
PUNISHMENT AS THE OFFENDER'S RIGHT IN G. W. F. HEGEL'S PENAL THEORY

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Abstract

Every society all over the world has her detention centres where people are incarcerated or put behind bars because they have been found guilty of having committed one crime or another. Every country spends huge amount of money on daily bases to maintain these detention facilities. The objective of this study is to analyse Hegel's concept of punishment as the right of the offender. The problem that warrants this study is to ascertain what should be the ideal purpose of criminal punishment. This study employs the analytical method of philosophical research. This research submits that punishment should not be one-sided: retribution or deterrence or rehabilitation. It should be all-encompassing. The ideal purpose of criminal punishment should be to maintain social order and justice. This study finds that Hegel's penal theory is retributive. A counter-infringement of an infringement of rights. Owing to the fact that punishment has to do with human beings, who are members of the society under fallible human institutions, and capable of making positive changes in their lives; therefore, this study recommends punitive minimalism, especially for first time offenders. Bearing in mind that what matters most is not the heaviness of the punishment, but the possibility of total change for good.

Keywords: Crime; Deterrence; Infringement; Punishment; Retribution; Right.

Introduction

From the ancient times, punishment never ceases; but only takes new forms and advance new values. In *The Code of Hammurabi*, one of the best-known legal documents of antiquity, Hammurabi, king of Babylon (r. 1792 – 1750 B. C.), introduces the law of retaliation for wounds: “If a man has destroyed the eye of a member of the aristocracy, they shall destroy his own eye. If he has broken his limb, they shall break the same limb”.¹ Children could be punished for the crimes of their fathers. In the *Protagoras*, on the other hand, Plato convinces the sophist to reject a retributive conception of punishment. He maintains that it must be futuristic and stresses its role as deterrent. In the *Gorgias*, Socrates equally turns down a purely retributive explanation. He compares judges with medical doctors, pointing out that just punishment cures an offender's soul

¹. Thomas Noble *et al*, *Western Civilization*, 2nd ed. (New York: Houghton Mifflin, 1998), 16.

of its evil in the same manner medical treatment cures bodies of physical illnesses.² Unlike Hobbes and Bentham, G. W. F. Hegel does not really regard punishment as evil, he develops a penal theory founded on the principle that it is “the offender's right to receive punishment.” Based on this, therefore, his ideas have drawn the attention of philosophers of law, penal theorists, and so on for almost two centuries; and has regulated and shaped the German penal law up to the most recent times.

Hegel's View on Abstract Right: Towards His Concept of Punishment

The understanding of Hegel's view on abstract right is very fundamental to his legal philosophy, and a leeway to having a firm grasp of his idea on punishment. Abstract right constitutes the first part of *Element of Philosophy of Rights*, and it is consistent with the first stage in the process of objectification of freedom because, according to Hegel, “the will which is free in and for itself is in the determinate condition of immediacy”.³ The idea of the person as the protagonist or champion, who fights for a cause, indicates the universality of this will which is free for itself and the simple reference to itself in its individuality. Abstract right, for Hegel, is the capacity for every other right in general. The person is the intrinsically individual will of the subject, a consciousness of itself as a wholly abstract 'I'. It has to do with the primal or cardinal level of moral life where every person realizes himself or herself as autonomous being with inalienable and unassailable rights.

Therefore, awareness of individual freedom; acknowledgement of rights; and authentic property ownership, are the three key points in Hegel's concept of abstract right. Awareness of Individual Freedom: Abstract right stresses and lays special importance on the autonomy of every individual person. Every human, as a conscious and sentient being, has natural rights and the natural capacity to make choices in life to make life worth living. Acknowledgement of Rights: The most vital part of abstract right is the acknowledgement of one's right and the right of every other human being. The concept: “be a person and respect others as persons” is very essential to the abstract right's principle.⁴ This mutual or reciprocal acknowledgement forms the concrete foundation upon which all social and legal orders are strongly built. To go contrary to this would tantamount to grossly countermining the entire values of the society and her legal system. Authentic Property Ownership: For Hegel, ownership of property implies prolongation of individual personality. Individual right to property permits someone to gain personal identity through ownership and utility of resources.

². Fred Miller, *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6 (Springer: New York, 2015), 74.

³. Hegel, *Elements of the Philosophy of Rights*, trans. H.B. Nisbet (Cambridge: Cambridge Univ. Press), §34.

⁴. Sabina Tortorella, “The Necessity of Punishment in Hegel as a Right of Freedom, *Italian Law Journal*, Vol. 7, No. 1 (2021): 494.

G. W. F. Hegel's Perspective of Crime and Punishment

In the opening section of the “Abstract Right,” Hegel indicates that individuals claim rightful ownership of property and make valid contracts. However, in the third section: “Wrong,” Hegel argues that it happens in three cases: non-malicious or unpremeditated wrong; fraud; and crime. In the case of fraud, the particular will is obviously respected because the defrauded person thinks that what has happened is in line with right. However, in crime, both the particular will and the universal will are overtly contradicted. So, if right is contradicted, it must cancel what contravenes it; by so doing, it proves itself to be a necessary reality. This is actually what contributes to compensation and punishment, according to Hegel. In non-malicious wrong, punishment is not necessary because right at the universal level, has not been infringed. Therefore, in civil lawsuit, the compensation that is given is adequate to justify right. However, it is only through punishment will fraud and crime be vindicated owing to the fact that in these cases right has been annulled or set aside as such, and mere compensation and restitution are not sufficient to reinstate what has been changed. The particular will of the criminal has to undergo punishment in order to cancel the crime.⁵

A person desires something already owned by another person as property, but does not want to acquire it by making an honest or fair contract involving commodities or goods of equal value or worth. So, the person just surreptitiously or sneakily takes hold of the property, and perhaps, forcefully harms the owner, in infringement of his or her right. Actually, this is a crime, where the offender contravenes or negates the right of the victim to the specific, ripped-off property; and by stripping the owner forcibly of his property, which embodies his freedom and right, the criminal equally denies the victim and every other person the capacity for rights and freedom in general. Crime has to do with the compelling of the will of someone who is innocent and, therefore, the abnegation of the freedom and rights of the victim's will. The will of humans can be compelled plainly because it subsists in property in order to demonstrate its freedom.⁶

Therefore, punishment, for Hegel, is a means to reinstate the abstract order of rights that has been troubled by the offender's or criminal's wrongful conduct. When a person's right is infringed, punishment serves as a way to reestablish the rule of law and the importance of acknowledging every person's right. It is the cancellation of a crime. An infringement of an infringement of right. This counter-infringement appears in the form of an “injury” inflicted on the offender. Hegel insists that this injury is not only just in itself, but also a right of the offender himself, he writes: “For it is implicit in his action, as that of a rational being, that it is universal in character, and that, by performing it, he has set up a law which he has recognised for himself in his action, and under which he may therefore be subsumed as under his right. In so far as the punishment which this

⁵. Hegel, *Philosophy of Right*, trans. T.M. Knox (London: Oxford University Press, 1969), §64.

⁶. Peter Stillman, “Hegel's Idea of Punishment,” *Journal of History of Philosophy*, (1976): 171.

entails is seen as embodying the criminal's own right, the criminal is *honoured* as a rational being”.⁷ Hegel's main objective is to justify or vindicate punishment as expression of the offender's own implicit and underlying will, as an overt and observable proof of his freedom and right. By being penalised, the offender is esteemed, honoured and respected as a rational being.

Towards the Proportionality of Punishment

Hegel simply elucidates that the idea of quality and quantity of punishment are deducted and inferred from the offender's own action. He maintains that in so far as crime has a determinate qualitative and quantitative magnitude, its negation should equally have the same. This implies that punishment should always have some precise form. He lays emphasis on the “identity of crime and retribution, pointing out that it is not *an equality* in the specific character of the infringement, but an equality of value. This idea made him jettison the *lex talionis* or retaliatory notion of precise equality of punishment that entangles its advocates in absurdity.⁸ In *German Idealism and the Concept of Punishment*, Jean-Christophe reiterates that for Hegel, “the absurdity lies not in an erroneous, literal determination, but rather in the axiom that 'what the criminal has done should also happen to him', and therefore, in the specific equality or in talion law, in contrast to the Hegelian principle of the negation of the negation.”⁹

Going further on the proportionality of crime and punishment, Hegel observes that when equality is not assumed as specific equality, but as equality of value, it still stays, according to him, “as merely the basic measure of the criminal's *essential* deserts, but not of the specific external shape which the retribution should take. It is only in terms of this specific shape that theft and robbery, on the one hand; and fines and imprisonment on the other, are completely unequal. Whereas in terms of their value, that is, their universal character as injuries, they are comparable.”¹⁰ With regard to children, the mentally deranged and lunatics, Hegel's penal theory exempts them from punishment on the ground that every person has the right to know his/her act as good or evil in the first place.

Justification of Coercion/ Force and Punishment in Hegel's Penal Theory

Hegel argues that coercion or force is directly self-destructive because it is the demonstration of a will which strikes down and declares null and void the expression of a will; therefore, from its abstract sense, force is wrong. For the reason that, in its very conception, force ruins itself, its principle is that it must also be cancelled and declared null and void by force. In certain circumstances, it is not only right, but also necessary that a second exercise of force should cancel

⁷. Hegel, *Philosophy of Right*, §100.

⁸. Hegel, *Philosophy of Right*, §101.

⁹. Merle Jean-Christophe, *German Idealism and the Concept of Punishment*, (Cambridge: Cambridge University Press), 122.

¹⁰. Hegel, *Philosophy of Right*, §101.

the first. A crime, no doubt, is a negative action, so its punishment is a negation of the negation. The harm or damage ensuing from the crime exists only as the particular will of the criminal; so, to harm this particular will is to cancel the crime and to reinstate the right. He says: “the initial use of coercion, as force employed by a free agent in such a way as to infringe the existence of freedom in its concrete sense, that is, to infringe right as right, is crime.”¹¹

Just as Kant's justification of punishment is derived from the principle of retaliation, which is grounded on the principle of equality, Hegel's justification of punishment and penalties is also retributive. It is neither humane nor liberal like the utilitarian justification. Hegel rejected the utilitarian justification of punishment and approves the implications of retribution. He stresses that the offender is a rational being who must be handled as a rational being. The offender is a subject, therefore, must be the subject and not the object of his free will, and consequently, even when the offender, the person, has worth and dignity. Crime is the will which is, without doubt, a nullity and it contains its negation within itself. The negation is demonstrated in the form of punishment. This punishment is only the public demonstration of crime. The second half which necessarily presupposes the first. The riddance of crime is requital, payback, which implies only that crime has turned back upon itself. Thus, it is the very act of crime itself that vindicates itself. Therefore, punishment is not only implicitly equitable, fair and just; but also, a concrete manifestation of the criminal's own freedom. A right constituted or founded within the criminal himself

This justification of punishment connotes at least two restrictions that Hegel was very cautious to take a firm stand on. Crime is cancelled through requital or justly deserved penalty, which has the appearance of something immoral or wrong, such as revenge, which has a personal element in it. “Vengeance is mine said the Lord.” However, in the real sense of it, the personal element must not be allowed to be.¹² Hegel uses the concept of retribution purely in a formal or official sense. It implies solely that the offence or crime is reversed and turned around against itself. If the subjective will steps in and interferes in punishment, retribution passes over and transits into retaliation and becomes a new transgression. This is a shortcoming or flaw that allows some crimes to be penalised not as *crimina publica* – public crime, but as *crimina privata*– private crime. The person who feels offended is minded or inclined to go to any extent in order to make amends of the harm done to him. Among the Arabs, for instance, revenge is undying and continues from generation to generation.¹³

^{11.} Hegel, *Philosophy of Right*, §67.

^{12.} Huntington Cairns, *Legal Philosophy from Plato to Hegel*, (Baltimore: John Hopkins Press), 529.

^{13.} Cairns, *Legal Philosophy from Plato to Hegel*, 529.

Also, Hegel acknowledges that requital, except in one case, cannot be made particularly equal to the crime. According to him, “the Eumenides sleep, but crime awakens them; an eye for an eye and a tooth for a tooth,” is truly their principle of life. Positive laws become a *sine qua non* because mere thinking cannot ascertain how punishment could be meted out for any particular offence. With more educational progress and enlightenment now at people's disposal, opinions about crime become less cruel and uncivil, and offenders are not so harshly and unkindly penalised. For Hegel, if the penalty to be meted out is ascertained regardless of empirical circumstances, then people may be led to employ the Stoic notion that there is only one virtue and one vice, or the notion substantiated in the Draconian law, with its extreme severity, which dictates death as a punishment for even a very minor offence. Murder, however, is of necessity liable to the death penalty; life is the full compass of a man's existence and punishment can consist only in taking away a second life.¹⁴

The Utilitarian Conception of Punishment: Cesare Beccaria and Jeremy Bentham

In *On Crime and Punishment*, the Italian reformer, Cesare Beccaria (1738-1794) applies the mixture of the Helvetian proto-utilitarian ideas and Jean-Jacques Rousseau's concept of the social contract to state the need for a penal theory that takes cognizance of the welfare of the members of the society. To this objective, he propagates the protection of the freedom of the people who abide by the law. He stresses the importance of instituting certainty and celerity – quickness of punishment for people who contravene the law. He tries to re-strengthen people's collective obedience and regard for the law by encouraging a new lenience or mildness in meting out penalties for people who violate the law.¹⁵ Beccaria founded his penal theory on some key innovative principles:

- Punishment should have a deterrent or preventive purpose, not a retributive one.
- Punishment should be proportional to the offence committed.
- A high likelihood or probability of punishment, not really its harshness or severity, would guarantee its deterrent or preventive efficacy.
- The processes and procedures of criminal convictions should be made public because every criminal act is an offence against the society in general; and to serve as deterrent to others or future criminals.
- Finally, in order to be very efficacious, punishment should be prompt, that is, performed with little or no delay.

This Beccarian humane and liberal principles, when it comes to penalising offenders, were quickly employed by many reform-minded intellectuals across Europe, including Jeremy

¹⁴. Cairns, *Legal Philosophy from Plato to Hegel*, 530.

¹⁵. Tony Draper, “An Introduction to Jeremy Bentham's Theory of Punishment,” *Journal of Bentham Studies*, Vol. 5 (2002): 6.

Bentham (1738-1832). Bentham an English legal philosopher, jurist and social reformer, laid the foundations of his penal theory firmly on the utilitarian principles. He defines utility as “that principle which approves or disapproves of every action whatever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.”¹⁶ If the party is an individual, then the principle of utility is fashioned to promote his happiness; if it is the community, then the principle contemplates the happiness of the community. Borrowing a leaf from Montesquieu's *The Spirit of the Law*, he employs a catalytic approach in combination with his own abandonment of the traditional understanding of common law and social contract, he made an important and significant break with the then ubiquitous and dominant English understanding of law and punishment into which he was confined on all sides.

The summary of Bentham's central ideas relevant to his penal theory are thus:

- Punishment is an evil inflicted on an offender by persons in authority. According to Bentham, punishment is mischief and evil. Therefore, it is to be reduced to the minimum in severity consistent with securing its ends.
- Punishment is evil because it is painful, and no normal person likes being in pain.
- Punishment may be justified, if at all, at the least bad use of coercion in the name of securing public safety, in the belief that the gain in a secure society outbalances the loss in punishment, which has to do with inflicting pain to offenders intentionally.
- Punishment should be forward-looking - to prevent future crimes and secure public safety; not backward-looking – retributive. Therefore, it has three main fundamental purposes: to prevent crime, to correct and rehabilitate offenders, and to compensate victims. These are inferences and illations he made from his utilitarian principles.
- Torture cannot be winnowed out flatly or unconditionally. It is justifiable if, by torturing one guilty person, many who are innocent can be spared of injury this is a straight application of utilitarian principle to the assessment of public policy.
- Afflictive punishments, the principal of which is the death penalty, are to be forefended wherever possible in favour of a less brutal and cruel interventions.¹⁷

For Bentham, unlike Hegel, punishment is evil because it causes pain to the victim, and the general principle of utilitarianism is that government should minimise pain and maximise the general happiness of the people. He outlines four key cases in which punishment ought not to be inflicted: when punishment would be – (i) Misapplied (ii) Inefficacious (iii) Superfluous (iv) Too Expensive.¹⁸

^{16.} Jeremy Bentham, *Theory of Legislation*, trans. Richard Hildreth (London: Paternoster Row, 1882), 1-2.

^{17.} Hugo Bedau, “Bentham's Theory of Punishment: Origin and Content,” *Journal of Bentham Studies*, Vol. 7 (2004): 9-10.

^{18.} Bentham, *Theory of Legislation*, 322.

Punishment Misapplied: Punishments are misapplied, according to Bentham, wherever there is no real offence, no evil of the first or second order; or where the evil is more than compensated by the attendant good, as in the exercise of political or domestic authority; in the repulsion of a weightier evil; in self-defence or self-protection; and so on.¹⁹

Inefficacious Punishments: According to Bentham, “I call those punishments *inefficacious* which have no power to produce an effect upon the will, and which, in consequence, have no tendency towards the prevention of like acts. Punishments are inefficacious when directed against people who, through no fault of theirs, could not know the law; who have acted without intention, who have done the evil innocently; under an erroneous supposition; or by irresistible constraints. Bentham, followed by Hegel in this regard, points out that children, idiots, imbeciles, though they may be induced, to a certain point or degree, by rewards and threats, have not a sufficient idea of futurity to be inhibited or restrained by punishment. In their case the laws lack efficacy.”²⁰

Superfluous Punishments: For Bentham, punishments are superfluous in cases where the same end may be achieved by means that are milder and more lenient. He writes: “A man spreads abroad pernicious opinion: shall the magistrate, therefore, seize the sword and punish him?” He goes on to respond: “No; if it is in the interest of one individual to give currency to bad maxims, it is the interest of a thousand others to refute him.”²¹

Punishment too Expensive: When the evil of the punishment exceeds or surpasses the evil of the offence, according to Bentham, it implies that the government will produce more pain and suffering than it prevents. The government will purchase exemption from a lesser evil at the expense of a greater evil. He recommends that two tables should be kept in view – one representing the evil of offences, the other the evil of punishments.²²

Critique of Hegel's Punishment as the Offender's Right: Responses from Philosophers

Contrary to Hegel's idea, J. G. Fichte's concept of penal law is founded on what he actually designated as a “compact of expiation.” For Fichte, anyone who contravenes the law has not really imbibed the community's essential principles as his/her perpetual rule of action. Every community member is part of this compact, his/her rights conditioned upon the honouring of those principles/laws. Any violator loses his rights and becomes an offender or malefactor. Fichte points out that punishment should be parallel with the moral law; and not just an end in itself, but a

^{19.} Bentham, *Theory of Legislation*, 322.

^{20.} Bentham, *Theory of Legislation*, 322.

^{21.} Bentham, *Theory of Legislation*, 322.

^{22.} Bentham, *Theory of Legislation*, 323.

necessary response to wrongful conduct that maintain justice. The main objective of the community is to secure for everyone the full enjoyment of his/her rights, and if it could be possible to realise this objective without lawlessness, outlawry or anarchy; then punishment does not need to be affixed.²³

Unlike Kant, Fichte maintains that the dictum: “he that killed must be killed” is positively meaningless. The end of the state is the maintenance of public security, and punishment is simply a means to that particular end. Contrary to Hegel, the sole purpose of instituting punishment, for Fichte, is to deter people from committing crime through threats on the law's violations. With great keenness and sharpness, Fichte sees the end of penal laws as that “they may not even be applied.”²⁴ However, the continuation of the argument made him to subscribe to the idea of *poena talionis* - *punishment of revenge*. The original and primary design for punishment, for Fichte, is solely to deter the offender from crime. When he finally commits an offence, his punishment would have another aim: to prevent others from committing the same offence.

Fichte adumbrates the rules that ascertains the sufficiency of the equality of punishment and the crime. With regard to offence committed through carelessness, he recommends a fine equal to the injury. However, when a crime is intentional, the offender not only reinstitutes what is taken away, but also pays an equal amount from his own property. It is only through this extra payment, Fichte opines, is the punishment made equal to the crime. On the issue of wilful murder, Fichte recommends an absolute exclusion of the offender from the community. He would allow for the establishment of private institutions with the aim of rehabilitating such grievous offenders. No one may proudly say that Fichte's penal theory imbibes the generous efforts of the liberal movement pioneered by Beccaria and continued by Bentham. Fichte was not really able to extricate himself from the harsh and cruel ideals of Hegel and some of his contemporaries like Kant, as his imposition of the gibbet or pillory for simple slander.²⁵ Regardless of the complete indefiniteness as a criterion of the idea of the *lex talionis* – *law of retaliation*, his penal theory was necessarily in the pipeline of reform by the nineteenth century legal philosophers and penologists.

Kant's anti-utilitarian arguments are no other better place manifested than in his penal theory. His entire idea of criminal law is geared towards retributive justice without any caveats. He maintains that punishment cannot be meted out simply as a means for enhancing another good either with regard to the offender himself or to the society in general. For Kant, punishment must, in all cases, be inflicted solely because the person on whom it is brought down has really committed a crime.²⁶

²³. J. G. Fichte, *The Science of Rights*, 344.

²⁴. Fichte, *The Science of Rights*, 345.

²⁵. Fichte, *The Science of Rights*, 371; Cairns, *Legal Punishment from Plato to Hegel*, 495.

²⁶. Kant, *The Philosophy of Law*, Path II, trans. W. Hastie (Edinburgh: T.T. Clark, 1887), 195.

In the first place, the offender must be found guilty and worth punishing before any thought of deriving from his punishment any welfare for himself or other members of the society. No person, according to him, should be handled merely as a means subordinate or instrumental to the purpose of another, nor be coalesced with the notion of rights in things. His arguments appear very logical, so, seems beyond attack.

Like Hegel, Kant rejects the ideas of reformation and deterrence as potential objects of punishment. For him, these aims should not be brought into focus until it has been decided that the individual on trial has committed a crime. Kant moves further to stress that retribution is the only exact and just principle of punishment. He writes: “the penal law itself is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or from the due measure of it, according to the Pharisaic maxim: 'it is better that one man should die than the whole people should perish.' For if justice and righteousness perish, human life would no longer have any value in the world.”²⁷ Kant quickly puts forward the case of a criminal already condemned to death, but who concurs with physicians to permit a dangerous medical experiments to be performed upon him on the understanding that the government would spare his life if he came out happily through the experiments. It is argued that physicians might, by so doing, obtain new information that would be of great value to the state. Kant would execute the criminal on the ground that justice should not be traded with any other consideration. He writes: “a court of justice would repudiate with scorn any proposal of this kind if made by the medical faculty; for justice would cease to be justice, if it were bartered away by any consideration whatever”.²⁸

So, Kant regards revenge as the only standard that can decidedly allot both the quality and the quantity of a just penalty; every other standard is irresolute, indecisive or faltering. Therefore, anybody who commits murder must lose his own life in return. When it comes to the satisfaction of justice, there is no judicial substitute or middle-ground. He avers that “there is no likeness or proportion between life, however painful, and death; and therefore, there is no equality between the crime of murder and the retaliation of it, but what is judicially accomplished by the execution of the criminal.”²⁹ At this juncture, Kant tells a remarkable story of a civil society about to disband itself with the full consent of all her members - as may be the case of people inhabiting in a small island deciding to separate and disperse themselves around the world. In that situation, Kant continues, the only murderer remaining in prison ought to be executed before the decision is implemented. By so doing, the murderer will then become fully aware of the desert of his actions, and there will be no bloodguilt upon the people; otherwise, they may all be reckoned as

²⁷. Kant, *The Philosophy of Law*, 195.

²⁸. Kant, *The Philosophy of Law*, 195.

²⁹. Cairns, *Legal Philosophy from Plato to Hegel*, 454.

participators in the murder as a public violation of justice.³⁰

Just as it is said: “exceptions prove the rules,” so, despite the logical cogency of Kant's arguments, he is pressured to make three exceptions to the categorical imperative that the murderer must die. First, if there are too many accomplices to a murder case, to the extent that the society would be in immediate danger of being deprived of subjects in resolving to be without such criminals. In such situation, another punishment may be allotted to them, Second, Kant would not employ death penalty to the survivor of a duel. He does not regard killing under such condition as murder, insofar as the dueling is public, with the consent of the two parties, and intended to settle a quarrel over a point of honour. Here, Kant imbibes the utilitarian principle. Finally, he rejects inflicting death penalty in the case of maternal infanticide as it concerns illegitimate child. For Kant, an illegitimate child is beyond the law's protection. It is similar to smuggled goods; and as it has no legal right to exist.

Earlier on, Beccaria refuses to accept the idea that the state has right to impose death penalty on her subjects because in getting into the social contract the individual could not have agreed to dispose of his/her own life. Kant turns down this idea as mere sophistry – a deliberately invalid arguments displaying ingenuity in reasoning in the hope of deceiving others. Kant maintains that no one subjects himself to the experience of punishment because he has willed to be punished, but because he has willed a punishable action. Unlike Beccaria, in this regard, Hegel denounces the idea that state is a contract, in the first place.³¹ With regard to individuals giving themselves to punishment, Hegel agrees with Beccaria, but he insists that the criminal gives his consent through his very act. Also, Hegel agrees, unlike Kant, that Beccaria's effort to have death penalty done away with, has advantageous effects. However, unlike Bentham and Beccaria, the penal theories which regard punishment as deterrent, preventive and reformative are, in Hegel's conceptual schemes, hasty, trivial, superficial, and without attention to details.

Hegel's arguments imply that retribution, rather than deterrence or rehabilitation, is likely the only vindication of punishment where in civil disobedience is “respected”. Asdeterrence undertakes to foreclose civil disobedience, and regeneration/reform attempts to change the notion of the disobedient, retribution handles the disobedient “with the *freedom* and *respect* he/she deserves as a person,” the freedom, not to ascertain but to argue and maintain what ought to be. In addition, it is only retribution that encounters the disobedient on the level he is arguing: the level of law and right, rather than the level of enforcement and efficiency. With deterrence and reform, the disobedient/offender is to be changed; with retribution, at least the friction is a conflict of right versus right, an argument of moral opinion versus the state's law which is or

^{30.} Cairns, *Legal Philosophy from Plato to Hegel*, 454.

^{31.} Cairns, *Legal Philosophy from Plato to Hegel*, 531.

should be founded on right, a rational dialogue between the disobedient/offender and the judicial branch of the state.³²

With deterrence in mind, Hegel would suppose, one obeys because the law says so; but with retribution, one obeys because one has pondered on the nature of the act and of right, and hence, is self-conscious in making a free decision. As already mentioned, Hegel considers self-consciousness as a fundamental aspect of freedom. When a person obeys a deterring law, he does that with his arbitrary freedom – not performing the unlawful act exactly for the same reason that the dog runs away from the man who raises a stick. On the other hand, when a person obeys a retributive law, he obeys because self-conscious thoughtfulness has made him to consider that the law is not only right, but also moral and, therefore, worth obeying. It is not on account of the stick, but because it is right. This obedience is not compelled, but free. So, the person in a retributive system is free and this self-conscious thoughtfulness is the genesis of morality.

There are important points Hegel overlooked in his penal theory, from H. L. A. Hart's point of view. According to Hart, in order to clarify our thinking on the subject of punishment, what is needed is the realisation that different principles are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? Hart goes further to give a summary of the three principal claims of what he calls the “crude model” of a retributive theory, namely: (i) The principle of responsibility: “a person may be punished if, and only if, he has voluntarily done something morally wrong.” (ii) The principle of proportion: the punishment must be equivalent to the wickedness of the person's wrongful act. (iii) The principle of requital: it is just or morally good to punish people for voluntarily doing wrong.³³

Conclusion

Hegel's penal theory implies a turning down of other theories prevalent in his time. According to Klein, crime and punishment are equally evil; two evils or wrongs cannot make a right, it is irrational and senseless to will an evil simply because there is already an existing one. His idea stems from the Hegelian argument that crime is wrong done to a particular person, and punishment is its equivalent imposed on the wrongdoer to cancel his wrong action. However, if crime is seen as an infringement of right, in lieu of an injury or harm to a person, Klein's argument has no weight.³⁴ Also, for Fichte and Feuerbach, punishment is a threat, and if an offence is

³². Stillman, “Hegel's Idea of Punishment,” 181.

³³. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 22-23.

³⁴. Cairns, *Legal Philosophy from Plato to Hegel*, 530.

nonetheless committed, punishment is vindicated owing to the fact that the offender, beforehand, is aware of the threat. Nevertheless, Hegel queries the justifiability of threat in this regard. A threat presupposes man's lack of freedom, and its objective is to compel man with the impending evil of punishment or sanction. This is similar to the action of somebody who frightens or threatens a dog with a stick. Just like a dog, threat seems to handle someone as if he lacks dignity; they may even awaken him to manifest his freedom.

Finally, unlike Plato who considers the primary purpose of punishment as curing the wrongdoer, and the modern advocates of general deterrence, like Hobbes, Pufendorf, Wolff, Beccaria, Feuerbach, Schopenhauer, and so on; Hegel regards it as the offender's right - a visible proof of his freedom, and by being punished, he is honoured as a rational being. According to him, he does not receive this deserved honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated as a harmful animal who has to be made harmless, or with a view of deterring or reforming him. For Hegel, punishment is neither paying back the offender evil for evil nor is the inwardness of punishment suffering or deterrence. He sees it as the compulsion of the free will of the offender, like denying him of liberty in reciprocity for the offender denying another of his rights. The ideal purpose of criminal punishment, in my opinion, should not be one-sided. It has to be all-encompassing- to ensure social order, justice and reformation of the victim. This is achieved by ensuring that the offender is inflicted with certain amount of pain – retaliation. This painful infliction will deter others. Meanwhile, the offender is not meant to lose every hope of being a better person since nobody is perfect. He is incapacitated for reformation, rehabilitation and reintegration back into the society as law abiding citizen. In all these, what matters most is not the heaviness of the punishment, but the possibility of making a positive change for good.

Bibliography

- Bedau, Hugo. "Bentham's Theory of Punishment: Origin and Content". *Journal of Bentham Studies*. Vol. 7 (2004): 1-15.
- Bentham, Jeremy. *Theory of Legislation*. Trans. Richard Hildreth. London: Paternoster Row, 1882.
- Brooks, Thom. "Hegel on Crime and Punishment." In *Hegel's Political Philosophy: On the Normative Significance of Method and System*. Eds, Thom Brooks and Sebastian Stein. Oxford: Oxford University Press, 2017, 202-221.
- Cairns, Huntington. *Legal Philosophy from Plato to Hegel*. Baltimore: The Johns Hopkins Press, 1949.
- Dubber, Markus D. "Rediscovering Hegel's Theory of Punishment." *Michigan Law Review*. Vol. 92 (1994): 1577-1621.
- Dworkin, Ronald. *Justice in Robes*. Cambridge: Harvard University Press, 2006.

- Ezorsky, Gertrude. *Philosophical Perspectives on Punishment*. Albany: State University of New York Press, 1972.
- Fichte, Johann G. *The Science of Rights*, trans. A. E. Kroeger. Oxford: Oxford University Press, 1869.
- Hegel, G. W. F. *The Philosophy of Right*. Trans. T. M. Knox. London: Oxford University Press, 1969.
- Kant, Immanuel. *The Philosophy of Law, Part II*. Trans. W. Hastie. Edinburgh: T. T. Clark, 1887.
- Merle, Jean-Christophe. *German Idealism and the Concept of Punishment*. Cambridge: Cambridge University Press, 2009.
- Miller, Fred D. and Carrie-Ann Biondi. Ed. *A Treatise of Legal Philosophy and General Jurisprudence*. Vol. 6, 2nd ed. Springer: New York, 2015.
- Njoku, Francis O. C. *Studies in Jurisprudence: A Fundamental Approach to the Philosophy of Law*. 2nd ed. Owerri: Claretian Institute of Philosophy, 2007.
- Noble, Thomas *et al.* *Western Civilization: The Continuing Experiment*. 2nd ed. New York: Houghton Mifflin Company, 1998.
- Schild, Wolfgang. "The Contemporary Relevance of Hegel's Concept of Punishment." In *Hegel on Ethics and Politics*. Eds. Robert B. Pippin and Otfried Hoffe. Cambridge: Cambridge University Press, 2004.
- Shiffrin, Seana. "Autonomy, Beneficence, and the Permanently Demented." *Dworkin And His Critics*. Edited by Justine Burley. Malden: Blackwell, 2004.
- Stillman, Peter. "Hegel's Idea of Punishment." *Journal of the History of Philosophy* (1976): 169-182.
- Tortorella, Sabina. "The Necessity for Punishment in Hegel as a Right of Freedom." *The Italian Law Journal*. Vol.07, No. 01 (2021): 489-512.