

# Undifferentiated Potency and Chiefly Punishment: A Phenomenological Analysis of Flogging in Botswana

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**Abstract:** In light of recent controversies surrounding judicial flogging in the customary courts of Botswana, this article surveys journalistic coverage of the issue and seeks to establish an account of flogging as a cultural practice. Drawing on legal, sociocultural, and phenomenological perspectives, it argues that flogging is deeply embedded in social hierarchies of age, rank, and *morafe* membership, and can be interpreted as a disciplinary practice aimed primarily at unruly youths. *Morafe* elders teach proper modes of public comportment that involve managing thoughts and behaviors, a practice termed here bodily modulation. Through bodily modulation, individuals convey an understanding of *botho*, or ‘humanness,’ expressing their existential interdependence with others and cultivating the social relationships that sustain their personhood. Flogging and its enmeshment with other aspects of Tswana life point to the theme of undifferentiated potency in Tswana thought, of which law is only one instantiation among others.

**Keywords:** flogging, phenomenology, customary law, the body, personhood

## Introduction

The practice of judicial flogging in Botswana has proved to be an enduring practice throughout the immense social, political, and legal changes over the past century of Botswana’s history. Equally enduring, however, has been its status as a topic of intense moral controversy. In 1933, Tshekedi Khama, acting chief of the Bangwato, sentenced a young white man to be flogged.<sup>1</sup> Though flogging was a conventional punishment in the Bechuanaland Protectorate, for a chief to flog a white European was unheard of, and the incident seized the attention of the British colonial administration. The man, a young wagon builder named Phinehas McIntosh, had been tried in the chief’s *kgotla*, or customary court, for assaulting a Tswana man. After being found responsible for the assault as well as other offences, he was sentenced to be flogged.

In recent years, Botswana has experienced a spate of judicial floggings—cases where chiefs have punished offenders with corporal punishment—that have been met with scrutiny. Bakwena, Bakgatla, and Bangwaketse *dikgosi* have been punished for excessive or illegal

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flogging. Political tensions between Botswana and Zimbabwe have arisen for the flogging of Zimbabwean immigrants. Some have called for the revival of flogging as a cultural tradition and social remedy came despite human rights concerns surrounding corporal punishment.<sup>2</sup> The flogging of schoolchildren, permitted by Botswana law, has also drawn public attention, as has the flogging of women.<sup>3</sup> For example, Rebecca Banika, the first female chief, advocated for the application of corporal flogging to women—an idea that was ultimately rejected.<sup>4</sup> That similar incidents have been occurring over such a lengthy period of time and across different Tswana *merafe* (sg. *morafe*, hierarchically-organized political units defined by submission to a chief) only further highlights the need to attend to this issue.

Why does flogging continue to be a meaningful social practice despite dramatic political and cultural changes over the past century? How do proponents and opponents of flogging envision its effects on both physical and social bodies? While flogging has certainly changed over time, the fact remains that most commentators assume some continuity between its precolonial, colonial, and postcolonial forms. Neither opponents nor proponents of flogging, however, provide an explanation of how it ‘works’—that is, how the practice produces or fails to produce specific effects on individuals and communities.

The task of this article, then, is to give an account of the practice of flogging as it is embedded in Tswana cultural logics. Flogging is an intensely debated topic that is embroiled in issues of legitimate corporal punishment, indigenous tradition, and customary law in the post-colonial state. These debates cannot be productively undertaken, however, without a shared understanding of how flogging operates. The contention here is that Tswana law is intimately bound up with Tswana phenomenology, especially since flogging is a practice directed at the body. Flogging, and legal practices in general, must be understood in terms of their relationship to Tswana notions of the body, sociality, and personhood. This is because Tswana law is premised on a hierarchically organized intersubjective cosmology that is based on a socio-moral principle of existential codependence, which is oriented towards managing social relations with a view towards promoting communal prosperity.

The existing literature on Botswana is substantial and diverse. Much work has been done on legal practices in Botswana. While earlier anthropology was bound up with the colonial enterprise and sought to understand indigenous peoples so as to rule them, recent scholarship has focused on legal dualism in the post-colonial state, with special attention to the institution of chieftaincy and its survival.<sup>5</sup> Meanwhile, a contemporary branch of medical anthropology literature on Botswana has studied the body as a site for the constitution of sociality and morality.<sup>6</sup> Studies conducted elsewhere in sub-Saharan African have focused on the physical body as the site of moral phenomena, part of a growing trend in phenomenological anthropology that addresses how the body shapes spatiotemporal modes of cultural experience.<sup>7</sup>

This piece bridges these two seemingly disparate veins of scholarship to shed new light on Tswana legal practices. Much of the research on law in Botswana has been conducted from political, historical, and anthropological perspectives. By bringing novel phenomenological perspectives to bear on legal scholarship, it draws attention to the corporeal aspect of law that has been obscured by other approaches. Only by attending to law as it is physically embodied and practiced can we develop a holistic understanding of practices like flogging.

This piece begins by historicizing the practice of flogging as a form of indigenous ‘custom’ subject to colonial rule. Flogging’s ambiguous position in the indigenous/colonial dichotomy complicates claims to its cultural authenticity. After examining legal proceedings in the *kgotla*, flogging is analyzed in terms of parent-child and insider-outsider dynamics in Tswana society, and it is argued that flogging is a means for disciplining delinquent behavior that endangers communal well-being. Flogging is an instantiation of ‘bodily modulation,’ the morally-binding management of one’s thoughts and actions, which can have tangible, potent effects on others.<sup>8</sup> The flourishing of self and community are deeply intertwined. Fostering communal well-being, then, is integral to the expression and realization of one’s personhood. Bodily modulation is the means for individuals to express their understanding of their existential dependence on others and do the work of caring for social relationships with those others. Ultimately, this phenomenon reveals a deeper principle of Tswana thought, which, drawing on Comaroff and Roberts’ characterization of Tswana law as an “undifferentiated repertoire,” can be termed as ‘undifferentiated potency.’<sup>9</sup> It is precisely because Tswana people conceive of personhood not as an essence that precedes action, but as an inalienable potential that is differentiated *through* action, that flogging is understood to work on the body, the self, and the community at large.

### **Situating Flogging in Contemporary Botswana**

The territory that is now Botswana came under British control as the Bechuanaland Protectorate in 1885. The British allocated reserves where indigenous peoples, divided into eight major Tswana *merafe*, could maintain relative autonomy. However, they also passed a number of policies that curtailed the political and juridical powers of chiefs. The practice of judicial flogging illustrates tensions that arise from this colonial past. The British administration’s approach of indirect rule incorporated select aspects of the existing indigenous legal system into the colonial administration. Indigenous legal practices were permitted in customary courts, but not recognized as law proper and instead relegated to the inferior status of ‘custom.’ Since gaining independence in 1966, Botswana has maintained a system of legal plurality whereby common law and customary law, inherited from colonial and indigenous legal systems, respectively, coexist.

Scholars of colonial and postcolonial Africa, however, suggest that independence has not overturned, but in many ways preserved the colonial legacy in Botswana.<sup>10</sup> Botswana has seen a resurgence in chiefs calling for the reintroduction of traditional Tswana values and practices, one of which is judicial flogging.<sup>11</sup> This development highlights the possibility that corporal punishment, recognized by many human rights groups as a human rights violation, may be defended in the name of culture and tradition.<sup>12</sup> Proponents’ arguments that youth are primarily flogged for educational purposes are particularly problematic from a human rights standpoint, since many criticisms of corporal punishment focus on abolishing punishment of children in schools.<sup>13</sup> The flogging of schoolchildren has become especially contentious following incidents where students were excessively punished, punished without their parents’ knowledge, and even died after punishment.<sup>14</sup>

Despite this trend of calling for the renewal of tradition, it is far from clear whether or not flogging is an ‘authentic’ expression of Tswana tradition. Mamdani points out that “corporal punishment was not only an integral part of the colonial order but a vital one.”<sup>15</sup> As a

preexisting indigenous practice that was transformed under colonial rule, flogging does not fall neatly into either 'European' or 'indigenous' categories. Flogging as it exists today is the product of a complex interplay of historical, political, colonial, and cultural forces and must be addressed accordingly.

### Hierarchies of Punishment

Flogging is a punishment administered by *morafe* elders in customary courts for petty crime. Immediately after sentencing, offenders are made to strip, lie face down, and endure lashes on their bare back using a cane or switch. Once the punishment is complete, the offender is released. While flogging is legally permitted, its application is constrained by the law.<sup>16</sup> The flogging of Phinehas McIntosh and the recent alleged flogging of immigrant Zimbabweans bear clear parallels, even though Zimbabweans do not share the racial privileges McIntosh possessed as a white man in colonial Bechuanaland. Both cases involve the punishment of foreign, delinquent youths perceived as a disturbance to social order. Examining how flogging is enmeshed with social processes beyond the legal sphere gives insight into how flogging operates within the *kgotla*. Specifically, judicial flogging can be productively interpreted in terms of hierarchies of seniority and *morafe* membership in Tswana society.

Multiple scholars have observed that Tswana society is characterized by a strong emphasis on respect for authority.<sup>17</sup> Seniority, both in terms of age and rank, demands respect in the form of obedience under threat of punishment.<sup>18</sup> Corporal punishment plays a significant role in the parent-child relationship, where flogging is commonly directed at disobedient children. Flogging can thus be interpreted as the obligatory disciplining of disobedient juniors by authoritative seniors. Drawing on Durham's work on youth, criminality and flogging are among the ways in which age status is negotiated.<sup>19</sup> Tswana understandings of youth are defined not by chronological age, but by the "linkage of childhood with the inability to manage people and relationships" and lack of experience.<sup>20</sup> In this sense, corporal punishment is a practice carried out by elders that works on the pliability of the youthful body and mind, shaping it into mature form.

The parent-child dynamic is similarly hierarchical. Children are frequently threatened with physical punishment from parents or other adults, and boys are more susceptible to punishment than girls. According to Durham, "public anxieties about male youth revolve around crime, whereas those about girls revolve around sexuality," and male children are often compared to criminals sentenced to flogging.<sup>21</sup> The *kgotla* models these dynamics: "children could look for examples of beating in the chief's court, where male miscreants were frequently flogged...The hand motion, a quick shake of the wrist, that depicts the flogging meted out at the chief's court is the same as that used to threaten children."<sup>22</sup> Moumakwa's fieldwork in the *kgotla* corroborates Durham's argument that judicial flogging tends to target young male offenders. Her results show that more retributive outcomes tended to involve young people.<sup>23</sup> Her observations of *kgotla* cases further reinforces the relationship between flogging as judicial practice and flogging as an educational practice primarily oriented toward young males. Of the fifteen cases Moumakwa recorded, only three resulted in flogging. Notably, all three involved young individuals between the ages of 19-25 years old, the youngest age group of all the recorded cases. One case involved three grandchildren aged 19 (gender unspecified) and

upwards who were reprimanded and flogged for disrespecting their grandparent. The two other cases were criminal cases, both involving delinquent behavior (one specified male, the other gender unspecified). Offenders above the age range of 19-25 were more likely to be fined or ordered to compensate the victim, not flogged.<sup>24</sup> In sum, young men are most susceptible to being flogged due to their age, gender, and perceived criminal potential.

Another hierarchical feature of Tswana society is based on hereditary proximity to the descendants of those who founded the *morafe*.<sup>25</sup> The chief stands at the apex of the *morafe*'s hierarchy, followed by his relatives and the headmen of wards.<sup>26</sup> Those who enter the *morafe* rather than being born into it face greater social difficulty because they lack a long-established relationship with its central families. These disadvantages come into play in the *kgotla* despite the Tswana principle that all are equal before the law.<sup>27</sup> Indeed, there appears to be a certain tension in asserting equality before a law that is inherently unequal, for example by demanding deference towards seniors. Comaroff and Roberts' argument that Tswana law is a "loosely constructed repertoire" helps alleviate this tension. While rules can conflict with each other, they lend themselves to an undifferentiated system that can be deployed in flexible ways.<sup>28</sup> Anyone may be accused of violating the law, but different stations of life come with different powers and responsibilities that determine what accusations can be made about certain people. Offences against a senior committed by a junior are therefore more egregious than the reverse because elders possess valuable wisdom and experience that obligates them to educate children who lack such virtues.<sup>29</sup>

Furthermore, foreigners and strangers are treated more harshly compared to cases where both the offender and the victim belong to the same ward.<sup>30</sup> *Malata* and *makwerekwere* are two categories of foreigner that provide insight into this apprehension towards outsiders, particularly those perceived to originate from places of poverty or upheaval. *Malata* are servants who were taken in as fugitives, captives, or "foreigners found destitute in the veld during times of drought or starvation."<sup>31</sup> A similar term, *makwerekwere*, is "employed in a derogatory manner to refer to African immigrants from countries suffering economic downturns."<sup>32</sup> *Malata* and *makwerekwere* parallel Tswana perceptions of Zimbabweans as destitute fugitives fleeing the crises of their own country to benefit from Botswana's prosperity.<sup>33</sup> Moreover, the *le-* (sing.) and *ma-* (pl.) prefixes "designate someone as foreign, different, or outside the community."<sup>34</sup> Thus, outsiders are linguistically as well as socially set apart from the dominant community.

Despite their marginalized status, however, foreigners are also regarded as possessing a unique potency by virtue of their foreignness. The doctors and diviners employed to strengthen the chief's spiritual powers "are often of foreign origin, reflecting a belief in their capacity to convey constructively highly potent, potentially dangerous spiritual forces prevailing beyond the limits of the *morafe*."<sup>35</sup> Like many other features of Tswana thought, foreigners seem to constitute an ambivalent, 'undifferentiated' category, the powers of which can either be constructively harnessed by the chief, or endanger the community. As such, foreigners must be closely regulated to channel their potency along productive lines. Alongside youth and juniority, then, foreign status is a factor that can predispose an offender to being flogged for threatening social order.

## The *Kgotla* as Site of Cosmological Order

The *kgotla* is a communal institution essential to the preservation of collective well-being. Easily accessible to all at no cost, the *kgotla* serves to resolve conflict in the community by providing a space for individuals to voice their opinions in a process that can take days and involve many people.<sup>36</sup> In the *kgotla*, “conflicts are translated into issues of communal concern” and settled primarily through reconciliation.<sup>37</sup> The strong motivation to seek reconciliation for disputes is rooted in cultural notions regarding the widespread adverse effects of conflict, and members of the *morafe* rely on the *kgotla* to promote social cohesion.<sup>38</sup>

In Tswana thought, gender, spatiality, and sociality are conceived in terms of a hot-cold distinction that governs productivity.<sup>39</sup> Comaroff argues that hot objects like blood or money have the potential to generate conflict and must be controlled. This generativity, however, is not solely destructive, but productive as well. The menstrual blood of women is necessary for birthing children; likewise, money is necessary for the pursuit of ambitions.<sup>40</sup> Heat, which connotes instability, is thus associated with not only conflict but also with creative generation. Coolness is associated with *kagiso*, “the state of harmony and peace,” as well as the *kgotla*, which exists to produce this state.<sup>41</sup> Because *kagiso* fosters collective prosperity, the well-being of the entire community is at stake in disputes. However, while coolness is conducive to creation and prosperity, it has no generative power of its own. Maintaining social order in the *morafe*, therefore, is managed through the balancing of heat and coolness.

The role of the *kgotla* is to “cool down heated atmospheres” generated by conflict through the process of mediated reconciliation, and ultimately to restore *kagiso*.<sup>42</sup> Interestingly, Gulbrandsen relates that his interlocutors often understood the cases they brought to the *kgotla* as misunderstandings rather than genuine conflict between parties with irreconcilably different interests.<sup>43</sup> Because all disputes are perceived to have the potential for resolution, the *kgotla* facilitates resolution by engendering shared understanding. Participants in the *kgotla* are discouraged from displaying intense or negative feelings, and instead urged to control their emotions and behave politely to ensure that outcomes are not coercively imposed, but instead grounded in mutual understanding.<sup>44</sup>

This hot-cold distinction also resonates with the principle of *botho*: the “Tswana ethic of humanness, which acknowledges that one’s actions affect others. It is practiced and continually reaffirmed through practices of sociability.”<sup>45</sup> If unresolved conflict threatens to spread destructive heat, *botho* fosters a state of harmonious coolness: “The hope is that one person’s *botho* helps promote another’s in an affective economy of mutual respect and kindness.”<sup>46</sup> The *kgotla*, then, can be understood as a key site for enacting *botho* in that participants are encouraged to express and thereby spread positive sentiments while suppressing negative ones.

Because the dangerous heat of conflict has the potential to affect the broader community, it is the duty of *kgotla* elders to contain it. Elders of the *morafe* possess wisdom and knowledge by virtue of their close connection with *badimo*, or ancestral spirits. These virtues are what empower elders to resolve disputes and establish *kagiso*.<sup>47</sup> In Tswana thought, ancestral spirits have the power to bring plague as well as prosperity depending on whether they are satisfied with or angered by their descendants’ behavior.<sup>48</sup> Elders mediate between the *morafe* and its ancestors, creating harmony by upholding the ancestors’ will.

The most senior member of the *morafe* is the chief, who personifies “the productive and distributive essence of the society, which emanate[s] from the depth of Tswana traditions.”<sup>49</sup> In

addition to overseeing the production and allocation of resources, the chief is also the custodian of “ancestral morality” due to his intimate ties with ancestral spirits.<sup>50</sup> His role is to mediate between his people and the spirits by employing ancestral wisdom to maintain the socio-moral order.<sup>51</sup> As Gulbrandsen observes, however, the chief occupies a paradoxical position in the hot-cold dichotomy: he is simultaneously expected to be powerful and thus a source of heat, yet is also obligated to use this power constructively for the purpose of cooling conflict and creating harmony.

This juxtaposition of heat and coolness within the figure of the chief sheds light into the tensions around flogging’s legitimacy. On the surface, flogging may be perceived as a ‘hot’ phenomenon: it is a violent punishment inflicted on the bare body that can produce feelings of distress and humiliation in both the criminal and onlookers, given the public nature of the *kgotla*. In administering this momentary punishment, however, *morafe* elders are using their heat—legitimated by their seniority—to contain the illegitimate heat of criminal youth. By disciplining young offenders in this way, they seek to rein in destructive behavior and restore a cool state of social harmony.

To summarize, flogging is a punitive disciplinary measure meted out by senior members of the *morafe* against juniors and foreigners. Because youth are still morally malleable, they possess the potential for maturation and change. Youth are the main subjects of flogging because their social immaturity threatens others. Foreigners, especially unwelcome ones, also pose a danger to the *morafe*’s established harmony as they originate from situations of conflict that may disrupt *kagiso* and are ignorant of the social norms that safeguard community well-being. Elders possess wisdom that legitimates their authority and makes them responsible for protecting communal prosperity, primarily through the *kgotla*.

Embodying the intersection between youth and foreigner, Zimbabwean immigrants’ vulnerability to flogging is twofold. The belief that Zimbabweans come to Botswana to escape the crises of their country establishes them as outsiders who enter the community not to contribute their foreign powers for the good of the *morafe*, but to sap its wealth.<sup>52</sup> Moreover, that most Zimbabwean immigrants are youth adds to the perception that they are unruly children in need of disciplinary education.<sup>53</sup> Through flogging, Tswana elders seek to curb their criminal impulses and shape them into mature, sociable individuals whose actions serve the community rather than harm it. This enforced social comportment can be termed ‘bodily modulation.’

### **Bodily Modulation and Public Sociability: Funerals and the *Kgotla***

This section juxtaposes flogging with a seemingly unrelated social practice: Tswana funerals. The two sites pattern social behaviors and interactions in surprisingly analogous ways. In both contexts, individuals participate in emotionally intense interpersonal processes that demand the regulation of their outward actions to promote a state of social harmony.

Funerals are emotionally fraught settings where a multitude of social relationships converge. Attendees participate in a funeral with a variety of motives. Besides friends and family members grieving the deceased, also present are those who may have harmed the deceased through jealousy or witchcraft.<sup>54</sup> Because the mere feeling of jealousy alone is sufficient to cause harm, attending the funeral of a person one has harmed is a way of fulfilling social responsibility and making amends.<sup>55</sup> The “public conduct of loving, helping or caring” lessens the destructive tendencies of negative sentiments.<sup>56</sup> In this sense, the funeral is similar to

the *kgotla*: it, too, is a public site where individuals negotiate emotionally challenging issues while maintaining a calm outward appearance.

The *kgotla* and the funeral illustrate the importance of public comportment in Tswana sociality. Both settings are public spaces where social relationships are worked out amidst emotionally sensitive situations. Participants are acutely aware of the negative effects their actions may have on others and the well-being of the community at large. Public conduct in Tswana society demands the careful modulation of personal behavior involving the selective disclosure and concealment of thoughts and actions.

The *kgotla* and the funeral also highlight the centrality of the body in Tswana social interactions. As a key site of visibility where private sentiments become publicly visible, the body must be meticulously tended to lest one endanger one's social relationships or, worse, the community at large. Durham's study of bathing practices and Livingston's work on bodily aesthetics both illustrate the social character of the body.<sup>57</sup> Both argue that because the Tswana emphasize the capacity of the body to act on others, they regard the body as something to be strategically concealed and revealed. While attending a public funeral may be a form of desirable bodily visibility that facilitates sociability, physical disfigurements are to be hidden from public view to avoid causing disgust in others.<sup>58</sup> Likewise, bathing practices signify a person who is mindful of others. The bathed body fosters positive sentiments in others and thus expresses readiness and eligibility for social relationships—it is "reciprocal evidence both of being the object of positive sentiment and of creating that sentiment in others."<sup>59</sup> The mere presence of the body in the sensory field renders it capable of affecting others in a very real way. Through caring for one's body, one also signals the ability to reproduce that same care for others.

One's internal feelings, too, have the capacity to act upon others in potent ways.<sup>60</sup> The individual is so deeply embedded in their social relationships that there exists no truly private realm with no bearing on the public. We can better understand the causal potency of thoughts and actions by considering it in relation to Tswana notions of the body. Comaroff's account of the self in Tswana thought identifies the heart as "the physical and experiential center of being," which "register[s] impressions that imping[e] on the person from outside and radiate[s] influence beyond the self."<sup>61</sup> When an emotional, cognitive, or sensory experience makes itself felt on an individual, their inner responses can act on others in powerful ways. According to this notion of the permeable self, one's internal experiences reflect outward into the world. Consequently, there is a constant need to modulate the potent causal powers of body and mind. *Botho*, the principle of 'humanness,' illuminates the social and phenomenological importance of bodily modulation.

### ***Botho* as Moral Practice**

The Tswana proverb *motho ke motho ka batho ba babang*, meaning "a person is a person through other persons," teaches that the personhood of all individuals is contingent upon others.<sup>62</sup> This proverb points to the profound intersubjectivity that characterizes Tswana sociality, wherein the personhood of all individuals is dependent on—and can only be fully realized through—their social relationships with others. Mnyaka and Motlhabi's account of the intersubjective character of Tswana sociality is particularly helpful:

A person is incomplete without others. He or she needs others to be fully human. He or she needs community to find fulfilment [...] A person is socialized to think of himself/herself as inextricably bound to others. One who does not belong or has not been made part of the community is considered to be a danger [...] A loner is viewed with suspicion...such a person tries to thrive and achieve on his or her own and yet one's existence is entwined with that of others.<sup>63</sup>

Members of a community share deep bonds of existential interdependence. Because one's personal fulfilment can only be attained in and through community, solitariness is resisted. One who seeks to pursue their interests on their own is regarded as ignorant or suspect and their social detachment suggests that they either fail to recognize their unavoidable reliance on others, or are guilty of harboring negative emotions.

The intersubjectivity of Tswana sociality is deeply practical. As the examples of funeral attendance and bathing illustrate, social relationships are continually negotiated, renewed, and reaffirmed through embodied action. Alverson emphasizes the practical construction of social personhood, going so far as to argue that "a Tswana must literally make his social personality."<sup>64</sup> Just as the body inevitably accumulates dirt and demands regular upkeep, so, too, do social relations require recurrent attention to prevent them from falling into disrepair, or worse, permanent breakdown. It is through practical activity that individuals enact this maintenance and thereby realize their social personhood.

Practice is central to asserting and reinforcing social belonging. Mnyaka and Motlhabi argue that "adherence to acceptable behavior patterns helps in the maintenance of fellowship, oneness and identity."<sup>65</sup> The practical, intersubjective sociality of the Tswana produces a particular kind of personhood wherein the subject recognizes their existential dependence on others, understands that physical and psychological actions have real effects on those others, and consequently pursues and maintains social relationships through modulation of body and mind. Furthermore, the crafting of social personhood is bound up with notions of youth and maturity. Immaturity is linked to an inability to make important decisions, particularly those pertaining to social relationships.<sup>66</sup> As such, attaining an understanding of one's social embeddedness and publicly demonstrating it through practice—for example, by bathing or attending funerals—is a mark of maturity.<sup>67</sup>

While social bonds can grow weak with time and neglect, a crucial aspect of the principle of *botho* is its inalienability. Every individual possesses, to an equal degree, a latent potential for humanness that can never be eliminated. No matter how socially isolated one may become—through crime, disgust, or any other form of social transgression—one can never fully lose their human potential. Humanness can always be retrieved or revived through cultivating social relationships with others. Mnyaka and Motlhabi elaborate on *ha se motho*, the state of being a non-person:

Yes, a person has dignity, which is inherent; but part of being a person is to have feelings and moral values that contribute to the well-being of others. To say a person [*ha se motho*] is to say that one lacks the inner state of being, lacks feelings of sympathy for others. This does not take away the intrinsic [*sic*] worth of that person. Rather, it shows that one contributes to the definition of oneself through everything that one does.<sup>68</sup>

Personhood and identity are things that one constructs through practical action, such that even the most socially estranged, 'non-human' individuals can redeem their humanness by reestablishing relationships of care and reciprocity with others. Because humanness—as well as its opposite, non-humanness—is always embodied in practice, it is always reversible.

To return to the question posed at the very beginning of this article: how does flogging work? As seen above, flogging is best interpreted not as a solely vindictive or retaliatory form of punishment, but as a measure intended to rectify delinquent, predominantly male youths. Flogging, ideally, reforms criminal youths on the existential level. In causing harm to others through petty crime, offenders demonstrate a disregard for others in the community and fail to recognize that they, like everyone else, are dependent on social relationships for the realization of their human potential. In other words, in the very act of committing crime, offenders mark themselves as immature youth who do not yet recognize the relations of mutuality that sustain them.

Such delinquent youths, in the eyes of elders, need disciplinary punishment. Crucially, however, this punishment is not intended to shield the larger community from the criminal's harmful behaviors—if this were the case, carceral punishment would fulfil the same function as flogging. Instead, flogging is meant to benefit both criminal and community by illustrating an important moral lesson: that crime harms all parties by damaging the social relationships upon which their existence depends. Comaroff suggests that initiation rites “work on the body so as to prize apart and refashion the continuity between social, natural, and personal being.”<sup>69</sup> Flogging arguably does similar work, reconfiguring the offender's character into a more sociable form. The institution of flogging aims primarily to reestablish the offender as a social person and reintegrate them into the community. Put another way, flogging works to restore their humanness, their *botho*.

Tswana understandings of personhood hold that one's person is always malleable and reversible. Even when individuals behave badly, they still retain their capacity for choice and reason and so always have the potential for change.<sup>70</sup> If social relationships are created and reaffirmed through positive practices such as caregiving, then what destroys those relationships are negative acts of crime. Part of flogging, then, is to instill the understanding that the body—that most public part of the self—is best put to use by helping rather than harming, cultivating social relationships rather than spoiling them. Though flogging endeavors to produce these moral sensibilities in both body and mind, there remains a tacit awareness that punishment can never definitively transform the individual in the intended way.

In judicial flogging, punishment is applied to the body, for it is the body that has been abused. In committing crime, the offender has misused their body for communal detriment, when its proper use is to promote the well-being of both the community and the individual. Moreover, flogging takes place in the highly public site of the *kgotla*, in front of an assembly of community members. Much like the jealous relative who attends a funeral to make amends to the deceased, so is the criminal flogged in the *kgotla* to make amends to the harmed community. In both cases, the transgressor is oriented towards reestablishing sociability so that they may return to their proper position within the “system of social reciprocities.”<sup>71</sup> The objective of social reintegration also accounts for the aversion to carceral punishment that some express. In contrast to flogging, imprisonment places the young delinquent in a state of lengthy isolation

where they are detached from the community they need, surrounded by the negative influence of other offenders, and are therefore more likely to become “hardened criminals.”<sup>72</sup> This is also the reasoning that chief Rebecca Banika cites in favor of flogging women as an alternative to jail time—incarceration disrupts women’s abilities to provide for and take care of their families, especially children.<sup>73</sup>

### Undifferentiated Potency

What, then, can flogging tell us about Tswana thought more broadly? Much of Tswana thought—not only its legal aspects—is characterized by ‘undifferentiated potency.’ As opposed to the abstract nature of Western law, which seeks to render static legal concepts by codifying their definitions in written law, Tswana law is characterized by legal concepts and actions that take on different meanings in different contexts.<sup>74</sup> We have already encountered a few examples of this: foreigners are seen as powerful by virtue of their foreignness, but also dangerous due to that same foreignness. Likewise, the chief is a powerful figure who can wield power to the benefit or the detriment of the community.

Much of the material presented above, however, also demonstrates this ‘undifferentiated’ quality. The body is a resource that can generate intense feelings and emotions in others and is the primary interface between the public and the private. Embodied behaviors such as caregiving or crime affect others in a very overt way, but also important are the tacit ways in which the body influences others; its very presence in the sensory field of others can alter the social environment. Thus, whether one’s body is dirty and odorous or clean and well-dressed can make the difference in one’s social relationships.

Similarly, the principle of *botho* is itself undifferentiated in that it teaches that all humans share equal human potential, but how that potential is realized and differentiated through action is contingent upon one’s behavior. Maintaining good social relationships through caring actions signals that one is attuned to one’s embeddedness in the community. Such practices humanize oneself and enable the fulfilment of one’s full human potential. By contrast, harming others and committing crime damages one’s social relationships and constitutes oneself as a social non-entity.

All of these cultural features—the chief, the body, and *botho*—are examples of undifferentiated potency. They each possess great latent potential that is differentially actualized through practice. In other words, Tswana thought does not conceive the body or humanness as inherently good because it can be used for good, or evil because it can be used for evil. It maintains, instead, that meaning is not immanent in these things themselves. Rather, meaning is differentiated through practice by social actors. This may seem like a trivial or obvious point, but it is one that is not clear in Western legal systems. The latter trends towards increasing order and classification, seeking to fix definitions so as to make them increasingly self-sufficient, and less context-dependent.<sup>75</sup> Whereas Western law is oriented toward eliminating ambiguity, ambiguity is structurally built into Tswana law and thought.

Furthermore, the ‘undifferentiated’ and ‘potent’ qualities of undifferentiated potency are interdependent: it is potent because it is undifferentiated, and vice versa. The most powerful forces in Tswana thought are precisely those that resist order and stubbornly retain their ambiguity. Foreigners embody undifferentiated potency because their very foreignness makes

them both powerful and risky: they can either be useful and good for the community or end up damaging it. Similarly, the chief is vested by the people with powers that can, in fact, be used to harm them. While his subjects certainly expect him to promote harmony instead of destruction, they also recognize that a truly effective chief is one who wields both heat and coolness.<sup>76</sup> The notion of undifferentiated potency suggests that power lies not only in the ability to attain a particular goal, but also in how flexibly it can be deployed towards different goals.

An anthropological analysis of legal practices such as flogging illuminates the ways in which law is bound up with social and cultural processes that are often regarded as non-legal. An understanding of how flogging works must be accompanied by an understanding of Tswana thought and cosmology. The case of judicial flogging, then, illustrates that phenomenology precedes law. Any iteration of law has always already assumed a culturally specific phenomenology as its basis. Whereas a human rights perspective may conceive of the body in terms of individual property and rights whose autonomy must be protected, Tswana law presupposes a very different phenomenology of the body: one of existential interdependence between self and society that finds expression in embodied moral action.

### **Conclusion: Towards an Embodied Understanding of Law**

This article began by posing the question of how flogging works and argued that flogging is usefully understood from a sociocultural perspective because it is bound up with multiple, overlapping hierarchies of age, rank, and *morafe* membership. Practices like flogging are directed towards the goal of establishing and maintaining social well-being. The *kgotla* is crucial to creating this state, protecting the community from harm by rectifying criminal behavior. Thus flogging, which is directed mostly towards younger or foreign individuals, is a means for *morafe* elders to both correct crime and educate the criminal. The confluence of social factors that predispose certain individuals to flogging such as youth, low social rank, and foreign status, are all concentrated in the figure of the young Zimbabwean immigrant and render them particularly vulnerable to flogging.

A phenomenological approach illuminates the implications of flogging in notions of the body and intersubjective personhood. What unites these elements of Tswana thought is the practice of bodily modulation. In deliberately managing how one's body presents to and interacts with others, one demonstrates an understanding of *botho*. As such, Tswana sociality is fundamentally intersubjective and practical. It is not sufficient to simply know that social relationships are necessary for one's own fulfilment, one must also enact that knowledge through acts of reciprocal care. By this view, flogging is a way for elders of the *morafe* to rehabilitate criminals who, through crime, have damaged their interpersonal relationships, and reestablish them as social persons eligible for reintegration into the community.

This analysis of flogging leads to a larger theme in Tswana thought termed 'undifferentiated potency.' Drawing on Comaroff and Roberts' argument that Tswana custom forms an "undifferentiated repertoire," this piece enlarges the scope of their idea by arguing that all of Tswana thought, and not simply its legal aspects, exhibit this undifferentiated quality.<sup>77</sup> Undifferentiated potency refers to the causal and transformative potential that certain things like the body and persons, such as foreigners and chiefs, possess that can be put to multiple ends, and becomes differentiated as its potential is realized in practice.

Judicial flogging is a convergence point for political, legal, sociocultural, phenomenological, and linguistic forces, one that demonstrates that Tswana legal practice cannot be meaningfully understood apart from Tswana cosmology and notions of the body. More generally, this points to the need to bring phenomenology and corporeality into the discussion of law, particularly when analyzing non-Western legal forms. To fully understand any legal process, we must interrogate the assumptions it makes about the bodies and subjectivities that fall under its jurisdiction. Only through a perspective of embodied law—law as it acts on and through the bodies and subjectivities of individuals—can we fully collapse the distinction between legal and non-legal realms and begin to grasp the law as it is embedded in everyday life.

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## Notes

<sup>1</sup> Crowder 1988.

<sup>2</sup> Bothoko 2021; Gabathuse 2004; Gaotlhobogwe 2010; *Guardian Sun*, 18 January 2018; *News From Africa*, 5 July 2005; *Guardian Sun*, 14 June 2017; 18 July 2019; Mosikare 2021a; Mosikare 2021b; *New York Times*, 23 April 2004; Seretse 2010; *Sunday Standard*, 23 May 2010.

<sup>3</sup> Banda 2004; Child Rights International Network 2011.

<sup>4</sup> Nkonjera 2014.

<sup>5</sup> Comaroff and Comaroff 2018; Comaroff and Schapera 1991; Comaroff and Simon 1981; Gillett 1975; Griffiths 1983; Gulbrandsen 1995; Ifezue 2015; Morapedi 2005; Moumakwa 2011; Sanders 1985; Schapera 1952, 1955, 1957; Vaughan 2003.

<sup>6</sup> Alverson 1978; Comaroff 1997; Dahl 2014; Durham and Klaits 2002; Durham 2004, 2005; Klaits 2009; Livingston 2008; Mnyaka and Motlhabi 2005; Morton 2011.

<sup>7</sup> Csordas 1990; Desjarlais and Throop 2011; Geurts 2002.; Jackson 1983; Throop 2003.

<sup>8</sup> Alverson 1978; Durham and Klaits 2002; Durham 2005; Gulbrandsen 2012; Livingston 2008.

<sup>9</sup> Comaroff and Roberts 1981, p. 9.

<sup>10</sup> Mamdani 1996; Mann and Roberts 1991.

<sup>11</sup> Comaroff and Comaroff 2018; Morton 2011.

<sup>12</sup> Human Rights Watch 2008, 102.

<sup>13</sup> Dundes Renteln 2010; Ghandhi 1984; Human Rights Watch 2008.

<sup>14</sup> Banda 2004; Child Rights International Network 2011.

<sup>15</sup> Mamdani 1996, p. 126.

<sup>16</sup> Ifezue 2015, p. 289.

<sup>17</sup> Comaroff and Roberts 1981; Durham 2004; Gulbrandsen 2012; Moumakwa 2011; Schapera 1955; Vaughan 2003.

<sup>18</sup> Schapera 1955, p. 29.

<sup>19</sup> Durham 2004, 593.

<sup>20</sup> Durham 2004, pp. 594-5; Alverson 1978, p. 49.

<sup>21</sup> Durham 2004, pp. 595-9.

<sup>22</sup> Durham 2004, p. 595.

<sup>23</sup> Moumakwa 2011, p. 23.

<sup>24</sup> Moumakwa 2011, p. 56.

<sup>25</sup> Schapera and Comaroff 1991, p. 28.

<sup>26</sup> Schapera 1955, p. 30.

<sup>27</sup> Schapera 1955, p. 51.

<sup>28</sup> Comaroff and Robert 1981, p. 18.

<sup>29</sup> Schapera 1955, pp. 51-2.

<sup>30</sup> Schapera 1955, p. 52.

<sup>31</sup> Schapera 1955, pp. 31-2.

<sup>32</sup> Nyamnjoh 2006, p. 244.

<sup>33</sup> Mosikare 2021a; *New York Times* 2004.

- <sup>34</sup> Nyamnjoh 2006, p. 244.
- <sup>35</sup> Gulbrandsen 2012, pp. 42-3.
- <sup>36</sup> Gulbrandsen 2012, p. 169; Moumakwa 2011, p. 58.
- <sup>37</sup> Gulbrandsen 2012, p. 169; Moumakwa p. 2011.
- <sup>38</sup> Gulbrandsen 2012, p. 176; Moumakwa 2011, p. 2.
- <sup>39</sup> Gulbrandsen 2012.
- <sup>40</sup> Comaroff 1985, p. 174.
- <sup>41</sup> Gulbrandsen 2012, p. 174.
- <sup>42</sup> Gulbrandsen 2012, p. 174; Moumakwa 2011, p. 45.
- <sup>43</sup> Gulbrandsen 2012, p. 175.
- <sup>44</sup> Gulbrandsen 2012, p. 175; Moumakwa 2011, p. 63.
- <sup>45</sup> Livingston 2008, p. 292.
- <sup>46</sup> Livingston 2008, p. 293.
- <sup>47</sup> Gulbrandsen 2012, p. 173.
- <sup>48</sup> Gulbrandsen 1995, p. 426.
- <sup>49</sup> Vaughan 2003, p. 10.
- <sup>50</sup> Gulbrandsen 2012, p. 59.
- <sup>51</sup> Gulbrandsen 1995, p. 426.
- <sup>52</sup> Nyamnjoh 2006, p. 104.
- <sup>53</sup> Durham 2004, p. 598.
- <sup>54</sup> Durham and Klaits 2002, p. 784.
- <sup>55</sup> Durham and Klaits 2002, p. 794.
- <sup>56</sup> Durham and Klaits 2002, p. 784.
- <sup>57</sup> Durham 2005; Livingston 2008.
- <sup>58</sup> Livingston 2008.
- <sup>59</sup> Durham 2005, p. 201.
- <sup>60</sup> Alverson 1978; Comaroff 1985; Durham and Klaits 2002; Gulbrandsen 2011; Klaits 2009; Livingston 2008.
- <sup>61</sup> Comaroff 1985, p. 128.
- <sup>62</sup> Mnyaka and Motlhabi 2005, p. 218.
- <sup>63</sup> Mnyaka and Motlhabi 2005, p. 222-3.
- <sup>64</sup> Alverson 1978, p. 132.
- <sup>65</sup> Mnyaka and Motlhabi 2005, p. 223.
- <sup>66</sup> Durham 2004, pp. 594-5.
- <sup>67</sup> Durham 2005, p. 204.
- <sup>68</sup> Mnyaka and Motlhabi 2005, p. 224.
- <sup>69</sup> Comaroff 1985, p. 8.
- <sup>70</sup> Alverson 1978, pp. 110-7.
- <sup>71</sup> Alverson 1978, p. 132.
- <sup>72</sup> Gabathuse 2004.
- <sup>73</sup> Nkonjera 2014.

<sup>74</sup> Mertz 2007.

<sup>75</sup> Mertz 2007.

<sup>76</sup> Gulbrandsen 1995, p. 431.

<sup>77</sup> Comaroff and Roberts 1981, p. 9.