

# **A Critical Assessment of Odera Oruka's Theory of Punishment**

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## **Abstract**

This paper is a critical examination of Odera Oruka's theory of punishment in his *Punishment and Terrorism in Africa*. It argues that although Oruka clearly highlights the weaknesses of the Retributionist and Utilitarian accounts of punishment and therefore calls for the Reformist view of 'treating both the criminal and society', he is mistaken in calling for the abolition of punishment simply because it cannot reform the criminal. The paper contends that the reform of the criminal is only one major function of punishment and not the only one, and so we cannot call for its abolition on the basis of this single consideration. The paper further urges that Oruka's theory of punishment is rather deterministic: according to him, the criminal commits the crime because of the criminal forces which he or she has very little control over, so that he or she cannot be held morally responsible for his or her actions.

## **Key words**

Punishment, Reform, Oruka, Philosophy

## **Introduction**

The issues of crime and punishment have been of great concern to human beings for a long time. This is probably because they touch on human dignity either directly or indirectly in that any time a crime is committed the victim's rights are violated by the criminal, and any time punishment is administered the question of whether it is just arises (Sommer 1976). A lot has been written on the justification of punishment in general. But although punishment has been a crucial feature of every legal system, "widespread disagreement exists over the moral principles that can justify its imposition" (Greenawalt 1983,343). One fundamentally controversial question in the moral debate on punishment has been why (and whether) the social institution of punishment is warranted.

Odera Oruka argues in his book, *Punishment and Terrorism in Africa* (1985) that punishment is unwarranted and should be abolished because we cannot eliminate evil (crime) by evil (the inflicting of pain inherent in punishment). Oruka advocates for the

'treatment' of the criminal and calls "for the abolition of punishment because it cannot reform criminals" (Oruka 1985, 78).

This paper therefore seeks to assess the validity of Odera Oruka's argument on the abolition of punishment. In this regard, it endeavours to address the following questions:

- What are the main tenets of Oruka's theory of punishment?
- Can punishment reform the criminal?
- How can we morally justify punishment?
- Ought punishment to be abolished if it cannot reform criminals?

The paper is divided into six sections. The first section is the introduction. The second analyses the concept of punishment in general. In the third section, the paper presents Oruka's theory of punishment, after which the fourth offers a critique of the theory. The fifth section addresses the question of whether or not punishment can indeed reform criminals - what Oruka refers to as 'treatment' of the criminal - and if not, whether or not it ought to be abolished. This is followed by the concluding remarks in the sixth and final section.

### **The Concept of Punishment**

The concept of Punishment is not the exclusive province of the law. From time immemorial parents, communities and societies have used punishment as a mechanism for social behavioral control. From a Judeo-Christian perspective, we are told that the Supreme Being punished the first man and woman for disobeying His command. We can therefore identify some common features that are inherent in actions that are regarded as punishment.

Greenawalt (1983, 343-344) argues that for punishment to take place, the following features must be present: "established authority, breach of conventional standards, act of condemnation, inflicting unpleasant consequences and responsible agents". For Greenawalt (1983), in typical cases of punishment, persons who possess authority impose designedly unpleasant consequences upon, and express their condemnation of,

other persons who are capable of choice and who have breached established standards of behavior. Punishment is therefore a practice that is performed by, and directed at, agents who are responsible for their actions in some sense. To punish, one must consciously inflict harm on the wrong doer as a just dessert for his or her action (retribution). What is more, to serve its deterrent function, punishment must involve designedly harmful consequences that most people would wish to avoid.

Boonin (2008) argues that actions that constitute punishment in the criminal justice system have five necessary elements:

- (1) They are authorized by the state.
- (2) They are intentional and directed toward a particular end or action outcome.
- (3) They are reprobative (express disapproval or censure).
- (4) They are retributive following a wrongful act committed by the offender.
- (5) They are harmful resulting in suffering, are a burden, or result in deprivation to the offender (Boonin 2008; cited in Ward & Salmon 2009, 240).

It can therefore be observed that punishment “serves the goal of re-affirming the society’s collective agreement on what is wrong and what is right as well as re-invigorating the individual conscience” (Sommer 1976, 174).

### **Oruka’s Theory of Punishment**

Odera Oruka outlines his theory of punishment in his book, *Punishment and Terrorism in Africa* (1976, 1985). We will summarise what we believe to be the main tenets of Oruka’s theory of punishment. Oruka attempts to give the rationale “for the abolition of the practice of punishment” and not “the abolition of the concept of punishment” (Oruka 1985, p.xi). He sets out by observing that “there are two philosophical views on punishment that are strongly opposed to each other” (Oruka 1985, 4). On the one hand, we have the retributive view which holds that punishment is itself a reward, compensation or a kind of annulment of a crime. On the other, there is the utilitarian view which holds that punishment is in itself undesirable and ought never to be inflicted for its own sake or just because a crime has been committed. Punishment in the utilitarian view “should only be administered if it promises to

exclude some greater evil; if it has good consequences to both the criminal and society" (Oruka 1985,5).

Oruka rejects both of these positions, and presents an alternative - punishment for reform/ rehabilitation. He argues that both the retributivist and utilitarian arguments for punishment are flawed because "they overlook or ignore the criminal forces, which are primarily responsible for the commission of crimes and focus only on the criminal's free will" (Oruka 1985, 14-15). For him, every person is born without knowledge of good and evil, so that his or her character is mostly the result of inherited character traits and social experiences. Oruka argues that people commit crimes because of the "desire to fulfill some economic or psychological needs" (Oruka 1985, 17). There are several "criminal forces or factors" that induce people to commit crimes. These are to be found in one's social experience and the nature of one's material or economic existence. These forces include "irresponsible parental care, belonging to a despised or poverty stricken class, bad education" etc. (Oruka 1985, 18).

Thus for Oruka, anyone who commits a crime is compelled to do so by these criminal forces that are beyond his or her control - he or she is a victim. Consequently, we cannot hold the criminal morally responsible for his or her actions. Therefore although an individual may commit a crime intentionally, such individual is always only a victim of the criminal forces: "Acting intentionally is therefore not incompatible with non-responsibility" (Oruka 1985, 19).

Since according to Oruka punishment in the retributivist and Utilitarian senses only focus on the 'victim' of the criminal forces- the criminal - they cannot be morally justified. He therefore calls for the abolition of punishment in favour of what he calls criminal and society 'treatment'. By the treatment of the criminal, Oruka refers to the curative and non-punitive ways in which we may help a criminal to change his or her criminal manners and become a citizen without criminal tendencies or behavior. By 'Society treatment' Oruka refers to the ways in which the social ills, bad conditions or obstacles to decent existence inherent in a society can be cured or removed (Oruka 1985, 87).

According to Oruka, in so far as punishment cannot and does not concern itself with treating either the criminal or the society, it is ineffective because it cannot reform the criminal. Punishment only serves as a temporary restraint: as soon as the criminal forces become intense, the restraint ceases to hold and the criminal is once more forced to act criminally (Oruka 1985,88). Oruka argues that unlike punishment, treatment aims at eliminating the basic cause of crime: the main emphasis is on eliminating the criminal forces. Criminals should therefore receive ‘individualized treatment’ to help them rise above the criminal forces. But individual criminal treatment can only be effective if it is coordinated with ‘society treatment’: individual treatment is only of secondary importance to society treatment, which is of primary importance (Oruka 1985, 89).

Reformists such as Oruka therefore advocate for ‘treatment’ of the offender and not punishment *per se*, holding that punishment is better described in deterrent and retributionist terms. **For example**, like Oruka, Sommer (1976) argues that criminals are victims of social, economic, political and psychological forces in our society. According to Sommer, since society is responsible for the presence of these deviants, it is society’s moral responsibility to make amends and help them to adjust to these criminogenic forces.

Oruka further makes a distinction between the pain experienced in punishment and that experienced in treatment. Punishment is to its recipient intrinsically painful and hence intrinsically evil. Treatment on the other hand can only be painful or unpleasant extrinsically, as a means to an end: the pain experienced in the course of treatment is necessary for curing the victim. Therefore while punishment aims at inflicting pain or harm as an end in itself, treatment aims at inflicting pain to rid the criminal of his or her criminal behavior (Oruka 1985, 91). Oruka therefore concludes that since no type or amount of punishment can obliterate any criminal force and consequently no criminal can ever be truly reformed or cured by punishment, punishment ought to be abolished. In similar fashion, Duff & Garland (1994) observe that as an objective of punishment, reform/treatment of the criminal embraces the strengthening of the offender’s disposition and capacity to keep within the law, which is intentionally

brought about by the human effort to change rather than through the fear of punishment.

### **Critique of Oruka's argument**

Although Oruka's critique of the retributivist and utilitarian views of punishment has merit - that both philosophical views overlook the criminal forces and focus only on punishment fitting the crime committed -, his argument for 'treatment' or the rehabilitation of the criminal is equally wanting. His call for the non-punitive treatment of both the society and criminal runs into both practical and conceptual difficulties. The philosophy of punishment for reform, what Oruka calls treatment, has its basis in the positive school of criminology, which was founded by Cesare Lombroso (1835-1909). The positive school rejected the classical doctrine of free will, which had emphasized on the "punishment fitting the crime" propagated by Cesare Beccaria (1764) and Jeremy Bentham (1748-1832). Positivists argued that punishment should fit the criminal and not the crime. The positive school therefore focused on the individual criminal rather than on the crime, believing that the only sure way to curb crime is by effecting the necessary changes to the social environment that influences the criminal (Bilz & Darley 2004).

The main conceptual challenge to the advocacy for the treatment of the criminal lies in the distinction Oruka attempts to make between the nature of pain involved in treatment and that entailed in punishment (Oruka 1985, 25-26). Whereas it is easy to assert that the pain inflicted in the retributivist sense of punishment is itself evil because it is an end in itself (pain for pain's sake), it is rather difficult to assert the same with regard to the utilitarian perspective. Pain in the utilitarian sense of punishment is supposed to eliminate a greater evil of the crime committed for the benefit of the society (Ellis 2003). However, the main challenge in using the utilitarian view of punishment still remains - how to determine the appropriate amount of punishment that is likely to eliminate the greater evil.

Likewise in Oruka's Treatment theory the challenge lies in how to determine, prior to administering 'treatment', the 'right cure' for a particular criminal or different criminals who have committed a similar crime due to different criminal forces. Even

if that were possible, where will the criminals be as we try to identify their individualized appropriate cures? Will they not be held involuntarily in some location as the authorities try to identify the criminal forces that compelled them to commit the crime? Does this 'withholding' not amount to punishment- the loss of liberty? If pain is in itself evil, a view that Oruka seems to agree with, does it become any less evil if the intentions of inflicting pain are noble - to treat the criminal?

On the practical front, the main challenge to implementing Oruka's treatment program would be that Judges lack the time to get sufficiently acquainted with an offender's history to make such individualized sentences (Shafer-Landau 1991, 211). It may be objected that difficulties in practically implementing principles of sentencing do not undermine the principles themselves. Yet if the principles cannot be implemented they ought to be abandoned. Further, individualized punishments or treatments would naturally amount to an indeterminate sentencing policy: the criminal would be on treatment indeterminately until he or she is fully cured of the criminal forces. However, the question that arises from the notions of the intensity and duration of this indeterminate treatment has to do with the ability to predict correctly - the question is whether or not human behaviour is predictable. The debatable assumption in the philosophy of reform or treatment is that we can predict with certainty when the offenders have been reformed enough to be released from the treatment program.

But following the high degree of our inaccuracy in prediction especially of human behaviour, it is probable that we will make grave mistakes in an attempt to establish whether or not a particular criminal has been reformed. For instance, we have had cases where the criminal 'fakes his reformed behaviour' to 'deceive' the officials that he or she is ready to go back to the society, only for him or her to commit a crime on his or her way home and to be arrested again. In such cases, whom do we hold accountable - the officer for false prediction or the criminal for faking reform? Using Oruka's criterion, what would be the criminal force compelling the criminal to 'fake cure', and what treatment ought to be administered next to 'fully' cure him or her?

Oruka's theory of punishment is also highly deterministic: according to it, the criminal commits the crime because of the criminal forces which he has very little control over, and therefore cannot be held morally responsible for his or her actions



(Oruka 1985,17- 18, 88). It can therefore be faulted for neglecting the agency of the criminal and treating him/her as a mere victim of circumstances. If Oruka's argument about the actions of the criminal being overly determined by the criminal forces is to be taken seriously, it is defeatist. We can only morally 'treat' or punish individuals if they are in some sense responsible for their actions. Consequently, Oruka cannot authoritatively argue for the treatment of the individual criminal, but only that of the society since the society is primarily responsible for the commission of the crimes. Oruka's argument can therefore be said to go against the fundamental principles on which we base our moral judgment: the principle of freedom and agency of the actor (Greenawalt 1983).

### **Can Punishment or even Treatment reform Criminals, and if not, ought it be abolished?**

Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state or any other established authority requires justification (Greenawalt 1983, 346). The central question remains, just as Oruka had posed it, whether or not society needs to retain a system of behavioral control that involves the infliction of pain. Generally the moral theories on the justification of punishment have been categorized as either *Forward- looking and outcome oriented* or *backward looking and dessert- oriented* (Bilz & Darley 2004, 1217). Backward looking theories (Retributive theories) are the oldest theories on the justification of punishment, and focus on what happened in the past (crime) unlike the forward looking theories (Consequentialist theories), which focus on the future - the effects of punishment both on the individual and on the society (Ward & Salmon 2009). Some of the oldest proponents of the retributivist view of punishment were Immanuel Kant (1887) and G.W.F.Hegel. Kant argued that society not only has a right to punish a person who deserves punishment, but also has a duty to do so. Hegel on his part held that punishment honors the criminal as a rational being and gives him what is his right to have (Hegel cited in Greenawalt 1983, 347).

Consequentialist theories of punishment hold that there is a contingent relationship between the overall goal of crime reduction and the practice of punishment. For them, punishment functions to deter, incapacitate or reform offenders, and these effects in

turn reduce the overall crime rate (Orth 2003). Consequential theorists therefore morally justify punishment on the grounds that more than any other types of crime reduction practices it is likely to produce an overall effect of crime reduction. They therefore view punishment as the most effective way of reducing crime rate (Ward & Salmon 2009, 241). Thus according to the consequentialist view, reform of the criminal is not the sole purpose of punishment, much as it is one of its key objectives. The moral justification of punishment on consequentialist terms can therefore be summarized as “prevention/deterrence; to maximize social security” (Oruka 1985, 27).

Oruka asserts that we reform a criminal not just to make him or her a decent citizen, but most importantly so that others may be free from the evils that his or her crime may inflict on them (Oruka 1985, 27). One is then left to wonder if Oruka does not contradict himself when he acknowledges that the main aim of punishment is not just to reform the criminal but to maximize society’s security, and then he turns around to call for the abolition of punishment since it cannot reform criminals. In fact, Oruka points out that whether punishment is justified on the basis of just retribution, reformation, deterrence or compensation, the end result is social security (Oruka 1985, 26-29). What Oruka does not clarify in his call for the abolition of the institution of punishment is: if punishment cannot indeed reform criminals, does it mean it has failed in its overall function of maximizing social security? If punishment still maximizes social security through deterrence, just retribution, incapacitation or compensation, on what grounds does he call for the abolition of the whole institution due to its failure to reform the criminal?

In our view, it is paradoxical to talk about treatment or punishment for reform. Reform or rehabilitation of the offender is about discretion because it deals with personality facets of the criminals, which by their very nature are oblique and therefore not easily subjected to objective assessment. When proponents of reform/rehabilitation such as Oruka call for the understanding of the individual offender, his or her background and character so that we can treat him or her of his or her criminal forces, they do not provide us with an objective criterion with which to determine if the criminal has been reformed. Whether we call it treatment or punishment, reforming the criminal in this sense would be a dynamic process involving the careful

and continuous assessment of our objectives and of the alternative consequences of a given judgment at any particular point. How then would we morally justify a particular form of 'treatment' which was expected to be curative but turned out to be ineffective?

What is more, reform or treatment of the offender is a complicated process that can only be undertaken by persons with the requisite expertise. The time the criminal takes to be 'cured' and thereby to be fit to go back to the society can only be determined by an expert - a psychologist, counselor, psychiatrist, group therapist, or whoever else is closely studying the criminal in order to understand why he or she engages in crime. Taking into account the number of people who commit crimes every day and the available experts, it is not practically possible for any society to reform or treat criminals *per se*.

Nevertheless, punishment ought and can be geared towards the reform of the criminal, its other functions notwithstanding. Our view is that we cannot call for the abolition of punishment on the basis that it does not reform criminals. 'Treatment' which is responsible for the reform of the criminal ought to entail some sanctions such as temporary loss of liberty. In this way we will obviate the criticism against the retributivist view of punishment for the sake of punishment and the charge against the utilitarian view of using the offender as a mere means to an end. Punishment in an attempt to treat the offender will also bridge the gap between offender-oriented and offence-oriented approaches to crime. As Moberly (1968) observes, if any form of punishment is to reform, it must be such that it enables the offender "to see his offence as does the society by which or in whom it is inflicted" (Moberly 1968, 140). We therefore punish the criminal for the offence committed partly in an effort to treat him or her of the criminal forces.

### **Conclusion**

This paper has outlined the main tenets of Oruka's theory of punishment, provided a critical analysis of the theory, and attempted to illustrate the conceptual and practical difficulties of adopting his 'Treatment' account. The paper has also outlined the main functions of punishment in general and argued that since the reform of the offender is

just one major function of punishment besides deterrence, incapacitation, compensation and retribution, Oruka is mistaken to call for the abolition of the whole institution of punishment simply because punishment cannot reform the offender. We conclude by calling not for abolition of punishment, but for punishment in an attempt to treat the offender.

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