CHAPTER - 4

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Crime

Although the term 'crime' is being understood in different aspects and dimensions by different human societies, it has certainly got some basic universal meaning. According to Terrence Morris, crime is what society says is crime by establishing that an act is a violation of the criminal law. Without law there can be no crime at all, although there may be moral indignation which results in law being enacted.\(^1\) Blackstone in his commentaries on the laws of England has defined crime as an act committed or omitted in violation of a public law, either forbidding or commanding it.\(^2\) According to Bentham\(^3\), if the question relates to a system of law already established, offences are whatever the legislature has prohibited for good or for bad reasons. Prof. Keeton\(^4\) says "crime today would seem to be an undesirable act which the state finds it most convenient to correct by the institution of proceedings for the infliction of a penalty." Prof. Glanville Williams asserts "crime" as one of the thorny intellectual problems of law. According to him, a crime or an offence is a legal wrong that can be followed by criminal proceedings which may result in punishment.\(^5\) Having seen these definitions, it can be summed up that crime is a wrongful act of commission or omission in violation of prevailing criminal law followed by criminal proceedings that results in punishment. The concept of crime in traditional Tangkhul society was basically attached to social need, morality and social sanction. Meaning, a forbidden act proved to have been committed is

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3. Chitnis Vijay (Prof.), op.cit, p.2
4. Ibid.
said to have resulted in commission of a crime. Such act of wrongful commission causes harm or injury not only to the individual or group of individuals concerned but to the society as a whole. It affects the individual, family and clan. Hence, crime in Tangkhul society is considered as a wrongful act of commission or omission in violation of the customary (criminal) laws of that society the consequence and impact of which affects the entire public. The native term for crime is khayon-khalang.

Elements of Crime

Generally speaking, there are two elements of crime. The physical element or actus reus and the mental element or mens rea. The actus reus can be termed as guilty act whereas mens rea as guilty mind. Liability in criminal law is based on the maxim actus non facit reum nisi mens sit rea which implies that an act by itself does not amount to a crime unless it is accompanied by guilty mind.

The physical element

In Tangkhul society and its customary law, it is accepted that an act is an event subject to the control of human will and human mind. It may take any of the following shapes.

(i) An act may be either positive or negative. In other words, it may be either a commission or an omission.

(ii) It may either be internal or external. An internal act is an act of the mind whereas an external act is an act of the body. To think is an internal act. While to talk or walk is an external act. An internal act
like an external act can be either positive or negative.

(iii) It may be either intentional or unintentional. An intentional act is the outcome of the doer’s will directed to that end. An unintentional act is not the outcome of the doer’s will directed to that end.

An act may be either (a) wholly intentional where the doer’s idea perfectly coincides with the fact, or (b) wholly unintentional where the doer’s idea does not coincide with the fact at all; or (c) partly intentional and partly unintentional where the doer’s idea coincides only partly with the fact. There are also three aspects of an act. Its origin in some mental or bodily activity, its circumstances and its consequences. For instance, in an act of shooting, the physical act of shooting until the bullet hits the victim is the origin. The presence of the victim within firing range, whether the revolver is loaded or not are the circumstances. Finally, the death of the person due to the shot is the consequence.

**Actus reus and its characteristics under the Tangkhul Customary Law**

As per Tangkhul Customary Law *actus reus* which is known as *khayon otsak* in native may be defined as a result of human conduct as the law seeks to prevent it. The characteristics of *actus reus* are;

1. It is the result and not the conduct. For example, in the case of murder, it is the victim’s death which is the actus reus (and the intention to cause the death is the mens rea).
2. It must be the result of a voluntary conscious act or the result of human will directed to that end. For example, A and B are climbing a
mountain. A’ is suddenly seized with epileptic fit and pushes B who is killed. Here, B’s death is not the actus reus.

3. Actus must be reus, that is, prohibited by law. If one takes away his own umbrella thinking that it is someone else’s, it would not be an *actus reus*.

4. It must be the act of the accused.

5. There must be a causal connection between the act and the harm which is forbidden by law.

6. It may be the result of a positive or a negative act.

The mental element

Accordingly to Prof. Glanville Williams, *mens rea* refers to the mental elements necessary for a particular crime and this mental element may be either intentional or recklessness. *Mens rea* in native is known as *khayonning*. Some crime require the particular kind of knowledge. The acts may be classified into three categories; intentional, negligent and accidental. Intentional and negligent acts are accompanied by guilty mind. Guilty mind, therefore, means either intentional mind or negligent mind.

Intention

‘Intention’ in native term is called *ningrin*. According to the criminal jurisprudence of the Tangkhuls, there can be no crime or wrongful act without the presence of criminal intention known as *khayon-khalang ningrin* in native. Therefore, intention is an essential mental element to constitute a crime. An act
may not necessarily amount to a crime even if it causes injury to another person unless the act is done with guilty mind. How to prove the existence of intention is a basic issue. In Tangkhul society intention of a person can be gathered from what he says. Intention can also be gathered from the previous or subsequent conduct of a person which may be indicative of his desire or consequence or foresight of consequences. It can be also gathered from what the person did at the time the event occurred. Actual conduct of the person also reflects his inner intention. For example, when a person holds a spear or duo and strike at the head or some other vital part of the body, it is clearly indicative of his intention of killing the other person.

A mere desire for the consequences with a foresight, the consequences would not, however, constitute intention. For example, if a person fires a shot from the window of his house in Imphal to kill someone in New York, he may have a desire to kill him but he does not have foresight of the consequences and hence one cannot be said to have an intention to kill that person in New York. Intention is different from motive although often the terms are used synonymously. On the other hand, the ulterior intent or motive is that part of the total intent which lies outside the boundaries of the wrongful act and relates to the object or series of objects for the sake of which the act is done. The native term for motive is ningphum.

Negligence

The Tangkhul customary principles of criminal law do not immune an act of negligence from criminal liability. An act of negligence in native is known as machekachin otsak. It is considered that an act of negligence is yet another form
of mens rea. In its ordinary sense it means either carelessness or thoughtlessness. Generally, there are two divergent views about the nature of negligence. One is called the subjective theory while the other is called the objective theory. According to the subjective theory, negligence is a state of mind. It is the mental attitude of indifference with reference to one’s conduct and its consequences. According to the objective theory, on the other hand, negligence consists of failure to attain a given standard of conduct. It may also be said that negligence consists of the omission to do something which a prudent and reasonable man would do or the doing of something which a prudent and reasonable man would not do. It consists in failure to achieve the objective standard of conduct of reasonable man. The same precept of criminal jurisprudence is applied in Tangkhul customary principles of crime. Any negligent act, therefore, will be a crime once proved to have been committed or omitted that causes certain harm to others.

Accidental act

The customary principles of criminal law exempts any accidental act from criminal liability. Accidental act in native is known as kala kashi eina suman kahai otsak. An act to the extent of causing someone’s death or damaging someone’s property while acting purely in good faith without any criminal intention is not an offence. The accused person can be exempted from criminal liability. However, the uniqueness of Tangkhul customary principles of crime is that despite the exemption from criminal liability, it is mandatory to compensate the victim on humanitarian grounds. Meaning, compensatory measures is to be taken up by the accused person to address the grievances of the victim or his family. Hence, this type of accidental

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7. Sources taken from an interview with NG Max Phazang, law and customary expert who is presently working as Registrar, Gauhati High Court, Imphal Bench, Manipur.
case causing injury to other persons can be settled down by payment of compensation to the victim.

Attempt

According to the principles of Tangkhul customary law on crime, an attempt is an offence. An attempt to commit any crime is a direct movement towards the commission of a crime after the preparation is over. An attempt is an act which, had it not been prevented by an unforeseen event, would have resulted in the crime. A' shoots at B with an intention to kill him. B' escapes the shot and the bullet misses him. A' is guilty of an attempt to commit murder. Punishment for an offence of attempt will also depend on the nature, facts and circumstances of a case.

Forms of punishment

The customary system of the administration of criminal justice of the Tangkhuls is considered to be brief but effective. There are mainly three forms of punishment as per Tangkhul customs. The term punishment is known as *shongran* in native language.

1. Permanent banishment or ostracism from the village

Tangkhul society was to permanently banish the convict from the village-state. Such type of punishment in native is called *khawui eina kakasham shongran*. Two such offences for banishment are; the offence of murder and offence of incest. The two offences are known as *mikhayum* and *shokhala* respectively in native term. These two crimes are considered to be the most heinous crimes that bring omen to the entire village as a result of such abhorrent act. A person who had been permanently
banished from the village cannot return back to the said village. This type of punishment is considered to be the highest form of punishment in Tangkhul criminal justice system. It may be noted that permanent banishment from the village was considered as the most effective form of punishment in the past. There was not much difficulty to effectively and stringently execute such punishment. It is mainly because of the social cohesiveness and the strong sense of unity and respect for the customary laws. The efficacy of customary law was very strong and accordingly it was obliged by the members of the society with fear, reverence and dignity. This is not the same today, especially in this modern society where unity and cohesiveness is being diminished to a great extent. When the researcher surveyed any such case where the convicts of such nature of crimes deserved to get such punishment, it was informed by at least ten village headmen that in the past ten years permanent banishment from the village under customary law was not found. Convicts of such nature of crimes are allowed to live in the village by payment of heavy fine and by debarring such persons from holding public responsibility. There are not less than three families in Nambashi village who are allowed to live in the village by payment of fine and debarring from holding public responsibilities for having committed the offence of shokhala.

2. Temporary excommunication from the village

This is the second most severe form of punishment available to the convict in the traditional Tangkhul society. Conviction for culpable homicide not amounting to murder is normally awarded with temporary excommunication from the village.

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8. Sources obtained from interview conducted with the headmen of Nambashi Kl., Kasom Kl., Kashung, Kangkum, Khamlang, Phungyar, Grihang, Bungpa, Sondal, Tolloi, Sinakeithel, Chingai etc. were held in different occasions.

9. Sources taken by the researcher from Nk. Ngamrei the village headman of Nambashi during an interview.
and/or concerned society with or without fine. Convict for the offence of rape 'ngalakatuk' in native is awarded with such punishment. The period for such excommunication may be from 5-10 years, This form of punishment includes social ostracism which is known as khangareng in Tangkhul. This means that there shall neither be social association nor personal interactions by the public with such convicts. The punishment of khangareng is awarded to the convict inside the village without being physically banished from the village. This type of punishment is awarded when a person deliberately defies the customary laws, other norms and agreements of the village. The convict is given forced exclusion from the society for a particular period of time as the customary court thinks fit and proper.

3. Fine

Imposition of fine is the most common form of punishment in the Tangkhul criminal justice system. The type of punishment in native is called lan eina takhami shongran. The amount of fine varies from one case to another depending upon the gravity of the offences. The measure of punishment of fine must, however, be carefully regulated or assessed and due regard must be had to the nature of fine as usually imposed in the olden days which were in kind as Tangkhuls did not have currency system in those days. The quantum of fine in most cases were found to be reasonable.

4. Confiscation of property

Attachment and confiscation of property is another form of punishment most often awarded in property offences. Act of confiscation arises as and when the
convict does not comply with the court’s order. Another circumstance under which this punishment can be awarded is when the accused person commits an offence of theft or receives stolen property from someone else. This type of punishment in native term is known as *shimlui thongthang khangapon shongran*.

**Deterrent and Reformatory theory of Punishment in Tangkhul Criminal Justice System**

The object of punishment should not be to wreak vengeance but to reform the criminals and prevent a repetition of the offence. The object of the criminal law must be to reclaim the criminal and prevent him from further commission of crime. Crime like all other diseases should be properly diagnosed and treated scientifically. The offender must be given proper treatment. The message of Mahatma Gandhi, “hate the sin and not the sinners” (a reflection from the Bible) should guide the reformer in adopting a judicious penal policy.

The *Tangkhul* customary law has a strong relevance on the deterrent and reformative theories. Their belief and practice is absolutely based on the principles and ideals of peace, (non violence) equality, freedom and dignity of all mankind. The Tangkhuls have an inherent quality of paying equal respect to all citizens. There is no evidence to show that death penalty was ever awarded in the administration of criminal justice in village *Kalangshim*. The maximum penalty awarded for the most heinous crime such as murder (*mikhayum*) or incest (*shokhala*) is permanent banishment of such convict from the village. The philosophy behind such penal policy is purely of paying highest respect to every mankind of God’s creation.
Tangkhuls’ bravery and courage in head hunting was exercised purely in defending their land (village) and their people from the external aggressors. The famous head hunting was not a practice as such but an imminent execution of responsibility of the people during war time or aggression of the enemies in defence of their people and the land.

Reasons why Tangkhul customary law is against death penalty

1. It is ethically unjustifiable: Ethically it is wrong to take human life even if it be the life of a convicted murderer. The village *hanga* has no right to take away something which it cannot give, that is, the human life which is the most beautiful and precious thing in the universe. If killing of a human being is bad, it is equally bad whether it is done by an individual or by a village *hanga kalangshim*.

2. It has demoralising effect: Death penalty has a demoralising effect in the society. In this regard, it has two fold results;
   
   (a) it makes the trial more sensational and juicy;
   
   (b) it produces a brutalising effect on the executioners. It may terrorise the people rather than moralising them.

3. It really is not deterrent: It is argued that death penalty itself is not as deterrent as it is believed to be. It rather arises the sensational feelings of vengeance against such brutality of punishment.

4. It is anti-reformist: It eliminates the criminal himself. In fact, what we have to do is to eliminate the criminality and to turn the criminal into a good citizen whose energies can be utilised to achieve the social goals. It leaves no scope for
reformation for a man cannot be reformed by cutting off his head.

5. A hanged person cannot be unhanged: Death sentence is irrevocable. It is an admitted fact that our system of administration of criminal justice is not foolproof. That, there might be miscarriage of justice in some cases as a result of which innocent people might be hanged to death or put to death in different ways. In such cases even if subsequently the mistake is realised it cannot be rectified when an innocent person is already hanged.

Measure of Punishment

In *Tangkhul* criminal justice system, there are basically three elements to be taken into account while determining the appropriate measure of punishment. The criminals cannot be always put to equal measure of punishment. The punishment has to vary from one criminal to another on different yardsticks. The measure of punishment for a criminal has to be determined in the following manner:

1. The motive of the offence: It is a general rule of the measure of punishment that other things being equal, the greater should be the quantum of punishment. Meaning, there should be proportional relationship between the intensity of the temptation to commit a crime and the severity of the punishment to be awarded. For instance, a person who kills another in order to relieve him of his physical tortures cannot be punished with the same severity as would be warranted in the case of a person who kills another in cold blood to grab his property. To this general rule, however, there is one qualification. In cases of urgent necessity, the temptation
to commit a crime may be very strong temptation to commit the crime, yet, necessity should be considered a mitigating circumstance.

2. Magnitude of the offence: Quantum of punishment should vary with the variation of the magnitude of the evil consequences of the criminal act. It can be argued that when the motive is equal, punishment should also be equal irrespective of the actual harm caused. But this would not be reasonable. For instance, both petty theft and murder may be committed with the same motive of gain. If both the crimes are punished equally (besides when there is more severe punishment for a more serious crime, it is not likely to be chosen by the prospective criminals) and the offender would prefer to cause death and avoid detection of the crime rather than to stop with theft. As such, it is necessary to vary the punishment with the magnitude of the offence for two reasons;

   (i) so that the petty offences should not be checked at too great a cost and

   (ii) the intending offenders may be deterred from inflicting greater harm.

3. The character of the offender: The character of the offender is another factor which requires notice at the time of awarding punishment. The worse the character or disposition of the offender, the more severe should be the punishment. It is strange but true that there were no habitual or professional criminals in the Tangkhul society of the days of yore. A casual criminal deserves the sympathy of the court because he is usually a victim of circumstances. In such cases repentance and reformation are always possible. On the other hand hardened criminals or man of bad character should be punished more severely.
Presumption of Innocence

It is a cardinal principle of criminal justice that a person is presumed to be innocent until he is proved guilty. This is known as the doctrine of presumption of innocence. It is a characteristic feature of English Criminal Procedure that it is the duty of the prosecution to prove that the accused is guilty beyond all reasonable doubts. The *Tangkhul* Criminal justice system (customary) also partly follows the principles of this doctrine; presumption of innocence unless it is proved guilty and the burden of the prosecution to prove that the accused is guilty beyond all reasonable doubts. *Tangkhul* customary law (criminal) sanctions various punishments to the convicts. The indicment and punishment of such accused persons cannot be carried out on mere complaint. The village (hanga) court and the complainant has the onus to prove the commission of such crime being charged against the accused person. Unless such a proof is being established against the accused person, the accused person cannot be convicted but rather be acquitted by giving the benefit of doubt within the ambit of the doctrine of presumption of innocence. But *Tangkhul* customary law do not compulsorily give this benefit to the accused for the very reason that sometimes the parties concerned are made to undergo ordeal if the parties give mutual consent to perform ordeal the outcome of which will determine the decision of the court. In the absence of such consent, ordeal is not compulsory.

The reason why the rule of presumption of innocence have been accepted and used in the *Tangkhul* criminal system since time immemorial are given below :-

1. If this principle is not accepted many innocent people may be harrassed by unscrupulous authorities for mere allegation or complaints.
2. It is always preferable that guilty persons be let off rather than that one innocent person should be convicted.

3. This rule or practice contributes greatly to the dignity and apparent humanity of criminal law and procedure (*yanza-yanret*) that prevents unjust potential conviction.

4. In the case of inadequate or doubtful evidence, it is always in the interest of justice that a person may be acquitted rather than convicted. This principle under Tangkhul customary criminal jurisprudence is in conformity with the opinion of Woodroffe according to whom the doctrine of presumption of innocence depends upon the doctrine of proof beyond reasonable doubt. If there is any doubt lurking in the mind of the Judge, whether the accused is guilty or not, the benefit must be given to the accused.\(^8\)

The presumption of innocence is a healthy rule crystallising the sanity of customary law and promoting justice by preventing conviction of the innocent. It protects the basic liberty of the people and checks exercise of arbitrary executive power.

Ordeal

Ordeal was practised by almost all human societies in the primitive ages. Tangkhuls are not an exception. Ordeal in Tangkhul language is known as *ameoyan bichar sak*. In the absence of a concrete evidence of a case either to prove it or disprove it, the customary court is compelled to initiate an act of ordeal by obtaining

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\(^8\) Chitnis, Vijay, (Prof). op.cit, p.91.
the consent of both the parties. It may be noted that under Tangkhul customary law forced ordeal is not acceptable. Mutual consent from the parties must be obtained. There are varied forms of ordeals practised in Tangkhul justice system. The two most prominent ordeal are:

A. **Tara Kazang (Immersion into water):**

   Under certain circumstances when the village *hanga kalangshim* cannot conclude a case for want of evidence or witnesses called *shakhi or shakhi-shapon* in native, it has to apply this drastic way of proving the case by undergoing an ordeal of immersion into deep water by the concerned parties known as ‘*tara kazang*’. This ordeal is based on superstitious belief that the god of supernatural being called *ameoa* shall intervene to unearth the truth. Normally, an oath is taken in the name of *ameoa*; “If I have done wrong, let heaven and earth judge me”. Immediately after taking the oath the parties will simultaneously be made to immerse into the deep water (it can be in a running stream, river etc.). The person who first float out of the water will be held guilty. There shall be one *hangva* each (member of village authority) standing by the side of the two persons closely monitoring the act of immersion. There will be a prescribed duration of time for conducting such ordeal. In case both of them do not float out of water till the expiry of the given time, it will be declared that the opponent is not guilty. Minors are prohibited from such ordeal, weak and physically handicap persons are also not allowed to undergo such trial. This ordeal is applicable in all nature of disputes.
B. **Ngaleira Khamang** (consumption of liquid of soil)

*Ngaleirakhamang* is an act of ordeal wherein either of the parties or both the parties of the disputed land consume the liquid made of the soil of the disputed land. Such act is occasioned when a land dispute arises between two or more persons or between two or more villages and amicable solution could not be brought between the parties or when conclusive evidence or witnesses are not available to settle the dispute. The village (*hangal*) *kalangshim* shall decide whether or not only one party or both the parties shall drink the muddy liquid. The most significant part of this ordeal is that of swearing a solemn oath in the name of *Ameoa* known as "*kameo ming kazai*" in native. The content of the oath runs as, "If I lie, may I and my family get destroyed and mingled with the soil of the earth and be seen no more". It is believed that as a result of this swearing the guilty person will suffer and get destroyed in the passage of time. This ordeal is not exclusively applied to land disputes, it is applicable to other nature of cases as it deems fit.

After analysing the nature of ordeal, it may be noted that an ordeal of any nature is formed by emotion and supernatural belief. It does not warrant certainty and accuracy of the end result of such ordeals. It bears a primitive character. As such, one cannot assert that an ordeal ensures justice to the parties.

On the other hand, development of legal process including that of good customary laws gradually diminishes the practice of ordeal. The advancement of science has brought a new phenomena in the field of law. "Reason" has substituted to superstitious belief. Therefore, a system of good customary law involves an appeal
to reason. Time and progress had softened the barbarities of primitive Hellenic institutions, and the unpalatable theories underlying them had been rationalized. In the fresh freedom of their intellectual process they had shaken off those shackles riveted into the souls of their ancestors by ordeals of fire and water. The criminal jurisprudence of the Tangkhuls should be given a broader outlook with more scientific enlightenment. Ordeal being a bad custom should be totally abolished and a good customary law be developed in tune with the emerging modern society. Apart from legal and scientific reasonings, an act of ordeal is also antithesis to Christian faith. The Bible says that thou shall not take the name of the Lord thy God in vain. This clearly manifests that ordeal is not in conformity with the belief of the Christians. As aforesaid, it is a bad custom even for those non-christian Tangkhuls whose population is very negligible.

Mistake of Fact

'Mistake of fact' in Tangkhul language is known as ningkathar eina ainwui azingli sakahai khangui otsak. The Tangkhuls strongly believe in the doctrine of Ignorantia facti excusat which means ignorance or mistake of fact is excuseable. Mistake of fact is a good defence in customary (criminal) laws of the Tangkhuls. The maxim Ignorantia juris non excusat which means mistake of law is not excuseable is also strictly followed in the Tangkhul criminal justice system. Mistake of fact is a good defence in customary (criminal) laws of the Tangkhuls. How can a person who is said to have done certain wrongful act without any criminal intent be punished? He cannot be punished at all for the very reason that there was total absence of mens rea (guilty mind) which is the basic element for constituting a crime. The
principle behind this is that, when one are not aware of the circumstances of an act, one cannot be said to have done it intentionally. The Tangkhul customary law, nevertheless, allows certain compensatory measures taken up in favour of the aggrieved person(s) or complainants. Such compensation is determined purely on humanitarian ground. The mistake must not be merely of superstitution but a reasonable one.

Justification for mistake of fact as a defence are

Negation of mens rea: All crimes exist primarily in the mind. Mistake of fact can only be excused if the mind of the accused is not guilty.

Natural Justice

It is unjust to convict a person for mistake of fact. If this principle is not accepted, law would act very harshly upon the individuals who act upon an honest and reasonable mistake of fact.

Ethical grounds

The purpose of punishment to the wrong doers is basically with the principle of retaliation, prevention or reformation. None of these purposes is achieved if a person is punished for mistake of fact.

However, it can be criticised that it is difficult to give a conclusive proof of ignorance of fact, ignorance of mistake being a state of mind is subjective and there are obvious evidentiary difficulties. Two conditions must be satisfied before this defence is allowed;
(a) Had the mistaken circumstances been real, there would have been no liability for the act. If A kills B thinking it is C, A would not be excused because even killing C also would not be justifiable.

(b) The mistake must be reasonable and done in good faith, that is, the act must have been done with due care and attention.

The customary principles of criminal law of the Tangkhuls that have been observed and applied since time immemorial is undergoing some significant changes with the passage of time. The permanent as well as temporary banishment from the village as punishment for heinous crime committed such as mikhayum and shokhala is now quite difficult to implement in the true sense of the punishment and its objective. In the past Tangkhul society was confined mainly to the village life. Banishment from the village was considered as a fit punishment. It is no more the same today when the people are venturing outside the villages for better education, better economy and better life. Today, the state government has come to play a more important role in the maintainance of law and order. The state through its judicial institutions have taken effective measures in the administration of criminal justice. Heinous crimes are now dealt by the state. Nevertheless ordinary or less severe crimes are within the jurisdiction of the village hanga and village customary courts. Having observed this reality banishment as the customary form of punishment be abolished and instead the state may take cognizance of the customary law. Consequently, the state may further take necessary measures to imprison the convicts from the customary courts in the state owned jails. This measure will, to certain extent, enable effective administration of criminal justice by the customary courts and others.