

DISSERTATION

THE PLACE OF AFRICAN CUSTOMARY CRIMINAL LAW: THE NEED FOR REFORM

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF LLB
DEGREE OF THE UNIVERSITY OF NAIROBI

BY

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NAIROBI

JULY, 1982

ACKNOWLEDGEMENTS

I wish to extend my sincere thanks to MR. NDIRITU, my supervisor for his incisive and illuminating comments on this dissertation. I am also greatly indebted to him for patiently correcting the mistakes I made. However, responsibility both for the views expressed and for the errors of law or fact or judgement is entirely mine. I also wish to thank MRS. PAULINE MOSE for sacrificing her time and energy to type this dissertaion. I am even more grateful that she managed to reduce my illegible handwritting to this neat manuscript and finally, I am grateful to all those others who either directly or indirectly assisted me in writing this dissertation.

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JULY, 1982

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INTRODUCTION

In this dissertation, I intend to examine African Customary Law as the law evolved by the people in society and whose affairs it was intended to regulate as opposed to the English type of Criminal Law which was introduced into the African Society and which has now entrenched itself in form of the written law meant to apply to all people.

Criminal customary law has been faced out on the ground that it is repugnant to justice and morality or that it is inhuman. To whose justice and morality? I hope to answer that question by dealing basically with the conflict between the two systems of law that is, African Customary Criminal Law and the Written Criminal law. It is my contention that all laws reflect the economic, political, social and cultural development of a society and the well being of a people depends not only on the form of government they have, but also on the ordinary laws of the land. The African societies had rules to define the behaviour of individuals and mechanism to maintain social order. The latter varied greatly between constituted authority and various forms of self-help, with Religious and supernatural sanctions and processes of reconciliation playing their parts. Hence laws will have their merit in the society they evolved and whose people they are intended to govern and it is only the society concerned that can know what is good for itself and it has a right inalienable to do so and that it is only when one tries to determine the norms of a society from outside it that one can say that one thing or other is repugnant or inhuman but if people in that society bear respect to it and have accepted it as such, then no-one else has a right to contradict such a stand by being paternalistic and imposing his own idea of what is good or bad on these people. I will endeavour to show that this is what happened to African Customary Criminal Law which only qualifies for application if it does not contradict the written law which in essence is foreign law.

I hope to show that the apparent conflict between the two systems of law is due to the fact that the written law consists of English law that was formulated originally for the English society which is essentially the law of a welfare society.

This same law was imposed on the Kenya people who are predominantly a peasant and to some extent a pastoralistic society who had over the years developed a legal system and methods which suited their needs and aspirations and were to a large extent fair and democratic, though there were some aspects of it that could be condemned such as it was customary among the Kikuyu to burn the witches to death. This form of punishment was too harsh and cannot be upheld.

Finally, I will deal with the question should the Africans be content with the place of African customary criminal law today? It is my view that there is a serious need for reform of criminal law in Africa should be restored to the position it was before the advent of colonisation. This is due to the fact that English oriented criminal law has failed to preserve and conserve the people's culture, law and customs. Most Africans do not understand the course of modern criminal and civil procedure which has replaced the traditional court system. English criminal law has failed to consider African traditions and culture in treatment of offences so as to arrive at just trials as under African customary criminal law.

Most African societies have similar laws and customs but to avoid too much generalisation, I will deal more specifically with the Kenyan situation

CHAPTER I

HISTORICAL BACKGROUND

There is a truth that is detectable through out the history of man that every society has set rules and standards of behaviour to which every individual is expected to conform. It is also true that certain individuals fail to live upto the expected standards and hence there are ways of punishing such undesirables. This was true of the African societies before the advent of colonization.

Most Kenyan societies like other African societies viewed crime socially and a crime or a wrong was any act or omission having a detrimental effect on social relations. Thus Hartland has written of the African societies.

"The individual is but of the kin, if he is injured, it is the kin which is injured. If he be slain, it is the blood of the kin that has been shed and the kin is entitled to compensation or vengeance. If he commit a wrong, the whole kin is involve and every member is liable not as an individual but as part of the kin." ¹

In the African social setting therefore, a wrong done by an individual to another or to the tribe would result in kinship divisions and animosity hence it would not be wrong itself that would be looked at, but the social consequences of the wrong. Hence the degree of condemnation of wrongful acts or conduct constituting an offence is what determined a crime under customary law. This greatly differed from the views on crime in western jurisprudence and certain matters which were regarded as serious crime were treated merely as private wrongs under the customary law, calling for compensation, for example there would be payment of "blood money" for a murder committed and no additional punishment would be imposed. Offences calling for criminal action often related to breach of important taboos such as incest or dangerous witchcraft activities.

Under customary law therefore, wrongful behaviour was met with punishment but imprisonment was unheard of and instead, the African strongly believed in restitution of the wronged person for example for minor thefts among the Akamba of Kenya, the restitution of the stolen property and the payment of one bull could suffice, but habitual small thefts, the offender's house would be burnt down and he could be driven out of the community. However, for more serious crimes, the offender would be executed, Referring to the Kikuyu, Jomo Kenyatta wrote.

"All criminal cases were treated almost in the same way as civil cases. The chief aim in proceeding was to get compensation for individual or the group against whom the crime was committed. Since there was no system of imprisonment, the offenders were punished by being made to pay heavy fines to the Kiama and compensation to right the wrong done " 2

This system took into consideration the wronged person and sought to restore him back to the position he was before the wrong unlike the English penal sanction where a criminal is sent to jail leaving the wronged person without remedy. Kenyatta compared ostracism in the case of a habitual to prisons during the colonial times.

"The stigma attached to ostracism was far greater and very much worse than that attached to the European form of imprisonment. Many Gikuyu would prefer to go to jail rather than to be ostracised. The fear of this was one of the factors which prevented the people from committing crimes." 3

If a man became a habitual thief, he was seen as a danger to the public as a whole and punishment was being beaten to death or burnt in the same way as a witch or wizard in public.

However, the system of law in the African community was not to last. In the 19th century, European powers invaded Africa and wherever they settled, they wanted to lead the kind of life that their brothers back home led and this leads to my next topic of discussion.

IMPOSITION OF FOREIGN LAW

During the period of partition, British took over East Africa and immediately started on the "civilizing" Mission which in essence meant dropping the African customs and traditions which they viewed as being primitive and "barbarious" and replacing them with their own. As a prelude to understanding the criminal law we have today, I will examine the origin of the Kenya Penal Code.

The English penal code of 1860 was transplanted in India. This means that it was meant for England because they were mere actually the common laws of England. The colonial leaders tried to apply this Indian Penal Code which was now modified in East Africa. In 1927, there was a heated debate whether the Indian penal code was suitable for these territories. The colonial settlers argued that the suitable law was the English law. However, since it was little unfamiliar, the colonial office introduced a new code, the colonial office code in 1930 which is basically the code existing now.

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The 1930 penal code had a number of things borrowed for instance from Queensland's penal code and it had the effect of diminishing the application of customary law, but to justify it, the secretary of state, in explaining the reasons for the change in East Africa from the Indian code to the newly drafted mode stated that he was "advised that officers will find it easier to apply a code which employs the terms and principles with which they are familiar in England than one in which the terms and principles have been discarded for others of doubtful import." However, my own view is that the reason for the change was to aid in exploitation of the African resources which to be quite effective needed rules laid down to justify what may otherwise be unjust. Whatever the reasons were, this change was intended to give effect to the principles of English criminal law which in essence meant that now customary criminal law could not continue holding the position that it did formally. From this period on, customary law was seen as second rate law which only qualified for application if it was not repugnant to justice and morality. As a prelude to understanding the position of customary criminal law today. I will examine this aspect of repugnancy briefly.

REPUGNANCY CLAUSE

Customary criminal law was dealt the first blow by the orders in council of 1897. Article 20 of the East African order in council established the British type courts in Africa and the relevant provision was;-

"In all cases, civil and criminal to which natives are parties, every court.. shall be guided by native law and custom, as far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or ordinance or any regulation or rule made under any order in council or ordinance."

This view was again expressed in the judicature Act of 1967 which still provide for guidance of courts by customary law principles, but only in civil cases. S3(2) of the judicature Act reads:-

"The high court and all subordinate courts shall be guided by African customary law in civil cases so far as it is applicable and is not repugnant to justice and morality."

The above two provisions have generally been called the repugnancy clauses and this begs the question. Repugnant to whose justice and morality?

A custom develops from a long practice founded along jurisprudential and sociological trends of a people and influenced by the environmental aspects of a people. This was true of the custom in African societies which, though its sources could not be accurately traced was generally oral and traditional and

reflected the composite picture of local conditions and established economic order. It is not arguable that such customs were democratically accepted by the people. They could be said to embody those principles which have commended themselves to the National conscience as principles of justice and public utility.

Customary criminal law therefore the moral backing of the indigenous people to whom it was meant to apply and making its application subject to the repugnancy clause was wrong. It is therefore the Europeans who viewed customary law from the outside, basing it on their own views as to what is right and just that could find some aspects of it repugnant. However, as I have already indicated, the colonialist were mainly interested in exploitation of African resources and in this they were going to use the coercive arm of the law and one step was to declare all that contradicted English law repugnant regardless of the fact that the African regarded this law as the right law to govern them and this had always been administered without any coercion. English criminal law was therefore introduced to meet the requirement of a monopoly of force in society and one case that arose in the Gold coast in 1895 demonstrate this. Pursuant to well defined custom, the leaders of the Aulo tribe condemned and executed some criminals. By so doing, they acted as responsible agents of their society in ridding the society of intolerable criminal elements. The elders had acted reasonably and pursuant to the imperatives of their own society for law and order. They were tried for murder and hung by the neck.⁴

I submit that one cannot determine the values of society from outside it or at any rate, it is wrong to do so because one cannot know under what circumstances a certain law or custom developed one needs to be within a community to be able to appreciate its values. This was the view held in one Nigerian case:-

"It is the assent of the National community that gives a custom its validity it must be shown to be recognized by the community whose conduct it is supposed to regulate."⁵

In essence the judge was saying that if the whole community accepts any conduct, it is not open for any person to evaluate it any further basing it on a different criterion, Allot alos emphasises the importance of customary law saying that it expresses the characteristic ethos and ways of life of the people and reflects their own choice of a legal system.⁶

A further attempt at facing out customary criminal law can be seen in the Judicature Act S3(8), and the Kenya Constitution S 77(8) which provide as follows:-

"No person shall be convicted of any criminal offence unless that offence is defined and a penalty therefore presented in a written law".

Immediately, one notices that this has the effect of removing all criminal offences from the ambit of customary law since customary law offences are not written. In East Africa, it is expressly provided for that criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Law which indicates the draftman's unwillingness to codify those principles.

The Kenya Penal code has the provision.

"This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England and expressions used in it shall be presumed, so far as is consistent with their context, and except as may otherwise be provided, to be used with the meaning attaching to them in English Criminal Law and shall be construed in accordance therewith."

With all these statutory bars, one wonders how much of customary criminal law is left. It would appear that though it is provided that courts may be guided by customary law, they however are not bound by it and may therefore depart from it.

In this chapter, I tried to portray the African society as it was before the invasion by European powers. I tried to show how they imposed their law on the indigenous people and finally how they made customary criminal law applicable subject to the repugnancy clause while aiming at proper and maximum exploitation of African resources. In the next chapter, I will deal with specific examples of crime and punishment as viewed both by the African and European.

CHAPTER TWO

In this chapter, I will discuss specific examples of crime and punishment both in the African and European context with a view of showing that English law cannot and will never be the kind of law suited to Africans. Before I do this, I would like to briefly discuss a controversial subject relating to customary law.

DISTINCTION BETWEEN CIVIL AND CRIMINAL LAW

Most writers in African law have often asserted that there is no clear distinction between criminal and civil wrongs as concerned with English law. They hold this view with regard to offences like murder and theft which are criminal offences according to English law but which are treated by African societies as matters for private redress. This view may be true and can be explained out by the fact that the African was not concerned with distinctions but believed strongly in restitution of the wronged party as opposed to English penal sanction for criminal wrongs whereby the person who commits a crime would be imprisoned. Customary law would in this situation order compensation to be paid for the wrong done, which compensation would go to the wronged victim. One may argue that this still left the criminal at large but we must here note that compensation was mainly in terms of livestock which was highly valued and regarded as *rea possession*.

However, all offences in African communities are not held out to be civil wrongs. Among the Kamba of Kenya for example, when the "utui" elders felt that a crime was too serious to be atoned for by the fine of a bull or by driving the culprit out, they would refer the matter to the 'King'ole' which consisted of the mass of the male population of the group known as 'Mutui', the largest Kamba group that acknowledged a common institution.⁷ If such person was found guilty of the charge levelled against him, he would be hanged by the neck from a tree in a public place as a warning to potential wrongdoers. Similarly among the Bantu of North Kavirondo, whereas homicide and theft are normally redressible by compensation, incest and witchcraft are punishable as crimes.

The view therefore that all wrongs are civil wrongs under customary law is erroneous and I reiterate that those who hold such view are people viewing the African society from outside, those who do not understand the operation of customary law. They hold such view basing it on English evaluation of wrongs. Hone thus asserts that a wrong is an injury to society at large and the punishment of which at the same time proves to be deterrent to all other members of the state and a correction to the individual wrongdoer is what

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Europeans call crime. ⁸ It is the duty of the state to detect criminals, arrest them and then punish them. Even following this definition of what is a crime, it can be seen that the African views certain wrongs as crimes for example an offence like murder affects the society as a whole and if the decision is reached that the murderer should be hang, it is done in public as a warning to potential wrongdoers. It is therefore inaccurate to assert that "primitive law lays down rules for behaviour and it's penalties are directed ----- towards restoration of equilibrium. There is no distinction between criminal and civil wrongs as we understand it" ⁹ Even in this case, the writers description of such offences like murder, adultery and theft among Africans seems to suggest that they are nothing short of criminal wrongs.

Orde Browne also writing of the African society contended that "thus the law was civil rather than criminal, and all but the gravest and most unusual crimes were dealt with on a system which resembled arbitration rather than punishment, so long as the harm done as far as possible made good, society was not expected to take further action" ¹⁰ Again while this may be true of some African societies, it is not accurate for all because as we have already seen, in some communities, the wrongdoer would be ordered to pay compensation especially when one was not a habitual criminal but in other cases, one may be separated from community which may have some resemblance to the English penal sanction. I therefore maintain that it is wrong for anyone to try and evaluate customary law basing it on English criterion because the two societies are essentially different therefore what may appear a crime to one society may not appear the same to the other.

I will now proceed to show specific examples of how African concepts of jurisprudential values were ignored in favour of English type of law which lacked moral force. I want to explore the African view of specific offences, penal sanctions and other matters incidental thereto with the view of showing the position of customary law and how it has been watered down by foreign law.

MURDER IN AFRICAN COMMUNITIES

In africa, there was firm belief that a man could only kill another if he was under the manipulation of evil spirits. Killing the murderer would therefore not eradicate the crime since a murderer is only a tool acting for the manipulating force. Therefore instead of killing the murderer, compensation is sought from him and his clan to the clan of the murdered man. It was also believed that the spirits would want somebody killed if they were annoyed, a goat was therefore slaughtered to appease them. Hence for the African, the only way to prevent murder was by deterring the spirits through appeasing.

However, with the influence of foreign law, the African view to murder is changing and they no longer strongly believe that spirits direct human actions.

In Kenya, the traditional view of crime no longer stands. The penal code was introduced which defined murder as:

"any person who of malice aforethought causes the death of another by an unlawful act or omission"¹¹

The penalty for murder is a death sentence which is commonly called "legal death for causing illegal death". It is clear that the death sentence ¹² hinges on vengeance similar to that in the Hammurabi code i.e.

"If a man put out the eye of a free man, they shall put out his" ¹³

It will also be noted that most Hammurabi laws end with:

"He shall be put to death"¹⁴

The argument seems to be that one who deprives another of his life should not be let to enjoy his. This is mainly the logic behind the death sentence though there are other justifications like deterrence of potential murderers. However this raises the question can one who is already eliminated be deterred? Those who argue for the death sentence express the view that since one knows that the natural and probable consequences of his action is death, he must take the consequences. In any case a criminal deserves a serious punishment to equal the serious crime he has committed.

Since Kenya adapted foreign law, it accepted the death penalty and even retained it after independence for the offences of murder and treason and more recently robbery with violence was added to the list.¹⁵ Though this idea was imported from England, the English no longer uphold it. Thus H. L. A. Hart has written:

"The English people have probably more disturbed and more divided by the use of the death penalty for murder than any people who still retain it" ¹⁶

There have been attempts by certain associations to abolish the death penalty for example in 1948 and 1956, the house of Commons attempted a removal of the death sentence for murder. In 1956 they said:

"...This house believes that the death penalty for murder no longer accords with the needs of the true interest of a civilised society" ¹⁷

If this were to be used as a criterion, for "civilization", Kenya whose length of the offences to be met by death penalty is increasing rather than decreasing would be in the eyes of the English house of Commons a most primitive society. This raises the issue - should we in Kenya still retain

the death penalty even after independence? The English law before abolishing the death penalty for murder and retaining it for treason only used what Hart called a "clumsy device" of leaving the ultimate disposition of each case to the executive. Further, in England, the position now is that it does not follow automatically that one will hang if found guilty because the home Secretary has been entrusted with the royal prerogative of mercy and hence he exercises his discretion.

From the above discussion, it is clear both from the African and the English point of view that killing a murderer, that fact alone cannot protect society. The death penalty presupposes that the murder committed by the state is justified but I here contend that life is such a valuable possession to anybody that nobody, for whatever reason should be deprived of it and hence killing whether by the state or by an individual is wrong. Even if one argued that a murderer should pay for the crime he has committed, if such person is put to death instantly, he does not suffer as much as he would if he was sent to jail and suffered total segregation from Kith and Kin, sexual deprivation and hard labour. By ending one's life, one is not given time to repent for the crime he committed. Others may argue that by killing the culprit, the others who intend to do the same may be warned that the consequences are grave. In this case, we would be reacting the murderer as an instrument and sacrifice for society's welfare which is not right.

I am here of the opinion that the African way of punishment is most practical and respects and enhances life as an ultimate value. I therefore submit that death cannot be prevented by death for this would amount to the same thing and the death sentence is therefore not the correct assessment of the human nature but only serves to dehumanize our society.

PROVOCATION AND WITCHCRAFT

Provocation is defined in the penal code to mean and include:

"any wrongful act or insult of such a nature is to be likely when done to an ordinary person or in the presence of an ordinary person who is under his immediate care or to whom he stands in a parental filial or fraternal relation of master or servant to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged has committed upon the person by whom the act or insult is done or offered"¹⁸

This definition of provocation is such that it will not entail certain acts that are also sufficient to deprive one of reason. In the African community, a witch is a very feared entity in society. He represents the evil demons and is capable of destroying the physical wellbeing of a man and of endangering the spiritual integrity upon which the whole society is

based. He enstigmatises social disruption by bringing about suspicion among society members. A witch is therefore a real danger in a society that believes in his power. Provocation will not however avail a person who commits assault because he has been provoked by acts of witchcraft. Our present law is based on English law which does not take into account local condition. The draftsmen who were of European descent do not know of witchcraft in their own societies and they therefore dismissed witchcraft as an emanation of primitive society to be ignored by the "civilized and christian" world. It is therefore not surprising when one judge said:

"To the best of my recollection, there is no reported case in which fear of witchcraft itself with nothing such as fear of poison super added has been accepted as provocation" 19

What this learned judge failed to note was that witchcraft takes many forms and the incidences where poison is used are rare. In witchcraft, there is normally an unequivocal overt act which should be enough and not necessarily accompanied by material poison. Several acts of a witch will provoke an African. These include nightrunning in one's compound, burying of certain things on the ground which are believed to cause death. Among the Gusii of Kenya, these are commonly known as "emesira". Uttering certain words about somebody or even just looking at another person with "bad" eyes is enough to cause death and therefore quite provocative to the party concerned. Among the Gusii community, the witchcraft of looking at another with "bad" eyes, commonly known as "ebibiriria" is quite common. These are normally directed at healthy babies and will have the effect of death if not treated fast. One woman the writer interviewed explained that to avoid this kind of witchcraft, small babies and children must be dressed in red especially on market days. This she explained is that that kind of witchcraft cannot work if there is the red colour. She went on to explain that that kind of witchcraft can be passed on through shaking hands with the witch or by helping the witch to load or unload something on her head. With this kind of witchcraft, there is no overt act as such but the effect is serious enough to cause death. Such a person therefore deserved to die. Among the Africans therefore, assaulty witch is good self defence or may be as a result of provocation while the English will dismiss it as mere fooling and whoever believes in it is simple minded and "naive". Hence one judge commented in one case:

"His bearing and conversation and general demeanour in court make it obvious that he is a simple minded, primitive peasant of a type not intellectually likely to reject the traditional existence and the

witchdoctors craft"²⁰

As if rejecting or accepting witchcraft was anything to do with intellectual capacity of the believer in it. It rather involves cultural conscience of a people.

Under English law the the act must be done in the "heat of passion" for the defence of provocation to avail in which case the factor of provocation must be of a sudden nature. This creates a problem because witchcraft can hardly be sudden except in a few cases and the reaction of the one attacked is not one of anger but fear.

In one case R. V. Fabiano Kinene Mukye the deceased died from shock resulting from forceable insertion of unripe banana into his back through the anus immediately after they had found him crawling naked in their compound. The appellants genuinely believed that he was the witch responsible for the death of one of their relations and that they had caught him in the act of trying to bewitch them. They honestly believed that their lives were in imminent danger and that if they did not kill the wizard , they would die. They therefore felt that they were acting in self defence. Could these people be availed of the defence of provocation? Following English argument, this could be termed as a deliberate action since the killers did not act in the "heat of passion", they first got hold of the witch and then one of them went to the shamba to collect bananas within which time their passion should have cooled.

I submit that witchcraft is so seriously taken among the Africans that it is not right to use the English view as the yardstick for the African conduct. A leading authority defines witchcraft as:

"... an imaginary offence because it is impossible a witch cannot do what he is supposed to do and in fact has no real existence".

Under customary law witchcraft was and indeed still is real offence. The act of witchcraft may be a psychric act because the witch may utter no spell or possess no medicine therefore the law need not require of necessity that there be a physical manifestation of witchcraft before it can be recognised as a crime or as a defence. In fact, in many traditional legal systems, the killing of a witch if caught red handed was often permitted and brought no legal sanction.

BIGAMY

The treatment of offences affecting family rights or relationships are treated differently in customary law.

The African society was essentially polgamous. If a man married a woman and later found her to be barren, the most natural thing was to get

himself another wife to give him children. Further, if a man was not satisfied with one wife, he was free to marry as many as he wanted so long as he could afford. Perhaps this may be explained out by the fact that a large family was associated with wealth. All the women married to one man respected each other and were respected by other members in society as the man's wives. They all cooked for and looked after the man and there was harmony.

However, with the advent of colonialism, polygamy was seen as primitive and instead, monogamy emphasised making bigamy which was socially accepted a crime. Dr. Mushanga Munene Tibamanya has stated.

"The christian teaching of monogamy has in general resulted in matrimonial chaos ... the doctrine of monogamy has turned some members of our society into hypocrites".²²

Introduction of bigamy was in total disregard of the African views on marriage. Little wonder that a learned judge decided that the word "marriage" is a misnomer for the African marriage. Since the African feels that he has a right to marry as many wives as he can and he finds that the law puts a bar, he resorts to hiding the identity of his first wife after he married a second one. The other woman is thus ignored and she suffers together with her children while in the African society she would be looked after. The report of the Commission on the law of marriage and divorce stated that:

"Traditionally, all the tribes of Kenya are polygamous without limit on the number of wives a man can have other than what he could afford".²³

It was further stated that:

"we are satisfied that there is a considerable body of opinion in favour of retaining polygamy"²⁴

The traditional view on marriage has thus been eroded away and the written law has taken root and the position at present in Kenya is that bigamy is a crime. One wonders if this does not contravene the provision in the constitution which provides freedom for every individual to choose whichever family laws he wants to govern him.²⁵

INCEST AND OTHER SEXUAL OFFENCES

Under African customary law, it was forbidden and in fact an abominable thing to have sexual relations with any close relative and breaches of this law were unknown. If a case occurred, both the culprits were killed or sold after investigation.

The penal code which contains the current criminal law does not accommodate adequately the African concept of these crimes. The penal code, following

modern English law punishes incest but defines the relationships which are relevant in terms of the English society, paying no heed to the differing notions held in Africa.

The range of relationships in the penal code relevant to the law of incest is limited to immediate relatives, grandparents, parents, children, sisters and brothers. This is very narrow if put in the African context. This may be explained out by the fact that the African notion of a family is much wider due to the extended family. They were particularly strict when it came to who was to marry who. There are certain clans which could not intermarry even if no relation could be traced. This is not the case in English from where we derive our criminal law. One then wonders why we in Kenya should retain a law that does not even adequately accommodate our crimes.

Conclusively, I submit that the African concept of crime is gradually being faced out. Instead we have the English notions of crime in form of the written law which itself was drafted by people who had no respect for customary law either because they did not know it or because they thought it primitive. I therefore submit that there is a strong case for reform of our customary law and this leads to my next topic of discussion.

CHAPTER THREETHE NEED FOR REFORM

In the first two chapters, I have attempted to show the effect of the application of foreign law on Kenyan communities and Africans generally. It resulted in customary criminal law, which was before the colonial era the governing law, being faced out on grounds of repugnancy. This was largely due to the arrogant attitude by the judiciary towards the social customs of the Africans. English law was seen as the better law to apply to all and though this was characterised with oppression, racial discrimination, political as well as cultural alienation, it is still retained in Kenya in the form of the written law. This is most lamentable since the colonialists designed these laws to aid their exploitation of African resources.

The East African countries, in an attempt to get round the problem of customary offences have tried to have them written and certain which presupposes that these countries have decided that the existing penal codes are satisfactory and should remain the basis of general criminal law. Indeed no East African country has so far opted for the wholesale reform of it's criminal laws in order to produce not merely a law incorporating into the existing general law certain customary offences but also a criminal law incorporating indigenous African ideas of crime, punishment and criminal responsibility. I submit that time has come for complete reform of our present laws, to remove the foreign elements that do not apply to our society. Cotran shares this view by saying:

"If the criminal law is to be a reflection of the social, economic and moral ideas, principles and feelings of the community, is not such wholesale reform necessary?" 26

Kenya still retains the legal system inherited from the colonial regime at independence and these are very complex in nature. While it may be understandable that Kenya accepted the laws as they were in order not to delay independence, one cannot understand why this situation is allowed to remain after 19 years of independence. One would have expected that S3 of the Kenya Constitution which is a repealing section would be put into full use by the government to bring about clear cut reforms in order to restore justice that was diminished during the colonial era. However, this has not been the case, the Kenya judiciary still comprises largely of white judges who, despite their long experience in administering justice are quite ignorant as to the inner workings of customary law and are not in a position to understand the significance of certain customs to the indigenous African. What Kenya needs

is a complete reorganisation and Africanisation of the judiciary with the hope that judges of African origin will display the right attitude towards customary law/that held by one Nigerian judge, Udo Udoma C.J. when he /like expressed disgust with the English view that parties to some marriages can be considered legally mamed for some purposes and unmarried for other purposes. He found this not only unusual to law but both extra ordinary and dangerous having regard to the social structure and situation of Uganda and the different and complex forms of marriage recognised by the law of Uganda²⁷.

We need the kind of judges who will apply the law with regard to the prevailing social factors and to the satisfaction of the societies's needs. The aim of the court should be to support the existing social values and institutions of the people and not to substitute them with ones, the judge feels would be appropriate. I here submit that no white judge will strip himself of cultural prejudices and serve the society, basing his decisions on African values. All the white judges will do is base their decisions on English jurisprudence resulting in decisions like R. V. Amukeyo²⁸ which express the view that some marriages are more equal than others which view has no place in custoary law.

What one would logically expect after 19 years of independence is law drawn to suit local conditions, with simpler language containing explanatory examples and simplifying to a large extent the complicated definition of certain offences and probably making adultery a criminal offence as it is recognised under customary law. So far, of the East African countries, only Ugandan penal code makes adultery a crime.

In view of the rapid social, political and economic developments taking place, the Kenyan government should use legal change as an instrument to bring customary law to it's original position by removing the vestiges of colonial domination which are evident in our present penal code. Terms such as "felony" and "misdemeanor" are still retained in our penal code. Not only do these terms have no real meaning in our society but they have also ceased to have any significance where they originated. They only serve to confuse the ordinary man who has no idea as to the inner working of the law and who would be much better placed if the penal code were in a language he could understand. It is to be observed in our courts that in most cases, the people being tried do not understand what is going on due to the technicality of the law. Little wonder that many people go to jail because of their ignorance of the inner working of the English oriented and imposed legal court system. Court proceedings are still carried out in English even after great emphasis has been made on our national language being Kiswahili. It is true that every court has an interpreter and indeed the constitution provides that each person gets an interpreter of his own choice²⁹ but in practice, the basics do not get to the accused persons

simply because certain provisions cannot be interpreted into one's language so the interpreter ends up repeating the same words the magistrate or judge uses.

Observed closely, one would get the view that western concepts of criminal law have been so thoroughly accepted that little scope is left for "Africanisation" of the law. Our penal codes still have certain provisions on actual crimes, defences and punishment which make few concessions to their African context. It is difficult to find any provision which can be considered to have resulted from a response to the E. African environment of the needs of the people of the area or their traditions. It is therefore not surprising to find provisions such as:

"any person who is found ---- having his face masked or blackened or being otherwise disguised with intent to commit a felony ---- is guilty of a felony" 30

Africa is predominantly black. One then wonders if we have any need for such a provision which seems to suggest that any black person is to be treated with suspicion as he is likely to commit a crime. This is one of the provisions that seems to maintain that black symbolises evil and I submit that it has no relevance to African societies and should therefore be done away with from our penal code. It is English based and serves no useful purpose but merely goes along way to discredit the Africans and display racial attitude.

Another provision which displays our dependence on English law is the interpretation section which reads:

"This code shall be interpreted in accordance with the principles of legal interpretation obtaining in English and expressions used in it shall be presumed so far as is consistent with their context and except as may be otherwise expressly provided to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith" 31

S2 of the civil procedure code repeats the above view and provides for interpretation following rules obtaining in England.. These provisions indicate that we still lean quite heavily on English type of law. It should be taken into account that the local conditions obtaining in England are not the same as those obtaining in Kenya so to follow their rules of interpretation is a blind move. Snell G.S. has correctly stated that:

"what might be regarded as a crime under English law might not be regarded as a crime under customary law" 32

S 17 further provides that :

"criminal responsibility for the use of force in defence of person or property shall be determined according to principles of English common law" 33

Finally S 40 applies the archaic English law of treason to Kenya. Clearly, the above sections do not support African jurisprudence and so should have no place in our law. Independent Kenya no longer needs provisions displaying racial arrogance or those which seem to suggest that the African is inferior and incapable of doing without guidance from English.

Reforms should be brought about to take into account of traditional African jurisprudence and apply in particular the principle of compensation or reparation instead of western notions of punishment as Dr. H.P. Junod has stated:

"we insist that Banut Africa does not need to copy the western world in it's failures. Restitution is an African living concept which can be used to spectacular effect if it is made the centre of the penal and penitentiary policy" ³⁵

Our penal code takes no account of African ideas of crime and morality. This is particularly relevant in those crimes relating to morals like adultery which is regarded as criminal by most customary laws in East Africa but not in English law. On the other hand, there are offences defined in the penal code which are regarded as criminal such as abduction but which is under customary law, part and parcel with the law relating to marriage. Also the offence of incest is defined as defined in the penal code as very narrow and only extends to immediate members of the family. In African customary law, the offence of incest may be committed with a very distant relative and in some cases with any member from the same clan.

SUGGESTED REFORMS

1. There should be recording or restatement of customary law. This would go along way into bringing about legal security and assuring a measure of primacy to the customary law enabling it to withstand outside influences and making the substance of the law available to the general public.
2. There should be a review of the existing penal registration with a view to repealing those sections that have no relevance to our criminal law.
3. The courts should take into account the fact that changes in customary law should stem from the people themselves and therefore act as a device for bringing the principles of the law to conform to the changing social conditions. An attempt should be made to incorporate in our written laws, the traditional customary laws of different communities. In this respect we may note that there was a restatement of customary criminal law when completed, it was proposed that customary offences capable of being defined should be incorporated within the penal code. This recommendation should be effected.

4. An attempt should be made at unification of the law. This should not pose a problem as Cotran's report on customary laws reveals that African communities have largely similar customary laws. The law should be made to apply uniformly to Kenyans regardless of their race. Unification could go along way to eliminate diversity between individual rules of different systems of customary law. Hutson explains that:

"diversity of rules makes the administration of the law difficult, confuses the lawyers and members of non-traditional courts and prevents successful application of customary law in urban areas"³⁶

we may here note that there has been no attempt at unification of civil law.

5. A commission should be appointed to look into the whole criminal laws of other African countries critically and see how the existing criminal law can be changed - probably, the existing law reform committee should be made use of in this respect.

It is my submission that if the Kenya government attempts reform following the above suggestions and any others that it may deem fit our customary criminal laws will once again enjoy the prestige that it did before the colonial era and it would probably go along way in proving wrong the contention that:

"certainly the texts indicate that criminal law in the future will be largely of a western type and in East Africa based very closely upon the common law of England"³⁷

CONCLUSION

We have seen from the preceding discussion that Kenyan communities, before the advent of colonialism, had traditional customary laws and customs which they considered the supreme laws of the land. There was no need for these laws to be written anywhere, they were well known to the people in the society they were involved and every person knew that failure to observe these laws would lead to punishment. Those who broke the law were given material sanction and penalties depending on the degree of the wrong doing of the culprit. These laws were enforced by elders who feared nobody. The people knew of the law like the view of nature and they abided by it. Customary criminal law developed within the peoples cultural, political, economic and social traditions. It is therefore ridiculous that anyone should find this law repugnant. I submit that no foreigner had any right to judge customary criminal law basing it on his own societies values because the two are essentially different

and hence developed in different circumstances. The African has a right, inherent in him to exercise his freedom in abiding with the law he is conversant with.

English oriented criminal law that was imposed on Africans has therefore failed to preserve and conserve the people's culture, law and customs. Most people do not understand the cause of modern criminal and civil procedure which has replaced their traditional court system. English criminal law has failed to consider African traditions and culture in the treatment of offences. The African governments should therefore aim at getting rid of foreign law and upraising customary law to its original position.

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