

# Lawgiving and the Administration of Justice in Some African and other Early States

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## INTRODUCTION

In this paper I present some aspects of lawgiving and the administration of justice in some early states. To do so I will apply some of the concepts developed by anthropologists. The use of these terms makes it necessary to ask to what extent it is useful to employ West European judicial concepts to the ways in which the rules and measures of early states were formulated and enforced. Would it not be better to employ the "participants" concepts so as to describe and analyze the systems of rules and regulations of early states in their own terms <sup>1</sup>? This would certainly be advisable if this paper aimed at the analysis of only one such system, but because its aim is to compare a number of early state judicial systems, a broader, intercultural frame of thought is needed. This requires that we formulate our categories and concepts in such a way that different systems of lawgiving can be brought under their headings.

In this paper I try to find if and how in early states rules and regulations--laws--were established; in what ways such rules and regulations were brought to the attention of those concerned; in what ways such rules and regulations were sanctioned; and how people were made to do what was ordered. Finally, I look for similarities and differences in the systems discussed.

Every society has norms and values according to which people are supposed to behave. This is true even though, as Malinowski pointed out, people do not obey rules and regulations automatically. They often seek to escape obligations, or try to interpret the rules to their own advantage <sup>2</sup>. As a consequence, most societies also have mechanisms to cope with deviant behavior. In hunter-gatherer societies, such mechanisms are usually very limited; when efforts to mediate have no success, one of the contending parties leaves the band <sup>3</sup>. In more complex societies, disputes are sometimes solved by what Gulliver calls negotiation <sup>4</sup>. Here the disputants, each assisted by socially relevant supporters, try to reach a settlement. Another method of dispute settlement is adjudication wherein a binding decision is given by a third party who has some degree of authority. Such a decision "is in some way coercive in that the adjudicator has not only both the right and the obligation to reach and enunciate a decision but also the power to enforce it" <sup>5</sup>. Such enforcement may vary from agreement by the audience to the support of an armed force. A good example of adjudication is found in Homer's *Illiad*, analyzed by both Tamayo y Salmorán and Van der Vliet <sup>6</sup>. Here a small group of elders was required to pronounce, each in turn, a judgment, and he who, according to the sentiments of the people, pronounced the most fair decision was rewarded. In fact the decision was rendered by

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the people and it would have been difficult for an individual to defy their judgment. The difference between the two ways of dispute settlement discerned by Gulliver thus is "the difference between the presence or absence of overriding authority" <sup>7</sup>.

Where adjudication is the dominant method of dispute settlement, acknowledged standards exist that can be interpreted to meet the particular cases. "This does not mean, of course, that standards are inevitably clearly defined, or that they lack a degree of flexibility, under adjudication; but definition and rigidity tend to be greater" than where negotiation is the dominant form <sup>8</sup>. This implies the existence of a set of rules with which a number of people is familiar. Such rules and convictions are usually inculcated during the education of the young; parents and family heads insure that a general knowledge of such notions is achieved. The next "higher" form of administered justice comes when a functionary or specialist hears the case and pronounces a judgment that eventually is enforced by his assistants. This development is characteristic of early states.

Where an increasing number of people live together on a permanent basis, the need arises for the development of additional, or new, rules and regulations. Studies by Gregory Johnson show that either more permanent rules and regulations develop, or the larger community breaks apart into smaller units <sup>9</sup>. Similarly, the description by Kottak of the development of an early state among the Betsileo of eastern Madagascar demonstrates that when groups of people are forced by reasons of safety to stay together on a permanent basis, new forms of organization develop, and new rules and regulations are needed to make the society work <sup>10</sup>. In early states, where large numbers of people lived together on a permanent basis, the ruler or central government had the task of developing the necessary rules and directives for the regulation of social relations.

## PROBLEMS OF LAWGIVING

In a comparative study of twenty-one early states, in all twenty-one cases "the ruler is the formal law giver" <sup>11</sup>. This statement requires certain clarifications. Is it only the ruler who makes laws? Are there also other bodies concerned with lawgiving? Is every decree by the ruler a "law"? When do we speak of "laws"?

The same comparative survey concluded that the "sovereign is the supreme judge in early states" <sup>12</sup>. This statement also poses a number of questions that need to be clarified. Is the ruler the only judge? Are there standard procedures for the administration of justice? Is appeal possible in judicial matters? Are there legal specialists? Is there a codification of law? And, finally, why do people obey rules? The actual amount of coercion in early states is, according to Maurice Godelier, often limited <sup>13</sup>. Now let us try to formulate answers to these questions.

Law is a complex concept. In studies of state societies law is usually connected with those regulations that by negligence or infraction are enforced by the central government. In theory laws hold for all inhabitants of the early state. Also, in theory, it is the ruler who lays down the laws and maintains law and order. In reality lawgiving and enforcement are complex processes. To begin with, not every decree by a ruler is a 'law'. There are decrees meant to arrange temporary matters only, or hold for just a few people. For example, when a ruler states that there should be new women added to his harem, this is not a law, but an order. The same holds

for his directive that certain people will not be invited to the next feast. Speaking more generally, incidental regulations, or regulations meant for specific people only, should not be considered as laws, even if the decrees may have dire consequences for the individuals concerned. Laws are regulations holding for the whole population, or at least for broad categories of it <sup>14</sup>.

Various people and institutions have influence over the preparation of laws. There are councilors and councils, personal advisers, brothers, friends, cousins, ministers, and in a number of cases, the queen. The formal influence of councils is mentioned for the the Aztecs, the African Kuba, the Indian state of the Maurya, Capetian France, and the Incas, among others <sup>15</sup>. Informal influences have been established for each of the twenty-one cases presented in The Early State <sup>16</sup>. In most cases, relatives of the ruler were mentioned as informal advisors, but administrative functionaries, priests, friends, and the like were mentioned in this capacity as well. In West African Dahomey, for example, the caboceers (civil servants), under whose supervision the subject matter of the new law fell, met with the ruler and a number of his female advisors. There were fierce discussions in which the contenders tried not so much to evaluate the merits of the proposal, but rather to outdo their rivals. Finally the ruler summarized the various points of view, formulated his decision, and issued the law <sup>17</sup>.

Such new laws and regulations could cover a great variety of matters. The formal prohibition for the inhabitants of Ouidah to plant coffee, sugar or peanuts had clearly a commercial background, but the prohibition to sit on a chair in public was connected with the sacred character of the ruler <sup>18</sup>. In East African Buganda, as in Rwanda and Burundi, the queen-mother dominated the administration of the state as long as the ruler was young and inexperienced <sup>19</sup>. In medieval West Europe, queens such as Aliénor of Aquitaine <sup>20</sup>, Emma of Normandy <sup>21</sup>, and the Merovingian queens Brunhild and Fredegund <sup>22</sup>, greatly influenced the administration of their states. Even in the strongly male dominated Islamic societies, queens have ruled and made law <sup>23</sup>. Consequently, it can be concluded that the central government of early states issued laws and regulations which were formally ascribed to the ruler, even though many people influenced their preparation.

To what extent was a ruler (assisted by his councilors) free to issue new rules and regulations? It is not easy to answer this question in a general way. Quite often "new" laws were not new at all, but only the reformulation of already existing directives. It was rather impractical to change an existing corpus of laws and regulations thoroughly; complete chaos would be the result <sup>24</sup>. Even the so-called new legal systems introduced by Visigothic or Carolingian rulers were no more than collections of existing rules and customs to which only some new, incidental regulations were added <sup>25</sup>. As long as a ruler remained within the limits of the norms and values of the particular society, subjects would accept new laws, because such a ruler acted in a legitimate way <sup>26</sup>. A ruler who did not live up to the norms and values and issued laws that were impractical or went against the prevailing morality would disqualify himself as a god-given ruler and seriously endanger his position. An example may clarify this point.

In 1722, the British slave trader Robert Norris went from the coastal town of Whydah to Abomey, more than 100 kilometers to the north in the interior. His journey was relatively easy. There were well-kept roads, bridges over rivers, and guest houses in the villages and towns

along the road, where he could spend the night. The captain of the escort took great care that Norris was served well, telling Norris that he was responsible with his head for the well-being of the white man. Norris was struck by the order and safety of the country<sup>27</sup>. There was continuity in the way in which travelers were protected. Norris's experiences were similar to those of John Duncan and to Skerchly who visited Abomey in 1847 and 1874, respectively. Less favorable were the experiences of travelers visiting Buganda. Explicit royal orders to assist him notwithstanding, John Speke, the discoverer of the sources of the Nile, had great difficulties in getting boats to cross Lake Victoria<sup>28</sup>. The American traveler Chaillé-Long, who visited Buganda some ten years, later mentioned that at a distance of only one day from the capital he already was aware of the enmity of the Bugandese functionary, entrusted with his well-being. Chaillé-Long even accuses the functionary of "malevolence and hostility" towards him and his company<sup>29</sup>. Although Stanley, who was in Buganda shortly after Chaillé-Long's visit, gives a more favorable impression<sup>30</sup>, the French lieutenant Linant de Bellefonds, who was in Buganda at the same time as Stanley, reports great problems with the leader of the escort over the carrying of his baggage and the distribution of food<sup>31</sup>.

The Bugandese problems were caused by administrative failures. The orders of the king were given without explicit details and without considering whether they were feasible or realistic. The courtiers immediately went out to do as ordered, only to find, once away from the capital, that their tasks were impossible. There were no facilities for travelers here: good roads, guest houses and food reserves were lacking, and the local population was not prepared to provide food and goods to complete strangers. The comparison of these two cases demonstrates that when a ruler issued orders without providing the tools to fulfill these, he was asking for deceit and disobedience. As long as his servants were in his presence his power seemed absolute, but once they were a safe distance away, the ruler's power diminished.

## THE MULTI ETHNIC STATE

The fact that the majority of early states consisted of different ethnic groups added to the already complex issue of law giving. In most cases, various ethnic groups were conquered and added to the state's existing population. This, in itself, did not necessarily endanger the development of well-functioning early states since in many cases the conquered groups had rather similar cultures, norms, and values. This was the case, for example, with the subjugation by the Incas of the Chinha Indians. A similar situation was found with the early extensions of the Asante state in West Africa. Only when societies with quite different cultures were affected did tensions become pronounced<sup>32</sup>.

Several scholars have addressed the problems early state rulers faced with populations of different ethnicities. Anatoly Khazanov distinguishes between mono-ethnic, mono-lingual, and poly-ethnic early states<sup>33</sup>. States of the first type have no problems in this respect. When similar linguistic and cultural populations were brought together into one political unit, political problems might arise, but not cultural problems. The majority of early states, however, consisted of people of different cultural backgrounds. This often created a paradox.

As a rule, only one ethnic group in these states was occupying the dominating positions. Its upper stratum had become the ruling class of a whole state but, naturally, tended to rely on its

own relations. At the same time, to strengthen the state and its power-base it had to give a stake in this state to members of other ethnic groups, thus undermining their own privileged positions<sup>34</sup>.

For example, the Incas incorporated a number of Quetchua-speaking groups from the regions adjacent to Cuzco. They became Incas-by-privilege, and enjoyed almost the same rights as the Incas-by-blood which facilitated their merging with the latter. At the same time, the Incas pursued a policy aimed at segregating themselves from other ethnic groups<sup>35</sup>.

Ronald Cohen emphasizes that early states were organizations that seriously constrained fission, a policy that could succeed only "when technology and/or material resources were sufficient to sustain large populations"<sup>36</sup>.

All of this implies that the state itself, once it emerges, provides the means for supra-ethnic belief systems, rules, ideology and even search for cause/effect relations or science. The state, being multi-ethnic but ordered, is dependent upon the development of supra-ethnic or universalistic rules, ideology, religion and even knowledge seeking<sup>37</sup>.

Although Cohen is certainly right, the development of such ideologies, was no easy task. According to Donald Kurtz, the government of an early state needed first of all to acquire legitimacy, that is the people's conviction that its activities are in accordance with the existing norms and values<sup>38</sup>. He suggests five strategies a government should develop in order to attain legitimacy. These include the inculcation of an ideology of work, the increasing of the social distance between ruler and subjects, the religious validation of the government's right to rule, the penetration of the local level institutions by government agents, and the socialization of the citizenry with rewards for supporting the government and penalties for resisting it<sup>39</sup>. In an earlier article, Kurtz stressed the importance of a government's fulfillment of its economic obligations as a means to achieve legitimacy<sup>40</sup>.

The discussions summarized above suggest that the ruler of an early state initially needed to strive to attain legitimacy in the eyes of his subjects. A paradox presents itself, for this required ruling according to different systems of norms and values so that subjects of different cultural backgrounds could identify with the ruler. This required a good deal of ingenuity and propaganda<sup>41</sup>. It is here that religious beliefs often play a decisive role. The Frankish conqueror Clovis became legitimate in the eyes of the Gallo-Roman inhabitants of France once he was baptized into Christianity<sup>42</sup>. Charlemagne tried to Christianize the Saxon peoples to better incorporate them in his realm, and Jeanne d'Arc succeeded in making "her" king of France legitimate by having him crowned in the cathedral of Rheims<sup>43</sup>. Hagesteijn describes at length the decisive advantages for Southeast Asian rulers when they succeeded in introducing the legitimizing ideas for kingship, as developed in Hinduism and Buddhism<sup>44</sup>.

## THE ADMINISTRATION OF JUSTICE

There always were individuals unwilling or unable to fulfill the obligations placed on them by the laws issued by a central government or its representatives, even when these laws were based on prevailing norms and values and accepted by a majority of the population. The maintenance of the law fell to state functionaries at the local, the regional, and eventually the national level. These functionaries had the authority of their office to impose a decision on the

disputants from a third-party standpoint. They also had military or police power to enforce their judgments<sup>45</sup>. This, as Roberts notes, does not necessarily imply that these judges always used force; in many cases disputes were solved by mediatory procedures.

In the majority by far (sixteen of the twenty-one cases) in the early state sample previously referenced, the administration of justice was the responsibility of general kinds of functionaries such as village heads, district chiefs, or rulers. Only in some cases did a professional judge play a role (Angkor, Aztecs, Incas, Kuba, Maurya), while in five cases (Capetian France, Incas, Jimma, Kachari, and Yoruba) general functionaries as well as professional judges operated side by side<sup>46</sup>. The majority of cases was handled by functionaries at the local-level; only some types of misconduct, such as murder, arson, and treason, were reserved for judgment by higher administrators. Usually three different kinds of misconduct were distinguished: crimes against the state (e.g., murder, treason, tax evasion), crimes against religion (violating rules surrounding the sacred king), and 'minor' misconducts (e.g., theft, robbery, adultery). Usually different categories of judges handled these types of cases.

One of the main problems in the administration of justice in early states was the lack of a coherent body of laws. In no less than thirteen out of twenty-one cases no such coherent body existed. This situation inevitably called for differences in judgment. We should not overestimate the value of codified laws. Patrick Wormald, who thoroughly studied the codifications of law in early medieval Europe, concludes:

On the whole, in spite of efforts by Carolingian kings . . . , custom seems to have remained primary. My conclusion for Europe as a whole is thus unsurprising, but nonetheless suggestive. In those areas where the use of *lex scripta* was not only ordained but made easy, *lex scripta* was indeed used. In the areas where we find similar ambitions, but more marginal assistance to the judge, there are signs of a move in this direction, but no more. In the parts of Europe where both instructions on, and manuscripts of, the law are rare, there is scarcely a trace of the use of written texts in actual cases<sup>47</sup>.

Fortunately, in many cases people could resort to courts of appeal; only in Hawaii and ancient Tahiti were there no indications that such courts existed<sup>48</sup>. The rather loose formulations of the laws, the lack of control over the judges, and the often heavy penalties encouraged many people to attempt to bribe officials. The missionary Roscoe gives the following description of such efforts at a court of appeal in Buganda.

If a man thought that he was losing his case, he would endeavor to bribe the judge; if he proposed to give him a slave, he would place his hand flat on the top of his head as if rubbing it, when no one but the judge was looking; this signified he would give the latter a man to carry his loads. If he proposed to give him a woman or a girl, he would double up his fist and place it to his breast, to represent a woman's breast; if he proposed to give him a cow, he would place his fist to the side of his head to represent a horn; if it was a load of bark cloth, he would tug at his own cloth. The signs were made secretly; if the judge accepted the bribe, he pronounced a sentence in the man's favor<sup>49</sup>.

It is not clear whether the situations described by Roscoe concerned criminal matters, or efforts at reconciliation. When serious crimes were judged, the sentences usually were harsh in Buganda. The missionary Ashe mentions death by burning, cutting the culprit into pieces, the slitting of ears and nose, and so on<sup>50</sup>. A problem with his statement is that it is not clear what

kinds of misconduct were punished. Roscoe writes that there was an extended period of time between the pronouncement of a sentence and its execution. This made it possible for the condemned to try to buy himself free <sup>51</sup>. Such bribes formed a considerable part of the income of king and notables.

The rather loose way in which the administration of justice was carried out in Buganda differs considerably from the rather formal approach of the Incas. There a detailed code of laws existed, and a whole hierarchy of judges carried out the administration of justice. Some cases were handled by the village curaca; others fell under the jurisdiction of the tucricuc cuna, the district chief <sup>52</sup>. Also, Inca punishments were harsh. Death, maiming, and torture were common, and in some cases not only the culprit, but his whole family was punished <sup>53</sup>. Although the majority of cases was handled by general administrative functionaries, a number of professional judges (such as the traveling hucha camayoc) handled crimes such as murder or having sex with an accla <sup>54</sup>.

The vast majority of disputes in early states, however, was handled by heads of families, trying to find solutions through negotiation or adjudication. When their efforts were unsuccessful, the village head took over the cases. Only when serious crimes such as murder or treason were committed did higher judges take over.

## Conclusion

On the basis of the data presented, it can be concluded that in early states attempts were made to develop and maintain systems of laws that could be and actually were supported by physical force. Laws were binding on the population as a whole, even though differing interpretations were possible when the transgressor held high status. Several groups of people were usually involved in the process of preparing laws, but it was the ruler who formally decreed the laws. The promulgation of laws based on existing norms was not so difficult; the introduction of really new laws was. To be legitimate in the eyes of the population, laws had to be based on the prevalent norms and values. When this was not the case the central government experienced resistance. It needed to indoctrinate the people to achieve voluntary compliance. The requirement of legitimacy became even more difficult to achieve when early states conquered peoples of differing cultural backgrounds. Minor judicial problems were usually solved by family heads through negotiation or adjudication. Village heads also tried to solve judicial problems through these methods. As state functionaries, however, they could apply force. Only more serious crimes came to the attention of higher administrative functionaries. In some early states professional judges played a role. The administration of justice was hampered by a lack of codification of laws and a lack of codified penalties. Arbitrariness and efforts at bribery were common. Yet early states laid the foundations for future constitutional states, however shaky the beginnings may have been!

## Notes

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