

Legal and Socio-Ethical Issues in Punishment

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ABSTRACT

The purpose of this paper is to reflect on the legal and socio-ethical implications of punishment. We have reviewed existing literatures on punishment with a view to establish a synthesis of scholarly opinions on punishment. It is appropriate for civil authorities to be properly educated on the functions of punishment. Public policy on punishment should have social dimension. Punishment should be seen as an aspect of social engineering. The study has strongly recommended that the purpose of punishment should ultimately be the reformation of offenders.

INTRODUCTION

The legitimacy and desirability of punishment has divided penologists into contending schools of thought. While there seems to be a consensus on the need to punish offenders, there is no agreement on what should be the nature, role and consequences of punishment. All over the world, penal law is punitive. The global and traditional consensus is that society cannot progress without law and order. It is also argued that social deviation requires social indignation and that failure to punish the offender tantamount to ethical and juridical indifference to public morality. It was in that mind-set that Austin Fagothey (1976:296-297) adumbrated on the social objectives of punishment: "... punishment is retributive, because it pays back the criminal for his crime, gives him his just deserts, reestablishes the equal balance of justice which has been outraged and reasserts the authority of the lawgiver which the criminal has flouted". A lawless society is a dangerous one. When members of society violate the norms and ethos without collective disapproval, it will inevitably culminate into chaos and outlawry.

WHAT IS PUNISHMENTS?

Etymologically, the word punishment is derived from Old French *punir*, and from two Latin words *punire*, meaning to punish and *poena*, which means "penalty". According to *Oxford English Dictionary* (1976:901), the verb form "punish" means: "...to cause (offender) to suffer for offence, chastise, inflict penalty on (offender); inflict penalty for (offence)". The *New Encyclopedia Britannica* (1975:281) has defined punishment as: "... the infliction of some pain, suffering, loss, or social disability as a direct consequence of some action or omission on the part of the person punished. The punishment may consist of death, physical assault, detention, loss of civil and political rights, or banishment". *Black's Law Dictionary* (1979:1) defines punishment as: "... any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him or for his omission of duty enjoined by law. A deprivation of property or some right".

N. S. S. Iwe (1987:246) has identified four essential elements of punishment to be deprivation, contrivance, misdeed or offence and legitimacy. Deprivation means that punishment is characterized by loss of life, liberty or socio-economic right. Contrivance means that punishment, as a social issue must be viewed perceptively as a direct or indirect consequence of human behaviour. Iwe is of the opinion that this element gives punishment its sociological dimension, for each society defines its own system of punishment to reflect its own level of culture and norms, its own ethos and values. Hence the penal code is usually a reflection and image of its society (1987:246).

Misdeed or offence has to do with the occasion and socio-ethical cause of punishment. It must be established *prima facie* that there is an infringement, or violation of the social order. Iwe writes: "... offence or misdeed must pass the appropriate psycho-moral test before it can qualify for punishment. To pass this test a given misdeed or offence must be truly human act performed with due knowledge, deliberation and voluntariness... The offender must be truly and humanly guilty of an offence before he can be legitimately punished" (1987:246). Legitimacy is a requirement that a competent authority must punish the offender. Such a person, or persons must possess a socio-juristic mandate to mete out punishment to deviants. Iwe maintains that: "... this element of punishment refers to the legality of

punishment which requires that the infliction of punishment must be in conformity with the laws of the land and their due processes” (1987:247).

The New Encyclopedia Britannica affirms that: “There must be a perceived relationship of legitimacy between the punisher and the punished; the agent of punishment must be in a position of legitimate authority over the punished, and the action or omission must be seen to merit the punishment by reference to a set of pre-existing criteria by which such acts or omissions may be judged” (1975:281). *The New Encyclopedia Britannica* argues further that the legitimacy of the actions of the punisher makes the difference between punishment and other coercive means of constraint and that “unless the agent who inflicts the pain or deprivation has authority to do so, his action constitutes a form of assault or civil wrong, both of which are themselves transgressions” (1975:281).

In view of the fact that society is an ethical, juridical entity, the Latin maxim "*ubi societates, ibi lex*", (that is, wherever a community exists there also must be law), is deemed to have a universal application. The laws are dictated by the norms and values of the society. The socio-juridical order has the State, or village council as its historic secular custodian. The ultimate goal, purpose and justification for maintaining social order are for the common good and welfare of all citizens. It is therefore in the interest of the larger society that punitive measures be taken to redress social deviation and restoration of the violated juridical order.

PRINCIPLES OF PENOLOGY

1) THE PRINCIPLE OF LEGALITY

The Latin maxim: "*nullum crimen sine lege, nulla poena sine lege*", means that nothing shall be recognized as crime and no punishment shall be entertained except as provided by the law. A person should not be made to suffer criminal penalties except for a clear breach of existing criminal laws. Such law must be precise, and clearly defined. The maxim therefore prohibits the introduction of new crimes and legislation with retrospective effect, which might incriminate a person for doing an act, which was not a crime when he did it. It also prohibits wide interpretation of precedents where crimes, which do not fall directly within it, are established and connected through analogical reasoning (Smith and Keenan 1982:468).

Through this principle, the penal system is subjected to the rule of law such that those in authority cannot impose their arbitrary will, whims and negative vested interest on the citizens. Lord Atkin (1931: 324) in his epochal and time-honoured ruling in the *Proprietary Articles Trade Association v. Attorney-General of Canada*, (1931), A. C. 310, said:

The domain of criminal jurisprudence can only be ascertained by examining what acts of any particular period are declared by the State as crimes, and the only common nature they will be found to possess is that they are prohibited by the State and those who commit them are punished.

In Nigeria, "*nulla poena sine lege*" is not just a legal principle, but a constitutional provision. Section 36(8) of the *1999 Federal Constitution of Nigeria* stipulates thus:

No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed (A898).

2) *MENS REA* AND *ACTUS REUS*

A criminal offence is the outcome of a human action, or failure to act, which is referred to as the *actus reus* of the crime. At common law, such act or omission must be accompanied by a state of mind which is referred to as the *mens rea* of the crime. The Latin maxim *actus non facit reum nisi mens sit rea*, "means the act does not make a man guilty unless his mind be guilty". The *actus reus* may be a voluntary conduct or an omission. At common law, the burden of proof is on the prosecution and it must be established *prima facie* that the act of the accused was the probable cause of the crime and that the accused intended the natural consequences of his acts (see *Hill V. Baxter*, 1958; *R. V. Hayward*, 1908; *R. V. Martin*, 1881; *R. V. Jordan*, 1956).

In establishing the mental element, the motive behind the act; that is the reason why the accused did not act, is irrelevant with regard to his guilt or innocence. In arriving at the mental element, the court will consider some variables like motive, intention, recklessness, negligence, malice and mistake, if any can be proven beyond reasonable doubt.

But it is trite law that no one can be punished for a crime unless the *mens rea* and the *actus reus* coincide (Thabo Meli v. The Queen, 1954) Section 24 of the *Nigerian Criminal Code* (1958) stipulates inter alia:

... a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident. Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

3) THE PRINCIPLE OF NON-DOUBLE JEOPARDY

The punishment of the offender and the enforcement of punitive justice must not exceed the requirements of crime and justice. No citizen should be over-punished for any crime. The punishment must be commensurate with the crime. There must be moderation in the infliction of punishment. It also prohibit punishing the offender twice for one and same offence. Section 36 (9) of the *1999 Federal Constitution of Nigeria* stipulates that:

No person who shows that he has been tried by any court of competent jurisdiction for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court (A898)

Section 36 (10) further provides that: “ No person who shows that he has been pardoned for a criminal offence shall be tried for that offence”(A898). This principle ensures that while a case is undergoing the scrutiny of the court (that is sub-judice), the parties should not be molested, or intimidated until the determination of the substantive suit.

4) THE PRINCIPLE OF HUMANIZATION

This principle emphasizes the humanity in the offender. Crime is viewed as evidence of man's failure to overcome his inherent weakness; hence the inalienable, fundamental dignity of the offender as a member of the human family is guaranteed within the penal system. Though the offender must be punished, it should be done without barbarism, sadism, brutality and vindictiveness. This is in recognition of the divine and eternal origin and destiny of man. To that extent, criminals are given access to the last rites of their religion and related gestures of humanity such as food and drinking of water. Those who have the duty to execute the judgment of the State on criminals should be conscious of the fact that they are dealing with fellow human beings who have been overtaken by anti-social spirit and habit.

5) THE PRINCIPLE OF PERSONAL RESPONSIBILITY

By this principle each person is directly responsible for his own offence. No innocent person can suffer vicariously for the offence of others. It is even reasonable to set free a criminal, than to punish the innocent. For a person to be held responsible for any offence, it must be shown that he is the author of the misdeed physically, materially, psychologically and morally. This requirement is in agreement with the moral nature of man. This principle therefore prohibits transfer, or misplaced aggression within the penal system.

6) THE PRINCIPLE OF PENAL OBJECTIVITY

Punitive measure can only be taken against those who have violated a definite juridical principle. The action, which constitutes the offence, must be ascertained objectively. This principle prohibits the operation of the penal system on subjective and trivial foundation. The Latin maxim "*cogitations poenam nemo patitur*", means no one is punished for his thoughts. Bowen L. J. in *Edgington V. Fitzmaurice* (1885), had posited that "The state of a man's mind is as much a fact as the state of his digestion". Legal objectivity requires accuracy and cumulative weight of evidences.

7) THE PRINCIPLE OF PRESUMPTION OF INNOCENCE

Section 36 (5) of the *1999 Federal Constitution of Nigeria* provides that "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Apart from the presumption of innocence, law enforcement agencies at various levels, should be conscious of the fact that offenders are fellow human beings.

FUNCTIONS OF PUNISHMENT

Theories of punishment have been a thorny and contentious issue over the years. Legal writers and criminologists are yet to arrive at a consensus on what should be the objective of the criminal law. Iwe posits thus: "... the fundamental function of penal law is justice and especially retributive justice, which restores violated order by castigating evil and punishing the criminal as he justly deserves. The other roles are desirable, incidental and subordinate to the essential retributive role of punishment" (1987:252).

1) RETRIBUTION

The theory of retribution goes with the notion that the punishment to be meted out should be commensurate with the gravity of the offence. It is one of the methods society adopts to show indignation and disapproval for the breaking of its laws. Retributive justice is "based on the ethical ground that: evil deserves castigation and wrongdoing deserves reparation..." (Iwe 1987:252). Many people have misinterpreted the concept of retribution as a display of vindictiveness, vendetta, atavistic barbarism and base instinct for revenge. Others have said that retribution is an emphatic and practical denunciation by the community of the offense.

Fitz-James Stephen (1874:161) observes that the punishments of common crimes are justified based on the principles of self-protection, "and apart from any question as to their moral character. It is not, however, difficult to show that these acts have in fact been forbidden and subject to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feeling of hatred and the desire of vengeance..." (Stephen 1874:161). The philosophy of retribution is clearly stated in the *New Encyclopedia Britannica*:

The *lex talionis*, typified in doctrine of "an eye for an eye" formed part of the law of many cultures and may be seen in residual form in many popular expressions of opinion about crime and punishment in present-day society. The notion that the offender ought to suffer in proportion to his wickedness has support from a wide range of philosophical and theological sources (283).

Within the concept of retributive justice, punishment is viewed as a moral imperative arising from the moral dignity of man and the need to reward both good and evil.

2) RETRIBUTIVISM

The extreme form of retribution is what Iwe calls retributivism. Immanuel Kant popularized the theory of exaggerated or absolute retribution. According to this theory, punishment is an end in itself. The offender must be punished at all cost. Punishment of the offender is not only legitimate, but a categorical duty. Since punishment is an imperative duty, a criminal cannot be set free. Iwe writes: "According to this theory, under no circumstances should a criminal be led to go free. Criminals should be punished whether the true interest of the juridical order requires it or not and whether crime is thereby reduced or increased" (1987:253). Iwe has rightly described retributivism as a limited vision of justice.

3) DETERRENCE

This theory holds that punishment should be meted out in such a way that the offender will never repeat his conduct for fear of a repetition of the punishment. Members of society will be deterred from committing the offence for fear of punishment. The deterrence theory which is the same as the preventive theory of punishment was taught and defended by Plato (1975:934): "Punishment is not retribution for the past, for what has been done cannot be undone; it is imposed for the sake of the future and to secure that both the person punished may either learn to detest the crime utterly or at any rate to abate much of their old behaviour". *The New Encyclopedia Britannica* has also endorsed the social utility of deterrence in prevention of crime within the social order: "Publicly inflicted punishment has the effect of encouraging the spectators to participate in a situation in which the values that have been violated are reaffirmed; alternatively, it demonstrates the power of the political authority and the price to be paid for disobedience" (1975:283)

The Nigerian jurist, Justice A. R. Bakare has observed that if the punishment meted out to the offender is disproportionate to the crime, and where punishment exceeds the crime committed, it may arouse public sympathy. He cited as example what happened when drug traffickers charged under the Miscellaneous Offences Decree NO.2 of 1984, when death penalty was the punishment: "The severity of the punishment under that decree excited so much compassion for three young men who were the initial scapegoats that the horror of the crime was drastically lessened.

On the day of the execution some people fainted while others cried” (184). Ethically and juridically, deterrence appears to be inadequate as the objective of criminal justice and it is unreasonable to punish a person only for deterrent purposes.

REFORMATORY THEORY

Criminologists have explained the phenomenon of deviance and criminal behaviours in different ways. There is a long tradition, which traces anti-social behaviours back to biological causes. This school of thought holds the view that deviants are born, not made. Berger and Berger have said that criminology in its early stages was considered to be a branch of medicine, the positivist school of criminology founded and popularized by the nineteenth century Italian physician, Cesare Lombroso, stressed the genetically based aspects of all human behaviours (Berger and Berger 1976: 311)

Behaviourist psychologists in their study of crime and criminal behaviours tend to see criminals as victims of psychological disorder and inadequate socialization. For Marxists, criminals are social victims of class struggle and stratification of society. Criminal acts are therefore classified as natural outcome of deprivation, dehumanization and social inequality. For the liberation theologians, crime is not only a product of poverty, but the consequence of structural violence. It is on this basis that some people have advocated that punishment should be reformative to correct, rectify, amend or remodel the offender.

In the Nigerian criminal case *Ekpo v. The State* (1982), 6. Sc, where the appellant was 18 years of age and a first offender was charged with being in possession of counterfeit bank notes contrary to Section 5 of the Counterfeit Currency (Special Provisions) Acts 1974, which provides 21 years imprisonment for convicted offenders. The accused person was found guilty and sentence to 21 years maximum imprisonment. The judgment, which was handed down by the court of first instance, was later affirmed by the Court of Appeal, which validated the *ratio decidendi* and dismissed the appeal. On appeal to the Supreme Court, Anyagolu JSC. said:

I wish to place it on record that I have much sympathy for the appellant on the severity of sentence passed on him. He is a young man of 18yrs of age and a first offender, and if the principle of reformation of criminals has any place in the sentencing policy of our courts, the salvaging of this young man from the direction of crime to the path of rectitude should be our paramount preoccupation (*Ekpo v. The State*, 1982, 6. Sc.).

Although the Supreme Court dismissed the appeal against conviction, she was reluctant to affirm the sentence.

CONCLUSION

The purpose of criminal law is to punish offenders, prevent crimes, and protect law-abiding citizens. While doing this, it must be emphasized that the State equally has a duty under the rule of law to safeguard the fundamental rights of all citizens including that of offenders. While admitting that there is moral justification for punishment, at least for the peaceful survival of the larger society, criminals should be treated as typical symbols and representatives of depraved humanity. The criminal justice system must overcome the prevailing limited vision of justice.

From the legal and socio-religious perspectives, punishment is desirable, hence a *condition sine-qua-non* for the attainment of a just, law abiding and egalitarian society devoid of deprivation, exploitation, outlawry and normlessness. We have stated point-blank that there is nothing wrong in compelling criminals to pay the price for violating social norms and values. Since punishment is not to be meted out from a vindictive disposition, the ultimate reformation and rehabilitation of criminals for normal and free social life should be paramount in criminal justice system. After a careful analysis of all contending views, it is our considered opinion that the three theories of punishment that is, retribution, deterrence and reformation should be blended into one. All punishment meted to offenders should reflect the three dimensions. To that extent, we are advocating the view that offenders should be justly rewarded for their deeds, the reward should serve as a deterrent to other members of the society. The State should at the same time do everything humanly possible to reform criminals.

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