

KANT'S THEORY OF PUNISHMENT: A REEXAMINATION OF JUST PUNISHMENT AND THE RULE OF LAW IN AFRICA

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Abstract

For the purpose of this article, we will be taking a theory of punishment to be a philosophical account comprised of a determinate number of discreet elements such as a definition, a justification, and distribution. The definition spells out what the necessary and sufficient conditions are for an act of violence or coercion to be punishment. There are many kinds of justifiable violence or coercion, but not all of them can be understood as punishment. Then, the justification (which in many respects is the most important elements of a theory of punishment) explains why the class of actions picked out by the definition is morally or politically permissible. The distribution finally specifies who is an appropriate target of punishment and the method or quantity of punishment that is appropriate, the later being a difficult component for any theory.

Keywords: Kant, Theory, Punishment, Rule of Law, Africa

Introduction

Within one of society's core institutions, the legal system, there exists a practice central to the system and with grave implications, yet scandalously lacking in a sure philosophical justification. The practice is that of punishment, and despite exercising many capable legal and philosophical minds, no generally agreed upon justification of punishment has been reached. The two most frequently cited, and perhaps, most plausible potential candidates for such a justification (utilitarianism - represented by Beccaria and retributivism - represented by Kant) ebbed and flowed in their popularity throughout the century, with neither offering a sufficiently comprehensive rationale for punishment and both in fact harboring significant theoretical deficiencies. Nor did a potentially promising attempt to marry the merits of the two views into one superior position prove tenable.

In outlining the dilemma involved in attempting to justify punishment, it seems important to clarify why in fact such justification is needed. To this end there appear to be at least two factors of significance. In the first instance, although the practice of punishment has a long tradition in human society, it is nonetheless a

practice human beings engage in by choice, and it is therefore one which could, theoretically at least, be abandoned. Secondly, the kind of suffering, harm and deprivation attached to punishment appear to be evils whose infliction is at least *prima facie* problematic and at worst morally wrong. Thus given the deliberate nature of punishment and the potentially odious consequences of its implementation, punishment surely requires at least an attempt at justification.

Punishment has been part of the human society ever since the beginning of civilization. Throughout the history, wrongdoing or wrong act have simply stood out like sore thumbs, greatly affecting the very emotions of man. These wrongful acts, which have been later termed as crimes, are as noticeable as kind acts but the only difference is that the former harbors condemnation than praise; punishment than reward. Human being see such crimes as condemnable especially those that are heinous such as rape, murder, arson, genocide and others that put humanity into shame and the community into disarray.

Rather than justifying punishment by reference to some advantageous social arrangement, or the intrinsic, non-instrumental value of the state, this study will do so by reference to the rights of the individuals. Unlike many of the dominant varieties of deterrence, which justify state punishment on the ground of the supremacy of the state's authority and the continued existence of the state, this study justifies the practice of punishment simply by reference to the fact that crime represents a threat to the civil order and by reference to state's obligation to protect each individual citizen from violations of her rights and for the reformation of both the crime victim and the offender.

We are, therefore, prepared to grant that although wrongdoing might be analytically concerned to moral desert, the main purpose for punishment incorporates elements of deterrence, rehabilitation, and reformation; and refusal to punish may sometimes be a refusal to achieve these ends. Specifically we analyze Kant's writing on punishment under a very precise conception of what a theory of punishment is. It is easy to focus so closely on the concept of punishment that one can lose sight of what it means for an account to be a theory of punishment at all.

For the purpose of this article, we will be taking a theory of punishment to be a philosophical account comprised of a determinate number of discreet elements such as a definition, a justification, and distribution. The definition spells out what the necessary and sufficient conditions are for an act of violence or coercion to be punishment. There are many kinds of justifiable violence or coercion, but

not all of them can be understood as punishment. Then, the justification (which in many respects is the most important elements of a theory of punishment) explains why the class of actions picked out by the definition is morally or politically permissible. The distribution finally specifies who is an appropriate target of punishment and the method or quantity of punishment that is appropriate, the later being a difficult component for any theory.

These necessary elements of a theory are deeply inspired by HLA Hart's division of punishment, outline in his collection of essays, *Punishment and Responsibility* (1970, p.3). According to Hart, any theory must offer a definition of punishment, must explain the aim that justifies the practice or institution of punishment, and must provide principles of distribution. In drawing distinctions in this way, he endeavors to establish the possibility of a theory justifying punishment according to one kind of aim, while specifying principles of distribution in accordance with some other (Hart, 1970, pp.8-10).

In exploring Kant's theories of punishment, then, this thesis seeks to identify his answers to each of these elements. It is our intention to do so in a way that produces a consistent theory that respects the most foundational characteristics Kant's practical philosophy while still situating him within the context of a sustained examination of his theory as a whole – painstakingly identifying and making possible substitutes for loopholes, and then applying it to the African context using Nigeria as example.

The utilitarian is primarily concerned with consequences and the guiding principle of this consequentialism is to maximize in quantity and/or distribution some perceived good. Thus, utilitarianism as it applies to jurisprudence, the law and legal institutions is base on, and aims to, maximize happiness, utility, self-actualization, autonomy or whatever accounts of good the particular version of utilitarianism being advocated prioritizes. As a consequence, and in line with the type of justification being sought here, the reason the utilitarian can offer for punishment appears strong, straightforward and plausible; namely, that since crime presents an obvious impediment to the attainment of these valued goods, it should be prevented. The institution of punishment is legitimate on the utilitarian view therefore, if it acts as an effective deterrent, by preventing or at least reducing the evil that crime represents.

Punishment, then, is justified solely by the claim that it will have the effect of deterring any future crime. In line with this, Beccaria writes:

The purpose [of punishment], therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore, punishment and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned (1995, p.9).

While Beccaria mentions the need for punishment to be consistent with proportionality, the way in which he conceives of proportionality is quite different from a literal interpretation of equivalence between crime and punishment. He does not, for instance, endorse the idea that a punishment ought to be roughly equivalent to the crime committed in a vague, an-eye-for-an-eye sense. Instead, Beccaria argues that the appropriate amount of punishment is simply that which is required to outweigh whatever good that was gained from the commission of the crime (Beccaria, 1995, p.66).

However, Kant, who is often cited as the paradigmatic retributivist and whose view will be examined in more detail in this work, clearly distinguishes retributivism from other positions on punishment in terms of its embrace of the principles of desert and autonomy. On his view:

Punishment by a court...can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him *only because he has committed a crime*. For, a human being can never be treated merely as a means to the purposes of another, or be put among the objects of rights to things (Timmons, 2002, pp.47-48).

Thus, for the retributivist, as Kant paints him, there is a clear and coherent answer which can be offered to the criminal as his desert for having committed a crime. In punishing according to desert, the retributivist can claim to be respecting an individual and treating him justly and as a rational being, not as a means to another end. The criminal is regarded as a responsible moral agent capable of making choices and he is dealt with strictly in terms of what he did,

not according to other considerations of hope for consequences like the public good. The retributivist thereby avoids many of the difficulties which plague the utilitarian (Timmons, 2002, pp.47-48) about the individual being used in punishment as part of a larger social agenda. In any case, the employment of punishment as a tool for the promotion of justice can only make sense if the process gives necessary attention to both the victim and the offender and to the principle of the rule of law.

Social theorists such as Thomas Hobbes have characterized the state of nature as a place where life is nasty, brutal, and short. The question of the basis of this characterization can hardly arise since the state of nature is known for its utter lawlessness. But since such life is not worthy of rational human beings, man has no more choice than enter into a social contract for a civil society where there must be law and order to protect the rights, security, safety, and "equality of all". In this way, the establishment of a civil society is justified and justice is ensured among members of the polis. Injustice results when a member of the society (an offender) acts in a manner that deprives another of her basic rights, security, safety, or suggests that she is unequal to the offender. To heal the wound and fill the gap created by an unjust action of a member of the society towards another, therefore, justice has to be established by means of punishment.

But how precisely can punishment translate to Justice? Undoubtedly, various justifications of punishment have been proposed through the ages by different traditions. While the utilitarians justify punishment based on its utility to the society, the deontologists justify it on retributive ground, as already observed. The commonsensical justification of punishment is the quest for justice - the need to render justice to the victim of crime, protect the society from further harm and in some cases to rehabilitate the offender. But, in Africa for instance, is this truly offshoot of punishment in real practice?

If this reasoning is true, then punishment is justice and justice is punishment. For the retributivist, punishment is a matter of choice on the part of an offender. The moment he perpetrates crime, he relinquishes his default rights and freedom as a member of the commonwealth of rights and freedoms. The offender must be punished simply because he has committed a crime. Does this not sound like punishment for punishment sake? Once you dish out the just desert to the offender, justice is *fait accompli*. If that is so, how does it translate to justice?

A dialectical foray into the institution of punishment has ironically shown that in our justice system, the victim is implicitly used to further the societal need -

deterrence. Following this line of thought the approach to be adopted in this paper is nominated, namely that any satisfactory justification of punishment will need to offer up good reasons for the practice not only to the society more broadly, but also to the criminal and the victim. So what exactly does Kant's theory of justification of punishment tend to solve and how compatible is this with contemporary society? These relevant considerations constitute the problems which this research attempts to address.

The basic objectives of the study are to find out why there is need for punishment and how it can translate to justice in terms of the crime committed; to examine how Kant's theory of punishment can enhance the reform of justice system in contemporary African societies; to determine the proportionality and distribution of punishment that would suffice to engender justification in terms of the crime committed; to determine who is to be punished, who is to punish her, why she is to be punished, and how she is to be punished that can be consistent with justice; and to discuss the tenability of justice in a less democratic society where there is less regard for the rule of law and where the justice system itself is corrupt.

Retributivism: Conceptual Framework

This is a policy or theory of criminal justice that advocates the punishment of criminals in retribution (payback) for the harm they have inflicted. It is a theory of justice which holds that the best response to a crime is a punishment proportional to the offense, inflicted because the offender deserves the punishment (Cavadino & Dignan, p.39). Prevention of future crimes (deterrence) or rehabilitation of the offender is not considered in determining such punishments. The theory holds that when an offender breaks the law, justice requires that she suffer in return.

Regarding retributive theories, C.L. Ten states that, "There is no complete agreement about what sorts of theories are retributive except that all such theories try to establish an essential link between punishment and moral wrongdoing" (Ten, 1987, pp.38-39). He is surely right about this. Therefore, it is difficult to give a general account of retributive justification. However, it is possible to state certain features that characterize retributive theories: in accordance with the demands of justice, wrongdoers are thought to deserve to suffer, so punishment is justified on the grounds that it gives to wrongdoers what they deserve (Ten, 1987, pp.38-39).

Retribution is different from revenge because it is only directed at wrongs, has inherent limits, is not personal, involves no pleasure at the suffering of others, and employs procedural standards (Nozick, 1981, pp.366-368). Unlike utilitarian views which depend on the consequences of punishment, retributivist accounts hinge around the notion of criminal desert and it in effect promote the principle of autonomy the utilitarian seems to breach. Put simply, according to the retributivist the criminal deserves punishment for having committed a crime so that the rationale behind legal punishment is to mete out to the criminal his desert. On more radical versions of retributivist theory a stronger claim about the infliction of suffering on those who have morally transgressed is purportedly advocated, or the sanctioning of pain for pain's sake. Retributivism is occasionally even characterized as some form of disguised revenge.

Desert is a normative concept that is used in day-to-day life to describe the belief that being treated as one deserves to be treated is a matter of justice and fairness (Pojman & McLeod, 1999, p.21). Although desert claims come in a variety of forms, they are generally claims about some positive or negative treatment that one ought to receive as a result of one's choice of action. It is widely held that desert is a relation among three elements: a subject, a mode of treatment or state of affairs deserved by the subject, and some facts about the subject, which are often referred to as desert basis (Pojman & McLeod, 1999, p.21). This relation is shown in the formula: S deserves M in virtue of B, where S is the subject, P is the mode of treatment, and B is the desert base.

Most desert theorists, such as Feinberg argue that desert is strictly a backward-looking concept, as a person's desert is based strictly on past and present fact about him (Celello, 2009, p.156). The argument is that in order for a person to deserve something at a given time there must be some relevant fact about the person at that time that gives rise to her desert. For, as Celello observes, a desert base with sufficient grounding conditions that lie in the future is metaphysically dubious and cannot be such a fact (Celello, 2009, p.156).¹⁸ In a general sense, justice can be understood to consist in a person getting what is appropriate of fitting for her.

Kant, who is often cited as the paradigmatic retributivist and whose view will be examined in more detail in this work, clearly distinguishes retributivism from other positions on punishment in terms of its embrace of the principles of desert and autonomy. On his view:

Punishment by a court...can never be inflicted
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for the criminal himself or for civil society. It must always be inflicted upon him *only because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things...He must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it premises (Ten, 1987, pp.38-39).

Thus, for the retributivist, as Kant paints him, there is a clear and coherent answer which can be offered to the criminal as his desert for having committed a crime. In punishing according to desert, the retributivist can claim to be respecting an individual and treating him justly and as a rational being, not as a means to another end. The criminal is regarded as a responsible moral agent capable of making choices and he is dealt with strictly in terms of what he did, not according to other considerations of hope for consequences like the public good. Thus, allegations that the utilitarian sanctions excessive punishment, insufficient punishment, or punishment of the innocent and those not responsible for their actions in order to send a broader message do not arrive for the retributivist. Similarly the retributivist can give a strong and cogent justification of punishment to the particular victim or victims of a crime, since through punishment what they have suffered at the hands of the lawbreaker has been recognized and thought to be significant. Appropriate and proportionate action has been taken in direct response to the crime so that justice has been done and the criminal has received what he deserved for the act he perpetrated against them.

Kant's Theory of Punishment

In the literature surrounding Kant he is almost invariably considered to be the paradigmatic retributivist. A sense is however conveyed by the manner in which these passages are put forward, that they lack an account which links and grounds them in any broader way - that such excerpts are isolated assertions

rather than key markers of a more developed outlook on criminal punishment. Allen Wood, for instance, acknowledges Kant's commitment to retributivism but observes that his defense of it remains at best embryonic (Wood, 1990, p.109). While Don Scheid makes the even stronger claim that when it comes to his retributivist principles, Kant offers no foundation for them, he merely introduces them ad hoc (Scheid, 1983, p.274).

There are three main claims attributed to Kant on the traditional interpretation of his view of punishment. These are that for Kant the entitlement to punish derives from looking back to the crime; that the type and amount of punishment is also derived from this source according to a principle of equality; and finally that there is in fact an obligation to mete out to the criminal his desert. These standard claims will now be expanded on below.

In the first instance, it is clear that for Kant, punishment draws its motivation not from any of its potential effects such as deterrence, prevention, rehabilitation and so on (as it does for the consequentialist), but simply from the commission of crime. As he explicitly indicates in one of the frequently quoted passages from the *metaphysics of Morals*:

...the law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it premises (Kant, 1991, p.331; Ten, 1987, pp.38-39).

The only acceptable reason for carrying out punishment on Kant's account is as a response to a criminal act, and so his view can be labeled 'backward-looking' since quite simply, the motivation to punish is drawn from looking back to the crime. Forward-looking consideration about good effects for the criminal or society more generally is just not relevant to the decision to punish. Thus, Kant's account is often thought to treat the criminal justly, since he is not regarded as a pawn in some broader and future-focused social agenda about minimizing crime and its harmful effects. To coin the phrase from Kantian morals, the criminal in punishment is therefore not 'used as a means to another end,' rather he is punished in accord with his own freely and rationally chosen action.

Let us now consider the second principle of Kant's account as it is traditionally construed, namely that not only does an individual's entitlement to his

punishment hinges on looking back to the crime, but the type and amount of his punishment is also derived from this source. The criminal must be punished according to the desert which attaches to the crime, and for Kant, this is based on the standard retributivist principle of equality, as he outlines again in the *Metaphysics of Morals*:

Whatever undeserved evil you inflict upon another within the people...you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him; you strike yourself; if you kill him, you kill yourself...only the law of retribution (*ius talionis*)...can specify definitely the quality and the quantity of punishment (Kant, 1991, p.332).

Kant reinforces this point in another less cited passage, noting that there is only one just punishment, namely the one equivalent to the crime in a fashion analogous to the way in which for a straight line 'there can be only one line (the perpendicular) which does not incline more to one side than the other and which divides the space on both sides equally (Kant, 1991, p.33). The manner in which the criminal is punished and the degree of that punishment are determined by reference to the act itself and attempts to match punishment to the crime, not by assessment of the possible consequences of such punishment.

Finally, for the classical reading of Kant, it is important to note that his retributivism entails not only right to mete out punishment according to desert, but in fact an obligation to do so. In his famous example of a civil society about to dissolve, Kant argues that in spite of their decision to disband, citizens are not thereby somehow absolved of their responsibility to undertake punishment of those found guilty of crimes and for whom punishment has already been determined. As he indicates:

Before the citizens separate, the least murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment (Kant, 1991, p.233).

Hence, even in the case where the society in which a crime was committed will no longer exist, the criminal cannot slip punishment if justice is to be done. This unwavering obligation to impose punishment is further reinforced in a passage where Kant discusses whether or not an individual convicted of a capital crime could opt to have potentially fatal experiments performed on him in lieu of punishment. Kant makes it clear that such experiments (even if they benefit society) are not an option, since they fail to meet his standards for justice (Kant, 1991, p.333). So in addition to supporting the obligation to punish, this passage also adds weight to Kant's claim that punishment should be set independently of any concern for the good of either the criminal or civil society more generally.

As it stands then (and significantly for the purposes of this research) the classic view of Kant on punishment suffers the same fate as other retributivist accounts when it comes to the practice's justification. While it seems Kant is able to offer a good justification of punishment to the criminal (since through punishment he is being treated as a rational and autonomous moral agent, solely in accordance with his actions rather than in line with other teleological agenda) and conceivably a satisfactory account to the victim (as an appropriate recognition of the wrong she has suffered), this is not the case when it comes to general justifying aim of punishment. On this traditional reading, Kant provides an inadequate rationale of the institution to society at large, since it appears as though he simply fails to address the broader question of why punishment should in fact exist at all.

Now although there is widespread acceptance of Kant's retributivist credentials among scholars and therefore of the above rendering of his view, there are those who challenge this reading of his doctrine on punishment. Some philosophers instead suggest that Kant's retributivism is in a sense limited or curtailed. So, for instance, Nelson Thomas Potter (1998, p.91) and Don E. Scheid (2003, p.38) label Kant a partial retributivist, and Mark Tunick considers him to be a retributivist but not a deontologist (Tunic, 1996, p.64). What lies at the heart of all this is the idea that while Kant is clearly a retributivist when addressing issues concerning the distribution of punishment, he is a consequentialist when it comes to punishment's general justifying aim.

Thus, writers as Scheid and Tunick have no difficulty ascribing to Kant a retributivist stance in consideration of punishment's title and even its amount. They clearly regard him here to be backward-looking in the requisite retributivist way since he advocates punishment only for those who have committed a crime. In these respect then, their views incite no conflict with Kant's retributivism as

traditionally conceived. However, when it comes to furnishing a general justifying aim for punishment, all those philosophers noted above suggest that Kant is really adhering to some form of consequentialism. They maintain that although he in fact fails explicitly to spell out what a general justifying aim of punishment might amount to, in effect teleological aspirations can be read into his philosophy. These teleological aspirations, for the convenience of analysis, can be considered to be of four different types. Firstly there is the commonplace notion that punishment is designated as a deterrent; secondly the idea that it is driven by the need to protect citizen rights; thirdly that it is intended to reform; and finally that punishment serves to promote good habits. Each of these points will now be detailed.

The idea that punishment aspires to deter crime is not an unusual one, although as has been made clear above, it is a view not generally attributed to Kant. Potter, Scheid, Tunick and others maintain, however, that Kant does consider punishment to be justified by its deterrent effect. To varying degrees, these authors all argue that for Kant Punishment serve as a disincentive to crime (though for Potter, deterrence is, on Kant's account, only a secondary effect of punishment), that in the legal as opposed to the moral setting punishment provides the requisite external motivation to conform to the law. Further, for these authors Kantian punishment acts as both a special deterrent (serving to deter the individual criminal) and a general deterrent (serving to deter society more broadly, whose citizens are effectively warned off by the example of the punished criminal). Evidence for this interpretation of Kant is drawn from a number of sources and Tunick (1996) in particular carefully compiles it in order to substantiate the case for deterrence.

Both Tunick and Scheid draw attention to a section in the Collins' portion of Kant's *Lectures on ethics* entitled *Of Rewards and Punishments* to bolster their claims that Kant holds a deterrence account. In part of this passage Kant says:

Punishment in general is the physical evil visited upon a person for moral evil. All punishments are either deterrent or retributive. Deterrent punishments are those which are pronounced merely to ensure that the evil shall not call. Retributive punishments, however, are those pronounced because the evil has occurred. Punishments are therefore a means of either preventing the evil or chastising it. all

punishments by authority are deterrent either to deter the transgressor himself, or to warn others by his example. But the punishment of a being who chastises action in accordance with morality are retributive (Kant, 1997, 286).

And later he added that:

All the punishments of princes and governments are pragmatic, the purpose being either to correct or to present an example to others. Authority punishes, not because a crime has been committed, but so that it shall not be committed (Kant, 1997, 286).

Thus it seems clear, as the advocates of a deterrent interpretation of Kant argue, that Kant (at least in this work) maintains that all state instituted punishment has deterrence as its goal.

Tunick also gleans evidence for a deterrent interpretation of Kant on punishment from the essay *On the Common saying: That May Be Correct in Theory, but It Is of No Use in Practice* in which Kant discusses a case where a man saves his own life by pushing another off a life raft. Tunick cites a portion of a footnote attached to this passage in which Kant writes that teachers of general civil right, "proceed quite consistently in conceding rightful authorization for such extreme measures. For, the authorities can connect no punishment with the prohibition, since this punishment would have to be death. But it would be an absurd law to threaten someone with death if he did not voluntarily deliver himself up to death in dangerous circumstances (Kant, 1999, p.301). A version of this life raft scenario is also to be found in the *Metaphysics of Morals* where Kant writes:

There can be no penal law that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still uncertain (death by a judicial verdict) cannot

outweigh the fear of an ill that is certain (downing). Hence, the deed of saving one's life by violence is not to be judged inculpable but only unpunishable (Kant, 1999, p.331).

Tunick wants to appeal to the excerpt to argue that Kant is making a distinction between the legal and moral domains, such that it is only the former which concerns external duties that can be reinforced by punishment motivated by deterrence. Thus, Tunick considers that "there is a moral not a legal duty not to kill the other person. The rescued person is to be morally condemned but not legally pushed (Tunick, 1996, p.65). The fundamental point is much the same as the one derived from *On the common saying*, namely that given the peculiarities of the situation, the threat of capital punishment cannot reasonably act as an effective deterrent.

Finally, further textual support for the deterrence interpretation of Kant is drawn from the *Metaphysics of Morals* where Kant discusses two additional instances in which, according to Tunick (1996), the person committing the crime could not be expected to be deterred by the threat of legal punishment. The cases are those of a mother who kills her illegitimate child and a soldier who murders a fellow soldier in a duel. Contrary to what Kant stipulates elsewhere, in these special circumstances he considers that neither killer should receive a capital sentence. Although Tunick admits that "much of what Kant says about these two cases is puzzling and difficult to agree with, he considers them to highlight the difference between the moral and legal realms, and he again explains the two cases as one in which "Kant implies that where a person could not be deterred by legal punishment from committing a crime, the state should not punish (Tunick, 1996, p.66). In both cases Kant invokes a consequentialist theory of why we have the practice of legal punishment.

Deterrence is not an isolated goal on the consequentialist reading of Kant, but is instrumental in promoting other goals with respect to citizens and the Kantian state. And this notion of punishment as motivated by the need to protect and bolster the claims of citizens, is the second strand which can be made out in the picture of Kant as a consequentially motivated philosopher of punishment. The institution of punishment exists on this interpretation as a means to secure and promote individual freedom and rights. The state is brought into being for Kant to secure the right to freedom we should all enjoy by virtue of being human, and this right is in turn supported by state sanctioned punishment (Tunick, 1996, p.63). In order to add weight to this view that punishment aspires to protect

citizens' rights, Turnick points to the case outlined in the *Metaphysics of Morals* where accomplices to murder might have their sentences lessened if the security of the state is at stake (Kant, 1999, p.334). If the execution of these individuals were to lead to the effective demise of the state because there were insufficient citizens, then Kant reserves for the sovereign power to ameliorate the situation by allocating non capital sentences. Thus, on Tunick's view because Kant provides a more lenient punishment in these circumstances, the case for Kantian punishment as fundamentally concerned with "preserving a society of ordered liberty" is reinforced (Tunick, 1996, p.63).

That punishment can help foster favorable behavior (or as Tunick ((1996, p.66) says, the habit of going good deeds) is the final teleologically inspired argument identified by the above-mentioned authors. Although not considered by Kant to be the ideal motivation for moral action, he does recognize in the *Lecture on Ethics*, that both "rewards and punishments can indeed serve indirectly as means in the matter of moral training...If a person refrains from bad actions because of the punishment, he gets used to this, and finds that it is better not to do such things" (Kant, 1999, pp.287-288). Though patently not Kant's preferred incentive, punishment can still effectively discourage repeat offenders.

The Problem of Proportionality

The retributivists argue that more serious offenses should be punished more severely because offenders who committed more serious crimes deserve harsher punishment than those who commit less serious crimes (Hart, 1968, p.2). Given our previous discussion of retributivism, it should not come as a surprise that the concept of *desert* plays a central role here. According to Immanuel Kant (1999) and other classic versions of retributivism, the deserved punishment is determined by invoking the *lex talionis*, which requires imposing a harm on a criminal identical to the one she imposed on his victim.

Those who argue that murderers ought to be put to death have often invoked the principle of *lex talionis*, but it is rarely invoked when attempting to determine the proper punishment for other crimes. Its lack of popularity can be explained by noting a couple of objections. More importantly, it is difficult to apply to many offenses, and it seems to be outright inapplicable to some. How should we, for instance, punish the counterfeiter, the hijacker, the rapist, or the childless kidnapper? Applying the *lex talionis* to these crimes is problematic. Surely we should not rape rapists! For these and other reasons, except when the topic at

hand is capital punishment, appeals to the *lex talionis* are rare in the contemporary literature.

While retributivists (represented here by Kant) seem to have an easier time ensuring that there be a direct relationship between the amount of punishment and the offense committed, their position is subject to criticism. Because they are committed to inflicting the deserved punishment, they must do so even when a lesser punishment would produce better or the same social effects.

Just Punishment and the Rule of Law in Africa

Proportionality of crime to punishment is very important to whole idea of just punishment. It is the element of proportionality that ensures the proper functioning of punishment, namely to create that lasting association in the human mind between the two ideas: crime and punishment. Hence, Beccaria argues that there should be a fit between the crime and punishment and that this fit is necessary to reinforce the association: "The punishment should, as far as possible, fit the nature of the crime, this serves admirably to draw even closer the important connection between a misdeed and its punishment (Harcourt, 2013, p.9). This means that punishment should be in degree to the severity of the crime. Beccaria (1995) is an advocate of the rule of law and as such he maintains that *the law should be no respecter of anyone at any point and at any position*. But what value do the ideas of just punishment and rule of law have in African societies? Obviously, they have little or no values in modern African world. To illustrate this point, let us look at the problem of immunity clause.

The immunity clause, as found in many constitutions of different African nations, provides the president, vice president, governors and their deputies, with protection from prosecution from offenses they commit while in office, and allows them open for trial only after leaving office. The Black Law Dictionary defines immunity clause as a provision that limits the responsibility of a trustee or a leader to liability for negligence or misconduct.

Immunity clause with its attendant problem of deferring punishment of an offender to an arbitrary future day rather than immediate punishment at the point of abusing an office, is a serious issue that merits reconsideration. This is because the original purpose which the clause is meant to serve has been adulterated and largely turned into an engine of fraud. While the original intention for its inclusion in the constitutions may be good, some politicians have corrupted and bastardized the well-reasoned privilege and willfully undermined the wisdom behind the grant of immunity to the detriment of Africans.

Crafted and provided as an open ended protection, the clause at present, provides a loophole that breeds criminals in power as it gives latitude to boldly commit crimes with impunity against the state and the people without any fear of punishment. Given this palpable danger, it is apparently clear that the immunity clause as presently provided can no longer serve the need of contemporary African politics. It therefore needs to be reviewed in line with emerging and contemporary realities. Any attempt to side-step or reject the call for a genuine and sincere review of the clause in the light of mounting anti-democratic activities of some of our political elites is a disservice to the continent, a betrayal of public trust, and the power people repose in representative democracy.

Inasmuch as we are not calling for the outright removal of the clause from various constitutions, it is sad to note that most of the arguments put forward in favor of its continuous retention (Jeje, 2017) are superfluous and essentially untenable. For instance, the idea that the clause serves as a check on frivolous law suits is good, but the claim that institution of criminal proceeding against those in position of authority would interfere with their constitutional duties and invariably distract them from the business of governance seems unfounded and dishonest.

As Jeje (2007) rightly observes, the real danger is not distraction from frivolous law suits, nor interference caused by the institution of criminal proceeding, but the criminal intention of corrupt political elites whose immunity protection needs to be put on check. This is because the loophole created by constitutional lapse has created an incentive which continues to recruit and retain criminal gangs in power whose mantra is 'steal now and settle your way later,' or 'keep stealing and keep remaining in power.' More so, from the standpoint that there is no error without a commission (or an omission), and there is no reaction without an action - no smoke without fire, it follows that it is a faulty constitutional wisdom to shield offenders from prosecution on the bases of avoiding political distraction that they caused and used their very hands to invite willfully. This attitude is quite contrary to Kant's moral thought as already highlighted.

On this score, the constitution is unexpectedly used to condone corruption or shield misdemeanor of those who became distracted not by avalanche of criminal proceeding as generally being claimed but by their own inordinate desire, the moment they conspired to steal from our common patrimony or do other harm to common good of the state. Our take is that if the executive, be it president or governor or whatever, wants no indictment, or criminal proceedings

instituted against it, the political office holder must then strive to refrain from such things that may compromise the law and abuse her office. If this is not done, then punishment has lost its deterrent function, and failed in protecting people's rights.

For while immunity clause remains hostage by this criminal intent, billions of dollars of the nation's resources is being stolen daily with some portion reserved in anticipation to be used to combat a potential battle for impeachment or a possible criminal lawsuit following an arrest after the pendency of office, if this is ever possible (Jeje, 2017). In other words, the money stolen is used to wade-off arrest from anti-graft agencies, obstruct justice at the court, and frustrate any impeachment move on the floors of the National and State Legislative Assemblies.

Therefore, if we say that an erring executive cannot be punished for his crimes, or removed from office except by impeachment process, or be challenged with criminal proceedings except until after the pendency of office (Jeje, 2017), are we not inadvertently supporting a system whereby the immunity clause creates incentives not to avoid misconduct and leaves the nation without sufficient protection against the killing and stealing dispositions of those enemies of state? A criminal President or Governor is of course an enemy of state. The implication of this is quite threatening. The fact that allegations of corrupt enrichment can only be made, but cannot be investigated and proved against incumbent executive political office-holders, nor be called to account for their actions and inactions while in office, nor be made to resign on proof of gross misconduct, simply puts such individuals "above the law".

When punishment is put at a latter day and there is no immediate punishment at the point of abusing an office, this, in effect, encourages the recruit of more criminals with the intention to go into government to steal and use part of the same money to hedge themselves against impeachment or against any law suit. Today actually, the privilege of immunity has become so abused in Nigeria (for instance) that the practice of overlooking the evils of a government executive has almost become something traditional. This in part, explains, according to Jeje, the reason many cases of high profile individuals were not prosecuted, and others that were prosecuted were not successfully effected, talk more of being properly convicted beyond a slap-on-the-wrist conviction (Jeje, 2007). Of what value is the rule of law then? One finds out that in many African countries, like Nigeria, the idea of rule of law in effect exists only in theory but not in practice.

As often happens in our elections, this emerging pattern is the same as when politicians without conscience, rig an election to steal people's mandate which comfortably puts them to sit in government houses and allow their opponents in the rigged election to fight from outside by going to court, while they use state machinery and the money stolen from the state to fight back.

In addition to the above issues bedeviling its application, technically by law, the provision of immunity clauses within the constitution also fundamentally poses some limitation that biases against the "rule of law", and under which every citizen of a country, no matter how highly placed is subject to the authority of the same law. Literally, the immunity clause says that those within its protection are above the law at that point in time, and this is a contradiction to the principles of the rule of law which claims superiority of the law over every member of the citizens at all points in time insofar as one is a citizen or guidable by laws of the nation.

If immunity clause, because of political expediency is accepted into the constitution to check frivolous law suits that may impair government functions and cause unnecessary political distractions (Jeje, 2017), then by the same token, the clause should be reviewed to take care of the loopholes and check the new wave of criminal activities perpetrated by government officials. To forestall abuse, such immunity from arrest, immunity from prosecution or immunity from imprisonment should be reviewed. The clause should not be made to protect fraud, corruption, embezzlement, and vindictive tendencies in government. Since graft in whatever forms wrought the same effect as overthrowing the sovereign, then, any incumbent executive found polluting the 'excellency' with our common patrimony should be immediately arrested, tried and charged with treasonable felony against the state.

The immunity clause though supported by Hobbesian writings on the absolutism of the sovereign is not in consonance with Kantian philosophy. For although Hobbes offered some mild pragmatic grounds for preferring monarchy to other forms of government (Malcolm, 1957), his main concern was to argue that effective government (whatever its form) must have absolute authority. Its powers must neither be divided nor limited nor checked. For Hobbes, to impose limitation on the authority of the government is to invite irresolvable disputes over whether it has overstepped those limits (Warrender, 1957, p.100). To refer an authority to a further authority would be just to relocate the seat of absolute sovereignty, a position entirely consistent with Hobbes' insistence on absolutism. It follows then that, in Hobbesian view, to avoid the horrible prospect of

governmental collapse and return to the state of nature, people should treat their sovereign as having absolute authority.

This sort of reasoning, however, has no merits in contemporary political society as Africa. The fact of rule of law, and of Kant's moral philosophy are evidence that Hobbesian civil society is not far removed from the state of nature he seeks to avoid. For Immanuel Kant, an act or a law cannot be right if it cannot be universalized in any given situation. No political official would reasonable will it to become a law the fact that whoever is in office should be self-interested, an embezzler, a killer, a thief, a supper-human, and at the same time give no answers for these.

No wonder speaking on the subject of social contract in his *Republic*, Plato made it clear that what men would most want is to be able to commit injustices against others without fear of reprisal, and what they most want to avoid is being treated unjustly by others without being able to do injustice in return (Plato, 1955). But this life which characterized the state of nature would lead to an agreement to establish a civil society where justice would prevail. How can it be reconciled that in contemporary Africa, this same life in Plato's state of nature obtains in our civil society with respect to government officials?

If, as we have so far established, punishment is justified as it helps to deter criminals, prevent crimes, and ensure a better society, then refusal to apply punishment to government officials who arbitrary overlook the laws of the land in the name of immunity is not only unjust but a disservice to these criminals and the country at large.

This conclusion is also in line with Beccaria's conception of social welfare which is unique in its emphasis on equality. As Harcourt points out, Beccaria's philosophy was very much a rejection and reaction against the privileges of the aristocracy and notions of natural hierarchy. He says that a major theme running through Beccaria is that the nobility, the rich, and the powerful should be subject to the same form of punishment and should not be able to buy their way out of justice (Harcourt, 2013, p.9). The resulting conception of utility thus focuses on the goal of maximizing equally the happiness of each individual. At the same time, Beccaria observes that punishment must be related to the harm associated with the criminal offense. He thus insists on prompt and immediate punishment of crimes.

Punishment should be close in time to the criminal action to maximize its deterrence value. Beccaria defends his view about the temporal proximity of

punishment by appealing to the associative theory of understanding in which our notions of causes and the subsequently perceived effects are a product of our perceived emotions that from our observations of a cause and effect occurring in close correspondence. Thus, by avoiding punishments that are remote in time from the criminal action, we are able to strengthen the association between the criminal behavior and the resulting punishment which, in turn, discourages the criminal activity.

For Beccaria, when a punishment quickly follows a crime, then the two ideas of 'crime' and 'punishment' will be more closely associated in a person's mind. Also, the link between a crime and a punishment is stronger if the punishment somehow related to the crime. This should be a lesson to Nigeria and other African judicial systems. There is need for prompt treatment of a case brought to the court rather than the culture of postponement of hearing by which our contemporary courts are well known. This will in turn enable the offender to serve her punishments with propinquity to the crime she committed. In this way, punishment will be able to serve its rightful purpose.

Conclusion

In the foregoing, this research has carefully examined the justification of punishment in the light of Kant with a view to ascertaining implications of his thought on the increasing quest for socio-political justice in Africa. The research acknowledged the impacts of Kant in moral and political thought and the current wave of change that is blowing around the world. With the aid of communication technologies like internet, the increasing reality of poverty and hunger due to joblessness and poor education, the phenomenon of crime is rapidly rising to its apex, especially in developing countries of Africa. The overemphasis on material gains have compounded and increased criminal tendencies in Africa. Punishment is therefore required to check misconduct and to improve the wellbeing of the society as such.

We attempt to take features of utilitarianism and retributivism (Kant) and combine them in a manner that retains the strength of both while overcoming their weaknesses. This is because the idea that punishment should promote good consequences, such as the reduction of crime, surely seems attractive; however, the idea that it would be justified to punish an innocent in any circumstance where such punishment would be likely to promote the greatest happiness surely seems wrong. Likewise, the idea that justice and the desert of the offender should play a central role in a justification of punishment is attractive, while

being committed to punishing an offender even when nobody's welfare would be promoted as a result seems to be problematic.

It is our view that punishment may take the form of the offender righting the wrong or making restitution to the victim. The point is that crimes harm people and relationships. Justice requires that harm be repaired as much as possible. This research invites a reconsideration of the immunity clause, as presently enshrined in different African societies with its attendant problem of deferring punishment of an offender to an arbitrary future day rather than immediate punishment at the point of abusing an office. This is because the original purpose which the clause is meant to serve has been adulterated and largely turned into an engine of fraud. The need for review of such constitutions has become eminent, because as it were, the constitution is unexpectedly used to condone corruption or shield misdemeanor of those in certain government positions.

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