

## 3. The Persistence of Colonial Vagrancy Laws in Southern Africa

*The English legal system has been transported to many African states through colonial rule. In addition, the British Empire deliberately shaped the content of Penal Codes in African states. It is therefore no accident that some provisions in such Penal Codes closely resemble the English vagrancy laws. These vagrancy provisions were used as a deliberate and convenient method of social control in African states where colonial policies had already caused significant poverty and dislocation.<sup>47</sup> This chapter outlines the incorporation of the English Vagrancy Act of 1824's provisions into the Penal Codes of many African states.*

### Introduction

British colonialism resulted in the application of English criminal law to all areas and territories under the control of Great Britain. Thus, by the late 1800s, English criminal law applied in many areas under colonial control. Because of this broad geographical scope, Britain sought to ensure uniformity in the application of its criminal laws and the development of Model Criminal Codes by the Colonial Office. Two hundred years later, post-colonial African states continue to utilise criminal codes that remain very similar to the laws imposed by British colonialists, despite the passage of time and the advent of independence.

#### **The Introduction of Uniform Criminal Codes in Africa**

The British legal system is rooted in common law, statutes and judicial precedent. Whilst Britain has historically resisted codification of its criminal laws, British colonial administrators saw the benefit of applying a comprehensive uniform criminal code to their colonies, which would render the application of English criminal law much easier in those areas.<sup>48</sup> This trend led to a wide array of legislative drafting initiatives aimed at developing a comprehensive and simplified code of English criminal law.

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47 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" (2000) 44 *Journal of African Law* 223.

48 Britain itself did not adopt a codified criminal law, nor did Ireland. The reluctance to do so dates back to the debates between legal scholars Jeremy Bentham and Sir William Blackstone regarding the merits of a formal codified system versus a more flexible common law system. B Wright "Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's" (2008) 12 *Legal History* 21-22.

Legal scholar Barry Wright has observed<sup>49</sup> that a number of factors contributed to the use of codified criminal law in the colonies:

- It had proved difficult to simply introduce English criminal laws into colonised settings with existing legal systems or less-experienced judicial benches and/or legal professionals
- The colonies had very limited access to legal materials and case law;
- There was increasing pressure from the Colonial Office for the implementation of criminal codes;
- The codification of criminal law assisted with some of the problems of colonial governance, for example by lessening reliance on the military to maintain control;
- In some jurisdictions, codified criminal laws provided a solution to the problem of the overly-complex mixture of English criminal law and colonial legislation;
- The criminal codes were considered a way to restrain abuses on power exercised by powerful judges in the colonies. In the absence of constitutions in the colonies, criminal codes did include useful, albeit idealistic, provisions to prevent corruption and abuse of office.<sup>50</sup>

Other observers have noted that the use of a uniform code also proved administratively useful where officials moved between colonies.<sup>51</sup> In such situations, institutional knowledge was applied in different geographical and cultural contexts to render more consistent the experience of colonial administration.

Figure 1 below illustrates how different versions of English criminal codes influenced penal codes in Africa, including the Indian Penal Code, the Queensland Criminal Code<sup>52</sup> and its derivatives, the Nigerian Criminal Code and the second Colonial Office Model Code.<sup>53</sup> The Indian Penal Code, widely hailed for its simplicity, was originally adopted in some African states, but these countries later adopted the more bureaucratic Queensland model.<sup>54</sup> Irrespective of the version adopted, the Codes were based on English law and many included a provision that they be read according to the English principles of legal interpretation.<sup>55</sup>

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49 Wright *supra* note 48, 24-30.

50 Wright notes, “[the] Macaulay and the Colonial Office successor models represented imposed codification, written by British imperial administrators, using English laws and involving little by way of local or indigenous input.” He contrasts this with the Canadian, New Zealand and Queensland contexts in which voluntary codifications were adopted through relatively democratic processes. Wright *supra* note 48, 9.

51 *Id*; L Sebba “The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies” (1999) 3 *Crime, Histoire et Sociétés*, at para. 36.

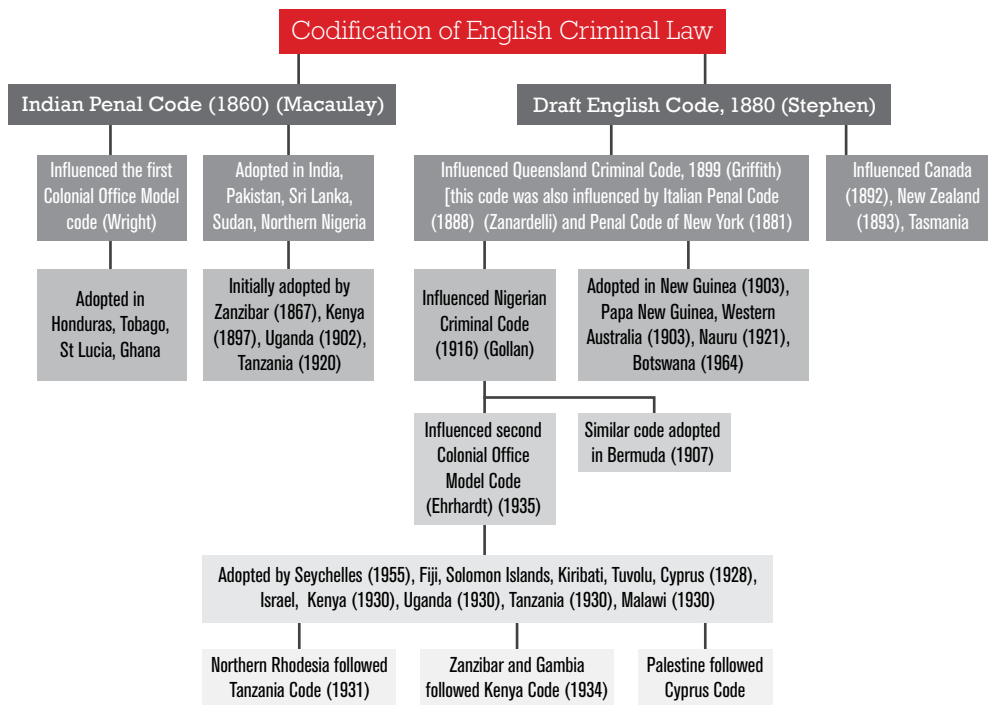
52 H Gibbs “The Queensland Criminal Code: From Italy to Zanzibar” *Address at Opening of Exhibition, Supreme Court Library* (19 July 2002).

53 This and other model codes discussed in this chapter should not be confused with the American Model Penal Code.

54 Coldham *supra* note 47, 219 fn 4.

55 *Id* 219 fn 5; Sebba, *supra* note 51 at para. 50. The Malawian Penal Code, for example, provides that it shall be interpreted in accordance with the principles of legal interpretation obtaining in England and that expressions used in it shall be presumed to be used with the meaning attached to them in English criminal law. Malawi Penal Code, section 3.

**Figure 1: The Development of Criminal Codes in Africa During British Colonialism, 1860 – 1964**



The above figure is interesting in that it shows the breath of English law’s influence in Africa. It further shows how instrumental the British Empire was in crafting Penal Codes for the colonies which were similar to their own laws, but also addressed their particular needs when administering these colonies.

## The Legacy of British Colonial Penal Codes

Despite the persistence of British codes and those heavily influenced by British practice, there exists widespread concern that some of the offences contained in these uniform laws are static or outdated.<sup>56</sup> Rising condemnation of sexual and domestic violence, for example, has produced a variety of amendments in various Criminal Codes to alter and update the definitions of some sexual crimes and to include provisions relating to trafficking. Lawmakers have made similar changes to terrorism and money-laundering offences. However, despite dramatic changes in societies’ understandings of vagrancy-related offenses, there has been little movement in Africa to amend or repeal vagrancy offences. The reform of vagrancy laws is long overdue in a context where national constitutions increasingly incorporate human rights and where social systems ostensibly seek to uplift the poor.

56 Coldham *supra* note 47, 225 (“The Codes are showing their age, they need to be rewritten in more accessible language and the principles of responsibility and the definitions of offences should be reformulated to reflect the requirements of contemporary African Societies.”).

Over time, troubling provisions in the English Vagrancy Act of 1824 have been amended or repealed (discussed *supra* in Chapter 2). This trend has not, however, emerged with regard to similar provisions contained in African criminal codes. For example, the following offences, based on English criminal law of past centuries and Model Criminal Codes, are still operational in their original wording in some countries in the Southern African Development Community (SADC):

**Table 1: Offences of Rogue and Vagabond and Idle and Disorderly in SADC:**

Country	Law	Rogue and Vagabond	Idle and Disorderly
<b>Botswana</b>	Penal Code, 1964	Section 182	Section 179
<b>Malawi</b>	Penal Code, 1930	Section 184	Section 180
<b>Mauritius</b>	Criminal Code (Supplementary) Act, 1870	Section 28	Section 26
<b>Seychelles</b>	Penal Code, 1952	Section 174	Section 173
<b>Tanzania</b>	Penal Code, 1930	Section 177	Section 176
<b>Zambia</b>	Penal Code, 1930	Section 181	Section 178

Historically, vagrancy-related offences have often been vague, over broad and arbitrarily applied by police in order to target persons whose existence or actions are deemed undesirable.<sup>57</sup>

## The Application of Vagrancy Offences in Africa

Provisions in colonial penal codes, though classifying certain crimes as nuisance-related offences, sought primarily to keep public order. As legal scholar Simon Coldham explains, “these were authoritarian states, concerned particularly with maintenance of law and order; sentencing was based on the principles of retribution and general deterrence and there was a marked reluctance to take into account customary notions of compensation and restitution.”<sup>58</sup>

Repressive colonial states fostered environments in which vagrancy laws were applied in practice in violation of basic legal notions such as being innocent until proven guilty. Similarly, the post-colonial period has also witnessed the application of vagrancy laws in contravention of fundamental principles of human rights. Vagrancy provisions contained in modern, British-influenced uniform codes are almost universally applied in ways allowing broad police discretion and ignoring the principle that arrest amounts to a deprivation of liberty and should be considered a last resort. Convictions based on these offences often

57 Sebbas *supra* note 51, at para. 22. Sebbas notes that the imposition of criminal laws was “reminiscent of the vagrancy laws in early English history; the vagueness of which has been seen as providing a legal basis for the control of populations perceived as dangerous to the establishment”.

58 Coldham *supra* note 47, 219.

occur without the due process accorded to other offences. This reality continued to be exacerbated by a general practice dating from the British colonial penal system favouring imprisonment, which results in severe overcrowding.<sup>59</sup>

The reasons for which post-colonial governments would retain legislation imposed on its citizens by a former imperial power may not be immediately apparent.<sup>60</sup> Such laws may have created normative attitudes in subsequent generations, resulting in a situation where persons in post-colonial states accept these laws and the values they reflect as being normal.<sup>61</sup> Such a normative development may have precluded the return to pre-colonial social values or the modern evolution of culturally independent norms, hindering a reformulation of vagrancy laws in post-colonial states.<sup>62</sup>

British-influenced uniform vagrancy laws, which primarily target poor and marginalised groups, undoubtedly continue to be useful to the wealthier propertied classes in the post-independence context. In addition, lawyers, bureaucrats and law enforcement officials familiar with these laws are unlikely to argue for their repeal or reform.<sup>63</sup>

Whatever the reason for the continued existence of vagrancy laws contained in uniform codes, the supremacy of national constitutions and human rights in current national, regional and international legal frameworks demand a revision of all laws developed in a period and context in which the universality of human rights was undervalued.

Vagrancy laws, influenced by British colonial rule, impact on different marginalised populations in overlapping and compounding ways. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted the disproportionate effect of nuisance laws on the poor. Such laws:

- Undermine the right to an adequate standard of physical and mental health;
- Constitute cruel, inhuman and degrading treatment;
- Deny life-sustaining measures to the poorest (e.g. by burdening the ability of the poor to engage in activities such as street-vending);
- Lead to harassment or bribery by police, especially of vulnerable groups;
- Impose fines on the poor, the enforcement of which is inefficient and reflects a waste of state financial and administrative resources, contributing to perpetuating social exclusion and economic hardship;
- Force street children into dangerous and abusive situations by barring their engagement in street-vending, touting and begging; and

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59 *Id* 220.

60 Sebba *supra* note 51 at para. 47.

61 *Id* at para. 54.

62 Coldham *supra* note 47, 223. (“The penal policies of independent African governments show a remarkable continuity with those of their colonial predecessors. In spite of the stress that many governments place on African values, African traditions, African socialism and the like, there has been little attempt to incorporate these values in the penal system. Penal policies continue to be characterised by their harshness, by their emphasis on retribution and general deterrence rather than on the individualisation of penalty and the rehabilitation of offenders.”)

63 Sebba *supra* note 51 at para. 56.

- Lead to arrest, which affects the poor particularly negatively because indigent populations are frequently detained for longer periods of time than their more affluent counterparts and do not have access to legal representation.<sup>64</sup>

In July 2012, the Global Commission on HIV and the Law recommended that States “ensure that existing civil and administrative offences such as ‘loitering without purpose’, ‘public nuisance’, and ‘public morality’ are not used to penalise sex workers”.<sup>65</sup> Similarly, the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation observed that the criminalisation of relatively neutral acts effectively criminalises entire populations as a result of stigma – for example, laws targeting public urination, whilst seemingly neutral, disproportionately affect homeless persons in the absence of public facilities available for their use.<sup>66</sup>

## Conclusion

Ultimately, it is clear that the legacy of colonial laws characterised by British influence continues to negatively impact on marginalised communities. Vagrancy laws derived from colonial-era codes may not reflect modern, post-colonial states’ values and appreciation for the principles of international human rights norms. By identifying and discussing the origins of such laws, governments are better able to determine their continued utility or the lack thereof.

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64 *Report by the Special Rapporteur on Extreme Poverty and Human Rights supra note 1.*

65 *Global Commission on HIV and the Law HIV and the Law: Risks, Rights and Health (2012) 99.*

66 *UN General Assembly Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation 21<sup>st</sup> Session of the Human Rights Council (2012) 11.*