

Review

Punishment as a form of legal order in an African society

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Accepted 10 March, 2011

Punishment within any social purview is a necessary vehicle that underscores the nature, place, function and the role of law. The paper posits that law in traditional African society is a developed structure though may not be formal or literate. The paper argues further that an attempt to purge law or legal order from the issues of justice, ethics and religion will not be acceptable in traditional African Thought. Punishment in Yoruba traditional society reconciles the various schools of thought on punishment thus contributing positively to discourse in jurisprudence. It serves as a mode of administering justice and the smooth-running machinery of the society.

Keyword: Punishment, African, Legal order, Society, Reconciliatory, Retributive, Retribution, Reformatory, Deterrence, Compensatory

INTRODUCTION

Punishment in Yoruba thought establishes that the society is in a good, perfect and governable state. It achieves the aim of making human beings live peacefully in the society. Thus one can argue that it is directed towards a legal order. Law or legal order has as its underlying principle the aim of directing the affairs of the society both at the individual and societal level towards achieving a common good and promotion of healthy living in the society. For the common good to be good it must be able to produce a society where human beings live without fear, live in peace and in harmony with his fellow human being. The Yoruba example of punishment as presented though may not be highly formal or literate but may be considered as contributory to the common good and social harmony of the society thus achieving legal order within the society.

Punishment within the Yoruba society

In Yoruba-African society, the institution of punishment is very important and it has as one its central purpose the aim to reduce or avoid crime in the society. The question who is to be punished is the first to be addressed in this paper. In other words what makes one qualify for punishment? The simple answer is that punishment is carried out on offenders. By this, we mean the person who has broken the laws, customs and traditions of the society. In bringing punishment to bear on the offenders it

is assumed that the offenders are well grounded and well educated in the laws, customs, traditions and taboos of the society. However, breaking of the law is not the only criterion for punishment there are other things to consider.

Punishment in Yoruba society also assumes that one is a rational human being that has a choice of action(s) and can be held responsible for this choice of action. Man is expected to be morally responsible for an action which he has control over.

So, Punishment is meted out on people who broke the law and can be held responsible for their actions. In other words, there must be a law whether moral, legal, religious or social to which offenders must violate. Laws and punishments are made available through town criers so ignorance is not an excuse in law (Olaoba: 2002).

It may be necessary to ask where do we place imbeciles, idiots and madmen. Bolaji Idowu (1962:145) in discussing moral values among the Yoruba asserts that:

Every human being who is not clearly an imbecile has knowledge of right and wrong---everyone knows that right is not the same thing as wrong.

Thus we may argue that imbeciles, mad people, the insane or mentally ill that is, people who have lost their rationality fully or partially are not in control of their actions and do not belong to the category of those who can be punished. Only those who have broken the law

voluntarily, that is, as an act of choice and are rational can be punished. Our argument is that from the standpoint of the traditional Yoruba –African, it is inefficacious to punish madmen and idiots and imbeciles because they have lost their rationality and they are not in control of their will. It is on the strength of this that idiots and madmen can be excluded from punishment in traditional Yoruba society.

We may probe further in what categories do we place children and infants since they are not as matured and rationally developed as adults. It is possible to argue that as for children and infants the traditional Yoruba believe that they are not beyond the law. Hence, the Yoruba would say '*ati kekere lati npeka iroko*' (It is from infancy that we prune the branches of an *Iroko* tree). Children are expected to be curbed from wrong doing before they become uncontrollable.

The underlying assumption is that the mind of the infant is still young and can be modeled at this age to conform to the ideas of the society. Once the child grows to maturity, he or she would have formed habits which may be detrimental to the society and the habit will not be easily remodeled.

However, because the Yoruba society is basically communal in nature, punishment at times goes beyond the offender and can be extended to the people that surrounds him or her i.e. his wife or her husband, children, extended family and community (Mbiti: 1982:206, Ajisafe: 29). The underlying principle is that whatever affects one affects also the others. That is why the Yoruba says: '*Ti ara ile eni ba nje kokoro ti ko da ti a ko ba so fun kurukere re ko ni je ka sun ni oru*' (If your neighbor is eating poison and you do not warn him the result may be disturbing at night for both of you).

Though the guilt of one person may involve his entire household including his animals and property in that it brings shame to them all but as Mbiti recognizes on the long run the punishment is for the criminal or offender.

The underlying aim of extending the punishment of a member of the family to others is to deter other families from committing the same offence. The act of extending the punishment to other members of the family may be justified on the basis that an individual is supposed to be warned by the family to avoid shame, disgrace and unnecessary hardship upon the family. The Yoruba cherish their descent, background and family name. Any action that may bring shame to the family name is often resisted or avoided. Going a little bit further we may ask who punishes the offender?

One category of people that qualifies to punish are elders of the society. The Yoruba emphasize respect for elders as such respect for elders in itself constitutes a crime that attracts punishment. According to Mbiti (1982:2008) a person of lower rank, status or following the principle of hierarchy in age may offend one of higher rank. Besides, persons of same status may offend each other. He further asserts that a person of lower rank can

be offended by one of higher rank but this is not often punished. Mbiti's assumption may not be totally correct, because among the traditional Yoruba, if an elder of higher rank offend the lower rank, he may not be punished in front of lower but he will be punished by the community, clan or elders of higher status to show the evilness in his actions.

The king or Oba is also qualified to punish. Every town, village or hamlet is under a responsible head, either a provincial king or baale (Mayor) (Johnson, 1960:75). He wields authority and powers which makes him to be feared and respected. He is called "Igbakeji Orisa" (The second in rank to the deities) or Kabiyesi (who can question his authority). He is in charge of rules and customs thus the custodian who is expected to keep the laws and tradition, maintain law and order and punish offenders.

The "Oyo Alafin" example in which a king is made to commit suicide by the Oyomesis (king makers) goes to show that though the Oba is in charge of rule and customs, he is not above those rules. In highly stratified systems among the Yoruba like the Oyo Kingdom a council of Kingmakers is always put in place to check the excesses of the king and to ensure that the Oba operate within his traditional responsibilities. Furthermore they try to discourage unfiltered despotism in the political system. As a result, no tyrant will enjoy the support and cooperation of the Kingmakers (Oyomesi) and the people. Thus it clearly shows that to a large extent the governance of any town was not exclusively an affair of the Oba or King.

This "Oyo – Alafin" example shows that nobody is above the law. Although the king is supreme and vested with absolute power, yet that power must be exercised within the limit of the unwritten constitution, otherwise the "Bashorun" who is the mouth-piece of the people and the head of the Oyomesis (the king makers) has the prerogative to move the rejection of a tyrannical king in which case His majesty has no alternative but to take poison and die (Johnson, 1960: 70).

A major lesson from the above procedure is that the sovereign is not above the law and that there are checks and balances in judicial processes within the Yoruba society. Unlike the Bentham and Austin's Sovereign who is above the law, the sovereign from the Yoruba-African society is not.

The act of compelling a tyrannical king to commit suicide generates both moral issues. It may be argued that for any king to act in this manner is for him to be courageous in order to cover up his shameful act but the questions are: is suicide moral in this regard? To the Oyomesis we can ask are they not in a moral stance to protect those who want to commit suicide from doing so after all we as human beings have an obligation to prevent suicide rather than institute it. Is it not our duty to stop others from committing harm to themselves? How do we guide against the abuses of power of the Bashorun

if any? As human beings there may be abuses of power even on the part of the Bashorun who is highly instrumental to the checks and balances. The history of Old Oyo Empire shows that at a time, there was one Bashorun Gaa, who became power drunk and was forcing kings to commit suicide because they were not following his dictates. It becomes clear that there is room for abuses of power even in trying to stop abuses of power. This makes the whole system circular and imperfect.

The authority to punish also lies with parents. Yoruba parents give rewards for good behavior and punishment for bad ones to encourage children toward better performance (Ayo: 2002:124-125).

The disobedient child is canded, and occasionally pain-inflicting acts are carried out by parents on the child. For example disobedient child may be deprived of his food and other materials and special privileges may be cut off depending on the nature and gravity of the offense committed. The child may even be ostracized or ridiculed or made to face public humiliation. All these according to Ayo (ibid: 126) "are designed to bring the child back on track and make him or her an obedient child". The belief is that punishment produces more good in that the child becomes a better person who is well cultured with acceptable behaviors in the society. It is assumed to shape a child's character, personality and behavior towards what is acceptable in the society. So punishment is usually carried out by the parents.

How then will a child know when not to do something that will attract punishment? At various stages of life, parents consciously or unconsciously try to teach their children in specific directions making them learn in specific ways to conform to the norms of the society (Ayo, 125-126).

The question arises how does the Yoruba take care of abuses in the discretion of punishment on the parents? How do they weigh the punishment because in Yoruba society, legally, there are no rigid or written rules to follow in disciplining a child. Usually this comes arbitrarily and the question of abuse may set in. So, we may ask when punishment turns to be an abuse.

One factor that may help judge whether punishment has been abused is intention or motive of the adult who is to punish a child. If the motive is to inflict pain so that it will deter others and reform the child then one can argue that it is right or moral. But if the motive is to inflict pain for the sake of pain especially if the adult derives pleasure from doing such then it is an abuse. Also if the pain is not commensurate with the offence that is if the pain outweighs the offence then it becomes an abuse. Although it is difficult to decide how to measure offences with punishment however, low intensity form of pain is tolerable than high intensity, that is pains that can cause burns, scratches, bruises, broken parts of the body or death. The society depends on the moral intention in the judgment of the parents on punishment.

There are some configuration of institutional arrangement and administrative structures within the traditional Yoruba society that can help in drawing out some conclusions on the role of punishment in legal order.

According to Ayo (58), each community (town or village) is usually divided into quarters (*adugbo*) in Oyo, "Itun" in Ijebu and "Idimu" among the Ondo people. The number of quarters depends on the size of the town, the larger the town the more the quarters. Each town is overseen by an important chief appointed by the Oba, on the recommendation of important or leading members of the quarter concerned. All quarter chiefs represent their people on the "Igbimo" (Oba-in-council). In addition to the quarter chiefs, there are certain traditional chiefs such as the Balogun (warlord) and the Otun Balogun and Osi Balogun (right and left wing assistants to the warlord).

Furthermore, there is the Oluode (the head of the hunters) and the Olori Awo (the spiritual leader of the community). The latter is believed to be highly versed in the traditional religions of the community. There may be other co-opted members of the community. These other members have from time immemorial assisted the Oba in the formation of policies regarding the community. They also perform advisory roles and they serve as the judicial body of the community. Each quarter is also broken down into compounds or *Agbo-ile* whose head is called *Baale* (father of the house). The *Baale* is usually the eldest male of the extended family. He is respected for his wisdom, experience and age. The *baale* settles disputes within his household. In addition he represents his family on the council of the quarter chiefs where issues affecting their quarter are discussed. The *Baales* are expected to refer cases that are beyond their capability to the *Igbimo* for settlement (59).

So the framework for political and legal organization can be summarized as: *Baale* – quarter chiefs – *Oba-in-council* – traditional chiefs, spiritual chiefs, and *Oba*.

The *Baale* from each compound constitutes the council of elders. They provide links between their constituent compounds and the political authorities in the town. When the council of elders joins with the *Oba*, an *Oba-in-Council* or *Igbimo* is established. This council Ayo (61) reiterates served in the pre-colonial era as the legislative, the executive and to some extent the judicial arms of government in each town. In essence, there was the culmination of responsibilities, or a fusion of authority. All offenses criminal and non criminal were handled by this council. Sanctions are often imposed by the *Igbimo*, the *Kabiyesi's* official usually enforce such sanctions. The *Ilari's* are the law enforcement agents.

The above form of governmental or legal structure is also supported by Ajisafe (20), he says the governing elements are: the king, under him come the members of the royal family occupying or holding high position and the statesmen who are responsible to the king for the proper administration of the country in matters political,

judicial and commercial . In short, the people that have the power and authority to make laws and carry out punishment on offenders are the, the king, the chiefs, custodians of the gods and parents. This structure indicates implicitly or explicitly that everybody is given a fair hearing in legal matters. It also shows that there are other party(ies) who are objective and are ready to give fair hearing and judgment. In other words justice and the dispensation of justice is one of the underlying assumptions of punishment. The Yoruba often say *Agba osika lo ngbo ejo eti kan da* (A bad elder listens to one side of a case). A good elder is suppose to listen to both sides of a case to objective in his judgment and dispensing of justice in terms of praise, reward or punishment. Olaoba (2002:81) confirms that there is a process of investigation and cross –examination attendant on the Yoruba legal culture.

The Yoruba have a distinct idea of the moral religious and natural laws and classify their crimes into sections each attracting different punishment. Let us look at a few examples of crimes and the punishment they carry. However there is nothing rigid about the classifications.

Ajisafe (1946:27-35) in an extensive collection of Yoruba laws and customs gave some examples of these crimes and the applicable punishment. Larceny, burglary and stealing are punishable by death or deportation. Incest can be punished by offering of sacrifices to appease the wrath of the gods of the family. False accusation is given a penalty equal to the penalty inflicted on the accused. A child who is guilty of pilfering is flogged to whip out the crime from the child. Highway robbery attracts execution. Treasons and sedition are capital offences; the penalty is death, ejection or deportation. The offenders' property is also confiscated. His children may be fined or expelled or sold out of the country.

Abduction, manslaughter, smuggling are also crimes. They are punishable according to the nature of the crime. Some other crime attracts flogging, payment of fine, beating, whipping, tying, caning, putting into the yoke or stocks, lacerating wounds, imprisonment, execution, ejection or banishment, razing the house of the offender to the ground, castration or emasculation selling into slavery and fines in various kinds.

According to Ajisafe (36) the idea of prison or confinement is not foreign to the African man. Every king, or chief or head of a village or compound is supposed to have his own place of restraint, with chains, shackles, handcuffs, and staples to match. This runs contrary to Odera Oruka's claim that in traditional Africa, there were no prisons or fines, that they were elements introduced into Africa by the colonial penal systems and are therefore foreign imports.

We can see that punishment involves inflicting of pain whether directly or indirectly on the offender. For example the idea behind fines and levies is to inflict pain on the individual or family. By the time an individual or the

family goes about trying to meet the financial consequences of his actions it, there is bound to be pain inflicted on such an individual or family concerned.

As for minor offences on minors there are direct pains such as flogging inflicted on the child. The essence is to scare away other children from such act and to make the offender avoid such crime when he remembers the pain thus reforming the offender. Also to prevent the offender from repeating the offense which if not nip in the bud may cause further injury on the society.

What then are the aims of punishment in Yoruba thought? A lot of scholars have made some conclusions on the aims of punishment in traditional African thought which appears debatable. Olaoba(2002:84) claims that punishment is reformatory and retributive in nature. Ajisafe (36) in support of the retributive nature of punishment in Yoruba society claims that, punishment is reckoned as payment to satisfy the injured party. It is retributive in that if I kill, I will be killed. He states categorically that it is customary to set fire to the house of an offender in retaliation. These include capital crimes and other set of crimes. The principle of justice requires one to suffer for the harm they have caused others. It is also assumed that it will also balance the equilibrium of injustice and will send a signal to the society to consider fair treatment on all and respect for the other party. Law and order is thus maintained by fear of retribution, restitution and retaliation.

Having seen that the treatment of punishment in traditional Yoruba society is punitive, it can be argued that one of the aims of punishment is towards retribution. This involves a four way principle which is social, moral, legal and religious

The social principle has to do with the well being of the society. Humans beings are expected to live in good relation to others. Man is a social being and if there is a disharmony in the society it will make people feel insecure.

There are religious laws which the Yoruba believes comes from the gods, divinities, and ancestors. It is commonly believed that they delivered the laws, customs to the people through oracles, divination etc. As such, the religious aspect of punishment in Yoruba thought has an ontological basis too. In African society it is assumed that there is vital force, being or spirit that governs the society any disruption will cause disharmony or disequilibrium. Punishment will have to be administered to bring harmony or equilibrium. So punishment in this regard is for the peaceful continuation of the community (Olaoba 2002:79).The legal has to do with enhancing peace and harmony I the society through administration of justice.

So law is intertwined with morality, religion and societal goals. The religious angle tries to promote good relations between the gods and the worshippers on one hand and it strengthens the relationship between the worshippers on another hand. Thus there are taboos to follow by the

worshippers of each deity. It also ensures good relationship between the society and the ancestors who are custodians of the laws.

The moral is to teach what is good and bad, while the legal aspect is meant to impose punishment for the benefit of all and to maintain law and order. The four are intertwined and the aim of the four is to maintain harmony in the society.

In another dimension, punishment is meted out to offenders among the traditional Yoruba in order to deter others. The pain and shame on the family and individuals as pointed out is expected to deter others. Traditional Africans are in most cases pragmatic about a lot of things in life. In their nature as pragmatists, they are always eager to see the practical effect of any thing, belief or institution. The practicality of punishment is shown when it proves that it can deter other would-be criminals and offenders in the society.

Apart from the retributive and deterrent function of punishment another aim of punishment in Traditional Yoruba society is to effect reconciliation, mutual cooperation and unity. Reconciliation is always used to bridge a gap that the offence may create. Thus it is a tool for social unity and harmony so that life will be bearable for all.

Alyward Shorter (2007) in his discussion on the concepts of social justice in traditional Africa concludes that in African societies justice was devoid of vindictiveness and that there was scarcely an idea of retributive or deterrent justice.

Shorter claims that persons caught in the act of theft for example, might receive immediate punishment, but past crimes were rarely followed up and there were hardly any penal institutions. Legal actions were initiated in most cases by private individuals, supported by a primary group. He further states that the idea of crime as an anti-social act certainly existed, and it was the concern of authority in society to restore and promote social relationship. Reconciliation and the restoration of social harmony were the objects of judicial proceedings, not retribution. Hence the importance attributed to compensation and even ritual feasting as the outcome of a process of reconciliation. Shorter's position creates an argument between the perspective of the aim of punishment as reconciliation and retribution.

The process of adjudication and settlement of disputes among the traditional Yoruba would show whether Shorter's position is correct or not, as presented by Ajisafe (39), when a case is settled, kola nut are brought by both parties, split, and distributed amongst the important persons present. One part (*awe*) is given to the contending parties, who take and eat it together in the presence of the presenter, after this a glass of water, or wine, or gin is given to both. The guilty man is ordered to make a befitting apology to the wronged in the first instance. All these are done as reconciliatory acts to restore peace and avoid further conflicts so that there will

on the long run be peaceful coexistence in the society. It also sets a seal to the settlement of the case. However, if a punishment attracts penalty in form of fine, the fine goes to the chiefs, who share it among themselves. But if the fine is for damaged for wrong done (as in the case of adultery, etc.) the wronged man is entitled to it, but should give at least 2.5% of the amount to the head chief. If however Kola nut or drink as the case may be is refused by either or both parties, the case is regarded as unsettled. It may be forward to a higher court where it is opened to review. So we can see that restitution is achieved, reconciliation is pursued till achieved and compensation made.

The effect of settlement of cases brings a chain of reaction. While a crime attracts punishment the Yoruba does not stop at that. Settlement is sort between the offender and the offended. Thus a punishment is given, compensation and restitution is made and reconciliation is pursued. All this is to effect mutual existence and love within the society. So to the question what are the aims of punishment in Yoruba society, our analysis so far has shown that punishment for crimes involves pain, infliction of pain on offenders to prevent further crime, to reform the offender and deter others.

According to Ajisafe (39), in all cases except capital crimes which is life-for-life (whose punishment is retributive) decisions are given to effect a reconciliation, mutual cooperation and unity. Punishment serves as an operation of law or as a mode of legal and social control and the effect it has on the persons to whom it applies in terms of justice.

Punishment in Yoruba thought is also expected to be reformatory especially at tender age to make a person a better or cultured member of the state. We flog a child to make him not to repeat the crime. *To omore ko le fun o ni isimi* (Train you child so that you can have peace in future). This kind of punishment also deters because other children will not want to be flogged. In fact parents refer to this hoping that the child will learn from others. The essence of reformation is also to make criminals conform to standards of the society which they have tended to violate. This is also the aim of confinement.

Punishment is also expected to be compensatory. That is, to redress injustice meted out to the wrong by the offenders. From what we have discussed so far, it is clear that the Yoruba do not only have retribution as one of the aims of punishment, but also compensation and restitution not only to the individual concerned but also to the society. This is because an injustice done to one is seen as injustice to all, one that may destabilize the cooperation and mutual existence in the society.

Punishment in Yoruba thought thus can be seen as serving five major functions namely: retribution, reformation, deterrence, compensatory and reconciliatory as against the reformatory and retributory functions alone that Olaoba claimed. Each one and all of this function highlighted aim at maintaining or maximizing mutual

existence, unity and harmony. They are all interrelated. So we can conclude by saying that retribution, prevention, deterrence and reformation are the aims of punishment in traditional African society.

As Oruka (1976:108) rightly pointed out there is no reason why studies in jurisprudence should focus on Western style of judicial system without paying attention to the good side of African traditional judicial system and if need be improve on it by bringing out the beneficial aspect and eliminating the weakness. The concept of punishment has helped us to establish that there is legal order in African traditional society.

The basic assumptions underlying legal and social order in African thought can be based on at least four principles which are: To act in a way that respect human dignity; to accept that as humans we are rational responsible for our actions, to do unto others what you wish they do unto you; to ensure that the society is in constant health and equilibrium for the benefits of all.

It is also on this basis that citizens surrender themselves thus having duties towards the society. Anyone who destabilizes the mutual harmony or does not allow a healthy state of the society will be punished in order to restore peaceful society and deter others from doing the same so as not to destabilize the society. Thus, we can make our final submission that the African concept of punishment reconciles the various schools of thought on punishment with the society as its primary concern. The underlying legal rule can be seen as obey lawful authority. By lawful authority we mean parents, elders, the institutionalized structures within the society that make laws and enforce them.

The major principles that form the basis for law making can be stated as: do not repay good with evil, render to each his own that is, dish out justice as required. Any law that is not practicable within these principles will not be regarded as human enough nor valid to be a good law. The underlying aim of law is to promote the good of humanity and peaceful co-existence in the society. It is these principles that help the Yoruba to measure what is to be done and what is to be restricted. This principle also applies to the spiritual. A god or religion that does not conform to the principles of promoting humanity will not be seen as a good god or religion. The end of law can then be seen as a way to realize the common good and social harmony, In effect to make man good to be able to achieve a total good.

CONCLUSION

Society in the thinking of the Yoruba needs to keep itself going, thus there is a need for machinery for its smooth running. Laws though informal evolve from experience and they become traditions, customs and rules that the people guide jealously. Punishment in effect can be seen as a way of protecting these laws which have otherwise become the customs and traditions aimed at achieving peaceful coexistence in the society.

REFERENCES

- Ajisafe Moore EA (1946). *The Laws and Customs of the Yoruba People Abeokuta Nigeria*: M.A. Ola (Fola Bookshops).
- Alyward S (2007). *Concepts of Social Justice in Traditional African Religion*.
- Ayo SB (2002). *Public Administration and the Conflict of Community Affairs among the Yoruba in Nigeria*. California; CS Press.
- Idowu EB (1962). *Olodumare: God in Yoruba Belief* Longman
- Johnson S (1960). *The History of the Yoruba Lagos*: C.M.S. Bookshops.
- Mbiti JS (1982). *African Philosophy and Religions* Heinemann Educational Books Ltd.
- Moore AEA (1946). *The Laws and Customs of the Yoruba People Abeokuta Nigeria*: M.A. Ola (Fola Bookshops).
- Olaoba OB (2002) *Yoruba Legal Culture* Ibadan: FOP Press.
- Oruka OH (1976). *Punishment and Terrorism in African*, Nairobi East African Literature Bureau.