

Punishment from a Hegelian Perspective

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Abstract: This paper proposes that verbal insult as a serious crime should receive severe punishment. This principle is established based on Hegel's perspective, that punishment should aim at restoring the injured universal recognition caused by the crime. Verbal insult is a severe crime because of the damage it inflicts on the universal will, thus the social and political contexts in terms of recognition. This also means that in Hegel's advocacy of punishment to fit the crime, the considerations he gave on the crime's effects on social and political contexts is a result of his primary importance given to mutual recognition. There is a common misconception that Hegel is a retributivist, which is mainly reflected by most discussions on Hegel's theories of punishment focusing narrowly on the part of Abstract Right in his *Philosophy of Right*. Focusing narrowly in this part causes a lack of consideration taken into how crime and punishment should be treated after Abstract Right has been actualised into Objective Right. This paper focuses on this neglected aspect and discusses the importance of recognition restoration and contextual influences in the Objective Reality of *ethical life* (*Sittlichkeit*) in Hegel's theory of punishment.

Keywords: Hegel, crime, punishment, recognition, Abstract Right, retributivism

"The man who has a conscience suffers whilst acknowledging his sin. That is his punishment".
(Fyodor Dostoevsky, *Crime and Punishment*)

Introduction

This paper adopts the perspective that recognition restoration is the basis for Hegel's theories on crime and punishment, and proposes the following practical principle for the implementation of punishment based on Hegel's philosophy of crime and punishment: Among the types of recognition being damaged by the crime, verbal insult is the second most serious type of crime following murder and therefore commensurate punishment is required. The principle is proposed based on the significant roles Hegel attributed to recog-

nition, or the intellectual identification of a thing or person at the same time the assignment to it of a positive value (Inwood 2017: 245).

An additional argument of this paper is that since crimes of different natures cause injuries of different types and varying degrees of severity to the collective human recognition, punishment should fit the crime, and contextual influences should be taken into consideration. The Objective Rights (or the embodiment of freedom in an external object), which are actualisation of Abstract Rights, should be taken into consideration in determining punishment (Brooks 2013). The above arguments indicate that unlike being widely advocated as a retributivist as many contemporary scholars such as the British Idealists Green and Seth (see Brooks 2017),¹ Hegel differs from them as he focuses on recognition restoration. Although this view on recognition restoration is hardly shared by past (notably Kant 1999) and most contemporary retributivists (see Brooks 2014b), many contemporary discussions acknowledge its value in generating insights for law and punishment. Another reason for the common misconception of Hegel as a retributivist is that most discussions on Hegel's theories of punishment focus narrowly on the part of Abstract Right in his *Philosophy of Right* (*PhR*) (Hegel 2008) written in his mature intellectual period (Brooks 2017; Komasinski 2018; see also Brooks 2005; 2013; Wood 1990). The principle proposed in this paper is based on Hegel's discussions in his works of his early period, especially those focus on how Abstract Right are actualised and realised in the *ethical life* (*Sittlichkeit*) and civil society.² This approach enables a more systematic reading of Hegel's philosophy.

Komasinski (2018), paraphrasing Hegel, states that the "the move to wrong is a necessary stage to move from the particular towards the universal" (529). This view is consistent with Hegel's account given in his *PhR* that crime is a form of alienation of personality, with the capacity of embodying property, intelligence, conscience, rationality, morality, *ethical life*, and religion (Hegel 1970; 2008). Thus, Hegel holds a developmental perspective on crime, that it is an extreme in the course of development of consciousness from Abstract

¹ Details on the British Idealists will be given in the third section of this paper. Connelly and D'Oro (2019) also suggested that self-actualisation of individual in the society is the major premise of the British Idealist.

² As many philosophers, Hegel changed his focuses throughout his intellectual life. He assigned primary importance to recognition in his early writings on practical philosophy (as represented by the Jena writings such as *Phenomenology of Spirit*) and in his mature writings (represented by *PhR*) he put his emphasis on free will. As remarked in the introductory section, the reason for putting together Hegel's texts from different period in this paper is to clarify the misunderstandings (especially Hegel is a retributivist) among Hegelian interpreters. References on the periods the texts belonging to discussed in this paper have been made.

Right to objective reality involving embodiment.³ As will be elaborated in the next section, this view shares his restorative stance that punishment should serve the function of inverting the injured universal recognition established in the *ethical life* (*Sittlichkeit*) and civil society.

Hegel (2008) provides very few details on the forms of punishment despite describing the types of crimes in his *PhR*. One possible reason is that in this part he focuses on Abstract Right instead of implementation of punishment in real life (Brooks 2017; Komasiński 2018). This paper takes a closer look at Hegel's views on crime and punishment as indicated from the accounts in addition to those in the Abstract Right section of his *PhR*.

An outline of this paper is given below. In the next section, Hegel's main tenets of his philosophy on punishment, which covers punishment as an inversion of the injured universal recognition, evaluations of contemporary discussions on recognition restoration with reference to Hegel's original texts of his various intellectual period. This will be followed by introducing how Abstract Right is actualised in the *ethical life* (*Sittlichkeit*), with special reference to crime and punishment. Reference on works in addition the *PhR* such as *Philosophical Propaedeutic* (Hegel 1986) will be made. This paper ends with the conclusion that contemporary discussions neglect how Abstract Right realises itself in Objective Reality.

Hegel's Views on Punishment

In this section, Hegel's major tenets on crime and punishment will be described.

Punishment as an Inversion of the Injured Universal Recognition

Early writings

In his *Realphilosophie* (Rauch 1983), or philosophy which is for the reality, Hegel mentioned injury can only occur after the emergence of recognition. A contract between individuals is a form of mutual recognition, and breaking the contract of one party causes injury to the other. Since entering into a contract is an endorsement of the universal, breaking a contract also injures the universal.

³ In the *Zusatz* to §408 of his *Philosophy of Mind* (*PhM*), part one of his compendium *Encyclopaedia of the Philosophical Sciences*, Hegel (1971) states that crime is comparable to madness, in the sense that both are extremes that human individuals in general inevitably have to overcome: "(C)crime and insanity are extremes which the human mind in general has to overcome in the course of its development, but which do not appear as extremes in every individual but only in the form of limitations, errors, follies, and offences not of a criminal nature" (125).

Given the importance of recognition in different types of crimes, punishment should distinguish the types of crimes that are directly and indirectly to recognition. Differential treatment should be provided to criminals committing different types of offences (Rauch 1983).

Recognition being treated as a core component of punishment also means that only individuals who are recognised members of a society are suitable for punishment. In his *Philosophical Propaedeutic*,⁴ Hegel (1986) stated that “(T)o hold a man responsible for an Act means to impute or attribute to him guilt or innocence. Children who are still in a state of nature cannot be held responsible for their deeds, nor can crazy people or idiots” (15). Unlike lunatics, children, and the mentally handicapped, recognised individuals are held responsible for their actions. Therefore, in receiving punishment the criminals are being recognised for their rights and their status as free individuals.

Hegel pointed out that the types of punishment should be distinguished for the types of crimes committed because of their differential impacts on the universal will.⁵ In his *Jena Lectures*, he expressed that “(I)n regard to penal law as well, there can be differences and modifications in regard to punishment. The stiffly formal equality [of law] does not spare character [differences]. One and the same thing does injury in one class more deeply and irreparably, while doing no disgrace in the other” (Rauch 1983, 168). In this account, Hegel is of the view that verbal injury is the most universal crime among other types of crimes such as violence and theft, given its substantial damage to the universal will.⁶

I thereby commit crime, acts of violence, theft, injury, etc. The verbal injury transcends all this as a universal crime. [In committing it,] I do not say [about someone] that he has done me this or another evil, but that he is this. The verbal insult places him in the universal, as negated. A judgment posits [e.g.] the tree to be green, [that] it is green — i.e., the judgment is not [intended as] subjective but [as] universal. Similarly, the verbal insult transforms the victim’s totality into something that is in itself a nullity. (Rauch 1983: 130)

⁴ *Philosophical Propaedeutic* is a collection of his annual addresses on graduation day while he served as a rector of Gymnasium in Nuremberg in his early intellectual period,

⁵ “(T)heft, robbery – they are just such confusions. They affect a particular existence: the former injuring the will unbeknownst, the latter injuring both will and knowing. Yet they do not injure the absolute will but only [the will in regard to] something determinate, i.e., the will in a particular existent – not as pure being, not as life. And the reaction therefore cannot be the absolute one, death ... Actual murder – the primary thing that is essential is the evil [intent], the imputation [that it is] not accidental killing, but there too the motive is difficult to ascertain ...” (Rauch 1983: 148–49)

⁶ An extreme view given by Hegel is on capital punishment, that since life encompasses existence, no value can be attached to it, and therefore only taking one’s life is qualified for capital punishment.

The above view implies that contextual considerations play a significant role in decisions on punishment, as the extent to which the universal will is damaged should commensurate the type and severity of punishment.

Mature writings

Hegel continued to attribute the aim of punishment as restoration of damaged collective recognition in his mature period. This is despite his shift in focus to free will in this period as represented by his *PhR* (Hegel 2008). Details are given below.

In his mature intellectual period, Hegel also emphasised the differential treatment of crimes not involving death penalty and different social classes for the purpose of re-integration into class after release from confinement. Hegel is of the view that there is no disgrace for the criminal who completed serving his punishment. The criminal is fully recognised by the civil society as a member with full rationality. A famous view of Hegel (2008) on punishment is that being punished the criminal is honored as a rational being, a view which is applicable to phenomena such as suicide and madness. This suggests Hegel advocated restoration of injured universal recognition of Abstract Right actualised in the *ethical life* (*Sittlichkeit*). This account may offer an impression that Hegel is a rehabilitationist (Brooks 2012b). However, his above view is based on the premise of restoration of the injured universal will.

In this same volume of *PhR*, Hegel (2008) re-emphasised that punishment is the restoration of the damaged recognition (despite the inclusion of the word 'retribution' in the paragraph):

The consummated crime is [a function of] the will that knows itself as individual, as being-for-itself, having come into existence despite the power of the other will that knows itself as universal will. But this crime is the animation, the activation, the arousal (to activity) of the universal will. Punishment is this overturn, it is retribution as (that) of the universal will. The essence of punishment does not rest on a contract (that has presumably been broken), nor (on) deterring others, nor (on) rehabilitating the criminal. Rather, the essence of punishment, its concept, is this transition, the inversion of the injured universal recognition (*Anerkanntseyn*). It is revenge, but as justice. That is to say, the recognition which is in itself and was damaged externally is to be restored. (Rauch 2012b: 131)

In another renowned section of his *PhR*, Hegel states that only individuals who are fully recognised in the civil society have rights. If punishment is for deterrence and rehabilitation, criminals are regarded as animals (Hegel 2008,

102-3). In his *PhR*, Hegel offered his view that punishment as rehabilitation and deterrence is fit only for dogs (Hegel 2008, Addition 102). Similarly, Hegel (2008) remarked that punishment is a form of communal self-defense, affirms the order and harmony of the *ethical life* (*Sittlichkeit*), and is a process of raising self-consciousness of the community. Hegel's restorative justice endows individuals the freedom to act freely, self-consciously as a citizen. Forgiveness of the victim to the offender is a form of recognition for the offender. The above descriptions show clearly that for Hegel deterrence and rehabilitation are not the bases for punishment.⁷ This paragraph has led many Hegelian scholars to treat Hegel as a retributivist, and details on this issue will be given at the end of the next section.

The above review indicates that in both his early period emphasising recognition and mature writing emphasising free will, punishment is treated as inversion of injured mutual recognition which has been achieved between rational beings." Given the theme of mutual recognition which permeates Hegel's entire theory of punishment, it is not difficult to understand why he viewed verbal injury as a serious crime after murder. The importance of mutual recognition for Hegel also means that the political and social milieu, as well as the punishment's contribution to societal stability, which are objective manifestation of subjective spirit, should be taken into consideration in punishment. Objective spirit refers to a common spirit of a social group embodied in its customs, laws and institutions (Inwood 2017: 275), or spirit above the individual level that is associated with community and culture (Gardner n.d.). Objective spirit should be distinguished from subjective spirit, which covers all individual psychological life (Gardner n.d.; Inwood 2017: 275). However, as mentioned briefly earlier and will be elaborated in later part of this paper, Hegel's emphasis on recognition in punishment makes his theories entirely different from the mainstream retributivists.

Contemporary Discussions on Recognition Restoration as the Aim of Punishment

Atomistic conceptualisation of mutual recognition

Brooks contended that two rather different accounts given by Hegel on punishment may be the cause of misinterpretations of Hegel's intentions by contemporary scholars (Brooks 2005; 2013). The first view, according to him, is Hegel's discussions on the 'abstract' relations between two atomistic indi-

⁷ One view is that retribution is functionally incompatible with rehabilitation (Fattah 1982).

viduals in a contractual relationship in the opening sections of his *PhR*. In this part, Hegel suggested that

punishment is deserved for acts of “wrong” [*Unrecht*] where one fails to recognise another as a holder of rights by violating contractual stipulations between two atomistic individuals. This failure of recognition entails a correction in the form of a punishment set in a value that is equal in severity to the value of wrong inherent in the offence. This value of wrong is determined solely by the criminal himself: society cannot add to or subtract from this value. (Hegel 2008: 91)

This account indicates that the value of wrong and the punishment to be rendered are only valid for the two-person contractual relation. However, Brooks (2005) remarked that in his treatment of the “actual” or “true” relations between persons in a much later part of the *PhR*, Hegel (1970) highlighted that the decision and severity of punishment is liable to the influences of others in the civil society:

(T)he fact that an injury to one member of society is an injury to all the others does not alter the nature of crime in terms of its concept, but in terms of its outward existence [*Existenz*]... Crime in itself is an infinite injury, but as an existence [*Dasein*], it must be measured in terms of qualitative and quantitative differences... its danger to civil society is a determination of its magnitude. (as cited in Brooks 2005: 91)

The importance of others in punishment shows that verbal insult not only injures the achieved mutual recognition between two individuals, but also damages that of the collective human consciousness. The above view also implies that decisions on punishment should take into consideration the political and social milieu as well as its contribution to the stability and betterment of society as this paper proposes. Although Brooks (2005) touches on the civil society, he made few references to Abstract and Objective Rights, the two essential elements in Hegel’s philosophy.

British Idealists’ emphasis on right (vs mutual recognition)

A comparison of Hegel’s retributivist perspective from contemporary proponents of restoration of recognition is pertinent here to highlight the uniqueness of Hegel’s views. Two representatives of treating punishment as restoration of recognition are the British Idealists Green (1941) and Seth (1907). Brooks (2011) highlighted one characteristic of the British Idealists that distinguishes them from other retributivists is their emphasis of societal maintenance. This

view shares some similarities with Hegel's focus on restoring established recognition in *ethical life* (*Sittlichkeit*) for maintaining the social order. Another unique view of the British Idealists is their focus on the act of crime instead of morality as suggested by Kant. Therefore, the British Idealists treat punishment as a response to criminal acts. Brooks (2010; 2012b) proposed that the British Idealists offer a unified theory of punishment which integrates the retributivist, deterrent, and rehabilitative aims of punishment.

It is clear that Hegel's theories on punishment is based on an entirely different philosophy from the British Idealists. Douzinas (2002) emphasised that from a Hegelian perspective legal right of individuals in modern society is based on recognition. Crime nullifies or negates recognition, and therefore punishment should aim at the restoration of right (386) and therefore recognition.⁸ According to Brooks, the two representative British Idealists, Green (1941) and Seth (1907), described above, treated right as the backbone for punishment. While Green highlighted that punishment is a form of disapproval of infringement of right, Seth advocated taking into consideration the importance of right and measurement of punishment be based on social necessity (which is changing over time) (Brooks 2014a).⁹ Seth (1907) added that the severity of punishment should be based on the importance of right violated (Brooks 2010). However, it should be noted that no reference on restoration of injured recognition emphasised by Hegel is made by these two representatives.

Based on the adumbration of Hegel's philosophy of crime and punishment, the following are the responses of this paper to the above contemporary arguments on the restoration of recognition as a justification of punishment. Strictly speaking, Hegel is not a retributivist, and retributivism is only an outcome of his philosophy, i.e. his philosophy after being applied. This results in the impression of him being a retributivist. Hegel's philosophy of punishment is based on his unique views on recognition restoration which are not shared by others, especially his argument that verbal insult is the second most serious crime after murder.

Need for taking into consideration collective rationality

Steinberg (1983) explained that means such as declaration and penalty for

⁸ Wood (1990) also expressed that Hegel regarded punishment as restoring the right (110).

⁹ However, Ryberg (2010a) raised the importance of clarifying the two issues of differential impacts of punishment on individuals and indirect effects of punishment which hinder the proper measurement of severity of crime and the challenge of delimitation.

deterrence purposes are not proper punishment, and punishment is necessary for logical and conceptual reasons. In fact, the deterrent and rehabilitative functions of punishment lack empirical support (Walgrave 2023: 626). Increased understanding on Hegel's philosophy of punishment has led scholars to suggest that calling Hegel a retributivist might be misleading (e.g., Brooks 2012b; 2017; Knowles 2002: 158; Komasinski 2018; Tunic 1992: 137).

As many Hegelian commentators, Dubber (1994) summarises features of Hegel's theory of crime and punishment including property right, contract, and mutual recognition. He highlighted the strength of Hegel's theory that in addition to focusing on the rationality of the offender, Hegel takes into consideration the rationality of the onlookers. This is because focusing on the onlookers avoids merely focusing on the offenders as the retributivist and rehabilitationists do, thus gives dignity to the offender. The presence of onlookers also implies that collective recognition needs to be accounted for in considering punishment. The onlookers also play a significant role in verbal insult, as verbal insults especially public ones injure collective mutual recognition thus universal will seriously. Again, as many contemporary interpreters, no mentions of Abstract Right and Objective Right are made in the above account (Dubber 1994).

An interim conclusion

The above review indicates that contemporary discussions on punishment as recognition restoration only take Hegel on the surface, overlooking the key transition from Abstract Right to Objective Right in Hegel's philosophy. Verbal insult is a severe crime because of the damage it inflicts on the universal will, thus the social and political contexts in terms of recognition. This also means that in Hegel's advocacy of punishment to fit the crime, the considerations he gave on the crime's effects on social and political contexts is a result of his primary importance given to mutual recognition. These views result in a common misconception that Hegel is a retributivist. This is especially true that most discussions on Hegel's theories of punishment focus narrowly on the part of Abstract Right in his *PhR*. Focusing narrowly in this part causes a lack of consideration taken into how crime and punishment should be treated after Abstract Right has been actualised into Objective Right. This paper focus on this neglected aspect and discusses the importance of recognition restoration and contextual influences in the Objective Reality of ethical life (*Sittlichkeit*) in Hegel's theory of punishment. Without taking into consideration the realisation of right to the objective reality of the *ethical life* (*Sittlichkeit*), it is hard to see the reason for Hegel being entirely different from the historical and contem-

porary retributivists and his insistence of punishment to fit the crime. This is also the reason for this paper to propose that due attention needs to be given to political and social milieu, as well as the contribution of the punishment to the stability and betterment of the society, which are intimately related to Hegel's major thesis, recognition in his philosophy of punishment. In fact, punishment is more than restoration of recognition, but covers restoration of right, raising the awareness (of both the offender and the public) on the importance of right and recognition, restoration of the harmony of *ethical life* (*Sittlichkeit*), mediation between the offender and the victim, and finally maintenance of the order of civil society (Brooks 2013). In the next section, the importance of Abstract Right realising itself to Objective Right will be introduced, and this will be followed by explanations on why punishment should fit the crime from a Hegelian perspective.

How Abstract Right is Actualised in Ethical Life (Sittlichkeit)

Embodiment and Abstract Right realised in ethical life (Sittlichkeit)

PhR (Hegel 1970; 2008) is a record of the development of Right in the world from the simplest to the most sublime. This explains why Hegel begins his account with property right which involves the simplest form of embodiment in reality. Steinberger (1983) added that property right allows the Will to externalise and alienate itself, as well as to envision and have knowledge on freedom in the most basic form.¹⁰ Tunic's (1992) contribution to Hegel's theory on crime and punishment is his view that freedom requires commitment in terms of embodiment. He summarises Hegel's view, that a commitment which allows us to be free must be universal, objective, and rational. Therefore, subjective commitment as utilitarianism suggested does not fall into this category despite being rational. Revenge, on the other hand, is particular and therefore unrelated to freedom. However, unlike Hegel, Tunic (1992) regards both objective and subjective commitments are essential for freedom.

Komasinski (2018) delineated the dialectical nature of Abstract Right and how Abstract Right is realised in the *ethical life* (*Sittlichkeit*). His description on how punishment becomes less abstract can be indicated by Hegel's later treatment of how punishment is executed in the Police, the Corporation and the Legislature.¹¹ A good example on the actualisation of right in the *ethical*

¹⁰ In Steinberger's (1983) words, "(P)roperty is thus the necessary embodiment of the Will's freedom", (860)

¹¹ Police (Hegel, 2008, 215–24), the Corporation (Hegel 2008: 224–28), and the Legislature (Hegel 2008: 284–304).

life (Sittlichkeit) can be found in Hegel's treatment of administration of justice in his *PhR*, in which Hegel (1953) re-stated his requirement of value equivalence in punishment, i.e., punishment which commensurate the severity of the crime (instead of mere punishment for the sake of punishment as described by the retributivists) and offered concrete content for punishment in relation to the society. In this part, Hegel extended the publicity of law to more practical procedures of legal proceedings.

The view of Brooks (2013, 2017) and Komasinski (2018) are that Hegel offers concrete details on the implementation of punishment only in his account which after Abstract Right has been actualised on the state level (or here the administration of justice). This is an advancement on a popular treatment of crime as infringement of Abstract Right, with rights remain on the abstract level (e.g., Stillman 1976). Hegel treats the state as having the power to punish because the state is a realisation of the Spirit (Siep 2017). As given by Hegel (1995) in one of his mature writings, "(W)here there is no state, there is revenge" (101). The state, for Hegel, has the function of mediating contradictions between individual property right¹², and the state has the duty to ensure individuals can secure their "own long-term interest in self-preservation and the pursuit of happiness" (Siep 2017: 520). State actions are mandatory in case of conflicts between the three self-contained parts of the *ethical life (Sittlichkeit)*, namely, the family, the society, and the state, and the infringements of the right of individuals within and between these realms. In his *Philosophical Propaedeutic* (belonging to his early writings), Hegel (1986) provided extensive accounts of freedom, law, morality, disposition, and obedience which elaborate his view on punishment in his other works on *ethical life (Sittlichkeit)*.

Punishment as restoration of freedom

In his discussions on the realisation of natural law to the objective realm (i.e., Objective Spirit), Hegel (1975) in another account in his early writings explained that punishment is the restoration of freedom, that

with the state of affairs +A there is linked for the criminal the opposite state -A, and both are brought about equally, while the crime had brought about one only. Thus, the punishment is the restoration of freedom, and the criminal has remained, or rather been made, free, just as the punisher has acted rationally and freely. (92)

¹² Property can be extended to a person's mental and spiritual skills, knowledge, and arts (Wood 1990: 95).

Although Hegel (2008) regards the prescriptions of actual punishment for different types of crime as beyond the scope of philosophy (particularly in his *PhR*), he mentioned there should be different degrees of the severity of punishment for crimes of different natures (i.e., equivalence of value). According to Steinberger (1983), Hegel viewed that the severity of punishment depends on the extent that freedom is inhibited, or how closely the right being infringed is related to freedom. This is the other side of the view that punishment should aim at restoring the injured universal recognition, for the reason that universal recognition enables the attainment of exercise of freedom. For Hegel (2008), punishment

is the reconciliation of the law with itself; through the annulment [*Aufheben*] of the crime, the law restores itself and thereby actualizes its authority. Subjectively, it is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he himself finds in this process the satisfaction of justice and nothing save his own act. (209)

The importance of taking into consideration contextual influences

Another reason for Hegel not willing to prescribe specific punishment for different types of crime is that punishment is context-specific, a characteristic which belongs to the objective realm. In his *PhR*, Hegel (2008) states that

(I)n itself, crime is an infinite injury (see §95); but as an existence [*Dasein*] it must be measured in quantity and quality (see §96), and since its existence is determined as affecting the idea and consciousness of the validity of the laws, its danger to civil society is a determinant of the magnitude of a crime, or even one of its qualitative characteristics... Now this quality or magnitude varies with the state of civil society; and this is the justification for sometimes attaching the penalty of death to a theft of a few pence or a turnip, and at other times a light penalty to a theft of a hundred or more times that amount. (207)

An example he gave is that there are different conventions on the punishment symbols used: Beheading is very often used for certain types criminals such as nobleman in the past (Feinberg 1965). This remark indicates the importance of “shapes of consciousness” in Hegel’s philosophy, that culture and history (i.e., context) exert considerable influences on the decisions on punishment such as type and severity.

Brooks (2012b; 2017) offered a similar view that contextual influences are critical consideration on punishment, which is re-iterated by Hegel in his *PhR*

(e.g., Hegel 2008, Addition 209; Addition 216). The severity of crime should be determined based on both the criminal's state of mind or intention and contextual factors such as danger to society. According to Brooks (2017), Hegel takes contextual influences seriously in determining the severity of crime (thus punishment). An example Brooks (2013; 2017) provides is the stability of society. An unstable society is vulnerable to certain types of crimes (e.g. rioting) and therefore this type of crime should be treated as more severe in terms of dangers to the society. Time is another critical contextual influence on determining punishment. Hegel (2008) stated that

harsh punishment, therefore, are not unjust in and for themselves, but are related to contemporary conditions. A criminal code cannot hold good for all time, and crimes are only semblances of reality [*Scheinexistenzen*] which may draw on themselves a greater or lesser degree of repudiation. (Addition 208)

This, again, provides clues to Hegel's reluctance on providing practical guidelines on how to implement "punishment to fit the crime" and is a major reason for the proposal of punishment taking into consideration political and social milieu and its contribution to social stability.

Tunic's (1992) book on Hegel's political philosophy is one of the landmarks in the interpretations of Hegel's theory on crime and punishment. Despite its title suggests that his book focuses on political philosophy, it covers mainly legal punishment. In addition to summarising Hegel's main dictums,¹³ he pointed out that rationality is the basis for politics and the legal system. According to Tunic, since the world is liable to irrationality and contingency and is not perfectly rational, crime is a manifestation of irrationality of the world. Increasing rationality of the world would lead to a decreasing need for punishment. As stated in *PhR*, "the fact that society has become strong and sure of itself diminishes the external importance of the injury and so leads to a greater leniency in its punishment." (Hegel 2008: 207) Again, Tunic's account, despite the lack of reference to the actualisation of Abstract Right to the *ethical life* (*Sittlichkeit*), offers insights on how rationality manifests itself to the reality of society.

¹³ For example, the criminal has a right to punishment, punishment is a negation of the negation crime causes, crime is a violation of society's general will and the infringement of right of a particular individual, and punishment frees the criminals.

Hegel as an Advocate of Punishment to Fit the Crime

The most extensive discussions on crime and punishment by Hegel can be found in his *PhR*, which has attracted considerable attention to commentators. In his discussions on Abstract Right, Hegel distinguishes three types of wrong, namely, non-malicious wrong, fraud, and finally coercion and crime.¹⁴ Non-malicious wrong or civil offence is implicit or immediate show of Abstract Right. It arises from a clash between the right of one person to another, and is a show of rightness. Fraud, on the other hand, is a show of right by the agent to actualise the Abstract Right into particularity or the will to be actualised. In his *Philosophical Propaedeutic* belonging to his early writings, Hegel (1986) suggested that fraud occurs when “the universal is reduced to a mere semblance by the particular will, as happens initially when the universal is reduced, in contract, to a merely external community of wills” (96). Force or coercion is “destructive because it is an expression of a will which annuls the expression or determinate existence of a will. Hence force or coercion, taken abstractly, is wrong” (Hegel 1986: 97). Another feature of crime is that it is a nullity made by the agent. This account indicates that only crime involves nullity, and as will be explained below, punishment should aim at nullifying this nullity.¹⁵

In addition to the three types of wrong based on Abstract Right, Hegel pointed out that the content of crime contributes to the specific qualities and their treatments in this part of *PhR*. He strongly criticises insufficient Understanding, or the intellectual capacity for isolating and analysing, because it resulted in superficial punishment such as Draco’s prescription of death for all types of crime. Hegel’s accounts of crime both in his mature period (as represented by *PhR*) and early period indicate that he places a heavy emphasis on the types of crime and advocates differential punishments for each of them. For example, in his Jena writings he states that “(t)he distinction between robbery and theft is qualitative” (Hegel 1986, 99) and mature writings “... murder is qualitatively distinct from theft, and theft, according to its scale, quantitatively distinct from greater or lesser theft” (Hegel 1995: 98). These statements reflect that Hegel is dissatisfied with the insufficient prescriptions of different types of crimes. Interestingly, Hegel did not recommend punishment for the crime involving verbal insult this paper proposed throughout his intellectual life. The proposal of the British Idealists of using

¹⁴ Wood (1990) recounted that in his Nüremberg lectures (belonging to his early intellectual period), Hegel (1986) listed three types of crimes, namely, violence and enslavement, injury of body and life, and finally theft of external property.

¹⁵ Wood (1990) offered four meanings of nullity, which includes the nullity of the criminal will because what it attempts to do cannot be done, the criminal act is self-destructive, the criminal act is an act with its outer existence at odds with its inner nature, and finally the will of criminal as null.

stern words can be considered as one of the punishments for this type of crime (Brooks 2010).

In both his *PbR* and *Philosophical Propaedeutic*, Hegel raised the view that punishment should be based on the concept of infringement of right instead of revenge. It is because revenge is a new transgression and “falls into infinite progression and descends from one generation to another ad infinitum” (Hegel 1986, 73). This, again, provides evidence for Hegel being an advocator of punishment to fit the crime. Contemporary discussions converge with this view, that empirical evidence has indicated that variables such as personal and social demographic influence punitiveness and the public’s preference for non-carceral alternatives (see Walgrave 2023: 627).

Punishment is the dialectical overcoming of crime and the dialectical unfolding of the Notion of Right (Brooks 2017; Steinberger 1983).¹⁶ In his renowned account on punishment in his *PbR*, Hegel described that punishment

reasserts itself by negating this negation of itself. In this process the right is mediated by returning into itself out of the negation of itself; thereby it makes itself actual and valid, while at the start it was only in itself [*an sich*] and something immediate (Hegel 2008: 93).

Steinberg (1983) extended this line of argument and recommended the type and severity of punishment be determined by the type and extent of freedom one is infringed, a view which this paper shares. For him, the freedom lost from being stolen a tennis racket would be different from a house being destroyed by fire despite both involve infringements of property right. He recommended further works on the distinction of different types and degree of freedom for punishment. Echoing the focus of this paper, Steinberg (1983) firmly believes punishment must fit the crime.

In fact, many contemporary philosophical discussions on punishment are based on retributive and utilitarian perspectives, which fail to provide satisfactory justifications for punishment.¹⁷ Goldman (1979) illustrated that adopting retributivism failed to justify specific punishment and utilitarianism failed to justify institutional punishment. In addition to retribution, deterrence, and rehabilitation for criminals to re-integrate to the community (e.g., McNeill 2014; see also Bennett 2010), another two purposes of punishment widely advocat-

¹⁶ Wood (1990) also remarked that punishment is the “cancellation” or “annulment” of crime (109).

¹⁷ In his book, Walkers provides detailed and convincing arguments that the modern retributive theory not only has not solved the problems of the classical utilitarian approach, but also created new ones (Walker 1991); see also Wood (1990).

ed are incapacitation of offenders by incarceration and death (Wilson 1975; Walker 1991) and restitution (Hershenov 2010).

Among the discussions to date, it is quite common for contemporary interpreters treating Hegel as a retributivist in the conventional sense, which resulted in his theory being viewed as sharing the limitations of the retributivists (e.g., Hoffheimer 1995).¹⁸ As Brooks (2012b; 2017), McDonough (2004) discussed Hegel's theory of punishment in relation to disjunctive crime and concluded that Hegel's theory of punishment is based on rational retributivism, or a form of reformation. This means that every individual who is rational and is a unified organic whole has the right to be punished. Excusing a criminal because of incapacity either mentally or physically is to treat him as an incomplete entity. The judge is a mediator between the universal law and the particularity of each individual crime. Rational retributivism does not specify the quantity of punishment for each crime, but rather is based on rational deterrence. McDonough's conclusion is that Hegel holds a reformatory view on punishment, which is characterised by a combination of retribution and deterrence. This reformatory view enables the actuality of punishment to manifest itself in the organic whole.

Stillman (1976) highlighted that Hegel justified the annulment of crime in retributive terms. He proposed his version of Hegelian theories of punishment, that unlike the earlier version of retributivism Hegel's is nuanced with justice, equity, and concern with the individual. However, increased discussions and understanding on Hegel's philosophy as this paper indicated have created doubts on whether Hegel should be regarded as a retributivist.¹⁹

Echoing the remark made in the introductory section, the above accounts show that it is easy to misunderstand Hegel as a retributivist. Retributivism is a result of Hegel's core basis of recognition restoration and the realisation of Abstract Right to Objective Right described above. Punishment restores norms and order, and heals the injured recognition. The types and severity of punishment should not be based on measurable and quantifiable criteria.²⁰ Instead, they should be determined by the ways and the severity of the Objective Right of the victim being violated, the nature and extent of recognition being damaged, and the crime's harm to the well-being of society as a whole (Fattah 1982; 2007).

¹⁸ Another example is McTaggart (1896). Wood (1990) is of the view that "Hegel is a genuine retributivist". (109)

¹⁹ For example, Brooks (2013) remarked that Hegel can only be regarded as minimally retributive.

²⁰ Ryberg (2010b) expressed that the severity of punishment can hardly be measured. Kershnar (2010) also argues that proportionality cannot be justified because there are no mathematical formulas for calculating the seriousness of crime and the commensurate severity of punishments.

Conclusion

"Criminals do not die by the hands of the law. They die by the hands of other men".
(George Bernard Shaw, *Man and Superman*)

Shaw succinctly summarises the rationale for punishment in human history, including that of Hegel, that the collective human entity executes punishment through the legal system. Shaw's view is also consistent with the Hegelian philosophy that punishment aims not to retribute, to revenge, to rehabilitate, to deter, and to incapacitate but to restore the wounds caused by wrongs of the collective human consciousness. Punishment serves reconciliative and mediational functions through the negation of the negation, including reconciliation of gaps between one's conscience and sin given by Dostoevsky given at the beginning of this paper. Therefore, adopting a right- and freedom-infringement perspective would result in more rational and practicable implementations. At the same time, the collective human consciousness and universal will could be protected and would function smoothly through this restorative mechanism. A right- and freedom-infringement perspective is also in harmony with the progress of human history, with the example of the abolishment of death penalty and physical torture over time in many countries.

A closer look at Hegel's views on crime, punishment and law as shown from works other than the Abstract Right section of his *PhR*, especially from Hegel's Jena writings, in this paper has confirmed the above view. Based on this conclusion that punishment to fit the crime because of the need for restoration of injured universal recognition, a principle for determining punishment are given at the beginning of this paper. Discussions undertaken in this paper have also indicated that based on the perspective of mutual recognition, verbal insult is the second most serious crime following murder. Given the importance social and political contexts caused by the determining role of mutual recognition, decisions on punishment to fit the crime should take into considerations political and economic stability as well as time and culture. The extent and the probability that the punishment will contribute to social stability and betterment not in utilitarian terms but in terms of recognition, proper operations of *ethical life* (*Sittlichkeit*), and the realisation of Spirit should also be taken into consideration on the decisions on punishment. In addition to illustrating Hegel's theories of punishment are entirely different from conventional retributivism, this paper has clarified that deterrence and rehabilitation, although mentioned by Hegel (1969) in his *ScL*, do not form the core of Hegel's theory of punishment.

Steinberger's (1983) account is highly suitable for concluding this paper. He viewed that Hegel offers very practical and down-to-earth views and recom-

mentations for the implementation by the legal system and penal departments. This is in sharp contrast to the complex metaphysical discussions most other philosophers have been engaging in the historical development in philosophy of crime and punishment. Dubber (1994) remarked that Hegel's theory is highly relevant today in respect to criminal law, because Hegel's view of punishment as relating to recognition indicates the alienation the oppressed groups are facing, and this aspect has been relatively neglected by other theories on punishment. Hegel's view on the common rationality shared by community members provides practical implications that are unique from other theories.

Despite the strengths of Hegel's theories of punishment over other competing theories, his views are not without criticisms. Brown (2001) refuted the utility of adopting rights as the foundation for punishment. According to him, both Kant and Hegel developed their theories of punishment based on rights, with the former based on inborn human rights and the latter freedom of the will (especially in his mature writings). The account provided by Kant is based on inappropriate analogy of repaying debts which fails to take into consideration bodily integrity is not transferable as money. This means that injuries involving one's body or even physical death cannot simply be compensated by punishment. Hegel's theories, which is based on metaphor, also failed because it fails to explain why and how punishment is related to the restoration of victim's rights. Attacking the rights of the criminal does not mean that right is restored, as it makes no difference to the rights of the victim.²¹

Apart from the above criticisms, Fattah (1982) argued that it is impossible to make punishment to fit the crime, because "the determination of the length of imprisonment is left either to the arbitrariness of legislators or the discretion of sentencing judges, with all the disparities and inequities that ensure" (217). Wood (1990) highlighted that sometimes Abstract Right, the pre-requisite for punishment, does not exist for some individuals (e.g., the rabble), the state has no right to inflict punishment on them. This means that Hegel failed to provide the circumstances the universal has a right to cancel the individual. Given these criticisms, more efforts to explore established theories on how punishment is related to notions such as rehabilitation, restitution, dignity (Petersen 2010), torture (Kershnar 2010), and discrimination (Lippert-Rasmussen 2010) are required.

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²¹ Brown's (2001) view is also shared by Wood (1990: 111) that punishment does not mean that rights of individuals are protected.

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