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The Criminalisation of Indigenous Social Control Systems among the Lugbara by the British Colonial Administration in Uganda

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Abstract

Social control systems based on established customs, traditions, practices, beliefs, and values, handed down through generations by word of mouth and practice still exist in African societies. It aims at bringing social order through healing relations, reconciliation, repairing the social fabric, protecting the peace, and preventing the recurrence of conflict. Since the introduction of modern law under colonial rule, society continues to experience a rise in crime and social injustice; a paradox which this study attempts to explain. This article attributes crime in contemporary society to the historical developments during the colonial and post-colonial periods. Colonialism introduced a modern state and law with a dual legal system that invented crime and criminalised aspects of African customs and culture. It further codified African customs into the native customary law which had the effect of disrupting social order. This work calls for rethinking aspects of modern law as a means to resolve the paradox of increased crime to emancipate the Africans from the continued existence of the errors of colonialism in the post-colonial state.

Keywords: Law, Lugbara, Indigenous social control, Crime

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Introduction

Modern states and jurisprudence argue that modern law is an effective means to social law, order, and justice. However, the escalating social disorder in post-colonies provokes the recurring question: why are social disorder, violence, and crime on the rise in post-colonies? Whereas post-colonial theorists Comaroff and Comaroff (2006) attribute post-colonial social disorder, violence, and crime to colonialism (Comaroff and Comaroff, 2006: vii, 1), this study asserts that attributing Africa's problem exclusively to colonialism would be untenable considering approximately the sixty years of independence in Uganda. This is further affirmed by Comaroff and Comaroff's (2008) paradox that democratisation in post-colonies founded on the rule of law and characterised by elected and representative political regimes has been accompanied by a sharp rise in crime and violence (2008: 1). To address this theoretical impasse, this work raised the overarching question: What are the intricacies in modern law instigating social disorder? To trace the roots of social disorder, it juxtaposed indigenous social control mechanisms with modern law and explored three colonial laws.

This work attributes social disorder in post-colonies to the inherent complexity of the legal systems arising from the continued criminalisation of aspects of indigenous norms and social control systems. It concurs with Arthur's idea attributing social disorder to the modernists' neglect of the role of indigenous African social structures in ordering society (Arthur, 1991: 500).

This work is the outcome of a historical study on 'The interface between indigenous and modern law, order and judicial system among the Lugbara of Uganda, 1914-2010' which attempted to address the critical research question: why social disorder, violence, and crime were on the rise despite the use of modern law. It was conducted in the districts of Arua, Maracha, and Yumbe inhabited by the Lugbara. A sample population of 117 respondents within the age bracket of 60 and 100 identified through the snowball method, and who had witnessed the practice of indigenous social control in the colonial era, and introduction of modern law among the Lugbara were interviewed. Key respondents included the Paramount Chief and Prime Minister of Lugbara Cultural Institution, selected clan elders and, elderly women.

The interviews, personal narratives, and focus group discussions inquired on the nature of indigenous social control mechanisms, the cultural significance of dances and local liquor, perceptions of homicide and, the impact of colonial and modern laws on social order. Colonial law on the Native Liquor Ordinance, 1902, and Native Tabulu Dance and certain other Native Dances, 1916 were retrieved from the Uganda National Archive at Kampala (Uganda National Archive: Secretariat Minute Paper, No

C. 1534/1). Oral history captured the personal experiences of respondents on the indigenous social control systems and modern law in society. Colonial anthropological research reports and colonial administration report on the Lugbara analysed to explore the nature, motive, and effect of colonial law. Ethnography was used as a reference to the written ethnographic literature and engaging with the community under study. The researcher spent a period of one month in the community attending High Court sessions in Arua Court of Judicature and a Local Council Court session at Oluko sub-county, observing behaviour and listening to conversations on crime and deviant activities in the courts and from respondents, making sense of the processes and impacts of the two systems on the people. Newspapers and legal reports as primary sources were analysed to capture prevailing situations of law and crime. Oral tradition explored the nature and impact of indigenous social control systems as handed down over generations. It explored law and order in precolonial indigenous Lugbara society. The lack of oratory skills among respondents with relevant historical knowledge hindered the effective narration of oral tradition (Alidri, 2016: 4). The gaps were filled by triangulating and corroborating data from personal interviews with group interviews; and the written sources.

Conceptualising Crime and Criminality in Africa

Theoretical Perspective of African criminality

In post-coloniality, the 'object of investigation' is the colonised people, to whom the colonisers ascribe negative and exotic attributes. The theorists perceive 'colonialism' as a two-way 'process of interdependent relationships and mutual transformations' between the centre and periphery (Dann and Hanschmann, 2012: 124). Post-colonial theories focus on "elements of colonial discourse and structures which have outlived the formal end of colonial rule and continue to exert strong influence today in politics, culture, economics, art, science, and law" (ibid 4).

Modernisation theorist Rogers (1989), associates social disorder and crime with social structural changes such as industrialisation, urbanisation, breakdown in familial relations, increased socio-economic development, and population increase (Rogers, 1989: 315). Modernisation theorists have failed to address the role of law in modernisation which directly affects the lives of people in developing countries (Ohnesorge, 2007: 222). Arthur (1991) argues that, in using the modernisation theory to explain crime, the theorists have neglected the role of indigenous African social structure in combating social disorder and crime (Arthur, 1991: 500, 501).

Crime and law

Black's Law Dictionary defines 'Crime' as "an act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding" (1999: 399). Crime is an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment) known to follow those proceedings", and an act of commission, omission, and possession deemed to be 'criminal' in law (Hollin, 2013: 8). Dubois (1899: 235) (cited in Matthews 2017: 11) observed that "crime is a phenomenon of organised social life, and is the open rebellion of an individual against his social environment" (Matthews, 2017: 11). Consequently, the state reserves the right to make and enforce laws that criminalised certain acts. Propounding Driberg's (1934) idea, African law is positive and not negative in the sense that it states: "Thou shalt," and not "Thou shalt not". It neither created offences nor made criminals (Driberg, 1934: 231). This study therefore argues that the purpose of the indigenous control system was to nurture acceptable behaviour and establish social harmony and order. Colonial administration in Africa introduced modern law to establish their form of social order defined by presence of colonial legal and state apparatus and weakened indigenous systems and customs. Thalia noted that it had the effect of distorting the representation of African black colour, black personality, and black culture (Thalia, 2013: vii). This study therefore associates the term 'crime' with the modern state and law, and has its roots in colonialism. Smith (2012) further substantiates that, "Imperialism and colonialism brought complete disorder to colonised people, disconnecting them from their histories, their landscapes, their languages, their social relations and their own ways of thinking and interacting with the world". Indicating that "it [imperialism] is a process of systematic fragmentation". "The fact that the indigenous societies had their own systems of order was dismissed" (Smith, 2012: 1). This study propounds that, 'crime' was an antithesis of indigenous social order as it lacked common meaning and purpose in the indigenous and modern settings.

Codifying of African custom transformed it into customary law and aspects which were not codified were considered indigenous social control mechanisms. Whereas state laws are made in the interest of the ruling oligarchy and imposed upon the citizens, indigenous social control systems are made for the society through societal customs, cultural traditions, and consensus. Different societies may coherently define the 'same' crime in different ways depending on the historically generated conception of property and other rights (Steinberger, 1983: 867).

Punishment

Modern law considers 'crime' as a breach of state law punishable by the state or any authority (Article 28 (12). The purpose and nature of punishment are to diminish crime through deterrence, reform, rehabilitation, or incapacitation (Schinkel, 2014: 579). However, punishment under modern law does not necessarily result in a crime reduction and therefore this study questions whether punishment is a solution to every context of crime.

Colonial law which was imposed on indigenous peoples to control their daily lives had criminal penalties attached (Thalia, 2013: xi). Yet Foucault (1977) believes that punishment and "prisons do not diminish the crime rate: they can be extended, multiplied or transformed, the quantity of crime and criminals remains stable or, worse, increases" (Foucault, 1977: 265). This calls for rethinking of punishment as a deterrent to crime, and an attempt to reconsider indigenous deterrence to social misconduct.

Colonial influence on criminalising indigenous social control systems

The colonial government did not introduce new customs, except it modified existing customs by writing and codifying them; and transferring its enforcement from custom to the native customary laws under colonial administration. The Native Law and Native Authority Ordinance 1919 codified custom, granting it the force of law as Customary Law. Customary law was applied to a specific custom and people. It was not uniform and only applied to a particular people provided that it was compatible with any legislation in force in the protectorate at that time (Hamilton, 1906: 1A, iv, Allot, 1957: 245). "The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion" (Chanock, 2001: 4). Customary law was explicitly overridden by statute law (Allot 1957: 245). The Native Court tried customary offences while non-Africans were tried in the colonial courts administered by the District Commissioner and European judges under the common English law (Anderson, 1960: 435). Native courts and native customary laws were an essential part of the apparatus of indirect rule and the British colonial administration in Africa (Allot, 1984: 58). Colonial law from the onset was intended to regulate the established cultural value systems. Economic and social life became very controlled under colonialism as social deviances were considered offenses triable by law. Colonialism and colonial law, therefore, created 'criminals' without criminal minds, and who in an attempt to adhere to indigenous customs, beliefs, practices, and values; were criminalised under the colonial law. Colonial domination and oppression of the subjects subsequently triggered social action in the form of deviance; further criminalising them.

Colonial theorists Lord F. D. Lugard (1922), Lord Hailey (1951), and Margery Perham (1962) considered colonialism as the forerunner of democracy because "the empire stood for order and the rule of law" (Kwarteng, 2011: 5.6). Lugard (1922) viewed colonial law as 'a moral benefit' to African societies because it curbed lawlessness and assisted in tribal evolution and progress to a higher plain (Lugard, 1922: 233). According to Perham (1962), colonial law and order were to enable Britain to expand her trade, protect her commercial interests, emigration, the balance of power, prestige, and philanthropic purpose (Perham, 1962: 126-127). Therefore, colonial law was a tool for colonial subjugation and economic imperialism. Justifying colonialism, Lugard argued that colonial law was 'a moral benefit' to African societies because it curbed lawlessness and assisted in tribal evolution and progress to the higher plain (Lugard 1922: 233). On the contrary, this study noted that contemporary society benefiting from social advancement had registered more crime and social disorder.

Chanock (2001), attributes post-colonial social disorder to the disruptive effect of colonialism which invented the Customary law; a hybrid law. Customary law subordinated and weakened the African indigenous social control system. Thalia (2013) argues that "criminalisation and colonisation are intricately connected" (2013: vii). Colonialism redefined African morality within the context of modern law and Christian values. Under colonial administration; the codified customs were referred to as 'customary law' to discredit their lawful status (Thalia, 2013: xii).

Post-colonial influence of law

Uganda inherited the colonial dual system of courts in which the central government courts administered the common English law while the lower native courts at the County and Sub-county arbitrated conflicts among indigenous Africans based on the customary law (Odoki 1994: 59). The "local courts apply and enforce rules that originate in the city to the fact that arise in local communities" (Economides, 2012: 3). Therefore, "residence, social status, and ethnic origin are ignored or seen as irrelevant to the citizen's right of access to the courts" (Economides, 2012: 2), causing a mismatch between modern law and indigenous social control systems in their purpose and function hence criminality.

This study argues that political independence did not mean an end to colonial law, rather the post-colonial state adopted colonial law with its disruptive effects on society. Law was used as a tool for political maneuvers and counter-maneuvers by transforming legal acts into crime through state decrees and legislation. "Uganda politics are played in an atmosphere where each is looking for legal 'loop-hole to be turned to its own advantage" (Engholm and Mazrui

1967: 590), laying the ground for further criminality and social disorder. The post-colonial judicial system most accurately mirrored colonial practices. "For nowhere in Africa did there exist centralised judicial institutions with exclusive jurisdiction over an area, something that colonialism created as customary" (Mamdani 1996: 49).

Social control systems among the Lugbara

Lugbara mythology observes that humans in the pre-historic period (the time before c. 1000) were mythical and pre-social beings lacking a sense of moral values. At the time, "Human inhabitants were unsocial, amoral and natural" and lived in "a world of social disorder" (Middleton, 1968: 190-191). Therefore, the pre-historic period had no reference to social conduct as an immoral or forbidden act.

The historical period (the time from c. 1000) among the Lugbara; is regarded as a social period characterised by the emergence of culture heroes Jaki and Dribidu who founded social control systems by inventing culture and custom (Vansina, 2009: 104). The Lugbara social control system is postulated to have emerged during this period.

Oral tradition and anthropological research reports on the Lugbara indicated that pre-colonial Lugbara was pre-literate with no written law. Modern jurisprudence posits that: "Peoples without formal legal codes, courts, policemen or prisons were thought to lack anything that might be dignified by the appellation law" (Freeman, 2008: 1084). This did not mean the absence of mechanisms of social order. Middleton noted that, the Lugbara had means of maintaining peaceful relations and preventing open conflict expressed by violence or quarrelling. The clan settled disputes by discussion or invocation of ghosts rather than by open conflict. (Middleton, 1966: 142). In spite of the anthropological diminutive reference to ancestral spirits as 'ghosts', society considered them as living dead and members of the clan whose roles were key in social ordering.

Abiria Jackson, an elder from the Vurra clan and retired historian traced the roots of the indigenous social control system to the social norms and rules of kinship; and social conduct embedded within customs, traditions, practices, beliefs, and values of the clan, defining certain actions as wrong, shameful, evil, or sinful (Interview, Abiria 2014). The term 'crime' did not exist among the Lugbara.

Reconciliation and healing of relation was central in the Lugbara indigenous justice which was restorative and emphasising social relations. Restorative justice meant restoring relations with the living, dead, and the gods, as sin and offense were against society as contemporary, antecedent in the person of ancestors and posterity as descendants. Indigenous social control and justice are aimed at bringing healing to the

victims of conflict, reconciling the parties in conflict, restoring the social fabric, protect the peace and prevent open conflict from occurring and, strengthening social cohesion. The Lugbara social control system defined societal expectations of the individual, family and, clan. Clan leaders were the custodians of custom and culture as those closest in age to their ancestors, and the father managed the family order. (Interview, Sila Amaga, Jackson Abiria & Salome Agabu, 2014).

Among the Lugbara, punishment for misconduct was inflicted upon a person by the family, clan, gods, or ancestral spirits; and its nature depended on the gravity of the offense, and social relations. Punishment aimed at bringing justice, restoring relations and, harmony and imparting moral teaching to the clan. (Interview: Amaga Sila, Abiria Jackson, Salome Agabu & Miriam Paricia, 2014). Whereas modern law aimed at determining guilt and punishment, indigenous social control systems aimed at disgracing the culprit. Therefore, the purpose of indigenous punishment was to grant justice to victims, correct social conduct, reconcile and restore relationships, compensate the victim's family, and prevent the recurrence of conflict.

An indigenous court system existed among the Lugbara taking the form of moots presided over by clan elders to mediate and reconcile the conflict parties. Mechanisms of instilling morals and social deterrence included: naming and shaming, word of advice/counsel, rebukes, flogging off the offender, imposing a fine, curse, ex-communication, and death. Retribution or vengeance justice inform of mob action and destruction of property of the accused was administered in grievous offences such as murder through killing, witchcraft and, poisoning. (Interview: Sila Amaga, Jackson Abiria, Salome Agabu & Miriam Paricia, 2014). Indigenous sanctions are still used in contemporary Lugbara society and offenses that demanded their use still existed.

Findings

This section explores three colonial laws which criminalised key customs among the Lugbara: The Liquor law, the law on traditional dance, and the law on homicide. It scrutinises the selected custom across the pre-colonial, colonial and, post- colonial periods and their impact on social order.

Criminalisation of the Lugbara Social Life during Colonialism and post-colonial periods

Colonialism introduced a codified law system that viewed more the negative potentials of a person and worked towards mitigating it by criminalising certain acts.

The Africa Order of Council 1889 a general legal system applied in the colonies was the basis of colonial law. The Order subjected all British colonies to the English law and

court system (Lugard, 1922: 34). It was the basis of the British Colonial administration in the West Nile District. The inclusion of the West Nile within the Lado Enclave "began a new era of administration in West Nile" (Harris, 1959: 19). Counties were demarcated as Native Administration headed by colonial chiefs appointed from the clan heads or prominent persons. The submissive chiefs, the custodians of law, order and, hallowed custom, rather than radical educated élite, were the favoured agents of European administration (Ajayi, 1969: 505).

The British colonial administration established in the West Nile region on 14th June 1914 introduced modern law among the Lugbara (Leopold, 2009: 468). In 1914 a colonial court was established in Arua town with the District Commissioner Sir Weatherhead as the Chief Magistrate. The Native Law and Native Authority Ordinance 1919 established the Native law and Courts in the West Nile District leading to the establishment of Customary law applied among natives while the common English law was applied to the non-natives who faced trial in the Magistrate Grade I Court. Indigenous customs, norms, and practices were codified into customary law, a colonial creation (Allott, 1969: 12). This introduced a dual judiciary system; the seed of the complexities and criminalising of indigenous norms, practices and, values under modern law.

Following the 1919 Yakani insurrection in which the local chiefs were implicated, Nubian officers were appointed district and county 'chiefs' to impose British administration and taxation. They enforced law and order administered justice in the native courts and, contributed significantly to developing the customary law (Lugard, 1968: 649). The Native Law and Native Authority Ordinance 1919 granted the Native Court powers to handle customary offences under the customary law. Conflict existed between the customary and English laws as the natives followed their cultural norms and customs. A Penal Code Act was enacted to establish a code of criminal law in Uganda creating crime, offences, and punishment; "to be used with the meaning attaching to them in English criminal law" (Penal Code Act Cap. 120). This was to enable the effective implementation and enforcement of the colonial law.

By the Uganda Order in Council 1920, the Legislative Council was established with powers to make ordinances, constitute courts and officers, make provisions and regulations for the proceedings in courts and the administration of justice, for the peace, order, and good governance of the Protectorate. By the Order, the High Court in Uganda was established with full civil and criminal jurisdiction over all persons and all matters in Uganda (Laws of Uganda 1951, vol. VI [Revised]).

By the Criminal Procedure Order 1920, 'crime' was introduced as an offence under colonial law, with capital offences such as treason, murder, manslaughter, and rape transferred from the clan courts to the Criminal Procedure Code handled by the Magistrate Court. Special districts were declared in which a magistrate tried Africans for a criminal offence with support from local assessors. West Nile District acquired a magisterial jurisdiction with the District Magistrate Grade I Court established in Arua town and presided over by the District Commissioner. Subordinate courts at the county and sub-county courts handled offences related to customs and Magistrate Grade II courts established at Arua, Adumi, Arivu, Logiri, Omugo, Koboko, Yumbe, Ovujo, Rhino Camp, Okollo and Ogoko (Laws of Uganda 1951, vol. VI [Revised]). With the institution of regular courts, offenses were against the state and were punishable by imprisonment and fines (Morris, 1967: 171). This ushered in modern law and criminalising of aspects of African norms and culture.

Indigenous Norms on Liquor and Criminalising of Liquor in the Colonial Period.

Liquor was culturally considered important, and its brewing and consumption was neither an offense nor an immoral act. Indigenous liquor had a social function of building and strengthening social cohesion. Brewed out of fermented grain, it was considered a healthy beverage for leisure and socialisation, in the performance of cultural rituals, during social events like marriage and funerals, traditional dance, and communal digging. (Interviews: Nason Fua, Rasil Opindu, Salome Agabu, Jason Avutia 2014). Indigenous liquor bonded the family and community; and from a traditional religious perspective, it bonded the living dead and the clan. Rituals would be considered incomplete without a home-made brew. Rules guiding liquor consumption existed and it was improper behaviour to act under the influence of alcohol and drunkenness was not an excuse for misconduct. However, the arrival of colonialism witnessed criminalising of brewing and consumption of local brew.

Following the abolition of the slave trade, there was a boom in the consumption and trade of cheap liquor which had affected the British colonial economies. In 1902, the Protectorate Government enacted the Native Liquor Ordinance and by January 1913 liquor was suppressed in all British colonies (Prothero 1920: 24). The colonial administration viewed drunkenness as the source of conflict, crime as adultery and fornication, inter-clan feuds, murder, and idleness. (Lugard 1922: 603-604). The Liquor Ordinance No. 9 of 1916 set the time and place for drinking liquor and license for the producers and sellers of liquor. According to Sila Amaga, distilled liquor was introduced among the Lugbara by

Emin Pasha's Sudanese force and it became prominent during World War I (1914-1918) as 'Waragi' a misnomer for 'war gin' (Interview: 2014). Although the colonial government had argued that liquor consumption would lead to social breakdown in the African society (Willis, 2007: 81), the regulation of trade in liquor aimed at protecting the British colonial economy and trade. Penal Code Act (1950) Cap. 16 under the section on sales of noxious food and drink, criminalised sale and consumption of liquor. The Liquor Act of 1960 further prohibited the manufacture and sale of native liquor in the Municipality, town, or trading center unless licensed. To widen the market and promote sales of British gin in Uganda, the Protectorate Government banned and criminalised the production and consumption of local alcohol. The African Inland Mission integrated the liquor law into the school rules and regulations, and church Christian ethics (Obetia, 2008: 31). The African Inland Mission team operating in Congo arrived at Ovisoni among the Lugbara of Vurra clan in 1917, establishing a mission station west of Arua Town in 1918. The mission station as an agent of change, disseminated, and implemented the Native Liquor Law in the churches and mission schools attended mainly by children of colonial chiefs, civil servants and, converts (Interviews: Rasil Opindu, Agabu Salome, Jason Avutia 2014). Nason Fua; a convert; reminisced that the baptism lessons and preaching demonised liquor consumption and yet as children, local brew made out of grains was often served as breakfast and lunch. Jason Avutia a former teacher and inspector of schools, and the Lugbara Paramount Chief, observed that the mission church and school played a key role in enforcing the liquor law (Interviews: Nason Fua and Jason Avutia 2014). Respondents referred to the church laws which were contrary to the Lugbara social norms, lacking indigenous ownership and enforced by Rev. Canon Albert Vollor; as 'Bwana Vollor's law'.

The invisible reality and purpose of the Liquor law were to engage the African subjects in the colonial productive economic activities aimed at generating revenue for the colonial administration; and end what Lugard described as the 'drunken orgies' which had made Africans economically non-productive (Lugard 1922: 603-604). This was a colonial misconception of indigenous leisure time and therefore law functioned as a tool for economic exploitation and coercion.

Criminalising Liquor in the post-colonial Uganda

Building on the colonial law on liquor, the post-colonial state enacted the Enguli (Manufacturing and Licencing) Act 1966. This was a post-colonial state reaction to the Colonial Liquor Act of 1960 (2) which prohibited the manufacture and sale of native liquor unless licensed. The purpose of the post-colonial liquor

law was to achieve the Africanisation and indigenisation of the economy. The UPC government built a liquor factory - Uganda Distillery Ltd and named the product "Uganda Waragi". Its purpose was to encourage local brewers to produce and supply the local gin to the Uganda Waragi factory. The Act would regulate liquor production and create avenue for taxing liquor production to raise revenues for the government. The Act had targeted the market-dominant minority Asians, with the aim of economically empowering the African.

To build an independent, integrated, and self–sustaining national economy, the NRM government has permitted the establishment of liquor production. The Ministry of Trade and Cooperatives has moved on to ban the sale of alcohol in sachets as a means to reduce consumption among youth and children and check on the illicit nature of the consumption in sachets which had led to a 68 percent loss in tax (Kamukama, 2019). Despite the liquor laws, the consumption of liquor is on the increase and liquor-related offences are on the rise. A countrywide survey conducted by the Uganda Alcohol Policy Alliance (UAPA) in November 2018 indicated that 61 percent of the population that consumed alcohol started drinking before the age of 18 years (Daily Monitor, September 10, 2019). This study argues that the post-colonial liquor law was an intrinsic strategy to redistribute wealth and power and deracialise the economy to achieve economic independence.

Indigenous Norms on Traditional Dances and Criminalising of Traditional Dances in the Colonial Period

Traditional dance, varying in type and purpose was an important aspect of Lugbara culture. It was important for socialising, courtship, rituals, and establishing inter-clan friendships. Traditional dance and songs were tools for imparting moral values, disciplining clan members, performing rituals, and building social cohesion. Dances were organised after the completion of the harvest, at marriages, to celebrate a victory, and it symbolised identity and belonging to a culture and clan. Funeral dances were to celebrate the life of the dead. Rules guiding indigenous dances were put in place. Courtship dance was restricted to clans with whom intermarriage was allowed. It was not permitted for clan members to have courtship dance as its purpose was to develop intimate relations which would lead to marriage (Interview: Miriam Paricia & Salome Agabu, 2014).

The Law for Preventing the Native Tabulu dance and certain other Native Dances, 1916

The Law for Preventing the Native Tabulu Dance and certain other Native Dances, 1916, was first enacted by Mengo on 12th October

1916 and approved by the Governor. Traditional dance in which the opposite sex closely wiggled their bodies was perceived as immoral, often leading to indulgence in sexual immorality and conflict. The law was adopted and applied by the colonial government outside Buganda. The law on native dancing and drumming stipulated that "no person shall hold or permit to be held, whether on his premise or elsewhere, any native dance, drum-beating, or other similar noisy entertainment unless he has a permit issued by the Authority" and a fee of Shs. 2 was to be paid for every permit issued (Section 16(1) and (3) of the Laws of Uganda Protectorate, 1951, Revised edition). Among the Lugbara, it criminalised traditional dance, banning it in the areas neighboring the European residence in Arua Town, as it was claimed to disturb the peace of the Europeans (Fieldwork: Obetia Joel; Retired Bishop of the Anglican Diocese, 2016).

Some of the songs directly attacked the colonial repressive rule and therefore the law aimed at suppressing songs and dances that expressed the people's cultural nationalism. Furthermore, the law banning native dance aimed at strengthening the enforcement of the Liquor law as liquor consumption was much associated with native dances. The law on native dances therefore aimed to maximise the appropriation and exploitation of African time and labour for colonial economic benefit. Prohibiting traditional dance would enable African subjects to spend time in producing cash crops and providing labour on public works.

Criminalising Traditional Dances in Post-colonial Uganda

Article 37 of the 1995 Constitution, grants every person the right as applicable to belong to, enjoy, practice, profess, maintain and, promote any culture, cultural institution, language, tradition, creed, or religion in community with others. The post-colonial state began to look for the political potency of dance evidenced by Idi Amin's regime revamping folkloric dance (Pier, 2011: 414). Dance-based nationalism emerged with songs praising the president. The use of dance and music-based nationalism continue to be used in twenty-first-century politics. Dancing was moved from the open arena to indoor theatres and halls giving it an economic attachment, a shift from the socio-cultural to the economic value of dance. The Constitution provided for urban councils to regulate singing, dancing, drumming, the playing of musical instruments, the production of music or the making of any noise likely to disturb any person, or any performance for profit in any public place (Sixth Schedule, Part3 (3[g]). These were the legacies of colonialism.

Indigenous Norms on Homicide

Homicide in the Lugbara context is the killing of a person either intentionally or accidentally or in self-defence.

Jackson Abiria observed that among the Lugbara, the gravity of the case of homicide depended on the motive of the killing and the blood relationship between the persons involved. Murder a premeditated intent to kill was prohibited and regarded as an abomination. Killing strangers was forbidden as it brought misfortune to the family and the clan, but was justified if it was in self-defence. The act of self-killing (suicide), killing one's father (patricide), siblings (fratricide) or mother (matricide), and child (infanticide) were prohibited as it disrupted the continuity and cohesion of the family and clan (Field Interview: Abiria Jackson, 2014).

Punishment for murder depended on the circumstance of the murder and the relationship between the murderer and the victim. Cultural rules of vengeance existed and it was accepted with the approval of the elders as it was regarded as a responsibility to the dead and the clan. But when prohibited, vengeance attracted a curse and had undesirable repercussions on the clan and future generations. No friendship and marital relations were allowed with the accused family or clan (Interview: Gard Ezayi 2014). Leniency was exhibited while handling unintentional killing as it was attributed to misfortune or curse following the offender or the victim. Truth-telling in which the accused explained the circumstance of the murder was core in tracing the source of the problem and passing the verdict. The offender's family and kinsmen would pay a bull to the deceased's mother's clan and a sheep to the offender's clan for performing a cleansing ritual. The elders counselled and performed a cleansing ritual by invoking the ancestral spirits *and* the gods for mercy. The culprit is reconciled with the deceased's family and vengeance is prohibited (Interview: Gard Ezayi 2014).

Criminalising Homicide in the Colonial Period

Colonial rule introduced the Criminal Law and Penal Code Act which criminalised every homicide and punishment was death sentence or life imprisonment. The criminal code was enacted with minor local adaptations to interpret the criminal law, offences, and the associated punishment. The law empowered the Governor-in-Council to make regulations with limited penalties and Orders in Council having the force of law. The municipality, native administration, and other authorities were empowered to make rules or by-laws (Lugard, 1922: 537).

Post-Colonial Law on Homicide

The post-colonial state inherited the colonial law on homicide. Tibatemwa-Ekirikubinza (2005) exploring the substantive case law on homicide in Uganda's colonial and post-colonial court records which have set precedents for legal decisions, noted that homicide was never always criminalised, and that "the term merely describes the act and does not

indicate the moral or legal quality of the conduct" (2005: 1).

The Penal Code Act categorised crimes of homicide into manslaughter (Section 187) and murder (Section 188). Manslaughter is the unlawful act and or omission which causes the death of another person. Murder is any person who of malice aforethought causes the death of another person. The punishment for murder is a death sentence (PCA Section 189) and the punishment for manslaughter is life imprisonment (PCA Section 190). Post-colonial punishment for homicide is retributive, with the life or death sentence being disruptive to social continuity and cohesion as relations are not restored. Despite the acquittal of the defendant, reconciliation and restoration of the relation are not attained, making them prone to vengeance. Indigenous mechanisms of administering justice have survived modern law and continue to be used among the Lugbara in the breakdown and loss of confidence in modern law and order.

Discussion

The post-colonial state continues to function as an instrument of criminalisation, making laws that criminalises aspects of culture and custom. This has resulted in the creation of new laws and crimes which criminalises society. This paper argues that society itself is not criminal but the making of laws that criminalise certain action is responsible for the apparent crime rise. Yet, society perceives their culture as key to social bonding. The adherence to custom, a symbol of Lugbara's sense of nationalism was criminalised. Using Gupta and Ferguson's idea of culture, locality, and community being socially and politically constructed (1997: 6), this study argues that colonial administration and the modern state through their economic interest, administrative system, and laws, created a 'criminalised people' without a criminal culture, a colonial identity to subjugate the colonised subjects. Culture being historically created, colonialism, and state law have created a culture and identity of criminality, further making a criminal without a criminal mind. This creates a dilemma in adhering to indigenous custom and state law.

Modern law and court system codified indigenous custom into customary law, applying it only to Africans until 1964 when the Magistrates' Courts Act that established a uniform system of law was enacted. Customary law was integrated into the post-colonial state law and justice system in which offenses and crimes, and sanctions were defined by the Penal Code Act.

This study established that since the introduction of modern law, a parallel system of indigenous social control existed among the Lugbara. The introduction of modern law did not result in the extinction of indigenous social control mechanisms and it is noticeable in the clan and Local Council Courts, while the modern

system is reflected in the magistrates' court system, High Court, Court of Appeal, and the Supreme Court.

The modern law and indigenous justice system did not have a common meaning of law and offence. The modern law system viewed the law as "a rule of human conduct, imposed upon and enforced among the members of a given state" and enforced by specialised agents (Barker and Padfield, 1996: 1). Modern law, therefore, is in the service of the rulers and state rather than the people. Law therefore in its motive and function is a machinery of domination and oppression of the subjects. The indigenous social control system viewed rules and regulations as norms and practices handed over by the ancestors and gods for posterity. The continuity of the indigenous system among contemporary Lugbara is attributed to their ethnic sub-nationalism and the negative experience during the Yakani insurrection against the British administration in 1919; and the impact of Christianity which had condemned aspects of Lugbara customs and cultural practices. The continuous usage of customs and culture is further attributed to the weaknesses in the modern justice system. Therefore, the indigenous social control system among the Lugbara has not been replaced by modern law but operates parallel to state law, often complementing and conflicting with each other. Geertz (1993), noted that socio-cultural persistence and change cannot be generalised but should be considered as partial and within a local context (Geertz, 1993: 496). The persistence and continuity of indigenous systems among the Lugbara cannot be generalised but rather contextualised to a specific clan.

Lugbara Response to colonial and post-colonial law

Faced with the pressure of colonialism, the Lugbara responded by adapting to the colonial and modern mechanisms of maintaining law and order as a survival mechanism. Under customary law, the native court was transferred to the county and sub-county with courts managed by colonial chiefs. Clan elders were often invited to sit in public meetings and attend the colonial customary courts at the sub-county and parishes. There was mutual co-existence between the indigenous and modern institutions of law and order as provided by the Native Law and Authority Ordinance 1919. The indigenous social control mechanism was limited to acts that breached customs and traditions within the family and clan.

The colonial and post-colonial states adopted the notion of crime and criminalised certain behaviour as offence. In the Lugbara context, there was no provision for the word 'crime' and breach of rules and norms was regarded, as deviant behaviour or ‘an act of sin’ against the clan, spirits, gods, and God the creator.

Conclusion

Therefore, this study's finding disagrees with Comaroff and Comaroff's (2006) assertion that colonialism was responsible for the disorder in the post-colonial states. In spite of the authority bestowed on the post-colonial states to make legislations and Africanise the law, the states continue to use the colonial mode of law to control, dominate and criminalise society, neglecting the role of the indigenous social control system in promoting social order. The increase in crime and social disorder is a result of the creation of new offences by the state, consequently criminalising acts that in their original state were not deemed criminal. Crime in the contemporary context has its roots in modern law while in the African context, offence has socio-cultural and indigenous religious contexts. The post-colonial laws were a replication of colonial law bearing similar outcomes of ambiguity and not aligned to cultural norms, and have outlived their purpose and usefulness in the legal history of modern states. To curb crime, African states need to redefine offenses within the African context, further calling the state and its legislative bodies to decriminalise some of the obsolete laws.

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Declaration of Conflicting Interest

The author declares no potential conflicts of interest to the research, authorship, and/or publication of this article.

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Key Respondents Interviewed Gard Ezayi 2014: Retired Parish chief.

Haruna Ndema 2014: Prime Minister Lugbara cultural institution.

Jackson Abiria 2014: Retired civil servant and historian.

Jason Avutia 2014: Lugbara cultural leader (Agoffe).

Miriam Paracia 2014: Elderly woman

Nason Fua 2014: Elderly man

Joel Obetia 2016: Retired Bishop

Rasil Opindu, 2014: Elderly woman, surviving daughter to Awudele who offered land for establishing West Nile District Headquarter in Arua and wife to the former colonial clerk.

Respondent 114 /2016: Former convict.

Salome Agabu, 2014: Elderly woman.

Sila Amaga 2014: Ayivu Clan elder.