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African Penal Systems, by Alan Milner

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AFRICAN PENAL SYSTEMS. Edited by Alan Milner, New York, London: Praeger, 1969. Pp. xiii, 501. \$12.00.

As one of the few books devoted to criminal law, penal problems and administration of criminal justice in modern Africa, Professor Alan Milner's *African Penal Systems* is important for students of both the law and criminology of Africa. The book is introduced by the editor's excellent essay on the relationship between crime and criminal law, and national development. The essay shows notable restraint by not leaping to conclusions about causal relationships between national development per se and an apparent increase in urban crime. This restraint enables the editor to generalize fruitfully in a clear concise manner without overreaching the evidence presented in the subsequent essays.

Part One, "Penal Systems in Africa," is composed of nine essays on the penal systems of individual or historically related countries. These works are basically descriptive and contain only general recommendations for reform. Much of their significance and value lies in the inclusion of recent statistics on African crime trends. Part Two, "Special Problems," consists of six longer essays, each of which investigates a functional aspect of either a particular penal system or a related group of systems. A reading of the second part tempts one to generalize about the entire continent, but one is repeatedly warned throughout about the imprecision of the data. The diversity of peoples, institutional conditions, legal heritage and extent of innovation and progress toward reform make this imprecision unavoidable.

The contributors to *African Penal Systems* have backgrounds in sociology, criminology, psychiatry, with law in the majority. Regrettably, only two indigenous contributors from sub-Saharan Africa and two from Egypt are included, probably for valid reasons of time, distance and coordination. This omission raises the critical question of whether certain insights into African behavior and thought can be grasped by non-Africans, even those expatriates with long experience in Africa. Any explanation of criminal behavior invariably involves some attempt to enter the psyches of potential criminals to ascertain their motivations and intentions for committing certain acts under particular conditions. Twelve of the sixteen contributors write from backgrounds in the same cultures that produced those European systems of criminal law and penal practices imposed on Africa to serve European objectives. These imposed legal systems and their residue of statutes, codes, procedures, institutional

practices and expatriate administrative and penal officers remain a major influence on African penal systems in various stages of evolution and stagnation. These imposed systems are probably not the legal influences which most African governments wish permanently to predominate in their countries, at least not in their present residual forms.¹ Therefore, the present inability or unwillingness of many governments to achieve significant modifications of or innovations in their legal and penal systems should not necessarily be interpreted as substantive approval of these systems, but rather as inertia in the face of an unresolved dilemma of competing priorities.

A danger in a book about Africa (as opposed to an African book), especially one about such value-laden fields as criminal law and penal goals and procedures, is that both the basis for evaluating progress and the ultimate definition of a "good" penal system will be drawn primarily from the lucid and well-documented Western legal tradition of civil, Roman-Dutch or common law but attributed to those persons and institutions responsible for such decisions in Africa. The more accurate analysis must either be wrung painfully from the fragments of rushed considerations by overworked, short-staffed African ministries (fragments which, in fairness, are only infrequently available to scholars) or from the thoughts of equally burdened cabinet ministers and presidents. Ideally, such analysis should be done by the actors themselves. This danger is readily apparent in two essays, *Portuguese Africa*² and *Penal Policy and Under-Development in French Africa*.³ However, the danger is minimized in this book by the high standard of scholarship and the full usage of available written and oral African sources to furnish supporting evidence.

The essays in the first part are basically quite good, although uneven in quality. At the "wrong" end of the scale is *Portuguese Africa*,⁴ a general summary composed almost entirely of a recitation of criminal code provisions currently in force in Portugal and in the African territories under its domination. The essay contains no reference to specific conditions of development in those territories and no evaluation of the institutional adequacy of local penal systems. It was apparently written to present the Portuguese government in the best possible light;

1. See Bentsi-Enchill, *African Law: Development and Reform*, in *AFRICA IN THE SEVENTIES AND EIGHTIES* 140-45 (F. Arkhurst ed. 1970) [hereinafter cited as Bentsi-Enchill].

2. *AFRICAN PENAL SYSTEMS* 213 (A. Milner ed. 1969) [hereinafter cited as *AFRICAN PENAL SYSTEMS*].

3. *Id.* at 365.

4. *Id.* at 213.

if that was not its purpose, it is certainly its effect. At the brighter end of the scale is *Ghana*⁵ by Professor Robert Seidman and J. D. Abaka Eyison, a penetrating discussion of the penal system and its relevance to Ghanaian economic conditions and developmental imperatives. This work includes an excellent institutional examination assessing the adequacy of postsentencing procedures, a discussion of new directions for crime prevention (such as the Workers' Brigade); a useful discussion of the doctrines of special and general deterrence and an attempt to identify some consistent philosophy in judicial sentencing practice. The essay establishes that the penal system in philosophy and practice has not responded to Ghana as a developing country, since that system is still based on the common law of England. *Ghana* trenchantly concludes that in practice "the objective of reclaiming the criminal has largely been abandoned."⁶

Most of the essays open with a brief introduction which relates the penal system to economic conditions and developmental needs in the country under discussion. There follows a summary of the pertinent penal legislation and code provisions, usually illuminated by some discussion of their history from the colonial period. The objectives of the penal system are isolated to the extent possible, and an assessment of the country's penal institutions (or lack thereof) is made. Each essay offers a discussion of the types of punishment authorized under a particular system; the better essays relate these measures to the objectives previously isolated by placing them in the context of the country's social and economic conditions and assessing their adequacy to meet the agreed goals, while the others only describe the available punitive measures. Each article also contains a discussion of the laws and institutions available for dealing with juvenile offenders.

As a group, the initial essays convey a picture of general institutional desolation in the face of an urgent need for new prisons, psychiatrists, probation officers, classifying procedures and trained staff. Also noted are areas of social correction in which some African states are either attempting to develop new penal methods not accepted in Western countries or are reaching back to customary traditions like corporal punishment and forfeiture to modify them for present use.

Part Two of the book presents inclusive essays on sentencing patterns, the experience of imprisonment, psychiatry and the criminal offender, penal policy and underdevelopment, capital punishment in South Africa

5. *Id.* at 59.

6. *Id.* at 83.

and a prison system in historical perspective. Perhaps the most useful of these is *The East African Experience of Imprisonment*⁷ by Professor Ralph E. S. Tanner. By examining the thoughts of a group of prisoners, Professor Tanner tests the stereotype: “[Prison] means nothing to [Africans]. It’s a hotel. Good food, plenty of sleep and not too much hard work.”⁸ The attitude underlying this stereotype is that imprisonment is virtually useless as a tool for social correction because prison conditions are materially better than the conditions Africans face in their villages or in urban areas. Those with this attitude reason that Africans will seek to be convicted, or at least will not be deterred from crime, in order to live an idle life at no cost to themselves. This attitude remains endemic among many white and expatriate residents, especially in Southern Africa. The essay conclusively demonstrates that material conditions do not make prison more attractive to Africans. Instead, it is the sheer denial of freedom that constitutes the punishment, no matter how it is wrapped. The essay’s validity is enhanced by its reliance on unedited statements written by prisoners about their lives. Unfortunately, this much needed demolition of a corrosive myth appears in what is essentially a specialized book and, therefore, is not likely to be read by the general public. It is especially unfortunate that the essay will probably not be read by those neocolonials resident in Southern Africa who proclaim such prejudices on their verandas over their gin-and-tonics as inside wisdom—“to understand the ‘special problem’ that we have here.”

The same essay establishes the fact that relatively little rehabilitation therapy takes place in African prisons, primarily because trained staff members are few and money is lacking. This situation is vividly demonstrated by the succeeding excellent essay *Psychiatry and the Criminal Offender in Africa*,⁹ authored by the editor and Tolani Asuni. This latter essay is notable for its lucid discussion of the deficiencies of the still extant M’Naghten rule of criminal insanity. Also valuable is its concluding section, which incisively discusses judicial psychiatric procedures in the context of African development and gives clear recommendations for remedies and reform.

Appropriately, the book ends with an historical essay by Professor Seidman which traces the prison system in Ghana from its early colonial origins to its present frustrations.¹⁰ This essay is an excellent chrono-

7. *Id.* at 293.

8. *Id.* at 295.

9. *Id.* at 317.

10. Seidman, *The Ghana Prison System: an Historical Perspective*, in *id.* at 429.

logical, institutional analysis, not lacking in humor. It is especially valuable since it demonstrates the impact that the imposed colonial system of criminal penalties has had upon the indigenous concepts of criminal responsibility in Ashanti customary law.

African Penal Systems is, in sum, a most competent and interesting collection. Yet, as recognized by the editor in his introductory essay, it represents only a beginning in the needed discussion of roles that are and might be played by penal systems in African and Pan-African contexts. The attempt to define these roles presents abstract issues which are probably unanswerable at the moment, but there are at least two subsidiary questions which must be met immediately.

The first concerns the relationship of a country's penal system to its developmental imperatives in the context of decision making within that particular government. The book emphasizes that expenditures for the improvement of penal systems are at the bottom of the list of developmental priorities in any given country. Indeed, money is not being spent; but this fact should be the catalyst for additional empirical inquiry into the basis of the decision placing penal improvement at any particular point in the list of priorities.

Does the low priority of penal system improvement represent a considered conclusion of particular African governments that the system is presently adequate for the country's needs? Is the low priority recommended by a Ministry of Justice influenced by excolonial (or otherwise foreign) advisers and/or conceptions of law? How important are the personal predilections of a president, minister or influential legislator who feels that prison must remain harsh to deter the apparent rise in urban crime, with an accompanying ease of criminal conviction? Is the low priority the result of an obscure official in some finance ministry recommending a huge slash in the penal system budget for reasons totally private or non-existent? Does the low priority reflect a fact that no Western foreign aid is forthcoming for penal reform (as opposed to police training)? Whatever the source of the low priority, a first task for those concerned with African penal reform is to ascertain both the factors and the criteria determining this priority and the level of government at which priority decisions are usually made. Professor Milner's introduction raises this general issue, but it is not pursued in the subsequent essays.

A second task is to inquire how the penal system may be upgraded in the context of "Africanization" and the government's other priorities.

Penal Policy and Under-development in French Africa,¹¹ an essay by Professor Jacqueline Costa, would appear to focus on this question. Regrettably, it does not. "Under-development" is defined by the author as a series of negative, even pejorative patterns of behavior with the clear implication that such behavior (*e.g.*, narcotics addiction as a "folkway of underdevelopment")¹² is a distinguishing feature of under-development. This implication is simply untrue; it fails to explain, for example, the enormous endemic drug problem in the United States—presumably a "developed" country. To proceed in this manner runs the risk of divorcing the penal policies consequent to those behavior patterns from their social context. For instance, one cannot usefully discuss penal sanctions for idleness without discussing the ability of the economy to provide employment, for without readily available employment such sanctions are either meaningless or indicate a retributive attitude toward beggars.

Professor Costa's essay contains other deficiencies, but the one that deserves special mention here is the general assumption that custom must be eradicated if progress from underdevelopment is to be made. The question of the proper relationship among the penal system, national development and custom is not framed by many African governments, especially in Eastern and Southern Africa, in terms of an assumption that custom must be eradicated. Rather, that is the very question to be decided! Although certain customary practices may be inimical to national development and may have to be tempered or abolished by the use, *inter alia*, of penal sanctions, that same body of custom remains the cement binding the nation together, especially in the rural areas, and during periods of great ferment, in the urban areas. The question, therefore, becomes how to modify custom and customary law to make it consonant with development, while leaving it sufficiently intact to avoid too disruptive a break with the past. This modification must lay a strong foundation for a future way of life that is both modern and African.¹³ To assume the eradication of custom implies that the end goal of the state is some form of Western European or American "modernism." Although conflict surrounds this issue, statements of African government officials demonstrate a desire instead to find an African way.¹⁴ Further, general

11. AFRICAN PENAL SYSTEMS, *supra* note 2, at 365.

12. *Id.* at 376, 380.

13. See T. VERHELST, SAFEGUARDING AFRICAN CUSTOMARY LAW: JUDICIAL AND LEGISLATIVE PROCESS FOR ITS ADAPTATION AND INTEGRATION (UCLA African Studies Center Occasional Paper No. 7, 1968).

14. See, *e.g.*, H. BIENEN, TANZANIA: PARTY TRANSFORMATION AND ECONOMIC

African acceptance of the probable future cultural, economic and political consequences of such modernism is unlikely.

The second subsidiary question is crucial to any inquiry concerning the functions and objectives of any penal system—the relationship of prosecutions and imprisonment to the political stability of the country and the political objectives of the government. In most African countries the pluralistic institutions usually attributable to a modern state are few. The government, including the network of the ruling political party, is generally the most visible, the most coordinated and the most powerful institution in the country. One outcome of the government's overarching position is that virtually all activities having public impact are politicized; they early became of power, wealth or other value significance to government and party officials. Underlying this phenomenon is the fact that the government inevitably assumes active responsibility for directing the development of the country. Just as inevitably, this responsibility for direction leads to some degree of governmental examination of activities across the entire spectrum of human behavior. In an African country with scarce resources, a shortage of trained manpower and monumental problems to be solved yesterday, there is very little that does not relate to building the nation.

This governmental concern is often intense, since ministers, presidents and party officials frequently have strong ideas on the conduct of a wide variety of activities. They actively seek to determine the quality of life in their country and, accordingly, attempt to use the apparatus of government to enforce their views. The penal system can be a primary tool in this respect. In addition, the real and imaginary threats to its existence that an African government may perceive are legion. Therefore, the use of the penal system to uphold political objectives—the decision making as to who is or is not prosecuted or treated leniently—is a legitimate and pressing consideration in any attempt to understand the role of an African penal system in the social process.

Regrettably, although somewhat understandably, this question is only implicitly posed in the introduction to *African Penal Systems*, but nowhere illuminated. The omission is regrettable because important areas of concern which shape local attitudes toward the criminal law and opinions on the basic fairness of the government remain obscured. It is understandable because such subjects are most sensitive to the governments concerned and their discussion may dry up future entrees for re-

search. Nevertheless, these obstacles to scholarship on Africa should not be allowed to obscure significant questions whose absence distorts that scholarship which is published by implying an overly antiseptic relationship between an African government and its penal system.

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DEVELOPMENT 203 *et seq.*, 213 *et seq.*, 356-58 (1970); Bentsi-Enchill, *supra* note 1, at 134-35.

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