

Punishment And Purpose - Introduction



In Anthony Burgess's *A Clockwork Orange* (1972), after spending some time in prison, young delinquent Alex is treated with the revolutionary Ludovico's technique. With this new technique a violent criminal can be effectively reformed within a fortnight. Ludovico's technique is happily embraced and advocated by the government that hopes to win the coming elections by boasting of the way it has effectively dealt with crime. As a result of the treatment, "the intention to act violently is accompanied by strong feelings of physical distress. To counter these the subject has to switch to a diametrically opposed attitude" (p. 99). In short, Alex is being impelled towards the good as a mechanical result of his inclination towards evil. Although as a result of his treatment Alex ceases to be a creature capable of moral choice, government officials stress that their main concern is with cutting down crime and relieving the congested prison system and not with higher ethics. After the treatment is successfully completed, Alex is released back into society. When he returns home to his parents, he finds that his personal belongings have been sold by the police in order to compensate his victims. He also finds himself rejected by his grief-stricken parents who now have a lodger, Joe, staying in Alex's room. Joe is like a new son to Alex's parents. He makes clear to Alex that it is only right he should suffer further because he has made others suffer in the past. Now homeless and, as a result of his treatment, incapable of defending himself, Alex is abused as an act of revenge by one of his victims from the past whom he encounters in the public library. Alex's newly found 'freedom' has become unbearable to him and he wants 'to snuff it'.

The story of Alex in 'A Clockwork Orange' incorporates a number of important issues related to the morality, legitimacy and goals of punishment that are still of relevance to the contemporary practice of legal punishment. It involves issues of moral choice and free will, criminal politics, interests of victims, revenge, proportionality in punishment and the uneasy relation between reformation and retribution. To date, these issues continue to be subject to fundamental differences of opinion. Legal punishment is considered a means of dealing, in a

suitable and just way, with those who infringe legal rules. However widely accredited such a view may be, it nevertheless begs the fundamental question of what should be considered as suitable and just punishment. The answer to this question is not immediately evident and yet, the practice of punishment needs a moral justification since punishment itself is morally problematic (Duff & Garland, 1994). Punishment involves a deliberate and avoidable infliction of suffering (Honderich, 1970). It involves actions, such as depriving a person of his or her freedom that, if not described and justified as legal punishment, would be considered to be wrong or evil (Cavadino & Dignan, 1997; Hart, 1963; Sullivan, 1996). Thus, while the institution of legal punishment is perceived by most as a self-evident part of society, it nevertheless needs a sound moral justification. From a moral point of view therefore, we would expect the practice of legal punishment to reflect a solid and commonly shared legitimising framework. Such a framework involves answers to questions relating to the justification and goals of punishment.

Irrespective of the specific legal system within which they are operating, criminal justice officials frequently clarify, justify and rationalise their institution and the concrete practice of punishment by referring to legitimising aims and values from moral theories of punishment. Moreover, we expect moral theory to serve as a critical standard for the practice of punishment (Duff & Garland, 1994). Closer inspection of sentencing practice, however, suggests that, though a link between (moral) theory and practice may well be present, it is not as evident or straightforward as one might expect or wish. A multitude of justifications and goals of punishment exist. Moreover, they appear to be employed in ever changing priorities and mixes. This may be explained, at least partially, by the fact that the justification and goals of punishment may be highly dependent on place, time and personal preferences (cf. Kelk, 1987). However, such an explanation can neither refute the expectation that the practice of punishment should reflect a consistent underlying legitimising framework nor invalidate the necessity of these issues being subject to continued reflection. Different theoretical and philosophical approaches have different implications for the actual practice of punishment and may even be in conflict amongst one another. The best known and most influential approaches include Retributivism and Utilitarianism. Retributivist theories are retrospective and non-consequential in orientation. For them the general justification for punishment is found in a disturbed moral balance in society; a balance that was upset by a past criminal

act. Infliction of suffering proportional to the harm done and the culpability of the offender is supposed to have an inherent moral value and to redress that balance. Utilitarian theories are forward-looking. Legal punishment provides beneficial effects (utility) for the future that are supposed to outweigh the suffering inflicted on offenders. The future good in the utilitarian approach is served by the reduction and prevention of crime. This utility may be achieved, through punishment, by individual and general deterrence, incapacitation, rehabilitation and resocialisation and the affirmation of norms. More recently, there has been a growing interest in the literature as well as within the criminal justice system itself regarding the position of the victim in criminal proceedings and in the role of restorative justice as an alternative criminal justice paradigm (cf. Bazemore & Feder, 1997; Malsch & Kleijne, 1995). Restorative justice emphasises the importance of conflict-resolution through the restitution of wrongs and losses by the offender.

The victim of a crime and the harm suffered play a central role in restorative justice. The main objective is not to punish, nor to re-educate, but to repair or compensate for the harm caused by the offence (Walgrave, 1994). The victim, the offender and the community are expected to be maximally involved in the restorative process (Bazemore & Maloney, 1994).

These moral theories of legal punishment explicitly aim at providing legitimising frameworks for the practice of legal punishment. The purpose of the present study is to determine whether or not a consistent legitimising framework founded in or derived from these moral theories underlies our institution and practice of legal punishment. In essence therefore, the study is about the link between the supposed justifications and goals of punishment and the actual practice of punishment. The outlook and subsequent shape of the study is determined by three interlocking building blocks. The first involves theoretical and philosophical perspectives on the justification and goals of punishment. The second is the theoretically integrated measurement of penal attitudes. The third and final building block is the examination of punishment in action by means of a scenario study. The existence of a variety of theoretical and philosophical approaches towards the justification, functions and goals of punishment (the first building block) is in itself no guarantee that the practice is morally justified. Perhaps, in practice, moral theory of punishment merely serves as a convenient pool of rationalisations to be drawn from eclectically (cf. Duff & Garland, 1994). We must

be able to show the relevance of such justifications for the practice of punishment. A first step in establishing this empirical relevance is the measurement of penal attitudes in a manner consistent with moral theory (the second building block). As such, it must be shown that the central concepts derived from moral legal theory are meaningful and consistently measurable among criminal justice officials.

If there is a legitimising (moral) view or framework underlying the practice of punishment today, it should somehow be reflected in the minds of the sentencing judges. Furthermore, the examination of penal attitudes and their underlying structure is important for demonstrating how abstract theoretical concepts become translated into practice and how they interrelate in the perception of judges in criminal courts. Apart from measuring abstract penal attitudes and exploring the underlying structure, studying the relevance of moral legal theory for the practice of punishment involves yet another important aspect. This requires an exploration of the relevance and consistency of theoretically derived goals at sentencing in concrete criminal cases (the third building block).

In Chapter 2 the (moral) value of philosophies and theories of punishment is considered. Subsequently, the chapter provides a concise overview of the various approaches to the justification and goals of punishment. Due attention is paid to the main issues and controversies that shape the theoretical debate. Chapter 3 focuses on the attitude concept in general and penal attitudes in particular. Different approaches to the measurement of penal attitudes are discussed and illustrated with a number of relevant studies. Chapter 4 reports on the development of a measurement instrument for measuring penal attitudes among Dutch judges. Conceptualisation and operationalisation of the moral theories of interest are described after which the chapter proceeds to report on the results of two studies with Dutch law students. Data obtained from these students are employed to develop and refine a theoretically integrated model of penal attitudes. This model is subsequently examined with data collected from judges in Dutch criminal courts. Before doing so, however, Chapter 5 provides a brief judicial intermezzo in which the legal context of the study with Dutch judges is explained. Relevant aspects of the organisation of Dutch criminal courts, the Dutch sentencing system and the discretionary powers of Dutch judges are discussed briefly. In Chapter 6, the procedure and results of the first study with judges in Dutch criminal courts are described. It involves the measurement of

penal attitudes and the subsequent estimation of the theoretically integrated model that was developed with data from the Dutch law students. While this first study with judges focuses on measuring and modelling penal attitudes independent of specific criminal cases, a further scenario study is carried out to explore punishment in action. Chapter 7 elaborates on the development of the scenario study. This study is designed to examine variation in preferred goals of punishment as well as in sentencing decisions in specific criminal cases. Its further aim is to determine the consistency and relevance of goals of punishment with respect to sentencing decisions. The relevance of penal attitudes for preferred goals at sentencing is also explored. The chapter describes a number of practical and methodological issues related to this type of study. Subsequently the design of the scenario study and the selection of suitable vignettes are discussed in the light of results from the penal attitude study. In Chapter 8, the procedure and results of the scenario study are reported. In the final chapter, Chapter 9, the main conclusions of the study are reiterated and briefly discussed.