Chapter II

Punishment in General

I  Punishment in Legal Science

1.1 Definition of Punishment. Elements

In 1954, Anthony Flew set out a series of requirements for the definition of punishment: punishment must be an evil or something unpleasant for the victim, inflicted – at least supposedly – from motives of an offence having been committed, inflicted on the presumed offender, in virtue of an authority conferred by institutions against whose norms the offence has been committed. Five years after Flew's work, Stanley I. Benn added a rider to the aforementioned requirements: the suffering should be an essential part of the punishment and not just something incidental to it. Also in 1959, H.L.A. Hart, in his *Prolegomenon to the Principles of Punishment*, drawing heavily upon Flew and Benn, introduced some nuances into the concept of punishment. These would restrict it to legal punishment or to punishment which should be inflicted by human beings other than the one offended. Below, we analyze some of the characteristics of punishment mentioned.

---


Chapter II

I.I.1 Existence of Suffering, Displeasure, Pain or Evil

If we should come to discover that prison was experienced by its occupants as a pleasant way of life, the prison would cease to figure as a punishment. This characteristic feature of punishment differentiates it from other coercive measures which the state may adopt and which might, though not easily, be confused with it. The state intentionally causes some suffering, unpleasantness, pain or evil to the offender with a specific end in view, or as a means to that end. This distinguishes it from other coercive state measures such as quarantine where the suffering caused is not intentional, but rather a by-product, a necessary consequence of an unlooked-for deprivation.

The idea of manipulated pain is not exclusively covered by physical pain or suffering but spreads to all imaginable situations involving the frustration of personal desires of whatever kind. We might rather speak of evil rather than of pain, insofar as the privation of a good is concerned. This is clearly seen in the evolution of punishment from Antiquity to present day societies. The gamut runs from the death penalty, as the ruling punishment, passes through prison and, from there, to pecuniary punishments as a deprivation of the basic goods of life, liberty and property. In each case, the suffering is increasingly less physical and more of a psychological or even an economic nature.

Not all deprivation of a good, however, falls within the category of punishment. A desired good may be involved. Hence, one might propose the substitution of the words “not desired” or “disliked” for the word evil. This sets certain problems for individuals who fall outside the common pattern. Think of the fanatic who does not mind suffering the evil which the punishment consists in since what he seeks is simply publicity for his cause; of the tramp who commits small, legal infractions in order to assure himself of the shelter and sustenance to be found in prison; or, even, the extreme case, of the person of masochistic tendencies who finds pleasure in corporal punishment. In all these cases, what is in principle an evil is experienced as something desired and wished for, already in itself at the service of the end sought.¹

In such cases can we still speak of punishment? To answer this question, it will prove useful to distinguish between objectively considered punishment and the subjective, individual representation of how the punishment might affect its addressees. Actions which objectively