Customary law and the punishment imposed by traditional leaders to ensure crime prevention in rural areas in South Africa

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Abstract

South Africa has been hailed as the most advanced democracy in Southern Africa. However, despite celebrating more than two decades of democracy, its society has been identified as unequal both politically and financially, and this gap between rich and poor seems to be widening. One indication of this persistent inequality is the limited access that rural people have to criminal justice. This marginalisation has compelled rural people to rely heavily on customary law whose application is vested in traditional leaders. Before the arrival of European colonialists, African people were governed by chiefs and leaders under age-old rules and customs derived from their version of ethical norms and values. This paper is an effort to quench our curiosity about these traditional laws and practices among traditional leaders and to determine to what extent they are successful in preventing crime in rural South Africa. The investigation was desktop-based and comprised of a literature search to highlight customary laws and the punishments meted out by traditional leaders. In essence, it was found that traditional courts are user friendly and affordable as they require neither lawyers nor the sophisticated measures and processes of modern Eurocentric courts.

Keywords: community, courts, democracy, elders, norms, customary law.

Introduction

South Africa is amongst the Southern African countries with the most advanced democracies. The Bill of Rights, which is found in Chapter 2 of the Constitution of the Republic of South Africa (Republic of South Africa, 1996), guarantees everyone's right to equality before the law as well as all citizens' right to be protected by the law. It also guarantees access to the courts for all (Hlubi, 2013). However, although South Africa has celebrated more than two decades of democracy, inequalities persist in society and the gap between rich and poor seems to be widening instead of shrinking. Most poor South Africans reside in rural areas where they are subjected to immense poverty and limited access to services. These rural areas are notoriously under developed and residents have insufficient opportunities and resources for advancement and development (Oyeike, 2012, p. 87). Various difficulties are faced by rural people such as poor access to basic services and the criminal justice system. The latter in particular compels rural residents to rely heavily on customary law and justice as meted out by traditional leaders.

Chief Mwelo Nonkonyane, a traditional leader, once stated that South Africa was a country with two legal systems (Nonkonyana, 2018). He lamented the fact that the African legal system was diminished and excoriated because it was not documented and thus, received no consideration by Eurocentric legal experts as a specialized field of law. Thus, the administration of justice on the basis of customary law remains subordinate to the kind of justice that is dispensed by civil courts that enforce Roman Dutch Law in South Africa (Nonkonyane, 2018). Prior to the arrival of the colonialists in Africa, Africans governed themselves successfully by adhering to rules derived from their traditional ethical norms and values, and it is thus, ironic that these rules are still marginalised and deemed unacceptable by Eurocentric policy designers and law enforcers.

Traditional leaders are the custodians of customary law in South Africa and are thus, at the forefront of dispensing traditional forms of justice. As both the authors of this article are products of rural communities, they will endeavour to explain the role of traditional leaders in the complex crime prevention hierarchy in South Africa. One undeniable irony is that Roman Dutch law and traditional leaders' role in practising customary law are often contradictory yet also complementary. Traditional leaders often have no training in the law other than their immersion in their customs and traditions, and it is generally recognised that they are imbued with sound wisdom and a strong sense of fairness. Their important role in dispensing justice in rural communities has thus become pivotal in the criminal justice system. Unfortunately, this reality is still overlooked by many in the formal system as they argue that academic training and achievement are the only yardsticks for dispensing justice fairly and equitably. It is against this background that we aim to explain how traditional leaders are guided by customary law and to what extent they are instrumental in the dispensation of justice and crime prevention, particularly in rural areas.

This article focuses on the indigenous justice system as an instrument that must be used to attain justice for rural traditional communities (Hlubi, 2013, p. 1). The indigenous system reveres the role of the head of the family and regards elderly family members, particularly males, as pivotal in the process of attaining justice for victims. In the face of modernisation, urbanisation, and democracy, it is these wise leaders who will become increasingly responsible for instilling, promoting, and enforcing societal norms and values among all residents in rural communities (Nonkonyane, 2018) as it is here where traditional norms still prevail. In the traditional justice system, it is the family, under the leadership of the family head or patriarch, that is still the primary structure for the dispensation of justice.

Background

Unlike the Roman Dutch legal system that focuses on guilt and punishment, African law aims to achieve reconciliation. According to Nonkonyane (2018), the head of the family refers all matters to traditional courts that have the right to request that the family resolve the dispute. If this does not occur, the matter can then proceed to the traditional court. However, Nonkonyane (2018) expresses vexation that these unwritten indigenous values are vulnerable to distortion because of ignorance and

colonial influences.

In light of the above, and because of the challenges within the current criminal justice structure, this paper aims to contribute to debates on the position of the indigenous governance system in providing social justice as a legitimate justice system for rural people (Chopra & Isser, 2013, p. 356). The broader study attempted to determine whether customary punishments imposed by traditional leaders are effective in curbing crime in rural areas in South Africa. To meet the aim of the study, the objectives were to:

- Determine what customary laws are still imposed by traditional leaders to curb crime in rural areas;
- List the methods of punishment meted out by traditional leaders and
- Evaluate communities' response to these traditional laws and punishments.

Hlubi (2013, p. 21) argues that traditional justice structures are indigenous legal forums on which residents in rural areas rely for access to justice. Traditional leaders can therefore be defined as community leaders who are the custodians of cultural morals and values. In essence, their role is to ensure that a legal framework, albeit based on time-honoured traditions and customs, exists in their communities and that they use it to direct all affairs. In the formal legal framework prior to democracy, it was the Black Administration Act No. 38 of 1927 that mandated traditional leaders to take responsibility for the governance of their communities and to play a leading role in the traditional justice system. They were also bound by this Act to apply customary law and follow customary procedures to resolve disputes or manage crime and bring criminals to book within their territories.

In recognition of customary law, the Customary Law Marriage Act No. 102 of 1998 was introduced in South Africa post-1994. This Act acknowledges the customs and traditions of the indigenous people of South Africa. Such traditions were never written down but were passed on from one generation to the next by word of mouth. This means that customary law is not universal, but it differs according to locality and tradition (Moore, & Himonga, 2018). South African Constitution (Republic of South Africa, 1996) affirms the value of customary law by giving recognition to the fact that it is based on restorative and not on punitive justice principles. It also forefronts the valuable role that traditional leaders play in their communities where they uphold customary law and enhance rural people's access to justice.

According to Kariuki (2009, p. 6), both the Interim Constitution of 1993 and the Constitution of the Republic of South Africa of 1996 recognise customary law and traditional leadership in this country. Moreover, The Traditional Leadership and Governance Framework Act No. 41 of 2003 provides the context within which local municipalities and traditional leaders may operate. It also obliges the state to offer protection to the traditional leadership institution (Tshehla, 2005). South Africa's Constitution recognises African law as equal to Roman Dutch law (Griffin, 2017; Barratt, & Snyman, 2002). However, the South African Constitution seems ironic that it has retained the repugnant clauses that requires African laws to be subjected to a Bill of Rights that is derived from Western norms. As Barratt, and Snyman (2002, para. 5) assert that "Today, many commentators regard the resulting legal system as a truly hybrid system, a mix of English common law and civilian Roman-Dutch legal

principles". African laws thus continue to be repressed despite the fact that some legal officials seem willing to promote customary law in South Africa (Nonkonyane, 2018). In this context it is noteworthy that certain rules and values have been developed and accepted as the basis of customary law.

The Freedom Charter is considered the founding document of a free South Africa. It forms the basis for the bill of rights included at the beginning of the country's 1996 constitution 30 years later.

Yet, the question must be asked: can the application of customary law be compatible with the civil rights granted by the Constitution and the human rights guaranteed by the Bill of Rights? This question becomes complicated, however, when one takes into account the inherent conflict in legislation between the Constitution and the Bill of Rights. Essentially, there are contradicting clauses regarding the right to culture within the same legislation. This conflict, as explained below, makes it difficult to ascertain the circumstances in which one has the right to engage in cultural practice. Due to this uncertainty, the practice of customary law is also potentially called into question.

Sections 30 and 31 of the Bill of Rights pertain to rights concerning culture. While section 30 grants the right to language and culture, section 31 serves to reaffirm the supremacy of the Bill of Rights in terms of the legislation as a whole. Section 31 ensures that a person has the right to belong to, and participate in, cultural, religious, or linguistic communities. However, it also states that those rights are conditional. This section establishes that the exercising of these rights cannot be in any way inconsistent with any other provision articulated in the Bill of Rights (Constitution, 1996).

Therefore, the practice of culture cannot undermine any of the basic human rights as detailed in this Bill. Culture must be practiced in a manner that remains in accordance with the sections concerning rights to equality and dignity. When the right to culture, as it relates to the aforementioned principles of customary law, is subjected to the Bill of Rights, it seems that the cultural practice of customary law ought to be re-evaluated. Further doubt arises when one considers the fact that Constitution does, in fact, recognize the application of customary law, but does so 'without resolving the conflict between customary law norms and human rights provisions' (Ndulo, 2011). Thus, the question is not whether there exists a conflict between customary law and Constitutional law regarding gender equality, but rather the extent to which that conflict continues to impact women's rights in South Africa.

Wall, D. (2015, June 15). Customary Law in South Africa: Historical Development as a Legal System and its Relation to Women's Rights by Devon Wall. *South African History Online*. https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens [Accessed 13 August 2021].

The literature considers traditional courts convenient, user friendly, and affordable (Nyamweru, & Chidongo, 2018; Muigai, 2017). Furthermore, traditional leaders ensure that, in the execution of customary law, the procedures are simple, informal, and are practised in a local language that people understand. Traditional courts are presided over by traditional leaders as well as community members who do not

assume the role of judges or lay assessors (Nonkonyane, 2018). Judgements are thus often delivered by traditional leaders and are not arrived at by the leader alone, as community counsellors are involved who are cautious and who decide together on the outcome of an issue. An important function of traditional leaders is thus to use customary law to decide on the outcome of cases. These courts are referred to as chiefs' and headmen's courts, or simply traditional courts, and were established as far back as 1927 under Section 2 of the Black Administration Act No. 38 of 1927 (South African Law Commission, 1999, p. 16).

Rural Areas

Rural areas are generally understood as areas that are far from urban areas and cities with limited development, service delivery, and infrastructure. Dasgupta, Morton, Dodman, Karapinar, Meza, Rivera-Ferre, Toure Sarr, and Vincent (2014) state that rural areas in developing countries are characterised by a high prevalence of poverty, isolation, marginalisation, deserted by policymakers', and low levels of human development. Residents in these areas mainly depend on natural resources and agriculture for subsistence. Wiggins and Proctor (2001) add that much of the landscape in rural areas comprises pastures, forests, water (ponds, dams, and rivers), mountains, fields, and even desert landscapes. At times climate change affects these areas immensely and either droughts or floods may cause the death of livestock and the destruction of crops. The economy in rural areas revolves around livestock and crops (Bettencourt et al., 2015) while people in urban areas largely depend on formal economic infrastructure.

Customary law is generally more applicable in rural areas where it is enforced by traditional courts that bring offenders to book for the crimes they committed. Although the formal criminal justice system is applicable in these areas by law, the locality of rural areas is such that residents do not have easy access to the formal justice system. It is thus the traditional court that assumes the role of judicial decision making and law enforcement in rural areas. Wiggins and Proctor (2001) point out that the remoteness of rural areas impedes people from reporting cases to the South African Police Service (SAPS), and thus they tend to rely heavily on a local traditional court to mediate a dispute or resolve a crime. Another issue is the considerable distances that people have to travel from rural to urban areas, and this is exacerbated by impediments such as rivers, mountains, and a poor road infrastructure. Distance also hinders the flow of information to and from rural areas.

A third feature of rural areas is that poverty is rife (Dasgupta et al., 2014), more especially so in developing countries, and this is the main reason that people living here cannot travel to urban areas but rather report criminal cases to their local leaders who, in turn, refer these cases to the traditional court system if they cannot resolve them immediately. Moreover, police officials stationed in rural areas have a large area to cover and are usually under-resourced, which limits their ability to attend to all reported cases. When the formal criminal justice system finds it impossible to attend to all the cases, traditional courts are left at their own devices to adjudicate and resolve disputes. It is thus widely accepted that the customary legal system,

particularly the traditional court, remains a viable solution for bringing criminals in rural areas to justice.

Traditional Leaders

Historically, traditional leaders functioned as governors in their communities. They performed various duties and had authority over various aspects of the lives of the people within their communities. These duties included sustaining social welfare, maintaining social order, and executing judicial functions. Many African countries have exclusively retained the role played by traditional leaders while other African countries have incorporated the role of traditional leaders with democratic forms of government and the legal system. However, it is accepted that it is not easy to incorporate the role of traditional leaders within a democratic dispensation, and it has thus remained problematic to create a space for traditional leaders within a modern-day democracy (Tshehla, 2005).

South African legal advisors had to carefully consider how they were going to accommodate the traditional leader system in the new democracy after 1994. This was not an easy task, particularly as many argued that the traditional leader system had been infiltrated and marred by colonial and apartheid policies (Chirayath, Sage & Woolcock, 2005). To this day many also sustain the argument that the traditional legal framework is, in many respects, a reflection of earlier Eurocentric policies rather than of the traditional and cultural practices of indigenous South Africans (Tshehla, 2005). As a result, they feel that the South African democratic Constitution does not sufficiently outline the constitutional status, powers, and roles of traditional leaders (Tshehla, 2005). Nevertheless, a House of Traditional Leaders was established in six of the nine provinces of South Africa, namely Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga, and North West, and one was established at national level (Ntonzima & Bayat, 2012).

The Bill of Rights was born out of the amalgamation of the universal fight against injustice that took place after the Second World War, and the fight against the inhumane rule of the Apartheid Government in South Africa. The Bill of Rights as we know it today is deeply informed by two vital documents in the history of fight for human justice: the Universal Declaration of Human Rights and the South African Freedom Charter.

The House of Traditional Leaders in the post-1994 democratic dispensation functions as the custodian of African traditions and culture. This body plays an advisory role at both provincial and national levels on matters that affect traditional communities, traditional leadership, and customary law (Ntonzima & Bayat, 2012). Two of the core functions of traditional leaders are crime prevention and the administration of justice (Tshehla, 2005). Traditional leaders dedicate most of their time to resolving cases by addressing conflicts and disputes within their communities.

According to customary law, people who deviate from or defy acceptable social norms are reprimanded by traditional leaders who have the authority to enforce such norms. One form of punishment that traditional leaders apply to punish those who affront social norms is banishment. In organised traditional communities those who

disrespect shared social norms may not continue to reside within the community that he or she affronted. Thus, the resettlement of an offender is one of the sanctions at the disposal of traditional leaders. It is generally argued that a traditional leader in whom such authority is vested is able to effectively control behaviour within his community.

Of immediate pertinence to crime prevention is the fact that the traditional leader is well placed to deal with misdemeanours and/or lawlessness within the traditional community. For instance, if someone in the community sells liquor and makes noise that disturbs the neighbours, such aggrieved neighbours may seek the intervention of a traditional leader. In that case the traditional leader is mandated to establish rules that accommodate both the person selling liquor and the aggrieved neighbours (Tshehla, 2005).

However, there has not been clear recognition of traditional leaders in formal crime prevention policy documents such as the National Crime Prevention Strategy (NCPS) (Tshehla, 2005) and the White Paper on Safety and Security of the role Played by Traditional Leaders. Thus, traditional leaders remain on the side-line of crime prevention although they play a significant role in crime prevention in rural areas (Tshehla, 2005). The Traditional Leadership and Governance Framework Act 41 of 2003 provides the government with the latitude to recognise the role of traditional leaders in safety and security as well as in other related services. This recognition views traditional leaders as playing an important part in improving the relationship between traditional leaders and other role players in crime prevention (Tshehla, 2005, p. 45). For instance, traditional leaders are pivotal in unifying the community and they are the ones who deliver pronouncements on decisions decided upon by a group of counsellors. In most cases traditional leaders are accepted and respected by all parties involved in a dispute (Nonkonyane, 2018).

There is an ongoing debate whether traditional courts should be given powers that are equal to those of the formal courts of law. For instance, if an accused is referred to a traditional court, may he/she request a transfer to a magistrate's court? Nonkonyane (2018) expresses the opinion that there should be no need for people to shift from a traditional to a magistrate's court as this notion contradicts the principle of equality that is entrenched in the Constitution and thus discriminates against traditional courts.

There is no customary law that regulates or compels legal representation or the constitutional right to legal representation, because matters that need to be resolved most often involve family disputes and it is argued that outsiders cannot articulate family or even community issues. Furthermore, most legal practitioners have no expertise in traditional law. In this regard Nonkonyana (2018) stated: *"I am certain that no lawyer outside of my area of jurisdiction understands Bhala law and its procedures"*. The latter author also argues that criticism of the traditional court system is often erroneous as it is based on a misunderstanding of traditional leadership and the role of such leaders in crime prevention.

Crime

Scholars have defined crime variously. People from a legal background for instance perceive crime as any act that contravenes the law. Social scientists view crime as behaviour that is detrimental to both the community and individuals, while theologians consider crime as sinful. Van Zyl (1996) argues that even though there are different perspectives on crime, the majority of definitions are neither juridical nor non-juridical. Juridical definitions elucidate that crime is an illegal act perpetrated by people who can be punished by law (Bezuidenhout, 2011). Non-juridical definitions of crime maintain that crime is an antisocial action that threatens and violates the stability and security of a society and its members (Bezuidenhout, 2011). In rural areas, people are exposed to the non-juridical definition of crime as customary law and traditional leaders are more prominent in these areas.

Scholars and criminologists commonly cluster crimes into different categories: (i) violent crime; (ii) property crime; (iii) white-collar crime; (iv) organised crime; and (v) consensual or victimless crime. These clusters each encompasses different types of crime. This paper focuses on those that commonly occur in rural areas such as violent crimes, property crimes, and victimless crimes. These crimes vary from stock theft, burglary, assault, rape, theft, and robbery to homicide, and this paper will explain how traditional courts adjudicate these different cases using customary law.

Customary Law

The terms customary and indigenous law are often used interchangeably. Customary law refers to the application and observation of tradition by indigenous African people of South Africa and matters that are part of their unique cultures (Diala, 2017). Customary or indigenous law is recognised by the South African legal framework and the courts, and the latter are mandated to apply such laws where applicable (Osman, 2019). However, historically colonial rulers were prejudiced against indigenous people and their way of life as governed by customary law and thus indigenous people were required to conform to the colonial legal system that is underpinned by Roman Dutch law (Osman, 2019, p. 99).

After attaining democracy in 1994, the South African government argued that customary law should become an integral part of its legal framework. The recognition of customary law commenced with its inclusion in the Interim Constitution of 1993 (Diala, 2017). This acknowledgement of customary law progressed to its inclusion in the 1996 Constitution. Since 1994, the following Acts in recognition of customary law have been enacted: The Communal Land Rights Act of 2004, the National House of Traditional Leaders Act of 2009, the Reform of Customary Law of Succession and Regulation of Related Matters Act (RCMA), and the Traditional Leadership and Governance Framework Act (TLGFA) (Diala, 2017).

Historically, the lack of formal recognition of customary law resulted in it being identified with common law customs. This was measured using the criterion that customs must have existed for a long time and that the community concerned must have thus been practising the custom for a very long time (Osman, 2019, p. 1002).

The application of customary law in South African courts requires traditional leaders to be invited as witnesses to testify according to their knowledge of the custom in question (South African Law Commission, 1999, p. 106). Traditional leaders are generally regarded as expert witnesses regarding customary law and its application. Customary law was only recognised by colonialists when it was consistent with colonial policies. In this regard customary law was marginalised and regarded as inferior to the formal legal system of South Africa (Osman, 2019, p. 100). Indigenous people's status was reduced to that of second-class citizens in their country of birth. Colonial and apartheid rule suppression of customary law also resulted in the distortion of the latter system of law.

According to Ehrlich (1936), indigenous people's means of living existed beyond legal terms as their lives were embedded in customary practices. However, this customary way of living existed even when it was opposed by the legal system of this country. This phenomenon has not been exclusive to South Africa. For instance, in Europe customary laws with an agrarian background were replaced forcefully with laws that were industrial based (Diala & Knagwa, 2019, p. 190). A number of state laws were abolished or altered, and the European indigenous application of laws was stiffly regulated (Morse & Woodman, 1988).

Customary law allegedly reinforces the power dynamics of male figures such as chiefs or *indunas* while suppressing vulnerable groups such as children and women (Maluleke, 2012). It is thus often said that customary law favours males while it disadvantages children and females. However, Weinberg (2016) argues that some females find customary law easily accessible as they are able to negotiate their rights even though they are dominated by males.

Chirayath, Sage and Woolcock (2005) emphasise the significance of recognising customary law within the formal legal system, arguing that failure to acknowledge the customary system will not only render the entire legal system ineffectual but that it could also create major problems. Failure to acknowledge different systems of understanding could in itself be discriminatory or exclusionary and thus inequitable. In some instances, there are valid reasons why some people decide to use customary systems. For example, people in rural areas may be far from a setting where the formal legal system can be accessed, while financial constraints may also prevent them from seeking recourse in the formal legal system. Curbing the marginalisation of customary law practices has reportedly been very difficult and, in some instances, have had dire implications (Chirayath et al., 2005). Furthermore, discarding customary law practices will undermine marginalised people in rural areas and will further lead to their repression. The formal legal system is not easily accessible to everyone, and thus customary law practices provide an alternative for those who reside in remote areas. The legal and norm-based framework in any society functions to bring about peace and ensure the safety of society by resolving social disputes. Without continued peace in the daily lives of communities and society security and stability in the market economy will be hard to maintain (Chirayath et al., 2005). Similarly, customary law practices ensure peace, safety, security, and stability in rural areas as they bring together and unite rural communities. People's behaviour is thus shaped and influenced by the informal and customary legal framework (Chirayath et al., 2005),

particularly in rural areas.

Customary court proceedings

Sections 9-21 of The Native Administration Act of 1927 allowed the functioning of headmen's, chiefs', and commissioners' courts as well as Native Appeal Courts. At the time, the Minister responsible for Native Affairs could allow any chief or headman to hear civil cases in black communities according to their indigenous laws. Native[1] laws were formalised in partial recognition of some aspects of indigenous law. However, the participation of lawyers was not permitted in chiefs' or headmen's courts (South African Law Commission, 1999), and this is still the case. The purpose for the establishment of a chief's or headman's court was to ensure easy access to convenient courts that were stripped of the technicalities of formal courts (Gordon, 1918). In such traditional courts people generally represent themselves or they are represented by a family spokesperson. The result depends on successful pleading and negotiation skills. If the parties involved are unable to reach agreement, the matter will be put before the chief. The chief, together with his counsellors who are a group of elders, will issue judgement in line with the social norms of the society they represent (Chirayath et al., 2005).

In the traditional court system, the complainant asks some advisors to state the case at the home of the opposing party. The complainant is supported by witnesses or a witness. The defendant may then consult his/her advisors. The parties will meet again later and discuss the terms of the agreement. This happens without the involvement of a third party. However, if the parties involved have failed to reach an agreement, the dispute will be appealed and referred to the headman and later to the chief's court. Serious cases such as murder are referred to the chief's court from the outset (Republic of South Africa, Act, no. 7 of 1985).

According to Chirayath et al. (2005), several principles drive the Southern African customary law systems, including the following:

(1) Court sessions are open to the public and all men presents are free to cross-examine witnesses and express their opinions.

(2) The Chief has the power to compel both parties to attend hearings, and no judgments are rendered by default.

(3) At this court level there is no legal representation.

(4) Although the chief presides, his decision reflects the consensus of the bench, or his counsellors.

(5) All the proceeding occurs orally, and records of cases are thus stored in memory.

(6) The proceedings are informal, which means that community members may come and go
as they please, talk quietly amongst themselves, and bring food and handicrafts to meetings.

1 'Native' at the time meant indigenous but this term has since been abolished from the law and social use as it is deemed derogatory by black South Africans.

Punishment and Crime Prevention

Punishment has been defined variously by different scholars from different fields. Psychologists understand punishment from the perspective of B.F. Skinner who refers to 'operational conditioning' where punishment is any change that occurs as a result of a behaviour that lessens the possibility of the behaviour occurring again in the future, while theologians understand punishment as repercussions that occur because of the sins a person has committed (Krischer & Müenster, 2012). Punishment is also defined as the practice of imposing something unpleasant on a person in response to some unwanted or immoral behaviour, or even disobedience. Types of punishment vary according to the crime or level of deviance as well as the age of the person who has committed the crime. These punishments range from fines to imprisonment, probation, and community service and are generally inflicted by the formal criminal justice system. Customary law and traditional courts also impose various forms of punishment, and some are very similar to those imposed by the formal criminal justice system.

Punishments imposed by traditional courts vary and include fines, expulsion from the community, confiscation, and whipping or caning. The fines imposed by these courts may also include a monetary fine or the payment of livestock or a quantity of traditional beer for the community. It is noteworthy that these types of punishment depend on the nature of the crime, which is similar to the criminal justice system although the punishment might differ. Imposing punishment in the formal criminal justice system is done for the same reasons as in the traditional court system, namely deterrence (specific or general), incapacitation, rehabilitation, retribution, and restitution. Nonkonyana (2018) emphasises that African law is based on the principle of reconciliation and not on punishment. The aims of punishment are illustrated in Figure 1.

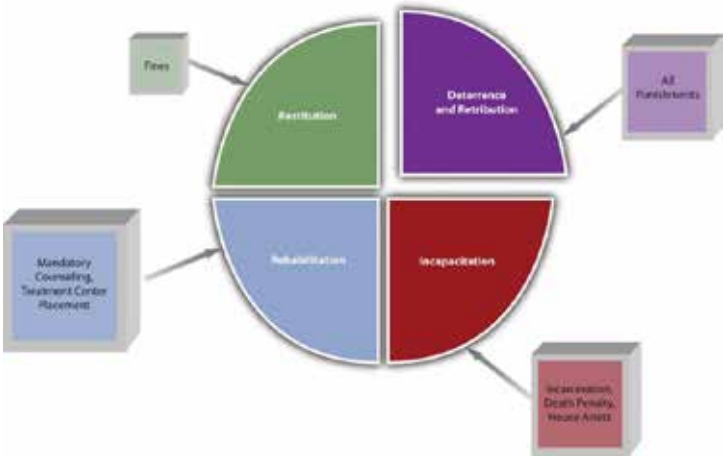

Figure 1: Aims of punishment
Source: *Google photos*

The types of punishment and the aims of punishment are the following:

- Deterrence: This form of punishment is intended to prevent future crimes by frightening potential perpetrators of crime and the public at large. There are two types of deterrence, namely specific and general. Specific deterrence applies to an individual. This form of punishment is intended to scare an individual not to commit a crime in the future due to the fear of a worse form of punishment. The punishment in this case matches the crime that was committed. General deterrence targets the public. The punishment given to an individual is envisioned as a lesson to other people to avoid committing the crime in future because of the fear of the punishment that will follow after such a crime. The punishment in this case does not necessarily match the crime that was committed because it is intended to scare even other people. Various forms of punishment may be imposed on the offender depending on the nature of the crime and whether there are aggravating or mitigating circumstances.
- Incapacitation: This form of punishment purports to prevent future crimes by removing the offender from the community. In the formal criminal justice system this punishment is imposed as house arrest or incarceration. In traditional courts this form of punishment was meted out when the offender was banished from the community. Traditional courts do not have access to prisons so the only way to curb re-offense in the community is to ensure that the offender is removed from it. However, this is imposed only after the offender has been to the traditional court several times without changing his/her behaviour. Moreover, there is no guarantee that the offender will not commit the same or other crimes in the new community.
- Rehabilitation: This form of punishment intends to prevent future crimes by changing the behaviour of the offender. In the formal criminal justice system, the offender is referred to a rehabilitation centre, mandatory counselling, or educational and vocational programs that will assist the defendant to change his/her behaviour. However, traditional courts also apply this form of punishment when the offender is referred to one of the elders of the community who will then assist him according to the behavioural skills that are required. For instance, in the case of domestic violence men are taught by the elders how to be strong and how to act like men without being violent. The primary aim in this instance is to change the behaviour of the offender so that he/she will become a law-abiding citizen.
- Retribution: By imposing forms of punishment that are associated with retribution the court intends to prevent future crimes. A form of vengeance thus becomes punishment for a wrongful or criminal act. The proponents of retribution suggest that people are rational beings who commit a crime after taking a well-calculated decision. The ultimate goal of retribution is to punish the offender according to the offense that was committed, and thus the punishment is usually proportionate to the nature of the crime, or even harsher (Flanders, 2010). When perpetrators are justly punished and this is sustained, society begins to trust the judiciary. Likewise, in traditional courts cases need to be concluded with an appropriate verdict. If this persists, the community starts to develop trust in the traditional court.
- Restitution: This is punishment that is intended to prevent the commission of future crime by imposing financial restitution on the offender. The court orders

the offender to pay a sum of money to compensate the victim for the harm that was caused. This punishment may be for physical injury, theft, and/or distress. Traditional courts generally impose this form of punishment. The offender will be ordered to pay the victim a sum of money, sheep, goats, a cow or cows, chickens, and/or a certain quantity of traditional beer. These punishments vary according to the nature and severity of the crime that was committed.

Conclusion

South Africa in spite of enjoying status of having the most advanced democracies in Southern Africa, politically, legally, and economically it remains most divided and unequal. This inequality is further illustrated by the placement of Justice system in urban areas, this has left people from remote areas to heavily rely in justice applied by traditional courts guided by customary values and norms.

The South African legal system is regarded as the hybrid system a mix of English common law and civilian Roman Dutch legal principles. Presently the South African legal system remains a plural legal, with customary law remaining a legal system for those who wishes to be subjected to it. However, the rule of customary law may not be in conflict with the South African constitution. Reflecting to the African legal system, the paper found that the African legal system does not enjoy appreciation because it is not documented down. This results in the customary law remaining subordinate to the justice applied in civil court where Roman Dutch law is enforced.

Recommendations

Customary law should be endorsed, and traditional leaders should be mandated to perform their function as legal advisors and redeemers in their areas of jurisdiction. The formal criminal justice system should thus acknowledge its legal limitations and minor cases should, as a matter of course, be referred to traditional courts. This will reduce the number of cases that the formal justice system has to attend to and that lead to delays that discourage people from reporting their cases to the SAPS. This will also curb overcrowding in correctional centres.

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