

# A CRITICAL ASSESSMENT OF THE RETRIBUTIVE THEORY OF PUNISHMENT.

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## ABSTRACT

On the question of punishment two questions are often asked namely, what is the purpose of punishment? And what is the justification for punishment? In answer to these questions, retributive theory states that when crime is committed, the balance of the moral order is upset, but when appropriate punishment is given, the balance of the moral order is put right again and justice is restored. The paper argues that the retributive theory is similar to the golden rule, which states that doing to a person what he has intentionally done to others cannot be unjust. Thus it subscribes to the notion of 'just desert', (the view that punishment must be deserved) which is an important element of the retributive theory. It however avers that since a good end does not justify an evil means, under no circumstances should an innocent person be punished even if doing so will produce good results.

## INTRODUCTION

Human society is a community of human beings whose activities and relationships are co-ordinated by the law and norms of morality. There is the principle that states that wherever a community exists, law is necessary to establish, protect and promote an ethico-judicial order. It is when this order is ignored, violated and abused by crimes and criminals that the state seeks its restoration by punitive measures. This underscores the view that where there is no crime, there is no punishment.

Because of the different roles assigned to punishment by various people and thinkers, various theories have emerged. They include retribution, deterrence and reformation. The aim of this paper is to critically assess the retributive theory. The first part of the paper considers the meaning of punishment. This is followed by an exposition of the retributive theory of punishment. The last part is devoted to a critical assessment of the retributive theory.

### What is punishment?

The term 'punishment' is customarily defined as the infliction of suffering upon an offender, on the grounds of particular offence, and administered by a legitimate authority (Ferguson and Wright, 1988; 547). According to Arikpo, it also means the subjection to strict rules of conduct, or the suffering or imposition of hurt, or injury for some offence or fault committed (Uduigwumen and Ogbinaka, 1999; 298).

Punishment can be descriptively defined as essentially a form of deprivation extrinsically attached to a human act of commission or omission perceived as anti-social or a violation of established norms or values of a given society (Iwe, 1991; 245). Punishment may take the form of fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court of law, either for an offence committed by him or for his omission of a duty enjoined by law. It therefore involves a deprivation of some right. The basic elements of punishment are:

1. Deprivation – which consists in some unpleasant experience characterized by loss of liberty or some socio-economic right or even life itself.
2. Contrivance - which means that punishment, is a socially, conventionally and extrinsically established measure against certain socially defined types of human behaviour.
3. Misdeed or offence - which implies that the offender must be truly and humanly guilty of a misdeed or an offence before he can be legitimately punished.
4. Legitimacy – which means that punishment must issue from the appropriate and accredited source. To

be qualified to punish others one must possess appropriate jurisdiction over them. In the larger political society like ours, this element refers to the legality of punishment, which requires that the infliction of punishment must conform with the laws of the land and their due processes (Iwe, 1991; 246 – 247).

The summary of it all is that punishment is the infliction of pain or loss upon a person by an authority, either for a wrong done, or for a willful disobedience or negligence of duty. It is a personal discomfort suffered as a result of an undesirable act.

### The Retributive Theory of Punishment

A retributive theory of punishment seeks to justify the imposition of punishment on a wrongdoer on the basis of just deserts. The idea is that by doing wrong the actor deserves to be blamed and in some cases even punished (Bogart, 426). The desire for revenge is necessitated by the fact that the wrongdoer suffers in the amount that he has imposed it on another person. It has been argued that, "The desire that the wrongdoer experiences suffering in the amount he has imposed it on another is simply the desire to have the golden rule executed by force on those who refuse to comply with it voluntarily" (Haas and Inciardi, 1988; 37). They observe that retribution helps to reestablish equilibrium in at least two ways, which they enumerated as follows:

First of all, by imposing suffering on the offender equal to that which he imposed on his victim, the offender is literally forced to recognize his likeness to his victim as a person vulnerable to suffering and desiring to avoid it. Second, retribution announces to the society that the suffering of each person is equally a calamity, and thus reaffirms the society's commitment to the equality of the victim with the offender that the offender has violated (Haas and Inciardi, 1988; 37).

Retribution is backward – looking in that it involves a process of looking back at the circumstances surrounding the crime and deciding what punishment the accused deserves for his conduct having regard to his responsibility

for the crime (Iwe, 1991; 253). It involves the taking of vengeance on the offender by the society on behalf of the injured individual. It also contains the idea of 'an eye for an eye and a tooth for a tooth', or 'he who kills with the sword, deserves to die by the sword' is a justified moral principle.

The above conception goes by the names retributivism, exaggerated retribution, absolute retribution and maximalist retribution. This traditional view of punishment which has Immanuel Kant as its father states that punishment is an end in itself. It holds that it is our legitimate duty to punish an offender and that the criminal must not be let go under any circumstances. In short, the duty to punish an offender is both categorical and imperative. Thus, retributivism is a clear case of a blind and unenlightened pursuit of penal justice without mercy, as punishment is seen as an end in itself not just as a means to justice (Iwe, 1991; 253).

On the contrary, there is a sound theory of retribution, according to which punishment is the fruit of rational reflection, the act of reason which determines and devises a measure proportionate to the entity and gravity of a committed offence. This is also designated as the modern version of the retributive theory which is the main focus of this paper. Commenting on this version, Njoku states that retribution aims at restoring the equilibrium upset by the wrongdoer. On this basis, the infliction of punishment aimed at making the criminal to pay back is morally justified as requirement of justice (Njoku, 2001; 232). According to Hart, as quoted in Njoku, the focus is that of:

Society concerned not as harmed by the crime but as offering individuals including the criminal the protection of laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework, each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty. From this point of view the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal who has voluntarily done harm; from the second it appears as a price justly extracted because the criminal had a fair opportunity beforehand to

avoid liability to pay (Njoku, 2001; 231 – 232).

Thus, for Hart, punishment should be seen as a means for securing fair terms for the protection of society.

It must be mentioned that the various retributive theories do not look at the sense in which the wrongdoer deserves punishment in the same way. According to some, punishment is a way of carrying out the will of the agent or wrongdoer. Kant's version of retributive theory falls under this category. For other theories punishment is a way of returning the agent to proper moral evaluations or a way of showing him how to walk on the path of proper values.

Robert Nozick's version falls under this category. Yet for some, punishing the wrong means either canceling it or balancing it. H. Morris holds this view. Morris contends that wrongdoing deserves punishment primarily because justice requires such a response. Not to punish a wrongdoer would be wrong. For that would amount to denying that he was the author of his deeds. Punishment, therefore, affirms the standing of the individual within the moral community (Uduigwomen, 1992; 324 – 325).

According to the retributivist, the aim of capital punishment is to placate the public and forestall people from taking the law into their hands. This argument is derived from the instinctive feeling of most ordinary men that a person who has done injury to another person deserves to be punished for it. This instinctive feeling arises because:

If a criminal escapes justice, the righteous member of the community feels wronged for he says to himself, 'if other people are punished unjustly, then my personal freedom is also in danger, or if another escapes the punishment which he deserves, why should I continue to Conform' (Seidman, 1966; 6).

What the above argument means is that not to punish a wrongdoer means a threat to our own repressive traits. Legal retribution which today has as its equivalent criminal law is a means of regulating the desire for revenge which is innate in every man. The function of the criminal law is to exact retribution by awarding a penalty to every crime based on the seriousness of the crimes as measured by the moral code of the society. It is therefore the duty of every state to endure the extermination of criminals in order to protect greater values.

### Critical Assessment of the Retributive Theory

Let us critically analyze the retributive

theory. When we apply this theory to the death sanctions of our criminal law, we might come up with the view that armed robbery and other capital offences listed in the criminal law are dangerous offences and because they are death carriers they should be treated with capital punishment. Following this, not to punish an armed robber is to deny him of his responsibility for his deeds.

Now, the inevitable conclusion from this line of argument is that there is need for legislation to reflect the collective conscience of the society. But in the case of a country where unquestionable laws or decrees hold sway, it will not be easy to ascertain what the collective conscience is. The Western idea of democracy has it that the collective or communal conscience of a society can be ascertained through the views of their elected representatives. But a military government does not represent the conscience or will of the people and, therefore, cannot determine what the people need (Onuoha, 1985; 12). Also, where laws are meant to exploit, repress, alienate and dehumanize some people at the expense of the lawmakers, the whole question of the justification of punishment is morally problematic. What this means is that the idea of 'just deserts' preached by the retributivists may not hold up if the laws of the society are fair and the society itself guarantees equity, if not equality (Dehaan, 1987; 328).

Apart from the criticism above, retributive theory has been criticized on several other counts. One of such counts is that it is retrospective, that is, it refers to past events. "The focus on desert means that retribution is solely for what has been done. This is why it is sometimes described as a disguised form of vengeance. The future effects of punishment are in no way relevant to the justice of punishing" (Bogart, 1987; 426).

Another criticism is that the theory does not contain elements of utilitarian value. Gainful consequences such as reforming the offender and deterring potential offenders and thereby benefiting the society should be considered. Law is an instrument of the state which prescribes human punishment, and it is the responsibility of the state to promote the welfare of its members. According to Jeremy Bentham, the general purpose of law is to promote total happiness of the community. Anything that subtracts from this is to be avoided. For him, punishment is mischief, and upon the principle of utility, if it is to be admitted at all, it will be only on the ground of excluding some greater evil (Bentham, 1948; 120).

A final criticism against the retributive theory stems from its insistence that punishment should

match or fit the crime. A problem arises when we try to ascertain how much retribution a criminal deserves. It is not possible, literally, to match punishment with crime, for how can a man lacking in omniscience measure the gravity of individual cases and apportion punishments accordingly? It seems the only crime that readily deserves death penalty is murder. That is to say that the only ground for taking a man's life is that he has taken another man's life. But this is not applicable to crimes such as armed robbery and other capital offences listed in our criminal law.

In spite of the many criticisms, the retributive theory of punishment has many positive dimensions. Summarily, these include:

First, it is based on a high view of man's freedom and dignity. The retributionist position is based on the assumption that normal adult human beings are rational and moral beings who know better, who could do otherwise, yet who chose to do evil anyway, and who therefore deserve to be punished (Geisler, 1989; 212).

Second, by punishing a deserving offender, the state is treating him with respect. To submit someone to a compulsory cure against his will is tantamount to treating him as an infant, imbecile or a domestic animal. Persons who consciously do wrong deserve to be punished, not to be treated as object to be manipulated.

Third, it is in accord with the biblical view of justice, which is that justice is penal, not remedial. It holds that the primary aim of punishment is moral or ethical, not therapeutic or pathological. This holds whether the crime is incidental or capital. Punishment is to be given only because people deserve it (Romans 13:4).

Fourth, it does deter crime, notwithstanding that many hold a contrary view.

In the case of capital punishment, for example, dead offenders will not be alive to repeat their crimes. Commonsense reveals to the average person that he must think twice before violating the law if he really believes that he will be severely punished.

Fifth, it protects innocent lives. This it does in three ways. First, it is a strong advance premium placed upon human life that generates our respect in preserving and protecting life. Second, when it is properly exercised it puts the fear of God into other would-be offenders. Finally, it prevents repeat crimes from capital offenders (Geisler, 1989; 213).

## EVALUATION AND CONCLUSION

The justification of the retributive theory of punishment is based mainly on the notions of the

equal worth of human beings and of the appropriateness of exacting from people the whole cost of the harm for which they are wholly responsible. In the case of capital punishment, for instance, by choosing to end his victim's life the murderer earns the loss of his own as just deserts. The characteristic difficulty with such a justification is to show that it is not simply a rationalization for satisfying the desire for revenge, a desire that is unworthy of social affirmation. This difficulty can however be met if we can give the revenge a better face by showing that the suffering it desires is not pointless. This is complicated by the fact that there is a feature of the desire for revenge that is truly not worthy of social affirmation. This is fact that the desire for revenge, inspired by the anger and suffering of the victim can be literally bottomless. It is certainly barbaric to give in to a bottomless desire to see wrongdoers suffer. Following this, it can be argued that the Mosaic Law and the ancient code of Hammurabi, often blamed for legitimizing revenge by their maxim of "an eye for an eye," were actually an attempt to limit the desire for revenge to the measure of suffering caused by the offender. So limited the desire for revenge is the desire that the wrongdoer experience suffering in the measure he has imposed it on another.

This is very much akin to the Biblical golden rule which seeks to establish a kind of equilibrium between persons such that each treats the other as of equal worth to himself. Doing unto others what one would want them to do unto him amounts to treating others as of equal worth to oneself. This is because testing the acceptability of one's own actions by putting oneself on the receiving end of them tends to limit one to doing only those things that a being equal to oneself (i.e. oneself in the other's shoes) could accept. The acts that prompt the desire for revenge are normally act that one does because he can avoid being on the receiving end. A person treats himself as of greater worth than his victim if that person does to the other what he would not accept done to himself. The desire to pay him back in his own coin is the desire to show him that he is not of greater worth than his victim. Since he is of equal worth with others, whatever he does to others may rightly be done to him.

What all this boils down to is that there is nothing shady or barbaric if the desire for revenge is limited to the desire to impose suffering equal to the amount that has been imposed. Like the golden rule, retribution seeks to reestablish equilibrium among persons when it has been upset. This it does by imposing suffering on the

offender in the proportion that he has imposed it on his victim, and by announcing to the whole society that the suffering of each person is a calamity, and thus reaffirming society's commitment to the equality of the victim with the offender that the offender has violated. Thus, the desire for retribution is the desire to have the golden rule enforced on those who refuse to comply with it voluntarily.

With the above submissions, it can be concluded that though the retributive theory of punishment has been criticized by its opponents, nevertheless, retribution is an essential aim of punishment. As a restoration of the violated ethico-judicial order, it is not only a simple way of making the criminal to make reparation for the injury done to the society through any of its members, it is also a way of educating him and potential offenders in the way of justice and morals of the society whose constant well being is the good of all including that of the criminal.

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