

SOME BASIC PRINCIPLES OF PENAL JURISPRUDENCE: AN ANALYTICAL APPROACH*

Abstract

This paper has critically examined the fundamental principles that guide the imposition and execution of punishment on a convict. It has thus analyzed the idea of criminal liability, the meaning and theories of punishment and of sentencing. Although this study is limited to discussion of the philosophical bases and general principles of the subject matter, it is, nonetheless, prompted by the rising rate of crime in Nigeria today with the consequent judicial involvement and attitude in the criminal justice process. This paper therefore reiterates the jurisprudence that governs and should govern the punitive role of the courts.

1. Introduction

The issue of punishment has been, from the earliest times, a subject of concern to scholars and people of diverse persuasions. Philosophers, theologians, moralists, jurists, politicians, psychologists, sociologists, criminologist, human right scholars and so on have each argued from their own perspectives and proffered many theories in connection therewith.

Be that as it may, recent happenings around the world and in Nigeria have necessitated the need to critically re-examine the very concept and idea of punishment in the light of the role of criminal law in the organization and restructuring of human society. Hence, the worldwide unending heated debate on the desirability or otherwise of death penalty and the adoption of sharia criminal law in most of Northern Nigeria together with the application of such punishments as amputation, stoning to death, *haddi* lashes and so on, are some of the issues that ignite our interest in the idea of criminal penalty generally. We are equally touched by some derogation from punishment such as grant of amnesty which constitutes the talk of the day in relation to militancy in the Niger Delta area of Nigeria.

In the face of the above scenario, one is confronted with a lot of legal and jurisprudential problems in relation to punishment. What does punishment consist in? What purpose should punishment serve or on what principles or reasons should the imposition of punishment rest? Who has the authority to punish and under what conditions should this authority be exercised? Should we punish at all and whom do we punish? Are any of the punishments inflicted reprehensible either in principle or for their consequences? How should we punish and how much should we punish? These questions can go on and on. But suffice the above to constitute some guidelines along which this article will tackle the problem of punishment.

2. Nature of Punishment in General

The word punishment is derived from the Latin verb root '*punis*' which means 'to reprimand'. It is an abstract derivative of the verb 'to punish' evolving from old French "*puniss*" which in turn is an extended form of the stem of "*punir*" meaning "to punish". "Punishment" is also traceable to the Latin verb "*punire*" or its earlier version '*poenire*' which means to "inflict a penalty on, or cause pain for some offences". It is from this Latin verb that its substantive noun '*poena*' takes its root.¹ It will certainly not be surprising that there is here a mutual linguistic symbiosis among the Latin, French and English connotations of the word "punishment" as they

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¹ Cf. D.P. Simpson, **Cassell's New Latin-English English-Latin Dictionary**, Cassell & Company Ltd., London, 1959, 424, 489 & 803.

belong to the same language family. It means to inflict some pains to somebody for having done something wrongly or for having failed to do something rightly. According to the **Oxford Advanced Learner's Dictionary of Current English**, punishment is a "causation of suffering or discomfort to somebody for his or her wrong doing"². Punishment has also been defined to be "any action designed to deprive a person or persons of things of value because of something that person has done or is thought to have done"³. Thus, what constitutes a punishment involves "the deliberate infliction of suffering on a supposed or actual offender for an offence such as a moral or legal transgression"⁴.

From the above definitions, it means that conceptualized generally, punishment denotes the infliction of pain (corporal, psychological, and even spiritual) and takes in the incidents of the pain of sense or the pain of deprivation or loss. According to Austin Turk, the valued things of which one can be deprived of include "liberty, civil rights, skills, opportunities, material objects, less tangible forms of wealth, health, identity, life and perhaps most crucial, significant personal relationship"⁵. Be that as it may, punishment within the ambience of law denotes, according to Fagothey, "harm inflicted by the executive power of the state on a person who is judged to have violated a rule or law"⁶. To harm a person means to take away what the person has or to deprive that person of what he or she otherwise has a right to have, do or enjoy. The most common applications of punishment take place in legal and similarly regulated contexts, being "the infliction of some kind of pain or loss upon a person for transgressing a law or command (including prohibitions) given by some authority"⁷.

Punishments are applied for various purposes, especially to encourage and enforce proper behaviour by society. Criminals are punished judicially by, for instance, fines, corporal punishment or custodial sentences such as imprisonment. In ordinary parlance, children, pupils, and other trainees may be punished by their educators, parents or instructors. Slaves, domestic and other servants were punishable by their masters. Employees can be subject to a contractual form of fine or demotion. Most hierarchical organizations, such as military and police forces, or even churches, still apply quite rigid internal discipline, even with a judicial system of their own (courts martial, canonical courts). In common usage too, punishment may also be applied on moral, especially religious grounds, as in penance (which is voluntary) or imposed in a theocracy with a religious police as in strict Islamic States or under the Taliban or even if not a theocracy, by inquisition.

The prevailing features in the modern theory of punishment were developed by analytic philosophers of the twentieth century. Although there are some emergent views, the *terminus a quo* of these ideas is the influential writings of H.L.A. Hart in England and John Rawls in the United States of America.⁸ These features are properly delineated in **Stanford Encyclopedia of Philosophy** in which the term punishment is described thus:

² A. S. Hornby, (ed.), **Oxford Advanced Learner's Dictionary of Current English**, Revised Third Edition, Oxford University Press, London, 1980, 677 – 678.

³ H. D. Barlow, **Introduction to Criminology**, Third Edition, Little, Brown and Company, Boston, 1984, 476.

⁴ "Punishment" In **Internet Encyclopaedia of Philosophy**. Cf. <http://www.iep.utm.edu/p/punishme.htm> (Accessed on 18/7/2008).

⁵ A.T. Turk, **Criminality and Legal Order**, Rand McNally, Chicago, 1969, 19.

⁶ A. Fagothey, **Right and Reason: Ethics in Theory and Practice**, C.V. Mosby Company, U.S.A., 1959, 371.

⁷ "Punishment" in **Wikipedia, the Free Encyclopedia**. <http://en.wikipedia.org/wiki/punishment> (Accessed on 17/8/2008).

⁸ Cf. H.L.A. Hart, **Punishment and Responsibility**, Oxford University Press, London, 1959, 1-27; J. Rawls, "Two Concepts of Rules", **Philosophical Review** 64, 1955, 3-32.

An authorized imposition of deprivations – of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens – because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.⁹

It may still be helpful to attempt an analysis of the features thereof¹⁰. First and foremost, punishment is seen as an authorized act, not an incidental or accidental harm. It is an act of the political authority having jurisdiction in the community where the harmful wrong occurred.

Second, punishment is constituted by imposing some burden or by some form of deprivation or by withholding some benefits. The deprivation may be a deprivation of rights since a crime is, *inter alia*, a violation of the victims' rights, and the harm, thus done is akin to the kind of harm a punishment effects.

Third, punishment is a human institution, not a natural event outside human purposes, intentions, and acts. Its practice requires persons to be cast in various socially defined roles according to public rules. Harms of various sorts may befall a wrong-doer, but they do not count as punishment unless they are inflicted by personal agency.

Fourth, punishment is imposed on persons who are believed to have acted wrongly even as the basis and adequacy of such belief in any given case may be open to dispute. Again, being found guilty by persons authorized to make such a finding, and based on their belief in the person's guilt, is a necessary condition of justified punishment. Actually, being guilty is not a necessary precondition. Therefore, it may not be, though unfortunate, to punish the innocent and undeserving without being legally unjust.

Fifth, no simple explicit purpose or aim is built into the practice of punishment. The practice is consistent with general functions or purposes and inconsistent with having no purpose or functions whatever.

Sixth, not all socially authorized deprivations count as punishments. The only deprivations inflicted on a person that count are those imposed in consequence of a finding of criminal guilt rather than guilt only of a tort or a contract breach, etc. Thus, what differentiates non-punitive deprivations from the punitive ones is that the former do not express social consternation.¹¹ This expression is quintessential to the practice of punishment.

However, for the purpose of this article, one is not concerned with the entire legal punishment but is confined to criminal punishment, which falls properly within the province of human positive law. In this article, the term 'punishment' is synonymous and interchangeably used with the word 'penalty'.

⁹ "Punishment" in **Stanford Encyclopedia of Philosophy**. <http://plato.stanford.edu/entries/punishment> (Accessed on 13/2/2009).

¹⁰ *Ibid.*

¹¹ Cf. J. Feinberg, "The Expressive Function of Punishment", **The Monist**, **49**, 1965, 397-423; H.A. Bedau, "Feinberg's Liberal Theory of Punishment", **Buffalo Criminal Law Review**, **5**, 2001, 103-144.

3. Criminal Punishment

Criminal punishments are those prescribed by the statute creating the relevant offence. According to this understanding, no act is regarded as a crime when there is no corresponding punishment attendant thereto and which law prescribes. Hence, according to Barlow, criminal punishments are those legal punishments provided for by law and imposed by lawful representatives of a State, community, or group according to the directives of law”.¹² This sort of punishment ranges from binding over, probation, caning, to fines, imprisonments and death penalty, etc.

These fundamental principles of penal justice are summarized in the following Latin maxims: ‘*Nulla poena sine leges*’, meaning, no one shall be held guilty of any act or omission which did not constitute a penal offence under any law at the time it was committed. The second maxim, ‘*nulla poena sine culpa*’, is translated to the effect that no one shall be punished for a violation of the law which did not result from personal guilt. Finally, the maxim, “*in dubio pro reo*,” means that a person is to be presumed innocent until proved guilty according to due process of law. All these principles have been guaranteed in the Constitution of the Federal Republic of Nigeria, 1999.¹³ Hence, section 36 (5) thereof provides that “every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty”. Again, section 36(8) states that 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. Further, section 36(12) provides as follows:

Subject as otherwise provided by the constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law.

It may also be noteworthy that in this provision, “the written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law”.¹⁴ The above principles, no doubt, will constitute a fulcrum around which our discussion on punishment will revolve.

4. Brief History of Punishment¹⁵

The practice of punishment is as old as man. Even in the Biblical Old Testament times, stories abound of how God punished human beings and groups especially the people of Israel whenever they violated the terms of their covenant within. This idea of punishment, but also reward, is replete in many religio-cultural milieus. The progress of human civilization has also evolved not only the practice but also the theory and method of punishment. In primitive societies, punishment was left to the individuals wronged or their families, and was vindictive or merely retributive. In quantity and quality, primitive punishment would bear no special relation to the character or gravity of the offence. Gradually, however there arose the idea of proportionate punishment of which the characteristic type is an eye for an eye (*lex talionis*).

¹² H. D. Barlow, *Op. Cit.*, 476.

¹³ CAP C 23 LFN, 2004

¹⁴ Section 36 (12), **Constitution of the Federal Republic of Nigeria, 1999.**

¹⁵ Most of the points here are culled and paraphrased from **Wikipedia, the free Encyclopedia** <http://en.wikipedia.org/wiki/punishment>(Accessed on 17/8/2008).

The second stage was punishment by individuals under the control of the State, or community. In the third stage, consequent upon the development of law, the State took over the punitive function and provides itself with the machinery of justice for the maintenance of public order. From this time, crimes began to be considered as offences against the State, and the exaction of punishments by the wronged individual became illegal. It is nevertheless observed that even at this stage, the vindictive or retributive character of punishment remained but gradually, and especially after the humanist movement under thinkers like Beccaria and Jeremy Bentham, new theories began to emerge. Two trends of thought combined themselves in the condemnation of the primitive theory and practice. On the one hand, the retributive principle has been very largely superseded by the protective and the reformative. On the other hand, punishments involving bodily pain became objectionable to the general sense of society. Consequently, corporal and even capital punishment occupied a far less prominent position, and tended to disappear. It began to be recognized also that stereotyped punishments, such as belong to the statutes, fail to take into account the particular condition of an offence and the character and circumstances of the offender.

The above enlightenment gave rise to the modern theories dating from the 18th century, when the humanitarian movement began to teach the dignity of individual and to emphasize rationality and responsibility. The effects were the reduction of punishment both in quantity and in severity, the improvement of the prison system, and the first attempts to study the psychology of crime and to distinguish between classes of criminals with a view to their improvement. At this age, criminal punishment became a subject of interdisciplinary study. Thus, in criminal anthropology and criminal sociology (criminology), crime is viewed as the outcome of anthropological and social conditions.¹⁶ According to this view, the law breaker is himself a product of social evolution and cannot be regarded as solely responsible for his disposition to transgress. Habitual crime is thus to be treated as a disease. Punishment can, therefore, be justified only insofar as it either protects society by removing temporarily or permanently one who has injured it, or acting as a deterrent, or aims as the moral regeneration of the criminal. Thus, the retributive theory of punishment with its criterion of justice as an end in itself gives place to a theory which regards punishment solely as a means to an end, utilitarian or moral, according to the common advantage or the good of the criminal is sought.

5. General Theory of Criminal Liability

Having gone thus far in delineating, albeit briefly, the nature and history of punishment on the one hand, it now remains to examine the nature of criminal responsibility. In other words, how does one become responsible or liable for a criminal act? That is to ask, what does a criminal act consist? What makes up a criminal act? When is one said to have committed a crime for which one is subject to penal liability? Consideration of these questions is particularly important for a good understanding of our subject matter for a man merits punishment only to the degree that he was culpable or responsible for his criminal act. Our present inquiry will fall under two heads, relating to the conditions and incident, and to the measure of penal liability.

Conditions and Incidents of Penal Liability

The general conditions of penal liability are adequately summarized in the legal maxim: *Actus non facit reum, nisi men sit rea*. The Act alone does not amount to guilt; it must be accompanied by a guilty mind. In other words, there are two conditions before which fulfillment penal

¹⁶ Cf, for instance, M. Haralambos & R.M. Heald, **Sociology: Themes & Perspectives**, Oxford University Press, New Delhi.1980, 407-452.

responsibility can rightly be imposed. One is the doing of some act by the person to be held liable. This is technically referred to as the '*actus reus*' literally meaning the 'physical guilty act'. According to Fitzgerald, "a man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether".¹⁷ The other is the guilty mind technically called the '*mens rea*' with which the act is done. In the words of Fitzgerald,

It is not enough that a man has done some act which on account of its mischievous results the law prohibits; before the law can justly punish the act, an inquiry must be made into the mental attitude of the doer. For although the act may have been objectively wrongful, the mind and the will of the doer man have been innocent.¹⁸

The implication is that a man is penally responsible only for those wrongful acts which he does either willfully or recklessly. Then and only then is the *actus reus* accompanied by the *mens rea*.

Be that as it may, the above general rule is subject to exceptions. First, criminal law may include provisions penalizing mere negligence, even though this may result from simple inadvertence. Secondly, the law may create offences of strict liability, where guilt may exist without intention, recklessness or even negligence. In what immediately follows, the researcher will *seriatim* consider in relative detail these conditions of liability analyzing, first, the conception of an act, and secondly, that of *mens rea* in its forms of intention, recklessness and negligence.

Actus Reus

The *actus reus* of a crime is the physical element of an offence. It may consist of an act, or of an omission, or more rarely of what is described as a passive state of affairs. According to Okonkwo, *actus reus* of a crime "may include not only the conduct of the accused, but also the events or consequences of that conduct".¹⁹ While the former may be illustrated with a flourishing of one's fist at another in view of a criminal assault, the latter can be exemplified with the injury resulting to the victim from the firing of a gun by the accused. Okonkwo also observes that certain other physical circumstances may be material to the proof of an offence.²⁰ For instance, in the offence of fraud by a trustee in relation to trust property under the Nigerian Criminal Code, the accused must be a trustee.²¹ Again, on a charge of stealing, the property in question must fall into the category of "things capable of being stolen".²² Hence, we are left with rather negative definition that "*actus reus* means the whole definition of a crime with the exception of the mental element".²³ We shall limit ourselves to discussing how act or omission can constitute an *actus reus* of an offence. First, an act can amount to the physical element in question. May it be noted, however, that the act here is the "human act" (*actus humanus*) as distinct from the "act of man" (*actus hominis*). While "human acts" are those that man can consciously control and deliberately will, "acts of man", on the other hand, are those acts that a person happens to perform but that he or she does not consciously control or deliberately

¹⁷ Fitzgerald, **Salmond on Jurisprudence**, 12th Edition, N. M. Tripathi Private Ltd., Bombay, 2001, 352.

¹⁸ *Ibid.*

¹⁹ C. O. Okonkwo, **Criminal Law in Nigeria**, Spectrum Books Ltd., Ibadan, 2002, 44-45.

²⁰ *Ibid.*

²¹ *Ibid.* Cf. also Section 434, **Criminal Code Act**, CAP C38 LFN, 2004

²² *Ibid.* Cf. also Section 382, **Criminal Code Act**, CAP C38, LFN, 2004

²³ *Ibid.*

will.²⁴ The second group of acts may include beating of ones' heart, automatic reflexes like sneezes, twitches or acts done in state of delirium, sleep, hypnosis or in the course of a fit of automatism. These acts are outrightly involuntary. Insofar as a man cannot help committing acts in this category, it would be unjust and unreasonable to penalize him for them. In common law, such a man would normally be regarded as not having committed the *actus reus* of an offence. Difficulty however arises where a man performs some dangerous act which is involuntary but to be liable to behave in this involuntary way. So that even as there is no *actus reus* for which to hold him liable, he still ought to be held responsible for the state into which he permitted himself to fall. Again, acts as understood here are different from natural phenomena beyond human control such as gales, thunderstorm, earthquake, and so on. Therefore, the acts that can constitute *actus reus* for the purpose of a criminal offence are those acts that are capable of being controlled by man. Thus, a slight movement of a property can constitute the *actus reus* of stealing. A small gesture could be the *actus reus* of an assault. Words alone are a sufficient *actus reus* in sedition, defamation, conspiracy, or the taking of an unlawful oath.

Secondly, omission can also amount to an *actus reus*. According to Fitzgerald, “an omission consists in not performing an act which is expected of one either because one normally does it or because one ought to do it”.²⁵ He however notes that law is concerned only with the latter type of omission in which there is a duty to act. Be that as it may, there is no hard and fast rule as to when an omission may constitute the *actus reus* of a crime, and when it does not. Okonkwo suggests that “one must look at the definition of each particular offence to see whether mere failure to do something is criminal”.²⁶ It seems that generally, the law is reluctant to punish omissions as the majority of crimes can be committed only by the positive doing of a thing. But there are some notable exceptions. For instance, the Nigerian Criminal Code provides a long list of criminal omissions. Here, duties are imposed on peace officers to suppress riots,²⁷ on members of ship's crews to obey orders,²⁸ on any person who being required by law to keep any record concerning a person in confinement, refuses or neglects to keep such record, and so on.²⁹ A breach of these duties is certainly an offence.

Further, section 343 of the Criminal Code specifies a number of duties where negligent omissions will be criminal. An example is omission to take precautions against probable dangers by anyone who handles fire or explosives or who is in charge of machinery. In the same vein, section 344 makes it a general offence for anyone to cause harm by negligent omission in breach of a duty. But it is the whole of chapter 26 of the Code that imposes a number of duties in relation to preservation of life. Instances of these include duty to provide the necessities of life on those in charge of the helpless, and on masters and heads of families in respect of their apprentices or children; duty to take reasonable care on those doing dangerous acts or in charge of dangerous things; and the duty to do it on anyone who has undertaken any act, the failure to do which may be dangerous to life or health. Although the chapter merely provides that one who omits to perform the relevant duty is deemed to have caused the consequences resulting from the omission, Okonkwo still observes that criminal

²⁴ Fagothey, *Op. Cit.*, 19.

²⁵ Fitzgerald, *Op. Cit.*, 352.

²⁶ Okonkwo, *Op. Cit.*, 46.

²⁷ Section 199, **Criminal Code Act**, CAP C38 LFN, 2004. Section 200 thereof also imposes on the general public the duty to assist,

²⁸ *Ibid.*, section 507.

²⁹ *Ibid.*, section 368.

liability is attendant to a mere finding of such an omission where there is a duty to perform an act.³⁰ For instance, section 339 of Criminal Code makes it an offence to fail to supply the necessaries of life if danger to health is likely to result.

Furthermore, the Code also provides that it is an offence generally for anyone to omit without lawful excuse to perform any duty which he is bound to perform by the provisions of any legislative enactment.³¹ There are also the very important criminal omissions in respect of offences committed by others such as aiding to commit an offence,³² or neglecting to prevent a felony.³³

What is very salient is that duties breach or omission of which attract liability are those imposed by law and not merely by morality. Thus, it is not an offence for a man to stand callously by, watching another's baby drown in a pool of water, two feet deep when it could be the simplest act to save it. Again, if X stands idly while a cigarette end sets fire to Y's house, there is no offence even though he could have stamped on the cigarette. It is however strongly suggested that, since law is made for man and not *vice versa*, these omissions be criminalized in Nigeria in accordance with the neighbour principle as in civil law by imposing duties to care on relevant persons. It is on this basis that the Belgian **Penal Code** was amended in 1961 to establish a duty to rescue persons exposed to serious danger.

Moreover, in some offences, it is the consequences of a man's conduct that constitute the *actus reus* of the offence rather than the conduct *per se*. For instance, for a justified imputation of guilt and infliction of punishment in murder, manslaughter and other homicide cases, death must result from the conduct of the accused. In such cases however, problems may arise as to the nature of the causative link between the act and the consequence. Hence, if A poisons B and 18 months later B dies from the poison, did A cause the death of B in law? What of the principle of "*actus novus interveniens*" (an intervening new act)? It must be noted that the principle of causation is wider than that of liability. For instance, in section 308 of the Code,³⁴ a man can cause death indirectly by any means whatever. But that only goes to the *actus reus* of the offence; for having decided that a man caused the consequence, the court still has to go further to determine whether he is liable for it. While the former is usually by objective process of examining the circumstances of the case, the latter is usually a subjective process of examining the mind of the accused³⁵ as well as the defences raised by him. An example is the public hangman who causes death but is not liable for it because he has a defence, or a man causing a consequence and yet not liable for it, if it is an event occurring by accident".³⁶

Mens Rea

Another necessary, though not sufficient conduction, for criminal liability is what is represented by the expression "*mens rea*". It literally means the "mental thing". In English law, the term '*mens rea*' has been used in two rather different ways.³⁷ First, *mens rea* is used to refer to the mental element which is required to be proved in respect of a particular offence. It is in

³⁰ Okonkwo, *Op. Cit.*, 47.

³¹ **Criminal Code**, section 202. The burden of proving which is on the accused (cf. **I.G.P. v. Anozie** (1954) 21 N.L.R. 29).

³² **Criminal Code**, section 7(b).

³³ *Ibid*, section 515.

³⁴ Criminal Code Act, CAP C38 LFN, 2004

³⁵ Except where there is strict liability or liability for negligence.

³⁶ **Criminal Code**, section 24.

³⁷ This is observed by Okonkwo, *Op. Cit.*, 49.

this sense that one can talk of *mens rea* of murder or *mens rea* of manslaughter. Secondly, the term is used to designate a general principle of statutory interpretation and of criminal responsibility to the effect that whenever a court is faced with considering the definition of an offence, it must presume, until the contrary is proved, that the definition requires proof of a guilty mind against the accused. It is in this later sense that one talks of doctrine of *mens rea* guiding the entire English criminal jurisprudence. However, that may be, the two meanings are not opposed to each other; they are closely related since the former is merely a particular application of the general doctrine in the latter. We are, however concerned with *mens rea* as the particular mental element in crimes which must be present in addition to the relevant *actus reus* in order to justify criminal liability.

According to **Black's Law Dictionary**, *mens rea* refers to the "state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime".³⁸ Thus, to secure a conviction in the case of stealing, the prosecution must prove the intent, on the part of the accused, to deprive the rightful owner of his property. *Mens rea* is therefore often called the criminal intent.

It must however be observed with Fitzgerald that the form which *mens rea* assumes will depend on the provisions of the particular legal system³⁹ or statute. Thus, criminal liability may require the wrongful act to be done intentionally or with some further wrongful purpose in mind. It is in this way that prosecution of most offences demand proof that the accused committed the *actus reus* in a particular state of mind, that is, that he intended the *actus reus*, or knew that it might result from his conduct. Hence, in **Hyam v. D. P. P.**,⁴⁰ dealing with the issue of intention in murder cases, the House of Lords held that there is intention to cause death or grievous bodily harm if the accused deliberately and intentionally did an act knowing that death or grievous bodily harm was a probable consequence of it, even though he did not desire that result. In some other occasions, it may suffice that the *actus reus* was recklessly committed. Recklessness is a term used to describe those states of mind short of intention, but distinguishable from mere inadvertent negligence because the accused foresaw the consequences of his conduct and risked it. Here, a man may see what is likely or probably going to happen but does not actually desire it, and may even desire it not to happen. Yet, because of the recklessness, he will be criminally responsible for the outcome on his conduct. There are only relatively few crimes in which it is enough to prove mere recklessness against the accused.

Furthermore, negligence is the next form of variable in relation to *mens rea* in which a man may not himself foresee what is going to happen. Nevertheless, the law sometimes holds that he ought to have foreseen it and was guilty of negligence. This negligence is qualified with the adjective 'inadvertent' to distinguish it from recklessness. Often referred to as culpable carelessness, negligence occasions a liability that is often wider than in recklessness since there is no need to prove subjective foresight. But as in recklessness, there are only very few offences which can be committed merely by negligence, and they do not normally attract heavy punishments except in the case of manslaughter punishable by life imprisonment. Okonkwo observes that the subtle distinction between civil and criminal negligence will arise only when

³⁸ B.A.Garner, (ed.), **Black's Law Dictionary**, 7th Edition, West Group, Minnesota, 2004, 1074.

³⁹ Fitzgerald, *Op. Cit.*, 366.

⁴⁰ (1974) 2 All E. R. 41.

the crime is serious.⁴¹ But at any rate, negligence presupposes the existence of care, and the consequent falling below the standard of that care or outrightly breaching the relevant duty to care.

It is also good to note that there are some offences where the prosecution need not prove any mental element against the accused to secure a conviction. These are offences of strict liability. In strict liability offences, it is enough for conviction for the prosecution to prove the *actus reus*. Thus, offences of this nature are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence. They therefore constitute the exceptions to the general requirement of fault.

There are other issues related to the idea of *mens rea* such as motive, accident, malice, ignorance, mistake of law, mistake of fact, and so on. But let the above suffice for the purpose of penal justice in relation to our subject matter.

6. Measure of Penal Liability

Having considered the conditions and possible incidents of penal liability, it now remains to discuss the measure of it. How much do we punish and what determines the severity of the punishment? Response to this question will certainly aid us in examining the propriety or otherwise of death penalty in relation to certain offences.

According to Fitzgerald, in every crime, there are three elements to be taken into account in determining the appropriate measure of punishment. These include the motive of the commission of the offence, the magnitude of the offence, and the character of the offender.⁴² We shall take them one by one.

The Motive of the Offence

Here, motive refers to temptation or tendency. This element entails that the greater the temptation to commit a crime, the greater should be the punishment. This is because the object of punishment is to counteract the natural motives which lead to crime by the establishment of contrary and artificial motives which the law supplies. Thus, the stronger the natural motives, the stronger must be the punishment. Fitzgerald observes that “if the profit to be derived from an act is great, or the passions which lead men to it are violent, then a corresponding strength or violence is an essential condition of the efficacy of repressive discipline”⁴³ (punishment). However, this principle is without prejudice to the many cases in which extreme temptation can be a ground of extenuation rather than of increased severity of punishment. It therefore follows that in relation to the element of motive, the circumstances of each particular case must be considered in order to know the measure of penal liability, all other things being equal.

The Magnitude of the Offence

Other things being equal, this element states that the greater the offence, the greater should be its punishment. Fitzgerald succinctly describes it thus:

The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hope of preventing it. For the greater this mischief

⁴¹ Okonkwo, *Op. Cit.*, 58.

⁴² Fitzgerald, *Op. Cit.*, 405.

⁴³ *Ibid.*

the less is the proportion which the evil of punishment bears to the good of prevention, and therefore the greater is the punishment which can be inflicted before the balance of good over evil attains its maximum. Assuming the motives of larceny and of homicide to be equal, it may be profitable to inflict capital punishment for the later offence, although it is certainly unprofitable to inflict it for the former. The increased measure of prevention that would be obtained by such severity would, in view of the comparatively trivial nature of the offence, be obtained at too great a cost.⁴⁴

Another reason for making punishment proportional to the magnitude of the offence is that in those cases in which different offences offer themselves as alternatives to the offender, an inducement is thereby given for the preference of the least serious. Thus, if the punishment of burglary is the same as that of murder, then the bugler has obvious motives for not stopping at the lesser crime. Again, if an attempt is punished as severely as a completed offence, then a man need not repent of his half executed purposes.

The Character of the Offender

According to this principle, the worse the character or disposition of the offender, the more severe should be his punishment. Bad disposition is the result of either the strength of the impulses to crime, or the weakness of the impetus to abide by the law. This principle therefore holds that “any act which indicates depravity of disposition is a circumstance of aggravation and calls for a penalty in excess of that which would otherwise be appropriate to the offence”.⁴⁵ This depravity of disposition can be illustrated with the following instances. First, the repetition of a crime by one who has been already punished (habitual offender). Here a punishment adapted for normal men would not be apt for those who are recidivists. Secondly, the situation where the mischief of an offence is altogether disproportionate to any profit to be derived from it by the offender, such as killing a man in order to facilitate the picking of his pocket. A third case is that of offences from which normal humanity is adequately dissuaded by such influences as those of natural affection. An example is the killing of one’s father. Although it is no worse a crime than any other homicide, but it has always been viewed with greater severity and by some laws been punished with greater severity by reason of the depth of depravity, which it indicates in the offender.

7. Theories of Punishment

It is now appropriate to examine the issue of why criminals should be punished. In other words, on what rational principles does the State stand in punishing offenders? What really is the basis for punishing those who are deemed liable for their criminal conducts? Can punishment be justified at all, and if so how? While commonsense and most scholars agree⁴⁶ that criminals are liable to some form of punishment, there is less agreement, however, when it comes to specifying what is it exactly that justifies the State in punishing criminals. Several theories of punishment have been proposed to solve this problem. The theories can be grouped into two

⁴⁴ *Ibid.*, 406.

⁴⁵ *Ibid.*, 408.

⁴⁶ There are, however, pacifists and those who regard crime as disease and thus hold that criminals should not be held responsible for their acts. Most of the latter group comes from the psychological community. For instance, Harry Elmer Barnes holds that most crimes are committed as a result of deep underlying subconscious compulsion or from impulse and anger. According to him, punishment is useless except it is for the reformation of the reformable elements or for the permanent segregation of those whose rehabilitation is quite unlikely or entirely out of the question. Cf. H.E. Barnes, “The Repression of Crime” in P. Smith (ed.), **History of Punishment**, Montclair, New Jersey, 1969, 25-30.

traditional categories, namely retributivism and utilitarianism. Modern penal jurisprudence has also identified hybrid situations such as found in liberal theory and the compromise theories. It is intended that the postulates of these points of view would be fully weighed and appraised in order to identify what seems the best rational guide or basis for punishment. It may be helpful to treat them one by one.

Retributivism

Although there is no complete unanimity among retributive theorists, yet “all such theories try to establish an essential link between punishment and moral wrongdoing”.⁴⁷ The exponents of retribution as the justification for punishment can be categorized into three: (i) those who hold to the theory of retribution *simpliciter* (e.g. Kant and Hegel), (ii) those who hold to the theory of retribution as a kind of revenge (*lex talionis*) (eg Code of Hammurabi of the 18th century BC, and the Mosaic Code), and (iii) those who hold to retribution which can at the same time be reconciled with some utilitarian ends (cf. St. Augustine, Aquinas, Devlin, etc).

The position reflected under (i) above is espoused by Kant and Hegel, who see retribution or retaliation as the only basis for punishment and not merely the primary or indispensable reason for it. This view is, certainly the direct antithesis of the completely utilitarian theory as expounded by Plato, Hobbes, Bentham, Mill, Locke, Rousseau, and their disciples. Unlike these scholars, Kant and Hegel see punishment as serving no other purpose beyond itself, nor should punishment be inflicted in order to produce any other desired consequence either on the person being punished or society or on others who see him punished. Thus, for these scholars punishment is not only an end in itself, that is, for its own sake, but also a “categorical imperative”. Nothing further should be sought except the presentation of the balance sheet of justice by seeing every wrongdoing duly requited by a proportionate measure of punishment - the punishment fit the crime sort of mentality. Hence, the assuaging of feelings of those injured, satisfaction from the motive of revenge, reformation of the criminal, deterrence of him or others, or the welfare of the society should not come into the motive for punishment. It is only to be imposed because the individual has committed a crime.

Specifically, Kant invokes what he refers to as the “principle of equality” in his discussion of punishment. If this principle is obeyed, then “the pointer of the scale of justice is made to incline no more to the one side than the other”.⁴⁸ If a wrongful act is committed, then the offender has upset the balance of the scale of justice. He has inflicted suffering on another, and therefore rendered himself deserving of suffering. Thus, in order to balance the scale of justice, it is necessary to inflict the deserved suffering on him. But it is not permissible to just inflict any type of suffering. Kant states that the act performed by the person “is to be regarded as perpetrated on himself”.⁴⁹ Kant refers to this as the “principle of retaliation”. Therefore, for Kant, the justification of punishment is derived from the principle of retaliation which is grounded on the principle of equality. This is perhaps why the Kantian theory is referred to as ‘*deontologism*’, a word so pivotal in the entire philosophical system of Kant, and denotes any act devoid of any utilitarian consequences.

⁴⁷ C.L.Ten, **Crime, Guilt, and Punishment**. Clarendon Press, Oxford, 1987, 38.

⁴⁸ Kant, “Justice and Punishment”, trans. W. Hastie in G. Ezorsky (ed), **Philosophical Perspectives on Punishment**, State University of New York Press, Albany, 1972, 104.

⁴⁹ *Ibid.*

This Kantian perspective has become the delight of some subsequent scholars. Lewis seems to be perfectly in accord with the Kantian view when he observes thus:

...when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of right, we now have a mere object, a patient, a 'case'.⁵⁰

Lewis is surely reacting disapprovingly to the views not only of those who hold that crime is a disease for which no one should be held responsible but also to those of the deterrent theorists. For him, justice is achieved by punishing one who has deserved it. In the same manner, Weiler argues that society in disapproving wrongdoing demands that it is good for the wrongdoer to be punished.⁵¹ For Cavanaugh, "retribution is probably the sole view most commonly adhered to by the general public or the reasonable man". Thus, according to him, "criminals are merely suffering the just consequences of their anti-social behaviour".⁵² Cavanaugh therefore maintains that retribution may be the most humane and most just basis for punishment. It may therefore be appropriate to summarize the position of these hard core retributive theorists with the words of Barlow: "Retributionists see only one possible basis for justification of specific penalties for specific crimes. A specific penalty is justified when the guilty person has received a punishment reflecting the gravity of the offence. The two issues of guilt and making the punishment fit the crime provide the grounds for arguing that any particular legal punishment is a just desert."⁵³

Be that as it may, another version of the retributive theory which has become a veritable source of controversy among scholars is the retaliation (*lex tationis*) theory. The controversy centers on whether retaliation can rightly be associated with the idea of retribution. Scholars are divided in this regard. Although Fitzgerald believes that retribution "means basically that the wrongdoer pays for his wrong doing"⁵⁴ in order to restore the balance which his original crime disturbs, yet he is convinced that the notion of retribution is clearly connected with that of revenge. He puts it succinctly:

Revenge consists of injury inflicted by way of retaliation by one person on another who has wronged him, and plainly requires the existence of a victim as well as a wrongdoer. Retribution might be thought of as an extension of this, society itself feeling sympathy with the victim and sharing his desire for vengeance. But when revenge gives way to retribution, the emphasis is no longer on assuaging the victim's feelings but on seeing that the wrongdoer gets his deserts.⁵⁵

⁵⁰ C.S.Lewis, "The Humanitarian Theory of Punishment" in W. Hooper (ed.), **First and Second Things**, Oxford Univ. Press, London, 1985, 96 & 101.

⁵¹ J.M.P.Weiler, "Why Do We Punish: The Case for Retributive Justice", **UBC Law Review**, vol. 12, 1978, 295.

⁵² B.J.Cavanaugh, "The Justification of Punishment", **Alberta Law Review**, vol 16, 1978, 43.

⁵³ Barlow., *Op. Cit.*, 478.

⁵⁴ Fitzgerald, *Op. Cit.*, 98.

⁵⁵ *Ibid.*

Similarly, Okonkwo notes that retribution involves “the wreaking of vengeance and infliction of pain by society, on behalf of itself or the injured individual, on the wickedness of the offender”.⁵⁶

However, on the opposite rung of the ladder stands Elegido who argues that the idea of retribution should be sharply distinguished from that of vengeance.

Retribution concentrates on the criminal getting his just deserts while vengeance focuses on assuaging the feelings of the victim. Retribution is disinterested while revenge is self-regarding Retribution is imposed by an authoritative person or body in the community ... while vengeance is arbitrarily taken by a person on his own authority.⁵⁷

Again, Barlow observes that “retributivists are quick to point out that their conception of legal punishment emphasizes the principle of justice and due process, not the subjective passions of punishers seeking vengeance”.⁵⁸

Be that as it may, the idea of retribution as revenge as presented under (ii) above and classically titled the *lex talionis*/retaliation theory is found in the ancient and famous **Code of Hammurabi** and especially in the Biblical Old Testament **Mosaic Code**:

...thou shall give life for life, eye for eye, tooth for tooth, burning for burning, wounding for wounding, stripe for stripe....⁵⁹

This tenet may be contrasted with certain passages in the Biblical New Testament: “...love your enemies and pray for those who persecute you....”;⁶⁰ or “Avenge not yourself...for it is written, vengeance is mine. I will repay, says the Lord”.⁶¹ It is, however, good to note that some authors associate the above two senses of retribution together. Thus, Fitzgerald writes: “retribution theory regards punishment rather as an end in itself. According to this view, it is right and proper, without regard to ulterior consequences that evil should be returned for evil, and that as a man deals with others so should he himself be dealt with. An eye for an eye and a tooth for a tooth is deemed a plain and self-sufficient rule of natural justice. Punishment as so regarded is no longer a mere instrument for the attachment of the public welfare, but has become an end in itself”.⁶²

The third group in the theory of retribution as stated under (iii) above can be classified as those whose tenet is ambivalent in that even though they espouse retribution, they at the same time associate to it the allied utilitarian purposes of prevention, deterrence and reform. In the opinion of this group, retribution is not only the primary reason for punishment; it is the one indispensable, for according to Aquinas “...punishment cannot be justified except as doing the

⁵⁶ Okonkwo, *Op. Cit.*, 28.

⁵⁷ J.M. Elegido, **Jurisprudence**, Spectrum Books Ltd., Ibadan, 1994, 219. He further cites Lucas to illustrate this distinction: “I punish you for the wrong you have done, full stop, whereas I revenge myself on you for the wrong you have done me”. Cf R.J. Lucas, “Or Else”, in J. Rachel (ed.), **Moral Problems**, New York: 1972, 222, 234-5.

⁵⁸ Barlow, *Op. Cit.*, 478. See also S.E. Grups (ed.), **Theories of Punishment**, Indiana University Press, Bloomington, 1971; Ezorsky (ed.), **Philosophical Perspectives on Punishment**, State University of New York Press, Albany, 1972.

⁵⁹ Leviticus 24: 20; **The New Jerusalem Bible**, Darton, Longman & Todd Ltd, London, 1985, P. 166

⁶⁰ Gospel of Matthew 5: 44; *Ibid* at p. 1617

⁶¹ Letter of St. Paul to Romans 12: 19, *Ibid* at p. 1885

⁶² Fitzgerald, *Op. Cit.*, 98.

work of justice”.⁶³ This view is distinguished from those of the hard core retributivists for whom retribution is the only basis for justification of punishment. For the members of this group, retribution is merely the only primary and not the entire reason for punishment; and it does not imply revenge or cruelty or indignity. According to Aquinas, all punishment must be remedial rather than merely retributive. For him, there could not be punishment for punishment’s sake since after guilt has been expiated by retributive punishment, the reform of the offender and his restoration in due course to a constructive share in the life of the community must be sought after. Punishment may also prevent a man from repeating his offence and may deter others from committing the same or other offences.⁶⁴ It is perhaps the possibility of these other reasons that provoked some scholars to espouse other theories of justification of punishment which we shall now examine.

Utilitarianism/Consequentialism

Utilitarianism as a theory of justification of punishment is quite a reaction to the tenets of hard core retributivism. It advocates a theory of punishment viewed from its consequences on the person punished, other human beings, and the society large. In this sense, the utilitarianist position is often referred to as consequentialism. According to **Stanford Encyclopaedia of Philosophy**, “the pure consequentialist views punishment as justified to the extent that its practice achieves or is reasonably believed to achieve whatever end-state the theories specifies such as public interest, the general welfare, the common good”.⁶⁵ Simply put, utilitarians argue in favour of a guiding principle anchored on the greatest happiness of the greatest number. Utilitarians are thus committed to taking into account every consequence of a given punishment insofar as it affects the balance of happiness over unhappiness.

The protagonists of the utilitarian theories include John Stuart Mill, Jeremy Bentham, John Locke, Thomas Hobbes, Jean Jacques Rousseau, Plato, Socrates and Protagoras. Unlike the backward-looking retributive theories, the utilitarian perspectives are essentially forward-looking. Punishment is imposed with an eye to its future result especially prevention of further crime. There are however many faces of utilitarianism. The scholars mentioned above do not, by any means, maintain a monolithic view. Each may hold to one or other utilitarian purpose for the justification of punishment. It may be for the reasons of deterrence or intimidation, reformation or retaliation, prevention or incapacitation, medicinal or curative, protection of society or reduction/mitigation of anti-social behaviours, self-defense or correction, restoration of the solidarity of the group or the healing of aberrant attitudes – all these ends can be served by the infliction of punishment for wrongdoing which all accept in principle. Hence, the controversy among the utilitarian theorists seem to resemble that of the proverbial five blind men that argued on what the elephant ‘looks like’ – from a description of the particular part of the body of the elephant which each one of them had touched. For the purpose of our discussion here, we shall limit ourselves to the following utilitarian theories.

Deterrence Theory

The early utilitarians especially, Jeremy Bentham and Beccaria believe that punishment could be made to deter individuals from committing crime.⁶⁶ For them, prevention of crime becomes

⁶³ T. Aquinas, **Summa Theologiae**, Part 2, Image Books, New York, IIA IIAe, q. 66, a. 6.

⁶⁴ *Ibid.*

⁶⁵ <http://plato.stanford.edu/entries/punishment/> (Accessed on 13/2/2009).

⁶⁶ J. Bentham, **The Principles of Morals and Legislation**, New York: Hafner Publishing Company, New York, 1948; C. Baccaria, **Essay on Crimes and Punishments**, trans. H. Paolucci, Bobbs-Merrill, New York, 1963.

the basis for justifying punishment. Their underlying assumption is that since people seek pleasure and avoid pain, they will tend to avoid those things that bring pain especially if the pain outweighs the actual or anticipated pleasure associated with them. Simply put, they argue that people are scared away from crime by fear of punishment. Therefore, deterrent theory would reject as totally unfit for any penal system any measures inadequate to dissuade offenders and others from other offences. Two levels of the theory can be distinguished: specific (or individual, or special) deterrence, and general deterrence.⁶⁷ This distinction recognizes two classes of potential sanctions. They are, on the one hand, those who have directly experienced punishment for a crime or crimes they committed in the past (specific deterrence); and, on the other hand, those who have not experienced the punishment but are deterred from crime by the threat of punishment (general deterrence). Be that as it may, an evaluation of the effectiveness or otherwise of the deterrence theory will soon be our preoccupation.

Rehabilitation/Reformation Theory

Rehabilitation or reformation as one of the consequentialist theories of justification holds that punishment seeks to bring about a change in the offender's character so as to reclaim him as a useful member of the society. Regarding reformation as the cornerstone of penal practice, it involves making strides to improve the character of the offender so that he will be less likely to re-offend. Influenced by the psychological theories of Cambell and Church, the pure reformist theorists argue that punishments have strong influence on behaviour.⁶⁸ Rehabilitation is distinguished from deterrence, in that the goal is to change the offenders' attitude to what they have done, and make them come to see that their behaviour was wrong. While this is the basic assumption of the proponents of this theory, it however remains for us to examine later the extent to which punishment can be an instrument of reform.

Incapacitation/Disablement Theory

Incapacitation is a justification of punishment that refers to the removal of the offender's ability to commit further crimes. In other words, this is a forward-looking view that regards the future reduction in re-offending as sufficient justification for punishment. This can occur in one of two ways: the offender's ability to commit crime can be physically removed, or the offender can be geographically removed. The former can be carried out in several ways such as amputation in the case of theft, or castration in the case of sexual offences. Incapacitation can include such punishment as taking away the driving licence off a dangerous driver,⁶⁹ or even by ultimate removal from the relevant group by death penalty. Imprisonment and banishment also fall under this category.

⁶⁷ J. Andenaes, **Punishment and Deterrence**, University of Michigan Press, Ann Arbor, 1974, appendices 1&2; Elegido, *Op. Cit.*, 212. However, Jack Gibbs distinguishes between absolute and restrictive deterrence. According to him, some people refrain from a particular criminal activity throughout their lives because of fear of punishment (absolute deterrence), whereas others may modify or curtail their criminal activities only for a period of time because they see a growing risk of punishment if they persist (restrictive deterrence). (cf. Barlow, *Op. Cit.*, 513-514).

⁶⁸ Cited in R.D. Gross, **Psychology: The Science of Mind and Behaviour**, second edition, Hodder & Stoughton, London, 1992, 180. B.F. Skinner's is directly opposed to this view. For him, positive reinforcement is of much more potent influence on behaviour than punishment. For the role of punishment and reward, see Gross, *Op. Cit.*, 812-814.

⁶⁹ **Road Traffic Act**, Cap R 11 LFN; 2004, section 19 (2).

It has often been observed that “the greater the danger a criminal is thought to present, the more willing is society that he should be shut off...”⁷⁰ Thus in **R. v. Adebisin**,⁷¹ on appeal against sentences imposed after a conviction for armed robbery and burglary, the Court of Appeal increased the sentences of the two accused of ten years and eight years imprisonment respectively to fifteen years and twelve years. The court held that “for the protection of the public, they should be sent to prison for even longer terms than those imposed by the trial judge”.⁷² There is no doubt that this approach adopts a utilitarian view that regards the protection and subsequent happiness of the majority as justification for increasing the prison sentences. It must also be noted that under this theory, the accused need not be culpable, provided that he provides a substantial danger to society, such as the indefinite detention of an insane man with tendency to violence.

Education/Enculturation Theory

Associated with both the deterrent and rehabilitative justifications of punishment is the educative perspective. The underlying rationale for the educative theory is that people acquire knowledge that a certain behaviour is illegal and contrary to accepted norm by experiencing, witnessing, reading about, or being told of punishment for doing it, and this knowledge enhances their respect and obedience to laws. In other words, people refrain from committing a crime because they learnt that it is wrong or bad through the punitive response to it. Thus, the punishment establishes the criminality of the act and that fact or belief becomes the reason for refraining from doing it. According to this view, penal system is used to teach people what are social norms and to obey the law.

Expiation/Reparation Theory

Related to the idea of retribution is the theory of expiation. But unlike retribution which is backward-looking, expiation is more forward-looking in the sense that by it, the criminal is made to repair the societal disharmony occasioned by his criminal conduct. On this view, crime is done away with, cancelled, blotted out or expiated by the suffering of its appointed penalty. Hence, according to this theory, to suffer punishment is to pay a debt due to the law that has been violated. Certainly, expiation is a further step away from the primitive conception of punishment as a revenge which attitude had been associated with hard core retributivism. It therefore marks a shift from redressing the injury done to the victim to restoring the balance of harmony. Fitzgerald puts it succinctly:

The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law than to the victim of the offence marks a further stage in the preferment and purification of primitive conception.⁷³

It is as if the penal mathematics involved in the expiation theory is that “guilt plus punishment is equal to innocence”.⁷⁴ The result is certainly akin to granting a state pardon to a convict by which he is made a completely new man (*novas homo*).⁷⁵ The only difference between the two is that in grant of pardon, the punishment due to an offence is completely obliterated by an act

⁷⁰ Okonkwo, *Op. Cit.*, 33.

⁷¹ (1940) 6 W.A.C.A. 197. Cf also **R.v. Thunu** (1943) 9 W.A.C.A, 61 where sentences were increased for the same reason in a case of a gang burglary by force.

⁷² **R. v. Adebisin** (1940) 6 W.A.C.A 197.

⁷³ Fitzgerald, *Op. Cit.*, 100.

⁷⁴ *Ibid.*, p. 99.

⁷⁵ **Falae v. Obasanjo (No 2)**, (1999) 4 N.W.L.R. (pt 599) 476 at 495.

of grace performed by an appropriate authority, while in expiation, one is made a new man and the societal equilibrium restored by the actual suffering of the punishment by the offender. The expiation theory of justification no doubt seems to have been espoused by those who are influenced by religious sensibilities.

A Critical Appraisal of the Theories

The above analysis constitutes the main outlines along which scholars of modern jurisprudence justify the practice of punishment. A more profound look at the theories would reveal that whatever is the reason on which any theory of justification of punishment is based will also limit and regulate its application. For instance, if justification of punishment is anchored only on reforming the criminal *simpliciter*, then it would follow that the use of death penalty would be meaningless, for killing an offender does not reform him. Again, if justification is based only on retributive considerations, then any idea of its consequences on the society would be completely unnecessary. Hence, according to Elegido, different theories of punishment have different implications for the way in which punishment should be applied, and the guidelines which can be inferred from alternative theories often conflict among themselves”.⁷⁶ The writer therefore wants to critically evaluate the theories to see whether or not any particular theory or the entire theories taken together would constitute a comprehensive justification for penal justice.

Certainly, one of the most controversial theories of justification of punishment is retributivism. It was almost unanimously rejected by the leading jurists during the 19th century and the first half of the 20th century. For instance, Salmond states that “it is questionable whether retribution can be justified”⁷⁷ insofar as it is for its own sake rather than for the protection of the society as maintained by the utilitarian theories. For this, opinions like Salmond’s regard retribution as *prima facie* wrong and question the propriety of state involvement in penal justice:

To force a wrongdoer to compensate his victim may be justified as a means of alleviating the latter’s suffering and as bringing about a more just state of affairs between the two, but to exact retribution in order to force offenders to balance the accounts of abstract justice is surely to arrogate to ourselves functions to which we are not entitled.⁷⁸

Yet another major challenge faced by the retribution theory is that of explaining exactly how any positive value can be derived from inflicting suffering on the criminal just as an end in itself. Hart believes that this challenge could not be met. For him, “it appears so be a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good”.⁷⁹ Hence, regarding both the criminal act and the punishment as essentially evils, Hart argues that two evils cannot make a good. However, this Hart’s view is obviously unfortunate for by regarding punishment as essentially evil, his argument flies in the face of reality and common sense as it goes to attack the very foundation on which the entire notion of punishment is built.

⁷⁶ Elegido, *Op. Cit.*, 213.

⁷⁷ Fitzgerald, *Op. Cit.*, 98.

⁷⁸ *Ibid.*, p. 99.

⁷⁹ Hart, *Op. Cit.*, 75-83.

What perhaps is a more fundamental problem associated with retribution as a just desert is how to measure or calculate what a criminal deserves in relation to the crime he committed. In other words, how is punishment made to fit the crime? Is it by making the punishment mirror the crime itself (*lex talionis*, an eye for an eye), or by adjusting the severity of penalties according to the social harm resulting from different offences, or even by linking the penalties to the moral outrage or indignation felt by a majority of citizens?⁸⁰ The basis for the mathematical computation involved in determining what just and fair desert to a criminal had been a veritable source of controversy among scholars, and the lack of unanimity with regard thereto partly became the initial reason for the rejection of the retributive theory.

Be that as it may, the second half of the 20th century witnessed a launch back by retributivism into a considerable acceptability upon the rediscovery that utilitarian views would be unacceptable if totally divorced from the idea of retribution. For one thing, Lewis observes that retribution or 'just deserts' is the only possible link between punishment and the idea of justice.⁸¹ Perhaps, it is the failure to take desert and justice into account that is the major problem with the utilitarian theories. No wonder Finnis approaches the problem of punishment generally from the standpoint of distributive justice which demands that there must be a fair distribution of benefits and burdens in the society.

When a criminal commits a crime, he benefits in a certain sense, for while other people restrain their actions in order to comply with the law, he casts off his burden of self-restraints and takes into consideration exclusively his own advantage. He thereby gains an unfair advantage over the law abiding citizens. If the free-willing criminal were to retain this advantage, the situation would be as unequal and unfair as it would be for him to retain the tangible profits of his crime.⁸²

Finnis, therefore, observes that when the authorities inflict punishment on a criminal, they ensure that distributive justice obtains in the society and that observing the law will have disadvantaged nobody.⁸³ According to this view, punishment, rationally justified as retribution, restores the fair balance of benefits and burdens among members of a society.⁸⁴ Besides, it is only the retributive theory that presupposes punishment as deserved only by the offender and in the measure in which the offence was committed. Inflicting harm on the innocent, even though believed to be guilty, is completely outside the scheme of retribution. For the foregoing reasons, it appears that retributive theory cannot easily be dismissed from any consideration of justification of punishment in human experience generally.

But the reformation theory seems to present some more worrisome problems. In the first place as we indicated above, reformation excludes the practice of death penalty. Its basic assumption is not only that crime is a disease but also that no disease is incurable. The idea of reformation as the reason for punishment appears to be self-contradictory. It touches the very fundamental

⁸⁰ Barlow, *Op. Cit.*, 478-479.

⁸¹ Lewis, *Op. Cit.*, 98.

⁸² J.M. Finnis, **Natural Law and Natural Rights**, Oxford University Press, Oxford, 1980, 263.

⁸³ *Ibid.*

⁸⁴ Elegido observes that an exaggerated version of this theory is Kant's teaching that even on the last day before society is dissolved, a murderer ought to be executed so that justice be done. Elegido condemns this theory in favour of the society's exercise of mercy on the criminal (cf Elegido, *Op. Cit.*, 220, footnote number 18. Cf. also Ezorsky's critique of Kant's idea of punishment (*Ezorsky, Art. Cit.*, xviii).

idea of criminal/penal culpability and liability. This is true as one who out of the effect of a sickness, whether of mind or of body, performs an act, though regarded as antisocial, would not justifiably be imputed with the guilt as a result of the act since the very important element of the *mens rea* would be lacking. Hence, if crimes were to be regarded as diseases, any thought of retribution would be out of the question. Accordingly, prisons and similar institutions should be transmuted into establishments devoted to psychological analyses and therapy.

Furthermore, accepting a purely reformist view of punishment could, no doubt, have serious implications for human rights. For even if one is regarded as a 'patient' rather than a criminal, in practice he would still have to be interned in an establishment to undergo "treatment" whether he likes it or not, for no society would like to overlook anyone whose behaviour, constitutes an affront to the common good. The treatment certainly, would be directed at changing the "sick person's" personality in such a way that he would not wish again to behave in ways that those treating him had defined as anti-social; and the period of such a 'treatment' may be indefinite in duration, as there is no telling how long it can take for a course of "treatment" to be successful. In other words, since the act is viewed as antisocial, the 'treatment' of the 'sick person' would be compulsory, and would deprive him of his freedom and other rights for an indefinite period.

It should also be noted that there is nothing in the concept of "treatment" that makes it necessary to wait until a person commits a crime before it is administered. After all, preventive or prophylactic medicine is universally believed to be more desirable than purely curative or therapeutic action. Thus, it would be an ideal to better try and achieve prevention before people commit any antisocial act. This will immediately tantamount to punishing the innocent before he commits a crime in order to prevent him from committing the crime. This would really be unreasonable as giving this type of prophylaxis to people with potential antisocial tendencies would be highly threatening to personal liberty.

What is so salient is that the great majority of the proponents of the reformation theory are philosophical determinists. They hold that freedom is an illusion and that all human actions are fully determined by genetic and environmental influences, for which they conclude that there must be some factors which force the criminals to engage in crime even if those factors cannot be identified as yet. For this reason, reformatory theory admits only such forms of punishment as are subservient to the education and rehabilitation of the criminal, and rejects all those which are profitable only as deterrent or disabling. It is this reductionist justification of punishment on purely reformist framework that is the source of the weakness of the theory. Fitzgerald observes that "if criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons must be turned into dwelling houses far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn".⁸⁵ Further difficulties arise with the incorrigible offenders who appear to be beyond the reach of any correctional influences.

However, it is not intended by the above critique to mean that there is no merit whatsoever in the reformist perspective. For one thing, it may be fitting for not only the first offenders and juvenile delinquents but also for those criminals who suffer from psychosomatic abnormality and degeneracy. But at the same time, the protection of the society and the common good

⁸⁵ Fitzgerald, *Op. Cit.*, 95.

demand much more than the reformation of the criminal. There ought to be put in place suitable methods of crime prevention by way of deterrence, disablement, and rehabilitation.

Does it then mean that deterrence is the last theory of justification of punishment? Certainly, almost everybody will welcome the deterrent effects of punishment. But can punishment be justified solely on the basis of deterrence considerations? There is, no doubt, that if the only objective of a penal system were to deter criminals, then it would probably be appropriate to use far more severe penalties. Thus, it is perfectly possible that prolonged torture of thieves, for instance, could have a significant effect on reducing theft. Still another way of increasing the deterrence value of punishment would be to extend it to the offender's family, as obtainable in some penal systems in the past.⁸⁶ But this would not only be an affront to commonsense but also would be quite unreasonable in modern times.

Besides, a penalty can still have the same deterrent effect even if it is inflicted on an innocent party once people are made to believe that the one punished, though innocent, was the criminal. Again, if deterrence were the only relevant consideration, then such defences like insanity, provocation, or accident would no longer be relevant as the notion of deterrence would not necessarily be connected with whether or not one is criminally liable or responsible.

More, if a penal system were to be exclusively interested in deterrence, then a person need not commit a crime before jailing him. According to this view, it may be necessary, for instance, to jail all those within the age of 15-35 around the Niger Delta area of Nigeria in order to prevent or deter them from engaging in militancy activities. Therefore, the deterrent value of punishment conflicts with the idea of punishment as a just desert as the need to deter others by holding the accused up as an object lesson may be thought to override the question of whether or not he deserves a punishment.

But the more basic problem with the deterrence theory is on the question of the extent to which people are deterred from committing crimes because of fear of punishment. Surely, this is hard to prove. While some criminals may be deterred, there may still be others who are not bothered. It may well be that certain types of punishment deter certain types of people. But it is much more questionable to think that punishments generally have deterrent effect without qualification. This would indeed involve the doubtful assumption that human beings think clearly before they act. It is equally a fact of human experience that, sometimes, punishments meant to deter offenders may instead turn an actual offender into a hardened criminal.

Nonetheless, the above is not to suggest that the principle of deterrence plays no useful role in a penal system. Even as some types of punishments may not deter some criminal, other criminals may certainly be. It is therefore needful in view of modern theories of penology and criminology to insist on the importance of the deterrent element in criminal justice. But it need not be carried too far as researches are still going on in order to clearly discover what types of punishment deter what types of people.

It is the considerations of inherent inadequacies associated with each of the above theories of justification of punishment taken exclusively that made modern scholars to realize that one variable does not explain the whole reality of justification of punishment. In what immediately

⁸⁶ For instance, the Roman *Lex Quisquis* provided for the punishment of the children of those guilty of the offence of 'majestas' (eg attempting to kill the emperor). Hart, *Op. Cit.*, 12.

follows, we shall examine the attempts of various scholars to put up a more comprehensive coverage.

Attempts at a Compromise

In the light of the merits and demerits of the individual theories of justification of punishment as delineated above, many theorists have attempted to take respective features of utilitarianism and retributivism and fuse them into a theory that retains the strengths of both while overcoming their weaknesses. The reason for this is not far-fetched. The idea that punishment should promote good consequences, such as reduction or prevention of crime, surely seems attractive. But also the idea that it would be justifiable to punish an innocent in any circumstance even if such punishment would be likely to result to the greatest balance of happiness over unhappiness, certainly appears wrong. In the same vein, the idea that justice and the desert of the offender should play a pivotal role in a justification of punishment is quite congenial. But being committed to punishing a criminal even when nobody's welfare is enhanced as a consequence seems to be problematic and mean. Thus, each type of theory is made up of its strong and weak points. Is there any possibility of a compromise among the theories?

Hart makes an attempt. According to him, in order to clarify our thinking on the subject of punishment,

What is needed is the realization that different principles ... are relevant at different points in any ... acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied?⁸⁷

Hart observes that it is the failure to separate these questions from one another and consider that they might be answered by appealing to different principles that has prevented many previous theorists from generating an acceptable account of punishment. Hart states that the first question (What justifies the general practice of punishment?) is that of "general justifying aim" and ought to be answered by citing utilitarian concerns. The second (To whom may punishment be applied?) is that of "distribution" and ought to be answered by citing retributive concerns. Hart therefore argues that punishment is to be justified by citing its social consequences, the most important of which is the reduction of crime, but we ought not be permitted to punish whenever inflicting a punishment is likely to reduce crime. It is to be inflicted only in the case of an offender for an offence.⁸⁸ Therefore, the Hartian compromise theory harbours both the utilitarian and the retributive concerns. While the former promotes the reduction of crime or it is not justifiable, the latter for its justification allows only the punishment of an offender for an offence.

At the heart of Hart's theory is the assumption that some social good must be promoted or some social evil should be reduced in order to justify a punishment. But this presents a problem, since the implication is that it would be unjustifiable to punish a person who ordinarily deserves a punishment unless some utilitarian aim is being furthered. So, for Hart, considerations of desert cannot override utilitarian objectives, as punishing a person guilty of a crime is subservient to the social consequences of punishment. At the end of the day, the so-called

⁸⁷ Hart, *Op. Cit.*, 3.

⁸⁸ *Ibid.*, 9.

“compromise theory” of Hart would, at best, capitulate to yet another version of utilitarianism. Be that as it may, Hart’s attempts become a spring-board for further efforts toward working a compromise between the competing views of justification of punishment. Such a compromise theory must be able to accommodate the retributive, the deterrent, the reformative, the educative, the disabling, and the reparative elements of punishment.

8. The Theory of Sentencing and Severity of Punishment

Our discussion on penal jurisprudence would not be complete without a discourse, albeit briefly, on the theory of sentencing, and on what determines the amount of punishment to be inflicted on any particular offender. According to Okonkwo, while punishment is the object of criminal law, “sentencing is the way in which principles of punishment are applied to individual cases”.⁸⁹ What are these principles? How do they influence the amount or severity of punishment to be inflicted?

Studies show that just as there are divergent views about justification of punishment, so are there different opinions of what principles determine the amount of punishment. Although the belief that, in most cases, the amount of punishment and sentencing should vary directly with the seriousness of the offence is widely accepted, yet utilitarians and retributivists have different ways of arriving at this general conclusion.

The utilitarian, Jeremy Bentham, for instance, states that “the greater the mischief of the offence, the greater is the expense, which it may be worthwhile to be at, in the way of punishment”.⁹⁰ Since both crime and punishment tend to cause unhappiness, Bentham argues that in calculating the amount of punishment for any individual case, it would be necessary to weigh the unhappiness caused by various punishments.⁹¹ Hence, the greater the unhappiness caused by a given offence, the greater the amount of punishment that may be inflicted for that offence in order to reduce its occurrence.⁹² It is however observed that this crime-punishment proportionality would hardly be a hard and fast rule for utilitarianist objectives. Critics argue that utilitarians would sometimes be committed to inflicting a severe punishment for a relatively minor offence provided that the total amount of unhappiness caused by many instances of it is great. This would happen in the case of a high rate of a minor offence. Thus, a state whose aim is to deter a significant number of people from committing that prevalent offence, though minor, would be committed to giving a very severe sentence for it.

On the other hand, the retributivists argue that more serious offences should be punished more severely since offenders who commit more serious crimes deserve harsher punishment than those who commit less serious crimes. This criterion no doubt “requires imposing a harm on a criminal identical to the one he imposed on his victim”.⁹³ Those who support death penalty for culpable homicide case often invoke this principle. But it presents a real difficulty when attempting to determine the proper punishment for other crimes. For instance, should raping him punish a rapist? Or should a thief be punished by stealing his property? In other words, must it merely be the case that there be a direct relationship between the amount of punishment and the seriousness of the offence, or must offenders suffer the same amount as their victim(s)

⁸⁹ Okonkwo, *Op. Cit.*, 37.

⁹⁰ Bentham, *Op. Cit.*, 181.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ R. Shafer-Landau, “The Failure of Retributivism”, in J. Feinberg, & J. Coleman (eds.), **Philosophy of Law**, Wadsworth / Thompson Learning, Belmont, CA, 2000, p. 773.

in order for the demands of the principle to be met? This constitutes a major problem with retributivism.

It therefore becomes inevitable that a comprehensive theory of sentencing must take the following into consideration. First and foremost, it would be quite helpful that the actual commission of a crime be made a condition for punishment. Hence, a person should not be sacrificed for the presumed convenience of society unless he has deserved to be punished by actually committing a crime. “No one may be punished until he/she is proved guilty of breaking a law” is clearly stated in article 7 of the **African Charter on Human and Peoples Rights**.

Secondly, considerations should be given to the possibility of mental defences. These defences include acting under duress or by accident, and situations where one’s self-control is significantly reduced as in cases of automatism, mental disease and provocation. Except in the cases of strict liability offences, these mental defences, if successfully pleaded, would either mitigate or obliterate the set punishment for the offence.

Thirdly, in spite of the attendant problems as adumbrated above, punitive severity must accord with the principle of proportionality. Ways of establishing this should be explored by those who are involved in sentencing. This however has to be subject to the principle of minimalism (less is better) which holds that given any two punishments roughly equal in retributive and preventive effects for a given offence and class of offenders, the less severe punishment is to be preferred. This is perfectly applicable in a case where there is a stipulation of maximum or minimum punishment, in which the judge or judges would be tasked with determining, within the range, the punishment suitable for that particular case.

Finally, it may be appropriate for utilitarian reasons to advert one’s mind to the relativity of punishment whereby the principle of sentencing may vary according to needs and circumstances of each case. Okonkwo succinctly puts it thus:

For one offender, the discovery and public exposure of his behaviour may be felt to be a sufficient punishment, so that it is enough to discharge him absolutely. In another’s case, it might be felt appropriate to leave him free in society but under a promise to be of future good behaviour (conditional discharge) or under the supervision of a representative of the court (probation). For a negligent driver, disqualification might be enough to protect the public. For a minor offence where deterrence is thought appropriate and likely to be effective, a fine may be sufficient. Where the offence is grave but it is still felt that consideration of the individual offender should be paramount, then there may be committal to some sort of “reformatory” institution. Where the court considers that the need of the community must over-ride the individual, then severer penalty permitted by law eg. imprisonment, may be imposed.⁹⁴

The implications of the above legal theory of punishment is that any penal justice system cannot be studied independently of the legal, cultural, political, and situational facets of social life.

⁹⁴ Okonkwo, *Op. Cit.*, 39.

9. Conclusion

This article has discussed some general principles of legal punishment. It has dealt with the nature, meaning and justification of criminal punishment in particular. It equally has not left out the legal theory of criminal liability and sentencing upon which the entire idea of penalty is founded. But in all these discourses, this study has deliberately failed to pitch its tent with the penal practices in any particular legal system or jurisdiction. This approach is certainly consistent with jurisprudence which John Austin has defined as “the science concerned with the expositions of the principles, notions and distinctions which are common to systems of law”⁹⁵, or as Salmond puts it, “the name given to a certain type of investigation ... of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems”⁹⁶. Yet in practice, these general principles of punishment have to be applied to local domains in accordance with the needs of particular jurisdictions and legal systems. This is particularly so as different situations may warrant correspondingly different penal measures. It is therefore imperative that a trajectory of relevant interdisciplinary studies will come into play for the good determination of appropriate penalties for different crime regimes. The roles of sociologists, anthropologists, psychologists and moralists, to say the least, may not be dispensed with in this regard. Besides, an adequate study of the causes and rate of crime in addition to strict application of trial procedures has to be commissioned for proper imputation of guilt on the accused.

⁹⁵ Cited in L. B. Curzon, **Jurisprudence**, 1979, 21.

⁹⁶ Fitzgerald, *Op. Cit.*, 1.