

TRADITIONAL CRIMINAL JUSTICE AND HUMAN RIGHTS: REFLECTIONS ON A DECISION BY THE BENIN CONSTITUTIONAL COURT

By Gilles Badet*, October 2005

A matter decided by the Constitutional Court of Benin on 19 February 2002¹ provides an opportunity to question the compliance of traditional criminal justice with the human rights provisions set out in the Constitution, as well as those found in international treaties, declarations and other norms.

On the 8th December 1998, Mr Boris Gbaguidi brought a claim to the Constitutional Court against the royal authority of Dassa-Zoumè for “physical abuse and violation of bodily integrity”.² The applicant explained, “for any crime or offence committed, it is the King and his court who decide the fate of the culprit. For example, in Dassa Zoumè, when a citizen steals something, King Egbakotan II instructs his associates to detain them. They are then taken to the royal palace and there subjected to humiliating physical abuse shamefully administered for the most part by bandits and delinquents; the *va-nu-pieds* of Dassa-Zoumè.” The claimant continued, “the same happens when a citizen is guilty of rape, incest or has denied the paternity of a child. There is a police force brigade at Dassa-Zoumè, as well as a court of first instance at Abomey. In spite of this, it is the King who arbitrarily decides what treatment to inflict on those suspected of an offence”.

Apprised of the petition and in the presence of both parties, the Constitutional Court issued investigative measures against the “King of the Dassa”. The King responded that any perpetrator of acts prohibited by tradition and *Idaasha* custom, committed on Dassa-Zoumè soil, “who is found or identified by any appropriate means,” is then “taken to the royal palace where he is immediately tied up and is then subjected to corporal punishment by way of whipping”. The King added, “a crime left unpunished always has sad and regrettable circumstances” such as “incurable disease, death, madness, disappearances”. On this basis, the King concluded that “Mr Gbaguidi is a misguided applicant in considering such physical abuse a breach of human rights;” the King justified his actions as based on the religious power he can claim as King from the *Oro Chiche* tradition.

Presented with these facts as reported by the applicant and confirmed by the King, the Constitutional Court gave its opinion on several points that it is relevant to set out. In a state that respects the rule of law, criminal justice is delivered in the name of the state. In contrast, civil law in the wider sense (family law to some extent, as well as private or state-owned property disputes, commercial and labour relations) may be “privatised”. Commercial arbitration is evidence of this, as well as civil law itself (family and private property cases). This “privatisation” (the intervention of non-state norms or actors) may manifest itself either in the jurisdictions competent to hear certain cases, or in the norms applicable by those jurisdictions. It is around these two points that it is worth making several observations relating to the judgment handed down by the judge of the Benin Constitutional Court.

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¹ DCC 02-014, Constitutional Court of Benin

² It is important to note that, under Article 117 of the Benin Constitution of 11 December 1990, the Constitutional Court, as well as being responsible for the supervision of the constitutionality of laws and regulatory acts, also has jurisdiction to hear allegations of violations of human rights which can be brought by any citizen whether or not a direct victim of the alleged violation.

I - Legal pluralism, official criminal law, and local and traditional criminal law

Legal pluralism

The law applicable in present-day Benin is characterised by legal dualism; the conjunction of written law (modern law), and of customary law (traditional law).³

Written law in Benin comprises, in part, French law introduced through colonisation and officially transposed into Benin law through colonial texts and the first constitutions of independent Benin; and, in other part, texts adopted after colonisation by the state, which modified, repealed or added to the original colonial law.

Traditional law is composed of the sum of traditions of the peoples. After having in vain tried to assert a policy which rejected the value of the legal system existing before their arrival, the French colonisers decided to recognise some legal value in local customs, but with limits, both in terms of the subject matter and persons subject to these customs. Those areas of law where some value was attributed to local custom, were essentially family law in a broad sense (marriage, divorce, succession, inheritance, marriage settlements...), and in the law of property, notably real property.

Little changed with independence in 1960. The situation remained static for some time with regard to land and until recently, family law. However, law No. 2002-07 of 24 August 2004, and its Individual and Family Code, finally standardised family law by combining colonial and customary law into one single text.

For example, the act by a groom's family of giving possessions (constituting a dowry) to a bride's family was, under customary law, equivalent to a marriage ceremony. The tradition was meant to symbolise the uniting of two families but had come to be exploited by the brides' families, who were demanding such unreasonable dowries that the inability to meet such demands was amounting to an obstacle to matrimonial freedom. Without prohibiting the custom, article 142 of the Code simply sets out that "the dowry is of a symbolic character". Such drafting is indicative of the concern to preserve traditional values, without sacrificing modern necessity. The new code suppresses the distinction between Beninois with modern civil status (those who chose to be subject to modern law) and those of traditional civil status (the majority who were subject to traditional law). It is relevant to point out that, in theory, the two legal systems, modern and traditional, are of equal importance, each with its own distinguishing features and both capable of being applied in the low and high courts.

Official criminal law and local traditional criminal law

From colonisation to date, formal criminal law has remained unaffected by juridical dualism. Neither the colonial state nor independent Benin has ever conceded an official place to local criminal law customs. Two reasons justify such an approach.

Firstly, local penal customs vary enormously across the nation. The territorial application of criminal law applied by (non-official) local traditional penal law bodies is such that these bodies do not look to the provenance of a person who has committed an offence under their local law. Whatever the origin or ethnicity of the person, the fact that the offence has been committed on the local territory is sufficient, in the eyes of the traditional local penal bodies, to attract a criminal sanction according to the local customs. Yet, although all citizens are free to settle in any part of the nation, they tend to see themselves as subject only to the penal customs of their locality. It is evident that for a relatively new state, such a disjointed approach is dangerous for national unity.

³ Ahonagnon Noël GBAGUIDI, Droit applicable et application du droit en République du Benin, in *Law and Information Bulletin of the Supreme Court of Benin*, No 1, 1997, p.12

In the case submitted to the Benin Constitutional Court, the plaintiff, Mr Gbaguidi, was not a native of Dassa and brought the action precisely because he did not accept that traditional penal rules of one town or village, and of an ethnic group different from his own, should apply to him. If the individual to whom the traditional and local criminal law of Dassa was being applied was of the *idaasha* tradition, the claim would have been more surprising.

The administration of traditional penal justice does not yet seem ready to disappear, neither at Dassa nor in other localities throughout the country. The state only became aware that the royal court of Dassa was administering traditional criminal justice because a “foreign” element in the town saw a penal rule being applied that he did not recognise as they were not state rules; and, more significantly perhaps, because they were not the traditional criminal justice rules of his own native town or village.

The general situation prevailing in Benin is that people from the same ethnic groups, especially when they live in a rural area, continue to be governed by traditional criminal rules without too much complaint and without any particular concern on the part of the state. This situation should constitute an appeal to African jurists to reflect on the endogenous character of the legislation in place.

Due to the risks that different rules of criminal justice for each town or village pose to national unity and to the keeping of the peace, it is preferable that the state, given its comprehensive power and potential to “unify diversity,” hold responsibility for drafting and enforcing the rules of criminal justice. The threat to national unity is tangible when one recognises that the traditional criminal rules of each town or village are imbued with a strong religious and mystic dimension particular to that locality. It is sufficient to set out here two decisions of the Constitutional Court to understand these threats, and by consequence the increase in certain forms of religious intolerance in Benin.

In the first case, decided on the 6 May 1997, Mr Adognon, head of the Allada regional office for the organisation and external relations of the church of the *Union Renaissance d’Homme en Christ* (URHC), lodged a claim for breach of fundamental rights. He stated in his petition that those in charge of the *Vaudoun* cult, supported by delegates (district or village chiefs) of the sub-prefecture of Zê, violently prevented Christians from the URHC carrying out their farm work on *Dantokpa* market day and invoked the *Vaudoun* tradition as justification for this behaviour. He maintains that the commander of the Zê police brigade supported the delegates and traditional chiefs in their demands that the Christians suspend all agricultural work on *Dantokpa* market days on pain of torture, beatings or other violence.

The Constitutional Court, in response to this claim, did not fail to highlight the secular nature of the state as well as its protection of freedom of religion. The Court found that the behaviour of the traditional chiefs and of the commander of the Zê police brigade was contrary to the Constitution since no religious or philosophical community has the right to impose its religious beliefs and practices on others.

Religious intolerance in Benin does not only take the form of traditional religions opposing “imported” religions. Another decision of the Constitutional Court (DCC 97/039 of 7 July, 1997) illustrates a case of intolerance shown by the followers of one traditional religion against an individual follower of another. The shrine Mr Gilbert Egbo had built in his home and dedicated to his faith was destroyed by members of the royal court of Pobè on the grounds that “no faith other than *Ohoundo*, the regional faith” should be worshipped in the region. Mr Egbo’s shrine was destroyed following orders given by the King of Pobè to a group of individuals to punish *Fon* and *Adja* citizens, allegedly followers of the wrong faith. Here the Constitutional Court held that there had been a breach of the freedom of religion as set out in Article 23 of the Constitution of Benin.

Clearly, if every village were authorised to apply its own traditional penal norms and, in particular, if these norms were applied indiscriminately to every resident of a village without reference to their

faith or ethnic origin, not only would the maintenance of peace and the national unity of Benin be at threat but freedom of movement, the prohibition on cruel, inhuman and degrading treatment, and religious liberty would also all be in jeopardy.

Secondly, in order to avoid establishing a criminal justice system which is completely out of step with traditional village life, nothing is stopping the national authorities from incorporating elements of local traditional criminal law into the national and official criminal code (as has already been done in the area of individual and family law) , provided that fundamental human rights principles are respected. This latter stipulation is important in order to avoid arbitrary application of the law.

By way of example, law No. 87-011 of 21 September 1987, amending Article 264 (new) of the criminal code, outlaws certain traditional practices. Article 1 of this text incriminates “whosoever engages or participates in any practice attempting to disturb the rainfall cycle” as well as “whosoever engages or participates in a transaction which has as its object the removal or transfer or human organs or bones”. Whilst these allegations may seem difficult to prove, particularly the offence relating to disturbing the weather cycle, they are not the most controversial provisions. The same text incriminates “whosoever engages or participates in sorcery, magic or charlatanism or any similar practice, liable to breach the peace or harm persons or their property.” Beyond the difficulties of proving such offences, and despite the presumed good faith of the legislator, it is difficult not to be concerned about a criminal code which incriminates “similar practices”. Although such offences aim to take the realities of local life into consideration in official criminal legislation, they carry with them the risk of arbitrariness and a weakening of respect for the legality of offences.

II - Monopoly of the state over criminal justice and bodies applying local and traditional criminal law

When constituting the official judicial system, the Beninois legislators tried to take concerns linked to a person’s occupation, profession or social position into consideration, and hence in some cases authorised the application of customary law by tribunals. With regard to the professions, shopkeepers, for example, have always had the option of excluding the jurisdiction of state judges from their claims and to turn to arbitrators or private bodies to resolve their conflicts, resorting to equity if so authorised.⁴ Litigation arising between employees and employers in the private sector is subject to “social courts” which, as well as having a judge, also have an employee and employer representative in their composition.⁵

The application of traditional customs and rules in state courts as well as the participation of elders and persons knowledgeable about these customs is found at two levels. First, law No 2001-37 of 27 August 2002, relating to the organisation of the judicial system in Benin provides for the creation of arbitration tribunals in each of the 74 ordinary districts and in each borough of the three districts with special status. These tribunals, to which the submission of a case is purely voluntary, are made up of notables, retired civil servants, or citizens of good moral standing and who have the confidence of the people.⁶ Not being professional magistrates but rather persons closer in understanding to their people, their role is to try to reconcile the parties using their good offices in order to avoid the pursuing of a contentious route to settle their dispute. In order to arrive at a settlement, the arbitration tribunal may hear “as well as the parties and their witnesses, any person with a recognised knowledge of the customs of the parties”.⁷ One can therefore note an effort to reconcile local justice, especially that of rural areas, through applicable norms and those charged with their application. But aside from the

⁴ See the Uniform Act of OHADA on Arbitration.

⁵ See Article 242 of law No 98-003 of 27 January 1998 on the Labour Law in the Republic of Benin and article 56 of law No 2001-37 of 27 August 2002 relating to the organisation of the judiciary in the Republic of Benin.

⁶ Article 22 of law No 2001-37 of 27 August 2002 relating to the organisation of the judiciary in the Republic of Benin..

⁷ Article 28, *ibid.*

fact that the tribunals can be bypassed as their jurisdiction is not compulsory, these tribunals have a limited competence. Notably excluded from their competence are criminal law, modern civil law, labour law and personal status law.⁸

Secondly, courts of first instance and courts of appeal take custom into account by using notables with knowledge of these customs. Both in the courts of first instance, which constitute the first degree of jurisdiction and in the courts of appeal, which constitute the second degree of jurisdiction, a traditional chamber has been created. In both types of court, where a judgment is to be made on a matter of traditional law, the magistrate, professional judge or civil servant takes on an additional two advisers.⁹ These advisers are, as in the arbitration tribunals, persons of standing. They must know the customs of the parties as their role is to provide assistance to the professional magistrate who must make his decision based on the customs of the parties. Persons of “traditional civil status” (in spite of the repeal of this status by the Individual and Family Code) will continue, by virtue of certain transitional provisions, to go before these traditional chambers contained within the courts of first instance in order to see their customs applied. Cases concerning non-registered land will also be governed by customary rules applied by these traditional chambers. On appeal, it will be the traditional chambers within the courts of appeal who will continue to hear these cases.

It is therefore clear that the Beninois judicial system does not ignore traditional rules or those who know them; but this inclusion of traditional rules and traditional “judges” does not extend to criminal law.

Here it is the state that has a monopoly over justice. Criminal sanctions amounting to imprisonment constitute a significant restriction of the right to liberty and security of the individual. Only a decision made in the name of the state may permit such a restriction to a fundamental right. The monopoly of the state over justice in general, and over criminal justice in particular, is established by virtue of Articles 125 and 126 of the Benin Constitution:

“Judicial powers are independent from legislative powers and from executive powers. They are exercised by the Supreme Court, the Courts and Tribunals created in accordance with the present Constitution” ; and,

“Justice is rendered in the name of the people of Benin. Judges are only subject, in the exercise of their functions, to the authority of the law”.

In the case described at the beginning of this paper, the Constitutional Court found no difficulty in referring to, as appropriate, these two constitutional provisions. Its analysis was carried out at the level of these legislative norms and it considered:

Law No 90-003 of 15 May 1990 reapplying Law no 064-28 of 9 December 1964 relating to the organisation of the judicial system states at Article 2: “Without prejudice to the constitutional and legal provisions relating to the Supreme Court, justice is rendered by the arbitration Tribunals, the Courts of First Instance, a Court of Appeal and a Court of Assizes.”

After such an analysis, the Court found no difficulty in finding:

“Royalty is not a republican institution; neither the Constitution nor the law gives competence to royal power to administer justice”.

The fact then that, in this case, King Egbakotan II and his court took advantage of *Idaasha* traditions and customs to administer justice was declared contrary to the Constitution.

⁸ Article 26, *ibid.*

⁹ Articles 55 and 75, *ibid.*



The Court's decision complies with Article 14.1 of the International Covenant on Civil and Political Rights,¹⁰ Article 7 of the African Charter on Human and Peoples' Rights¹¹ and Article 1 of the Directives and Principles of the African Commission on Human and Peoples' Rights relating to the right to a fair trial and judicial assistance in Africa.

All these instruments specify that courts, and criminal courts in particular, must be established by law or be competent to deal with a criminal problem. Currently in Benin, indictable offences and minor infractions are judged by criminal law courts of first instance. On appeal, they are submitted to the criminal law courts of appeal as courts of last resort.¹² One appeal of last resort (*cassation*)¹³ is still possible after this stage in the judicial chamber of the Supreme Court. The 'Cours d'Assises'¹⁴ deals with serious crimes. These are composed of three professional judges and four other persons of standing or merit.

Here, like in all penal matters, it is the criminal code and the criminal procedural code which are rigorously applied to the exclusion of any traditional penal rule. A *cassation* remains possible in front of the judicial chamber of the Supreme Court on the judgments handed down by the 'Cours d'Assises'. This is the only way that the principle that crimes and punishments should be established by law, and the legality of criminal jurisdictions can be respected.

In conclusion, it should be emphasised that in addition to the points that have formed the object of this analysis, the Constitutional Court condemned violations of the secularist and republican nature of the state. Further, it has condemned treatment of individuals which it considered to be cruel, inhuman and degrading.¹⁵ However it could have upheld other rights. The first of these which was not addressed, although violated, was the legality of the violations of the rights to freedom of movement and security. This is provided for in Article 16 of law No 2001-37 of 27 August 2002, relating to the organisation of the judiciary in the Republic of Benin which states:

"A person may only be arrested or charged under a law in existence prior to the events that relate to the charges against him".

The Court could have used this provision and in addition it could have invoked Article 9.1 of the International Covenant on Civil and Political Rights and Article 4 of the African Charter on Human and Peoples' Rights.

Similarly, the right to the presumption of innocence and the principle that crimes and punishments should be established by law¹⁶, together with the rights of the defendant, provided for in Articles 7 of the African Charter and 14 of the International Covenant on Civil and Political Rights, are violated. These rights are also provided for under the national Constitution. The Constitutional Court of Benin

¹⁰ Adopted by the United Nations 16 December 1966, this treaty came into force on 24 March 1976. Benin ratified the treaty 12 March 1992.

¹¹ The African Charter on Human and Peoples' Rights was adopted in 1981, ratified by the Republic of Benin in 1986. It became part of the Beninese Constitution 11 December 1990 (Article 7 of the Beninese Constitution of 11 December 1990).

¹² Articles 49, 50, 61, and 65 of law No 2001-37 of 27 August

¹³ In the civil law system, the 'Cours de Cassation' is a court of last resort which hears appeals of decisions of high courts and rules only on legal errors of lower courts (not on material, substantial issues of the case).

¹⁴ In the civil law system, the 'Cours d'Assise' is a criminal court with trial jury

¹⁵ Articles 18 and 19 of the Benin Constitution and Article 5 of the African Charter on Human and Peoples' Rights.

¹⁶ Article 17 of the Benin Constitution "Anyone accused of a criminal act is presumed innocent until his guilt has been legally established as a result of a public trial during which were provided all guarantees necessary to ensure his defence". "No-one shall be condemned for any action or omission which, at the time of their commission, did not constitute an offence under national law. Similarly, a more severe penalty than that which would have been applicable at the time of the offence, may not be imposed."



does not have the right to determine punishments. It is up to each applicant, armed with the decision of the Court, to present himself in front of another judge in order for this judge, in accordance with the decision of the Constitutional Court, to make the correct criminal, civil or administrative order. But, as in this case, many applicants only go as far as the Constitutional Court. This is a pity given the need for effective enforcement for breaches of human rights.

Despite the principles set out in the current Constitution of Benin, cultural inheritance and the propensity of African people to turn to alternative means to regulate conflict, will, for a while yet, continue to constitute challenges to the political, judicial and administrative authorities of Benin if they wish every individual to enjoy their human rights without discrimination.