H. L. A. Hart on Philosophical and Legal Conception of Punishment

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Abstract

The aim of punishment, for H. L. A. Hart, should be assessed from the utilitarian perspective - to deter and reform the criminal. However, the question as to who should be punished, he claims, should be answered partly from retributivist and partly from utilitarian perspectives: that only those who have committed crime should be punished (those who have the required mental element); and punishment should be forward-looking in the sense of intending to reform the criminal. A critical analysis of Hart's philosophical and legal understanding of punishment reveals that it is instructive in the way he clarifies punishment as a justified extraction of fine from someone who has over-indulged his will; hence, punishment seeks to restore the balance that was tipped by the action of the criminal in relation to his victim. This article appreciates Hart's incisive arguments, but finds out that Hart's attempt to avoid the pain element in punishment has not been successful. Furthermore, Hart seems to have forgotten that the criminal does not only pay his victim, but also returns the stolen advantage to all those who would have been criminals but restricted themselves.

Introduction

In his article, "Philosophy and Wisdom in Punishment and Reward," C. J. Ducasse writes that punishment "is inherently of a sentient being, and for, i.e., because of its doing or having done 'something wrong,'" (Ducasse 1968: 7). The word 'punishment' may not necessarily be used only of sentient being; in a wider sense, "to punish means simply to cause damage, destruction, or hardship to what undergoes it, which need not, but can be, a sentient being," (Ibid.) One can say that the rains 'punished' the crops in tropical Africa. But against the background of 'punishment' in the first sense, one employs phrases such as 'punishment for murder, insolence, perjury, wrongdoing of some kind' and so on. In this light, one can say that punishment is a "purposive infliction of pain, loss, suffering, deprivation or other hardship on the under-goer: such hardship being inflicted because the under-goer is known by the de facto under ruler to be doing, or to have done, some particular thing the latter disapproves. The immediate purpose of inflicting the hardship is to cause the wrongdoer to desist from his present wrongdoing, and/or to deter him from repeating in the future the disapproved thing he is known to be doing or to have done," (Ibid., 8). Punishment, therefore, is a

purposive activity – performed either for its own sake (autotelic) or "for the sake of some effect which the activity causes" (heterotelic). A purposive activity is differentiated from a mechanical one in that, whereas a purposive activity is rooted in conation or a craving partly or wholly, a mechanical activity does not in part or whole consist of a conation.

According to Ducasse, to qualify an activity as punitive, the following characteristics must obtain: "(a) It must have power to inflict on some entity capable of being punished an experience disliked by the latter. (b) It must be capable of purposive activity, not blind (like the neonate's) but cognizant of what it aims to accomplish,"(Ibid., 10). On the other hand, the following necessary and sufficient conditions must obtain to make an entity capable of being punished:

> 1. The entity must be a conscious being; 2 It must be capable of experiences it dislikes; 3 It must be 'guilty,' i.e., held to be 'wrong,' by R who de facto has power to make the entity undergo experiences it dislikes; 4 The entity must be such that infliction upon it of experiences it dislikes (if the infliction is wise in timing, in frequency, in kind, and in degree of severity) causes the entity to stop such present wrongdoing, and deters the entity to some extent from repeating it in the future, (Ibid., 11).

Summarily, punishment is a purposive activity intended to inflict pain for wrongdoing, and deter one from doing, in the future, the act for which pain was inflicted; it must be administered by someone who has the authority, and the one to which it is administered is judged 'guilty.'

Two general positions have been adopted in treating punishment, especially in articulating the end of punishment: some say it is to punish a person for moral wrong doing, and others say it is to deter him and others from doing the act in the future. H. L. A. Hart steps in here to clear away some intellectual rubble in the way theories of punishment has been conceived. In Hart's thinking,

> What is needed is the realisation that different principles (each of which may in a sense be called 'justification') are relevant at different points in any morally acceptable account of punishment. 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? However severely may we punish? In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most other social institutions, the pursuit of one aim

> may be qualified by or provide an opportunity, not to be missed, for the pursuit of others, (Hart 1968: 3).

H. L. A. Hart was born in 1907. His parents were of Polish and German descent, (See Hart 1998:114). Hart entered Oxford University in 1926 to study Greats, which included Philosophy. He did not think that he had the capacity for academic life; hence he took to legal practice afterwards, and became a successful barrister in 1930; no wonder at the time he turned "down the offer of a job to teach philosophy at New College in 1937, and if it had not been for the interruption of the war, he would . . . have remained in the legal profession. Away from the Bar for four years and moving politically towards the Left, he reflected on what he was doing with his life," (Ibid.,110). During the war, in 1940, he joined the MI5 -- a British Government secret Intelligence Service, (See Ibid., 109). And while working in the MI5, Hart was convinced by his colleagues - Gilbert Ryle and Stuart Hampshire – to come back to academic life; hence in 1945, according to Jennifer Hart, Hart decided to accept in an opportunity as a philosophy don at Oxford, (See Ibid). In fact, between 1945 and 1953 when Hart was elected to the Chair of Jurisprudence in Oxford University. In his inaugural lecture, "Ascription of Responsibility and Rights," he argued that philosophy could be tutor to lawyers, as the new philosophy at the time – linguistic philosophy – could be used to clarify legal concepts that puzzle the legal profession, while fighting reductionism in the elucidation of legal concepts. Hart was convinced that the penetrating insight of philosophy should guide our analysis of concepts. One of such concept is 'punishment.'

This article seeks an understanding and an evaluation of Hart's contribution to the philosophy of punishment. As M. D. Bayles rightly asserts, Hart "delves deeper into the moral principles involved in punishment than almost any other previous legal scholar. His account has spurred others to more thoughtful reflection and analysis than had previously been given," (Bayles 1992:253).

Hart's Assessment of Utilitarian and Retributive Theories

Two major theories have traditionally dominated the discussion of punishment, namely: the utilitarian and the retributivist's notions. For the utilitarian, the criminal justice is there to reduce crime, which is achieved by taking a coercive action against selected individuals, usually those who have broken the law and who can be held personally responsible, (See Galligan1981: 146). And by so doing, the utilitarian thinks that people will be deterred from committing crimes. What justifies punishment in this scheme is the deterrence of people from committing crimes. One is punished for "doing the offence, not for being an offender," (Knight 2010: 5).

One recalls that for Bentham, deterrence works in two ways: on the part of the wrong doer, it restricts his will and reforms him and physically disables him; on the part of others, punishment operates by example since others' wills are influenced,

(See Bentham 1978: footnote to Ch. XIII, § 2, no. 2, 170 - It is good to note that modern utilitarians present their account of punishment in a more distinctive manner than Bentham did. For example, they distinguish among special deterrence, general deterrence and reform). Thus, the punishment of the wrongdoer is not itself part of the general aim or purpose of punishment within the utilitarian scheme; it is rather aimed at deterring people from committing crimes; and where the will cannot be deterred, as in the case of infants and mad people, Bentham argues that punishment will be considered inefficacious, (Ibid., Ch XIII, § 9ff, 173-175).

One significant merit of the utilitarian theory, according to Hart, is that, first, it does not focus on the guilt of the offender, (like its rival theory -- the traditional version of retributivism), so as to measure out to the offender an amount of penalty that is commensurate with his crime. It is forward looking, that is, it aims at the prevention of crime and even for the reformation of the criminal. Second, it recognises the fact that only those who are responsible for their acts are to be punished; hence Bentham's elaboration of excusing conditions. All punishment, according to Bentham, is evil or mischief; since the general object of law is to augment happiness of the community, the recognition of excusing conditions concurs with the general objective of utilitarian legislation: to increase happiness and minimise pain, (Ibid., Ch. XIII, §1-3, 170-171).

It is morally sound to punish only those who have voluntarily committed an offence. The reason Bentham gives for punishing them is that the threat of punishment will not operate on them. On the other hand, the reasons why we should not punish the infant and mad people, for example, is not because we think they have not broken the law responsibly, as one would have thought. In Bentham's thinking, it is because the threat of punishment will be inefficacious if applied to them. Granted that the threat of punishment may not operate on this class of people as Bentham claims, but it may still secure a higher measure of conformity to law on the part of normal persons, on utilitarian grounds, than is secured by the admission of excusing conditions, (See Hart 1968: 19). Since the utilitarian end of punishment is to deter people, the utilitarian claims then that it is possible that actual punishment of those who act unintentionally or in some other morally excusing manner may have utilitarian value in its effects on others. The recognition of the principle of responsibility should play a major role in punishing offenders because it remains in principle morally sound to punish only those who have voluntarily committed the offence they are said to commit. But the reason given for upholding this principle in the Benthamite utilitarian tradition is inadequate and unattractive to Hart.

Whereas the utilitarian sees criminal justice as primarily concerned with reducing crimes, the retributivist sees the punishment of offenders as the dominant purpose of the criminal justice, aimed at achieving social retaliation, (See Vago 2006: 204). The logic of punishment consists in singling out an offender for his offence and

imposing punitive treatment upon him, (See Galligan 1981: 153). In the thinking of retibutivists, punishment "arises out of the demand for justice, and justice is demanded by angry, morally indignant men; its purpose is to satisfy that moral indignation and thereby promote the law abidingness that, it is assumed, accompanies it," (Berns 2005: 43). Retribution, in the retributivist theory, includes both a description of criminal justice (a social principle) and a justification of punishment (a moral principle). As a moral theory, it is thought to be axiomatic that wrongdoers ought to be punished. The fact of one's guilt is the sole justification of the suffering inflicted on one. Hart summaries the three principal claims presented by 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 offence; and (iii) the principle of just requital: it is just or morally good to punish people for voluntarily doing wrong," (Hart 1968: 231).

Hart accepts that it is a welcome idea to insist that only those who have voluntarily broken the law should be punished; but he remarks that, although the law approximates in its doctrine of the mental conditions of responsibility to what the moralist requires for moral blame, it is an approximation and not a complete convergence; hence Hart's argument that voluntariness is not a general requirement for mens rea. In Anglo-American criminal law, the term mens rea is used to designate a collective of mental elements in crime that bear on criminal responsibility. The aim of mens rea in all advanced legal systems is to ascertain that frame of mind or will with which the offender has done what he did. It is not enough to condemn that he did what the law prohibited; hence, Hart writes:

> even if you kill a man, this is not punishable as murder in most civilised jurisdictions if you do it unintentionally, accidentally or by mistake, or while suffering from certain forms of mental abnormality. Lawyers of the Anglo-American tradition use the Latin phrase mens rea (a guilty mind) as a comprehensive name for these necessary mental elements; and according to conventional ideas mens rea is a necessary element in liability to be established before a verdict, (Ibid., 187).

Mens rea has to do with state of mind. In principle, it has to be proved that the state of mind of the accused is a 'guilty' one in order to establish liability. The doctrine of strict liability will be one of those instances where the law has to compromise besides the claim that liability to punishment must be dependent on a voluntary act, (See Ibid., 174-175). The traditional retributivist method of proportion based on equating punishment to the wickedness of a person's offence is simply primitive, Hart insists. Writing about proportion Hart declares that the retributivist feeds on

the notion that "what the criminal has done should be done to him, and whenever thinking about punishment is primitive, as it is often is, this crude idea reasserts itself: the killer should be killed; the violent assailant should be flogged," (Ibid., 161)," a view that will invariably approve of capital punishment, (Rivkind and Shatz 2009: 7-11). This way of conceiving punishment could only lead to absurdity and wickedness in its generalised form. Certainly, we cannot punish theft by-theft or forgery-by-forgery! Therefore, Hart objects to Jerome Hall's view that mens rea is a voluntary doing of a morally wrong act, (See Ibid., 35-36). People are held liable for doing acts prohibited by law, acts that will result in social harm for which they are punished or asked to pay damages, (See Coval and Smith 1986: 84).

The Issues involved in Punishment

How then, in Hart's view, is the issue of punishment to be addressed? Having indicated the utilitarian and the retributivists positions, Hart does not think that the issue of punishment is adequately treated by adopting exclusivist positions. One will be falling into the reductionist trap if the relevant questions are not raised and addressed rationally. 'Punishment,' like other legal terms, needs proper analysis within the legal context. This way of understanding punishment is consistent with Hart's anti-reductionist stand in his jurisprudence. Thus, in talking about punishment and its justification, we must, first, indicate what we mean by 'punishment'; and second, what is the general justifying aim of punishment. Third, given that the institution of punishment exists and it is justified to retain it, the question of distribution of punishment comes to the fore: on what grounds can an individual be justifiably punished? And how much can one be asked to pay back by way of punishment? These are the relevant questions, Hart insists, must be asked and answered.

The Focal and Penumbra Meaning of Punishment: (The First Question)

In defining punishment, Hart subscribes to the view that the standard or central case of punishment includes five elements, namely:

i) It must involve pain or other consequences normally considered unpleasant;
ii) It must be for an offence against legal rules;
iii) It must be an actual or supposed offender for his offence;
iv) It must be intentionally administered by other human beings than the offender;
v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed, (Hart 1968: 5).

These five elements, in the central case, indicate that punishment is a pain administered to one who has broken legal rules. There are also penumbra cases of

punishment apart from the central cases. Such 'sub-standard or secondary' cases of punishment include:

> a) Punishment for breaches of legal rules imposed or administered otherwise than officials (decentralised sanctions); b) Punishments for breaches of non-legal rules or orders (punishments in a family or school); c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorisation, encouragement, control or permission; d) Punishment of persons (otherwise than under (c) who neither are in fact nor supposed to be offenders, (Ibid.)

We cannot just say, according to Hart, that these penumbra cases of punishment are not instances of punishment because they may not be forced into our standard of definition. Thus, he warms against an attitude that can polarise the issues involved in the notion of punishment. Such an attitude may not help us get at the root of the issues involved in treating punishment. Hart does not deny that the cases that fall under punishment in the secondary list are punishment, but they are not punishment strictly administered by officials according to strict legal rules. Well, if they are punishment, whether or not they are strictly bound up with legal rules, the retributivist may say to the utilitarian: why do we not apply them when it will pay to do so, since there might be beneficial consequences in applying punishment to selected even innocent individuals? Hart calls this way of looking at the standard cases a "definitional stop," and an abuse of definition. He writes:

> Not only will this definitional stop fail to satisfy the advocate of 'retribution,' it would prevent us from investigating the very thing which modern scepticism most calls in question: namely, the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence. Why do we prefer this other forms of social hygiene which we might employ to prevent anti-social behaviour and which we do employ in special circumstances, sometimes with reluctance? No amount of punishment can afford to dismiss this question with a definition, (Ibid., 6).

Hart is aware that definitions do help to clarify a subject matter, but his point is that caution should be exercised so that we do not overdo our request for it. This is a fact Hart reiterates in treating the problem of legal concepts explained in exclusively fictional, realist or concessionist terms, (See Hart 1983:21-47). Depending on the type of question one raises, a reductionist-exclusivist position that is oblivious to the operations of analogy or contextual analysis can blur our views as to the other

aspects of the issue, which can be excluded from our own definitional standard. One does not forget Hart's claim that the traditional definition by genus et differentiam is not well adopted to legal concepts, (Hart 1961: 14); hence one needs to elucidate legal concepts within their environment of occurrence, the reason being that legal concepts are not co-extensive with extra-legal concepts.

Elucidation of the General Justifying Aim of Punishment: (The Second Question)
In addressing the question: "what justifies the general practice of punishment?" Hart separates the related question, "why certain kinds of action are forbidden by law and so made crimes or offences?" These two questions can be confused. The latter deals with the aim of criminal legislation which, according to Hart, is "to announce to society that these actions are not to be done and to secure that fewer of them are done," (Hart 1968: 6).

The former question -- what justifies the general practice of government? -- concerns the General Justifying Aim of punishment. Within this ambient, Hart argues that retribution as a feature of the General Justifying Aim, as traditional retributivists conceive it, is inadmissible, that is, retribution simply defined as the application of the pains of punishment to an offender who has committed an immorality, which is seen as wickedness. This is the position Hart criticises in Patrick Devlin (See Delvin 1965: 254-255), who thinks that we should punish people for immoral acts or wickedness, (Hart 1963: 82). Hart claims that such an argument does not separate two distinct questions: "what sort of conduct may be justifiably be punished? And, "how severely should we punish different offences?" Hart argues:

> There are many reasons why we might wish the legal gradation of the seriousness of crimes expressed in its scale of punishment, not to conflict with common estimates of their comparative wickedness. One reason is that such a conflict is undesirable on simple utilitarian grounds: it might either confuse moral judgements or bring the law into disrepute, or both. Another reason is that principles of justice and fairness between different offenders require morally distinguishable offences to be treated alike. These principles are still widely respected, although it is also true that there is a growing disinclination to insist on their application where this conflicts with the forward-looking aims of punishment, such as prevention or reform, (Ibid., 36-37).

In Hart's thinking then, the retributivist claim should not be the general justifying aim of punishment (that is, punishing people for their wickedness). Many English judges, Hart argue, still adopt the 'tariff system' in their sentencing; the English judge has been trained to measure and graduate offences and mete out punishment;

according to Hart, he has little knowledge of the psychology or social condition of criminals: "What he will have are qualities which make an English judge an incomparable master of the art of a fair trial: an exactly trained sense of justice and fairness and great common sense. It is altogether natural that he should give primacy to that aspect of sentencing, which relies mostly on these qualities and least on the technical or expert knowledge, which he has not got. But though natural it does not follow that this is as it should be," (Hart 1968: 168-169). It is not enough to measure punishment to offenders. Knowledge of their psychology and social condition of the criminal might reveal grounds for mitigating circumstances.

The retributive idea can become formulated as a denunciatory theory of punishment. According to this version, judgment is said to be morally justified because it is a denunciation of crime on the part of the community. The Royal Commission of Capital Punishment 1949-1953 appealed to this understanding when it quoted Lord Justice Denning in articulating its stand, (See The Royal Commission on Capital Punishment: 1949-1953, Report, Cmd. 8932, Par. 53).

Hart disagrees with the view that the general aim of punishment should be maintained on retributivist grounds. He criticises the denunciatory theory in Patrick Devlin, maintaining that we may not arrive at one morality for all as Devlin purports: "Our society, whether we like it nor not, is morally a plural society; judgements of the relative seriousness of different crimes vary within it far more than this simple theory recognises. Judges talk much of the judgements of the 'ordinary reasonable man' and claim to be able to discover what he thinks. But the method used is usually introspection and this is because the judgement of the reasonable man very often is mere projected shadow, cast by the judge's own moral views or those of his own social class," (Hart 1968: 171).

Hart thinks then there is no one moral view held sacred by every member of the society, that judges mostly reflect their private views in giving judgement. He, therefore, rejects the retributivist claim (whether tariff or denunciatory brand) as basis for the general justifying aim of punishment for it looks like revenge, although it is projected under the cloak of principle of fairness. Hart goes on to assert that the general justifying aim of punishment is better supported on utilitarian grounds: deterrence or prevention of crime. He observes:

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

> moral feeling. Fairness between different offenders expressed in terms of different punishment is not an end in itself, but a method of pursuing other aims which has indeed a moral claim on our attention; and we should give effect to it where it does not impede the pursuit of the main aims of punishment, (Ibid., 172).

Since Hart claims that the mental element in crime is judged as a legal wrong, not as a moral wrong, he believes that punishment is applied to address the socio-legal impact of crime. People are punished for their harmful conduct, not for their wickedness. Thus, the general justifying aim of punishment is to deter people from causing harm. In this view, the severity of punishment is not graduated so as to match the moral gravity of the offence, (See Hart 1963: 37).

The Question of Distribution of Punishment: (The Third Question)
The question of distribution of punishment is subdivided into: "who may be punished?" and "what amount is to be extracted from the offender?" a) Who may be punished (liability to punishment)? The answer will be "only an offender for an offence." According to Hart, this admission of retribution in distribution does not immediately settle the question of the severity or the amount of punishment to be meted to one: "in particular, it neither licenses nor requires, as Retribution in General Aim does, more severe punishments than deterrence or other utilitarian criteria would require," (Hart 1968: 11). Hart believes that the word 'retribution' has another use at the level of Distribution in addressing the specific question, namely: "to whom may punishment be applied" which answer is "only to an offender for an offence." This admission of retribution in Distribution, says Hart, has a moral importance. And this moral importance of restriction of punishment to the offender cannot be explained as merely a consequence of the principle of the General Justifying Aim in retribution for immorality involved in breaking the law. Retribution in Distribution has a value quite independent of retribution as a justifying aim, in the traditional retributivist theory. As Charles A. Baylis comments, "emphasis on the consequences of proposed punishment is of primary importance, both for a criminal and for society. But we cannot give up entirely our efforts to discern some things about the mind of the accused," (Baylis 1968: 38).

Only persons who have committed offences are to be punished. It does not matter yet what crime they have committed. Here, both the utilitarian and the retributivist agree. But the admission of retribution in the distribution of punishment does not automatically tell us how much one is to be punished. This is a separate question; hence the b-part of the question of distribution of punishment. Hart, in fact, posits the admission of retribution in distribution as a requirement of mens rea: that only those who have voluntarily committed a crime should be punished. This principle of autonomy embedded in the criminal law is not immediately concerned with the gravity of punishment. Thus, retribution in distribution is a demand for mental

conditions that should be generally considered, in a civilised system, before one can be singled out to be punished. This demand also makes a retributive appeal: to be fair to the offender, he must have mens rea before we punish him, (See Hart 1968: 174). At this level of distribution, regarding liability to punishment, the aim of punishment should be answered, according to Hart, in retributivist terms – only those who have voluntarily broken the law may be legitimately punished. Conversely, along side the rejection of Hall's reduction of mens rea to a morally wrong act, Hart also rejects Barbara Wootton's suggestion for the elimination of mens rea in the assessment of criminal responsibility, (See Wootton 1981: 78).

b) The second part of the distribution question is: what amount of punishment is to be extracted from an offender? Hart claims that the amount of punishment is to be decided upon partly by considerations of deterrence, which are determined by the purpose and justification of the institution of punishment, and partly by criteria on which the retributivist would insist, that is, that punishment ought to be measured out so as to serve the end of deterrence in an efficient but economic way; at the same time, however, there ought to be some proportion between crimes and punishments. And in cases of diminished responsibility, the severity of punishment ought to be mitigated, (See Primoratz 1987: 204-205). Against this understanding, Hart presents us with an inspiration that retribution in Distribution is a requirement of justice; thus, punishment comes to be seen as securing fair terms for the protection of society. According to Hart, the focus is that of:

> Society concerned not as harmed by the crime but as offering individuals including the criminal the protection of laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework, each individual is given a fair opportunity to choose between keeping the law required for society's protection or paying the penalty. From this point of view the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal who has voluntarily done harm; from the second it appears as a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay, (Hart 1968: 22-23).

Hart's view is within the modern version of retributive theory. And this theory tries to smoothen the rough edges of the traditional version. According to D. J. Galligan, the modern version seeks to explain and justify punishment in the following way:

> The criminal law as a system of public standards imposes burdens on all for the benefits of all. These standards provide the yardstick as to what is allowed and not allowed in the dealings between the

> members of the society. Each person is said to gain from the compliance of others with these standards; correspondingly then each has a duty in turn to comply. When an individual freely commits an offence he gains an advantage over the law-abiding members of the society, (Galligan 1981: 154).

Hart subscribes to this modern version, albeit he thinks it needs a refinement by way of elaborating on the issues inherent in its claim. The criminal, in Hart's conceptual schemes, through his free choice has 'stolen' some benefit from the framework of rights of the society for his selfish interest and with total disregard of others. This has to be justly extracted from him by means of punishment. And punishment here seeks at restoring the equilibrium. In The Concept of Law, Hart writes: "the strong man who disregards morality and takes advantage of his strength to injure another is conceived as upsetting this equilibrium, or order of equality, established by morals; justice then requires that this moral status quo should as far as possible be restored by the wrongdoer," (Hart 1961: 161). From the preceding citation, punishment is seen as an extraction from the criminal of what he has unjustifiably deprived his victim; hence Hart would be seem to endorse a qualified consequentialist position, (Duff 1990: 107).

General Assessment of Hart's View of Punishment

Hart rules out the punishment of innocent, for as the retributivist would insist, only those who have voluntarily committed a crime have the right to be punished; the moral licence here is that an innocent person is not punished. But it also has some negative effects in the sense of promoting the aim of deterrence, on which the utilitarian would insist; the state has a duty to punish when that punishment curbs or deters people from committing social harms. Hart's theory "implies that in cases when considerations of deterrence do not apply, the guilty may not be justifiably punished. No matter how grave and morally reprehensible a crime is, if by punishing for it no deterrence results are to be attained, it ought to remain unpunished," (Primoratz 1987: 210). Primoratz is correct to indicate that Hart's answer is not a very satisfactory one because, for example, death sentences meted out to many have not been able to deter future mass murderers (See Ibid., 211). Since deterrence is the sole basis for the justification of the institution of punishment, Hart does not seem to have gone far beyond the Benthaminte tradition he criticises. Does extraction involve pain? Actually, there seems to be a parallel here, in Hart's treatment, between 'obligation' and 'punishment.' Obligation or duty is something one owes to the other or society, (See Hart 1955: 180). Hart refers to an obligation or legal duty as something exacted from one. One recalls the passage:

> Far better adapted to the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a

> categorical reason to do, as the etymology of 'duty' and indeed 'ought' suggest, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be demanded or extracted from them, (Hart 1982: 159-160).

Linguistically, obligation (like tax on an income) and punishment (like fine on a conduct) are opposed; however, they all involve something taken either from an obedient or disobedient citizen alike by pressure or force, for 'to extract' means "to draw or pull out especially by force," and 'to exact' means "to compel to do." From the point of view of obedience, obligation is that which is 'justly,' in the legal sense, exacted from a law-abiding citizen. On the other hand, punishment is that 'justly,' in the legal sense also, extracted from a disobedient citizen – a way of making him return something, which he had stolen from the other. The extraction might involve some pain or something unpleasant but it is demanded from him whether or not he likes it (punishment). In obligation, however, one directly or indirectly consents to that which is extracted from one. After all, one accepts the rules of the system as a guide for action and standard of evaluation; hence both terms – exact and extract - involve some force or pain. And this fact blurs the distinction Hart already made between tax on a conduct and a punishment on a crime (fine), (See Hart 1961: 39), a difference which Hart pushes further in distinguishing between being 'obliged' and being 'obligated,' (See Ibid., 80-81). One who hands over his money to the gunman, who says 'your life or your money' is obliged; for one submits out of fear to what one would ordinarily not have done; one who acts under obligation is obligated – he has acted, not of out compulsion, but out of respect for legal duty. And Hart's distinction between a fine on a conduct (crime) and tax on a conduct (legal obligation),' and 'being obliged and obligated' is to stress the presence of fear/compulsion in one, and the expression of duty in another. Hart's elucidation of punishment seems to blur this significant distinction he earlier made. It seems, however, that there is an unavoidable social pressure or force felt by one in both tax on a conduct (obligation) and fine on a conduct (punishment). In punishment one receives the pressure or force against one's will, while in obligation (following the rule) one welcomes it as part of one's duty and contribution to social harmony.

Sometimes, the society many not simple wait to neatly separate the wrong conduct, then denounce, then apply punishment, thereby making the moral 'condemnation' and 'the unpleasant consequences' as distinct elements of punishment; it is rather in many cases that the unpleasant treatment is an expression of the condemnation that society feels, (See Feiberg 1991: 636).

Furthermore, Hart does not seem to abandon the idea that corrective justice aims at inflicting pain. He accepts by definition that punishment "must involve pain or consequences normally considered unpleasant," (Hart 1968: 3). But the principal

aim of punishment in the modern version of retributive theory is not conceived in principle as involving pain. Although equilibrium is intended by way of corrective justice, the justifying aim of punishment is not pain. The pain element Hart subscribes to then is not consistent with the modern version of retribution he is advocating. By committing the crime, the criminal exercised his will for his own selfish interest with total disregard of others. As a counter response to what he has done, the community, through the operation of punishment, represses his will. Hart was close to this view (although he never pursued it further) when he writes: "It is pointed out that in some cases the successful completion of a crime may be a source of gratification, and, in the case of theft, of actual gain, and in such cases to punish the successful criminal more severely may be one way of depriving him of these satisfactions which the unsuccessful have never had," (Ibid., 131).

Punishment is then by definition the repression of the will of the criminal who disadvantaged his victim through the free exercise of his will. Through the process of punishment he pays "some sort of penal compensation, which restores him to the equality of justice; so that, according to the order of Divine justice, he who has been too indulgent to his will, by transgressing God's commandments (the law), suffers, either willingly or unwillingly, something contrary to what he would wish," (Aquinas 1947: ST I-II, q. 87, a6).

Again, one needs to push further Hart's claim that punishment returns the balanced disrupted by the criminal against the background he exercised his control over his victim – dominance: "Criminal conduct establishes the dominance of the criminal over the victim and, in the case of homicide, the victim's loved ones or next of kin. This is obvious in some crimes, such as rape, mugging, or burglary; where the victims characteristically fear a repeat attack by the criminal...," (Fletcher 1999: 518).

Hart seems to concentrate more on restoring the equilibrium between the wrongdoer and the victim; he omits the fact that the wrongdoer not only indulged his will by self-preference against his victim but in a wider sense he commits wrong against all other law-abiding citizens. So, the criminal, through the repression of his will, has to repay not only his victim but also other law-abiding individuals who refrained from breaking the law for the sake of enhancing the common good; after all, Hart sees law as an instrument of social control of behaviour. Thus, the person who has over-indulged his will extracted more from his follow citizens who submitted their will to the authority of law and for the effective control of behaviour for the actualisation of the common good.

Conclusion

Punishment, in the Hart's conceptual schemes, is a way of restoring the balance tipped by the action of the criminal: an action that primarily injured the victim and

secondarily harmed others. The action of the criminal caused social harm to the harmonious system of making free choices which society offers everyone. While the criminal is justifiably singled out for punishment, Hart insists that the General Justifying Aim of punishment should be the healing of the criminal and his integration in the community since, as he said, "we do not live in society in order to condemn, though we may condemn in order to live"

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