to be effective. See D. Anderson, “Stock theft and moral economy in colonial Kenya”, (1986) 56(4) *Africa* 399.

²⁵ For an interesting account of how difficulties in bringing politically-motivated arsonists of public buildings to justice in colonial Uganda led to the offence of arson being (temporarily) brought within the scope of the Collective Punishment Ordinance, see E. Hopkins, “The politics of crime: aggression and control in a colonial context”, (1973) 75 *American Anthropologist* 731.

African societies, the British used the criminal law as a blunt and generally harsh instrument of social control.

POST-COLONIAL PERIOD

In terms of both political history and socio-economic development the post-independence experiences of the states under consideration have been remarkably diverse. Some have experienced frequent changes of government including long periods of military rule (Nigeria, Ghana, Uganda). Others have enjoyed relative political stability under authoritarian civilian administrations (Kenya, Tanzania, Zambia, Malawi). It was only in the 1980s that progress towards multi-party democracy based on the principles of good governance and respect for human rights began to be made, and that progress has been fitful and uneven. It is equally difficult to generalize about the economic record. Some countries enjoyed short-term booms, largely based on high prices for their products on the international market, but for economies based primarily on agricultural production the story has been a sorry one. Even the introduction of IMF/World Bank-initiated reforms in the 1980s, though they have claimed some successes, has made little effect in a region characterized by poverty and disease.

However diverse the political histories, the economic records and the law reform programmes of Commonwealth African states over the past 30 or 40 years may have been, it is still possible to identify general patterns in their approaches to criminal law and policy. One striking feature has been the lack of interest shown by governments in reform of the criminal justice system. Governments which have undertaken far-reaching reforms of land law and family law, of customary law and constitutional law, seem never to have asked whether the criminal justice system inherited at independence was appropriate for the needs of a modernizing African state.²⁶ This lack of official interest is reflected in the paucity of research in the field; Read's 1966 lament about the "appalling lack of serious and informative research on crime and the administration of criminal justice in common law African states" remains valid today.²⁷ Penal legislation is seldom the fruit of research and deliberation; more often, as will be illustrated below, it is enacted in instant response to some threat (real or imagined) to the status quo. Apart from the necessity for more research on the need for and the effect of specific penal measures, research is required on the general relationship between crime and development or social change.

The penal policies of independent African governments show a remarkable continuity with those of their colonial predecessors. In spite of the stress that many governments place on African values, African traditions, African socialism and the like, there has been little attempt to incorporate these values in the penal system. Penal policies continue to be characterized by their harshness, by their emphasis on retribution and general deterrence rather than on the individualization of penalty and the rehabilitation of offenders. Finally, continuity

²⁶ The Attorney-General of Tanzania once asked (rhetorically), "Is it enough to rely on a Penal Code written in a background of preoccupation of protection for the individual and his property? What about the protection of society as a whole and its property?"; M. Bomani, "The machinery of justice in a developing society", (May 1966) *East Africa Journal* 20, at 23. Except for amendments relating to self-defence, the Tanzanian Code remains largely unchanged today.

²⁷ J.S. Read, "Penal systems in common law Africa", (1968) 39 *Revue internationale de droit penal* 181, at 185.

is shown in the reluctance of governments to invest resources in the criminal justice system. Moreover, while colonial penal policies were monitored by humanitarian bodies (for example the Anti-Slavery Society and the Howard League for Penal Reform) as well as by the Colonial Office itself, independent African governments are subject to few such countervailing pressures. Certainly, all the states under consideration are parties to the African Charter on Human and Peoples' Rights and most are parties to the International Covenant on Civil and Political Rights. There are also sets of principles or rules emanating from the United Nations laying down minimum standards in various areas of criminal justice. However, it is sufficient to note at this stage that such international commitments have not operated as a very effective constraint on penal policy-making. Generally speaking, African governments have been impervious to international criticism of their policies, and domestic criticism has been muted. Indeed, these policies appear to command widespread support both from the public and, with the exception of one or two successful constitutional challenges, from the courts. These themes will be elaborated upon in the following discussion.

Penal Codes

No significant attempts have been made to amend the Penal Codes either in line with criminal law reforms in England and other common-law jurisdictions or in line with customary concepts of criminality.²⁸ Moreover, while the Codes, together with other colonial penal legislation (including the Witchcraft Ordinances), remain firmly in place, customary criminal law has been abolished.²⁹ Two initiatives, one from Zambia and one from Tanzania, are worthy of note. The Zambia Law Development Commission has been reviewing the Penal Code for some time and, as a result of its recommendations (made in 1982), the Code was amended in 1990 introducing the defence of diminished responsibility and reforming the law of duress and self-defence.³⁰ In Tanzania, the 1977 Report of the Judicial System Review Commission contained important recommendations, but its prime focus was on the law of evidence and criminal procedure.³¹ Perhaps its most important recommendation on the substantive law was that "self-defence" should be defined in the Penal Code rather than continue to be defined by reference to the principles of English law.³² It further recommended that the criminal law of Tanzania should be reviewed "with a view to giving it a shape and image which befits our . . . socio-economic posture and our determination to fight for legal decolonisation".³³ Although such a review has never taken place,

²⁸ Where the Codes have been amended, this has usually been done in order to increase penalties. Examples are discussed below.

²⁹ Independence Constitutions contained a provision to the effect that no person should be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.

³⁰ See J. Hatchard, "Developing the criminal law in Zambia: The Penal Code (Amendment) Act, 1990", [1992] *J.A.L.* 103.

³¹ See *Commonwealth Law Bulletin*, 1981, 613ff., for a summary of its recommendations, most of which were incorporated in the Criminal Procedure Act, 1985.

³² The Penal Code (Amendment) Act, 1980, contained the new law on self-defence and also gave effect to several other of the Commission's recommendations. Elsewhere Penal Code references to the principles of English law remain untouched.

³³ Recommendation (lviii), (1981) *Commonwealth Law Bulletin* 618.

this has not prevented Tanzania from extending the scope of the criminal law, from relaxing procedural safeguards and from introducing severe sentences.³⁴

To undertake a review of this kind is, of course, a major exercise, and governments may feel that the Codes have stood the test of time and are daily applied by the courts without obvious difficulty. However, the Codes are showing their age, they need to be rewritten in more accessible language and the principles of responsibility and the definitions of offences should be reformulated to reflect the requirements of contemporary African societies. Some offences may need to be abolished altogether (for example bigamy and some vagrancy offences), but generally provisions need to be reviewed to ensure that the essential ingredients of offences, principles of liability, defences and punishments relate to societal norms and values and reflect accepted notions of criminality. The law of murder provides a good example of this need.

Murder carries a mandatory death sentence in all the countries under consideration and yet the definition of malice aforethought in the Codes is very broad,³⁵ covering states of mind that would not constitute malice aforethought in Britain today, where nothing less than an intention to kill or cause grievous bodily harm must be proved, and would not have justified the death sentence in pre-colonial African societies, where premeditated killing was generally required. The harshness of the definition becomes even more apparent when one considers the limited scope of voluntary manslaughter under the Codes. There are two points to make. Firstly, under the Penal Codes, as in Britain, provocation may be a defence to a charge of murder, entitling the accused to be convicted of manslaughter. However, it appears that the courts, at least in West Africa, tend to interpret the defence in a very narrow way. One writer argues that, in their application of the objective test and, in particular, in their assessment of proportionality, the Nigerian courts have severely limited the scope of the defence, and he concludes that the number of murder convictions would be "greatly reduced" if the legal definition of provocation was "less stiff".³⁶ Indeed, the decision of the Federal Supreme Court in *Oladiran v. State*,³⁷ to the effect that provocation was not a defence where there was an intent to kill or inflict grievous bodily harm, virtually abolished the defence altogether. In Ghana the courts have taken a similar view.³⁸ The second point relates to mental incapacity. All the Penal Codes contain provisions dealing with insanity, based broadly on the M'Naghten Rules. However, with the exception of Uganda and Zambia, none of them have adopted the defence of diminished responsibility, which was introduced in Britain in 1957 and which entitles an accused to be convicted of

³⁴ These policies are discussed below.

³⁵ The 1984 ECOSOC safeguards state that the scope of crimes punishable by death "should not go beyond intentional crimes". However, although there are variations in the Penal Code provisions, "malice aforethought" may include constructive malice (abolished in Britain in 1957) and/or recklessness (a ground of liability for manslaughter in Britain). The 1970 Penal Code Amendment Act of Uganda abolished implied and constructive malice, redefining "malice aforethought" as intention to cause death, or knowledge that the act or omission causing death will probably cause death.

³⁶ M.A. Owoade, "Death penalty—the Nigerian experience", (1985) 11(1&2) *Indian Socio-Legal Journal* 16 at 19.

³⁷ [1986] 1 N.W.L.R. 75. See E.O. Isedonmwun, "A requiem for provocation", [1988] *J.A.L.* 194 for a cogent criticism of this case.

³⁸ (1987–88) *Ghana Law Digest* 46. The courts have also interpreted section 53 of the Criminal Code in a restrictive way, holding that as a matter of law the theft of the accused's cattle could not amount to provocation; (1989–90) *Ghana Law Digest* 98.

manslaughter (instead of murder) where his/her responsibility for his/her actions was impaired by an abnormality of mind. The result is that, unless an accused can bring him/herself within the M'Naghten Rules and, in particular, show that s/he was suffering from a disease of the mind,³⁹ s/he is liable to be convicted of murder, however abnormal his/her state of mind may have been.⁴⁰ Here again, although most of the material comes from Nigeria, the position of the mentally ill offender is not likely to be very different elsewhere.⁴¹ The law of murder needs to be reviewed.

Although little attempt has been made in Commonwealth Africa to review the substantive criminal law inherited at independence, some governments have extended the scope of the criminal law in the pursuit of their economic policies. Contrasting examples come from Tanzania and Nigeria. In the 1970s Tanzania revived unpopular colonial bye-laws in order to secure good land use, and in 1983 it amended the vagrancy provisions of the Penal Code in order to force people to work by bringing within the definition of "idle and disorderly person" "any able-bodied person who is not engaged in any productive work and has no visible means of subsistence", as well as any employed person found "engaged on a frolic of his own" when he is supposed to be working.⁴² The creation of the new offence of money-laundering in Nigeria shows how the criminal law must adapt to deal with new problems. Originally intended to deal specifically with the proceeds of drug-trafficking, the law imposes general controls on the payment, acceptance and transfer of large sums of money. It introduces severe minimum penalties and forfeiture provisions and it does not require full *mens rea*.⁴³

Criminal Courts

Although African governments have seen little reason to alter the criminal law inherited at independence, they have all (with one important exception) taken steps to reorganize the structure of courts by replacing the dual system (with its racial overtones) with a single hierarchy of courts, all of which exercise both criminal and civil jurisdiction. The former Native or African Courts have either been abolished (as in Kenya) or (more frequently) been integrated at the lowest level of the hierarchy. They deal predominantly with customary and minor civil matters; their criminal jurisdiction is very limited. The majority of

³⁹ This will depend largely on whether he is fortunate enough to get access to expert testimony, and even then a judge may reject that testimony. See L. Bienen, "The determination of criminal insanity in Western Nigeria", (1976) 14(2) *Journal of Modern African Studies* 219.

⁴⁰ M.A. Owoade, *op. cit.*, at 20.

⁴¹ Writers on Ghana some 30 years ago concluded, "In general questions of *mens rea* and specific problems of intent, mistake, mental abnormality, provocation and absolute liability, [the Ghanaian courts] have given the Code a common law interpretation which has forced it in the direction of objective *mens rea* and general deterrence". R.B. Seidman and J.D. Abaka Edison, in Milner (ed.), *op. cit.*, at 75. Such evidence as there is suggests that the comment would be valid today.

⁴² The Human Resources Deployment Act, 1983, provided machinery for the compulsory repatriation of the urban unemployed to their villages. These measures were largely ineffective, though they provided an opportunity for police harassment of the poor. See, generally, L.P. Shaidi, "Crime, justice and politics in continental Tanzania", (1989) 17 *International Journal of the Sociology of Law* 247.

⁴³ National Drug Law Enforcement Decree (No. 48 of 1989) and the Prevention of Money-Laundering Decree (No. 3 of 1995). Outside Southern Africa, Nigeria is the only Commonwealth African country to have laws dealing specifically with money-laundering. This is discussed further below.

criminal cases come before the Magistrates Courts or the High Court. The most striking exception to this pattern was Malawi, which not only retained the dual system of courts, creating the National Traditional Appeal Court at the apex of the Traditional Court hierarchy, but established three Regional Traditional Courts (composed of three Chiefs, a trained chairman and a qualified lawyer) with unlimited original criminal jurisdiction, including the power to try cases of homicide and treason and the power to pass the death sentence.⁴⁴ This controversial policy was justified on the grounds that the application of "technical" rules of evidence and procedure (often by expatriate judges) and an accused's right to professional representation together operated to allow "criminals" to go free. There was a need, it was argued, to return to "traditional" African justice.⁴⁵

Unlike the former Native/African Courts and their successors, the Magistrates Courts and the High Court are bound by the laws of evidence and criminal procedure, and lawyers are permitted to appear before them. Yet, in a number of ways, the operation of the criminal justice system is weighted against the accused. In the first place, the accused is likely to be remanded in custody. Some offences are unbailable,⁴⁶ but even in those cases where the court has a discretion as to whether to grant bail, it tends to refuse to grant it or it pitches bail at a level outside the accused's means. Persons on remand constitute a sizeable proportion of the prison population, as they did during the colonial period, and, given the slow pace at which the criminal justice system moves, they may remain in custody for years.⁴⁷ Secondly, legal aid is not widely available, and even where it is available (as on capital charges), the level of remuneration is unlikely to attract the most able lawyers. The accused may not be adequately represented in court, if he is represented at all.⁴⁸ It may be difficult for the defence to challenge the prosecution case, particularly where that case is based on a confession made to the police.⁴⁹ Finally, the criminal justice systems often provide

⁴⁴ These courts, which generated international criticism, were abolished by the 1994 Constitution, art. 110 (3). For a discussion of the operation of these courts in homicide cases, see P. Brietzke, "Murder and manslaughter in Malawi's Traditional Courts", [1974] *J.A.L.* 37.

⁴⁵ See M. Chanock, "Neo-traditionalism and the customary law of Malawi", 16 *African Law Studies*, 80. Of course, there was little that was either traditional or African about the new courts. The reinforcement of the position of the chiefs had an obvious political dimension.

⁴⁶ Statutory provisions prohibiting the grant of bail may be open to constitutional challenge. In Tanzania a number of successful challenges have been made to section 148 (5) of the Criminal Procedure Act, 1985, which lists circumstances in which bail must be denied. See, for example, *Daudi Pete*, [1991] L.R.C. (Const) 553.

⁴⁷ The worst situation is probably to be found in Nigeria. Prison admissions rose from 87,947 in 1975 to 269,121 in 1988. More than two-thirds of inmates are on remand. Long trial adjournments coupled with the failure of the accused to meet bail conditions is largely responsible. See E. Alemike and E. Alemike, "Penal crisis and prison management in Nigeria", (1994) 1(2) *Journal of Nigerian and Comparative Law* 62 at 77. In 1994 more than one-third of the Kenyan prison population was on remand. Kenya Human Rights Commission, *A Death Sentence; Prison Conditions in Kenya*, Nairobi, 1996, 27.

⁴⁸ The High Court of Tanzania has held that the constitutional right to a fair hearing implies a right to legal representation at the expense of the State where the accused cannot afford the expense him/herself. *Khasim Hamisi Manywele*, High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990, reproduced in C. Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Cologne, 1997, 349.

⁴⁹ Confessions to the police do not require corroboration to be admitted as evidence in court. For an account of some of the problems to which this gives rise, see D.D.N. Nsereko, "The poisoned tree: responses to involuntary confessions in criminal proceedings in Botswana, Uganda and Zambia", (1998) 5 *American Journal of International and Comparative Law* 609.

little protection for vulnerable defendants such as young persons or the mentally ill.⁵⁰

Although governments have tended at least to respect the constitutional provisions designed to ensure an independent judiciary, impatience with or distrust of the operation of the courts has led some of them to set up alternative institutions to try certain kinds of offences, usually offences of an economic or political nature. Many African governments, for instance, have felt it necessary to take drastic measures to stem the growing tide of corruption, hoarding, smuggling and black-marketeering that has afflicted their economies. Measures include the imposition of draconian penalties (these are discussed below), the reversal of the burden of proof,⁵¹ the departure from normal principles of *mens rea*, the extension of police powers and, perhaps most controversial of all, the establishment of special tribunals. The Economic and Organized Crime Control Act, 1984, of Tanzania is a case in point.⁵² It established the Economic Crimes Court (presided over by a High Court judge assisted by two lay assessors) with jurisdiction over certain "economic offences". The police are given extended powers of search and seizure, rules governing procedure and evidence at the trial are relaxed, and there is a maximum sentence of 15 years imprisonment in addition to any other measure (for example forfeiture) provided for in the Act. In Zambia, while there are no special courts to deal with economic crimes, the Supreme Court has held that such a crime is a "threat to public security" within section 2 of the Preservation of Public Security Act and that therefore the President has the power to detain without trial a person suspected of gems-smuggling.⁵³

Even more controversial were the tribunals established in Nigeria and Ghana during periods of military rule. Military tribunals have a long tradition in Nigeria. First established in the 1970s to combat a sharp increase in armed robbery following the end of the civil war, they were set up in the course of the next 20 years to deal with a wide range of economic and political offences. Apart from the Chairman (who was usually a High Court judge), the tribunals consisted wholly of military or police representatives, and the jurisdiction of the courts was ousted. The decrees were retroactive in operation, reversed the burden of proof in many cases, and dictated harsh penalties. Often drafted rapidly in response to some public outcry, they were subject to frequent amendment.⁵⁴

⁵⁰ In Zambia, for example, the provisions of the Juveniles Act are largely ignored. See E.M. Simaluwani, "The criminal process in juvenile courts in Zambia", (1997) 29 *Zambia Law Journal* 71.

⁵¹ Notably for offences involving corruption. For a discussion of the variety of measures taken to combat corruption, see S. Coldham, "Legal responses to state corruption in Commonwealth Africa", [1995] *J.A.L.* 1.

⁵² The Act replaced the Economic Sabotage (Special Provisions) Act, 1983, some of whose provisions (for example no appeal, no bail, no advocates, decision by a majority) had provoked domestic and international criticism, though it had been justified by President Nyerere on the grounds that the courts had proved incapable of dealing with racketeers. See Maina Peter, *op. cit.*, 493ff.

⁵³ *Bhagvatilal Dabhyabhai Rao v. Attorney-General*, SCZ Appeal No. 24 of 1987. For differing views of the decision see M.L. Mbao, [1989] *J.A.L.* 116 and B.H. Simamba, (1988) 4(2) *Lesotho Law Journal* 171.

⁵⁴ See generally M.A. Owode, "The Military and the Criminal Law in Nigeria", [1989] *J.A.L.* 136, and for developments during the 1990s see C.O. Okonkwo in I.A. Ayua (ed.), *Law, Justice and the Nigerian Society*, Lagos, 1995. The Saro-Wiwa trial attracted international publicity: see comment in G.N.K. Vukor-Quarshie, [1997] *J.A.L.* 215.

The tribunals were abolished in 1999.⁵⁵ In Ghana, the Public Tribunals Law, 1983, not only established the Public Tribunals but created new offences affecting the economy or state security.⁵⁶ There was no requirement that members of the tribunals should have any legal qualification, nor were the tribunals bound by rules of evidence or procedure. Although it was envisaged that the tribunals would try primarily offences of an economic or political nature, there was nothing to stop them trying general offences under the Penal Code. They could impose the death penalty where "very grave circumstances meriting such a penalty have been revealed".⁵⁷ They were abolished in 1993.⁵⁸

In conclusion, brief mention should be made of certain unofficial methods of dealing with crime. Concern about the inability of the police to deal adequately with rising crime levels in the urban areas has led to the establishment of neighbourhood watch groups and increased reliance on private security firms. In theory, at least, such organizations operate within the law, they reinforce the work of the police and, when an arrest is made, the suspect is handed over to the police. "Instant justice", on the other hand, operates outside the law and, though it may claim an antecedent in the practices of customary law, it is essentially a post-independence phenomenon reflecting dissatisfaction with the criminal justice system on the part of the urban poor.⁵⁹ Evidence of the incidence of instant justice attacks is largely anecdotal, though there is a sense that they are on the increase.⁶⁰ Finally, an interesting example of a traditional law enforcement institution that has been given official recognition and support is provided by the Sungusungu of central Tanzania.⁶¹ They are based in part on traditional forms of co-operation, membership depends on passing through an initiation ceremony, traditional modes of crime detection (for example divination) are used, and much of their activity involves tracking down stolen cattle, recovering women who have eloped, dealing with witches and settling disputes. "Fines" collected go into the Sungusungu fund. Although the government accepts them as upholding law and order in areas where limited resources make it impossible for the government itself to maintain a police presence, and although it has accorded them formal legal status under the People's Militia Acts, it has been unable to prevent them from exceeding their statutory powers of search and arrest and, indeed, from operating what amounts to a parallel system of justice.⁶²

⁵⁵ Tribunals (Certain Consequential Amendments etc.) Decree No. 62 of 1999 and Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999.

⁵⁶ See generally K. Frimpong, "Criminal law and criminal justice in Ghana since the military coup of December 31, 1981", (1983) 4 *Jahrbuch für Afrikanisches Recht* 27.

⁵⁷ Public Tribunals Law, 1983, s. 8 (1).

⁵⁸ Courts Act No. 459 of 1993, s. 120 (1).

⁵⁹ J. Hatchard, "Crime and penal policy in Zambia", (1985) *Journal of Modern African Studies* 493 at 500.

⁶⁰ It has been described as a "frequent occurrence" and "a part of urban life" in Zambia; J. Hatchard and M. Ndulo, *Readings in Criminal Law and Criminology in Zambia*, James Currey, 1994, at 95.

⁶¹ Much has been written on the Sungusungu. See, for example, S.H. Bukurura, "The maintenance of order in rural Tanzania: the case of the Sungusungu", (1994) 34(1) *Journal of Legal Pluralism and Unofficial Law* and Maina Peter, op. cit., 512ff.

⁶² Sungusungu groups often try and punish suspects, and execution and torture are not unknown. See [1991] Tanzania Law Reports 1 and [1992] Tanzania Law Reports 134.

Punishment

There has been a consensus among Commonwealth African governments about the central role that punishment has to play in the fight against crime, and in their emphasis on the objectives of retribution and general deterrence their policies have broadly pursued and indeed gone far beyond those of their colonial predecessors. The extension of capital and corporal punishment, the introduction of mandatory and minimum sentences, the increasing use of prison sentences—these are the policies that have found favour with governments. Totally absent is any interest in devising alternative strategies to combat crime.

*Capital Punishment*⁶³

None of the countries under consideration are party to the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. They have all retained the mandatory death penalty for murder⁶⁴ (as well as treason) and many of them have introduced the mandatory death penalty for other serious offences whose incidence has generated public concern. Thus, aggravated robbery (usually, but not necessarily, involving the use of a firearm or other offensive weapon) has been made a capital offence in Zambia, Uganda, Nigeria, Ghana, Malawi and Kenya, while in Cameroon the mandatory death penalty has been even extended to theft where aggravating circumstances were present.⁶⁵ In addition, a wide range of economic and political offences were made capital in Nigeria and Ghana during periods of military rule; given that these offences were tried by special tribunals rather than by the courts, a defendant was in an especially vulnerable position.⁶⁶

Although the death penalty is specifically provided for in most of the constitutions of Commonwealth African countries, attempts have been made to have it struck down as unconstitutional as being a cruel, inhuman or degrading punishment. In 1990 the Zimbabwean government pre-empted a hearing of the issue by the Supreme Court by rushing through a constitutional amendment upholding the constitutionality of executions by hanging.⁶⁷ When the issue was raised in Tanzania, the Court of Appeal held that the death sentence was saved as being “lawful and in the public interest”.⁶⁸ By way of contrast the Constitutional Court of South Africa has, in a landmark judgment, struck down capital punishment as unconstitutional.⁶⁹ An interesting point of contrast between the two cases was the importance accorded by the Tanzanian Court of Appeal to

⁶³ For a detailed treatment of this topic see J. Hatchard and S. Coldham, “Commonwealth Africa”, in P. Hodgkinson and A. Rutherford (eds.), *Capital Punishment: Global Issues and Prospects*, Waterside, 1996.

⁶⁴ The Zambian Penal Code was amended in 1990 to provide that the death penalty need not be imposed for murder where there are extenuating circumstances.

⁶⁵ Penal Code Amendment Ordinance, 1972. See W.P. Capstick, “Aspects of the penal consequences of economic change”, (1973) 3 *Revue Camerounaise de Droit* 8.

⁶⁶ Similarly a person charged with a capital offence before the Regional Traditional Courts of Malawi was deprived of many of the safeguards of a High Court trial.

⁶⁷ This became s. 15(4) of the Constitution of Zimbabwe.

⁶⁸ *Mbushuu v. Republic* [1995] 1 L.R.C. 216. To similar effect, in *State v. Niesang* [1995] 2 L.R.C. 338, the Court of Appeal of Botswana ruled that capital punishment was constitutional because s. 7(1) (prohibiting torture, inhuman or degrading punishment) was qualified by s. 7(2) (expressly preserving the death sentence).

⁶⁹ *S v. Makwanyane and Mchunu*, 1995 (3) SA 391. For a more detailed examination of these cases as well as a discussion of the effect of delay in carrying out the sentence, see Hatchard and Coldham, *op. cit.*, at 170ff.

the fact that public opinion strongly supported capital punishment. Finally, it may be possible for a person who has been sentenced to death to appeal to international human rights norms to have his/her sentence commuted. In *Lubuto v. Zambia*⁷⁰ a man sentenced to death for armed robbery claimed before the UN Human Rights Committee that the sentence was disproportionate given that nobody had been killed or wounded during the robbery. The Committee upheld his claim on the ground that the sentence violated Article 6(2) of the International Covenant on Civil and Political Rights which limits the imposition of the death sentence to "the most serious crimes". This case could provide a useful precedent elsewhere in Commonwealth Africa.

Corporal Punishment

It was noted above that during the colonial period the corporal punishment of offenders (particularly juvenile offenders) was common and was usually imposed, in the discretion of the court, in addition to some other penal measure. In most countries it has remained a discretionary and supplementary penalty⁷¹ and this was the case even in Nigeria under Military Decrees that markedly increased the number of strokes that could be awarded for certain offences.⁷² In Kenya, on the other hand, corporal punishment has gained considerable official favour since independence and as a result of a series of amendments to the Penal Code made in the late 1960s and early 1970s, it has become mandatory for many offences (primarily property offences) and discretionary for even more (primarily sexual offences). While the policies were adopted in response to public concern about growing crime rates, such evidence as there is suggests that they have not proved an effective deterrent.⁷³ In Zambia it continues to be imposed on juvenile offenders in spite of the former Chief Justice's description of it as inhuman and degrading and his plea for it to be used sparingly.⁷⁴ However, in a number of African countries the courts have struck down corporal punishment as unconstitutional. Thus the High Court of Tanzania held in *Thomas Mjengi and Another v. Republic*⁷⁵ that corporal punishment is inherently inhuman and degrading, and therefore unconstitutional. In reaching his decision MWALUSANYA, J., derived support from other jurisdictions and, in particular, the judgment of the Supreme Court of Zimbabwe in *Ncube v S*,⁷⁶ where a similar conclusion had been reached. *Ncube* involved an adult, but subsequently, in *S v. A Juvenile*⁷⁷ the Supreme Court of Zimbabwe ruled that the corporal punishment of a juvenile was unconstitutional, a decision that was subsequently nullified by Parliament.⁷⁸ The Supreme Court of Namibia followed the Supreme Court of Zimbabwe in

⁷⁰ Communication No. 390/1990, noted in [1997] *J.A.L.* 147.

⁷¹ It was abolished in Ghana in 1960.

⁷² For example, the Indian Hemp Decree, 1966, and the Robbery and Firearms (Special Provisions) Decree, 1970.

⁷³ See, generally, L.C. Kercher, *op. cit.*, 73ff. He notes that the use of corporal punishment for adults rose from an annual figure of 181 in 1962 to around 5,000 cases in the late 1970s.

⁷⁴ SILUNGWE, C.J., in *Berejena v. The People*, [1984] Z.R.19, at 21.

⁷⁵ [1992] Tanzania Law Reports 157, also reproduced in Maina Peter, *op. cit.*, 115. Mandatory corporal punishment had been abolished by the Minimum Sentences Act, 1972, only to be re-introduced in 1989 by an enthusiastic and near unanimous Parliament.

⁷⁶ 1987 (2) ZLR 246.

⁷⁷ 1989 (2) ZLR 61. Rule 17(3) of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985, calls for the abolition of corporal punishment for juveniles.

⁷⁸ Constitution of Zimbabwe Amendment Act No. 11 of 1990.

ruling that the corporal punishment of both adults and juveniles was unconstitutional.⁷⁹

Imprisonment

It was noted above that the British colonial penal system rested upon the foundation of the prison and in the decades following independence, when considerable interest was being shown elsewhere in the world in finding suitable non-custodial alternatives, courts in Africa have come to rely ever more heavily on imprisonment.⁸⁰ This manifests itself both in the increased use of imprisonment for first offenders and in the imposition of longer prison sentences.⁸¹ Even when fines are offered in lieu, a failure to pay often results in imprisonment. In Nigeria it has been claimed that the "vast majority" of inmates are in prison for offences for which they should not have been sent there in the first place.⁸² In Kenya the Attorney-General conceded in 1994 that two-thirds of convicts in prison were "petty offenders".⁸³ There is no doubt that courts throughout the region must bear some responsibility for the dreadful congestion in African prisons.⁸⁴

However, in some cases the courts have had little choice in the matter, since governments have frequently responded to growing crime rates (or, at least, to growing public concern about crime) both by increasing maximum prison sentences and by introducing minimum and mandatory prison sentences for certain offences. Such policies have few precedents in the colonial period (when the only mandatory sentence was the death sentence for murder and treason and when minimum sentences were almost unknown) and they reflect a belief on the part of governments that the courts are showing excessive leniency to criminals. Multiple examples could be given from all the jurisdictions under consideration but, broadly speaking, there are two kinds of offence that have been particularly targetted in this way, economic offences

⁷⁹ *Ex parte Attorney-General Namibia in re Corporal Punishment*, 1991 (3) S.A.76. See J. Hatchard, "The fall of the cane again: Corporal punishment in Namibia", [1992] J.A.L. 81.

⁸⁰ Writing in the 1970s, Clifford commented that "the prison in Africa remains central and crucial to the concept of the treatment of criminals and the frequent recourse to prison sentencing for first offenders . . . attests to its popularity with the courts". Clifford, *op. cit.*, 190. The comment remains valid today.

⁸¹ In Zambia, in 1966 sentences of less than three months accounted for 56 per cent of prison sentences and sentences of over eighteen months for 7 per cent, whereas in 1986 the figures were 15 per cent and 22 per cent. See Hatchard and Ndulo, *op. cit.*, 90ff. The interpretation of such statistics is problematic.

⁸² Alemika and Alemika, *op. cit.*, at 74ff. For example, persons are imprisoned for idleness, for violation of local and customary laws, for non-payment of debts or fines, or because they are mentally ill and there is nowhere else to send them. Juveniles are routinely sent to prison and little attempt is made to separate them from adult convicts. On juvenile justice in Nigeria, see M.T. Ladan in Ayua (ed.), *op. cit.*

⁸³ Kenya Human Rights Commission, *op. cit.*, 30.

⁸⁴ The large number of prisoners on remand has been noted above. Most systems allow for remission for good behaviour, but there is little information on how this operates in practice. The Zimbabwe Criminal Procedure and Evidence Amendment Act, 1997, provides that life imprisonment means life, though it is arguable that a provision entirely precluding the possibility of early release is unconstitutional; see *State v. Tsoib* [1997] 1 L.R.C.90, where the Supreme Court of Namibia considered that it would be.

and various aggravated forms of theft or robbery.⁸⁵ Nigeria and Tanzania provide good illustrations.⁸⁶

From the Indian Hemp Decree, 1966 (which imposed the death penalty or a minimum of 21 years imprisonment for the cultivation of hemp and a minimum of 10 years imprisonment for its possession) to the Money-Laundering Decree, 1995 (which imposes a minimum 15-year and a maximum 25-year prison sentence), successive military governments in Nigeria have promulgated decrees imposing draconian minimum and mandatory sentences for various offences and, as mentioned above, providing for these offences to be tried by special tribunals. Many of the decrees were retroactive and while the majority of the offences could be categorized as economic or political offences of a relatively serious kind, some were not.⁸⁷

The Minimum Sentences Act, 1963, of Tanzania, enacted just two years after independence, is one of the earliest examples of minimum sentences legislation, imposing two-year minimum sentences for certain crimes against property together with mandatory corporal punishment and mandatory compensation. Subsequently it was replaced by the Minimum Sentences Act, 1972, which significantly increased both minimum and maximum sentences as well as the range of offences covered,⁸⁸ and one of the issues raised in *Mjengi* (above) was whether the minimum sentence of 30 years imprisonment imposed on the appellants for robbery with violence was constitutional. The judge, MWALUSANYA, J., held that it was not. In determining whether the sentence was inhuman or degrading, the judge applied the proportionality test, asking first whether the sentence was arbitrary and secondly whether it was inherently excessive or unconscionable. He found that it was arbitrary in the sense that the court was prevented from taking into account any special factors (for example the accused's age, record, remorse, mental condition, degree of participation etc.)⁸⁹ and he found that it was excessive in the sense that it made no contribution to acceptable goals of punishment and indeed went beyond legitimate penal objectives. Similarly the High Court of Namibia, applying the proportionality test, has ruled that, while mandatory minimum sentences are not unconstitutional *per se*, a punishment would be struck down as cruel and degrading where it was "startlingly inappropriate" in the light of prevailing societal norms.⁹⁰

The effect of mandatory and minimum prison sentences legislation is difficult to assess. There is some evidence that the courts resent such restrictions on their sentencing discretion, particularly where they are compelled to impose much more severe sentences than they would otherwise have done. Thus a reluctance

⁸⁵ The Botswana Penal Code (Amendment) Act, 1998, introduced a minimum ten-year prison sentence for rape.

⁸⁶ For Kenya, see Kercher, *op. cit.*, 248ff., and for Zambia, see Hatchard and Ndulo, *op. cit.*, 82ff. The Ghanaian Punishment of Habitual Criminals Act, 1963, introduced a minimum sentence of ten years imprisonment with hard labour for a person convicted for the third time of any felony or misdemeanour. For a comment on this extreme example of the "three strikes and you're out" principle, see A. Kuenyehia, "The problem of recidivism in the Ghanaian penal system", (1978-81) 15 *University of Ghana Law Journal*, 84.

⁸⁷ Cheating in examinations, for example, or ridiculing government officers. See, generally, Owode (1989), *op. cit.*

⁸⁸ The 1972 Act abolished mandatory corporal punishment, as noted above.

⁸⁹ MWALUSANYA, J., distinguished the decision of the Supreme Court of Zimbabwe in *The State v. Arab* [1990] 1 Z.L.R. 253 precisely because under the applicable Zimbabwean legislation the trial court was entitled to take special factors into account in determining whether or not to apply the minimum sentence provision.

⁹⁰ *State v. Vries* [1997] 4 L.R.C. 1.

to impose the stiff penalties contained in the Indian Hemp Decree led the Nigerian courts to show "an almost ridiculous insistence" on the prosecution proving that the substance concerned was indeed Indian hemp.⁹¹ Similarly, when severe minimum sentences were introduced in Malawi for theft by a public servant, "on every aspect of the law calling for legal interpretation the judiciary has quibbled and attempted to shield public servants", even at the expense of legal clarity.⁹² In Cameroon, when theft was made a capital offence if it was accompanied by certain aggravating circumstances, the courts tended to "ignore" such circumstances and to convict of simple theft.⁹³ Even in Tanzania there is evidence that the courts have interpreted the legislation in a strict and technical manner in order to avoid the imposition of minimum sentences.⁹⁴

The popularity of imprisonment both with governments and with the courts has undoubtedly led to enormous congestion within the prisons. The effect on crime rates is less easy to judge. If incapacitation is one of the aims of punishment, then it is of course true that a relatively large number of people are incapable of committing crimes because they are behind bars. However, severe sentences are usually justified in terms of general deterrence and here the evidence is scanty. Even where government figures exist, they may not be reliable, and even where they are reliable, they may not be broken down in the sort of ways that would make detailed analysis possible. Perhaps the most that one can say is that all commentators who have felt able to reach a conclusion on such evidence as there is have concluded that severe sentences have not led to a decline in crime rates.

Research in Zambia suggests that neither the 1969 imposition of a minimum 15-year sentence for aggravated robbery nor the 1974 introduction of a mandatory death sentence for the same offence had any deterrent effect.⁹⁵ After analysing figures for Nigeria, a distinguished writer and judge of the Supreme Court concludes that "there is no justification for the theory that an increase in the number of capital crimes or the harshness of the sentences result in reduction in crime of the offences so punished".⁹⁶ In Tanzania, where one of the justifications for minimum sentences for property offences was that the policy would enable the proper rehabilitation of offenders in prison, research at the time showed that "prisons remain primarily custodial and punitive institutions"⁹⁷ and that the policy had no apparent effect on the steadily upward trend in property crime.⁹⁸

⁹¹ Owoade (1989), *op. cit.*, 136. The penalties were drastically reduced in 1975.

⁹² Clement Ng'ong'ola, "Controlling theft in the public service: penal law and judicial responses in Malawi", [1988] *J.A.L.* 72, at 94.

⁹³ P. Bringer, "The abiding influence of English and French Criminal Law in one African country: some remarks regarding the machinery of criminal justice in Cameroon", [1981] *J.A.L.* 1, at 12. Bringer identifies a growing tendency for theft cases to be decided "customarily" by awards of compensation, none of the parties having an interest in involving the official courts.

⁹⁴ D. Williams, "The Minimum Sentences Act, 1972, of Tanzania", [1974] *J.A.L.* 79 at 86.

⁹⁵ K.T. Mwansa, "Aggravated robbery and the death penalty in Zambia: an examination of the 1974 Penal Code Amendment Act (No. 2)", (1984) 16 *Zambia Law Journal* 69. Of those sentenced to death in Zambia, only a small proportion have actually been executed. Many remain on "death row".

⁹⁶ A.G. Karibi-Whyte, *Criminal Policy: Traditional and Modern Trends*, Lagos, 1988, 111. To similar effect is Milner *op. cit.* (1972), 272ff. One writer concludes that while there is no evidence that the death penalty has a deterrent effect, there is evidence that it leads robbers to use greater brutality than they would otherwise have done. A.B. Dambazau, *Law and Criminality in Nigeria*, University Press, Ibadan, 1994, 141.

⁹⁷ Williams, *op. cit.*, 88.

⁹⁸ *Ibid.*, 80.

Again, in Botswana there is no evidence that the incidence of offences attracting minimum sentences (of which there are quite a few) has declined; rather, the opposite seems to be the case.⁹⁹

Finally the question arises whether the experience of imprisonment has a deterrent effect on the individual concerned, but it is a question that the paucity of information on reoffending rates makes it impossible to answer. Two general points, however, can be made. Firstly, little attempt is made to rehabilitate offenders in prison.¹⁰⁰ It is partly a matter of resources. Governments do not regard investing money in the prison system as a priority and would resist the idea of supporting training programmes for prisoners when the training needs of the population at large remained unmet.¹⁰¹ In addition, as we have seen above, governments (as well as those who run the prison system) see punishment as retributive. Criminals deserve to suffer. Secondly, physical conditions in African prisons are generally appalling. They are heavily congested, there is little attempt to separate different categories of prisoner and medical facilities are limited. While it is possible that the prison experience may deter some inmates from reoffending, those who survive long terms in such conditions (and many do not) are likely to emerge either brutalized or broken.¹⁰²

Other measures

Widespread recourse to imprisonment is a reflection of the failure of African governments to devise suitable community-based alternatives, as well as their failure to develop an indigenous policy for the treatment of offenders. It was noted above that probation services were established late in the colonial period, and it remains the case today that such services are limited to the larger towns. Even there, however, the courts rarely make probation orders and again the issue is partly a matter of resources and partly one of sentencing ideology. Probation and social services are insufficiently funded for much use to be made of probation orders.¹⁰³ Moreover, there is a feeling, shared by judges and the public alike, that a person placed on probation has been "let off". The use of community service orders for adults in lieu of a custodial sentence would be likely to encounter similar objections, though, interestingly, they have been recently introduced in Zimbabwe.¹⁰⁴

⁹⁹ D.D. Nsereko, "Crime prevention in Southern Africa: a legal perspective", (1999) 32(2) *Comparative and International Law Journal of Southern Africa* 247, at 257.

¹⁰⁰ This is the case, despite the fact that many Commonwealth African states are parties to the International Covenant on Civil and Political Rights which lays down the reformation and social rehabilitation of prisoners as an essential objective of imprisonment.

¹⁰¹ Even when a person does acquire skills in prison, the absence of an "after-care" service, the absence of any system to place discharged prisoners in employment and the absence of a parole system or similar scheme of supervised freedom mean that the prospects of social readjustment are poor.

¹⁰² For a horrifying picture of the state of prisons in Nigeria, see Civil Liberties Organisation, *Behind the Wall: A Report on Prison Conditions in Nigeria and the Nigerian Prison System*, Lagos, 1996. For Kenya, see Kenya Human Rights Commission, *op. cit.*

¹⁰³ In Zambia probation is restricted to juveniles, there is little contact between probationer and probation officer, and many probationers fail to complete their probation period. See generally, J. Hatchard, "Policy and perspectives on juvenile justice", in Osei-Hwedi and Muna Ndulo (eds.), *Youth and Development*, Lusaka, 1990. For a discussion of ways in which the probation system could be adapted to African conditions see Clifford, *op. cit.*, 198ff.

¹⁰⁴ An EU-funded pilot scheme was started in 1994. Community-based programmes are, of course, much less expensive than imprisonment. It has been estimated that the monthly cost of keeping an individual in prison in Zimbabwe in 1995 was US\$65, whereas the monthly cost of

Many commentators have urged African governments to incorporate traditional African sanctions and notions of justice in their systems of criminal justice.¹⁰⁵ Rather than being punished, offenders should, it is argued, be required to reach an accommodation with their victims and pay them compensation, thereby paving the way for their reintegration into society. Such measures, which might have particular relevance in the rural areas, have found no more favour with governments and courts today than they did during the colonial period.¹⁰⁶

CONCLUSIONS

Little is known about criminality in Africa and it is impossible to estimate the volume of criminality with any certainty. Even where the statistics for reported crime are reliable, the considerable amount of unreported crime taken together with the difficulties in drawing up an accurate census of population make it impossible to compute meaningful crime rates. However, the number of reported crimes, and in particular crimes against property, has increased substantially and fairly steadily in the years since independence¹⁰⁷ and there is a general perception, particularly in the urban areas, that crime rates are rising too.¹⁰⁸ Consequently, governments have been under pressure to take measures both to combat crime in general and to deal with specific forms of criminal conduct that have caused public concern (for example robbery, drug-trafficking or corruption). This article has provided a broad overview of the range of measures taken.

Political independence did not herald any change in penal policy. The substantive criminal law continues to be based on the common law, the values and assumptions underlying the penal system are British, and the machinery implementing those values is modelled on British patterns. No systematic review of penal policy has taken place and no attempt has been made to adapt the inherited norms, values and models to the local context. Authoritarian governments have adopted penal policies based on the principles of retribution and general deterrence and they have not hesitated to use the criminal law as an instrument of social change. The scope of the criminal law has been extended, special criminal courts or tribunals have been set up, and attacks on the right to a fair trial and on the presumption of innocence have been made. Most noteworthy, however, has been the widespread and increasing reliance on the use of severe penalties to combat crime. Examples are the extension of both capital and corporal punishment and the introduction of mandatory and minimum sentences. The prison continues to play a central role in African penal

community service per individual was US\$10–20. "Prisons in Africa", *West Africa*, 10–16 February, 1997, 220.

¹⁰⁵ For example, see H.P. Junod, "African penal conceptions and the emancipation of African states", *Geneve-Afrique*, 1962, 1, 156; G.H. Boehringer, "Aspects of penal policy in Africa, with special reference to Tanzania", [1971] *J.A.L.* 182; M.A. Owoade, "Legal aspects of compensation and restitution in the science of victimology in Nigeria", (1996) 21(1&2) *Indian Socio-Legal Journal* 7.

¹⁰⁶ It has already been mentioned that the Tanzanian Minimum Sentences legislation provided for compulsory compensation in the case of various property offences. This was, however, in addition to a sentence of imprisonment and (for a period) to mandatory corporal punishment. It was not an alternative, and, given that the offender would be in prison for several years, it is not clear how he would find the money to pay. See D. Williams, "Compensation for victims of crime in Tanzania", (1973) 44 *Revue Internationale de Droit Penal* 266.

¹⁰⁷ Thus in Zambia the crime rate rose, with some fluctuations, from 1,287 offences per 100,000 of population in 1964 to 2,168 in 1980. Hatchard and Ndulo, *op. cit.*, 75.

¹⁰⁸ Urban life is subject to a multiplicity of regulations and it is breaches of these that bring many people before the criminal courts.

systems. Governments have given little thought or support to non-custodial alternatives, nor have such alternatives, where they do exist, found much favour with the courts. Prison has become a convenient way of disposing indiscriminately with the variety of people who come before the courts (fine-defaulters, the mentally ill, those awaiting trial, juveniles, petty offenders as well as those convicted of serious offences). Conditions in prison range from the dismal to the appalling and imprisonment is clearly intended to serve a retributive rather than a rehabilitative purpose.

Governments have thus responded to public concern about rising crime levels by adopting a range of "tough" policies and, in particular, by introducing more severe penalties. They have not conducted research on the causes of crime (which might in turn lead to effective crime prevention programmes) or on the effects of their policies, nor have they invested resources in alternative strategies (whether the creation of a properly-resourced police force, rehabilitation programmes, or community-based sentences). While the adoption of these policies may have placated a public calling for action on crime, it is doubtful whether they have led to a decline in crime rates. Sanctions have little deterrent effect when the chances of detection are slim, and in many countries the police forces are inadequately trained and resourced, police corruption is common and police complicity with criminal gangs not unknown.¹⁰⁹ A more important point is that, where the State itself is "criminal", the "criminal"/"non-criminal" divide breaks down, the law loses authority and everything is permitted. Thus the successful use of force in coups and mutinies, the use of state violence against minorities or political opponents, the confiscation of property without compensation and the institutionalization of state corruption all tend to undermine the legitimacy of the state and the moral authority of the law.¹¹⁰ Such factors cause "crime".

The relationship between crime and economic development is complex and outside the scope of this article. One question relates to the extent to which poor economic and social conditions cause crime. It seems that any causal relationship remains elusive and that it would be an over-simplification to draw any direct connection between environment and behaviour.¹¹¹ Another question relates to the extent to which crime is an obstacle to economic development. Certainly the cost of crime is considerable, if impossible to evaluate with any accuracy. Budgets allocated to the criminal justice system are one obvious cost. Crime prevention measures taken by individuals and businesses are another cost, though a less quantifiable one. Some crimes (for example smuggling, tax fraud) directly harm the economy. As Clifford pointed out many years ago, governments must recognize that "the prevention of crime is not just an aside to general economic and social growth but a factor of efficiency in the total process".¹¹²

¹⁰⁹ See Dambazau, *op. cit.*, 150ff.

¹¹⁰ See R.E.S. Tanner, "Penal practices in Africa: Some restrictions on the possibility of reform", (1972) 10(3) *Journal of Modern African Studies* 447. For a vivid account of how a ruthless armed robber became something of a folk-hero in Nigeria for his challenge to the power of the state and its corrupt representatives, see O. Marenin, "The Anini saga: armed robbery and the reproduction of ideology in Nigeria", (1987) 25(2) *Journal of Modern African Studies* 259.

¹¹¹ Clifford, *op. cit.*, 210. One researcher who analysed data for 11 sub-Saharan African countries for the period 1961–1984 concluded that the impact of development on crime was positive only for minor property offences. Rates for homicide and major property offences had declined. J. Arthur, "Development and crime in Africa: a test of modernisation theory", (1991) 19 *Journal of Criminal Justice*, 499.

¹¹² *Ibid.*, 211.

However, the likelihood of African governments altering their policies on criminal justice in the near future is remote.

In addition to the problems posed by domestic crime levels, governments are likely to be increasingly confronted by the challenge of cross-border crime and the need for international co-operation in tackling it.¹¹³ So far most of the problems as well as most of the initiatives designed to address those problems have occurred in southern Africa.¹¹⁴ In the absence of extradition treaties, one mechanism is to give courts extra-territorial jurisdiction or to create offences with an extra-territorial element.¹¹⁵ It is difficult enough for the authorities to deal with gangs which steal cars or cattle and move them across borders, but dealing with the transfer of the proceeds of crime requires more sophisticated forms of transnational co-operation. Attempts to combat money-laundering were originally driven by a concern to stem the illicit traffic in drugs,¹¹⁶ but recently governments have come to accept that targetting the profits of crime may be a useful weapon in the fight against crime in general. However, given the relative ease with which money can be transferred across borders, the need for international co-operation is essential. After all, domestic forfeiture and confiscation regimes designed to combat corruption are undermined when it is easy to transfer assets abroad. However, although Nigeria is the only country (outside Southern Africa) to have introduced legislation on money-laundering, there is evidence that many other countries are concerned about the problem.¹¹⁷ It remains questionable, though, whether governments which have been neither imaginative nor particularly effective in tackling domestic crime are likely to rise to the challenge of sophisticated international crime.

¹¹³ One of the aims of the UN African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), established in 1989, was to promote international action against transnational organized and economic crime. See L.P. Shaidi, "The role of UNAFRI in the ninth UN Congress on the Prevention of Crime and the Treatment of Offenders: an Overview", [1995] *J.A.L.* 183. UNAFRI has now closed down.

¹¹⁴ See the discussion in Nsereko, *op. cit.* The 1996 SADC Protocol on Illicit Drug Trafficking is an important example of such co-operation.

¹¹⁵ For example, in an attempt to tackle gangs which steal property, particularly motor-vehicles, in South Africa and smuggle them into Botswana, Botswana created a new offence (Penal Code s. 320) of "being found in possession of property stolen or unlawfully obtained from outside Botswana".

¹¹⁶ The 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which the majority of Commonwealth African states are parties, required states to criminalize money-laundering of drugs proceeds. Nigeria complied. See n. 45 above.

¹¹⁷ An example is provided by the 1996 Southern and Eastern African Money Laundering Conference, attended by all the Commonwealth countries of the region. See [1997] *J.A.L.* 150 for a note on the conference.