

FROM CUSTOMARY LAW TO POPULAR JUSTICE

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The Portuguese-speaking countries represent rather varied socio-political realities and are going through very different internal developments. They share, however, some fundamental similarities within the contemporary African context. I will distinguish two characteristics of particular significance for the topic I propose to treat here.

1. THE RUPTURE OF THE COLONIAL BOND

In the first place, the manner in which these countries broke away from the colonizing state distinguishes them from the other African countries. The first characteristic of this rupture was that, with the exception of Sao Tome e Principe, it happened after a more or less extended period of war. This war had two important consequences in the field of law and administration of justice: on one side it disrupted the colonial system of justice administration, aggravating a permanent and fundamental crisis of legitimation; on the other side, it made it possible for autochthonous forms of political organization to be tested in the liberated areas and for the alternatives of popular justice based on local customs filtered by the politico-military criteria of the liberation movements to be introduced. However, these wars did not end with the unconditional victory of the liberation movement, but rather due to a profound political transformation which occurred in the colonizing power. This represents the second characteristic of the process of rupture between the colony and the colonial power.

By the end of the decade of the sixties it was clear that colonialism was being gradually transformed into the essence of the Salazarist regime, the true material base of its ideological reproduction. It can even be said that colonialism provides a substitute for corporatism as the central nucleus of the regime. The latter did not have a static conception of the colonial relationship. It knew that to maintain the system it was necessary to allow for some transformation. Thus appeared the measures of the Caetano period which induced more economic autonomy for the colonies (i.e. the new system of interterritorial payments). But these measures were too timid and were taken too late. They did not terminate the war; they were supported by the war. That is, as the regime was supported by colonialism, so colonialism was supported by the war. Thus, the regime was in a total impasse: it could neither win the war nor afford to lose it. In this impasse the regime was totally dependent upon its military apparatus.

But the political logic of the regime coincided only in part with the technical logic of the military apparatus. For the latter, to wage the war was at the beginning a technico-administrative problem, a responsibility which the armed forces were legitimately charged with. From the point of view of military logic there was only one way out in view of the technical impossibility of winning the war: to accept an honourable defeat and to make the Government responsive to other solutions to the conflict. To this, however, the regime was opposed. It was this impasse, not clearly perceived by the regime, that forced the military to treat the war as a political rather than a technical

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problem. Contrary to what happened to the American armed forces in Vietnam, the Portuguese "were forced" to make illegitimate the war they could not win, a process publicly detonated by General Spínola's book *Portugal and the Future*.

But presenting the war as illegitimate was the same as refusing to fight; it was, in short, the same as refusing to serve the regime. Deprived of its military apparatus the regime collapsed. This collapse caused the war to end by negotiation, through which the liberation movements and the new authorities emerging from the April revolution came against a common enemy just defeated: the regime of Salazar and Caetano.

This political context created the conditions for the total independence of the colonies, free of the neo-colonialist burdens which still today condition the social and political life of countries of Franco-phonic and Anglo-phonic Africa. This process of rupture therefore allowed the new countries, on the one hand to question radically the colonial administrative methods and, on the other, to freely establish contacts with the non-capitalist East European countries, thus making possible the application of administrative methods not derived from the colonial tradition.

All this obviously had a price, a high price. Because independence took place in a context of a double revolution (in the colonies and in the colonizing country), the price paid for not being subjected to the neo-colonial onus was the massive departure of European settlers, the near total destruction of the productive system, the stoppage and total disruption of the State administrative apparatus, including the administration of justice. The hurried escape of senior and middle-ranking administrators, and the inability to replace them at short notice caused a very serious institutional void. Hence the reconstruction of the legal and justice systems of countries became of the utmost urgency. It was, however, one urgency amongst many others even more extreme. Thus, it has not been possible to plan it entirely, very often the solutions proposed and adopted lacked adequate justification and had an *ad hoc* character, thus undermining the credibility of the new countries in this process of administrative innovation. On the strictly normative level the position seems nevertheless easier, as colonial law may be allowed to stay in force whenever it does not collide directly with the new political arrangements.

But law is not just a set of norms, it is also a combination of research, careers, professional profiles and social practices in the daily life of the people. This is where the position of the new countries is more precarious; and where *ad hoc* solutions may produce negative effects. Through their own efforts and because of the vicissitudes of recent Portuguese history, these new countries are, however, in a privileged position: to choose freely among various normative and administrative patterns already tested in other countries; to investigate the possibilities, virtues and limits of each of these patterns; and to create solutions, adequate to the social, economic and political realities of the country. The fact that almost everything is still to be done may be taken as an advantage.

2. THE LESSONS OF COMPARATIVE EXPERIENCE

The second great characteristic which these countries have in common, and which sets them apart from the other African countries, is the fact that they achieved independence a long time later and in an international climate very different from that which characterized the French and English decolonization. This international scene has two faces, one negative and one

positive. The negative being that these countries achieved independence in a period of world economic recession, and this produced a turbulent entry for the young economies into the world economy. Its impact was not softened in any significant way by the attempt more or less frustrated to get help from the non-capitalist world.

This fact involved some important constraints. In some cases there was even a danger that one form of neo-colonialism might be replaced by another. These conditions were reflected, in some countries, in the solutions adopted in the field of law and the administration of justice. But this international scene has also a positive aspect derived from three main factors. In the first place these countries have at their disposal the rich and complex experience of those African countries which first reached independence. This experience is well known today, has been in part evaluated, its failures and successes in several areas acknowledged. There is a pool of experience as to how to deal with customary law; how to ascertain this law and integrate it in the new legality; and how to deal with the traditional and colonial judicial institutions. All this experience and this knowledge may have a fundamental role, as it may help to avoid the errors other African countries nowadays admit to having made. However, on this point our optimism must be moderate. The lesson of history is very often ambiguous and difficult to learn; we have reasons to believe that this also applies to the former Portuguese colonies.

A second positive factor of the international environment in which Portuguese colonial Africa reached independence, is that, between 1950 and the present, important transformations took place in law and the administration of justice in the capitalist countries; countries whose judicial and legal model, based on liberal political theory, was copied in the colonial period and, very often, following independence. Many of these transformations, specially in the area of the administration of justice, were the results of social pressures to which these countries were submitted in the decade of the sixties. These were absorbed through the granting of new social rights in areas such as labour, welfare, education, and housing. This expansion of social rights and the emerging new juridical conflicts were the occasion for a growing demand for judicial services. However, the judiciary could not expand enough to satisfy this increase in demand. Meanwhile, in the mid-seventies, an economic recession developed; the countries went through serious financial crisis, making adequate expansion of the courts impossible. The result was an enormous overload and with it, justice administration became slower and more inefficient. Whenever it became necessary to increase the costs of the administration of justice, justice became still less accessible and increasingly selective.

From all this resulted a very great preoccupation with the danger that the legitimacy and credibility of the law courts would be lost. This gave birth to a movement, today in full progress, for the reform of the courts; and above all the search for alternatives to the existing pattern of justice administration.

The overload of the law courts has shown this pattern to be in crisis and the reform of the law courts, undertaken at present in many countries implies that they are no longer adequate. These reforms are of two types, technocratic and those aimed at informality, as I have described elsewhere. I think that the new African countries are interested primarily in the second type of reform, those that point to informality of justice. They tend to search for alternatives which make the resolution of social conflicts more speedy, less expensive and more accessible. Basically, they consist of dispute settlement processes created under the protection of the Government, with limited jurisdiction, relatively

unprofessionalized, unconcerned with procedural formalities, and, above all, interested in compromise solutions achieved through mediation between parties. These reforms have led certain categories of small claims, of frequent occurrence, which presently lead to the overloading of the courts, to be resolved by informal processes. Committees of conciliation, consumer courts, neighbourhood courts, etc, have thus appeared.

Independently of their viability and even of their wider objectives in the developed countries where they are being established, these reforms have importance for the new African countries; because, adapted and altered, they may suggest solutions for the problems which the new African countries face at present in this area of reconstruction of the state. I think, however, that more important than these transformations, or proposals for transformation, in the administration of justice in the developed countries is the new understanding of the juridical systems of these countries, made possible in the last thirty years by the sociology and anthropology of law. As I will have occasion to say later, this knowledge helped to undo some myths about law and justice in these countries and could surely pave the way for the reconstruction of legal and judicial systems in new African countries.

A third and last positive factor of the international environment in which the new African countries became independent is the fact that, in the last thirty years, knowledge of comparative law and the administration of justice was enormously enriched through the successes and failures in those countries which, in different historical periods, tried to create a type of law and justice administration radically different from the ones in use in the more advanced capitalist countries. Examples of such cases are provided by the countries of Eastern Europe and Cuba, not counting the more short-lived experiments in Allende's Chile between 1970 and 1973, and in Portugal between 1974 and 1975.

The Portuguese case, notwithstanding all its vicissitudes, has a particular interest. In the area of substantive law as well as in the area of justice administration, important transformations took place or were proposed and here it is necessary to consider not only Portuguese law during the colonial period but also the democratic legality constituted in Portugal after 1974, at normative as well as institutional levels. In the field of justice administration the proposed innovations were many: reinstatement of the jury, justices of the peace, judgement and conciliation committees, committees for the protection of minors, and arbitrary committees for rural leases. Most of these innovations had little practical success and many were suppressed; but they were nonetheless experiences which led to a larger participation by citizens in the administration of justice, and, thus, to the democratization of justice.

To me it appears that these new African countries have an important opportunity to mobilize on their behalf all this accumulated knowledge and experience. The fundamental question is, therefore, whether they have the internal conditions and external support to take real profit from this circumstance. It behoves all of us to collaborate to this end knowing, however, that notwithstanding all this international experience and knowledge, it is the new African countries themselves that have to devise the best institutions for the conditions and objectives of their development.

3. THE STATE, CUSTOMARY LAW AND POPULAR JUSTICE

Within this context, I am now going to consider the relationship between customary law and popular justice. The extreme experiences in Africa ranging

from the virtual sacralization to the rejection of customary law, are well known. It is important to acknowledge that former Portuguese African countries follow, almost unanimously, an intermediate position although with different nuances from country to country. This was made clear in the positions taken at the first Meeting of the Ministers of Justice at Luanda in 1979. It may be said that notwithstanding the very different local conditions in Angola and Cape Verde, to name two extreme cases, it is possible to identify one common characteristic. In all cases there is the need for profound knowledge of customary law or customary rights. For example in the report of the Minister of Cape Verde, at this meeting, it is written: "A last word on the researchers. Whenever it is possible, the ideal would be to bring together specialists from the Western Universities with knowledgeable representatives of the people from the localities. If we put customary law under the exclusive control of jurists we run the risk of perverting it and of precipitating its decadence." This obviously does not imply the exclusion of jurists or of faculties of law once they are equipped with the technical knowledge and research techniques made available through social and cultural anthropology. The study of the family and of traditional law made in Mozambique by Francesca Dagnino, Gita Honwana, and Albie Sachs, recently published in *Justica Popular*, is a good example of this.

A second important point about customary law is that *knowledge* of it does not automatically imply its continued recognition, as this must depend upon the social and political objectives of the state which very often do not coincide with those relating to customary law in the colonial period. In the report of Angola's delegation to the same meeting we read that "the interconnection, very often even the confusion, of custom as a judicial institution with religion is not compatible with the principles of dialectical materialism; the metaphysical aspect of custom is a factor of obscurantism and will prejudice the economic and social progress of the country". Thus, it is proposed that custom, instead of being a primary source of law, will only rise to the "law" category "whenever it will be a determinant factor of social and economic progress, and should be rejected if it is maladjusted to the political principles which guide the new type of society we endeavour to create". Also in Cape Verde's report we read: "But after research we should not become enraptured by the uses and customs of the people. We should be able to distinguish on the whole the essential from the unessential, the positive from the negative, the progressive from the reactionary, all this taking into account the exigencies of the cultural, social and economic progress of Cape Verde." It concludes that "national reconstruction, the thorough examination of decolonization, the fight for freedom of the national forces of production, may require the removal of certain rules of traditional law". One example of this criterion may be apparent in the conclusion reached by the authors of the work on traditional family rights in Mozambique already referred to: "the norms of traditional law have no future as part of the legal system applied by the law courts independently of the necessity to study them as part of the historic and cultural patrimony of the country."

The third and perhaps more important point is that customary law as well as the new law should be applied through a truly democratic administration of popular justice. With differences from country to country it may be said that, in a general way, popular justice in these countries aspires to the following: to make all law courts collegiate; participation of popular judges, or assessors with the same rights as the professional judges; judges to render accounts periodically to electing agencies who may dismiss them for incompetence; the

existence of community-based law courts composed of non-professional judges for the resolution of small conflicts; the principle that above all the law courts should have an educative function; finally, the suppression of private advocacy and the substitution of popular advocacy.

Thus, we believe that the institutional dimension of the legal system is as important as its normative dimension; through it the people interact directly with the law in their everyday social practices. It is precisely at the institutional level that customary law acquires a new importance. Beyond the more recent and perhaps superficial influences, popular justice has its deepest roots in African traditional practices, very often significantly transformed and amplified by innovations introduced during the colonial war in the administration of justice in the liberated areas.

The concern with the reconstruction of popular justice in accordance with these patterns seems to be specially strong in Cape Verde and Mozambique. In this last country, a position of vigilant criticism of customary law, in its normative dimension, is complemented with a position of active support in relation to its institutional dimension. The article on traditional family rights referred to above says: "It is necessary to know the most significant aspects of the traditional forms of decision-making which were redistributed, transformed and absorbed in the system of popular justice, and which give to popular justice a great dose of vitality and personality. It is not by accident that, today, illiterate peasants give solutions to a range of the people's problems in a just and rapid way; they have behind them the experience of generations of people used to solve conflicts in collective patterns".

The previous references are enough to define the general profile of the relation between customary law and popular justice, adopted by the new African countries as a definite plan for politico-judicial action. It is incumbent upon specialists in the sociology and anthropology of law to evaluate how it has been fulfilled, what are the obstacles to its fulfilment, what are the vicissitudes, deviations, repressions and directions of progress. It is an investigation that must be made as accurately as possible and with the utmost independence.

In the light of experience elsewhere and of such information as is now available on the former Portuguese countries in Africa I would like to refer to three potential obstacles to a constructive relationship between customary law and popular justice. The first concerns professionalization in the administration of justice; the second concerns the politics of justice administration; and the third concerns the very relation between law and state.

4. PROFESSIONALIZATION OF JUSTICE ADMINISTRATION

It is well known that the pattern of justice administration linked to the liberal state, although actually in deep crisis, is today still hegemonic and its hegemony shows itself precisely by its capacity to infiltrate the juridical systems. This pattern presupposes an administration of justice which does not allow popular participation. The administration of justice is institutionalized and professionalized, and lay participation is only permitted when unequivocally subordinated to the legal professions and institutions. Secondly, this pattern presupposes a unified and centralized administration of justice, monopolized by the state.

This model's hegemony is reproduced by multiple channels, from the mass media through the detective novel, to the law faculties. And in such a way that

common sense, meaning the practical sense of the people about law and justice, ends up by accepting as natural that justice administration should be given to the professionals of the law. In spite of educative efforts in the opposite direction and of strongly contrary historical roots, the new African countries must not consider themselves immune to the influence of this model of justice administration. The infiltration of this pattern may be revealed in several ways. In the first place, by the progressive control of the professionals of the law over the judiciary and by the development of the professional ideology with which they exercise this control. In such a position it is very possible that the unprofessionalized side of the administration of justice will be evaluated by the professionals, and thus, in accordance with criteria imposed by the latter. In these conditions the action of the unprofessionalized judge will not come up to professional requirements.

A risk of this type may be run, for instance, when a Minister of Justice uses reports by professional judges as the exclusive source of information and evaluation of the work of the popular assessors and lay judges. The risk of this professional control is obviously very strong in western countries. It is, maybe, one cause of the failure of recent innovations in the direction of increasing popular participation in justice administration. A recent survey made in Spain, on the acceptance of the jury by magistrates, reveals that the great majority are unfavourable to the jury, which is not surprising and coincides with corresponding Portuguese research at the Faculty of Law in Coimbra. It is not surprising that hostility to the jury is deeper in those magistrates who are sons of jurists, i.e., the group more exposed to professional ideology.

The African countries are obviously far from this risk, but to warn is better than to rectify. Besides, this discrimination of the professional over the layman has usually another consequence: a motivation crisis among popular and lay judges. Because their functions are reduced to irrelevance, or because they absorb professional ideology, they start to detach themselves from their own functions and fulfil them bureaucratically and passively.

5. POLITICIZATION

A second question concerns the politicization of justice administration. It is well known today that justice administration, as well as any other sector of public administration, has, beyond its technical dimensions, a political dimension. But this political dimension is usually not very clearly articulated in the West today.

In the report from Guinea Bissau to the Meeting of Ministers of Justice to which I have referred we read that the trials of the popular law courts in general, and their sentences in particular, should contribute—and I quote two clauses among four—to: “defend the state, the riches and national economy as well as the conquests of our glorious liberation struggle, against the crimes that may harm human rights and the constituted power; contribute to the resolution of cultural, economic and political problems of the State in this phase of national reconstruction and educate the masses, institutions and organizations in respect for, and conscientious application of, the laws”.

This global political function, however, should be clearly distinguished from bondage to the politics of the moment, and above all from temptations which may turn justice administration into an indistinct sector of party-political work and thus into the uncontrolled exercise of sectional interests. The consequence, historically verified, of this phenomenon is a lack of motivation and remoteness of the citizen from the justice system. From Soviet

sources, we know about a concern for the growing popular desertion of the comrade courts, revived by Khrushchev in 1959 as part of the destalinization process, and instituted in factories and residential districts. Reports in the press on the lack of popular interest for these courts are very frequent, and excessive control from the party is given as a possible cause for this lack of interest. From recent studies, the comrade courts in the Soviet Union have little vitality, specially in labour areas, and are not taken very seriously by the authorities or by the public. In 1979 *Pravda* reported that "there are hundreds of comrade courts in the city but not even half are functioning". A similar conclusion may be taken from the recent Polish studies on social law courts, which correspond to the Soviet comrade courts. On the other hand, in all these countries, the role of popular assessors and lay judges is becoming reduced, and is being confined to a position of little activity. In Cuba there are also signs that notwithstanding the institutionalization of popular justice, it is difficult to achieve levels of popular mobilization and civic involvement in the administration of justice similar to those obtained after 1962 when, following a speech of Fidel Castro to the pupils and professors of the School of Juridical Sciences of Havana, the first popular courts were launched in the East Mountains. Excessive party control in the selection of judges may be at the base of this process.

Surprisingly, the village social courts established in the Soviet Union in 1929 took root rapidly because they had the same line of procedure as the traditional law courts of the peasants, the *volost* courts, carrying on the production of justice based on mediation in accordance with custom. This did not happen with the comrade courts and the *kolkhoz* because they were charged with the specific task of imposing labour discipline upon workers of peasant extraction.

These experiences, documented today with reasonable accuracy, are evidence of the very subtle and complex relation between politics and justice and indicate a need for the maximum prudence in this matter. However, it is my belief that the former Portuguese African countries are sufficiently alerted to this problem. There is already some historical experience in this field. When Amílcar Cabral organized the administration of justice in the liberated areas, the party military commanders in charge of these areas were initially entrusted with it. These commanders, with no juridical background and with very little political knowledge, made errors, often grave over the years of 1963 to 1964. This caused the Congress of Cassaca, in 1964, to transfer the administration of justice from the military commanders to political commissioners, as these "had a more profound political knowledge, and thus, justice would also be separated from the other administration departments". Similarly the *Guide to the Courts of Cape Verde*, edited in 1977, advised that at least one judge should belong to the political committee of the area "so that there will always be a strong connection between the popular courts' activity and the directions of the party" and added that: "However, this link should not be through the area political leader to avoid an abuse of power through an accumulation of responsibilities in one individual only". This indicates that the African states are aware that in these recommendations very fine lines are woven which may turn the scales on one side or the other.

6. THE LAW AND THE STATE

The third and last question concerns the relation between law and state. It is a very complex question, obviously associated with the previous one although

more extensive. This is not the time nor the place to make an elaborate study of this point. I mention it just to note that this is an area in which the African countries may take advantage of sociological studies in the capitalist world, accumulated over the last decades. A great number of studies (among which I may quote the ones I made of the *favelas* in Rio de Janeiro)¹ reveal that, in these societies the identification of law with state law, inscribed in the politico-juridical matrix of the liberal State and theoretically reproduced through legal dogmatics since the nineteenth century, does not correspond to the socio-juridical realities of these countries.

In the town districts, the villages, the social groups, the schools, the family, in short, *out* of the state, we can identify instances of juridical reproduction, emerging from the social relations in these areas, which are connected in different ways with the law produced by the State. On the other side, within the State itself, and given the way this has been expanding, we may detect instances of law production, with their own development rhythm and logic, in the parties, unions, public firms, etc. In all these cases it is impossible to reduce their juridical life to the formal laws and regulations in the statutes. Beyond these statutes there are juridical micro-climates, specific juridical practices which emerge from the social relations in these areas and which, although informal, have a high efficiency.

All this leads us to the conclusion that, even in more developed countries, it is wrong, from a sociologic point of view, to reduce law to state law. There are different modes of the juridical, different methods of juridical production, which are connected in different ways under the rule of state law, making up what we call the legal system.

This knowledge may be useful to the new African countries where the forms of legal pluralism are sometimes very clear. An excessive preoccupation with centralization and uniformity may end up by being detrimental to the acceptance of the new law and administration of justice now under construction. It is necessary to use prudence to safeguard the basic unity of the polity, without, however, destroying the capacity for traditional popular creativity, at a local and regional level, without which it will not be possible to create a true national identity towards a more just society.

¹ "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada", (1977) 12 *Law and Society Review*, 5.