"CONSOLIDATING REFORMS IN CRIMINAL JUSTICE AND ITS ADMINISTRATION- BEST PRACTICE". AT THE MAIDEN CONFERENCE OF SUB-SAHARAN CRIMINAL JUSTICE STAKEHOLDERS BY THE JURIST CENTRE SOCIO-LEGAL RESEARCH AND DOCUMENTATION. 1 – 4 OCTOBER, 2022, ABUJA

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Introduction

The sub-themes to the main theme to this conference include:

- Anti-corruption Trials;
- Case Management;
- Pre-trial Detention;
- Punishment- non-custodial and restorative justice.

The focus of my remarks would be on: anti-corruption trials, case management and punishment. However, I will allude to issues of pre-trial detention as I go along.

There is the need to clear some conceptual debris that have been deposited on the landscape of reforms of the criminal justice systems in African countries as well as briefly sketching out its historical context and contemporary relevance.

There is the general view that a criminal Justice System by definition is the system of law enforcement that is directly involved in apprehending, prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offenses. By far, the focus has been on deploying the state's coercive powers. Little is said about alternative criminal justice systems that have focused on restorative forms of criminal justice that also involves rehabilitation. This paper seeks to sketch out the historical context, raise some conceptual issues and make some remarks on attempts at reforms of criminal justice systems in Sub-Saharan Africa (SSA) in relation to the theme and sub-themes of the Conference. It would also draw some conclusions on the main theme.

Historical context of Criminal Justice in Africa

Africa's criminal justice systems like other systems has its continuities and discontinuities. Before formal colonization, most African communities had their traditional criminal justice systems, which were more nuanced to be appreciated by the colonial powers. They therefore sought to dismantle these traditional systems and described them as 'barbaric' and against 'equity and 'good conscience'. They outlawed some traditional criminal law principles and subjected others to the test of meeting English standards of justice- at the least in former British colonies. The paradox was and is still that one could and cannot not discern the 'good conscience' in an imperial project such as colonization.

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There is ample historical evidence of European criminal justice barbarism such as 'trial by ordeal'- presided over by Bishops and the Clergy[2]. It is also interesting to register the fact that 'detention without trial' was introduced in Africa by our colonisers[3]. This colonial concept and form of criminal justice has continued to the present times under post-colonial laws as: Preventive Detention Acts, Preventive Custody Decrees, and State of Emergency provisions in most post-1990S Constitutions of SSA[4]; to the present laws which are part of the 'war against terrorism'; as well as constitutional provisions on 'national emergency powers'.

Since independence, and particularly during the scramble for power, set against the backdrop of the Cold War, with foreign aid being sold for political allegiance, the emergence of a new political elite in Africa became evident. Leaders of independence struggles against the colonial powers took over, only to be confronted with internal challenges to their hegemony. The criminal justice systems established in the colonial periods served a purpose for these leaders. The criminal justice system was used to consolidate their new earned political power and to register the 'new' and yet 'old' political presence[5].

Criminal justice systems in Africa today have developed somewhat from those in the immediate post-independence era in order to cope with the actual and perceived challenges faced by modern African society. The United Nations Office on Drugs and Crime (UNODC) has stated that Africa has a serious crime problem, caused mainly by high income inequality, rapid urbanisation, high youth unemployment and poorly resourced criminal justice systems, and that this has subsequent negative effects on investment, human and social capital, and development in general[6]. To manage this situation, SSA governments have sought to maintain or further institutionalise those criminal justice systems of Western genesis through legal and constitutional reform.

The retention of criminal justice systems that originated from the West has arguably provided elites in SSA countries with the ability to preserve their position through the control of systems that can contribute to structural and political violence. Given the power imbalances that is embedded in the criminal justice systems of the former colonies, it is questionable as to whether such systems meet the needs of Africa today based on the 'consensus-functionalist doctrine'.

Crime in Africa is on the increase and responding to rising crime levels, or at least to public concern about perceived rising crime levels, governments introduce harsher punishments and reduce procedural safeguards in order to secure more convictions[7]. While this may meet with Western conceptions of criminal justice, it has important negative implications for African society. The effect of increasing the retributive element of the criminal justice systems in SSA follows the

[2] Fitzpatrick, P**.** (1992) *The Mythology of Modern Law*. Pluto Press: London.
[3] Tsikata, F. S. "Limits of Constitutionalism" in *U. G. L. J.* (1978-81), Vol. XV. Faculty of Law, University of Ghana: Accra: 17-31
[4] See Article 31 of the Constitution of Ghana, 1992.
[5] ISS (2009) *The Theory and Practice of Criminal Justice in Africa*. Monograph No. 161
[6] United Nations Office on Drugs and Crime, Crime and development in Africa, available online at http://www.unodc. org/pdf/African_report.pdf (accessed 6 April 2008).
[7] S Coldham, Criminal justice policies in Commonwealth Africa: Trends and prospects, Journal of African Law 44 (2000), 218-238

neoliberal agenda espoused by the West[8]. However, an implication of this is to situate criminal justice with the referent being the individual, thus removing justice from the social. In pursuing an aggressive retributive criminal justice, there is a danger of undermining the social fabric of African communities. Criminal justice, rather than being held in the domain of the community in order to restore societal relations and protect social cohesion, becomes rooted in the ideals of individualism.

Some conceptual issues

Concepts of Justice

We cannot understand the philosophical basis of criminal justice systems outside the broader justice systems. While the notion of justice is often linked to a genre of moral concepts connected more with politics and law, it is often spoken of in terms of right or wrong when it is inappropriate to use the term justice. In another context, justice refers to relatively rigid application of rules and standards woven around issues of equity and mercy. In other words, justice can be viewed as a moral or ethical category or a legal precept (law's justice). Aristotle's division of the concept of justice into *corrective* justice and *distributive* justice remains the entry point for most political thinkers[9]. Corrective justice in Aristotelian terms refers to situations between two parties where one has taken from the other or harmed the other. Current discussions on corrective justice amongst jurists revolve around the appropriate standards within tort and contract law, with 'siblings' in criminal law.

Distributive justice is said to involve the appropriate distribution of social goods and services among a group- in common parlance giving each person his or her due. In modern times, most of the discussions of justice are about the proper structuring of government and society.

Along with the discussion of corrective and distributive justice, justice is often referred to as following rules laid down, which has a lot of relevance to law i.e., no retroactive punishment and not changing the rules in the middle of the game.

The works of John Rawls (Theory of Justice)[10] is probably the most influential discourse on justice in the twentieth century. Probably if the question were asked why we need a theory of justice, Rawls would certainly respond that because publicly agreed terms of social cooperation are both necessary and possible. According to him people who inevitably have different sets of values and goals in life can coexist, cooperate and in some cases compete. The basis of such societal coexistence registers immediately some agreed principles of social ordering either in the abstract or historically to a particular societal or political arrangements, the basis of which is the proverbial *social contract* and its ramifications.

[8] See Duff, R.A and David Garland (1994; 2013 reprint) *A Reader on Punishment*. Oxford University Press: Oxford, for a detailed discussion on the genesis of Western Criminal justice Systems.
[9] Aristotle, "Nocomachean Ethics, Book VIII, 1:1155a, in The *Complete Works of Aristotle* (J. Barnes ed.) Princeton University Press: Princeton.
[10] John Rawls, *Theory of Justice* (Harvard University Press, Cambridge, Mass., 1971)

More significantly, Rawls postulates an *original position* from which imagined negotiators under a veil of ignorance proceed to agree on some principles as the basis for ordering social life; the result of which would be legitimate principles of justice (justice as fairness)[11].

To be fair, Rawls has written a number of articles which expanded or modified his ideas on the *Theory of Justice*[12]. Ian Mcleod summarizes Rawls' (both young and mature) position in the following words:

> This begins with people in the *original position*, and subject to the *veil of ignorance*. It is at this point they formulate the principles of justice. At the second stage, the veil of ignorance is lifted, so that the kind of society is known and a constitution is drawn up. [...] At the third stage, the principles of justice are applied to the *enactment of laws*, in accordance with the constitution. At the fourth stage, the veil of ignorance is *finally removed* and the legal system operates on a day-to-day basis[13].

There have been a number challenges raised on Rawls' theory of justice, the most influential and thought-provoking coming from Libertarian theorist Robert Nozick in his book, *Anarchy, State and Utopia*[14]. Nozick's main response to Rawls has been his notion of just distribution. For Nozick, most of the goods which we own or want to own are not distributed in the sense of being divided among people at one given time by the government or basic structure of society: "what each person gets, he gets from others who give to him in exchange for something, or as a gift[15]". Therefore, the issue for government will not be one of distribution but of *re*distribution. Nozick's further issue is that any type of *patterned distribution* where justice requires that 'everyone to have an equal amount, or that distribution of goods according to need, merit, intelligence, ability or effort' will be vulnerable; since it is likely to be disrupted repeatedly by voluntary independent choices by individuals.

Nozick proposes an alternative approach to replace just (*re*) distribution with just holdings as follows:

- A thing should have been acquired consistently with principles of just acquisition; for instance, the appropriation of unheld things such as cultivating unclaimed land; or
- A thing should have been acquired in accordance with the principles of *just transfer* from another person who was herself entitled to own the thing either by exchange or gift without fraud or duress.

The above two principles suggest that no one can own a thing where ownership cannot be traced to their original just acquisition; which Nozick refers to as *historical principles of justice*[16].

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[11] ibid at pp. 12, 136 - 142.
[12] See John Rawls, 'Kantian Constructivism in Moral Theory', 77 *Journal of Philosophy* 515 (1980); John Rawls, ' The Basic Liberties and their Priority', in The *Tarner Lectures on Human Values*, Vol.3 (Utah University Press, Salt Lake City, 1982; and John Rawls, 'Justice as Fairness: Political not Metaphysical', *14 Philosophy & Public Affairs* 251 (1988).
[13] Mcleod, T. I (1999) *Legal Theory*, Macmillan Press: London, (p. 144).
[14] Robert Nozick, (1974) *Anarchy, State and Utopia*, (Basic Books, New York).
[15] ibid, p 149
[16] ibid, 150-153

A central idea of Nozick's concept of just holdings is that government or society has no right to redistribute goods, violating peoples just claim to the objects they own for some general benefit. It is however the case that he recognizes the fact that society does have the right or even the duty to redistribute goods to correct some prior injustice on holdings.

A number of questions have been raised in relation to liberal notions of justice generally and more specifically on Nozick's views on justice as typical of such views. For instance, it is often asked what if only a small percentage of property are justly held? And why is property rights (private property) accorded such a central position in our moral and political thinking? These questions arise because there is an influential world view that many members of our communities and the community itself have claims upon us and our resources, which justify infringements regardless of how just those holdings may be. Such views have been espoused by members of the communitarian episteme. A dominant figure in that community is Michael Sandel[17].

Sandel is of the view that, liberal views of justice treats people as essentially 'atomistic' and argues that such a view of justice does not reflect real life at any level. To him, we come to the world as part of a family, community, ethnic or religious group which is an essential part of our identity. In this context, Justice and ethics should centre on or take account of our connections and responsibilities as members of our communities and citizens of a country. In the light of the above views, Sandel argues that principles and legal rules should focus on communities and society. For instance, the basis for adopting rules should be how those rules help or hurt society and not how it might affect the autonomy of 'atomistic' individuals. For example, public education should not be one to enable a person fit into the market but how it will make one a better citizen[18].

Another Communitarian, Michael Walzer is of the view that notions of justice arise *within* a community, a tradition, and particular set of circumstances. He disagrees with the general notion of justice and morality seen as universally right for all people and for all times. For him critical debate about justice occurs within *thicker* culturally based moralities[19].

Understandably, Feminists have entered the debate on the notions of justice and as expected most part of such discourse takes issue with notions of justice nested in a male dominated view of the world. It is argued that liberal views of justice in terms of the individual sees that individual as a male. Therefore, seemingly neutral law ends up not to be neutral because it often fails to take account of the special circumstances of women. A classic example of this view is captured in a number of murder cases in the United Kingdom[20]. In all these Cases, abused and violated wives who eventually killed their husbands were treated like all normal murder cases without consideration of years of abuse that culminated in the murders.

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[17] Michael J. Sandel, "Morality and the Liberal Ideal", in *The New Republic*, (1984), Anor Press: NY.
[18] ibid, pp 15 - 17.
[19] See Walzer, M (1994) *Thick and Thin: Moral Argument Home and Abroad*, Univ. of Notre Dame: Notre Dame Pp2 - 11.

[20] See *R v Ahluwalia* [1992] 4 All ER 889; *R v Thorton (No. 2)* [1996] 2 All ER 1033; and DPP *v Morgan* [1976] AC 182.

A useful critical departure of theories of justice which is particularly relevant to non-European/American discourse is by Amartya Sen[21]. The works of Sen is a 'must read' for any student interested in the departure and arrival on the theory of justice.

I can only recommend Sen's study to my audience as there is no way I can make even a summary of its essentials and nuances. What is however significant is that he takes a departure from most of the theories (some of which I have referred to earlier) that focused on rules and institutions as a basis of justice. Beyond institutions and rules, Sen introduces the useful dimension of real human experiences in terms of justice and injustice; expressed as 'realization, lives and capabilities'. I hazard to characterize his views as *local knowledge* of justice. He argues:

> The importance of human lives, experiences and realizations cannot be supplanted by information about institutions that exist and the rules that operate. Institutions and rules are, of course, very important in influencing what happens, and they are part and parcel of the actual world as well, but the *realized actuality goes well beyond the organizational picture, and includes the lives that people manage - or do not manage- to live* (emphasis mine)[22].

His concept of the realization of justice is not just about judging institutions and rules but judging the societies themselves. He observes that no matter how proper an established organization might be "it cannot prevent the big fish from devouring the small fish at will". We are here again prefiguring law's justice in contradistinction to ethical or moral justice. The watershed to my understanding of Sen's discourse on justice is the dialectic between *justice* and *injustice* which he courageously juxtaposes. Such an approach brings out conceptual clarity of the real world in which we daily encounter more of *injustice* and less of *justice*.

Sen's view registers the importance of having the 'social' as the basis for all justice systems-including criminal justice systems. The preambles to post-199s constitutions of SSA countries more often that refer to 'We the People' who solemnly declare and affirm a commitment to 'freedom and justice … adopt, enact and give to ourselves this Constitution'. Therefore, justice ought to ultimately spring from the people. However, criminal justice has become the preserve not of the state but that of temporal governments of either 'elected or unelected dictators', autocrats and oligarchs.

That is the reason to agree with Baxi to the effect that some of the '**We** the people':

> Have both bread and freedom; others have freedom and little bread or none at all; yet others have half a loaf (which is better than none, surely) with or without freedom; and still others have a precarious mix where bread is assured if certain (not all) freedoms are bartered[23].

[21] Amartya Sen (2009) *The Idea of Justice*, Penguin Books, London: England.
[22] ibid, p 18.
[23] Baxi, U (1989a) "From Human Rights to the Right to be Human: Some Heresies, in S. Kothari and H. Sethi (Eds), *Rethinking Human Rights*, Triparthi: Bombay.

It is in the context of Baxi's irony that one can posit the view of Anatole France that "The Law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread (*Le Lys Rouge, 1894*)"[24]- being the very essence of contemporary criminal justice systems in SSA.

Global (in) Justice

The justice architecture or the quest for global justice has witnessed more challenges than the quest for justice at the domestic or national level. We have witnessed over time the interesting paradox in which powerful states in the use of unilateral, often unprovoked force, in defiance of the reasonableness of global justice with an ostensible objective of ensuring justice to citizens of other states. It seems to be an irony that humankind escaped from a domestic state of *nature* to re-enter another in the global setting. Can we agree with Sir Henry Maine, writing as late as 1888 that 'War appears to be as old as mankind, but peace is a modern invention?

There are a number of significant nodal points of global injustices. I have elsewhere drawn attention to some of the epistemological foundations and underlying assumptions which precipitated such injustices[25]. I (re) register some of them for emphasis:

- The trans-Saharan and trans-Atlantic slave trade were occurring at the time charters of freedom, equality of men, escape from the state of nature to the state of law were being scripted in domestic settings
- The colonial encounter in which some humankind enunciated laws that justified their dominion over others and plundered their resources while recognizing private property rights in their domestic settings[26]
- An international economic order in which other states were consigned to producing primary products for exports at lower prices while importing finished products at higher prices. At the same time development of anti-trust and unfair competition laws were taking place in the jurisdictions of the beneficiaries of such an international economic order.
- Within the contemporary global village, the benefits and burdens of globalization are not evenly distributed. There is the further thick wall between the south and north of the global village which permit easy movement from the north to the south but not the other way round.
- Significantly, the events of September 11 has brought in its wake the global *war against terror* with wide ranging ramifications and consequences for global justice in terms of one's' position (both physical and mental); as to whether you are categorized as *victims of terror* or *helping or harbouring terrorists*. And Baxi's further distinction of *war on terror* and *war of terror*. I will make a few brief remarks on this issue.

[24] Also see Kunbuor, B. (2020) "Law and Justice in Constitutional Democracies: Ghana's Jurisprudence", in *As a Matter of Public Law and Rights in Ghana*. AP Atupare and EK Quashigah eds. LexisNexis: South Africa, Chapter 5.

[25] See Kunbuor, B. (2020), supra.

[26] Ibid.

There is an interesting development that has come to the fore with the upsurge of terrorist activities- *the war on* terror and *the war of* terror[27]. As observed by Baxi, *the war on terror* is said to be a 'just war raising the question only of how far the nomenclature may regard its efficient pursuit. It also defocuses the antecedent or on-going forms of state and international terrorism'. On the other hand, he sees the *war of terror* as one of collective intent and capability of non-state actors and networks[28] to deliver, organize, and implement the threat or use of force directed permanently against civilian populace and sites across the world[29].

The above global injustices have occurred or continue to occur within the framework of the international rule of law. Bingham has observed that ' the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large[30]. However, there is an asymmetry between how the principles of the rule of law are observed in domestic jurisdictions as against that in the international legal order. Is it the case that the global community see the 'rule of the jungle as more tolerable in a big jungle'?[31] A number of factors account for the global inertia in ensuring observance of the principles of global justice within the international legal order.

Criminal Justice

Criminal justice systems, through their philosophical origins, is said to serve to manage societal conflict of one form or another. And that like all social institutions they are born out of, and reformed through conflict[32]. The very need for a criminal justice system presupposes a conflict between what those that constitute a society, or those that hold power in a society, see as acceptable and unacceptable.

Simply defined, the purpose of criminal law is to identify a set of rules that define the limits of socially acceptable behaviour and, with suitably measured punishment, to prohibit behaviour that falls outside those limits. The 'consensus-functionalist' school, often accused of idealism and naivety, 'conceives criminal law as aggregation or embodiments of the values and norms of the diverse groups in society regarding conducts that should be prohibited so that peace, safety and security can be guaranteed'[33] This perspective of criminal law champions the equity of judicial practice and distribution, whilst simultaneously recognizing its function as a reflection of the contextual needs of a society[34].

Such a conception of criminal justice is problematic and has been challenged at a number of levels- particularly by the 'radical-conflict' paradigm of criminal justice. This paradigm is of the view that criminal justice systems protect and sustain the interests of dominant power groups in society

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[27] This distinction is taken from Upendra Baxi's article "The *War on Terror* and the *War of Terror*: Nomadic Multitude, Aggressive Incumbents, and New International Law: Prefatory Remarks on Two Wars", in *Osgoode Hall Law Journal, Vol. 43 No. 1/2.*

[28] These Baxi refers to as 'nomadic multitudes' as against 'aggressive incumbents' who wage the war on terror.

[29] Ibid.

[30] See Bingham, T (2011)"The Rule of Law in the International Legal Order", in *The Rule of Law*, Penguin Books: UK.

[31] Ibid, p. 112.

[32] See Richad Bowd (2009) "The Theory and Practice of Criminal Justice in Africa". Policy Brief Nr. 07, July 2009. ISS.

[33] ISS (2009) *The theory and practice of criminal justice in Africa*. Monograph 161. African Security Initiative

[34] See S Coldham, "Criminal justice policies in Commonwealth Africa: Trends and prospects", *Journal of African Law* 44 (2000), 218-238

and with the implication that the social values serving as a basis for communal peace, as espoused by the consensus-functionalist school, do not adequately reflect the diversity of societal groups, nor their divergent interests and thus do not accurately comprehend power structures and struggles.

In the view of Foucault:

> "The power of normalization determines the "acceptable" limits of behavior by demarcating the normal and "respectable." Normalization "imposes homogeneity" on the subject both in thought and comportment; but at the same time, it individualizes the subject "by making it possible to measure gaps, to determine levels, to fix specialties, and to render the differences useful by fitting them one to another.[35]" (Gordon, 1999: 1)

Foucault widens the field of legality to include the huge array of disciplines and professions that go to deeming an act or a person criminal. The architect, for instance, of the prison, the psychiatrist that deems someone either able or unable to stand trial, the police officer that makes the initial arrest, the politician that votes on the piece of legislature, the social worker, the teacher, the judge and the member of the jury all contribute to our notion of what is a legal action and what is not. For Foucault, it is this network of enunciation that produces legal statements and objects such as statutes and instruments:

> We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the social-worker-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behaviour, his aptitudes, his achievements.[36](Foucault, 1991: 304)

The radical-conflict school in essence, suggests that criminal justice systems represent elite bias thus disempowering the already disempowered and perpetuating the status quo. Whilst it may seem apparent that the consensus-functionalist and the radical-conflict perspectives occupy diametrically opposite ends of the philosophical continuum in regard to criminal law, it is in fact possible for criminal justice policy to benefit from an elaborate consideration and appreciation of both accounts. Taking either viewpoint it remains the case that the criminal justice system is a conflict management system; either it manages conflict in an equitable manner for the betterment of society (consensus-functionalist) or it manages conflict to the advantage of the power elites (radical-conflict). The former advocates how things should be while the latter suggests the way things are. The latter position, therefore, can inform policy reform so as to navigate a path to the former but only if it is the aim of policy to reach that goal.

Attempts at reforms

Individual SSA countries have adopted different pathways to reforming their criminal justice systems. A few countries are beginning to explore the relevance of pre-colonial justice systems with a view to modifying them to suit the present reality. In a generalised sense, pre-colonial SSA had in place a set of complex and advanced legal institutions that best met the needs of African

[35] Gordon, Neve (1999), *Foucault's Subject: An Ontological Reading*, published in *Polity*, Vol. 31.
[36] Foucault, Michel (1991), *Discipline and Punish: The Birth of the Prison*, (London: Penguin)

populations. In some cases, this survived in the colonial period. Indeed, when considering the Arusha of Tanzania, Carlston et al (1968:332) assert that 'there is no process in Western society closely comparable to the dispute-settlement procedures utilised by the Arusha'. Traditional African legal systems were based around the resolution of disputes in such a way that community cohesion was restored, while individual needs were met:

> Such institutions and procedures were set out by Africans because they placed a great emphasis on peaceful resolution of disputes which was always aimed at restoring social harmony; while at the same time, upholding the principles of fairness, equity and justice as engraved in their customs and traditions … Emphasis was not on punishment, but on reconciliation and restoration of social harmony among the parties in conflict (Nwolise 2004:59–60).

For example, the restorative approaches in Uganda have been of two types: 'top-down' and based on Western models, and 'bottom-up', based on customary process and rooted in a popular justice system, the local council courts. Both have been extensively reviewed elsewhere[37]. A British colonial commentator, writing in 1939, made what is probably the earliest recorded reference to restorative justice practice in Uganda. While describing the indigenous (in this case, Baganda) concept of justice, it effectively summarises the aim of contemporary restorative approaches:

> If my goat is stolen, I must find the wrongdoer and bring him to the chief; my remedy is then either to get the goat back or to be compensated in money or kind so that I am restored to my original position. In other words, the native conception of law extended only to restitution. When the existing balance of things is upset by a wrongful act, the justice of the case demands, and the machinery of the law is available to effect, a restoration of the balance (Hone 1939:181).

In Africa, restorative process gained the highest profile through the work of the South African Truth and Reconciliation Commission (TRC), which sought 'transitional justice' following the end of apartheid. The TRC explicitly adopted a restorative approach, claiming to provide 'another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation' (Tutu 2000). The TRC used explicitly Christian language of forgiveness and reconciliation, but was widely criticised for the amnesty policy on which it was predicated. In the criminal justice arena in Africa some restorative initiatives have been taken, notably attempting to use elements of traditional practice (Bowd: 2008).

At the present, most SSA countries have resorted to passing Alternative Dispute Resolution (ADR) legislation to provide for informal resolution of disputes, using negotiation, arbitration (including customary) and mediation mechanisms. But most of them address issues of civil disputes. The

[37] See Simon Robins (2009) "Restorative Approaches to Criminal Justice in Africa", in *ISS* (2009) supra, pp. 57-79 and Nnamdi Aduba & Emily I Alemika (2009) "Bail and Criminal Justice Administration in Nigeria", ISS (2009), supra, pp. 85-105

criminal justice systems still rely on procedures of withdrawal and settlement out of court for minor offences.

Given that other presenters would address in some detail the specific experiences of some SSA countries, I limit my remarks to the Ghana context in relation to some contextual issues on the sub-themes.

Anti-corruption Trials

The penal codes of most SSA countries categorise crimes broadly as:

- against a person or property,
- against the state or economy,
- inchoate crimes of conspiracy, aiding and abetting.

The crimes that address corruption and corruption related issues is a long compendium, often changing their names and essence. The name of the crime is not very much the problem but its essential ingredients. Ghana is legendary in producing anti-corruption legislation. For instance:

- Rumour mongering was a crime directed against persons who baselessly accuse high public officials of corruption;
- Sabotage to the economy by persons who crossed into a neighbouring country to purchase toiletries and other confectionaries;
- Willfully, recklessly or negligently causing financial loss to the state

Trials under these crimes has been intensely political. Charges under these crimes are often trumped up against political opponents, critics of the government, persons who are perceived as political threats and, in some cases, to settle personal scores. By far the crime of 'Willfully, Recklessly or Negligently causing Financial loss to the State' is the most abused and immediately available tool for governments against their political opponents. A few examples in terms of some high-profile trials in Ghana underscore the point[38].

The most detailed piece of criminal justice legislation in Ghana is the *Office of the Special Prosecutor Act, 2017 (Act 959)*. The object of the office is to:

- Investigate and prosecute specific cases of alleged and suspected corruption and corruption-related offences;
- Recover proceeds of corruption and corruption related offences, and
- Take steps to prevent corruption[39].

The Office is to specifically investigate and prosecute corruption and corruption related offences under:

- Public Procurement Act, 2003 (Act 663);

[38] See *Tsatsu Tsikata v the Chief Justice & A-G;* 2001-2002] SCGLR 437; *Tsatsu Tsikata v A-G (No. 1)* [2001-2002] SCGLR 189 and *Tsatsu Tsikata v A-G (No. 2)* [2001-2002] SCGLR 620

[39] Section 2 of Act 959

- Criminal Offences Act, 1960 (Act 29), involving public officers, politically exposed persons and persons in the private sector involved in the commission of the crime
- Recover and manage the proceeds of corruption
- Disseminate information gathered in the course of investigation to competent authorities and other persons the Office consider appropriate
- Receive and investigate corruption cases from other persons, referrals from parliament, the Auditor-General, Commission for Human Rights and Administrative Justice (CHRAJ), Economic and Organised Crime Office and other public body[40].

Case Management

Following the judgment of the Supreme Court in *Republic v Eugene Baffoe-Bonnie and 4 Others* (Suit No. J1/06/2018, Judgment given on 7th June, 2018), the Chief Justice issued a *Practice Direction (Disclosures and Case Management in Criminal Proceedings)* for the resolution of criminal cases in criminal courts.

Paragraph 3 of the Practice direction states:

> Before a criminal matter is commenced in Court, the Prosecution shall file and serve on the Accused person or Counsel for the Accused person (if any) the Charge Sheet/Indictment and the facts of the Prosecution's case together with all other materials that require disclosure under paragraph 7 of this Direction.

Paragraph 7 provides that materials requiring disclosure by the Prosecution shall include the following:

- Copy of the Charge Sheet / Indictment.
- Copy of the Facts of the Prosecution's case.
- Copies of *Statements* made by the accused person before commencement of trial (such as *Caution Statement, Charge Statement, Statutory Statement as well as any other Statements* made by the accused person before trial commences).
- Copies of all *Witness Statements* made to the Police and other law enforcement or investigative bodies by persons who may or may not be called upon to testify for the Prosecution at the trial.
- Copies of any documents in possession of the Prosecution which are relevant to the case and which the Prosecution may or may not tender at the trial.
- Photographs of any real evidence (objects) in possession of the Prosecution which are relevant to the case and which the Prosecution may or may not tender at the trial, such as guns, cutlasses, knifes, etc.
- Copies of any other materials in possession of the Prosecution which are relevant to the case including audio, video and other electronic recordings as well as any unused materials which may assist the accused person in the preparation of his defense.
- Copies of any exculpatory evidence in possession of the Police and other law enforcement or investigative bodies (the Prosecution is under an obligation to inquire

[40] Section 3 of Act 959

> from the relevant law enforcement or investigative bodies the existence of such evidence, procure and preserve same for disclosure) (emphasis mine).

There is no clear distinction in the Direction between statements (caution, charge, statutory and other statements made by the accused) before the commencement of the trial and statements 'made to the police and other law enforcement and investigative bodies'. In the opinion of Alex Odonkor:

> […] under paragraph 12 of the direction a Police Prosecutor is expected to submit a witness statement. […] the Police Prosecutor has no training on how to prepare a witness statement with some wrongly assuming it is one and same as the one submitted by witnesses at the police station. This is different all together and must be prepared by the prosecutor himself based on the ingredients of the offence and what evidence he wants to lead the witness in to prove the case. This is supposed to build upon the one submitted at the investigative stage. That is why prosecutions in the past had not relied on witness statements submitted at the police station as part of the evidence unless an issue arises as to a substantial difference between what the witness is telling the court and what he/she had told the police. Without the proper training and orientation, substandard witness statements are going to be submitted which will tilt the scale of justice in favour of the accused[41].

This statement by Superintendent Odonkor of the Legal and Prosecutions Department of the Ghana Police Service is not only relevant to Police Prosecutors who are not Lawyers but to Lawyers as well. The Practice Direction on criminal matters and Order 38 of the High Court Civil Procedure (Amendment) Rules, 2014 (CI 87) in civil matters, can be challenging for many Lawyers still at the beginning of their 'learning-curve' in the preparation of such statements.

Ghana's 1992 Constitution in article 19, makes elaborate provision for fair trial as a fundamental human right. Of particular significance to disclosures in criminal proceedings is article 19 (g). The specific provision states that:

> […]
>
> (2) A person charged with a criminal offence shall—
>
> […]
>
> (g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution […].

[41] Odonkor, A. (2019) "The Chief Justice Practice Direction and Matters Arising", at *https://www.modernghana.com/news/907412*.

It is my humble view that the Chief Justice's Practice Direction in the Prosecution of criminal matters on disclosures, should be read in the context of article 19 of the Constitution generally and article 19 (2) (g) in particular.

Pre-trial Detention

Punishment- non-custodial and restorative justice

Restorative justice, as practiced in many African communities, is a conflict resolution paradigm that brings together the victims, offenders, and community members to address and resolve a crime or a dispute. It aims at restoration, reparation, reintegration, and community participation in tackling crime, disputes, and related problems that affect them[42].

Restoration takes many forms, such as compensation, reparation or apology, and helps mend broken relationships. This makes perfect sense because African peoples tend to live communally and abhorred anything that could strain relationships, disconnect an individual or family with the community, and paralyze their social relationships[43].

Restorative justice is not a new phenomenon because it used to be practiced in Africa long before the advent of the colonization of African territories by Western European powers. Its effectiveness in the adopted Western criminal justice system, however, is no longer as it used to be [44]. Restorative justice is gaining popularity again, however. Llwelyn and Howse (2002) state that it is a return to the old ways of resolving conflicts in many parts of the world. Other studies assert that the roots of restorative justice are deep in Africa, and indeed in many parts of the world, regardless of the term used to describe it[45] .

Indeed, in Tanzania, for example, restorative justice has been practiced for millennia. The Kinga of Southern Tanzania, for instance, resolved conflict amongst its members through restorative justice processes. Thus, whenever a conflict occurred either between family members or between families of a clan, the community concerned called for a meeting to reconcile the parties. Community members would sit in circles around the fire place, a kind of court setting known as *Lugono*, and then a complainant would narrate the incident or present their account of what happened and the defendant or defendants allowed responding to the accusations and defending him/herself or themselves (Ilomo, 2013). The reconciliation of the parties is sealed or solemnized with a sharing, from the same pot, of some alcohol, locally known as '*ukupelanila ulupelo*', and

42 Doolin, K. (2007). But What Does It Mean?: Seeking Definitional Clarification. Journal of Criminal Law, 71, 432.

43 Ladan, M. (2013). Towards Complementarity in African Conflict Management Mechanisms. Retrieved from Towards Complementarity in African Conflict Management Mechanisms (Traditional Methods of Dispute Resolution: Chinese and Nigerian Perspectives website: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356459

44 Wyk, D. L. a. L. v. (2016). The Perspectives of South African Legal Professional Son Restorative Justice: An Explorative Qualitative Study. 52(4).

45 Mancuso, S. (2014). African Law in Action. Journal of African Law, 58(3).

eating roasted meat, termed as *okukatelanila inyama*. The *okukatelanila inyama* process involved cutting a piece of roasted meat held by the disputants and each ate the piece followed by a blowing of special medicine into one's face known as '*ukupulilanila untuguva'* as a symbol of reconciliation (Ilomo, 2013).

Similarly, in Nigeria, where restorative justice has been practiced amongst many communities, Omale (2006) also addresses the importance of reconciliation and how it is solemnized:

> Councils of Elders to be sure that genuine reconciliation has been achieved after dispute mediation, both parties may be expected to eat from the same bowl, (drink palm wine, *burukutu* or local gin from the same cup and/or break and eat kola-nuts).

It was the wisdom of African communities that the social fabric of their people was soundly built on the truth, understanding the root causes of problems in the community, and reconciliation. Uncovering the truth about what happened and why, they understood, required the involvement of all members of the community in frank and open discussions of either a particular wrong, problem, conflict or a set of issues or conflicts. Thus, the African communities' mechanisms for handling conflicts allowed ordinary people to participate in and address or discuss disputes and crimes that affected them freely without interference from a centralized and far-removed authority of a State. By contrast, however, in post-independence African countries, State organs now handle conflicts and disputes through an adversarial and retributive process, and especially in criminal justice. While these foreign processes of justice are not invidious per se, they are prone to inordinate delays, especially in criminal trials, where procuring State witnesses is a serious challenge (Omale, 2006).

Ghana's legal system, like that of South Africa, Kenya, Uganda, and Nigeria, was also inherited from the British colonial powers. The people of the different ethnic communities that now form the State of Ghana had their ways of handling crime and conflicts in their communities before the coming of the colonialists. Their methods of handling conflicts were determined by their culture.

Quashingah explains that the legal system of any community is a result of their culture and political forces over a period of time and that there is no legal system that develops out of the unknown. In this context, the British common law that was exported and enforced on African communities such as in Ghana is a product of British and not African culture[46]. Despite the existence of the indigenous laws, the British applied their own laws and made it the dominant legal system.

Kwame states that the Ghanaian people, culturally, are not inclined to taking matters to the courts of law, especially matters that involve the State[47]. That partly explains why many Ghanaians responded positively to the National Reconciliation Commission (NRC), established to, among other things, 'help reconcile the people of Ghana by finding out the truth about past human rights

[46] Quashingah, K. (2008). The Historical Development of the Legal System of Ghana: An Example of the Co-existence of Two Systems of Law. *Fundamina, 14*(95).
[47] Ameh, R. K. (2006). Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commisssion *Canadian Journal of Law and Society, 21*.

abuses'[48]), because its proceedings were not like those in a court of law. However, Dua states that Ghanaians believe that imprisonment is not the best option to offenders in Ghana because the prison services face many challenges. Under present conditions and challenges, Ghana's prisons can hardly contribute towards changing the behaviour of offenders or provide them with the necessary training to equip them with the knowledge and skills that will enable them to make positive contribution to their country upon release from prison. Ghanaians believe that community services should be prioritized over imprisonment especially for minor offenses and for first time offenders, women and the aged in Ghana[49] .

The Commission helped a great deal in healing victims of crimes perpetrated under the Rawlings military junta and beyond, a feat that would not have been achieved through normal court proceedings. Ghana opted for an NRC, having seen the success of South Africa's TRC. The history of Ghana, however, differs a great deal with that of South Africa and Uganda in a sense that South Africa went through apartheid, Uganda experienced human rights violations under the leadership of Iddi Amin and Milton Obote between1962 to 1986, while Ghana went through civil wars perpetrated mostly by want of political powers which caused grave violations of human rights, hence there was a need of ensuring that Ghanaians unity is brought back through reconciliation so that rule of law, democracy and human rights could as well be observed in Ghana.

One can argue that the efforts of bringing peace into different countries might be named differently, but the aim remains the same that is finding out the truth, healing the effects of human rights violations and in the end building a nation for the betterment of each individual in particular and a community as a whole. Kwame argues that reconciliation, healing, and making offenders accountable is the best option for the Ghanaians than other options and that the National Reconciliation Commission cannot be a panacea of everything but is the best option compared to the adversarial criminal prosecutions[50] .

Ghana used to have the *Kima* system of dispute resolution before the advent of colonialism whereby whenever community members had conflicts, the matter had to be reported to either the clan leader, the subsection leader or the chief. Having summoned the parties to the conflict, the chance was given for each to tell their part of story and thereafter a decision was made by the *Kima*. The decision was meant to unite the disputants and not to cause more enmity; it was imperative for the leaders to ensure that the offender pays compensation and ask for forgiveness. Once that was done, then the parties had to eat in the same bowl and where necessary danced together as a sign of total forgiveness and unity. This culture of eating or drinking something in the course of resolving conflict seem to be a common feature in the countries discussed in this paper and demonstrate that Africans wanted a happy ending to conflict resolution. Eating or drinking from the same bowl and dancing together after the resolution of conflict or dispute are powerful symbols that shows that African systems and mechanism were aimed at restoration of communal relations.

[48] Attafuah, K. (Ed.). (2004). An Overview of Ghana's National Reconciliation Commission and its Relationship with the Court: Springer.
[49] Dua, K. O. (2015). Prison Without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis, Ashanti Region Ghana. *International Journal of Social Science Studies, 3*(6).
[50] Ameh, R. K. (2006). Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commisssion *Canadian Journal of Law and Society, 21*.

From the brief review of the relevant literature, one can conclude that the Western legal system has to a great extent eroded the African traditional ways of resolving conflicts, such as restorative justice approaches or processes. Daly, however, cautions that confusions should be avoided on whether RJ means the traditional mechanisms of handling conflicts or that RJ should replace the conventional justice system. She believes that RJ is a contemporary justice mechanism that can work well if properly defined. She adds that the existing confusion of retributive justice vs restorative justice should come to an end, if RJ is to succeed because retribution is one of the aims of the conventional justice system and is not in itself a system and RJ is not a replacement of the conventional justice system only a mechanism to be used when parties agree to follow that path[51]

However, truth need be told, some African indigenous conflict mechanism were punitive and against human rights, the best part with the practices was the involvement of all parties and insistence on reparation, compensation, forgiveness and restoration of peace and harmony for communal development that is recently missing in the conventional justice mechanism. Its use has been revived in most of the developed countries and few African countries. For fairness to prevail among African community members this paper proposes that RJ should complement the conventional system in areas where it has failed as explained in the following section.

Reforms of African criminal justice systems need to focus on a number of key issues:

- A commitment to develop a justice system that seeks to deliver an efficient and equitable form of justice rather than one which maintains position of the power elites;
- Reforms need to reflect the needs of society of which they are set down to govern and therefore should engage mechanisms to enable that process to take place i.e., through community consultation;
- The need to incorporate restorative justice and focus on the communal effects of the process, both in terms of the negative effects associated with retributive systems and positive effects associated with restorative systems;
- The need to develop the technical ability of the criminal justice system to dispense justice in an efficient and equitable manner when needed; and
- The reforms should be linked to the social reform processes in other to synergize initiatives and reduce the patterns of structural violence that exacerbate levels of violence.

Conclusion

African governments subscribe to the normative standards of criminal justice articulated by the UN, the AU and other regional organisations, and these are enshrined in their constitutions[52]. However, in practice, these standards are not met for several reasons: authoritarian systems of government; ineffective procedures; underequipped, unaccountable, inaccessible and irresponsive law enforcement and justice institutions; and a general climate of helplessness among the population in relation to criminal justice officials. This sense of powerlessness arises partly because of powerlessness and poverty of the citizens of SSA countries.

[51] Daly, K. (2016). What is Restorative Justice? Fresh Answers to a Vexed Question. Victims and Offenders, An International Journal of Evidence-based Research, Policy, and *Practice*, *11*(1).
[52] See Article 19 of the Constitution of Ghana, 1882

These articles, particularly in the African Human Rights Charter and National Constitutions most SSA countries, reveal the gap between the normative standards of criminal justice, as enshrined in the constitutions, and the quality of criminal justice administration. This has led to the demand for alternative or supplementary systems of criminal justice administration. While the envisaged supplementary systems – such as alternative dispute resolution through local institutions and properly supervised customary policing and justice systems – are desirable, they cannot replace the formal state criminal justice administration system because of the increasing complexity of society and social relations among citizens. African countries therefore need to find a new system of governing the criminal justice system in order to deliver justice to the citizens.

There are also inequities found in criminal justice systems across the continent that have made access to justice elusive for the majority of Africans. Technical incompetence, political manipulation, lack of knowledge of the administration of bail and a general failure to respect the rule of law affect the application of bail to accused offenders. Access to criminal justice within the legal system is mediated by too many factors that tend to favour those wield various forms of power, those in the correct political camps and, at times, those from the ethnic group currently enjoying the benefits of incumbent governments.

A major stumbling block in administering impartial criminal justice, concerns the different (and multiple) institutions administering different kinds of justice in the same country, as in Nigeria and the Gambia, where Islamic law is applied in one part of the country (the north in the case of Nigeria) and the standard international formal justice system runs in the rest of the country. This exacerbates the challenges of coordinating numerous institutions that are often incompatible, and that can sometimes follow incongruous principles. This use of varied processes by the fragmented, independent, though complementary components of the criminal justice system, across space and time, results in differing qualities of justice. The criminal justice system in Africa thus struggles to dispense criminal justice in accordance with due process or rule of law and a large part of the problem is in the failure to fulfill both the substantive and procedural pre-conditions.