Abolitionist Limits to State Authority:

For a Democratic Political Theory of Criminal Justice

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Submitted to Central European University

Department of Political Science

In partial fulfillment of the requirements for the degree of

Master of Political Science

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Vienna, Austria

2023

ABSTRACT

This study is organized around two questions: When is the state authority legitimate? And who has the morally legitimate authority to punish so-called criminals? Through a critical analysis of some philosophical accounts of state authority and legal punishment, the thesis argues that neither the state authority in general enjoys a moral foundation, nor the state punitive authority. Behind this critical conception lies some ontological and normative principles that together are called the negative and diarchic idea of authority. According to the ontological principle, any political community is so deeply plural and divided, mainly between the elite's desire to dominate and the citizens' desire not to be dominated, which makes the foundations of authority indeterminate. Another ontological principle is that radical plurality makes human action unpredictable and irreversible. This ontology gives rise to two normative principles, i.e., the right not to be dominated and the normative powers of forgiveness and promise. The second normative principle specifically is capable of suspending the state's punitive authority. Corresponding to this notion of authority and after a critical revision of retributivist and consequentialist accounts of criminal justice as two forms of criminalizing individuals and unpredictability and irreversibility of human actions, a version of abolitionism and restorative justice is set forth that envisages a tripartite structure of criminal justice system (composed of community members, social movements and civil organizations, and state officials and legal professionals). This structure potentially serves as a context in which citizens can develop normative powers of forgiveness and promise.

AKNOWLEDGEMENTS

I would like to express my deepest appreciation to Professor Zoltan Miklosi for his comforting and supportive supervision. Without his help and consideration, writing this thesis was far more complicated.

A DEDICATION

The 16th-century Dutch painter, Peter Bruegel the Elder, has a work titled The Magpie on the Gallows. The work depicts, among its myriad elements, a group of peasants dancing and a person emptying their bowels on gallows that is drawn in the form of an impossible triangle. While peasants are a direct allusion to the Dutch proverbs of 'dancing on the gallows' or 'emptying one's bowels on the gallows' meaning a total disrespect of the state authority, portraying the gallows in the form of an impossible object may refer to the indeterminate foundation—and in the perspective of this thesis, moral foundation—of state's punitive authority. I wrote this thesis anticipating a wish-image inspired by this painting—the dream of a day when people dance on the ruins of notorious prisons in Iran. I would like to dedicate the following thoughts to my dearest friend, Mehrdad, who never stops reflecting on the possibility of the rule of law in the age of—at least in my opinion—its global death.

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INTRODUCTION: POLITICAL THEORY AND CRIMINAL JUSTICE

What is the problem?

Coming from a continent where law regularly appears in its violent, punitive face (with China, Iran, Saudi Arabia, Syria, Iraq, and Yemen being among the first ten countries with the highest death penalty records in 2021), my concern is the relationships between the problems of contemporary political philosophy and theories of punishment in legal philosophy. However, global processes that entail a general rise in the power of the executive and/or judiciary branches against the legislative branches and are deemed, among others, as "erosion of the rule of law," "democratic backsliding," "illiberalism," or "populism" should alert us that the problem of punishment as the most frequent form of state violence is not just a matter of undemocratic regimes mentioned above.

Historically speaking, punishment has played a significant role in the history of modern political thought. For instance, there seems to be an inner relationship between punishment and political authority in John Locke, a founding father of modern liberalism:

> Political Power then I take to be a Right of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Publick Good." (Locke, 1999, 268)

In later periods, this inner relationship resurfaces again in positivist legal theories. For example, John Austin, another founding father in the history of modern legal thought, this time, father of legal positivism, asserts that "to have a legal obligation is to be subject to a sovereign command to do or forbear, where a command requires an expression of will together with an attached risk, however small, of suffering an evil for non-compliance" (Renzo and Green, 2022). And punishment appears so central to political philosophy that Rawls admits that even in his methodology of ideal theory or strict compliance theory according to which it is supposed that

"Everyone is presumed to act justly and to do his part in upholding just institutions" (Rawls, 1999, 8) there should be an account of penal sanctions (ibid, 212).

However, the problem of punishment as the state's act in delivering intentional harm, has been mostly approached from a moral perspective. There are different theories in legal and moral philosophy on justification or critique of punishment but they have not often treated legal punishment from a wider political perspective, i.e., considering its bearings on state legitimacy and citizens' political obligations. In this study, I argue for one set of critical theories of punishment, i.e., abolitionism, and one set of alternatives to punishment, i.e., restorative justice, based on a critical idea of state authority labeled as diarchic authority.

Approaching the question of punishment from the viewpoint of political theory, nonetheless, is not a totally new endeavor. One such attempt is to justify punishment based on the Rawlsian principle of liberal legitimacy (Dolovic 2004; Brettschneider 2007). Another attempt is providing a theory of punishment according to the republican ideal of non-domination (Petit 1997). Dan Markel's attempt (2012) at providing a retributive justification of punishment compatible with liberal democracy in contrast to typically moral retributive accounts is another example. In addition, on the extreme left end of the political spectrum, anarchist criminologists regard the abolition of legal punishment as a constitutive stage in the withering away of the state (Nocella et al. 2015). After the failure of an ambitious early plan to cover all theories of punishment according to their political implications, I decided to take a more specific route like the above authors, that is, proposing a specific idea of political authority and based on it, an alternative idea of state punishment.

Some Methodological and Conceptual Remarks

This study takes a non-ideal approach to the question of authority, that is, it does not start from an assumed well-ordered society to deduce some normative principles based on which it can evaluate

its question. My point of view, then, is that of the non-ideal condition of disagreements and conflicts, structural injustices, and struggles for justice. This corresponds to what Rawls calls "partial compliance theory … stud[ying] the principles that govern how we are to deal with injustice" (Rawls, 1999, 8).

However, it does not mean that a normative approach is not possible yet, but then any normative judgment should be considered contextual, contested, positional, and conditional. Real politics is a realm of contestations; so, I suppose, the realm of a normative thought that would like to be agile enough against the changing scene of contestations. While the normative moral value of democracy is subject to ongoing debates, this study articulates its normative judgments based on the idea that our contemporary socio-political life is divided by myriad struggles that can be crystallized as the struggle between various social movements promoting progressive democratization of social life on one hand, and movements and elites promoting a 'democratic backslide' on the other.

There should be clarification regarding the concept of crime. First, following the legal positivist tradition, I consider as a 'crime' every act that is rendered so by the existing legal systems. This definition also corresponds to abolitionists' definition that crimes are those acts that "the criminal justice system is authorised to take action against them" (Hulsman, 1991, 682). This concept may or may not correspond to moral accounts of what is wrong. The second point is that philosophical theories of punishment have rarely offered a differentiated concept of crime. They typically approach crime as a unified concept, and unless in considering specific crimes that are so repulsive that need exceptional consideration. To clarify that in arguing for a weak abolitionism what sort of crimes are in my mind, I propose a typology of crimes based on the state-citizens relationship:

1) Civil criminal offenses that occur between citizens, like robbery or in its extreme case, rape or homicide.

2) State criminal offenses that state institutions and/or officials commit against citizens, like corruption, or in its extreme case, genocide.

3) Rebel criminal offenses that citizens commit against state institutions and/or officials, like protestors' rampage of state buildings, or in its extreme case, tyrannicide.

4) And international criminal offenses that occur among states and other international actors, like illegal exploitation of another country's natural resources, or in its extreme cases, invasion or terrorism.[1]

My argument for a weak, gradual replacement of punishment with restorative justice processes and values concerns the first type of crime. However, there should be differentiated considerations of different civil criminal offenses, which is not in the domain of this study (for example, a minor robbery cannot be treated in a similar way as rape or homicide). The other types of 'crime' demand their specific political-philosophical investigations.

Synopsis

This study proceeds from the general to the particular. The first chapter provides a general theoretical perspective of political authority based on which the question of punishment is approached. The chapter begins with a summary exposition of the problem of justifying authority (1.1) and then proceeds to a critical investigation of some justifications of political authority, i.e., contractual, associational, and instrumental accounts (1.2). Section 1.3 critically appropriates the philosophical anarchist challenge to the idea of legitimate political authority which leads to the more positive section of the chapter (1.4). This last section sketches a negative or di-archic idea of political authority that considers the political legitimacy as always already divided, undecided, and

[1] This type has specifically attracted scholarly attention (e.g., see Hoskins and Duff, 2021, section 8). Also, other types have been subject to philosophical investigations, like tyrannicide and civil disobedience. The problem is that they should be ruled out from considerations of 'normal' offenses.

indeterminate between those who wish to dominate and those who wish not to be dominated nor to dominate.

Chapter two reconstructs a 'weak' concept of abolitionism and a transformative concept of restorative justice as a limit to state authority. I start with a summary exposition of the problem of punishment from a normative perspective (2.1), then proceed to a critical consideration of two classical categories of punishment theories—i.e., retributivism (2.2.1) and consequentialism (2.2.2)—based on the political-ontological and normative perspective suggested in chapter one. Sections 2.3 and 2.4 contain more positive arguments. In 2.3, I offer an exposition of the abolitionist approach in legal studies and an interrelated alternative vision of criminal justice, i.e., restorative justice. 2.4 considers abolitionism and restorative justice from a more political perspective, specifically, considering their challenges, and finally offers a preliminary sketch of a democratic criminal justice system.

CHAPTER ONE: ON THE INDETERMINACY OF AUTHORITY

> [I]n every republic are two diverse humors, that of the people and that of the great, and that all the laws that are made in favor of freedom arise from their disunion… (Machiavelli, 1996, 16).
>
> [People's] aims are more honourable than those of the nobles: for the latter want only to oppress and the former only to avoid being oppressed (Machiavelli, 1991,35).

1.1. The Normative Approach to Political Authority

State authority is almost everywhere today, and as David Boonin (2008, 3) writes about another ubiquitous phenomenon at the heart of this thesis, i.e., punishment, "[u]biquitous practices are rarely called into question." However, state authority has been subject to various questions: Where does the (legitimate) legal authority come from? When does an authority enjoy moral legitimacy? Is there any moral foundation to authority, or is it just a phenomenon of the historical development of political force? What is—if there is any—the moral foundation of our political and legal obligations? Does the legitimacy of state authority correlate with or necessitate citizens' political obligations toward the state? These are some of the questions around which a whole literature in Anglo-American political philosophy revolves.

These questions can be approached from different perspectives. In the most general sense, there are two methods, i.e., normative and descriptive. While the normative method considers the morally legitimate political authority, the descriptive method focuses on the de facto political authority and power. Christiano (2020) also introduces three sets of conceptual distinctions—between political power and political authority; between the non-normative, de-facto notion of political authority and the normative, morally legitimate notion of authority; and finally, between legitimate political authority as justified coercion, legitimate political authority as the capacity to impose obligations, and legitimate political authority as the right to rule.

But why does state authority need justification? Theoretically, to justify authority and the obligations it demands from us is, at least to some extent, to justify transferring our power of autonomous moral judgment, or more simply our personal and collective freedoms, to a higher political entity which, even in the case of democratically limited authority, is a professionalized entity independent from our will. And in more practical terms, de facto legal authorities either do not fulfill their assumed tasks (e.g., by withdrawing from the provision of social services) or even engage in practices that are morally problematic and logistically burdensome (e.g., making wars). For these theoretical and practical considerations, authority is a problematic phenomenon in need of moral justification.

In addition, Simmons (1979, 10) points to a disjuncture between "being obliged to do X" and "having a reason to do X" which is of importance for my discussion. For Simmons, stating that there is an obligation to do X alone does not provide a definitive justification for X but simply acknowledges a valid reason for acting, which can be overridden by other factors. When it comes to the legal authority and our obligations, this gap turns into a gap between being legally obliged to do something and other considerations, including our moral judgments about our obligations. This potential gap makes justifying legal authority and obligations a demanding task.

There are different answers to the question of when a legal authority or if the legal authority at all is legitimate. In what follows, I focus on three justifying answers, i.e., contractual, associational, and instrumentalist justifications (1.2), and one de-justifying answer, i.e., philosophical anarchism (1.3). Then in section 1.4, based on a 'weak' version of anarchism and borrowing from theoretical debates outside of normative analytical political theory—namely, the German-American Jewish political theorist, Hannah Arendt, and the French radical democrat thinker, Claude Lefort—I argue for a 'di-archic'[2] concept of political authority as divided between the de facto, instrumental authority of the state and dissenting, non-domination-oriented political

[2] Historically, diarchy refers to a form of government where two de jure or de facto heads of state ruled a polity.

authority of citizens. This concept of authority draws on ontological principles of plurality and uncertainty of public life, the political principle of the foundational rift in political authority, and normative principles of forgiveness and promise.

1.2. Justifications: Contractual, Associational, Instrumental

Consent or contractual theory, simply put, regards state authority as legitimate if it is founded on the voluntary consent of members of the political community. In a classic account of contractual theory, John Locke writes in his *Second Treatise of Government*,

> Men [sic!] being … by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it (Locke, 1999, 330-31).

There are two significant elements of justification in this quote: first, for an authority to be legitimate, there shall be unanimous consent on the side of members of the community; and second, that legitimate authority has to satisfy a range of demands here summed up as "comfortable, safe, and peaceable living." While the second point is common among almost all justifications of legal authority, the first point is the weak point of unanimous voluntarist consent-based accounts. How would it be possible to secure the unanimous consent of every single community member?

Among consent-based or contractual accounts, there are various modifications trying to solve this problem, including the liberal principle of legitimacy proposed by Johan Rawls. Rectifying the voluntarist account, Rawls writes in *Political Liberalism*:

> Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may **reasonably** be expected to endorse in the light of principles and ideals acceptable to their common human reason (Rawls, 2005, 135, my bold).

Instead of Locke's men agreeing to unite into a community for the sake of comfort and security, Rawls brings forth the principle of reasonableness according to which persons propose fair principles for a system of social cooperation that is acceptable to other reasonable persons (For Rawls's account of reasonableness see ibid, 49-54).

However, the main challenge with this principle is that if one tries to develop a notion of reasonableness that can generate such agreement, it is likely to be controversial and not widely accepted. As Christiano (2020) puts it, this account requires a consensus on a significant number of fundamental norms in order to claim that there is agreement on the basic principles governing a society. This approach may fall short of respecting the opinions of individuals in society, as many are likely to disagree with a given concept of reasonableness. On the other hand, if a more flexible notion of reasonableness is adopted to accommodate most people in society, it is unlikely to result in agreement on the fundamental principles of society. The concern is that this idea demands a level of consensus among society members that is unrealistic in normal political conditions.

Another perspective on political authority—which dates back to Plato—draws a parallel between the obligations within a family and the authority of parents, using this analogy to argue that a political society can possess legitimate authority even if it is not based on voluntary association and even if there is disagreement on many political principles. This comparison between family, friendship, and political society is based on the notion that individuals are obligated to follow the rules or norms of their respective communities. In modern legal thought, Ronald Dworkin represents this idea contending that legitimate political authority emerges when members of a political society acquire obligations to obey the rules of a genuine community, either through shared principles or a sense of being bound together by common principles (Christiano, 2020).

In Dworkin's own words, there seems to be a sort of natural obligation to the community. In other words, he envisages a unified moral foundation for the political community resulting in an immediate unity between community membership and legal obligations: "Political association,

like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation" (Dworkin, 1986, 206). One may doubt how an analogy between family and political community could be helpful, from both a descriptive and a normative perspective, to understand the nature of political authority. In fact, according to the idea of authority which will be proposed in 1.4, there are few things more problematic than envisaging the state and citizens in a foundational moral unity.

Joseph Raz, among others, provides an instrumental justification for authority. In this account, "all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive" (Raz, 1986, 47). What justifies state authority is that it is guided by citizens' existing reasons and motivations. This argument also seems appealing from the perspective of concerns for autonomy, as the state's appropriation of some public functions could possibly make space for other autonomous spheres of action for citizens instead of being forced to directly involve themselves in the details of every public decision-making.

However, there are still two problems with the instrumentalist account: First, there is nothing in the concept of state authority to ensure that it would base itself on reasons that apply to the subjects of directives themselves. It is the question of de facto state authority and whether there are fair and functioning feedback mechanisms informing the state what are citizens' reasons and motivations. Second, "Raz's conception of authority depends for its cogency on the thought that as long as the subject does better by reason overall by obeying certain classes of commands, the subject has a duty to obey every one of the commands: the correct as well as the incorrect" (Christiano, 2020).

1.3. From the Anarchist Challenge…

Two concerns have led to a fundamental suspicion whether political authority could be justified at all: the failure of hitherto justifications of state authority and the idea that state authority is in principle opposed to individual autonomy. This suspicion, when it is mainly a theoretical concern, is called philosophical anarchism, and when it turns into an activist struggle against state authority, political anarchism. In other words, philosophical anarchism is "the removal of any moral presumption in favor of compliance with and support for state" (Simmons, 1996, 23). For philosophical anarchists, unlike the strong political anarchists, this lack of moral foundation and legitimacy does not necessarily translate into an ethical obligation to eliminate the state. And when suspicion toward authority is mainly due to the failure of existing justifying notions, we have a posteriori or weak anarchism, and when it is concerned with the undermining of individual autonomy, we have a priori or strong anarchism.

Robert Paul Wolff represents the a priori philosophical anarchism. He regards the relationship between state authority and individual autonomy as a disjunction:

> If all men [sic!] have a continuing obligation to achieve the highest degree of autonomy possible, then there would appear to be no state whose subjects have a moral obligation to obey its commands. Hence, the concept of a de jure legitimate state would appear to be vacuous, and philosophical anarchism would seem to be the only reasonable political belief for an enlightened man (Wolff, 1998, 19).

However, while the concern with individual autonomy is a sane concern, there are still some problems. First of all, strong anarchists' concern with the so-called surrender of judgment to authority is self-defeating, as contracts and promises—a central theme for the anarchist imagined ethical, stateless world—also require the surrender of judgment (Renzo and Green, 2022; Simmons, 1996, 25). We can even go further to say that while in a society with legal authority, citizens may only surrender their judgment in some legally specified cases to one social, supra-personal institution, an anarchist society is made up of a network of personalized judgment surrenders with

no normative mechanism of ruling out immoral contracts, e.g., contracts of slavery or child marriage.

This leads to another, and in my opinion, stronger criticism of a priori anarchism. From an instrumentalist perspective, one can assert that Wolff's insistence on a person's moral obligation to think and act independently in every moment is sometimes immoral when one may actually act worse as a result of consistent independent judgment and behavior (Christiano, 2020). It can even be said that the law's authority—under severe limits and controls, for sure—is a precondition of individual autonomy. Since in a complex society, relations of power and dominance cannot be reduced to the relation between state and individuals, the law as a social institution can mitigate non-state forms of domination, e.g., traditional patriarchal relationships between father and his children, or some oppressive communal traditions like female genital mutilation. The point is that starting from a non-ideal viewpoint, individuals are already situated in social relations, and/or their so-called autonomy is weakened or buttressed by their social (e.g., gendered, racialized, or class) position. Therefore, rather than being a pre-given, a priori fact that only needs to be liberated from state authority, Wolff's ideal of individual autonomy is something that should be fought for or constructed aposteriori through creating empowering social institutions, including the law.

Another critique of strong anarchism can be similar to a critique of the idea of reasonableness in Rawls's justification of legitimate authority. Just as the concrete meaning of reasonableness could be subject to fierce conflicts from various moral viewpoints, Wolff's starting point—i.e., the idea of individual autonomy—for debunking the morality of state authority rests on a specific moral account of human nature and on a normative language of what human beings ought to or ought not to do, which is too controversial to serve as a good foundation for a normative account of political life.

1.4. … to a Diarchic Idea of Authority

Considering the shortcomings of ideal, a priori, and autonomy-centered anarchism, I defend non-ideal, political, and a posteriori anarchism. This can also be called a negative idea of authority, since instead of providing an affirmative justification for state authority, it offers an external limit in the form of free citizens' politico-ethical authority. It is also negative because, in this account, authority's foundation is always indeterminate. Further, this may be called—and in fact, I prefer this name—a diarchic concept of authority, since, first it argues against providing a single moral foundation for political life as it is the case even with anarchism, and second, because rather de-justifying any kind of political authority, it recognizes a rift in political authority between the instrumental authority of the state and citizens' authority pushing back state's tendency to dominate. This conception can be summed up as follows:

First, politics has an ontological constitution revolving around the radical plurality of social beings. We can find an account of this ontological constitution in Hannah Arendt's phenomenology of politics. For Arendt, what is specifically 'political' about politics is the plurality of public actions by free, equal persons each of whom is capable of new beginnings (d'Entreves and Tömmel, 2022). Then, instead of attaining some pre-given moral good or refraining from some pre-given moral evil, politics is the scene of plural unpredictable and irreversible actions. New beginnings that political actions entail might be morally acceptable or unacceptable from different viewpoints, but it is how politics works. In fact, it is this specifically unpredictable and irreversible nature of political action that renders unreliable the moral justifications of political phenomena. It does not mean that politics is immoral or anti-morality, but that is essentially non-moral; it is a domain different from the domain of morality that has taken and will take indefinite moral contents.

Second, socio-political life is in principle conflictual due to an endless birth, renewal, and withering away of myriad value-, identity-, or interest positions. The possibility of consensus is not totally ruled out, but there is nothing as an overall, all-inclusive consensus. Re-reading Machiavelli's work in a contemporary context, Claude Lefort arrives at a central category to explain ontological dissensus at the heart of the political—i.e., "the originary division of the social." This concept is based on the notion that within every political community, there exists a split that constitutes the social order. Lefort identifies in Machiavelli an ultimate indeterminacy that pertains to the fundamental basis of the legitimate exercise of political power. This indeterminacy arises from the foundational division between the elite's quest for control and the people's yearning for non-domination. Since modern society cannot definitively establish the law, there arises a dispute or conflict surrounding its pronouncement since it considers the very nature of the just and the unjust. The elite oppose the people systematically because its members have a vested interest in monopolizing the authority to pronounce what is just and what is unjust, and the people, as carriers of a certain negative power expressed in their desire to avoid subjugation, question the elite's pronouncement (Breaugh, 2013, 25-31). Accordingly, from a normative viewpoint, there is always a rift in the concept of political authority between the state authority and ethical authority imposed by citizens' organs of power, e.g., communities, social movements, or even ethical authority in one individual person's appeal against the law. From this perspective, as it was said concerning Dworkin's associational account, there are few things more problematic than conceiving a moral unity between a political community and its members, between state and citizens.

Third, within the terms of Anglo-American normative political theory, this conception corresponds to a version of philosophical anarchism 'weaker' than Wolff's ascribed by Christiano (2020) to John Simmons and Leslie Green. This version asserts that each person has a right not to be bound by the state's commands. This thesis is quite different from the kind of anarchism defended by Wolff that assigns a duty to be autonomous to each individual. This view does not

imply that one must never obey the state. It merely implies that one does not have content-independent duties to obey the state. Then, this anarchism is not an absolute moral rejection of any possible political authority. As Simmons sums it up, hitherto existing justifications of state authority cannot justify it and cannot justify obligations towards it for all citizens who are living under currently existing states. (Simmons, 1979, 191) "Nothing in the definition of the state precludes its legitimacy" (Simmons, 1996, 21).

Fourth, Arendt's theory of action revolves around two key aspects: unpredictability and irreversibility, and their corresponding remedies, i.e., the power to promise and the power to forgive. Action is unpredictable because it stems from freedom, allowing individuals to innovate and alter situations. Moreover, the action takes place within the realm of human relationships, where the final outcome remains beyond any actor's control. Irreversibility is closely tied to unpredictability. Unlike fixing a faulty product, actions initiate processes that cannot be undone or retrieved. As action occurs within existing human relationships, each action begets reactions and future deeds, none of which can be halted or reversed. The consequences of every act are not only unpredictable but also irreversible. To address these challenges, Arendt proposes two inherent faculties of action. The faculty of forgiveness aims to mitigate irreversibility by absolving actors from unintended consequences, while the faculty of promise seeks to moderate the uncertainty of outcomes by binding actors to specific courses of action. Both faculties rely on temporality—which is also a significant category in my reconsideration of punishment theories—and depend on plurality, as forgiving looks back to absolve past actions and promising looks forward to establishing a sense of security in an uncertain future. These faculties embody human freedom, enabling individuals to undo past actions to some extent and exert partial control over ongoing processes, preventing them from becoming mere victims of inexorable laws (see d'Entreves and Tömmel, 2022, esp. 4.5).

Fifth, what does happen when someone forgives or promises another person? From a political perspective, forgiveness and promise should not be considered merely as personal or psychological phenomena. Rather, I speak of these two human actions as two normative powers that can alter the moral status of a perceived situation. Raz (2014, 61) sees normative powers as "the abilities of people (or institutions) to change normative situations or conditions (i.e., to impose or repeal duties, to confer or revoke rights, to change status, etc.) by acts intended to achieve these changes, where the ability depends on (namely is based on, grounded on, justified by) the desirability (the value) of those people (or institutions) having them" (Raz, 2014, 61). Then, forgiveness is a normative power since it can cancel the obligations of the forgiven (Bennett, 2018) or keep away the forgiven from the hitherto fixated damnatory character of his past actions through a commitment not to treat the forgiven as if they are still guilty; and promise is "a special sort of power we have over our normative circumstances, the power to invoke obligations by promissory utterance" (Habib, 2022), or in Raz's words that curiously echoes Arendt's concern with mitigating the unpredictability of action, "In the case of promises the value of the power is that it expands people's ability to fashion their lives or aspects of their lives, by their actions" (Raz, 2014, 61).

There is one typical moment when forgiveness and promise can potentially coincide, that is when Person A offends Person B. As it was implied above, not only promise but also forgiveness involves commitment and obligation. As promises entail a commitment on the part of one who promises towards one who is promised (a commitment that the former will act in a certain way), forgiveness also involves a commitment on the part of the forgiver to the forgiven (a commitment that the former will act in a certain way, that is not treating the latter as guilty). But forgiveness is typically conditional[3] and the condition for that is a promise on the part of the offender not to commit offenses in the future. In exchange, the forgiver releases the forgiven from the burden of

[3] Here, I draw on a more common understanding of forgiveness in criminal contexts which typically presupposes a condition or a promise on the part of the offender. For unconditional accounts of forgiveness, see Gerard and McNaughton, 2002.

the past wrong. Under the di-archic concept of political authority and in the specific context of criminal justice, forgiveness and promises are the *arkhe* (foundation, beginning) of citizens' authority, while punishment is the *arkhe* of state authority. The coincidence of forgiving and promising as two normative powers suspend the state's punitive authority.

Finally, according to this notion of authority, the proper normative question regarding political authority is no longer 'What makes or when is the state authority legitimate?' but 'How should a good political community be organized?' The normative conclusion of the negative, di-archic notion of authority is that the political community should be organized so that ordinary citizens have 1) the broadest possible sphere to express their individual and collective identities and interests, with conflicts of interest and identity regulated in a political and non-violent way, and 2) the broadest powers possible to minimize the adverse consequences of human action's irreversibility and unpredictability.

In the next chapter, on the background of ontological principles of plurality and uncertainty of public life, the political principle of the foundational rift in political authority, and normative principles of the right not to be dominated and powers of forgiveness and promise, I engage in a critical dialogue with some normative approaches to legal punishment.

CHAPTER TWO: LIMITS TO PUNITIVE AUTHORITY

2.1. The Normative Approach to Punishment

"When someone inflicts evil on another person, they ought to receive a proportionate bad in response. And, at least for the sake of proportionality, there needs to be a neutral party in charge of inflicting the response. In our complex societies, this role is relegated to the state, specifically to its judicial authority as the professionalized body of enforcing criminal justice, which might work poorly in this or that case, but is in general morally justified." This crudely reconstructed argument might be the most widely accepted view on criminal justice. Then, why is punishment a normative problem? Why should someone look for moral justifications for legal punishment?

But what is punishment?[4] Boonin (2008, 3-26) conducts a thorough analysis of the concept of legal punishment to provide an accurate and ethically neutral definition. He introduces five interrelated requirements for an act to be considered as legal punishment: harm requirement (it should be bad for the punished), intention requirement (that harm should be intended as harm), retribution requirement (it should be inflicted because the punished person had already done a prohibited act)[5], reprobation requirement (this infliction of intended retributive harm should express official disapproval of the offender's behavior), and authorization requirement (that intended reprobative retributive harm should be carried out by an authorized state official). Accordingly, Boonin proposes two definitions (ibid, 24-25):

On the stronger version, *P*'s act *a* is a legal punishment of *Q* for offense *o* if and only if

[4] The discussion here is limited to legal or state punishment and does not include punishment in family or school.

[5] We should distinguish definitive retribution from moral retribution. The former suggests only that punishment should be a response to a previous act and unlike the latter does not consist in a moral judgment about the act of retribution. The same applies to the reprobation requirement because the punishment has a condemnatory character regardless of our ethical stance towards this condemnation—like the stance in the communicative or expressive justification of punishment. For the reprobation requirement, it is also important to have in mind that this is *official, i.e., state* disapproval, and not necessarily the public, i.e., popular disapproval.

(1) *P* is a legally authorized official acting in his or her official capacity and

(2) *P* does *a* because *P* correctly believes that *Q* has committed *o* and

(3) *P* does *a* with the intent of harming *Q* and

(4) *P*'s doing *a* does in fact harm *Q* and

(5) *P*'s doing of *a* expresses official disapproval of *Q* for having committed *o*.

On the weaker version, *P*'s act *a* is a legal punishment of *Q* for offense *o* if and only if

(1) *P* is a legally authorized official acting in his or her official capacity and

(2) *P* does *a* because *P* believes (perhaps mistakenly) that *Q* has committed *o* and

(3) *P* does *a* with the intent of harming *Q* (even if *P* fails to actually harm *Q*) and

(4) *P*'s doing of *a* expresses official disapproval of *Q* for having committed *o*.

While Boonin argues for the stronger version, I reckon that it is unnecessary for a non-ideal, political account of legal punishment. First, when P carries out punishment, the correctness or fairness and wrongness or unfairness of the punishment verdict do not make a difference in the fact that they have intentionally inflicted harm on somebody as a reprobative response to a conceived offense. Secondly, whether the punishments are really bad for the conceived offender or not, just as the former point, does not alter the fact that punishments are a significant realm and expression of state authority. In other words, in both of these cases, the idea and the fact that the state retains the authority to punish, hence the political nature of punishment remains intact.

Now it is time to turn the question of why the state-authorized probative retributive intended harm needs moral justification. It is usually assumed that if the law prohibits an act in a

just and right manner, then it has the right to punish those who commit that. Boonin denaturalizes this widely held belief by asking that,

How can the fact that a person has broken a just and reasonable law render it morally permissible for the state to treat him in ways that would otherwise be impermissible? How can the line between those who break such laws and those who do not be morally relevant in the way that the practice of punishment requires it to be?" (Boonin, 2008, 1)

Going back to the terminology of the debate introduced in the first chapter, this disjuncture between the state's supposed right to set norms and its supposed right to punish those who have violated those norms can also be regarded in terms of a disjuncture between state authority and citizens' obligations towards it. Even if we consider the state authority as legitimate, it does not necessarily mean that we as citizens are obliged to follow its commands.

Considering moral concerns brought about by punitive measures, the problem is that punishment creates a distinction between two groups, treating them differently. Since this is typically unjust in itself, moral philosophers have engaged in a challenging effort to find a relevant moral difference to justify punishment. Furthermore, punishment not only treats one group differently but also intentionally inflicts harm on them while sparing the other group. Justifying this distinction requires explaining why the difference between offenders and non-offenders justifies causing intended harm to the offenders (Boonin, 2008, 28-29).

In the next sections, I argue for an abolitionist approach to punishment based on the idea and practices of restorative justice. In section 2.2, I present a summary exposition of two main categories of punishment justification, i.e., retributivism and consequentialism. I will explain why both of them sound problematic from the perspective offered in the first chapter.[6] Thus, this section serves as a negative argument for my abolitionist perspective. After this critical exposition,

[6] Certainly, there are more sophisticated accounts which I will touch on them too mainly in footnotes.

section 2.3 gives a more affirmative exposition of abolitionism and focuses on a central abolitionist alternative, i.e., restorative justice. However, in 2.4 I explain why abolitionist vision in its most radical sense—i.e., total relegation of criminal justice to local communities—is problematic. Based on this sympathetic and at the same time critical consideration of abolitionism, that section ends with a preliminary institutional design for a democratic system of criminal justice.

2.2. Political Problems with Justifying the Punishment

2.2.1. Retributivism as Criminalization of Irreversibility

Retributivist accounts revolve around a moral conception of the desert. Punishment is justified because or if and to the extent that the convict deserves it.[7] Concerning the temporal dimension of punishment, retributivism, then, is backward-looking; punishment is justified because something bad has happened in the past and now the punishment is supposed to rectify it by inflicting a proportionate harm on the offender. There are two main types of retributivism, i.e., rights-based and fairness-based retributivism (for an overall critical account of these two versions see ibid, 103-143). The rights-based version argues that committing crimes involves a violation of some right which entails forfeiture of the same right for offenders and hence makes them liable to punishment. And according to the fairness-based account, since society is a cooperative practice that firstly, works through members' obedience to a set of rules and secondly, distributes some benefits to all of its members, crime is an unfair share of benefits through violating the law and refraining from burdens that law-abiding members have accepted. This unfair freedom from law-abiding—not the specific material gains of crime—justifies the punishment.

[7] It is important to distinguish between because and if or to the extent, since these different conjunctions denote two different approaches to retributive justice: the positive approach which considers penal desert as the sufficient reason for punishment, and the negative one which considers desert as a constraint, e.g., to consequentialist accounts. (Hoskins and Duff, 2021). However, here I focus on positive retributivism. In addition, the type of retributivism that is the subject of political critique here, however, is not negative retributivism or as Boonin (2008, 95-96) calls it 'reluctant retributivism' or inductive retributivism that induces from empirical cases a principle of retributive justice, but a version of retributivism that bases their accounts on general moral principles.

The overall problem with retributivism in both rights-based and fairness-based accounts is its over-individualistic social ontology and hence ethics. Against this individualism, I will propose a deterministic skepticism towards free will and personal responsibility. However, any punishment theory should consider two facts of the human condition. One is that human beings are born into, raised in and shaped by pre-existing communal and social relations. Another fact is bad luck which is only one of the myriad forms of unpredictability and irreversibility of human actions. Many of us might have found ourselves in situations that were somehow out of our control and behaved in a way that had no rational explanations for them afterward. And, such occurrences are supposedly on the rise in our accelerating, globalizing world with a decrease in public support for people. In such a situation, rather than facilitating the criminalization of these accidents, the law should serve as an airbag in case of social accidents.[8]

Further, with regard to the temporal dimension of justice, retribution criminalizes the irreversible nature of human action which could be handled with forgiveness. Of course, retribution does not rule out the possibility of forgiveness, but forgiveness does not have a central place in its account of justice. The problem of forgiveness is a complicated issue, of course. Forgiveness should not be an additional pressure on the victim. Forgiveness is not a moral duty per se but a power that the offended may or may not apply. However, by appropriating and professionalizing the criminal cases in the name of the public, the state authority deprives individuals and communities of opportunities to develop their power to forgive.

2.2.2. Consequentialism as Criminalization of Unpredictability

Consequentialist accounts maintain that we can justify punishment if and because it will (or is predicted to) lead to a good greater than the harm imposed. Then, with regard to the temporal

[8] There are some typical moral criticisms that Boonin applies to almost every justification of punishment. They can in fact be applied to punitive practices too; criticisms like 'not punishing the guilty', 'punishing the innocent', and 'disproportionate punishment'. These criticisms can also be read from my political-ontological perspective. Punishment infuses a high dose of insecurity, precariousness, vulnerability, and risk to life.

dimension of punishment, consequentialism is forward-looking; punishment is justified because something bad has happened (and its temporal dimension is not significant in itself) and now the punishment is supposed to achieve a greater good in the future (e.g., by reducing possible offenses in future) by inflicting harm (which its proportionality and target precision is not significant in itself). There are two versions of consequentialism, i.e., act-consequentialism and rule-consequentialism.[9] While the former justifies the specific acts of punishing offenders because they promote some specific good (e.g., crime reduction), the latter distinguishes "between justifying a practice and justifying a particular action falling under it" (Rawls, 1955, 3) and thereby providing a consequentialist justification of punishment as a socio-legal practice and meanwhile retaining a retributive justification of particular cases of punishment (thereby rectifying the critique that consequentialism may justify disproportionate punishment or punishment of innocents).

A well-known criticism of act-consequentialist accounts corresponds to my concern with the political-ontological implications of punishment theories. According to that criticism, act-consequentialism would justify punishments that are clearly unjust, such as punishing innocent individuals or administering excessively harsh penalties. Any purely consequentialist framework would still ultimately make the protection of the innocent contingent on its use within the system's goals (Hoskins and Duff, 2021). Then, while retributivism rests on an overly individualistic ontology and ethics, consequentialism draws on a potential disdain for the individual whose bodily integrity can be violated for a supposed bigger gain. While rule-consequentialism circumvents this criticism by distinguishing the punishment as a social practice (subject to the consequentialist justification) and punishment cases (subject to the retributivist justification), it exposes itself to

[9] They are usually called act-utilitarianism and rule-utilitarianism. However, since the difference between utilitarian and non-utilitarian consequentialisms is not of importance here—since, as Boonin (2008, 80) writes the problem with the consequentialist justification of punishment lies in its mere logic rather than the nature of consequences it pursues—I use act- and rule-consequentialism.

both critiques of retributive over-individualist ontology and consequentialist handling of temporality.

With regard to temporality, consequentialism fails to consider the unpredictability of human actions and social relations, hence inflicting pain on a person in the present with the prospect of an anticipated future outcome. This results from an over-rationalist conception of human beings as subjects who mainly act according to instrumental rationality. Then, if it is supposed that human beings should and do refrain from pain, inflicting pain would lead to a reduction in future crimes. Nonetheless, consequentialists disregard the possibility that inflicting pain in the name of society may breed feelings of hatred and resentment, leading to even more severe offenses in the future. In other words, the consequentialist remedy to the unpredictability of human actions is its criminalization.[10]

2.3. Abolitionism and Restorative Justice

Against the justifying approaches to punishment, abolitionism is the view that state punishment is not and cannot be justified and should be replaced by other forms of criminal justice. Abolitionists argue that the current criminal justice system is inherently flawed, oppressive, and ineffective in achieving justice and reducing crime. Abolitionism can take a limited or an absolute version; while the limited version focuses on abolishing specific kinds of punishment like the death penalty or incarceration, the absolute one supports the wholesale replacement of punishment.

[10] Another justification for punishment is the tacit consent theory which has a strange relationship to the temporality of punishment. According to this theory, committing a crime involves tacit consent on the part of the offender to be punished. As Boonin quotes from C.S. Nino, a proponent of this account, "[a] necessary legal consequence of committing an offense is the loss of immunity from punishment that the person previously enjoyed" (Boonin, 2008, 157). The phrase "immunity from punishment that the person previously enjoyed" sounds like a strange temporal dimension. It seems that punishment already exists as an always ready-to-be-carried-out potential, and citizens are just exempt from it temporarily. It corresponds, however, to John Locke's idea of authority that considered punishment as central to state authority: "Political Power then I take to be a Right of making Laws with Penalties of Death, and consequently all less Penalties" (Locke, 1999, 268).

Theoretically, abolitionist accounts are founded on a reconceptualization of crime, free will skepticism, or moral relativism (Hoskins and Duff, 2021). Classical abolitionist texts, inspired by neo-Marxism and critical legal theory, reconsidered the concept of crime in terms of 'trouble' and 'conflict' in order to rethink due measures in terms of mediation and reconciliation rather than punishment. They see the criminalization of 'troubles' as a power mechanism inseparable from the development of the modern state and capitalist society. Free will skeptics point to determining social conditions, luck, and chance as factors leading to crime, rather than the offender's individual responsibility, hence deconstructing the very concept of a legal person as the subject of punishment. Moral relativism—the idea that there is no solid ethical ground on which we can distinguish right and wrong—is another—though, in my opinion, weakest—basis for abolitionism.

When it comes to alternatives to punishments, abolitionist proposals can be distinguished as—albeit not reduced to—restorative justice. Abolitionists also call for a focus on addressing the root causes of crime, such as poverty, inequality, and systemic oppression, through social and economic policies. They argue that the criminal justice system is based on oppressive power structures that disproportionately harm marginalized communities, such as people of color and those living in poverty. In this sense, abolitionism is not an ideal legal theory but takes its premises from and is consciously rooted in critical criminology, sociology of law, and the history of activism against slavery, sex workers' incarceration camps, and prisons (Swaaningen, 1986, pp. 9-12, 16-18). However, since they consider punishment inherent to the modern state and capitalism, from a normative perspective, they usually take an absolute negating approach to punishment.

The idea and practice of restorative justice (RJ) is significant to abolitionism but is not limited to it nor can abolitionism be reduced to RJ. Whereas absolute abolitionists' normative quest is abolition of punishment as a social institution—and probably alongside other social institutions of modern capitalist society—and in this quest argues for RJ, RJ can be a much more limited practice of criminal justice and even a complementary part of existing penal systems. However,

there are different conceptions of RJ, and I propose a concept of RJ corresponding to an abolitionist vision of the unjustness of all existing systems and justifications of state punishment.

According to Van Ness and Strong (2015, 23) the term 'restorative justice' in its contemporary sense was probably used for the first time by Albert Eglash in 1958-9 in the classification of three types of justice: retributive, distributive, and restorative. However, Ann Skelton (2005) found that Eglash's source for his conception of RJ was seemingly a 1955 book, *The Biblical Doctrine of Justice and Law* that argued for a realigning of justice and love in the form of RJ against the secular concept of justice in its threefold form of distribution, commutation, and retribution (Schrey et al., 1955, 182-3).

Conceptually, RJ has been subject to different definitions with different, though overlapping and not mutually exclusive, points of emphasis. Marshall (1999, 5) has focused on the specific process constituting RJ practices "whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for future." On the other hand, Wright's definition focuses on the reparative goals of these practices that instead of "add[ing] to the harm caused by imposing further harm on the offender,… do as much as possible to restore the situation" (1991, 112). Morris (1994) goes as far as replacing the term 'restorative justice' with 'transformative justice' since they see the restorative processes in response to criminal offenses as opportunities for self- and societal transformation.

These different conceptions of RJ correspond to what Johnston and Van Ness (2011) regard as RJ's internally complex character. They recognize three conceptions of RJ revolving around 'encounter', 'reparation', and 'transformation'. The most common approach to RJ is regarding it as a process of encounter in which,

> [R]ather than remaining passive while professionals discuss their problem and decide what to do about it, victims, offenders and others affected by some crime or misconduct meet face to face in a safe and supportive environment and play an active role in discussion and in decision-making (ibid, 9).

However, there is an important challenge to this purely processual conception. Braithwaite (2002, 567) recounts a conference in Canberra where the stakeholders agreed on the idea of making a child wear a T-shirt announcing 'I am a thief'. Then the problem is that what if the community comes up with a solution harsher and more inhumane than usual punitive measures?

However, few proponents of RJ regard it in pure processual terms. More than being a mere process and simply replacing formal and official processes with informal ones, RJ entails substantial values that are supposed to ethically oversee the communal procedures. Braithwaite (ibid, 569-572) determines three sets of values and standards: constraining standards that are supposed to prevent the process from becoming oppressive (values like non-domination, empowerment, respectful listening, and equal concern for all stakeholders); maximizing standards that are supposed to guide the process and measure its success (e.g., restoration of property and dignity, compassion, social support, etc.); and emergent standards describing some certain outcomes that may or may not result from the process (values like remorse, apology, the censure of the act, forgiveness, promise, etc.).

The second conception is about how restorative processes constrained and guided by a set of values can lead to the reparation of properties, relationships, emotions, and values that are broken by the offensive behavior. Then, while the participatory processes are still important in this conception—and it can even be considered as one of its main value components—the most important aspect of RJ processes is that they should lead to specific goals—in general, reparation—and strengthening of specific values. Specifically, what makes the case of 'I am a thief' T-shirt problematic is that it violates a very important contribution of abolitionist criminology and restorative justice theories—the idea that offenders themselves have suffered both from past injustices and their offensive behavior (Johnston and Van Ness, 2011, 13).

As Johnston and Van Ness puts it, under the reparative conception, RJ principles "would become a profound reform dynamic affecting all levels of the criminal justice system" (ibid). This

is where the transformative concept comes in. In other words, in its most radical sense, RJ is an ideal or program of transformation of not only the judicial system but the whole social relations and even our conceptions of ourselves and human subjectivity. This transformative conception is closely related to abolitionism. However, while the 1960s and 1970s abolitionists' idea of transformation was deeply political in a radical leftist sense, today's proponents of transformative RJ are mainly concerned with how RJ can transform our conception of self and our relation with our environment: "to live a lifestyle of restorative justice, we must abolish the self (as it is conventionally understood in contemporary society) and instead understand ourselves as inextricably connected to and identifiable with other beings and the 'external' world" (ibid, 15).

Thus, by dislocating the subject of transformation from politico-judicial structures to self-environment relations, proponents of transformative RJ may seem to promote an apolitical version of abolitionist ideals. In response, however, they may call into question the classical distinctions of political and personal or of public and private, and even consider these distinctions and giving primacy to the political over the personal as responsible for the failure of early abolitionist attempts:

> [For them,] both the initial and the ultimate goal of the restorative justice movement should be to transform the way in which we understand ourselves and relate to others in our everyday live. The argument appears to be: 1) that, in the absence of such transformations, any efforts to change specific practices, such as our social responses to crime, are unlikely to succeed and can even have effects quite different from those intended; and 2) that even if such changes do succeed, they can make only a peripheral contribution to the goal of achieving a just society – achieving that goal requires much deeper and more far-reaching transformations (ibid, 15).

Another point that makes the transformative RJ attractive is the idea of the irreparable. Sometimes what is offended by crime cannot be repaired or restored at all; the most famous case in this regard can be murder where the offended is a human life. What is lost here due to the criminal offense is—at least—a living human that is now impossible to be revived. Since, the main thing that is to be repaired—i.e., the lost human life—does not exist anymore,[11] we should go

[11] However, there are still other things to be repaired, e.g., communal relationships affected by the loss of that life.

beyond a personal, material reparative concept towards one that involves changes in supra-personal, communal relations.

However, we should distinguish between transformative RJ as a program and as a moral ideal. While the goal of personal transformation can be acceptable in terms of a moral ideal that could or could not be achieved after a rather long time, it is so problematic in terms of political programs like any other political vision that attempts at enforcing a specific vision of human nature or moral ideal by the way of a consciously developed political program.

Then, although I do agree with the moral-anthropological visions of transformative RJ, politically I opt for a politico-judicial conception of transformation which is more in line with the 'political' and pluralistic notion of the limits to legal authority. Accordingly, RJ would be a grand socio-legal framework where different conceptions of RJ—procedural, reparative, and transformative, or politico-judicial and moral-anthropological—can promote and develop their projects. In other words, considering these different conceptions as different aspects of one unified vision of RJ, the encounter aspect is its formal, procedural aspect; the reparative aspect is its value component that combines the participatory values with constraining, maximizing, and emergent standards; and transformative aspect is its political program.

2.4. Political Merits and Challenges of Restorative Justice

RJ's political merits can be considered in both negative and positive terms. In negative terms, abolitionism targets one important aspect of state/law control over citizens' bodies/minds. In fact, since the 1960s, critical criminologists have considered punishment, criminal law, criminalization, police—and the whole apparatus of the criminal justice system—as a mechanism of social control perpetuated by the state and/or capital and structurally informed by systemic injustices, rather than neutral means of social regulation. Therefore, transferring those processes to communities would considerably reduce the state's power domain.

In positive terms, RJ's main political advantage lies in its potential for citizens' empowerment. Transformative RJ seeks to bring highly professionalized, hierarchical, and in many respects repressive processes of criminal justice under communities' control. It promotes community-based justice and policing, which involves giving communities the power to create and enforce their own justice systems, e.g., under the control of a community board that is more prone to communal investigative and transparency procedures than state police. This can include creating community review boards that have the authority to investigate and discipline police officers, as well as establishing community-led initiatives that focus on preventing crime and promoting public safety (Cohen, 1986).

In addition, RJ calls for decriminalization or de-categorization of many activities that are currently illegal, such as drug use, sex work, and homelessness. This can help reduce the number of people who are criminalized and incarcerated for non-violent offenses, and instead, redirect resources towards social programs and support services that can address the root causes of these issues.

Specifically with regard to individual autonomy and empowerment, by criticizing individualistic notions of responsibility and acknowledging that so-called legal persons are in fact conditioned by societal relations or chance, radical alternatives to punishment have a more realistic conception of the individual and can create a context for flourishment of real personal responsibility through giving actual role in real community life, rather than alienating the individual from highly professionalized bureaucracies.

Concerning the encounter with the temporal dimension of human life, RJ promotes methods of conflict resolution and crime handling that gradually transfer the control of social time to citizens. Abolitionist critiques of punishment have revealed that the modern state and specifically punishment are problematic ways of handling the unpredictability and irreversibility of human

actions. By promoting normative values and powers of forgiveness and promise, RJ creates alternative modes of time regulation other than the state-punitive mode.

There remain two significant challenges that RJ should encounter: First, should the punishment be eliminated even for severe violent crimes? And the next one pertains to the power relations and individuals' rights inside each community. I do not engage in the first challenge here. Certainly, we cannot propose the same abolitionist treatment for robbery as for sexual violence and homicide—if there should be any. However, as a critique of absolute abolitionism, one can say that it is unacceptable and ethically irresponsible to say that "there is no ontological reality of crime" (Hulsman, 1986, 28). Murder ends the ontological reality of a person—notwithstanding the psychological effects on others—or rape has a lasting effect on the victim, however, these physical acts are discursively framed.

The second challenge is of more political and theoretical significance here. More generally, it pertains to political problems with community-based accounts of justice and freedom. Inspired by a Marxist conception of class struggle and/or a simplified Foucauldian conception of truth-power—the idea that truth is what 'the powerful' announces it as truth—early critical criminologists had a rather naive, one-sided notion of power relations which mainly focused on capital-labor or state-citizens conflict. Thus, they downgraded, as is also the case in communitarianism, the power relations inside communities and between their ordinary members. It is not just the state or capital that excludes, marginalizes, discriminates, etc. Local communities are also fraught with power imbalances, exclusion, and marginalization—e.g., excluding women, LGBTQ—people, or ethnic minorities within the local community from decision-making processes. If a restorative justice process is dominated by individuals with more power and privilege in the community, it will replicate the punitive practices of the criminal justice system rather than promote healing and restoration. In addition, communal justice processes should be complemented by an important

achievement of modern courts, which is safeguarding the offender, the victim, and the witness during the procedure.

To address these challenges, RJ processes must be guided by an intersectional vision of social oppression and grounded in a tripartite power structure regulating criminal justice processes composed of local community members, inter-community, national, or supra-national social movements and civil society organizations, and reformed laws representing universal human rights and determining the conditions, institutions, and limits of RJ processes. Laws themselves should be written, supervised, and revised regularly by two other groups of actors. State and its legal apparatuses should be also in charge of providing a safeguarded procedure and ensuring the safety of all parties involved in communal processes of criminal justice.

CONCLUSION

What makes political authority legitimate? Who has the morally legitimate authority to punish the so-called criminals? These two questions have been the basis of this study, and long story short, my brief answers are '(so far) nothing' and 'nobody'.

But why? The first question was the subject of the first chapter. The main basis of that 'never' and 'nobody' is an account of social and political ontology that considers the plurality of human expressions and accordingly, the dividedness of the social, and an endless struggle over what is right/wrong, just/unjust, good/evil, and reasonable/unreasonable as foundational facts of human society. This ontology of plurality and dividedness suggests an idea of political authority that is negative (since its moral foundation is always indeterminate) and di-archic (since this indeterminacy refers to a foundational conflict between a desire to dominate and a desire not to be dominated).

From a radical democratic concern, this ontology results in two normative principles: first, the foundational negative right not to be dominated, and second, interrelated powers of forgiveness and promising as normative powers capable of releasing the burden of past actions (then a remedy to irreversibility) and mitigating the pressure coming from an uncertain future (then a remedy to unpredictability). Then, the proper normative question regarding political authority changes from 'What makes the state authority legitimate?' to 'How should a good political community be organized?' To sum up, the political community should be organized in a way that ordinary citizens have 1) the broadest sphere possible to express their individual and collective identities and interests, where the identity- and interest conflicts can be handled in a 'political' way, and 2) the broadest powers possible to mitigate the human action's unpredictability and irreversibility.

To argue that the state's authority lacks a moral foundation logically leads to this argument that the state's punitive authority is morally unfounded too. An investigation of how two main

theories of punishment—i.e., retributivism and consequentialism—treat ontological but at the same time normative questions of personal responsibility and social temporality have hopefully shed light on their political drawbacks against a radical democratic ontology and ethics. In a nutshell, retributivism overloads the individual with criminal responsibility and proposes a criminalizing remedy to the irreversibility of actions; on the other hand, consequentialism tends to disregard the individual's dignity by considering him as a means to prevent future crimes, thus proposing a criminalizing remedy to the unpredictability of actions. What the practice and justifications of legal punishment can suggest regarding the more general handling of social time by the modern state can be the subject of future studies.

But what should a good community do with those who offend other citizens' rights or even their very existence? It was the subject of the second chapter. An advantage of the political vision suggested in the first chapter is that the possibility of offense is already implied in its ontological foundations. Further, its normative principles, i.e., the right to non-domination and forgiving and promising powers, entail a prospect of crime handling. In legal terms, I attempted at arguing for an alternative vision of criminal justice drawing on two interrelated movements in critical legal theory and practice, i.e., abolitionism and restorative justice.

Abolitionism, both as a critical legal theory and a radical process of de-criminalization, seeks to replace state punishment with alternative criminal justice mechanisms. The main proposal in abolitionist accounts and practices is moving towards community-based forms of justice. Restorative justice also argues for the replacement of punishment with processes that restore and restitute what has been lost or damaged by an offense. I set forth a politico-judicial transformative concept of restorative justice that combines different conceptions of restorative justice as a process of encounter, a set of restorative values, and a societal transformative vision. While forgiveness and promise cannot be politically forced on parties of a criminal case, this political program for the

transformation of socio-legal relations, I suppose, establishes a framework where citizens can develop alternative ways of handling conflicts.

However, there are two main challenges and limitations to the abolition of punishment and establishment of community-based justice: the problem of severe violence (that should be the subject of another study about more specific and detailed aspects of restorative justice) and the problem of power imbalances inside each community. Countering this second problem requires restorative justice to develop an intersectional view of systemic injustices. In practical terms, this vision can be reflected in a tripartite institutional setting in charge of criminal justice, comprising local communities' members, national and international civil organizations and movements, and state officials and legal professionals. This institutional structure also fits into the non-unitary political vision of the first chapter; if society is traversed by myriad lines of conflicts and struggles, any legal or political vision that seeks to reduce these tensions to one single principle—whether state authority or a single principle of justice, or personal or communal autonomy—is politically and morally problematic. Any political entity then should be organized as a field of multiple forces and voices.

BIBLIOGRAPHY

Bennett, C. (2018), The Alteration Thesis: Forgiveness as a Normative Power. *Philosophy & Public Affairs*, 46, 207-233. https://doi.org/10.1111/papa.12117

Boonin, D. (2008). *The Problem of Punishment*. Cambridge: Cambridge University Press.

Braithwaite, J. (2002). Setting Standards for Restorative Justice. *The British Journal of Criminology*. 42(3), 563–577. https://doi.org/10.1093/bjc/42.3.563

Breaugh, M. (2013). *The Plebeian Experience: A Discontinuous History of Political Freedom*. Translated by Lazer Lederhendler. New York: Columbia University Press.

Brettschneider, C. (2007). The Rights of the Guilty: Punishment and Political Legitimacy? *Political Theory*, 35, 175–99.

Christiano, T. (2020). Authority. *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2020/entries/authority/>.

Cohen, S. (1986). Community Control: To demystify or to reaffirm? *Abolitionism: Towards a Non-repressive Approach to Crime* (pp. 127-132). Edited by Herman Bianchi and René van Swaaningen. Amsterdam: Free University Press.

d'Entreves, M.P., Tömmel, T. (2022). Hannah Arendt. *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta and Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/fall2022/entries/arendt/>.

Dolovich, S. (2004). Legitimate Punishment in Liberal Democracy. *Buffalo Criminal Law Review*, 7(2), 307–442. https://doi.org/10.1525/nclr.2004.7.2.307.

Dworkin, R. (1986). *Law's Empire*. Cambridge: Balknap Press.

Garrard, E., McNaughton, D. (2002). In Defence of Unconditional Forgiveness. *Proceedings of the Aristotelian Society*. 103(1), 39–60. https://doi:10.1111/j.0066-7372.2003.00063.x

Habib, A. (2022). Promises. *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta and Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/win2022/entries/promises/>.

Hoskins, Z., Duff, A. (2021). Legal Punishment. *The Stanford Encyclopedia of Philosophy* (Summer 2022 edition). Edward N. Zalta (ed.). URL = <https://plato.stanford.edu/archives/sum2022/entries/legal-punishment/>.

Hulsman, L. (1986). Critical Criminology and the Concept of Crime. *Abolitionism: Towards a Non-repressive Approach to Crime* (pp. 25-41). Edited by Herman Bianchi and René van Swaaningen. Amsterdam: Free University Press.

————. (1991). The Abolitionist Case: Alternative Crime Policies. *Israel Law Review*. 25(3-4), 681-709. https://doi.org/10.1017/S0021223700010694.

Locke, J. (1999). *Two Treatises of Government*. Peter Laslett (ed.). Cambridge: Cambridge University Press. Student Edition.

Machiavelli, N. (1991). *The Prince*. Quentin Skinner and Russell Price (eds.). Cambridge: Cambridge University Press.

————. (1996). *Discourses on Livy*. Harvey C. Mansfield and Nathan Tarcov (eds.). Chicago: The University of Chicago Press.

Markel, D. (2012). Retributive Justice and the Demands of Democratic Citizenship. *Virginia Journal of Criminal Law*, 1(1), 1-133. https://ssrn.com/abstract=1930443.

Marshall, T. (1999). *Restorative Justice: An Overview*. London: Home Office Research Development and Statistics Directorate.

Morris, R. (1994). *A Practical Path to Transformative Justice*. Toronto: Rittenhouse.

Nocella, A. J. II, Seis, M., Shantz, J. (eds.) (2015). *Contemporary Anarchist Criminology: Against Authoritarianism and Punishment*. Bern: Peter Lang.

Pettit, P. (1997). Republican Theory and Criminal Punishment. *Utilitas*, 9(1), 59-79. https://doi:10.1017/S0953820800005136.

Rawls, J. (1955). Two Concepts of Rules. *The Philosophical Review*. 64(1). 3-32. https://doi.org/10.2307/2182230

————. (1999). *A Theory of Justice* (Revised Edition). Cambridge: The Belknap Press of Harvard University Press.

————. (2005). *Political Liberalism*. New York: Columbia University Press.

Raz, J. (1986). *Morality of Freedom*. Oxford: Oxford University Press.

——. (2014). Is There a Reason to Keep a Promise? *Philosophical Foundations of Contract Law* (pp.58-77). Gregory Klass, George Letsas, and Prince Saprai (eds.). Oxford: Oxford University Press.

Renzo, M., and Green, L. (2022). Legal Obligation and Authority. *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta and Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/fall2022/entries/legal-obligation/>.

Simmons, A.J. (1979). *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

———————. (1996). Philosophical Anarchism. *For and Against the State: New Philosophical Readings* (pp. 19-39). John T. Sanders and Jan Narveson (eds.). Boston: Rowman and Littlefield Publishers.

Swaaningen, R. (1986). What is Abolitionism? An Introduction. *Abolitionism: Towards a Non-repressive Approach to Crime* (pp. 9-21). Herman Bianchi and René van Swaaningen (eds.). Amsterdam: Free University Press.

Schrey, H.H., Walz, H.H., Whitehouse, W.A. (1955). *The Biblical Doctrine of Justice and Law*. London: SCM Press.

Skelton, A.M. (2005). *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice*. Dissertation submitted in partial fulfillment of the degree Doctor Legum in the Faculty of Law. University of Pretoria.

Van Ness, D.W., Strong, K.H. (2015). *Restoring Justice: An Introduction to Restorative Justice* (5th ed.). Amsterdam: Anderson Publishing.

Wolff, R.P. (1998). *In Defense of Anarchism*. Berkeley and Los Angeles: University of California Press.

Wright, M. (1991). *Justice for Victims and Offenders*. Philadelphia: Open University Press.