

HUMAN RIGHTS AND THE AFRICAN INDIGENOUS JUSTICE SYSTEM

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Abstract

Despite the dominant position of African states in social control, African indigenous institutions of social control remain relevant in the affairs of the people. This is especially so in the rural areas of Africa where the majority of the people reside. African peoples' disappointment with the colonial sponsored justice system, derive mostly from their perception of the system's concept and practice as alien, and prone to abuse and corruption, and antithetical to the African concept and practice of justice. African indigenous justice system employs restorative and transformative principles in conflict resolution. Victims, offenders and the entire community are involved and participate in the definition of harm and search for resolution acceptable to all stakeholders. Questions remain as to whether African indigenous institutions of conflict resolution are capable of respecting and protecting the rights of suspects and litigants. Underlying this thinking is the perception that pre-colonial Africa had no concept of human rights. As such human rights are only achievable through liberal regimes, since they are products of Western culture. Therefore, African post-colonial states modeled after Western states are in a better position to protect the rights of suspects and litigants. Further, social developmental theorists often draw a distinction between traditional and modern societies, where the former represents the "take-off" point and the latter the "landing" stages of the developmental continuum. This position overlooks the inherent differences in world-view, and the role of culture in the conception and administration of justice. Findings from this study indicate that the restoration of rights, dignity, interests and well-being of victims, offenders, and the entire community is the goal of African indigenous justice system. As such, opportunities for the achievement of justice is higher under the African indigenous justice system than with African state criminal justice system, partly because, the empowerment of victims, offenders, and the community is the central principle of African justice. As a victim centered justice system, the first priority of African indigenous justice is the safety of victims. Assistance is given to victims to restore their injury, property lost, and their sense of security and dignity. Again, the victims' needs for information, validation, social support, vindication, are the starting points of African justice.

INTRODUCTION

Questions often arise as to whether justice processes and procedures under African indigenous justice system meet international human rights standards. Underlying this thinking is the belief that pre-colonial Africa had no concept of human rights, and so could not practice human rights. As such, human rights are only achievable through liberal regimes, since they are products of Western culture. African post-colonial states modeled after Western states are therefore in a better position to protect the rights of victims of crime, offenders and the community. Raising issues with this position, it is noted here that concerns for human rights are as old as humanity. All societies, African peoples included, have grappled with human rights issues. Philosophers of every race and creed have for centuries been concerned with the nature of humanity, interpersonal relationships, and the position of individuals as members of groups. Unlike victims under African state based justice systems, victims under African indigenous justice are accorded access to mechanisms of justice and to prompt redress, and remedies such as restitution, material and emotional support are provided. Furthermore, victims of violent crime in Africa, according to available records actually feel re-victimized by government agencies of social control. See Elechi (1999) for a discussion of the victims' experience under the Nigerian state criminal justice system.

This study therefore examined the principles and practices of African indigenous justice system in contemporary times. The African indigenous justice system is community based, human centered and employs restorative and transformative principles in conflict resolution. Restorative justice is negotiative and democratic; hence it empowers the community to mediate in conflicts. Ideally, African indigenous justice systems provide opportunities for dialogue amongst the victim, the offender, their families and friends, and the community. Conflict provides opportunities for primary stake-holders to examine and bring about changes to the society's social, institutional and economic structure.

African indigenous justice system is also victim-centered, with victims, offenders, their families and the general community involved in defining harm and repair. As an inclusive system, it seeks to address the interests of all parties to the conflict. The social solidarity

and humane emphasis of the system is reflected in the treatment of offenders. Offenders are encouraged to understand and accept responsibility for their actions. Accountability may result in some discomfort to the offender, but not so harsh as to degenerate into further antagonism and animosity, thereby further alienating the offender. Strenuous efforts follow chastisement to reintegrate the offender back into the community. The institutions of social control are formal agents of re-socialization, hence providing offenders support through teaching and healing. It is argued that the African indigenous justice system is functional, effective, unique, democratic, and allows for the participation of all community residents. It must be pointed out however, that adult males dominate the processes of conflict resolution. This does not necessarily mean that women's rights are in jeopardy under African indigenous justice system. See Elechi (2004) for a discussion of the position and role of women under African indigenous justice system. Nevertheless, the rights of the victim, offender and the community are respected and protected under African indigenous justice system.

This study examines African indigenous justice system's perceived popularity and legitimacy. How the rights of suspects and litigants are addressed under the system is also inquired into. Further, the African indigenous economic, social and political institutions that functions as channels for conflict resolution are examined, as well as the basis for the system's social solidarity, humane emphasis, popularity and legitimacy. How the system addresses victims, offenders and the community's needs and concerns are also examined.

This study is grounded in theories of restorative and transformative justice and other concepts of African justice and human rights. Inquiries into state, state/society and postcolonial state theories are undertaken to further illuminate this phenomenon. Several qualitative research methods were utilized in the study, including participant observation, oral history, content analysis, in-person and focus group interviews.

HUMAN RIGHTS

Human rights are both a cultural and value laden concept, which symbolizes rights, which a person is entitled to for no reason other than his or her humanity. Human rights emanate from two broad conceptions of rights, namely negative and positive rights. Negative rights according to Weisheit/Morn (2004) seek to protect the individual from the coercion of the state and from other individuals. The Bill of Rights of the United States Constitution they note seeks to protect the individual from the power of the state. On the other hand, the positive rights doctrine argues that individuals have “rights to food, clothing, medical care, education, and housing” (p.31). The underlying assumption here is that active and meaningful participation in the affairs of the community is possible when the individual is not constrained by hunger, poverty, illiteracy and fear. Weisheit/Mom (2004) observe however, that these rights represent statements of entitlements rather than protections, which is actionable by the individual.

The concept of human rights assumed international status with the emergence of the United Nations Universal Declaration of Human Rights on December 10, 1948, whose objective is to act “as a common standard of achievement for all peoples” (as cited in Alderson 1984:9). There are two parts to the United Nations Declaration of Human Rights. The first part, also known as the first generation of rights, protects the individual’s civil and political rights, which include the right to life, freedom from torture and inhuman treatment, the right to liberty and security, equality before the law, and freedom of thought. The Covenant on Economic, Social and Cultural Rights is referred to as the second generation of rights. According to the UN Bill of Human Rights, the second generation rights protects such rights as the right to work, the right to favorable

conditions of work, the right to social security, the right to education, and the highest attainable standard of physical and mental health. The focus of the first and second generation of rights is on the individual as a human being with inalienable rights, and with integrity and dignity. Moskowitz describes it best, thus:

Because there is but a single definition of man, so there can be but a single measure of man... Its dimensions are the fixed drives of human nature and all the elemental pleasures and pains of the flesh; the human spirit, with all its intuitions, feelings, fantasies and impulses, which seek the good, the true and the beautiful; and the power of the human mind, which is the basis of man's claim to dignity and worth, to freedom and justice (as cited in Mahmoud 1993: 487).

Human rights therefore is a 'negotiated package.' In other words, it is a process whereby the ruled bargain with rulers over rights and the extent of the powers of the sovereign. Basically, human rights, is about limited government. Human rights is concerned with the relationship between people and their political authority. It raises questions about the responsibility of the political authority with respect to the protection of the individual and the scope of the claims that the individual can make from his/her sovereign. In sum, "... it is protections against arbitrary deprivations of life and liberty; it, therefore, includes notions of due process (i.e., fair trial, right to confront witnesses and present evidence, appeal, etc.)" observes Pena 1994: 212). Further, Lauren (1998:11) asserts that "the issue of human rights addresses age-old and universal questions about the relationship between individuals and their larger society, and thus is one that has been raised across time and across cultures."

The African Charter of Human and Peoples' Rights

The African Charter on Human and Peoples' Rights came into force on October 21, 1986 upon ratification by a simple majority of member states of the then Organization of

African Unity (OAU)¹. It is also referred to as the Banjul Charter because the final draft was adopted in Banjul, the capital of Gambia. The Charter was first adopted in 1981 by the 18th Assembly of Heads of State and Governments of the, Organization of African Unity (OAU). The African Charter of Human and Peoples' Rights highlights the cultural dimension of human rights. It is a regional initiative for the promotion of human rights that is relevant to Africa. It is conceptualized as a regional initiative for the promotion of human rights that is relevant to African peoples' needs. The Charter therefore reflects African peoples' world-outlook, legal philosophy, collective developmental needs and peculiar circumstances and autonomy. Known generally as the third generation rights, the emphasis of the Charter is on the protection of national rights, rather than individual rights. In this respect, the rights listed for protection by the Charter include the rights to self-determination, liberation, and equality of all peoples; the right to international peace and security; the right to use one's resources; the right to development; the right to satisfactory environment and the right of national minorities. The justification for the preference of national to individual rights, and to development, according to Robertson (1982) is because

The economic development of underdeveloped countries is necessary for their social well-being and political stability, without which they cannot ensure effectively the civil, political, economic, social, and cultural rights announced in the major international texts and that therefore the "right to development" is a human right (as cited in Mahmoud 1993: 488).

¹ The OAU was replaced with the African Union (AU) on July 10, 2002. Its objective is the achievement of unity between African countries and its people. It is also geared towards the defense of African sovereignty, territorial integrity, independence and the political and socio-economic integration of the African continent. It also seeks to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights.

Another important principle of the African Charter is that it imposes duties upon the individual towards the State, Community, and Family, in line with the African communal ethics.

Human Rights in Pre-Colonial Africa

A brief overview of the concept and practice of human rights in pre-colonial Africa is very important to understanding human rights thinking in contemporary African indigenous justice systems. This section also addresses the claims often made that pre-colonial Africa had no concept of human rights, and therefore could not practice human rights. As such, human rights are only achievable through liberal regimes, since they are products of Western culture. These views are ascribed to Maine (1889) who argues that in pre-colonial Africa, rules of social conduct could not be differentiated into law and custom, hence the rules were oppressive. Further, Durkheim (1966) argues that there are ideally two types of society, namely mechanical and organic. In societies characterized by mechanical solidarity, members of the society are highly integrated through their cultural and functional similarities. Mechanical solidarity prevailed in pre-industrial societies, and religion and law worked together, with little or no differentiation between the two. Mechanical solidarity societies as Durkheim described them were closest to acephalous societies, while his organic solidarity societies describe European societies with centralized state systems. Above all, Durkheim insisted that the law that prevailed in societies characterized by mechanical solidarity was basically repressive. The interpretation of this in contemporary human rights parlance implies a lack of human rights in mechanical solidarity societies.

Donnelly (1984) further argues that the concept of human rights was non-existent in pre-colonial Africa. He states, “recognition of human rights simply was not the way of traditional Africa, with obvious and important consequences for political practices” (p.308). Earlier, he argued that, “even in many cases where Africans had personal rights vis-à-vis their governments, these rights were not based on one’s humanity per se, but on membership in the community, status or some other ascriptive characteristics” (p.304). Human rights therefore, notes Donnelly (1984), is a Western invention. To justify his claim, he distinguishes human rights from human dignity. He defines human rights as a right which is inherent in an individual for the simple reason of his/her humanity. On the other hand, human dignity obtains in situations where the rights of the individual are dependent upon his/her membership of a particular community, hence ascriptive status.

Gyekye (1996), Motala (1989) and Busia Jr. (1994) note that the concept of human rights was not alien to pre-colonial Africa and that human rights was deeply rooted in African cultural values. Gyekye (1996), drawing from his Akan (of Ghana) culture, observes that the African conceives of the individual as endowed with dignity, and believed in the sanctity of human life. To underscore the belief that all human beings are equal, which are ends in themselves, Gyekye cites an Akan maxim that “all human beings are children of God; no one is a child of the earth” (1996: 150). Gyekye notes that the African believes in human dignity, which is an expression of the natural and moral rights of the individual. The individual’s right must be appreciated within a communal context. This is because the group or community rights or interests generally override that of the individual. However, the individual’s membership in a community does not rob the

individual of his or her dignity, and by extension, the individual's rights. In support, Ifemesia (1978) describes Igbo (Nigeria) societies as humane. A humane living according to him is a

Way of life emphatically centered upon human interests and values, a mode of living evidently characterized by empathy, and by consideration and compassion for human beings. ... Igbo humanness is deeply ingrained in the traditional belief that the human being is supreme in the creation, is the greatest asset one can possess, is the noblest cause one can live and die for (as cited in Iro 1985:4).

African communities make the welfare and the well-being of one the concern of all. Onwuachi (1977:16) describes African humanitarian emphasis as spiritual communalism. African spiritual communalism must not be confused with the concepts of socialism or welfarism, he insists. African spiritual communalism he observes derives from African indigenous principles of *“live and let live; collective sharing; common concern for one another; sense of belonging together; social justice; economic progress and viability for all; and the African indigenous political process of participatory democracy”* (emphasis in the original). Awa (1985:32) in support argues that

.... A society which believes in the values of equality, individual rights and human freedom will tend to evaluate quite highly any political systems which maximize opportunities for participation and in other ways promote these values.

African morality it must be reiterated has a social and humanistic basis, rather than a religious foundation notes Gyekye (1996). According to him, African moral values derive largely from the peoples' experience living in the community. It is informed by the peoples' understanding of what is appropriate in inter-personal relationships. African moral values were not revealed to them by the Supreme-being. Any behavior that is not geared towards the well-being of the individual and the community is considered morally

wrong according to African cultural values. He maintains that the basis of African moral values are social and humanistic, not religious or individualistic. He states:

Such a basis of moral values enjoins a moral system that pursues human well-being. Thus, in African morality, there is an unrelenting preoccupation with human welfare. What is morally good is that which brings about – or is supposed, expected, or known to bring about – human well-being. This means, in a society that appreciates and thrives on harmonious social relationships, that what is morally good is what promotes social welfare, solidarity, and harmony in human relationships. (Gyekye 1996:57).

Mbiti (1970) in addition observes that morality is a corporate affair in African societies.

It is recognized that the individual's wrong doing does not only affect the direct victim and his or her family, but also undermines the community's well-being. Since the community is an entity affected by criminal behavior, community needs and concerns are to be addressed. This includes creating new positive relationships and or strengthening existing relationships, and increasing community skills in problem solving. Reinforcing informal social control mechanisms is very important to African justice. It is also important to note that the community also shares in the responsibility of the wrong-doing of its member.

Further, Mutua (1995) argues that the emphasis on individual rights as against communal rights in Western societies is connected to their peculiar historical experience, which Africa lacks. As such, the pursuit of individual rights is neither natural nor universal. The emergence and dominance of the state in social control in Western societies atomized and alienated the individual both from society and the state, hence the need to seek its protection. On the other hand, African states developed differently, for it was imposed through colonialism on ethno-political communities. As Cover rightly observes,

“the rise of the modern nation state in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state” (as cited in Mutua 1995: 342).

John Locke in his *Two Treatises of Government* reiterates the social contract whereby individuals in society concede some of their rights and powers to a sovereign in return for their protection. Two major aspects of the social contract are mandate and accountability, from and to the people, arguably a revolutionary shift from the earlier paradigm where the mandate to rule was from divine powers, and therefore accountability was to such powers. Mutua (1995: 342) as cited from (Donnelly 1990:34), notes that this power is conditional and dependent on the state’s duty to “protect individual rights and freedoms from invasion and to secure their more effective guarantee.” When governments fail to protect individual rights, they lose their legitimacy. As such, the emphasis on individual rights by Western societies derive from European history and world outlook, hence they view human rights corpus merely as “an instrument for individual claims against the state” (Mutua 1995: 341).

Motala (1996) further asserts that in traditional Africa, as well as in modern Africa, the individual was neither autonomous nor alienated. The individual was always a member of an extended family or community. Membership of the extended family or community bestowed the individual with rights and duties. According to M’Baye and Ndiaye (1982), “within the framework of the group, the individual enjoyed freedom of expression, freedom of religion, freedom of movement, freedom of association, the right to work, and the right to education” (as cited in Motala 1989: 381). However, according to Motala, failure to conform to the norms of society could jeopardize the rights of the individual.

This could occur because, as Marashinge notes, freedom of thought, speech and beliefs were considered communal rights. Other conditions for enjoying these rights were guided by the “principle of respect” opines Marashinge. Respect involved respect for oneself and for others. Respect for others varied according to age, ability, and sex. Respect for others was “very much a part of the normative structure of the legal system, and determined the extent to which freedom of speech could be expressed,” observes Marashinge (as cited in Motala 1989: 382). Motala justifies the limitation on freedom of speech as similar to what obtains in all societies – it is not absolute.

In traditional African societies, according to Gyekye (1996) and Motala (1989), the individual’s right to food and shelter was respected and protected. Everyone had access to land, since land was owned both privately and communally. As Motala (1989) observes, pre-colonial Africa had no “leisured class of land owners.” Everyone had access to land, which was the major means of economic production and was encouraged to work, and idleness carried a social stigma. African societies being gerontocratic, the elders are the custodians of the community wealth. The elders, as custodians of the community land, administered the land to the best interest of the lineage or community. Old age is deferred to in recognition of the contribution and wisdom of the elders. Moreover, everyone will get old and enjoy the same status. However, it is important to note that the elder does not own or control the community land, but only held it in trust for the lineage or community. An abuse of the position could result in replacement and or denial of other privileges. Again, land is not a marketable commodity in some African societies, and as such the individual had the right to use the land for the production of food and development for residential purposes only.

Notably, Gyekye (1996) and Motala (1989) observe that traditional African societies were democratic and egalitarian, and allowed for the participation of all adults in the decision making process. Even in communities with Kings or Chiefs, decisions are reached only after full consultation with community members. (See Elechi (2004) for a discussion of pre-colonial African state systems). All participating adults were free to express their opinions on issues before decisions can be reached. Again, all decisions were reached through a consensus. No one is punished for holding opposing views on issues, and no attempt is made to suppress any voice. In some cases, decisions on issues are deferred until all the constituting members or groups of the community are represented. Sithole aptly sums it up thus:

Things are never settled until everyone has had something to say. African traditional council allows the free expression of all shades of opinions. Any man *has full right to express his mind on public questions* (as cited in Gyekye 1996:153 emphasis in original).

Gyekye (1996) further observes that the individual can assert his or her civil and political rights against violation by the state. There was a recognition by African peoples: that people entrusted with power are capable of abusing it. As such, assertion of political rights, have sometimes led to the removal of autocratic or corrupt leaders from office. This practice is geared towards safeguarding the individual's dignity, which is generally referred to as African humanism, according to Motala (1989). In this regard, "torture, killings, and other abuses would be objectionable in terms of Africa's own traditional standards of human rights" (Motala 1996: 387).

Human rights, therefore, is not purely a Western invention. Neither did the concept of human rights originate from any part of the world, or from liberal democracy, as postulated in some quarters. Arguably, all peoples of the world do not assent to the same

basic values and beliefs, but what is certain is that every society has been concerned with the notion of social justice, the relationship between the individual and his/her political authorities. As Roberts and Merrills (1992) point out, “the struggle for human rights is as old as [world] history itself, because it concerns the need to protect the individual against the abuse of power by the monarch, the tyrant, or the state” (as cited in Lauren 1998: 11-12). Lauren (1998:120) further points out that “what the West did provide, however, was not a monopoly of ideas on the subject but rather much greater opportunities for visions such as these to receive fuller consideration, articulation, and eventual implementation.” As Eze (1984) rightly observes, all societies recognize human rights. However, its manner of conceptualization varies across different cultural settings. He asserts that pre-colonial Africa had a system of law which is similar to the systems of law in Western states. The difference according to Eze is that

... in most traditional African societies the law existed outside the framework of a state in the modern sense. Obedience to the law was maintained through custom and religion as well as established patterns of sanction. These pre-colonial African societies had a high level of organization in which political, economic, and social control was maintained (as cited in Motala 1989:379).

Gluckman (1955) concurs with Eze’s viewpoint. He argues that the functions and objectives of law in Africa is similar to that of other societies. According to him, the central objective of the Lozi jurisprudence for example, is the “regulation of established and the creation of new relationships, the protection and maintenance of certain norms of behavior, the readjustment of disturbed social relationships, and the punishing of offenders against certain rules” (p.163). Again, he observes that the Lozi jurisprudence shares with other societies such basic legal doctrines as

“right and duty and injury; the concept of the reasonable man; the distinctions between statute and custom; and between statute and equity or justice; responsibility, negligence, and guilt; ownership and trespass; etc. (ibid)

African States

A common characteristic of post-colonial African states is war, authoritarianism, political instability, famine, disease and poverty. Almost all the countries of Sub-Saharan Africa have in the past four decades gone through several attempts to install democracy but failed. The military have had to intervene in the political process and dominated the political affairs of many African countries. Other constraints to Africa’s development are identified as inadequate levels of human development, inadequate physical and social infrastructure, bureaucracy and ineptitude. Others blame Africa’s development on the lack of investment on technological and scientific research. African leaders are also accused of not cooperating amongst themselves, and of corruption and human rights abuse.

The dependent state theories throw some light on the character and performance of the postcolonial African states. The neo-colonial states of Africa, South America and Asia are often characterized as dependent states. This is because these states depend to a large extent on the more powerful and industrialized countries for their economic and political survival. Santos defines dependency as a “situation in which the economy of certain countries is conditioned by the development and expansion of another economy to which the former is subjected” (Magstadt 1991: 426). Dependency, according to Santos, goes beyond the economic and political realms. It affects both the social and psychological attitudes and behaviors of both the dominant and dependent countries alike. The concept describes a relationship that is not equal or reciprocal.

Dependency theory best explains the underdevelopment² of the neo-colonial states of Africa, Asia, Latin America and the Caribbean countries. Ferraro (1997) credits the theory to Raul Prebisch, the Director of the United Nations Economic Commission for Latin America in the late 1950s. The dependency theory challenges the neoclassical socioeconomic theories that argue that economic growth, especially that which was occurring in the Western World, is beneficial to the rest of the world, following the ‘trickle-down’ economics thesis. This argument, however, recognizes that the economic benefits may not be equally distributed. The proponents of the dependency theory observe that economic growth in the Western Countries does not lead to economic growth in the neo-colonial states. Dependency also describes the kind of relationship existing between the industrialized countries and the neo-colonial states, which is neither equal nor reciprocal relationship. The power structure and institutions of the dependent states are controlled from outside.

Furthermore, Cockcroft et al (1972:xviii) observe that “the so called ‘national’ and ‘progressive’ bourgeoisie in Latin America is neither nationalist nor progressive – it is a dependent, comprador bourgeoisie.” They represent the interests of the investors from the dominant states. As such, their economic activities impoverish the masses and undermine the society’s potential for development. Following the dependency thesis, the world is described as constituting two sets, namely, dominant/dependent, center/periphery or metropolitan/satellite. Again, the dependency theory, according to

² It is imperative to distinguish underdevelopment from undevelopment. Undevelopment describes a situation where a nation’s natural and human resources are not fully exploited for national benefit. Underdevelopment, on the other hand, describes a situation where resources are being exploited often from the dependent states for the benefit of the dominant states. A country is said to have developed when the country achieves political stability, successfully reduces societal problems that are generally associated with underdevelopment, such as poverty, the high incidence of disease, unemployment, ignorance, poor infrastructure and technological backwardness.

Macionis et al (1997: 299), “is a model of economic and social development that explains global inequality in terms of the historical exploitation of poor societies by rich ones.”

Another major argument of the dependency theory is that the political class in Africa, has no economic base outside the state. The capitalist class was yet to develop before colonialism. The neo-colonial state of Africa, according to Diamond (1989), owns or controls the vast share of wealth outside the subsistence economy. Diamond describes African states as *statist*, in that they control virtually all the means of economic production and distribution. Since the political class has no economic base of their own, the state becomes their source of economic acquisition. They cannot survive without the state. The political class is dependent on the state for their economic well-being, and this generates a feeling of insecurity.

Because of their insecurity, the political class placed a high premium on power. They accumulated power by all means, did everything to secure it and to prevent others from getting it. As rulership became permanent, politics became Hobbesian: power was pursued by all means and kept by all means and the struggle for power became the overriding concern (Ake 1989: 52).

Experiences from Africa indicate that when the state controls the means of economic production and distribution, it fosters corruption and political instability.

Mention must also be made of the negative effects of slavery, colonialism and neo-colonialism on Africa’s social, economic and political development. Slavery and colonialism, without question, are momentous historical forces with the greatest influence on African culture and development. Both slavery and colonialism degraded and exploited African peoples, and this left a lasting negative effect on the African peoples’ psyche, economy and culture. Further, colonialism disturbed the natural process of state

formation, created alien social structures and institutions, and introduced new relations of production.

African Principles of Justice

African indigenous justice system employs restorative and transformative principles in conflict resolution. African justice system is process-oriented, rather than rule based. Its emphasis according Armstrong et al (1993: 14) is on the “processes of achieving peaceful resolutions of disputes rather than on adherence to rules as the basis of determining disputes.” A fair and just judgment must take into account a wider range of facts and interests, including that of the community, without necessarily compromising the facts of the matter in dispute and the rights of the litigants.

Nsereko (1992: 22) notes that African customary legal processes “focused mainly on the victim rather than on the offender.” The goal of justice was to vindicate the victim and protect his/her rights. The imposition of punishment on the offender, was designed to bring about the healing of the victim rather than to punish the offender. In any conflict, rather than punish the offender for punishment sake, the offender was made to pay compensation to the victim. Compensation according to Nsereko (1992) goes beyond restitution. It also represents a form of apology and atonement by the offender to the victim and the community.

African indigenous justice systems support offenders by persuading offenders to understand and accept responsibility for their actions. Accountability may result in some discomfort to the offender, but not so harsh as to degenerate into further antagonism and animosity. Obligations must also be achievable hence justice processes recognize and respond to community bases of crime. Above all, efforts are made by the community to

disapprove of wrongdoing, rather than the wrong-doer. As such, collaboration and reintegration as a process of justice-making is encouraged, rather than coercion and isolation. Underlying this approach is a belief that all human beings are important and are not expendable. Healing must go deep to the center of the problem, to the soul of the person. In addition, it is generally believed that human beings are naturally good and are capable of change when they make mistakes.

African justice system is negotiative and democratic, hence it empowers victims, offenders, their families and the entire community to participate in the identification, definition of harm and the search for restoration, healing, responsibility and prevention. Justice making is an opportunity for dialogue amongst the victim, offender, their families and friends, and the community. When the primary stake-holders to a conflict participate in the definition of harm and potential repair, all complaints and issues relevant to the case are openly discussed. The thorough airing of complaints “facilitates gaining of insight into and the unlearning of idiosyncratic behavior which is socially disruptive” (Gibbs, Jr., 1973:374). If participants are free to express their feelings in an environment devoid of power, there is nothing left to embitter leading to a more enduring peace. Further, when people involved in a conflict participate and are part of the decision making process, they are more likely to accept and abide by the resolution. Furthermore, conflict provides opportunities for stake-holders to examine and bring about changes to the society’s social, institutional and economic structure.

Discussion

The different and alien political, social, economic and educational systems imposed on Africa, by colonialism has, fostered authoritarian governments, corruption, ineffective

and illegitimate social control systems. And as a result, African people are disenchanting with the African government based criminal justice system. It is pertinent to point out that it is not only in the area of social control that the post-colonial governments of Africa is found ineffective and unpopular, thereby necessitating the interest in African traditional ways of solving social, economic and political problems.

It is important to note that the centralization and bureaucratization of Western social control systems occurred between the eighteenth and nineteenth centuries. As part of this development, the state became the dominant agent of social control. The prison also emerged as the dominant form of punishment. Positivist approaches to scientific inquiries expanded the role of professionals whose task it was to classify deviants into different categories. Boosted by scientific knowledge, the new experts segregated the deviants into mental hospitals, penitentiaries, reformatories. There was also a marked increase in the role of law and lawyers in the justice system.

This social control system was exported to Africa by European colonial authorities. Incidentally, the imposition of European models of social control on Africa occurred at a time when Western people were becoming disillusioned with the justice system. As Clifford (1974: 185) points out:

Africa has inherited its approach to the treatment of crime from its colonial era. Some prisons now standing were erected in the nineteenth century and the legal systems followed the colonizers as surely as Roman Laws went with the Legions. Similarly, treatment systems were European in origin and made few concessions to tribal tradition ...[T]he importation of foreign treatment measures for offenders was often blind to the better and more effective arrangements locally available.

Indictments against the state system are that state courts in an attempt to reform offenders remand them in prisons and psychiatry institutions. Records show that criminals

deteriorate, and are stigmatized, with a consequent increase in recidivism and difficulty in reintegration into the society. The extensive use of imprisonment to enforce conformity is flawed. Incarceration should be used as a last resort to deal with offenders who have demonstrated clear disregard for responsibility and community feelings, or where the individual is a threat to community safety. As Harry E. Allen eloquently observes:

It is hard to identify the benefits inmates gain from prison, but the harm done there is readily seen. If you want to increase the crime problem, incite men to greater evil, and intensify criminal inclinations and proclivities, then lock violators up in prison for long periods, reduce their outside contacts, stigmatize them and block their lawful employment when released, all the while setting them at tutelage under the direction of more skilled and predatory criminals. I know of no better way to gain your ends than these (as cited in Latessa & Allen 2003:1).

As such, by the middle of the twentieth century, a movement calling for the reversal of the ideological and institutional foundations of the prevailing social control system emerged (Cohen 1985). According to Cohen, partly motivating these attacks on the justice system are the “destructuring impulse” which was very popular in the 60s. Part of the agenda of this movement was the search for alternative or complementary methods of conflict resolution.

In Africa, the services provided by the state justice system are poor or nonexistent in some places. This partly accounts for the renewed interest in the African indigenous systems of conflict resolution. However, as earlier mentioned, it is not only in the area of social control that the colonially derived system has failed African people. African indigenous healthcare delivery, for example is becoming more relevant and popular. As Olowu and Erero (1996) rightly observe:

This renewed interest is based, in part, on the fact that these institutions have proven to be resilient. In addition, they are more effectively institutionalized and Africans rely upon them to provide required goods

and services in the face of the failure of the formal, colonial-based structures. Such goods and services include: security, roads, bridges, schools, post offices, mechanisms for conflict resolution, common-pool resources management and credit provision, to mention a few.

Findings from this study indicate that African people are dissatisfied with the African state based criminal justice system. African state based criminal justice system was, created by colonial authorities and Africans find it incongruent with their beliefs and customs. African indigenous justice system allows for the active involvement and participation by victims, offenders, their families and friends, and the entire community in defining harm and in crafting a resolution acceptable to all concerned. The goal is to restore those who have been harmed. Victimization creates opportunities for victims, offenders and the community members to meet and discuss the crime and its aftermath. Offenders are held accountable. Strenuous efforts are afterwards made to restore the victim and offender back into the community as positive contributing members of the community. African indigenous justice is able to condemn a behavior and yet retain respect and love for the wrong-doer. Africans believe human-beings are capable of change and therefore deserve a second or even a third chance.

The famous South African Truth and Reconciliation Commission process was based on the restorative principle, known as “ubuntu³” in the Zulu, South African language. Desmond Tutu, the chief architect of the Truth and Reconciliation Commission describes the “ubuntu” principle, thus

³ Justice Mokgoro of South Africa defines Ubuntu - a Zulu word as a lifestyle or unifying world-view “of African societies based on respect and understanding between individuals. Ubuntu has been translated as humaneness, and is derived from the expression: umuntu ngumuntu ngabantu [a person is a person because of other people/ a person can only be a person through others]. It envelopes values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity” (as cited in Anderson 2003).

For ubuntu the summum bonum, the greatest good is communal harmony. Anger, hatred, resentment all are corrosive of this good. If one person is dehumanized then inexorably we are all diminished and dehumanized in our turn. A criminal offense has caused a breach in relationship and the purpose of the penal process is to heal the breach, to restore good relationships and to redress the balance. Thus, it is that we set out to work for reconciliation between the victim and the perpetrator. There may be sanctions such as fines or short exile but the fundamental purpose of the entire exercise is to heal (Desmond Tutu (2004).

Conclusion

African indigenous justice processes and procedures respect and protect the rights and interests of victims, offenders, and the community. It empowers victims, offenders and the community, as primary stakeholders in a conflict to actively and meaningfully participate in the identification, definition of harm and the search for restoration, healing, responsibility and prevention. As Nils Christie (1976) rightly observes, conflict is a neighborhood (community) property. Efforts should therefore be made to restore a sense of empowerment and deliberative democracy. When the victim, offender and the community openly participate in defining harm and potential repair, all complaints and all issues relevant to the case are openly discussed. If participants are free to express their feelings in an environment devoid of power, there is nothing left to embitter leading to a more enduring peace.

Further, when people involved in a conflict participate and are part of the decision making process, they are more likely to accept and abide by the resolution. Opportunities for the achievement of justice and the respect and protection of the rights of victims, offenders and the community are higher under African indigenous justice system than under African state based criminal justice system. It must be noted however, that in traditional Africa, as in all societies, there are sometimes contradictions between the ideal

and the practice, as it relates to justice and human rights. There are cultural practices that denied individuals or groups human dignity and human rights. African states in empowering African communities in justice making, must also ensure that justice processes and procedures meet international human rights standards.

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