THE RELEVANCE OF H.L.A HART'S JUSTIFICATION OF PUNISHMENT TO NIGERIA pgs 85- 101

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Abstract

This paper aims at an examination of Hart's justification of punishment and its relevance to Nigerian penal system. When scholars clash over the issue of punishment their problem usually is not about punishment in such contexts as the family or the workplace, but on how to justify legal punishment imposed by the state on criminals. This is not because the other species of punishment do not raise important normative questions, nor because such questions can be answered in terms of an initial justification of legal punishment as being the paradigm case, but because legal punishment, apart from being more burdensome than other types of punishment raises distinctive issues about the role of the state, its relationship to its citizens, and above all, about the role of the criminal law. To this end, this work employs the method of analysis to investigate or examine the concept of punishment as famously formulated by H.L.A Hart. Accordingly, Hart distinguishes three justificatory issues on punishment. 1. general justification or aim of punishment, 2. the person that can be justifiably punished. 3. how to determine the appropriate amount of punishment. Navigating through these justificatory challenges, Hart composed his compromise theory of punishment which are the theories of retributivism and utilitarianism. This paper therefore applies the outcome of our investigation of Hart's compromise theory to Nigerian penal system in order to see how Hart's concept of punishment can help to improve upon the shortcomings of Nigerian penal policy. In the end, analysis as the philosophical method of breaking up complex semantic structures into their basic units is applied in this work to facilitate the reading of Hart's *Concept of Law*— the main primary source of the work—as well as to enhance its application to the Nigerian context.

Keywords: H.L.A Hart, Punishment, justification, Nigeria

INTRODUCTION

Punishment has been in use in nearly every society since the beginning of recorded history. This implies that punishment is as old as the history of human being. Every society has its own means of controlling the social behavior of its citizens in order to reach its desired goals. Thus, law provides, among other things, the penal technique by which those who are found guilty of acts prohibited by the society are punished. Philosophical reflection on punishment has helped in the development of different theories of punishment, which have led to better understanding of punishment. In this regard, B. Hudson holds that:

> before the installation of constitutional governments in most of Western Europe in the eighteenth and nineteenth centuries, penalties were arbitrary, dependent on the whims of monarchs or the local nobles to whom they delegated authority to punish. There was very little proportionate graduation of penalties, with capital punishment available for everything from murder and high treason to fairly minor theft [1]

I was moved to write on this topic because of an event I witnessed at Isikalu Street Junction, Olodi-Apapa Lagos, in the afternoon of 19thAugust, 2001. This was a case of jungle justice, where a man was set ablaze by an angry mob for stealing a box of matches. He was caught at about 12 noon on that very day by some people selling goods around the area. After a massive beating the angry mob spontaneously set him on fire, ignoring suggestions to hand him over to the police, with the suspicion that he would be set free by the law-enforcement officers. In this case, nobody was interested in the quantity and quality of what was stolen. On the other hand, in the same country one person will steal a huge sum of money from the government treasury and will go scot free. Like what happened in pension board some years back, where somebody stole a huge sum of 2.7 million naira and was only asked to pay five hundred thousand Naira as a penalty for his crime. It is based on this issue that the study of Hart's justification of punishment is paradigmatic, because in Hart's notion of punishment, the nature of crime committed and the proportionate punishment are put into consideration. Hart's concept of punishment (compromise theory) holds that punishment is meant only for those that break the law, to deter other people from the same act and such punishmentshould commensurate the crime committed. To this end, this work proposes to answer this question: can Hart's concept of punishment help to improve Nigeria's penal code especially in ensuring commensurability between crime committed and punishment received? This study defends the thesis that Hart's notion of punishment (compromise theory) can provide solutions to the problem of crime and punishment in our society to a great extent.

Exposition of Hart's Concept of Punishment

H. L. A. Hart was born on July 18, 1907, in Harrogate England, the son of Jewish parents, Simeon, wool merchant and Rose (Samson) Hart. He received his early education at Cheltenham Collage and Bradford Grammar School. He then enrolled in New College, Oxford, where he studied under H. W. B. Joseph. Hart was an exceptional student, especially in the Classics, Ancient History and Philosophy. He earned his bachelor's degree in 1932. For the next eight years, Hart practiced as a barrister in the Chancery Courts of London. He established a successful legal office handling complex cases involving trusts, family settlements and taxes. Although he was asked to become philosophy tutor at New Collage, he declined the offer and remained with his legal practice.

During World War II, the British War Department called on Hart to serve in the military intelligence. From 1939 to 1945, he was a civil servant with the M15, the British intelligence division. While at the post, Hart worked with two Oxford Philosophers, Gilbert Ryle and Stuart Hampsher. Their frequent philosophical conversations spurred Hart's interest in the philosophy. During this time he married Jennifer Fischer Williams; the couple had one daughter and three sons. He also managed to fulfill the requirements for an advanced degree and was awarded an M.A from Oxford in 1942.

When the war ended, Hart was again invited to return to New Collage. He became a fellow and tutor in philosophy at Oxford from 1946 to 1952. He was also appointed as a university lecturer in philosophy in 1948. Hart came to the field of jurisprudence almost by accident. He later became a professor of jurisprudence and served in Oxford University. He wrote many works which include: *Definition and Theory in Jurisprudence* (1953), *Causation in the Law* (with Tony Honoré) (1959), *The Concept of Law* (1961), *Law, Liberty and Morality* (1963), *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982), *Essays in Jurisprudence and Philosophy* (1983), *The Morality of Criminal Law* (1964) in which he laid out a defense of the limits of law in regulating moral behavior. Then, *Punishment and Responsibility: Essay in the Philosophy of Law* (1968), in it Hart offered a complex theory of punishment that combines elements from both retributivism and utilitarianism.

Hart's point of Departure (Compromise Theory)

According to Hart, in order to clarify our thinking on the subject of punishment, **"**what is needed is the realization that different principles (each of which may in a sense be called justification) are relevant at different points in any morally acceptable account of punishment."[3]He holds that "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? How severely may we punish?"[4]The failure to separate these questions from one another and consider that they might be answered by appealing to different principles of punishment (Deterrent, Reformative, Utilitarian and Retributive) has prevented many previous theorists from generating an acceptable account of punishment. Making such separations and delineation was the aim Hart set for himself and this was his point of departure toward the formulation of his compromise theory of punishment.

Meaning of Punishment

In his definition of punishment, Hart distinguished what he called punishment as punishment and punishment in the debased sense. He outlined five elements that make for existence of punishment. They include; 1. It must involve pain or other consequences normally considered unpleasant. 2. It must be for an offence against legal rules. 3. It must be on the actual or supposed offender for his offence. 4. It must be intentionally administered by other human beings than the offender. 5. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

On the other hand, punishment in the debased sense is punishment apart from the central case as listed above, like1. Punishments for breaches of legal rules imposed or administered other than by officials (decentralized sanctions). 2. Punishments for breaches of non-legal rules or orders (punishments in a family or school). 3. Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control, or permission. 4. Punishment of persons who neither are in fact nor supposed to be offenders. For Hart,"the chief importance of listing these sub-standard cases is to prevent the use of what I shall call the 'definitional stop' in discussions of punishment. This is an abuse of definition…"[5]These penumbra punishments are punishments, but they are not punishment strictly administered by officials according to strict legal rules. If they are punishment, whether or not they are strictly bound up with legal rules, the retributivists may say to the utilitarian: why do we not apply it when it will pay to do so, since there might be beneficial consequences, in applying punishment to selected even innocent individuals? Hence, Hart in his work *Punishment and Responsibility*calls this way of looking at the standard case a definitional stop and an abuse of definition.

> Not only will this definitional stop fail to satisfy the advocate of 'retribution', it would prevent us from investigating the very thing

> which modern skepticism most calls in question; namely, the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence. Why do we prefer this other forms of social hygiene which we might employ to prevent anti-social behavior and which we do employ in special circumstances, sometimes with reluctance? No amount of punishment can afford to dismiss this question with a definition.[6]

Hart was of the view that definitions do help to elucidate a subject matter, but recommended that we should be extremely careful not to overdo our request for it. Hence, he repeated this fact in treating the problem of legal concepts explained in exclusively fictional, realist or concessionist terms. Depending on the type of question we raise, a reductionist-exclusivist position that is unaware of the operations of analogy or contextual analysis can distort our views as to the other aspects of the issue, which can be excluded from our own definitional standard.

The General Justifying Aim of Punishment

Hart states that the first question (what justifies the general practice of punishment?) is a question of 'General Justifying Aim' and ought to be answered by citing deterrent, utilitarian and reformative concerns. Thus, "the general justifying aim of the practice of punishment is its beneficial consequences."[7] So, the general practice is to be justified by citing the social consequences of punishment, the main social consequence being the reduction of crime. Here, Hart attempts to avoid what he thinks is an impasse blocking the construction of an acceptable theory of punishment−an impasse arising from the definitional conflict between retributionists and utilitarians. His point is that utilitarianism only offers the ground for the general justification of punishment.

Thus, he accepts that the practice of punishment must primarily promote the reduction of crime, or else it is not justifiable. He argues that retribution as a feature of the General Justifying aim, as traditional retributivists will have it, is unacceptable (retribution simply defined as the application of pains of punishment to an offender who has committed an immorality, which is seen as wickedness). Hart criticizes this position in Patrick Devlin who holds that people should be punished because of their immoral acts or wickedness. For Hart, such argument does not separate two distinct questions; what sort of conduct may be justifiably punished and,howseverely should we punish different offenders? In his work *Law,Liberty and Morality*, Hart holds that:

> There are many reasons why we might wish the legal gradation of the seriousness of crimes expressed in its scale of punishment, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds; it might either confuse moral judgments or bring the law into disrepute, or both. Another reason is that principles of justice and fairness between different offenders require morally distinguishable offences to be treated alike. These principles are still widely respected, although it is also true that there is a growing disinclination to insist on their application where this conflicts with the forward-looking aims of punishment, such as prevention or reform.[8]

Hart maintains that the general justifying aim of punishment should not be searched for from the reributivist claims (that is, punishing people for their wickedness), but from the utilitarian grounds. He deplores Patrick Devlin theory, maintaining that we may not arrive at one morality. Devlin opines:

> Our society, whether we like it or not,is morally a plural society; judgements of the relative seriousness of different crimes vary within it far more than this simple theory recognizes. Judges talk much of the judgements of the 'ordinary reasonable man' and claim to be able to discover what he thinks. But the method used is usually introspection and this is because the judgment of the reasonable man very often is mere projected shadow cast by the moral views or those of his own social class[9]

Hart was of the view that there is no one moral view held sacred by every member of the society, that judges mostly reflect their private views in giving judgment. Hence, he rejects the retributivist claim (whether tariff or denunciation brand) as the basis for general justifying aim of punishment, on the ground that it looks like revenge, although projected under the umbrella of principle of fairness.

Therefore, Hart affirms that utilitarian view should serve as the general justifying aim of punishment, because it upholds deterrence or prevention of crime. In his work *Punishment and Responsibility,* he notes that;

> We do not live in society in order to condemn, though we may condemn in order to live. On the other hand, the injunction 'treat like cases alike' with its corollary 'treat different cases differently' has indeed a place as a primea facie principle of fairness between offenders, but not as something which warrants going beyond the requirements of the forwarding-looking aims of deterrence, prevention and reform to find some apt expression of moral feeling.

> Fairness between different offenders expressed in terms of different punishment is not an end in itself, but a method of pursuing other aims which has indeed a moral claim on our attention; and we should give effect to where it does not impede the pursuit of the main aims of punishment. [10]

Hart believes that punishment is applied to address the socio-legal impact of crime, because he claims that the mental element in crime is judged as a legal wrong, not as a moral wrong. Hence, people are punished for their harmful conduct, not for their wickedness. Therefore, the general justifying aim of punishment is to deter people from coursing harm.

Distribution of Punishment

The issue of distribution of punishment is in two aspects; who may be punished (Liability)? And what amount of punishment is to be extracted from the offender (Amount)?Taking the first question; who may be punished? What comes to mind is simply, 'only an offender for an offence'. This (To whom may punishment be applied?) is a question of 'Distribution' and ought to be answered by citing retributive concerns. Thus, "retribution is the simple insistence that only those who have broken the law – and voluntarily broken it- may be punished."[11]In other words, we may not apply punishment indiscriminately. We may only punish an offender for an offense. Hart is of the view that the idea of retribution in distribution does not immediately settle the question. He argues that the word 'retribution' has another use at this level of 'distribution' in addressing such question. This implies that only those who voluntarily committed a crime should be punished. In applying the concept of retribution in distribution, the mental conditions should be considered generally in a civilized system, before we single out who to be punished. This requirement of *mens rea* makes a retributive appeal to be fair to offenders, because we must consider the mental state of an offender before punishing him. At this level of distribution, regarding liability to punishment, Hart holds that it should be answered in retributivist terms, that only those who have voluntarily broken the law may be legitimately punished.

Ground for Criminal Liability (*Mens Rea*)

Hart holds that the individual's liability to punishment for crime depends on certain mental conditions (*mens rea*). *Mens rea* has to do with guilt intent or mind. Hence, this guilty mind could be a voluntary doing of a morally wrong act or a voluntary doing of an unlawful act. "On this view the law inquires into the mind in criminal cases in order to secure that no one shall be punished in the absence of the basic condition of moral culpability"[12]. These conditions can best be expressed in negative form as excusing conditions. Thus, Hart holds that:

> the individual is not liable to punishment if at the time of his doing what would be otherwise a punishable act he is said to be unconscious, mistaken about the physical consequences of his bodily movements or the nature or qualities of thing or persons affected by them, or, in some cases, if he is subjected to threats or other gross form of coercion or if the victim is suffering from certain type of mental disease. If an individual breaks the law when none of the excusing conditions are present, he is said to have acted of 'his own free will' or 'voluntarily', therefore, he will be held responsible for his action[13]

Hart's point here is that individuals should not be punished for actions which they are not conscious about. His position on this is informed by his insistent that only those who have voluntarily broken the law should be punished. According to him:

> …these are the mental conditions or mental elements' in criminal responsibility and, in spite of much variation in detail and terminology, they are broadly similar in most legal systems. Even if you kill a man, this is not punishable as murder in most civilized jurisdictions if you do it unintentionally, accidentally or by mistake, or while suffering from certain forms of mental abnormality. Lawyers of the Anglo-American tradition use the Latin phrase *mens rea* (a guilty mind) as a comprehensive name for these necessary mental elements; and according to conventional ideas *mens rea* is a necessary element in liability to be established *before* a verdict.[15]

For Hart, mens rea has to do with the state of mind and this state varies from individual to individual according to their mental conditions and social circumstances.Thus *mens rea* is said to be heterogeneous set of defenses or exceptions.

In the same line, Hart also appreciates that *mens rea* is not really the only general requirement of criminal liability. "But nowhere on its face does English law explain why these conditions are required, and it does not indeed refer to any general requirement of a responsible or voluntary act".[16] Thus, there are some other elements in the definition of a crime except the *mens rea.* These elements make the situation of the crime to happen, so that without these elements crime will not take place (actusreus).

Actusreus as Hart sees it is a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it"[17]The mental state (mens rea) is also limited in the case of strict

liability. Hence Hart states: "the general principle that for criminal liability there must be *mens rea* has been qualified by the admission into the body of the law of a number of offences where liability is said to be strict"[18]Furthermore, mental states or excusing conditions can also be limited where the State do not accept it. Hart explains this: "many legal systems do not accept some of the other conditions we have listed as excluding liability to punishment"[19] Considering the ideas of limitation of punishment listed above, it is observed that though voluntary act (mens rea) is a principal requirement for criminal liability, voluntary act is not a general requirement for liability.

Additional Ground for Criminal Liability (Intention)

Hart also delves into the analysis of intention in order to secure criminal liability. He is of the view that punishment is meant for someone that has voluntarily violated the law of the state. In criminal law, intention is one of those mental or intellectual elements that form part of *mens rea* that is needed to secure liability or establish culpability. "Criminal laws of most countries allocate to the idea of intention, as one of the principal determinants both of liability to punishment and of its severity".[20]Effort should be made to differentiatebetween legal and non- legal understanding of intention because " the concept, which legal theorist speak of and define as intention diverges from its counterpart in ordinary use at certain points which are of immediate interest to the philosophy of punishment"[21]Thus, to secure liability, he looks into the analysis of intention. Dwelling more on these elements, Hart explains that "The most prominent, of these mental elements, and in many ways the most important, is a man's intention, and in English law and in most other legal systems intention, orsomething like it,is relevant at two different points"[22]. Hence,

> these mental or intellectual elements are many and various and are collected together in the terminology of English jurists under the simple sounding description of *mens rea,* guilty mind…the most prominent, of these mental elements and in many ways most important, is man's intention"[23]

Hart divided intention into three parts. The first, he calls 'intentionally doing something', the second according to him is 'doing something with further intention', and the third he describes as 'bare intention' because it is the case of intending to do something in the future without doing anything to execute this intention now.[24]

He is of the opinion that any action done intentionally or with further intention should be held liable, because the agent foresaw the consequences of his action. He also holds that intention is not the general

condition for liability. Hence, "intention as the law understands it (that is either oblique or direct intention) is generally, though not always sufficient and generally necessary for criminal liability."[25] Although intention forms a very important part in criminal liability, it is not the general condition for liability, thus; "I have said that the intention as the law understands it (that is either oblique or direct intention), is generally, though not always sufficient and generally necessary for criminal liability" [26] An instance of this is a case where no form of intention is required for criminal liability. In order words, intention is not always a general condition for criminal liability.

Amount of Punishment to be extracted from an offender

With regards to the second question, 'what amount of punishment is to be extracted from an offender?', Hart maintains that the amount of punishment is to be decided partly by consideration of deterrence, which are determined by the purpose and justification of the institution of punishment, and partly by criteria on which the retributivist would insist, (thatis, that punishment ought to be measured out so as to serve the end of deterrence in an efficient but economic way), at the same time, however there ought to be some proportion between crimes and punishment. Hart holds that when it comes to the question of sentence and the determination of the severity of punishment, it may be (though I am not all sure that this is in fact the case) that on both a retributive and a utilitarian theory of punishment "the pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law".[29]In case of diminished responsibility, the severity of punishment ought to be reduced. This implies that there are some crimes that are not punishable with the same crime that is retributively. For instance, the case of theft cannot be punished with theft, the same goes with the case of rape and related others.

> To many the most perplexing feature of the model is its requirement that the punishment should in some way match the crime. The simple equivalencies of an eye for an eye or a death for a death seem either repugnant or inapplicable to most offences, and even if a refined version of equivalence in demanding a degree of suffering equivalent to the degree of the offender's wickedness is intelligible, there seems to be no way of determining these degrees. Hence, instead of equivalence between particular punishments and particular crimes, modern retributive theory is concerned with proportionality. But this idea, as Bentham elaborate treatment of it shows, is susceptible of both a Utilitarian and a Retributive interpretation[30]

Hart holds that retribution in distribution is a requirement of justice. Thus, punishment arises as a result of securing fair terms for the protection of society. In his work *Punishment and Responsibility,* He explains that Society concerned not as harmed by the crime but as offering individuals including the

criminal the protection of laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework, each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty. Hart's contention is that viewed from this perspective the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal who has voluntarily done harm.Thus, from Hart's account sincethe criminal being punished had a fair opportunity beforehand to avoid liability he therefore cannot be said to be unfairly treated[31]

From the above citation, it is evident that Hart's view falls within the modern version of retributive theory. This modern theory tends to smoothen the rough edges of the traditional version of retribution. Explaining this modern version of retributive theory, D.J Galligan in his essay*The Return to Retribution of Penal Theory; from Crime, Proof and Punishment* states that;

> the criminal law as a system of public standards imposes burdens on all for the benefit of all. These standards provide the yardstick as to what is allowed and not allowed in the dealings between the members of the society. Each person is said to gain from the compliance of others with these standards; correspondingly then each has a duty in turn to comply. When an individual freely commits an offence he gains an advantage over the law-abiding members of the society[32]

Galligan's contention here is that since the criminal through his free will has stolen some benefits from the general right hold by the society for his selfish interest in total disregard of others, this has to be extracted from him justly by means of punishment. For example, if Mr. A is given the sum of N50 to share with Mr. B, and Mr. A through his mischievous act takes N40 and gives Mr. B N10, The punishment here is to make Mr. A's act unattractive by collecting the excess money from him and balancing it with what Mr. B has, so that the equilibrium will be maintained. Thus, for Hart, it is restoring equilibrium in the society. In his work *The Concept of Law,* he holds that;

> the strong man who disregards morality and takes advantage of his strength to injure another is conceived as upsetting this equilibrium, or order of equality, established by morals; justice then requires that this status quo should as far as possible be restored by the wrongdoer.[33]

Obviously, from the foregoing, Hart views punishment as justly extracting from a criminal the excess he has unjustly gained from the society.

Strengths of Hart's notion of Punishment

Hart's notion of punishment makes a great impact in the history and theories of punishment. His view brings together different strands hold by different theories of punishment (compromise theory). He develops an account of punishment that rest ultimately on concerns of crime prevention, but in which liability was limited to offenders and in which the amount of the sanction was constrained, at least to a degree, by considerations of proportionality. To this end, he distinguishes the 'general justifying aim' of punishment (namely, why the criminal sanction should exist at all) from the criteria for penalties' 'distribution' (namely, the criteria governing who should be punished and how much).

Unlike other theorists like Kant and Hegel who emphasized retribution at the expense of utility and vice versa, Hart while relying on crime prevention as the general aim-that is, as the reason for existence of punishment, still leaves room for placing non-utilitarian limits on the distribution of punishment, so long as the latter can be justified independently. Accordingly Hart argues:

> …it remains to be observed that most contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the Utilitarian conception that the institution of criminal punishment is to be justified as a method of preventing harmful crime.[30]

Hart's theory attempts to avoid what may have appeared to be an impasse blocking the construction of an acceptable theory of punishment. Utilitarian concerns play a major role in his theory: the practice of punishment must promote the reduction of crime, or else it is not justifiable. Nevertheless Hart also believes that retributive concerns also play a major role in the justification of punishment. He was convinced that the range of acceptable practices that can be engaged in by those concerned with reducing crime is to be constrained by a retributive principle that allows only the punishment of an offender for an offense. Therefore, Hart's theory represents a plausible attempt at a 'compromise' between those inclined toward utilitarianism and those inclined toward retributivism.

Weaknesses of Hart's notion on Punishment

Inasmuch as Hart's view on punishment and responsibility made great impact in legal field and philosop hy of law, it did not go without criticism. In Hart's theory, some social good must be promoted or some social evil must be reduced in order for punishment to be justified. Hence, Hart does admit that on certain occasions the principle stating that we may only punish an offender for an offense (referred to as the

principle of 'retribution in Distribution') may be overridden by utilitarian concerns. Commensurably, when the utilitarian case for punishing an innocent person is particularly compelling, it may be good for us to do so, but "we should do so with the sense of sacrificing an important principle"[31]

Many people will agree with Hart that it may be necessary to punish an innocent person in extreme cases, and it is thought to be an advantage of his theory that it captures the sense that in these cases an important principle is being overridden. An instance of this is where an innocent man but who was wrongly believed to be a terrorist is tortured to have him disclose the location of a bomb that would kill many people if allowed to explode. This extreme cases, however, cannot work in the opposite direction. For instance, if an innocent man can be punished for utility purposes, going by the same logic, it is unjustifiable to punish a person who seems to deserve punishment unless some utilitarian aim is being furthered. Imagine the most despicable character you can think of, a mass-murderer perhaps. The justifiability of punishing a person guilty of such crimes is beholden to the social consequences of the punishment. That a depraved character would suffer for his wrongdoing is not enough. So, for Hart, the fact the someone is guilty of a crime cannot override utilitarian considerations in this way. Some theorists find this consequence of his theory unacceptable. Ten argues that, "it would be unfair to punish an offender for a lesser offense and yet not punish another offender for a more serious offense"[32] If we are behaving in accordance with Hart's theory, we may, on occasion, have to avoid punishing serious offenders while continuing to punish less serious offenders for utilitarian reasons. Since doing so would be unfair, it seems that Hart's theory may be seriously flawed.

Similarly, Primoratz has also "indicated that Hart's answer to the question−whether an offender should be punished when there is no utility ground for doing so−is not a very satisfactory one because, for example, death sentences meted out to many have not been able to deter future mass murderers."[33] Thus,Primoratz believes that since deterrence is the sole basis for the justification of the institution of punishmentHart does not seem to have gone far beyond the tradition of Bentham he criticizes. What this criticism boils down to is that it would seem on Hart's account that we cannot talk of justice with regard to punishment from a realist's consideration since the only punishment worth carrying out is the one that has utilitarian consequences. In other words, justice becomes only real from the social good principle of how beneficial a particular punishment is to the society. From Hart's perspective, it would be justified, for instance, to murder an innocent man provided his killing is seen to be in the overall interest of the society. The troubling question that arises here could be formulated as follows: is justice defined as

anything that seem beneficial to the society a good definition of justice? If it is not, can we legitimately say that justice is done when an innocent man is punished in the manner that Hart's theory seems to be proposing?

Another difficulty question from this Hartian notion of punishment is: how does one determine a particular punishment that would be of benefit to the society? The example of how capital punishment has been unable to prevent crime given above byPrimoratz is an instance of how wrong a society could be in judging the consequence of a given punishment. The question persists: is justice achieved when a society makes this kind of wrong calculation?

Njoku in his work *Studies in Jurisprudene; A Fundamental Approach to the Philosophy of Law,* observes that Hart's understanding of intention is not well defined. According to him this is "becuse he [Hart] does not accept the distinction between when something is slightly or virtuallyfo reseen and when it is directly foreseen."[34] Thus, for Njuku, Hart did not distinguish between direct and o blique intention. Therefore, the difference between intention and recklessness is not clear.Njoku's case against Hart is that the province of intentionality in the field of law is a very complex area that requires a more rigorous delineation than the one Hart seems to offer. The manner in which Hart presents it, according to Njoku, is capable of undermining the whole legal process as he does not indicate when and how intention could be used as a limiting factor to acquit or to indict an offender for his or her crimes.

Generally, these criticisms are cogent and compelling that they have undermined to a certain degree the plausibility of Hart's theory. However, it has to be pointed out and strongly too that they are not strong enough to require the pulling down of the whole edifice constructed by Hart in his compromise theory. For once, while the interpretation that Hart avers that some crimes can be excused on utility grounds, it is in the main very important to realize that this particular assertion cannot stand alone in Hart's jurisprudence as a legal principle. In other words, Hart made this statement in the context of buttressing the importance utility has as an indispensable aspect of punishment. Again, the consideration of utility as the hallmark of Hart's jurisprudence as Primoratz does amounts to losing sight of Hart's effort as a mediator between utilitarianism and retributivism.

On the other hand, while one must agree with Njoku as a matter of logical consistency one must not lose sight of the complex nature of intention in the field of jurisprudence. That St Augustine, Aquinas and

many of their later disciples spent years working on intentionality is a laudable testimony of how complicated the concept is. This however, is not to excuse Hart for being sketchy in his approach to the concept. Nevertheless, it creates the aperture to offer the explanation that Hart's main intention in the passage that treated intentionality is not to give a comprehensive treatment of the subject but to call attention to one of the legal factors that limits culpability. It is our contention that Hart's compromise theory is not a perfect system, but is still by far the best legal theory on punishment that could help Nigeria improve its penal code.

Conclusion

The particular importance of Hart's proposal to the Nigerian situation derives from his contention that punishment is used to maintain social equilibrium in the society, between criminals and law abiding citizens. Looking at it from this perspective it would be clear that Nigerian penal policy due to corruption is not in accordance with this view. Hence, punishment in Nigeria is more of a tool for suppressing and intimidating the less privileged.

In other words, Nigerian penal policy is in need of rectification and can be rectified through a conscious application of Hart's principle. The starting point towards this application is to learn from our mistakes and endeavour to formulate future penal policies on the basis of this experience. In whatever way it is formulated, it is important that the policy must adopt strategies or measures which may include the removal of the factors that encourage criminal behaviour, the offer of incentives and disincentives, education, deterrents and at last sanctions. It is also important that at the centre of this effort must be the examination of our differences as a people. Nigeria is a multi-ethnic country with different experiences and these differences must be recognized in the formulation of future penal policies. To this end, this work is suggesting that criminal responsibility and defenses must be re-examined to justify the legal liability on which they are based. Secondly, criminal policy that emphasizes humiliation of the culprit should be used as this is more effective in fulfilling a reformative or deterrent objective. Thirdly, some other aspects of punishments which are non-custodial in nature should be encouraged. Lastly, the Police Force that is constitutionally charged with the responsibility of investigating and detecting crime must conduct itself in such a manner as to elicit the confidence of the ordinary citizen who is a necessary party for an efficient detection of crime. In so doing, the Nigerian penal policy will exemplify the view of H.L.A Hart on punishment and thus lead the country's penal policies to a great height.

Endnotes

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