A Philosophical Defence of Punishment in Traditional African Legal Culture: The Yoruba Example

by

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Abstract

The paper attempts to provide a philosophical justification of punishment in Yoruba legal culture and argues that the institution of punishment is machinery for facilitating collective conscience of the Yoruba through frowning at impropriety of manners capable of being inimical to the developments of legal norms and disrupting the social equilibrium. Hence, the methodology adopted in the paper is analytical and critical and thus explores the tool of conceptual analysis in examining the nature of the philosophical problem of punishment within the framework of Yoruba legal culture. And with the aid of critical analysis, the paper argues, contrary to contemporary calls from humanitarian quarters for the abolition of punishment and that the institution of punishment in traditional Yoruba legal culture can be philosophically defended and justified. Therefore, the paper establishes that whatever its typology, punishment for the Yoruba is quite reformative, retributive and has deterrent effect as well as being instrumental to the dynamism of legal culture; and concludes with a caution note that if punishment were to fulfil its essences in contemporary societies, a cue must be taken from the traditional experience of Yoruba legal culture, where punishment enhanced the administration of justice as well as the social equilibrium.

Introduction

The Yoruba constitute one of the major ethnic groups of modern Nigeria. They effectively occupy the whole of Ogun, Ondo, Oyo, Ekiti, Lagos, and a substantial part of Kwara State (Atanda 1980,1). Aside from Nigeria, the Yoruba are also found in sizeable numbers in the south eastern part of the republic of Benin,Togo,and Dahomey in West Africa, in West India and in South Africa. There is also a thriving Yoruba culture in South America and the Caribbean, especially Brazil and Cuba, where the descendants of the unwilling immigrants to the new world have been able to maintain their identity and preserve their cultural heritage(Gbadegesin 1991,174).While the Yoruba are dispersed throughout the world, this paper focuses on the Nigerian Yoruba. The reason for this choice is that the ancestral home of the Yoruba is in Nigeria and each of the Yoruba in the Diaspora still traces its origin to this home where the culture thrives best.

Yoruba culture is an amalgam of reality permeating all aspects of life, that is, pattern of living and habit of thought of the Yoruba. As a complex whole, Yoruba culture is a composition of knowledge, beliefs, art, moral, religion, customs, politics, technology, law and other living capabilities acquired by the individual as an indigenous member of the Yoruba race. As with other aspects of the culture, the legal arm is undoubtedly important to the dynamism and vitality of the Yoruba culture as a whole. This legal aspect of the culture propels the drive of social engineering, peace and harmony. While its origin cannot be easily discovered, the fact remains that the Yoruba legal culture can be adequately situated within the realm of political governance. Hence, the Yoruba legal culture performs the dual function of peace-making and peace-keeping.

While the peace–making aspect of the legal culture centres on the legislation of indigenous laws towards the regulation of societal conduct that will engender a dynamic, peaceful and progressive political society, the peace-keeping is basically concerned with ensuring considerable conformity to the regulated rules through a cross examination of cases of defaulters of laws and disputes in order to sustain equitable justice and fair play. These two functional processes of the Yoruba legal culture are operational in Yoruba courts by the legal officials and the politically constituted authority. Peace–making is correspondingly identical to legislation, while peace-keeping is situated within the framework of arbitration and adjudication. Significantly, both are instrumental to the maintenance of es-spirit de corps among the Yoruba. (Olaoba, 2002:5)

Given the above background to the nature of Yoruba legal culture, our concern in this paper is neither to provide a historical detail of the development and origin of Yoruba legal Culture, nor to undertake a descriptive discussion of the modus operandi of administration of justice by the Yoruba legal officials as it is anchored on legal culture. The focus of this paper is not even to examine the processes, conditions and contents of the indigenous laws, which are by-products of peace making.

Rather, it bothers on the philosophical justification of machinery of peace–keeping. The Yoruba like any other cultural group of the world, have the institution of punishment, which involves the imposition of pain on a supposed offender for a supposed crime. Such an institution of punishment according to the Yoruba, is premised on the saying that "Ilu ti o si ofin, ese o si nibe" – meaning "any society without laws, ceases to have the notion of sin," a sine-qua non to punishment. In other words, to every human violation of the societal laid down rules and regulations, is legal penalty in the form of punishment.

Punishment is an important aspect of the Yoruba legal culture. However, the subject of punishment, in the sense of attaching legal penalties to the violation of legal rules has always been a controversial moral issue of philosophical importance. The problem of punishment is not centred on whom to punish, (for it is definitely the violators of law), but revolves round the justification of punishment. Central to both legal and political philosophy, are the fundamental questions of whether and how punishment can be morally and legally justified? More precisely, it could be asked what moral justification does a state have in using the apparatus of the law to inflict burden-some sanctions or pains on its citizens? In other words, under what conditions can we justify formal and legal punishment imposed by the state on criminals? What are the moral and philosophical justifications of punishment imposed by legal officials on convicted culprits in traditional Yoruba society?

There is no concrete answer to these fundamental questions because none of them has won any sort of general acceptance, as each theory of justification is replete with endless controversies. Recently at the heat of the controversies on justification of punishment is another contemporary philosophical position that punishment is unjustifiable whether in principle or in practice. Hence, it should be abolished. This recent position has aroused further recrimination on the question of punishment. The position logically involves a violent rejection of punishment and geared towards replacing legal punishment in the society.

This paper shall attempt an exposition of the various philosophical problems surrounding the justification and justifiability of punishment. Contrary to the contemporary philosophical arguments that punishment is unjustifiable, both in principles and in practice, it argues that punishment can be justified and philosophically defended in Yoruba legal culture.

Punishment in Yoruba Legal Culture

Just as law is referred to as "ofin" (Lloyd, 1962: 3-10) in Yoruba etymological model, "Ijiya" (Anon, 1991:46) is Yoruba translation of punishment. Punishment, which involves infliction of pain or other penalty upon a person for the violation of a regulation, is a machinery of facilitating collective conscience of the Yoruba through frowning at impropriety of manners, which are capable of being inimical to the developments of legal norms and disrupting the social equilibrium. Understood in this sense, "Ijiya" (punishment) is meted out only to offenders or criminals who have breached the law and certainly not to the innocent (Achilike, 1999:168).

This perhaps accounts for the Yoruba saying that "elese kan ko ni lo lalai jiya", meaning "no offender shall go unpunished". Corroborating this view, S. Ade Ali (2001:113) argues that "punishment is the imposition of something that is intended to be burdensome or painful, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so. While this remark is true of the Yoruba conceptual understanding of punishment, such a conception presupposes that any organized social grouping has certain laid down rules and regulations that guide the corporate existence of the social set-up. Therefore whoever violates or contravenes any of the laid down principles, rules and regulations is handled and treated appropriately by the law of the land (Alli, 2001:113). This suggests an utmost regard for the rule of law in Yoruba legal culture.

The popular consensus of the Yoruba to the mechanism of the rule of law as stated above, suggests that any affront to it was seriously frowned at and penalized. Thus, a wrongdoing or misdemeanour would amount to the "the violation of a rule, a command or an expectation" (Lindersmith, 1968:217). Whenever this is done, the societal moral and laws have been breached with some consequential effects (punishments). However, it is very rare in Yoruba society for a person to be wrongly punished because of the nature of investigation and cross-examination embedded in the legal culture (Olaoba, 2002:81). Indeed, there is a Yoruba legal maxim which states thus "Ika to ba se l'oba nge" which translates, to mean only the offenders are punished by the ruling elite. In traditional Yoruba society, crime and formal punishment are intrinsically connected and totally inseparable. In such a society, there is a central agency which adjudicates cases and imposes sanctions. As a special arm of the Yoruba legal culture, the institution of punishment is a projection of societal concerns, for a violation of the collective conscience, which is a crime. This central agency comprises of several legal officials with prescribed authority and prerogatives of power to impose sanctions on offending members of the Yoruba society. These legal officials, who are members of the "Ogboni" secret societies jealously guard over the legal norms of Yoruba society to the effect that there was minimal breach of promulgated laws. In fact, no member of the traditional Yoruba society could claim ignorance of the existing sanctions instructed by this legal authority. The reason for no ignorance of the law as excuse for breaching it is not farfetched. The populace is aware of these catalogues of punishment through training of the children at moon-lit, public assembly and announcement made on them by the town crier (Olaoba, 2002:82). According to S. Ojo (1953:32),

> Before the public bell is rung, the head-chief and chiefs of the town must have a previous meeting and pass a resolution on a matter, rule or bye-law, as the case may be, and then order the lead-chief to send his bell ringer out. Anyone who disobeys such bell ringing will, according to the gravity of the offence to be punished.

The upshot of the above is that ignorance of the law is never an excuse for breaching it in traditional Yoruba society. It rests on individual volition and freedom to either act in such a way to be legally reprehensible or in a way that will maintain the societal equilibrium of the society. This fact brings to fore, the "peace keeping" and "peace making" functions of the Yoruba legal culture earlier discussed.

Types of Punishment in Yoruba Society

Ideally, people have been differently exposed to punishment as there are different types of crimes and the gravity that goes along with such crimes. Punishment in traditional Yoruba society is not different from this general mode of thought. There are many types of punishment which are meted out to offenders in Yoruba society. The nature of the offence depends on the type of punishment meted to it. The weightier the offence the severest the punishment it will carry. "Obviously, no offender escapes punishment in Yoruba society while this is true, no one was made a scapegoat for the offence he has not committed; doing so amounts to incurring the wrath of the ancestors" (Olaoba, 2002:83).

There are various categories of punishment in Yoruba society. However in order to enhance our cognitive understanding on these typologies of punishment, perhaps there is need to first examine the types of crime in Yoruba society. Basically, there are two types of crime: social and spiritual crimes. Social crimes are directed against individuals who ultimately upset the societal harmony. Notable among such crimes are adultery, fighting, lying, stealing, egocentricism, and a host of others. Spiritual crimes have spiritual undertones which made them affect the gods and goddesses with consequences visited upon the entire community. Spiritual crimes are not directly against individual as such, but essentially an invitation to the wrath of both the gods and goddesses. (Udigwoman,1995: 64-65). Spiritual crimes are viewed with more seriousness than social crimes among the Yoruba. In this category is incest, murder, suicide, killing sacred animals, unmasking the masquerade, speaking evil of elders and so on. These crimes are believed to have something to do with specific gods. Its commission is believed to have serious consequences on the entire community (Udigwoman, 1995:69).

Punishment in Yoruba legal culture can be categorized into capital, corporal, imprisonment and miscellaneous punishments. Principally, social crimes attract corporal punishment. This kind of offence does not require death. Such punishment may consist of flogging, whipping, tying, putting in the stocks or yoke, lacerating wounds, banishment, castration or emasculation, etc (Ajisafe, 1946:35). Capital punishment is the type of punishment which involves the execution of the convicted criminal under the sentence of a court constituted by legal officials. Spiritual crimes are most liable to capital punishment. For the Yoruba, death is the common modes of punishment for the most serious crimes, such as murder, sacrilege and other magico-religious offences (Oppenheimer, 1913:121).

Imprisonment is another mode of punishing offenders in traditional Yoruba society. It is a type of punishment where the offender is put in prison or kept in a place or state where he cannot get out as he wishes. The prison house is known as "Ibi-ihamo", which are located in Yoruba "Oba" palaces. Imprisonment is a punishment that involves loss of liberty on the part of the convict. It inflicts pain on the psyche of the criminal by restricting his movement, his social liberty and actions in order to have a change of heart and character. Imprisonment in traditional Yoruba society can either be of short term or life imprisonment. The short term has time-lag while the life imprisonment involves life duration.

Miscellaneous punishments are less severe punishments against the violations of rules of the land and which may take different forms. They are usually in the form of fines and levies, suspension and expulsion of membership, excommunication, razing down the house of the offender, selling into slavery and among others.

Modernism, Punishment and the Question of Justification

A philosophical discussion of punishment in Yoruba legal culture is very crucial to the understanding of the question of justification and the challenge of modernism. Having examined in our preceding discussions, the Yoruba conception of punishment and its various typologies as evident in Yoruba legal culture, our concern in this section is to examine the question of justification in relation to punishment and how contemporary philosophical reflections have channelled new course on the idea of punishment.

Basically, the question of justification of the institution of punishment has been traditionally viewed from two opposing perspectives: Utilitarianism and retributivism. The idea of justification of punishment centres around the question that what precisely, could justify a state using the apparatus of law in inflicting burdensome sanctions on its citizens? In order words, why should the legal officials in the Yoruba legal culture act on the basis of their adjudication? That is, why punishing the violators of law? What is the philosophical justification of such an act? The answers to these fundamental questions have traditionally divided scholars into either the utilitarian camp or the retributivist camp.

Utilitarianism is an ethical view that considers the morality of an act in terms of its utility, i.e. the consequences, the welfare and the satisfaction it produces on the greater number of people and on the basis of the magnitude of the interest it serves the overall society (Alli, 2001:123). Given this, utilitarians like *Jeremy Bentham* and *David Ross* are of the view that punishment should not be seen as a good in itself, but rather as a means of achieving certain ends. Expressing this view, *Joel Feinberg (*1970:106) opines that "punishment in itself is evil and so cannot be justified by appealing to it." In other words, punishment to utilitarian is not justified when considered alone, but only justified when compared in relation to certain ends in which it is meant to achieve. According to *David Ross* (1970:615), an exponent of the theory, "punishment is justified only on the ground of the effects it produces. The effect usually referred to are those of deterrence and reformation".

Deterrence is the restraint which fear of criminal punishment imposes on those likely to commit crime (Owoade, 1998:47). The theory says that the purpose of punishing wrongdoers or criminals is to deter other people from doing the same wrong or criminal act (Dzurgba, 2000:62). The idea of deterrence has two notions. One is particular and the other is general deterrence of crime. Punishment as a deterrence may either deter the punished from committing the same crime, which he is being punished for, or deter would be or potential criminals or offenders from carrying out the same wrong later in future. The reformative aspect of utilitarianism holds that the justification of punishment on an offender is to reform the character of the offender on the condition that the punishment is inflicted with minimal pain, since the idea of punishment is evil in itself.

S. Ade Ali (2001:124) explicates the above when he said that "the essence of punishing the offender is to have a reformative effect." In other words, when a criminal is punished, such punishment under reformative principle is meant to redeem and rehabilitate the offender in order to make him more useful, patriotic and worthwhile to the progress of the society.

In sharp contrast to the utilitarian position, retributivists consider punishment as a right of retaliation and in fact good in itself. Retributivists like *Immanuel Kant, F.H. Bradley and Hegel* frown at the utilitarian's positions that offenders are punished in order to either reform them or deter future offenders. These supposed justifications of punishment are to them, immoral. As far as they are concerned, the justification of punishment is that one has committed an offence and whoever commits an offence must be punished (Achilike, 1999:169). Bradley echoed this point in his remark that "punishment is just only when it is deserved. We pay the penalty because we owe it and for no other reason. (Bean, 1999:81) By implication, punishment is an inalienable right of the offender which he must not be denied. If punishment is inflicted for any other reason than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, which makes punishment an unjustified institution. In buttressing the above position, *Immanuel* Kant (1975:197) argues:

> Punishment can never be (justified) merely as a means for promoting another good, either with regard to the criminal himself, or to the civil society but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.

The aim of retributivism as presented by *Kant* is to ensure that every wrong act is duly reciprocated by an appropriate measure of punishment, commensurate to the proportion of the offence committed.

The challenges of contemporary philosophical reflections on punishment have aroused further recrimination on the question of justification. Emerging from this challenge is the humanitarian theory of punishment.

Contrary to the above explicated traditional theories on justification of punishment: utilitarianism and retributivism, which held that punishment is justifiable, but the condition on which to base this justification is the subject of dispute, the humanitarian theories held that even in principle, punishment is not justified. (Duff, 1996:67-87). They vehemently reject punishment, its rationale and practice with the intention of replacing legal punishment rather than justifying it.

Prominent among the exponents of this theory is *Odera Oruka* (1975:89) who believes that the institution of punishment is unjustified. He advocates a strong argument for the unconditional abolition of punishment in general (which he considers intrinsically evil) and suggests "treatment" as a feasible alternative. To *Oruka*, punishment is inhuman and useless. Hence, it is aimed at the wrong target. Only 'treatment' he argues, and not punishment can eliminate and eradicate the forces that give birth to crime. What induces us to commit crimes is not the use or misuse of our freedom but certain criminal forces that are beyond our controls. Thus, criminals are not to be held responsible for their actions, since they are only victims of circumstances, that is, the criminal forces. As a matter of fact, the utilitarians and retributivists miss the mark when they endorse punishment instead of getting deep down to the roots of criminality. *Oruka* concludes by arguing that in order to eliminate misdemeanour and crimes, we should deal with the criminal forces and not the victims of these forces. Hence, punishment is not justified. People who commit punishable offences and crimes are sick and need to be cured through treatment.

In Defence of Punishment in Yoruba Legal Culture

In view of the above expositions of the traditional theories on the justification of punishment, and the contemporary challenge, as ably posed by the humanitarian theory of punishment, (Lewis, 1984: 451-454) this paper shall in this section, posit a philosophical defence of punishment, especially as it were in traditional Yoruba legal culture.

Punishment, whatever its typology, is philosophically justified in traditional Yoruba legal culture. Not only is it reformative, it is also retributive and has deterrent effect, as well as being instrumental to the dynamism of legal culture. Contrary to the humanitarian stance on the unjustifiability of punishment; punishment for the Yoruba is philosophically justified and morally acceptable. The contemporary call for the abolition of punishment from the humanitarian quarters should be opposed root and branch wherever it surfaces. Let us assume that crime is only a disease which needs cure as the exponents of the humanitarian theory would suggest, and violation of legal rules is taken to be pathological diseases deserving treatments. Such kind of pathological diseases are better treated with punishment appealing to pity or mercy as suggested by the humanitarians. It is unfair to simply abolish justice and substitute it for mercy. To the traditional Yoruba, the arguments of the humanitarians are not strong enough to discard the issue of punishment which is very vital in maintaining peace and order in their society.

It is true that the humanitarian may want to argue that the treatments involved in their therapeutic theory is not synonymous with the kind of pain inflicted on a convicted offender, rather, their own mode of treatment entails educating the offender to enable him have correct beliefs and proper orientation about right and wrong in the society. The above argument may initially appear sound, but on a more critical reflection it becomes gratuitous. The humanitarian theory of punishment is unrealistic in the world where there are too many crimes and by implication, it implies much unnecessary treatment of purposeful criminals that need to be punished for their wrong doings. In addition, when we cease to give criminals what they deserve and continue to consider what will cure them only as the humanitarian apologists would want us to believe, we are making the criminals incurable from the sphere of justice altogether; instead of developing a full person, (a subject of rights), we now have a mere pathological patient whose abnormality is illusionary conceived to be easily curable. In fact, the humanitarian position that punishment should be abolished and replaced with treatment in our penal system is not a convincing argument and as a result cannot stand the test of time.

Reiterating a point earlier mentioned, punishment in Yoruba legal culture, holds the maxims that "elese kan ko ni lo la lai jiya" (no offender will go unpunished and" Ika toba se l'oba nge" (only the offenders are punished by the ruling elite). These sayings are existential evidence that the Yoruba are retributive in their conception of punishment. Though, critics may want to argue that such justification of punishment is too vindictive and retaliatory such that it amounts to nothing but vengeance and escalation of crisis, enmity, crime and confusion. However, such criticisms are bereft of substance because it is the belief of the Yoruba that refusal to punish the offenders may invite the wrath of the gods on the whole community. In order to avert this catastrophe, the Yoruba legal officials deem it an obligation to always punish the offenders. Even in cases where the culprit has committed misdemeanour in secret, the legal officials must find the criminal through spiritual elders (who serve as intermediary between man and God) so that such culprit can be punished and avert the wrath of the gods on the whole community.

Critics may perhaps go further to question the commensurability of the offence and the punishment imposed. They may argue that it is logically impossible even when we go by the moral calculus to determine the proportionality between the offence committed and the punishment that follows.(Ali, 2001:122)In other words, that there is a miscarriage of justice in retributivism. However, such arguments as these become impotent when we realize that the gods, whose fear in the mind of the legal officials in particular and the populace in general, have the supreme power to impose sanctions on individual and the entire community whenever justice is perverted. The "Ifa" oracle is always guidance to the commensurability of punishment with the committed offence. In addition, the natures of investigation and cross investigation attendant on the legal culture greatly reduce the notion of miscarriage of justice. This kind of cross investigation is attached to taking oath or swearing to juju by the alleged offender so as to reduce telling of lies and miscarriage of justice. Without being immodest, swearing to juju and taking of oath have been found to be effective among the traditional Yoruba because of the power of the gods behind such oath.

Punishment has an ethical function in Yoruba legal culture. It is meant to teach and inculcate discipline in matters relating to the use of human freedom and being liable to responsibility. It disallows moral decadence and the breakdown of collective conscience and goodwill in the society. This functional importance of punishment is necessary because, an individual is a product of the network of social relationship, thus maintenance of the es-spirit decorsssps is paramount to the societal peaceful co-existence. In its reformative essence, when a culprit is punished, such is done with the view to fine-tuning the character of the said offender in line with the communalistic ethos of the Yoruba culture. Given this communalistic nature of the traditional Yoruba, emphasis is placed on communion of souls than an aggregate of individuals. Thus, punishment within such social set-up is machinery for maintaining a crime reduced society; protecting lives and properties; ensuring social order and enhancing the sanctity of human dignity. All these are made possible with the deterrence function of punishment, which serves to justify the institution within the legal culture. Though, critics may argue that punishing an offender on deterrence ground is a similitude of making a man a means to an end, which is ethically wrong in its own sake. Critics may even go further to argue that it is not the case that punishment prevents future offenders from getting involved in crimes, which at least someone did commit earlier (Achilike, 1999:170). Hence, the deterrence essence of punishment is defeated.

In reacting to the above criticisms, the paper argues that they are in fact, misdirected criticisms. Punishment is a justified institution in Yoruba legal culture because the person being punished has been found guilty of committing some offence(s) and such punishment inflicted upon him is a just desert. This position we have earlier argued, is assumed to be established before any question of making him "a means-to-an-end" could arise. In the process of giving an offender what he deserves, ipso facto, an example is being set to others. This being the case, punishment is rationally defensible in Yoruba legal culture. Moreover, experiences have shown that punishment in contemporary times appears to be sterile in being an effective deterrence. At least, as it were in traditional Yoruba legal culture, the threat of punishment was able to exercise considerable control in the affairs of man in relation to societal order. Through this deterrence, offenders do not feel comfortable with constant breaching of the law, which quite often, injures the feelings of the masses and the ancestors. Punishment usually restrains people from committing crimes. It deters, abhors, chastises and intimidates wrongdoing in the traditional Yoruba legal culture (Olaoba, 2002:5). Infact, punishment is the major instrument of making people conform and comply with the dynamics of social relationship typical of Yoruba value system.

The import of the above exposition is to show that punishment has failed to fulfil its essences in contemporary societies because its administration has been palpably exposed to several abuses. Little wonder, that many people have been falsely led to argue for its abolition. Punishment can be philosophically justified as it has been shown in traditional Yoruba legal culture. It is our argument that the institution of punishment could still be made relevant in contemporary societies. To this end, this paper concludes with a caution note that if punishment were to fulfil its inherent essences in contemporary societies, a cue must be taken from the traditional experience of Yoruba legal culture, where punishment enhanced the administration of justice as well as the social equilibrium.

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