



ZIMBABWE · LAW · REVIEW

Volume 4

1986

EDITORIAL BOARD

Professor R.H.F. Austin, BA, LLB (Cape Town) LLM (London), Legal Practitioner.
A.K. Armstrong, AB (Brown) JD (Boston).
M. Cooney, BCL, (NUI), LLM (Harvard).
G. Feltoe, BA (Rhodes), LLB (London), M.Phil. (Kent), Legal Practitioner.
D.P. Galen, BA (Mich), JD (Yale), Supreme Court (USA).
S.B.O. Gutto, LLB (Nairobi), MALD (Tufts) Dip. Int & Comp Law of Human Rights
(Strasbourg).
B. Hlatshwayo, BL (UZ), LLM (Harvard).
P. Lewin, BA (Rhodes), LLB (Cape Town), Legal Practitioner.
M. Maboreke, BL, M.Phil (UZ).
El Magade, BL, LLB, M.Phil (UZ).
K. Makamure, LLB, LLM (London).
P.R. Naidoo, BA, LawCert (Natal).
W. Ncube, BL, M.Phil (UZ).
T.J. Nyapadi, SRN, BL (South Bank), LLM (London).
P. Nherere, BL (UZ), LLM (Cambridge), BCL (Oxford).
S. Nzombe, BL (UZ), LLM (London).
D.A.B. Robinson, BA (Cape Town), MA (Oxford) Legal Practitioner.
F.G. Smith, BL, LLB (Rhodesia), Dip AIA Eng, Legal Practitioner.
J.E. Stewart, LLB (London).

Issue Editors

A.K. ARMSTRONG, E. MAGADE AND S. NZOMBE

*Faculty of Law
University of Zimbabwe
P.O. Box MP 167
Harare
Zimbabwe*

Focus on Criminal Law in Southern Africa

UNIVERSITY OF ZIMBABWE
LAW LIBRARY
PERIODICALS

Articles

page

Shaidi, L. P., Explaining Crime: A Marxist Perspective.....1

Mwansa, K. T., The Status of African Customary Criminal Law and
Justice under the Received English Criminal Law in Zambia:
A Case for the Integration of the Two Systems.....23

Mabiriizi, D., Reflections on the Socio-Economic Content of
Medicine Murder in Lesotho.....43

Feltoe, G., Extenuating Circumstances: A Life and Death Issue.....60

Maboreke, M. Violence against Wives: A Crime sui generis.....88

Armstrong, A., Consent in Rape Cases in Swaziland:
A Woman's Right to Decide.....112

Gutto, S., The Law and Mass Rape during Armed Social Conflicts:
Lessons from the 1982 Coup Attempt in Kenya.....125

Frimpong, K., Some Observations on Botswana's Prison System.....136

Case Notes and Comment

Feltoe, G., Killing in Defence of Person.....149

Armstrong, A., Sentencing for Infanticide in Zimbabwe.....159

Stewart, J., The Legal Age of Majority Act Strikes Again.....168

Nherere, P., By Situs Alone.....173

Nzombe, S., Toss of the Coin: Urban Councils Act or Labour
Relations Act.....183

Tshuma, L. Charged with and Convicted of Indecent Assault
but Sentenced for Rape.....185

Book Reviews

Stewart, J., On Christie, Business Law in Zimbabwe, Mac Coll,
First Year Business Law for Zimbabwean Students, and Bampton
& Drury, Introduction to Zimbabwean Business Law.....188

THIS ITEM IS NOT AVAILABLE
FOR LOAN AND MAY NOT BE
REMOVED FROM THE
LAW LIBRARY

**THE STATUS OF AFRICAN CUSTOMARY CRIMINAL LAW AND JUSTICE UNDER
THE RECEIVED ENGLISH CRIMINAL LAW IN ZAMBIA:
A CASE FOR THE INTEGRATION OF THE TWO SYSTEMS**

KALOMBO T. MWANSA*

1. INTRODUCTION

The coming of the British administration to Zambia towards the beginning of the 19th Century brought with it not only a different system of maintaining social order, but an entirely new criminal justice system. This article attempts to examine African criminal law and justice which prevailed at the time the Europeans came, the introduced and current English system and the European reaction to the former. It then assesses the impact English ideals of criminal justice had on the indigenous African concepts and practices and throws light on the continuities of certain themes introduced during the Colonial rule into the post-independence Zambia. The article ends with a call for the integration of certain traditional practices into the modern criminal justice, without sacrificing the basic aspects of justice. This approach would enhance the acceptability of criminal justice which at the moment could be regarded as rather too divorced from people's expectations and sense of justice especially if viewed in the eyes of traditional practices.

2. HISTORICAL BACKGROUND

Northern Rhodesia, as Zambia was known before independence in 1964, was opened to the outside world as a result of trips which were undertaken by Dr. David Livingstone between 1849 and 1873. He travelled across the country from Barotseland (Western Province) to Victoria Falls and from Lake Mweru to Lake Bangweulu in Luapula Province and finally to Chitambo in Central Province where he died in 1873.

Dr. Livingstone's death inspired other explorers, missionaries and merchants largely to fulfill his wish to open up this part of the world to Christianity and commerce, what he termed the "two pioneers of commerce and civilisation".¹ It was not therefore surprising that by 1886, missionaries had already firmly established themselves in the country, thus by and large giving encouragement to those whose intentions were eventually to settle and colonise this country.

* LLB (Zambia), LLM (Harvard), M.Phil (Cambridge), Lecturer in Law and Criminology, University of Zambia.

1. Davidson J.W. (1948) The Northern Rhodesia Legislative Council, London, Faber and Faber, p. 14.

Between 1869 and 1870, diamond deposits were discovered at Kimberly in South Africa which rapidly grew into a major diamond centre. This development necessitated the growth of trade with territories in the North. Traders and financiers started venturing in the northern territories with grand schemes of eventual settlement. The man credited with this scheme was Cecil Rhodes. His efforts in uniting various factions into a single force were rewarded by the issue in October 1889 of the Letters patent, granting a Royal Charter² of Incorporation of the British South Africa Company (B.S.A. Co.) formed by him.

The Charter gave the B.S.A. Co. the legal power to obtain territories from the local chiefs by signing treaties with them. According to the Charter the B.S.A. Company's area of operation embraced all Southern Africa north of Bechuanaland (now Botswana) and the Transvaal and west of the Portuguese possessions in East Africa.³ A rather surprising aspect of the Charter was that it did not specify the northern limits of the territories. This gave Rhodes an excuse and opportunity to expand north as far as he was able.

In 1890 Rhodes sent F.E. Loncher to Barotseland to negotiate and sign a treaty with Paramount Chief Lewanika which was achieved on 27th June of the same year. By the terms of Treaty, Lewanika accepted British protection and surrendered in exchange mining and commercial rights to the BSA Co. During the same year A. Sharpe and J. Thompson were on a similar mission and concluded similar treaties with Chiefs in North Eastern part of Zambia.

In 1899 and 1900 the BSA Co. established administrative centres in Barotseland and North Eastern Rhodesia respectively.⁴ Barotseland came under the Crown through the High Commissioner for South Africa while the North Eastern part came under the direct control of the BSA Co. subject to the supervision of the Commissioner for Nyasaland. After 11 to 12 years this arrangement proved expensive for the BSA Co. Further, a rail network was opened from Bulawayo through Livingstone to the Copperbelt Province of Zambia which greatly improved communication between the North-Eastern part and Barotseland. In 1911, therefore the Crown agreed to the merger of the two territories which assumed the name of Northern Rhodesia. During its reign in Northern Rhodesia, the B.S.A. Co. introduced the common law system.⁵ However, the B.S.A. Co. did not have enough time to

2. See the B.S.A. Co. Orders-in-Council, bound in the Special Collection of the University of Zambia Library.

3. Section 3 of the Charter.

4. By the terms of the Barotseland - North Western Rhodesia Order-in-Council 1899 and the North-Eastern Rhodesia Order-in-Council, 1900.

5. By section 8 of the Barotseland North Western Rhodesia Order-in-Council 1899 the High Commissioner was empowered to issue Proclamations for the administration of justice, raising of revenue etc. Similarly by section 17 of the North Eastern Rhodesia Order-in-Council 1900, the Commissioner was equally empowered to issue Regulations for the administration of justice, raising of revenue etc. But the North Rhodesia Order-in-Council of 1911, provided for the adoption of common law and all English Statutes enacted before the commencement of this Order, i.e. 17th August, 1911.

fully entrench the common law system because its mandate over the territory expired in 1924 and the British Government took over the administration of the territory on a protectorate basis until 1964 when Zambia became an independent country. The British administration developed and entrenched the system of common law thus ushering in a new era of criminal justice which was radically different from that of the indigenous people.

It is now proposed to examine some aspects of African Criminal law and criminal justice as it existed prior to the advent of the European system of criminal justice.

3. SOME ASPECTS OF AFRICAN CRIMINAL LAW AND JUSTICE

African criminal law categorised severe crimes in the following manner:

- (a) wrongs against the person;
- (b) wrongs against property;
- (c) wrongs against tribal authority;
- (d) witchcraft.

(a) Wrongs against the person included the offences of defamation, assault, homicide, infanticide and adultery. False allegation for instance that a person was witch was defamation as long as the allegation was not true. This offence was usually punished by a fine chicken or a goat according to the gravity of the allegation and the extent of damage to the reputation of the victim. Compensation was regarded as a means of repairing the damage. Assault in an African sense meant causing actual bodily harm, resulting into a wound and flow of blood. Technical assault by causing a reasonable apprehension of fear in the victim or simple bruises were not regarded as assault. In very olden days punishment took the form of retaliation⁶ whereby the victim was allowed to avenge himself by inflicting a wound with a similar weapon upon the same part of the body of the assailant as he had himself been wounded. Punishment for this offence later became payment of two goats or two chickens.

Homicide was regarded as a very serious offence and was usually tried by the chief himself, whereas other offences could be heard by elders and headman. The seriousness which was associated with this offence emanated from the way society perceived an individual. Every member of the community had value, he at least contributed to the well being of his community, however minimal that contribution was. Intentional killing or murder was usually punishable by death, usually in the manner in which the victim was killed. If the deceased was axed to death, the assailant was killed by that method⁷. Any other killing of unintentional nature was punishable by compensation.⁸ Purely accidental killing for instance that resulting from

6. Schapera I, (1938) A Handbook of Tswana Law and Custom, London, Oxford University Press, p. 259.

7. Ibid, p. 261.

8. Milner A, (1969) The Zambia Penal System, in African Penal Systems, Milner A, (ed.) London, Routledge & Kegan Paul, pp. 241-242.

self-defence was not punished. In other societies, even intentional killing was punishable by compensation because it was considered "ridiculous to kill a person because he has killed another, why make a bigger hole in the community, let him pay compensation and be allowed to live."⁹ Infanticide involved the killing of children who were born with their feet out first, with a tooth already out, or those who cut their first tooth on the upper jaw. Such children were regarded as evil omen who would bring misfortune to the community and were promptly put to death usually by throwing them in rivers on the premise that it was better to destroy that child rather than let the whole community or family suffer.¹⁰ So if a parent or grand parent or any other person killed such a child he was not punished.

(b) In the case of wrongs against property the underlying principle was restitution in case of damage to property or compensation where restitution was not possible. There was no offence where damage to property was done accidentally. If someone set fire to another's house, he was expected to put a new roof on it and this was the case whether he was negligent or not. It appeared that someone's state of mind was relevant when it came to very serious offences like arson because anybody could plead accident. In case of animals destroying someone's else crops or other property, the owner of the animals had to make good that loss.¹¹

(c) Offences against tribal authority involved disobedience to the chief or his headman. The chief and his subchiefs had a general right to allegiance and total obedience. They were entitled to free labour in their own gardens from their subjects. Refusal to supply labour was viewed as a serious offence as it amounted to disloyalty. That offence was usually punished by confiscation of the accused's property. A chief and his subordinate chiefs were similarly entitled to a basket full of every produce from each subject and a skin of every leopard or horn or tasks of every elephant killed by his subject. Failure to provide them was punished by confiscation of the item in question followed by banishment from the village.

Revolting against the chief was probably regarded as the most serious of all the offences under this category for it was viewed as challenge to authority. Culprits were promptly put to death usually secretly, and without an open trial. But before executing a culprit, all his property would be confiscated and his house set on fire.¹² Just before the arrival of Europeans this form of punishment was replaced by one of banishment from the village.

(d) Witchcraft which was the use of poison or magic to cast spells or to inflict harm upon people or property was too a very serious offence. If a man became ill and the person who bewitched him was

9. Smith E. and Dale (1920) The Ila Speaking People of Northern Rhodesia London, MacMillan, (Vol. 1), p. 414.

10. Ibid p. 421.

11. Smith and Dale ibid., reported a case in the Ila country where a man claimed two cows and an ox because another's dog had spoiled a skin belonging to him, p. 395.

12. Schapera op. cit. p. 274.

identified he was first asked to cure him. If the patient recovered the witch would be set free, but if he died he would be killed. In most societies a witch was so feared and dreaded that when convicted he was promptly put to death. ¹³

Given the foregoing aspect of African Criminal law and justice, it is worthwhile now to examine briefly the European reaction to this system.

4. THE EUROPEAN REACTION TO AFRICAN CRIMINAL LAW

Throughout the colonial administration, but especially at its inception, missionaries and anthropologists exerted tremendous influence on the colonial officials in formulating certain policies. Missionaries regarded African law and customs as mere aspects of paganism which had to be wiped out in order to pave the way for Christianity and 'Civilisation'. To the anthropologists, African law was primitive and inhuman and it had to be abolished because "it was futile to seek reason in tribal justice as it was not rational". ¹⁴

But the guiding principle on how English settlers had to react to law of strange territories abroad was stated as early as 1694 by Holt C.J. in Blackard v Galdy ¹⁵ when he stated:

"1st in case of an uninhabited country newly found out by English subjects all laws in force in England are to be in force."

2nd that it was impossible the laws of this nation by mere conquest without more should take place in conquered country in the case of an infidel country, their laws by conquest do not entirely cease but only such as are against the law of God and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity."

In 1722, this principle was amplified in the Anonymous ¹⁶ case which was decided by the Privy Council in the following terms:

"Any uninhabited country newly found out and inhabited by the English to be governed by the law of England. A conquered country to be governed by such laws as the conqueror impose, but until the conqueror gives them newly laws, they are to be governed by their own laws, unless where those laws are contrary to the laws of God or totally silent."

13. Doke, C.M. (1931) The Lambas of Northern Rhodesia, London Harrap, p. 307.

14. Ellias, Olawale T, (1956) The Nature of African Customary Law, Manchester, Manchester University Press, p .28.

15. (1694) 2 Salk 411.

16. (1722) 2P WMS 75.

It is however, the case of Campbell v Hall ¹⁷ which is regarded as the immediate basis of what later came to be known as repugnancy doctrine. In that case the court inter-alia held.

"Where English men have found a colony in an uninhabited or savage country, they carry with them English Law so far as it is possible there."

The settlers in general recognised the existence of African law but reacted to it by subjecting it to the "repugnancy" test or making it take a second place to English law. Thus section 14 of the B.S.A. Co. Charter, 1889 stated that "in the administration of justice to the people in the territory, careful regard shall always be had to the customs and laws of the class or tribe or nations to which they belong ... but subject to any British laws which may be in force in any of the territories ...". Similarly in 1911, when the North Eastern and North Western Rhodesia were merged to form Northern Rhodesia, the Ordinance carried substantially the same provision ¹⁸ but specifically spelt that "native" law shall be followed where parties are "natives" as long as it is not repugnant to natural justice or morality or to any Order made by His Majesty in Council or to any Proclamation made under this Order". It is within this perspective that the impact of English law on African criminal justice ought to be viewed.

5. THE IMPACT OF ENGLISH LAW ON THE INDIGENOUS CRIMINAL LAW AND JUSTICE: THE REPUGNANCY DOCTRINE IN PRACTICE

Probably the greatest impact of colonial administration's reaction to customary criminal law and its subjection to the 'repugnancy' test was on the chiefs, the custodians of customary law. Their powers were severely eroded and in the eyes of their subjects, they become mere symbols of custom without real power. In certain cases their authority was openly defied. A case which occurred in the Northern Province of Zambia clearly illustrates this point. In R v Mubanga and Sakeni ¹⁹ the facts were as follows:

"The accused were African men living in senior chief Mwamba's area who was a junior chief to Paramount chief Chitimukulu of the Bemba. The Bemba customary law required all subjects to contribute millet towards the ceremony of the country. The accused refused to contribute (and persuaded others not to) on the ground that they were Christians. They appeared before Chief Mwamba's Court who found them guilty and fined Mubanga £2/10 while Sakeni was fined £1/10. They appealed against both conviction and sentence to the Native Appeal Court, the Ituna Native Court presided over by Ituna Native Court presided over by

17. (1744) Loft 655.1 Cowp, 204 quoted by Elias, T, (1962) The British Colonial Law, A Comparative Study of the Interaction Between English and Local Laws in British Dependences, London, Stevens, pp. 50 - 51.

18. The 1911 Order-in-Council, ss. 18, 22 and 35.

19. 1959 (2) R & N 169.

Paramount Chief Chitimukulu. Their appeals were dismissed and their fines increased to £5 and £3 respectively. They then appealed to the District Commissioner's Court (a colonial court)."

The District Commissioner called assessors who testified that in the olden days refusal to make such contributions was a very serious offence and resulted in having the subject's hand mutilated. At the time this case occurred (1958) it was no longer an offence for any Bemba subject to refuse to contribute, even though tradition bound them to do so. The District Commissioner therefore acquitted them since it was no longer an offence under customary law and custom to refuse to contribute.

Probably the most significant aspect of this case is the court's observation that "even if it was an offence under customary law the accused would have had no case to answer because the existence of such an offence is not only unknown to the Penal Code of this Territory, but it is also inconsistent with the Common Law and repugnant to justice". 20

The attempt to weaken the Chief's authority was rather inconsistent with the idea of Indirect Rule which recognised tribal authority and tried to strengthen it as a medium of governing. In fact the traditional dues to which chiefs were entitled whose contribution was held to be 'repugnant' was a form of 'tax' which in times of need ensured that certain indigent families or those who could not fend for themselves due to one reason or another, were properly catered for.

Another significant impact of English law on African law was with regard to witchcraft practice and beliefs. At the height of the settler rule the BSA Co. administration passed the Witchcraft Suppression Proclamation No.5 of 1914. Section 5 of the Proclamation stated:

"S.5 Whoever

- (1) by his statement or action presents himself to be a witch doctor or witch finder or be exercising the power of witchcraft; or
- (2) professing a knowledge of witchcraft or of any non-natural process of any kind advises or undertakes to advise any person how to bewitch or injure any other person or any property; or
- (3) supplies any person with the pretended means of witchcraft shall be liable upon conviction to a fine of one hundred pounds or to imprisonment with or without hard labour for any term not exceeding seven years or to corporal punishment not exceeding twenty-four lashes or to any two of such punishment. 21

20. Ibid, pp. 179.

21. Punishment was provided for in s. 4 of the Proclamation.

22. By section 7, punishment for this offence was the same as provided in s. 4.

This proclamation also prohibited any person from naming or indicating any person as being a wizard or a witch.²² All chiefs and headmen were prohibited from promoting or encouraging or facilitating the commission of any act prohibited by the Act. Chiefs and headmen were expected to report anybody contravening the Proclamation to the Magistrate or to the Native Commissioner. Failure to report was an offence, punishable by a fine not exceeding Fifty Pounds or to imprisonment with or without hard labour for any term not exceeding three years.

At the time when this Proclamation was enacted belief in witchcraft was more prevalent than it is today.²³ At this time witches were so dreaded and feared that those who were accused of practising witchcraft were tried by Chiefs and if found guilty were promptly put to death.²⁴ In fact witchcraft was one of the very few offences for which a death sentence was passed. This Proclamation therefore had a profound effect on both the Chiefs and ordinary people. Chiefs were found in an unenviable position where either they failed to perform their duty as African rulers with a sacred obligation to protect their subjects from the dreaded witches or they risked prosecution for abetting or encouraging the practice of witchcraft for the said proclamation even prohibited recognition of its existence. In their quest to enforce the law chiefs became unpopular. On the other hand, for Europeans to expect Chiefs to administer this law, who themselves might have been witchdoctors, was rather absurd and could only breed deceit and hypocrisy.

From the point of view of the ordinary people, the law clearly perverted justice. As they could no longer be protected by their traditional rulers they often resorted to 'private' means especially that the law seemed to protect witches. Many suspected witches were secretly put to death without any traditional trial as was the case before this law was enacted and when the Colonial Officials turned up in villages to collect personal levy (tax) they were told that so and so died of pneumonia, was killed by a lion and so on.²⁵ Another aspect of this law which infuriated Africans was that the witchdoctor was criminalized, thus mischarging one who in their eyes was the person working with chiefs to suppress witchcraft.²⁶

Some interesting cases need mention here. The Zambia Daily Mail of 3rd December 1986 carried out a report about three men who had been picked up by Police in the North Western Province of Zambia. They

23. See for instance Evans-Pritchard E.E. (1937) Witchcraft, Oracles and Magic Among the Azande, London, Oxford Press quoted by Fields, Karen E., (1982) Political Contingencies of Witchcraft in Colonial Central Africa: Culture and the State in Marxist Theory, in Canadian Journal of African Studies, vol. 16 No.3 p. 578.

24. Doke C.M. (1939) op. cit., p. 307.

25. Melland F. (1935) "Ethical and Political Aspects of Witchcraft" Africa Vol. 8, No. 1, p. 498.

26. Melland F. and Young C. (1937) African Dilemma. London, The United Society for Christian Literature, p. 127.

were alleged to have beaten a suspected witch to death after the local medicine man (witchdoctor) had named the man as the one responsible for the death of their relative. According to the local Police chief such acts were prevalent in the area. At the time of writing the men had not yet appeared in court. A similar case occurred in Ghana. In the case of Konkomba,²⁷ the accused's first brother died. He thereupon consulted a "juju" man (medicine man) who pointed out the deceased as the responsible man. The accused's second brother became ill and the deceased was again named as the responsible man. The accused then killed the deceased. He was charged with murder and convicted.

It is useful to compare the above two cases with that celebrated English case R v Bourne.²⁸ In that case a fifteen year old girl had become pregnant as a result of a brutal rape. A psychiatrist of eminent standing recommended abortion in order to save the life of the young girl who was unable to psychologically and physically cope with the pregnancy. The accused then proceeded to perform abortion. To a charge of committing an abortion, he pleaded necessity, basing it on the professional advice of the psychiatrist. He was acquitted.

It is difficult to distinguish this case from the other two. In all the three cases, the accused honestly believed what they did was necessary to save life of another or to prevent future loss of life. Each of the accused relied upon the advice of an expert in their relevant fields and yet Konkomba was convicted whilst Bourne was acquitted. The only explanation of the of the difference in the two cases is that the court in Bourne believed in psychiatry and did not believe in witchcraft in Konkomba.²⁹ It is small wonder that Melland in 1936 observed:

"I honestly believe that today our attitude as regards the law is a stumbling block in our effective rule in Africa, as a source of discontent and irritation, a handicap to the acceptance of our bonafides in other directions that it seems in native eyes the lie to our protestations about preserving the best of their customs and helping them develop their own lives. It is a sore in the body-politic and there is no worse sore than a constant feeling of labouring under injustice."³⁰

In many other cases strict adherence to English principles produced injustices to the point of absurdity. The courts' reasoning in reaching a decision in Attorney-General for Nyasaland v Jackson³¹ is the case in point. In that case the accused had been away from his village for two years. He came back when he heard of his brother's death in inexplicable circumstances. He also discovered that his

27. [1952] 14 WACA (Ghana) 236.

28. [1939] KB 678

29. Seidman, Robert B. "Witchcraft and Mens rea: A Problem of Society under Radical Social Change", in Chambliss W. (ed) Crime and Legal Process, New York, McGraw-Hill, pp. 348-349.

30. Melland F. and Young C. (1937) op. cit. p. 124.

31. (1957) R & N 443.

eldest relative, the deceased had not brewed the traditional beer as required by custom following death. The deceased was rude to the accused and she threatened that he (the accused) would not see the sun that day. That threat made the accused brood for some hours and he later reached the conclusion that, it was a case of witchcraft. He then decided that before the sun set he should kill the deceased or he would die as a result of her threat which he honestly believed to be witchcraft. He therefore took a bow and arrow and shot her in the stomach and then struck her four blows on the head with a hoe. She died as a result of the injuries she sustained. In dismissing self defence, the court said:

"..... to justify a killing in self defence the belief in the reality of the danger must not only be genuine, it must be reasonable. The test of reasonableness in itself implies an objective test. In considering whether a man's belief is genuine, the belief must obviously be examined subjectively. But to answer the question whether or not a belief is reasonable, the test must equally obviously be an external standard. The test of reasonableness is one that is constantly being invoked in English law. In applying it, the standard is what would appear reasonable to an ordinary man in the street in England." 32

Since an English man did not believe in witchcraft, a belief he held unreasonable the defence failed.

An ordinary man really should mean an ordinary person of the community to which the accused belongs, in this case, the accused's village in Nyasaland. Marshall's observation cannot be more apt when he says:

"..... there is more positive, more afoot in many courts of the Commonwealth to decline to be bound by the decisions of the Judicial Committee and by other English precedents and also to apply local rather than English standards to the interpretation of the law, so that the man on the Clapham omnibus has to give way to the man in the bush or on the sheep farm or in the oriental bazaar." 33

6. CRIMINAL LAW AND PENAL SYSTEM IN ZAMBIA TODAY

The settlement of this territory by the British brought profound changes especially in the area of punishment and these changes remain largely the basis of penal policy in Zambia today. The bulk of law on crime is embodied in the Penal Code, Cap 146 of the Laws of Zambia, which traces its origin from English law. This code was largely the work of Sir Samuel Griffith whose Queensland Code provided a model for new Penal Codes in the colonies. 34

32. P. 448.

33. Marshall H.H. (1982) "The Future of "received" English Law in the Countries of the Commonwealth", The Comparative and International Law Journal of Southern Africa, p. 89.

34. Hatcher J., Readings on Criminal Law and Penology (mimeo) p. 2.

The Queensland Code which was first introduced in Northern Nigeria in 1904 was finally adopted in Northern Rhodesia in 1931 on 1st November, thereby replacing the English common law which had been in force until then. This Code is still the basis of criminal law in Zambia today.

This Code has to a great degree remained intact with only very few amendments. The first amendment took place in 1936 which shifted the burden of proof in murder from the accused on to the prosecution. The earlier position was that the accused in murder was presumed to have willfully killed and the burden of proof of justification or extenuation was upon the accused.³⁵ The case of Woolmington v DPP³⁶ prompted the amendment as it decided that as a general rule the burden of proof in criminal cases rested with the prosecution.

There have since been other amendments. The notable ones being those of 1952 and 1974. The 1952 amendment related to the incorporation of the "reasonable relationship" rule in provocation cases. This rule is today found in S.205(2) of the Penal Code which states that "provocation shall not be applicable unless the act which causes death bears a reasonable relationship to provocation". The 1974 amendment introduced the mandatory death penalty for aggravated robbery involving the use of a fire arm.³⁷ During the same year sentencing provisions were amended regarding stock theft and theft of motor vehicle.³⁸

The advent of independence was also accompanied by the creation of new offences which reflected the birth of the new and sovereign nation. Some of these were insulting the flag³⁹ and defamation of the President.⁴⁰

Even though the Penal Code is the prime source of criminal law, there are several other individual statutes creating criminal

35. S. 181 of the Penal Code (Act no. 42 of 1930) read as follows: "Any person who is shown to have caused the death of another is presumed to have unlawfully murdered him unless the circumstances are such as to raise a contrary presumption. The burden of proving circumstances of excuse justification or extenuation is upon who is shown to have caused the death of another."

36. [1935] All ER 1.

37. For a more detailed discussion of this amendment see Mwansa K.T., "Aggravated Robbery and the Death Penalty in Zambia: An Examination of the 1974 Penal Code Amendment Act No. 2" in Zambia Law Journal Vol. 15.

38. The 1974 Amendment imposed a minimum sentence of seven years imprisonment upon second or subsequent offence and a maximum of 15 years imprisonment with regard to stock theft. Similarly punishment for theft of motor vehicle is up to three times the period of imprisonment for general theft, by the 1974 Amendment.

39. S. 68 of the Penal Code.

40. S. 69 of the Penal Code.

offences. Notable among these are the Road Traffic Act, (Cap.776 dealing with traffic offences, Fire Arms Act Cap 111 dealing with offences relating to possession and use of firearms, Dangerous Drugs Act Cap 549 dealing with possession and use of drugs and many others.

The other significant aspect of Zambia criminal law is with regard to the interpretation of the Penal Code. The Code has to be interpreted in accordance with the principles of legal interpretation obtaining in England and expressions used are to have the meaning assigned to them in English criminal law.⁴¹ It appears that notwithstanding this provision, with regard to substantive law, Zambian courts are not bound by English decisions. Those decisions are only persuasive in nature.

Zambia's penal system allows a sentencer a considerable amount of latitude in as far as choice of sentence is concerned. Upon conviction, a judge or magistrate can impose any of the following sentences: death,⁴² imprisonment, corporal punishment, fine, payment of compensation, finding security to keep the peace and be of good behaviour or to come up for judgement, forfeiture, deportation and any other punishment provided by the Penal Code or any other law.⁴³ Included in the last means of sentencing are the suspended sentence and probation orders⁴⁴ and sentences provided by individual statutes such as the Road Traffic Act. The table below shows sentences passed on persons convicted of offences under the Penal Code:

Sentence	1968	1969	1971	1973	1974	1975	1976
1. Death	1	19	8	8	27	12	20
2. Imprisonment	12549	13531	13519	14969	15484	15115	14549
3. Caning	1375	1532	1924	1996	1853	1974	1914
4. Fine	20195	22235	24440	26005	35956	30241	28346
5. Other *	934	877	1134	1118	1205	942	1205
TOTAL	35064	38194	41025	44096	545225	48284	46014

*warned, bound over or discharged

Source: Zambia Police Annual Reports (reproduced from Hatchard, J. Readings on Criminal Law and Penology, (mimeo) p. 73.

As can be deduced from the above table, imprisonment is a very popular form of punishment, second only to fines. In 1968 for instance, 12,549 out of the total of 35,064 people convicted of various offences, were sentenced to prison terms, imprisonment representing roughly 40% of all the sentences.

-
41. S. 3 of the Penal Code.
 42. Death penalty is mandatory for murder, treason and aggravated robbery where a firearm is used.
 43. S. 24 of the Penal Code.
 44. Probation is provided for by the Probation of Offenders Act, Cap. 147 of the Laws of Zambia.

7. THE STATUS OF AFRICAN CRIMINAL LAW TODAY

The legal status of African customary criminal law in the post-independence era is found in Article 20(8) of the Constitution. It states as follows:

"No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law:

Provided that nothing in this clause shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not a written law and the penalty therefore is not so prescribed."

The effect of this Article is that African customary criminal law is not part of our criminal law unless it has been reduced to writing or incorporated in the Penal Code or in any other legislation. It is common knowledge that African customary law is unwritten and that being the case it is clearly outside the statutory criminal of Zambia and it cannot even be pleaded as a basis for a defence.⁴⁵

In the following pages we attempt to speculate about some factors which influenced the Government to outlaw African customary law of crime. It seems that it was centralism and the nature of African customary law itself which weighed heavily in favour of this development.

One of the first things the colonial administration did upon setting foot on the Zambian soil was to introduce Indirect Rule by which it recognised the chiefs and asserted their rights to adopt themselves to the functions of the new government.⁴⁶

Chiefs became the instruments through which that administration ruled as they were allowed both administrative and judicial powers through Native Authorities. In some cases the chiefs could have been seen as collaborators in foreign domination and could have made themselves unpopular especially in the eyes of nationalists fighting for independence. It was therefore not surprising that at independence some African countries viewed the powers of chiefs with some concern. Although at the national level the new President took precedence above everyone else, he took a second place within the traditional occasions.⁴⁷

Given this situation, the new nationalist Government took remedial steps. In 1972, Zambia enacted the Chiefs Act. Among its chief features was the provision that:

45. See the case of R v Ndhlovu, 5 NRLR 298 where the court rejected a defence based on African Customary law.

46. Melland F., and Young C. (1937). op. cit., p. 111.

47. The Independence Constitution of Uganda entrenched this in its 1962 Constitution, s. 123 - this was probably one source of conflict which later surfaced between the Kabaka a [continued]

"The chief shall hold office by virtue of recognition by the Government and the President shall reserve the right to withdraw that recognition at any time if he deems it necessary in the interest of peace, order and good Government."

Other aspects of the Act abolished the Native Authorities.⁴⁸ Further the traditional functions of a chief and prestige under customary law which were preserved by the abolished Native Authorities were too restricted by a provision enabling the President to strip him of his functions and transfer them to a deputy appointment by the President.⁴⁹ Within their areas chiefs were expected to preserve public peace and to take reasonable measures to quell riots and affrays.⁵⁰

These functions are to be discharged only to the extent that such discharged is not contrary to the constitution or any written law and is not repugnant to natural justice or morality.⁵¹

There is undoubtedly a recognition of the place of chiefs in traditional life of the Zambia people and the Government has decided to preserve this institution.⁵² But at the same time the Government has asserted its supremacy over chiefs so as to not allow them to become mini-states within a state, as they might easily be if their ascent to the throne and powers were to continue to be governed and exercised by customary law with the government having no say at all in these affairs.⁵³ The point being made here is that to the extent that the chiefs were the custodians and sometimes the givers of customary law, this post-independence development has had a crippling effect not only on the growth and status but also on the need to preserve customary law.

Another explanation for the neglect of customary law, closely related to the above is that the existence of strong chiefdoms with their divergent customary laws (Zambia is said to have 73 different tribes with their own customary laws though they all retain many

47. (continued) traditional ruler and the new President of Uganda, Dr. Obote. In Zambia, the Times of Zambia of 27th August, 1969 reported that President Kaunda placed himself second to the Litunga a traditional ruler of Western Province of Zambia see Nwabueze, B.O. (1974) Presidentialism in Commonwealth Africa. London, C. Hurst & Co., p. 162.

48. Ss. 3, 4, 8, of the Chiefs Act.

49. S. 6 of the Chiefs Act.

50. S. 11(1) of the Chiefs Act.

51. S. 10(1) of the Chiefs Act.

52. The Government has established the House of Chiefs which is a Constitutional creation, through which chiefs participate in the affairs of the country.

53. Nwabueze, B.O. (1974) op. cit., p. 163.

striking similarities) would tend to reinforce tribalism and sectionalism, the arch enemies of national unity and integration. The need for national unity, as a pre-condition to peace and therefore development cannot be ever emphasized especially in a new nation just emerging from colonial rule. Allegiance to the nation should inevitably take precedence to that of a tribe. Indeed tribal loyalty at the expense of national allegiance can only lead to disintegration of a nation.

8. A CASE FOR THE INTEGRATION OF THE TWO SYSTEMS

In many countries, notably those in Western Europe criminal codes are to a great extent consistent with customs and morality of the people to whom they apply, even though there may be certain aspects of their criminal laws which are not in consonance with the times, such as laws against duelling and blasphemy.⁵⁴ The point, however, is that with regard to the bulk of criminal law there exists a substantial agreement between the law and people's popular sense of justice largely because such law has not been imposed on the people at least in recent past.

This harmonious relationship between law and custom, taken for granted in other parts of the world has been lacking in many former colonies. It is probably because of this reason that in 1981, the United Nations General Assembly resolved that member states should take into account the political, economic, social and cultural circumstances and traditions of their countries in formulating criminal justice policies.⁵⁵ It is with this resolution in mind and other factors discussed elsewhere in this paper, that we now examine the basis of the adoption of certain aspects of African criminal justice and incorporating them in the current criminal law which is patterned on the English model. In this connection, it is proposed to centre this discussion on provocation and African beliefs, compensation and imprisonment.

A. PROVOCATION AND AFRICAN BELIEFS

Under the Zambian Penal Code, provocation reduces murder to manslaughter in certain specified circumstances. Provocation is defined as an act or insult which is offered to an ordinary member of the community or in his presence to the person within specified degree of relationship. The provocative act must deprive the accused of the power of self control and induce him to assault the person by whom the act or insult is done or offered. There are other conditions which should be fulfilled for a successful plea of provocation. These are that the killing should be done in the heat of passion, that provocation must be sudden, that there should be no time for the passion to cool and that the act which causes death must bear a reasonable relationship to the provocation.⁵⁶

The issue here is to what extent the Penal Code takes into

54. Mittlebeeler, Emmet, V. (1976) African Customary Law and Western Law - The Development of the Rhodesian Criminal Law for Africans, New York, African Publishing House, pp. 1-2.

55. United Nations General Assembly Resolution 36/21 of 9th November 1981.

56. S. 205 of the Penal Code Cap. 146 of the Laws of Zambia.

account African beliefs especially with regard to witchcraft. In East Africa, the Court's position has been authoritatively stated in the case of Galikuwa v R.⁵⁷. According to this case all the ingredients of provocation stated above⁵⁸ apply to witchcraft as provocation.

However, there has been an extension of the law in this regard in order to accommodate the special nature of witchcraft. First, a belief in witchcraft per se does not constitute a circumstance of excuse of mitigation for killing a person believed to be a witch when there is no immediate provocation. Second, the act causing death must be shown to be done in the heat of passion (in anger or fear). Third, if the facts establish that the deceased was performing some act in the presence of the accused which he believed and an ordinary member of his community would genuinely believe was an act of witchcraft against him and the accused was so angered as to be deprived of his self control, the defence of grave and sudden provocation is open to the accused. Fourth, the provocative act must amount to an offence under the criminal law. It seems that at least in East Africa there has been some recognition that a belief in witchcraft by Africans may not always be unreasonable. Thus in R v Fabiano Kinene S/O Mukye⁵⁹, where the appellants believing that a witchdoctor had caused the death of a number of relatives by witchcraft set upon and killed him, provocation was available to them. They had found him crawling naked in the compound in the middle of the night.

Another case worth mentioning is a Zambian one which does not involve provocation but raises the question of belief in witchcraft and supernatural powers. In R v Matengula and Others⁶⁰ the accused were pallbearers for the coffin of Chichibanda. According to one Lamba⁶¹ custom the dead can "point out" the one responsible for their death. In this case an old woman Mayaya Lusika was "pointed out" by the coffin, ramming her on the chest three or four times. The blows were quite hard and caused her injuries from which she later died. The accused contended that they felt as if they were under supernatural forces and could not control their actions. This meant that they had no malice-aforesought (guilty mind) necessary for a conviction for murder. They also pleaded automatism under section 10 of the Penal Code.

Evidence was adduced which proved the existence of this belief and witnesses testified that the coffin caused the death of the deceased and that the accused were but helpless marionettes, strings being pulled by some supernatural power emanating from the dead man, Chichibanda. The court found this custom repugnant to natural justice and convicted the accused of manslaughter. The judge stated that:

"I do not think that these four stupid men had any knowledge

57. 18 EACA 175.

58. Most Penal Codes in East and Central Africa carry substantially the same provisions, see Coolingwood J.J. (1967) Criminal Law in East and Central Africa. London, Sweet and Maxwell.

59. EACA 96.

60. 5 NRLR 148.

61. Lamba tribe is found on the Copperbelt Province of Zambia.

that the bumps of the coffin, severe as they were, would probably have caused the death of Lusika."

It is a well known principle of criminal law that if a person has knowledge that the act or omission causing death will probably cause death or grievous harm to some person is guilty of murder.⁶² In this case the accused were engaged in acts which could cause death or at least, grievous harm. Further the intention of the men was clearly to cause death so as to avenge the death of Chichibanda. The court should have found them guilty of murder. The manslaughter verdict probably illustrates the recognition of African beliefs and patterns of behaviour. This trend is welcome since Africa is still largely customary bound. What is probably required is an express policy statement on which a legitimate provision could follow. This could take a form of an amendment by way of an insertion of a section in the Penal Code to state that where self defence, provocation or any similar defence is raised African beliefs and patterns of behaviour should be taken into account.

B. COMPENSATION

African concern for justice as indicated above was based on maintaining the equilibrium, the quid pro quo. In the eyes of the African there is no justice where the equivalent of loss is never obtained. Where a person has been found guilty of murder or manslaughter, for instance, and he is executed or thrown in jail without at the same time being made to pay the 'blood-money' to his victim's surviving relations as required by customary law, infuriates both the deprived relatives and the general public.⁶³ Jeremy Bentham perceived compensation as an object of public good and the security of all. He put in the following words:

"If a person set fire to his neighbour's house it would be juster and simpler to fine the offender a certain sum which should then be made over to his victim so as to achieve the additional aim of compensation to the wronged ... the best fund hence satisfaction can be drawn is the property of the delinquent, since it then performs with superior convenience the functions both of satisfying and of punishment. But if the offender is without property ought the injured party to remain without satisfaction? No, for satisfaction is almost as necessary as punishment. It ought to be furnished out of the public good and the necessity of all interested in it."⁶⁴

African countries have at various fora debated this problem and in 1983, it was agreed that courts should be encouraged to make an increased use of compensation orders and suggested that the finance for this would come from national funds, fines or the earnings of the offenders.⁶⁵

62. S. 207(b) of the Penal Code.

63. Elias (1956) op. cit., p. 286.

64. Bentham, Theory of Legislation (ed) Ogden, Chapter 18 entitled Principles of the Penal Code, p. 317, quoted by Elias (1962) op. cit., p. 286.

65. See the Report of the African Regional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Addis Ababa 21st December, 1983.

Compensation which was widely used in traditional African society was discontinued by colonial administration largely on the ground that crime was an act against the state requiring monetary or other penalties to be paid in the form of a fine or imprisonment. ⁶⁶ Satisfaction of the personal grief suffered by the victim or surviving relatives was achieved allegedly by the peace provided by the government which all law and non-law abiding citizens enjoyed. This legacy unfortunately lingers on today. The Penal Code ⁶⁷ provides for compensation as one of the punishments a court is free to order, but it has largely been under utilised. The law imposes a maximum of K50 in compensation for all cases, a figure which has remained static since 1931 when the Penal Code was enacted. Clearly wide use of compensation will be a step forward in the indigenization of penal policy in Zambia. The first step is for the policy makers to realise that punishment of the offenders and a corresponding satisfaction of the offended are two distinct interests which have to be met if real justice has to be achieved.

C. IMPRISONMENT

In Zambia it seems that an impression has been created by sentencers that imprisonment is the standard punishment and other penalties are exceptional. At the time of increasing crime rate it is not surprising that this trend has ensued because non-custodial measures may be considered too lenient in a society where the public has been led into believing that only imprisonment is capable of both punishing the criminal and protecting the public.

In a recent study John Hatchard has demonstrated statistically the increase in crime rate in Zambia. From 1964 to 1969 the rate for all offences per 100,000 of population climbed for 1,287 to 2,131. The rate of burglary rose by 47% from 1982 to 1984 representing a rise from 194 to 409 per 100,000 of the population. ⁶⁸ As a response to this phenomenal rise in crime, courts have increasingly imposed deterrent and long prison sentences. Just before independence over 70% of all male adult offenders for instance, sent to prison were sentenced to a term of six months or less. This trend has been changed to the extent that by 1980, this figure was 30%. But those offenders serving 18 months and over rose from 6.8% in 1965 to 25% of the sentences imposed in 1980. ⁶⁹

Another unfortunate development has been the increase in the number of first offenders being sentenced to prison terms. In 1964 the figure was 4,500 or 41% of all convicts, that figure has risen to 7,780 in 1980 or 63% of all convicted prisoners. ⁷⁰ It is interesting to note however, that in spite of this trend towards more use of imprisonment the vast majority of Zambians to not believe that

66. Hatchard J (1985), "Crime and Penal Policy in Zambia", The Journal of Modern African Studies, 23, 3 p. 504.

67. S. 24 of the Penal Code.

68. Hatchard, op. cit., p. 496.

69. Hatchard, ibid., p. 496.

70. See Zambia Prisons Annual Reports, 1964-1980.

imprisonment is the best way to control crime. In a survey carried out in 1985 on property crime in Zambia 40% of the respondents viewed an increase in employment opportunities was the best method and only 10% believed that imprisonment was the best method of controlling that crime. 71

It must be noted that imprisonment is a colonial legacy which has not only survived independence but has also been increasingly resorted to since independence. In certain instances imprisonment does not in Africa carry the same social stigma as it usually does elsewhere. According to Elias, some people have gone out of their way deliberately to commit offences with sole purpose of going to prison because that institution seems to have superior amenities, and the easier opportunities it offers to inmates to learn a trade that is not available to their own homes. 72

Steps must be taken towards reform of penal policy. It would be useful to pass legislation which should as far as possible prohibit sending first offenders to prison. Such legislation exists in other countries. 73 There is need also for policy changes aimed at introducing other non-custodial penalties to supplement fines, suspended sentence and probation orders. It should be worthwhile for instance to try community service orders on experimental basis. This sentence where it has been tried elsewhere involves a commitment by the offender to do unpaid work in his community. In England it is functioning successfully as it does not disrupt family, other affectional ties or normal work of the prisoner, but involves loss of leisure time which is spent on work. 74

9. CONCLUSION

The blanket rejection of African customary criminal law cannot be justified especially now that there is a wealth of material on what customary law is. 75 The British administration thought that to

71. Mwansa K.T., (1985) "A Survey of Property Crime in Zambia", in Hwedie and Ndulo Issues in Zambian Development, Boston, Omenema Press.

72. Elias (1956) op. cit., p. 287.

73. In England by virtue of s. 20 of the Powers of Criminal Court Act, 1973, no court can pass a sentence of imprisonment on a first offender of or over twenty-one years unless the court is of the opinion that no other method of dealing with him is appropriate.

74. Report to the Secretary General of the United Nations by the Criminal Justice and Crime Prevention Branch, Vienna, pp.21-30 March 1984, item 5 p. 12.

75. See for instance: Schapera I, A Handbook on Tswana Law and Custom, Allot, Essays on African Law, Cunnison I, A Note on the Lunda Concept of Custom; Elias, I, The Nature of African Customary Law, Doke, C.M. The Lambas of Northern Rhodesia, Gluckman, Custom and Conflict in Africa, Burton, The Lundas of Kazembe.

"civilise" and to maintain peace and good order British concepts of wrongdoing and punishment were suitable for colonies. But such policies receive little support among people who also feel that they know what is best for themselves based on their own culture and experience. This was one of the errors made by colonialism because instead of making the law fit the people it tried to make the people fit the law.

What is needed is a serious and indepth study of African criminal law and justice, and see where it can be retained or adapted without prejudice to basic justice. The starting point is probably the restoration of some of the lost powers of chiefs, so that within the introduced decentralization ⁷⁶, they can be authorised to hear at least less serious African customary criminal cases and administer customary punishment. Eventually full integration will be realised which will go a long way in making our criminal justice not only more broadly based but also more acceptable to the vast majority of the Zambian people.

76. By the Decentralization Act, 1980, local authorities at the District level have been given powers to run and organise their own affairs subject to minimal control of the Central Government. This Act could be amended so as to give the suggested powers to chiefs.



This work is licensed under a
Creative Commons
Attribution – NonCommercial - NoDerivs 3.0 License.

To view a copy of the license please see:
<http://creativecommons.org/licenses/by-nc-nd/3.0/>

This is a download from the BLDS Digital Library on OpenDocs
<http://opendocs.ids.ac.uk/opendocs/>