# DETERRENCE AND ELIMINATION THEORIES OF CRIME, CONTENT AND APPLICATION WITHIN THE NIGERIA JUSTICE SYSTEM

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## Abstract

Crime is depicted as any act which is against the law and which attracts punishment and/or fine as stipulated by the law. The Criminal Justice System of a nation represents a system or structure through which the laws guiding the existence and order of such a society is applied and the rights of the citizens are upheld. Criminal justice implies ascertaining whether or not an accused is guilty of a crime and ensuring that due process is involved in the determination of guilt or innocence and the administration of punishment or compensations as appropriate. This paper seeks to explain punishment theories in the criminal justice system and especially the assumptions of various criminologists on deterrent and retributive perspectives with their applicability within the Nigerian criminal justice system. The research methods employed in this study includes a combination of both primary and secondary sources. The

paper argues that the chief aim of the entire criminal justice system comprises deterrence, atonement and retribution through punishment administered at the instance of the State. It is against this background that it is always said that the aim of criminal law is to protect the society and the citizens and to pay the wicked for his wrongdoing. The paper concludes that punishment should focused on the needs of society in terms of protection from crime, and the needs of the individual who deserved to be punished, in terms of his reformation.

**Keywords:** Deterrence; Retributive; Punishment; Criminal Justice System; Criminology

## 1. INTRODUCTION

The purpose of civil law generally is to compensate the victim of wrongful conduct for injury he has sustained, while criminal law generally seeks inter alia to forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual or public interest. As Karibi-White JSC has put it "the repression of anti-social conduct by means of punishment is the paramount objective of the criminal law[1]. Consequently, to talk of compensation within the context of criminal law certainly sounds somewhat odd. Criminal law is therefore essentially concerned with the definition, trial and punishment of those acts and omissions which are known as crimes.

Criminal justice, on the other hand embodies a method through which administration of criminal law, establishes procedures aimed at fair, accurate and expeditious determination of guilt or innocence that do not infringe upon the

[1]Karibi-Whyte, A., 1990. An examination of the criminal Justice System: Lagos: *Law Review Series*, (Ministry of Justice).

rights of citizens and aim to provide an enlightened but effective system of punishment for those found guilty. Therefore, the chief aim of the entire criminal justice system comprises deterrence, atonement and retribution through punishment administered at the instance of the State. It is against this background that it is always said that the aim of criminal law is to protect the society and the citizens and to pay the wicked for his wrongdoing. Again, one often hears the view that crimes are punished to show those who have broken the law and those who might be tempted to break it that the law has teeth that bite. In short, the enterprise of criminal justice system is to make the community safer by identifying and then removing (or at least watching) those who have shown themselves to be dangerous, be it a corporation or an individual.

One distinguishing rule relating to criminal trial is that of the standard of proof; while civil trial rules require that only a person asserting a claim establishes his case on a balance of probabilities, criminal procedure rules require that the prosecution establishes its case beyond reasonable doubt. But probably more relevant to our discussion in this paper is the explanations of punishment theories in the criminal justice system and especially the assumptions of various criminologists on deterrent and retributive perspectives.

## 2. DEFINITION OF PUNISHMENT

The role of retribution and deterrence resides in punishment. It behoves this work to discuss the concept of punishment. Punishment may be defined from a legal,

moral, religious and pedagogical perspective. Its potential exists in all situations in which an authority and subordinate relationship exists.[2]

This work confines itself to the legal definition as that definition relates relevantly to a discussion involving the criminal justice system. Punishment is the authoritative infliction of suffering for an offence.[3] Van der Merwe[4] aligns himself with the definition which conveys that sentencing is a public quantification of the individual offender's blameworthiness, determined according to acceptable standards of proportionality. Primoratz[5]defines punishment as "an evil deliberately inflicted *qua* -evil on an offender by a human agency which is authorised by the legal order whose laws the offender had violated". He explains that by offender he means a person who has offended against any positive criminal law, no matter whether that law is just or unjust whether it is an expression of a condition of universal freedom or of a tyrant's arbitrary will, whether it is morally legitimate or not.[6]

Gammage and Hemphill[7] view punishment as a restrictive measure imposed by the courts for breach of legal observance. It is sanctioned by the criminal law. Flew A[8] views all punishment, be it formal (as enforced by the judicial system) and informal (as enforced by the church, the school, etc for example), as having the characteristics of (1) "evil" and unpleasantness to the person undergoing it; (2) it must be for an offence; (3) it must be for an offender (4) it must be by authorised human agencies and (5) it must be imposed by virtue

[2]Vander Merwe D. P. 1991. *Sentencing.* Cape Town: Juta & Co.
[3] Bean, P. 1981. *Punishment: a philosophical and criminological inquiry.* Oxford: Martin Robertson
[4] Op. cit note 2
[5] Caldwell, *R. 1965. Criminology* (2nd ed.). New York: Ronald Press
[6] Primoratz I. 1989. *Justifying legal punishment.* London: Humanities
[7] Gammage, A. and Hemphill, C. 1979. *Basic criminal law.* New York: McGraw-Hill
[8] Reid, S. T. 1991.*Crime and Criminology* (6th ed.). Fort Worth: Holt Rinehart and Winston

of some special authority conferred through or by the institution against whose laws or rules the offence has been committed. To effect a penological definition Flew's elements have been adapted by addition of the element that punishment is imposed and implemented with a specific purpose.[9]

## 3. THE AIMS OF CRIMINAL PUNISHMENT

Punishment of an offender, in any form, be it a fine, imprisonment, a death penalty or compensation deprives the individual of his liberty and serves the purpose for which that punishment is meant. The Court is always informed by differing punishment objectives before imposing a sentence upon the accused. The objective and purpose of punishment can be categorized into four main theories, namely: deterrence, incapacitation, retribution and rehabilitation/reformation.

### 3.1. Deterrence

It is usual to divide this aim into special and general deterrence. Special deterrence involves a sentence which is designed to deter the wrongdoer from future wrongdoing. Though it looks to the future rather than the past, in contrast with retribution, it is still based on some notion of wrongdoing by the offender.

General deterrence involves making an example of the offender so that others will not be tempted to emulate their conduct. Controversies rage at one end of the spectrum over the question of whether attempts at deterrence are futile on the ground that would-be offenders are not capable of being deterred, and at the other end over whether deterrence should replace retribution as a

[9] Neser, J. J. 1980. "'n Teoreties-prinsipie~le studie van sekere aspekte van die straf en behandeling van die oortreder van uit 'n penologiese perspektief". D Phil thesis University of South Africa, Pretoria

principal aim of the criminal law.[10] It is not seriously suggested that the threat to inflict harm against potential offenders has no deterrent effect. The widely recognised and approved defence of duress shows, if support were needed for the proposition, that threats are generally regarded as effective. It is true that some people cannot be deterred, for instance because of mental incapacity or psychopathic personality, and the law must find other justifications for using coercive measures against them (for instance, incapacitation). But it is clear that the vast majority of people are capable of being deterred, even if most do not require threats to keep them law abiding. The effect of relying on threats alone however is well illustrated by the widespread outbreaks of lawlessness which appear when the police go on strike.[11] Even more graphic examples can be given where countries are prepared to impose more drastic penalties. Dr Ali Ali Mansour reports that Hijaz in Saudi Arabia was once one of the worst places for violent crime and highwayman ship, but when 'hudud' penalties were introduced (involving amputation) such crimes ceased and criminal gangs were disbanded.[12]

### 3.2. Prevention or incapacitation

Society must protect itself against those who commit serious harms even if they cannot help themselves from doing so.[13]If considerations of proportionality required account to be taken in all cases of blameworthiness, offenders in this category would have to receive either no penalty or a much reduced one. Since a long period of custody may be necessary to protect the community, some

[10] Ashworth A, 2003. *Principles of Criminal Law* (4th edn) p 15, n 40.
[11] ibid
[12] Hudud Crimes' in Cherif Bassiouni M 1982. (ed), *The Islamic Criminal Justice System* p 201.
[13] Robinson PH and Darley J. M, 2004. 'Does the Criminal Law Deter? A Behavioural Science Investigation' 24 *OJLS* 173.

technique must be found which affords the appropriate measure of control while insulating the predicted harm-doer from blame, and affording him or her procedural protection of the criminal law.

Where a society takes drastic action against those who are not, or not fully, to blame for the harm they do, it is important that prevention or incapacitation should be reserved for genuinely dangerous offenders and not mere nuisances. The protective principle should go a long way to ensuring this, since the principle of proportionality would rule out long periods of incarceration for those who commit relatively minor harms.[14] One of the manifestations of this in practice is that under Nigerian law, the defense of insanity, though widely applicable in theory, is only worth running in murder cases. In contrast, in the past, it has been worth running with any capital crime. The other two defenses which come closest to insanity for this purpose diminished responsibility and provocation (where available), are also generally limited to the field of murder, although here as a matter of law, not of defense strategy.

As has been seen, in the case of the insane, the law makes no pretence of blaming the killer or applying retributive or deterrent penalties. The law's purposes switch from retribution and deterrence to incapacitation (protection of the community) and rehabilitation, purposes which may require indefinite periods of incarceration. The leading English and Australian cases on diminished responsibility reveal the conflicting tensions. In *R v Byrne,*[15] a sexual psychopath killed and mutilated a young woman from a YWCA hostel and was charged with murder. Despite un-contradicted evidence that he suffered from an abnormality

[14] ibid
[15] [1960] 2 QB 396.

of mind and found it difficult or impossible to control his perverted sexual desires, the jury convicted him of murder. The Court of Criminal Appeal quashed the conviction for murder, and disapproved a direction by the trial judge to the effect that difficulty or inability to exercise self-control was outside the defense of diminished responsibility.[16] The court did however confirm the sentence of life imprisonment as the only possible one, having regard to the tendencies of the appellant.[17]

### 3.3. Rehabilitation or reform

Another way that society may protect itself against future crimes by offenders is by rehabilitating the offender. In many ways this is the most enlightened purpose of the criminal law. That is in theory. But there are problems. One is that rehabilitation has not proved to be very successfully achieved in practice.[18] Secondly, rehabilitation may require a longer period of control than a deterrent or retributive punishment may warrant. Unless the longer sentence could be justified on grounds of incapacitation, as in the case of dangerous offenders, the excess period of control or incarceration looks like control for the good of the offender rather than for the good of society. Such paternalism should find no part in the criminal law.

On the other hand, rehabilitation should not be abandoned as one of the aims of the criminal law. If a person is to be imprisoned on retributive, deterrent, or incapacitative grounds, the period of imprisonment may provide an opportunity to reform the offender. Applying a Rawlsian theory, Professor

[16] Donnelly SJM, 1990. 'The Goals of Criminal Punishment: a Rawlsian Theory' 41 *Syracuse LR* 771 at 778-783
[17] Victorian Sentencing Committee, *Sentencing* Report (1988) pp 100-106.
[18] Opt cit note 15

Donnelly has persuasively argued that sending a person convicted of a crime to prison without providing an opportunity and programs for rehabilitation is unjust and contrary to human dignity.[19] While society as a whole is responsible for avoiding such injustice, it is for the supervised prison system to discharge this responsibility.

### 3.4. Denunciation

A sentence may be imposed in order to express society's abhorrence of the crime committed. Denunciation is sometimes seen as a separate aim of the criminal law.[20] It is hard to see, however, what denunciation adds to the other aims of punishment, particularly retribution and deterrence, and what circumstances would lead to giving a sentence which could not be justified by one of the other aims of the criminal law.[21] It has been noted that, despite negative research findings, denunciation constituted justification for sentencing in England, though the Australian Law Reform Commission did not consider it to be a legitimate sentencing aim. Even so, the commission recommended that one of the purposes for which a sentence might be imposed was to allow the court to denounce the conduct of the offender. The *Sentencing Act* 1991 in Australia largely adopted this recommendation and provides that a sentence may be imposed to manifest the denunciation by the court of the offender's conduct.[22] It would be better to regard denunciation as a side effect of sentencing rather than a justification for it.

[19] Pollard C, 2000. 'Victims and the Criminal Justice system: A New Vision' *Crim LR* 5
[20] Morris A and Gelsthorpe L, 2000. 'Restorative Justice under the Crime and Disorder Act 1998' *Crim LR* 18
[21] Pollard C, 'Victims and the Criminal Justice system: A New Vision' [2000] *Crim LR* 5 at 5-7.
[22] ibid

### 3.5. Restoration

This purpose of punishment aims to pay greater attention to the position of the victim, by getting offenders to face up to the harm they have inflicted. A degree of community participation is involved with meetings which may contain support groups both of the defendant and the victim. Recommendations emerging from such meetings may be taken into account by the sentencing judge, and the community representatives may be involved in seeing that the defendant complies with conditions which may be laid down in the sentence. While the aim is rehabilitative and reparative rather than retributive, some element of deterrence may emerge from the pursuit of this aim of punishment.

Since one aspect of this aim is to replace prison with community based sentences some fairly serious offences such as robbery at knife-point may be covered.[23] There is more ambivalence about the suitability of this aim of punishment and its attendant procedures to cases of sexual offences and domestic violence.[24]

## 4. EXAMINATION OF THEORIES

### 4.1. DETERRENCE THEORY

Proponents of deterrence believe that people choose to obey or violate the law after calculating the gains and consequences of their actions. Overall, however, it is difficult to prove the effectiveness of deterrence since only those offenders not deterred come to the notice of law enforcement. Thus, we may never know why others do not offend.

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[23] ibid

[24]Sherman LW and Strang H, 1996. *Policing Domestic Violence: The Problem Solving Paradigm* <http://www.aic.gov.au/rjustice/rise/sherman-strang.pdf>

### 4.1.1. GENERAL AND SPECIFIC DETERRENCE

There are two basic types of deterrence—general and specific. General deterrence is designed to prevent crime in the general population. Thus, the state's punishment of offenders serves as an example for others in the general population who has not yet participated in criminal events. It is meant to make them aware of the horrors of official sanctions in order to put them off committing crimes. Examples include the application of the death penalty and the use of corporal punishment.

Since general deterrence is designed to deter those who witness the infliction of pains upon the convicted from committing crimes themselves, corporal punishment was traditionally, and in some places is still, carried out in public so that others can witness the pain. Although outlawed in the United States, public punishment is still used in other countries. For instance, in August 2001, Nigeria introduced *shari'a,* or Islamic law, that allows the application of corporal punishment. That same month, Iran sentenced 20 people to be caned for consuming alcohol. In November 2001, Saudi Arabia lashed 55 youths for harassing women. Likewise, Human Rights Watch reports that under Saddam Hussein's regime in Iraq, those who violated military orders or committed other crimes could be punished by amputation of arms, legs, and ears. Finally, in England and the United States, hangings were once carried out in public. The public and family members were allowed to attend so that they could see what happened to those who broke the law. Today, some advocates call for televised executions as a way of deterring murder.

Specific deterrence is designed—by the nature of the proscribed sanctions—to deter only the individual offender from committing that crime in the future. Proponents of specific deterrence also believe that punishing offenders severely will make them unwilling to reoffend in the future. A drunk driver, for example, would be deterred from drinking and driving because of the unpleasant experience he or she suffered from being arrested, or having his or her license taken away or his or her car impounded. The state must apply enough pain to offset the amount of pleasure derived from drinking.

### 4.1.2. EARLY CLASSICAL PHILOSOPHERS OF DETERRENCE THEORY

The deterrence theory of punishment can be traced to the early works of classical philosophers such as Thomas Hobbes (1588–1678), Cesare Beccaria (1738–1794), and Jeremy Bentham (1748–1832). Together, these theorists protested against the legal policies that had dominated European thought for more than a thousand years, and against the spiritualistic explanations of crime on which they were founded. In addition, these social contract thinkers provided the foundation for modern deterrence theory in criminology.

#### *4.2.1.1. Thomas Hobbes*

In *Leviathan,* published in 1651, Hobbes described men as neither good nor bad. Unlike religious philosopher Thomas Aquinas, who insisted that people naturally do good rather than evil, Hobbes assumed that men are creatures of their own volition who want certain things and who fight when their desires are in conflict. In the Hobbesian view, people generally pursue their self-interests, such as

material gain, personal safety, and social reputation, and make enemies without caring if they harm others in the process. Since people are determined to achieve their self-interests, the result is often conflict and resistance without a fitting government to maintain safety.

Hobbes also pointed out that humans are rational enough to realize that the self-interested nature of people would lead to crime and inevitable conflict due to the alienation and exclusion of some members of society. To avoid this, people agree to give up their own egocentricity as long as everyone does the same thing approximately. This is what Hobbes termed the social contract. To avoid war, conflict, and crime, people enter into a social contract with the government so that it will protect them from human predicaments. The role of the state is to enforce the social contract. Hobbes indicated that if one agrees to the social contract, that individual authorizes the sovereign to use force to uphold the social contract. But crimes may still occur even if after governments perform their duties. In this case, Hobbes argued that the punishment for crime must be greater than the benefit that comes from committing the crime. Deterrence is the reason individuals are punished for violating the social contract, and it serves to maintain the agreement between the state and the people in the form of a workable social contract.

*4.2.1.2. Cesare Beccaria*

Building on the ideals of the social contract philosophers, in 1764, Cesare Bonesana, Marchese Beccaria, published his treatise, *Dei Delitti e delle Pene* (*On Crimes and Punishments*), in which he challenged the rights of the state to punish

crimes. He followed Hobbes and other 18th-century Enlightenment writers that laws should be judged by their propensity to afford the "greatest happiness shared by the greatest number".[25] Since people are rationally self-interested, they will not commit crimes if the costs of committing crimes prevail over the benefits of engaging in undesirable acts. If the sole purpose of punishment is to prevent crime in society, Beccaria argued[26], "punishments are unjust when their severity exceeds what is necessary to achieve deterrence".[27] Excessive severity will not reduce crime, in other words, it will only increase crime. In Beccaria's view, swift and certain punishment are the best means of preventing and controlling crime; punishment for any other reason is capricious, superfluous, and repressive.

Beccaria and the classical theorists believed that humans are rational beings with free will to govern their own decisions. Indeed, he emphasized that laws should be published so that people may know what they represent—their intent, as well as their purpose. Basing the legitimacy of criminal sanctions on the social contract, Beccaria called laws "the conditions under which men, naturally independent, united themselves in society".[28] He was against torture and secret accusations, and demanded they be abolished. Furthermore, he rejected the use of capital punishment and suggested that it be replaced by imprisonment.

According to Beccaria, jails should be more humane and the law should not distinguish between the rich and the poor. Judges should determine guilt and the application of the law, rather than the spirit of the law. Legislators should pass laws that define crimes and they must provide specific punishments for each

[25] Beccaria, C. 1963. *On crimes and punishments* (introduction by H. Paolucci, Trans.). New York: Macmillan. p.9
[26] ibid
[27] ibid
[28] Ibid p.14

crime. To have a deterrent value, punishment must be proportionate to the crime committed. Finally, Beccaria argued that the seriousness of crimes should be based on the extent of harm done to society. As an advocate of the pleasure-pain principle or hedonistic calculus, Beccaria maintained that pleasure and pains are the motives of rational people and that to prevent crime; the pain of punishment must outweigh the pleasure received from committing crime.

*4.2.1.3. Jeremy Bentham*

Jeremy Bentham, a contemporary of Beccaria, was one of the most prominent 18th-century intellectuals on crime. In 1780, he published *An Introduction to the Principles of Morals and Legislation,* whereby he proclaimed his famous principle of utility. He argued that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure".[29] Bentham believed that morality is that which promotes "the greatest happiness of the greatest number"[30]a phrase that was also common to Beccaria. The duty of the state in Bentham's view was "to promote the happiness of the society, by punishing and rewarding"[31].

Like Beccaria in Italy, Bentham was troubled by the arbitrary imposition of punishment and the barbarities found in the criminal codes of his time in England. Noting that all punishment is mischief, he maintained, also, that all penalties, per se, are evil unless punishment is used to avert greater evil, or to control the action of offenders. In short, the object of the law is to widen the happiness of the people by increasing the pleasure and lessening the pain of the community.

[29] Bentham, J. 1948. *An introduction to the principles of morals and legislation* (with an introduction by W. Harrison, Ed.). New York: Macmillan. p.25

[30] Moyer, I. L. 2001. *Criminological theory: Traditional and nontraditional voices and themes.* Thousand Oaks, CA: Sage. p.26

[31] Op cit. note 29 p.31

Punishment, in excess of what is essential to deter people from violating the law, is unjustified.

### 4.1.3. SEVERITY, CERTAINTY, AND CELERITY OF PUNISHMENT

The theory of deterrence that has developed from the work of Hobbes, Beccaria, and Bentham relies on three individual components: severity, certainty, and celerity. The more severe a punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts. To prevent crime, therefore, criminal law must emphasize penalties to encourage citizens to obey the law. Punishment that is too severe is unjust, and punishment that is not severe enough will not deter criminals from committing crimes.

Certainty of punishment simply means making sure that punishment takes place whenever a criminal act is committed. Classical theorists such as Beccaria believe that if individuals know that their undesirable acts will be punished, they will refrain from offending in the future. Moreover, their punishment must be swift in order to deter crime. The closer the application of punishment is to the commission of the offense, the greater the likelihood that offenders will realize that crime does not pay.

In short, deterrence theorists believe that if punishment is severe, certain, and swift, a rational person will measure the gains and losses before engaging in crime and will be deterred from violating the law if the loss is greater than the gain. Classical philosophers thought that certainty is more effective in preventing crimes than the severity of punishment. They rejected torture as a means of eliciting confessions, and the death penalty as an effective method for punishing

murderers and perpetrators of other serious crimes. Capital punishment is beyond the just powers of the state

### 4.1.4. MODERN DETERRENCE RESEARCH IN CRIMINOLOGY

The deterrence hypothesis remains a key intellectual foundation for Western criminal law and criminal justice systems. Today, the idea that sanctions deter criminals has influenced penal sanctions in death penalty cases and other areas of criminal sentencing. Adherents of the deterrence theory have consistently favored policies such as “three strikes” laws, establishment of more prisons, increased penalties, longer sentencing severity, certainty of conviction and sentencing, and the hiring of more police officers. Together, these policies would control and reduce the recidivism (a return to the life of crime) of offenders who have been convicted, and curtail the participation in crime by future offenders.

Yet, despite the merits of the deterrence argument, and until 1968 when criminologists started again to test the deterrence hypothesis, empirical measurement of the theory have been scant. Prior to the 1960s, studies focused only on the philosophical ideas of the deterrence doctrine, its humanitarian orientation, and its implications for punishment. One popular research endeavor that actually tested the deterrence theory in 1968 concluded that homicide might be deterred by both certainty and severity of punishment. In research conducted in 1969, criminologist Charles Tittle found support for the theory and concluded that that the certainty of imprisonment deters crime but that severity can only deter crime when certainty of punishment is reasonably guaranteed. Other studies in the 1970s have also challenged the validity of the earlier empirical

findings, arguing instead that variations in police record keeping could account for the results on certainty.

When it comes to celerity of punishment, prior and current studies have generally avoided its inclusion in deterrence measurement. Most important, much of the empirical analysis of the deterrence value has been focused on whether capital punishment deters potential offenders from engaging in homicide acts. Collectively, the empirical results of the death penalty studies have concluded that the death penalty does not deter murder.

### 4.2. The Retributive Theory of Punishment

An essential characteristic of the retributive theory of punishment is that it conceives of punishment as harm, as suffering, as "retribution" for the evil caused by a crime. Therefore, the imposition of punishment is justified not because of a future purpose, but for the value of punishing the past. Punishment is a criminal's "just deserts".[32] And, at the same time, retribution, by its very definition, represents the idea of institutionalized vengeance.[33] One might argue that this theory was sufficiently justified by its defenders, the most notorious being two German philosophers, Immanuel Kant[34] and Georg W.F. Hegel.[35]

Immanuel Kant was in favor of the death penalty, especially for the crime of murder, and he justified it on the ground of just retribution. His thoughts on the

[32] The idea of just deserts is one of the most important aspects of retribution. It represents the belief of deserving punishment and what is a fair treatment for criminal offenders.

[33]The State, as the guardian of moral and justice, is the responsible of inflicting punishment.

[34] Kant, I. 1797. *The metaphysics of morals*, [in:] *Practical Philosophy*, ed. M.J. Gregor, Cambridge 1996, pp. 353–604, *The Cambridge Edition of the Works of Immanuel Kant*, Cambridge Books Online: http://dx.doi.org/10.1017/CBO9780511813306.013 [access: 15.07.2018].

[35] Hegel, G.W.F. 1979. *Philosophy of Right*, London.

death penalty can be exemplified with the following passage, from his book *The Metaphysics of Morals*:

> What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any underserved evil that you inflict on some-one else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal form yourself. Only the law of retribution can determine exactly the kind and degree of punishment.[36]

From the above remarks, it is fair to assume that for Kant just retribution requires the death penalty for the crime of murder. Nonetheless, we may take into account the fact that Kant lived between 1724 and 1804, and perhaps his ideas were more progressive than may seem to us nowadays.[37] Anyhow, the fact is that the death penalty is still a plausible punishment in the present day and the idea of retribution is central to that plausibility.

Both Kant's notion of just retribution and its role in the retributive theory of punishment are not isolated from other defenders of retribution that share the same basis and understandings. As a matter of fact, it is possible to establish the principle that represents the main aspects of a retributive theory of punishment, i.e. the following: "All and only those who commit legal offences may justly

[36] *op. cit. note 34*

[37] For example, Kant's rejection of torture-executions might be considered as progress in the context of his lifetime, when cruel executions still took place. This is the view of Potter, N. T. Jr., *Kant and Capital Punishment Today*, "The Journal of Value Inquiry" 2002, no. 36, pp. 267–282.

receive punishments so long as the punishments are in proportion to the seriousness of the respective crime".[38]

The above mentioned principle can also be extracted from Hart's Model of Retributivism.[39] and even though there is no absolute consensus on the definition of retributivism, the following premises are almost always present in retributive theories of punishment: a) A person may be punished if and only if he has voluntarily done something wrong; b) The punishment must match, or be equivalent to, the wickedness of the offence; c) The justification for punishing persons is that the return of suffering for moral evil voluntarily done is itself morally good.[40]

In this context of classification, we may refer to the above premises as the principle of responsibility, the principle of proportionality and the principle of just retribution, or just requital.[41] Looking closely at this scheme and the theory that it embodies, one can deduce that it excludes the consequences of punishment from analysis, only focusing on the immediate deprivation that shall be inflicted on the criminal,[42] the latter being a person who had voluntarily done something wrong.[43]

Perhaps the most evident principle that distinguishes the retributive theory from the other theories of punishment is the principle of just requital, which aims to justify penalties in themselves. As was mentioned before, penalties are not justified by some future good they may bring to society, through deterrence, or

[38] Sheid,D. E. 1983. *Kant's Retributivism*, "Ethics", vol. 93, no. 2, pp. 262–282.
[39] Hart, H.L.A. 1968. *Punishment and Responsibility*. *Essays in the Philosophy of Law*, Oxford
[40] Ibid. p. 231
[41] Bedau, H. A. 1978. *Retribution and the Theory of Punishment*, "The Journal of Philosophy", vol. 75, no. 11, pp. 601–620.
[42] Lessnoff, M. 1971. *Two Justifications of Punishment*, "The Philosphical Quarterly" 1971, vol. 21, no. 83, p. 141.
[43] This is one of the points on which the retributive theory contrasts with the utilitarian theory of punishment.

by some good brought to the victim by compensation, or even to the criminal through reformation. Similarly, penalties are justified only on the grounds that they are morally good in themselves, regardless of any future benefit or loss.

This discussion grows in importance when we analyze the most severe of punishments, capital punishment. Firstly, we must discuss the idea of proportionality and its aspects, since it is a principle present in most legal systems in the world.[44] Taking into account the general concept of proportion: what would be a proportional penalty for murder? If, to go further into the retributive theory of punishment, we may ask what would be a "just requital" or, in other words, what amount of suffering would be enough for somebody that committed such crime?[45]

Well, according to retribution theories, death is definitely one of the options, if not the best one. It recalls the ancient *Lex Tallionis*: "An eye for an eye." Clearly a tempting option for a lot of people, including lawmakers, as it appeals to the human emotion of vengeance. However, we should definitely not assume that death is the answer to death, because once we do that, we may as well assume that robbery is the answer to robbery and that rape is the answer to rape. This line of thinking must be rejected, once it threatens the principles and rights that the criminal law must respect, including, of course, the right to life. This is a basic human right, enshrined in the Universal Declaration of Human Rights[46] and solidified as a fundamental right in many constitutions in the world. The death penalty is the ultimate denial and violation of that right.

[44]Even though it may be interpreted in different ways, proportionality is a concept familiar to any jurisdiction.

[45]The death penalty may be carried out in various ways, including electrocution, hanging, fatal injections, and others. When we discuss the death penalty from the point of view of retribution, we must ask ourselves not only if the death penalty is deserved, but how it should be executed, how cruel should it be.

[46] UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, Article 6.

### 4.3. Abolitionist versus retentionist arguments

One of the major arguments against capital punishment is that it does not deter criminality. The retentionists, on the other hand, reject the deterrence-only theory of criminal justice, insisting that the retributive value of capital punishment should also be considered. Looking at both positions critically, we must concede that there is no conclusive statistical demonstration that capital punishment is a better deterrent than are other alternate punishments. However, deterrence is less than decisive for either side. Dismissing capital punishment on the basis of non-deterrent value would require the elimination of all prisons as well because they do not seem to be any more effective in the deterrence of crime. If we execute murderers and there is in fact no deterrence effect, we have killed a bunch of murderers. On the other hand, if we fail to execute murderers and doing so would, in fact, have deterred other murderers, we have allowed the killing of a bunch of innocent victims. Suffice it to say that capital punishment is a retributive justice, and no direct correlation to murder rates can be logically applied with respect to its deterrent value. Actual statistics about the deterrence value of capital punishment are not available because it is practically impossible to know who may have been deterred from committing a crime on its account. One thing is very clear, most potential criminals would think twice before committing a capital crime if they know their lives are at stake.[47] It is reasonable, therefore, to believe that capital punishment is useful for the formation of the internal restraints so necessary as to control crime and thus has a strong deterrent effect on presumptive criminals.

[47] Bailey, W. C 1994. " Murder, Capital Punishment, and Deterrence. *Journal of Social Social Issues* 29: 1-2.

Another criticism raised against capital is that it is inhumane and barbaric and thus can never be accepted in a civilized society.[48] It is maintained that putting an end to someone's life is cruel and unusual form of punishment. Beccaria, an early abolitionist, believes that capital punishment is inherently barbaric, representing the "war of a nation against a citizen whose destruction it judged to be necessary or useful".[49] The retentionists, on the other hand argue that the crime of murder is inhumane and uncivilized, and thus, insist that punishment must fit the crime. Retentionists maintain that by murdering, the offender has so dehumanized himself that he cannot remain in the community of the living. The social recognition of his self-degradation through deliberate assault on the victim's life is the punitive essence of execution.[50] Hence, it would amount to injustice for the state to impose identical unpleasantness for unidentical offences such as awarding life sentences for culpable homicide in place of death penalty. In fact, it can be reasonably argued that supporting armies and waging war is far more barbarous than the death penalty. Therefore, one find it hypocritical that the same countries who have abolished capital punishment simply because it is barbaric" to defend public safety in such a way,[51] are at the same time prepared to enforce political power and defend their territorial claims through infinitely more violence and bloodshed than the capital punishment would ever require. It seems to one that those nations are just trying to rationalize their apathy and scorn for any institution that does not serve their self-serving and political interests.

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[48] Van den Haag, E. 1975. *Punishing Criminals: Concerning a Very Old Painful Question* New York: Basic Books.
[49] Beccaria, C. 1764. *Of Crimes and Punishments.* Indianapolis: Bobbs-Meril.
[50] Op cite note 49
[51] Jayewardene, C. 1973. *The Penalty of Death*. New York: J.B. Lippincott.

When the society ignores her moral and legal duty to defend the safety and security of its decent and law abiding citizens and leaves them at the mercy of violent criminals, they are not being civilized "but negligent and permissive. It is based on a vague humanitarian philosophy that makes fetish of the idea that the taking of life is barbaric under every circumstance.

The abolitionists also contend that it is wrong for the state to kill in order to show that killing is wrong.[52] They argue that two wrongs do not make a right; therefore executions are state sanctioned murder. They posit that no one, not even the state has the right to play God. In response to this, it is argued here, that it is wrong to label capital punishment "state sanctioned murder". The dictionary meaning of the term 'murder' is the unlawful killing of a person with malice and afore thought. Logically, the term 'murder' cannot be used to describe executions since the death penalty is something prescribed by the law. To do so is an obvious abuse of semantics. Equating execution with murder is like equating incarceration with kidnapping. Consequently, the abolitionist argument, here, is guilty of aiming a death blow against the legal system as such. If a state governed by just laws lacks the right to impose proportionate punishing sanctions against criminals in order not to 'copy' the criminal act, then the state would, as a consequence, have to dissolve. The abolitionist argument, here, is in other words, anarchist by its nature and breathes an undermining hate toward every punishing authority. The state gives soldiers legal rights to kill in war which we do not call murder. Similarly, the police in an extreme emergency situation kill but we do not call it murder, if a citizen in an extreme situation of self-defence kills, it is not called

[52]Hertzberg, C. 1992. *Pre-Meditated Execution*. New York Times. 18: 49

murder. But when the state in the interest of public safety executes a murderer we also call it murder. This creates an irrational feeling around such a penal sanction. It is, therefore important to use the right word in the right context.

Another argument of the abolitionists is that we should value all human life even the most despicable ones. Hence, capital punishment is deemed to be a desecration of the sacredness of human life. In response, it is contradictory to oppose capital punishment on the basis of the sanctity of human life when murderers are those who display the very least reverence for human life. Obviously, those who descend into the mental maelstrom of murder tend to be precisely those who have left reason and common sense behind. Any crime which involves bloodshed is a bestial act which reduces the worth of the culprit to that of a beast. Therefore, the abolitionists have a lot of gall claiming that they are motivated to oppose the death penalty by the above reason when the only people they are interested in protecting are those who display the very least reverence for it.

Kant[53]holds that murderers deserve equal or exact proportion of punishment with the severity of their crime in accordance with the principle of retribution. He maintains that capital punishment far from degrading the convict, affirms his humanity, his rationality and responsibility for his actions.

The risk of executing the innocent is another major objection to capital punishment. It is argued that a miscarriage of justice that results in the execution of an innocent person cannot be undone.[54] There is no denying the fact that the innocent could be executed in error owing to some human factors like prejudice,

[53]Kant, I. 1991. *The Philosophy of Law*. Trans. W. Hastie. Edinburgh: Clark.
[54] Amnesty International 1979. *The Death Penalty*. London. Amnesty International Publications.

conspiracy and false evidence. However, where the necessary legal principles are followed the risk of the innocent being executed can almost be avoided. These include ensuring that the burden of proof is very high so as to prove the guilt of accused beyond all reasonable doubt; making room for experienced defence counsel as well as the placement of necessary appeals. The state should take every reasonable precaution, including the utilization of criminal technologies such as the DNA tests against the danger of error.[55]

The abolitionists also contend that there is an alternative to the death penalty in life imprisonment without parole. They maintain that paying the ultimate price extinguishes possibilities for reform and rehabilitation for the person executed as well the opportunity for him to make creative compensation for the evil he/she has done. This proposal fails to take into account all the terror criminals unleash on others (including murders they commit) within the prison wall and also when they kill upon release or escape from prison. As long as the criminal lives, there is always a chance that he will strike again. It is also quite clear that our prisons are far from being good reformatory centres as our experience in Nigeria have shown. In view of this, the criminal justice system should be structured in such a way that the murderer is not given a chance to repeat his crime. For a society that values public safety, there is no better way to deal with the crime of murder than through capital punishment. Once again, this favours the idea of its retention.

In addition to the foregoing contentions, abolitionists argue about the futility of combating violence with 'violence', that you cannot fight fire with fire.

[55] Sherill, R. 2001. *Death Trip: The American Way of Execution*. The Nation US 8 Jan: 1-4

Labeling capital punishment a form of violence as Etuk opines,[56] in order to rationalize its abolition has no foundation in the real world. It is just like calling the dog a bad name in other to hang it. Law enforcement and punishment, which is to crime as water is to fire, are clearly distinguishable from the act of violence.

Finally, the most clichéd abolitionist argument is that executing a criminal will not bring back his victim. Therefore, the murderer should not be punished as fit the crime. In response to this, mere execution is not the purpose of capital punishment. Justice is all about enforcing the consequences of one's action to endorse personal responsibility. The argument of the abolitionists, here, appears weak in that it ignores the law of natural justice. Suffice it to say that by killing, the murderer has upset an ontological balance which needs to be balanced through appropriate restitution.

## 5. CONCLUSION AND RECOMMENDATIONS

Punishment has been recognised since the foundation of human society. The present theories of punishment, retribution and deterrence have evolved from primitive times when blood feud and vengeance were the forerunner of retribution. Punishment philosophies underwent changes to the point where they eventually focused on the needs of society in terms of protection from crime, and the needs of the individual who deserved to be punished, in terms of his reformation. The classical, neoclassical and positivist schools all had an impact on the modern philosophies of punishment.

The theories of punishment that have evolved are the absolute theory which embodies the concept of retribution, the relative theories which present

[56]Etuk, U. 2000. Capital Punishment as Violence. *SOPHIA* Vol.2, No.1:1-18.

deterrence, reformation and prevention as the aims of punishment. There is also the integrative theory which takes into account the offender, society and the interests of justice and integrates it in the consideration of appropriate sentences. The roles of retribution and deterrence have historical recognition. They are important considerations in the sentencing process. It has become evident from the foregoing discussion however that all these theories, although presented by their protagonists as entities capable of functioning independently, need to be considered together for purposes of determining an appropriate sentence. Although the focus of this work has been on retribution and deterrence it must be stated that the other purposes of punishment also each play a role, albeit differently. It is true to say that the operations of retribution and deterrence are mutually complimentary.

The objectives and justification of the theories are reflected in the philosophical rationales of the various scholars. They underline the role of retribution primarily to inflict punishment as deserved, i.e. proportionate to the gravity of the offence to eliminate the need for private revenge by those harmed by crime and to maintain the social order. They underline the role of deterrence on the basic premise that criminals as well as other people who may be tempted to transgress the laws can be deterred by the fear of being caught and punished.

Both these theories are subjected to attack, retribution by those who, in particular, favour rehabilitation, and who maintain that "treatment" and not punishment ought to be administered to an offender. It may here be mentioned that the Viljoen Commission[57] affirmed retribution as a fundamental criterion of a

[57] *Report of the Commission of Inquiry into the penal system of the Republic of South Africa* (1976) RP 78/1976 PretoriaGovernment Printer at 53

sentence in the South African legal system apart from its quoted affirmation by the courts. What may be considered as the best treatment for the offender may conflict with the need to deter others if rehabilitation were to be employed as the only response to crime. As to deterrence the major objections highlighted above have been that there is a lack of empirical evidence in support of ·the efficacy thereof and that it is unjust to punish an offender excessively as an example to deter others. To the first objection the response has been that the lack of empirical evidence of deterrence must not be regarded as proof of evidence of inefficacy of deterrence as the empirical data does not provide an answer as to what the crime rate would have been but for the deterrent measures. With regard to the latter objection, relating to exemplary sentences, In S v. Maseko, the court recognises the propriety thereof but have placed a limitation on grossly disproportionate sentences.[58]

In the light of the foregoing discussions, it would be essential to correct the perceptions of government impotence in the face of escalating crime. It would be essential to take steps that will ensure that deterrence and retribution deliver to their full capacity. It is a fact that if the public were asked as to what the courts should impose as a sentence upon a rapist, a great number of them would, without hesitation, demand: "castrate the brute." In this example the courts could respond in one of two different ways. They could give effect to the horrendous demand and descend into disrepute in the eyes of the civilized world or ignore the expressed public expectations and suffer the courts to be unacceptable. Here, it is only a circumspect modification of the expected retributive and deterrent punishment that would be accepted as a reasonable punitive response. It would

[58] 1982 (1) SA 99 (A) 102

not necessarily be as demanded by the public. In this regard it is urged that society's reasonable expectations be recognised by the rulers when effecting penal reforms, particularly if they impact on retribution. Full recognition of society's expectations with regard to retribution is essential if vengeance is to be stifled.

It is essential that greater publicity be given to deterrent and retributive penal measures imposed by the courts. With regard to deterrence, there is no doubt that the communication of the threat of punishment is of significant importance to its effectiveness. Consideration could be given to providing an official either on the establishment of each Magistrate's office or for a cluster of, say, 10 Magistrates' offices especially assigned the duty to provide publicity in the interests of deterrence and retribution. Then the constructive roles of deterrence and retribution will not be lost. In this regard, it is necessary that "…. the public should be much more aware of what is being done in its name than is the situation at present."[59] This is important for the process of ensuring acceptability of the courts.

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[59] Vander Merwe, Op cit note 2

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