

## SUBJECT IN POLITICS AND JUSTICE

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### RESUMEN

En este artículo examinamos el sentido kantiano del castigo y su reformulación en la problematización foucaultiana del derecho de castigar, que es en gran medida una crítica de la concepción kantiana. Luego presentamos la concepción de una justicia restaurativa fundamentada en el ideal social del reconocimiento; la cual corrige ciertos aspectos de la concepción kantiana pero le confiere a la justicia su estatus de institución, sin quedarse solamente en criticarla.

#### PALABRAS CLAVE

*Castigo, justicia restaurativa, reconocimiento, sujeto jurídico.*

### ABSTRACT

In this paper we study the kantian conception of punishment in the *Metaphysics of Morals*. We look at Foucault's reformulation of the right to punish which is mostly a critique of the kantian conception. Then we introduce the conception of restorative justice grounded on the social ideal of recognition, which corrects certain aspects of the kantian conception, but gives to justice its status of an institution rather than being a critique of it.

#### KEYWORDS

*Punishment, restorative justice, recognition, juridical subject.*

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I want to thank the Universidad del Norte in Baranquilla, and Pr Pedro Pablo, for the invitation to discuss some issues in political philosophy. When I began to think of what I wanted to tell in this lecture, I thought about Foucault and the way he displaced the question of the right to punish to the question of the *power to punish* in his book “Discipline and punish: The Birth of the Prison” (1977). But I had the feeling that I needed to change somehow my perspective on Foucault to fit more to the contemporary philosophical issues around philosophy of right and justice, and precisely concerning the recent notion of restorative justice.

We have several answers to justify punishment: retaliation, protection of society, to absolve the evil, to correct, discipline or educate prisoners, etc. We have plenty of possible justifications to accommodate to different time and situations. But, according to Foucault, the right to punish compels us more to draw a genealogy (a history) of the punitive reason, and to understand it as technique of power, than to accept any of the justifications of the right to punish that I mentioned. I think Foucault’s genealogy of prison is a good instrument to make it clear how our societies have made the power to punish natural and legitimate, how the carceral system «tends to efface what may be exorbitant in the exercise of punishment» (Foucault, 1977, p. 301). It is indeed important to acknowledge that there is a scandal in punishment, because violence is exerted on a person, even if it is a legitimate one. But it is important too to emphasize that there is a scandal in impunity.

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And to be true, not very much is told about impunity in Foucault's work. But in democracy, justice means also that crimes should be punished; the ones perpetrated by individuals or groups (political or religious), and those committed by State violence. Punishment in democracy is exposed to the two scandals —punishment itself and impunity—, and we have to think about what would be a sense of penalty (so not a right and neither a power), which would be in accordance with justice.

Restorative conception of justice is a valuable concept, based on the philosophical notion of recognition, and it can help in thinking of the sense of penalty. These concerns do not belong to Foucault, they are in fact posterior to his work. They belong to the reflection on recent evolutions in the practice of justice, which tend to place the victim in the center of the process of justice, as you can see for example with the Commission Truth and Reconciliation in South Africa but also in the place now devoted to the victim in the trials in Europe or in the United States. But if we want to apprehend a concept of restorative justice, we have to reflect on the very notion of recognition, and Foucault is central to this debate because he sees recognition as a power relation.

I want to stress the way Foucault transforms the question of the right to punish into the one of the power to punish. And then, I want to shift to the sense of punishment based on the notion of restorative justice. If crime is always a destruction of the social tissue, is it possible to reconcile the opposed parts? Can penal justice repair such destruction of the social tissue? The notion of restorative justice is an attempt to think of the requirements of the process of reconciliation.

#### THE SUBJECT OF THE LAW AND THE RIGHT TO PUNISH

The most comprehensive answer to the question *why do we have to punish criminals?* is given by Kant. He grounds the right to punish on sovereignty. "The right of administering punishment is the right of the sovereign as the supreme power to inflict pain upon a subject

on account of a crime committed by him". (Kant, 1887, 49 E). You can see that the right to punish does not belong to the victim, neither to the people or the society, but to the sovereign, that is to the executive power as a separate and authorized power, the State itself. According to Kant, that is not to give some kind of privilege to a class of the society, *i.e.* the people in charge of government, but to define the neutral position of a third-party, representing the law, to which every citizen is subjected. The punitive authority does not equate itself to the totality of the subjects of the law, but to source and warranty of the law. The sovereign authority embodies the position of this third-party. It is an impersonal guarantee of the public law. Then, as a consequence, the sovereign authority cannot be punished and is provided with immunity. But that does not mean general impunity. He who governs can, as a physical person, lose his sovereignty, which comes with his mandate, when he is charged with a crime. But then he will not be judged and punished as sovereign.

Why do we punish criminals? According to Kant, it is only because a crime has been committed and for no other better reason than that. So Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative.

Kant can be considered as representing the conception of retributive justice; criminal shall be punished because he has enforced the law. He must pay for that. Transgression is being paid equivalently either with money (fines, etc.) or with time (prison) and in general pain. In the question *why do we punish?* there are in fact two concerns: one deals with the internal principle of punishment (the reason of punishment) and the other with what is aimed by punishment (the effect on the convict or on society). Kant makes

a difference between penal justice (*iusticia punitiva*) and penal prudence, which is concerned with pragmatic issues: education for the criminals or defense of the society. The right justification for punishment is because a crime has been committed. One punishes *because* and not *in order to*. It does not mean that punishment does not imply the transformation of the convict or the protection of society, but Kant stresses a perverse logic, which looks for the principle of punishment in its effects. It is good if punishment transforms the individual or if it protects the society, but according to Kant it cannot justify the punishment.

One may object that it is absurd to punish for a fault belonging to the past, it is more rational to punish it in order to prevent it to be committed in the future. So to punish someone only for the reason that a crime has been committed is more anger or passion than reason. But according to Kant, the individual is a moral person, who has free will and is as such respectable, and to punish him for the protection of society or for the sake of the transformation of his psyche means to deprive him from his moral status. Hypothetical imperative is only concerned with utility. But justice relies on categorical imperative. And, as you know, the second formulation of the categorical imperative is «Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end» (Kant, 1993, p. 36). The political right to punish is an absolute and categorical moral duty. And impunity is the supreme injustice.

Who then shall be the subject of punishment? In order to explain the relationship of the delinquent subject with the punishment, Kant makes an appeal to the division of the subject. A part of me (the sensitive one, *homo phaenomenon*) wills an illicit action for some sensitive profit (pleasure) or for immediate interests, all which concern the empirical self. But in the same time, there is a relation between the criminal act and the pure will a relation between the pure or the reasonable subject of the law (*homo noumenon*) with the law itself: I universally want punishment for who accomplishes a

criminal act and I accept punishment as a sensitive being capable of crime.

No one undergoes punishment because he has willed to be punished, but because he has willed a punishable action; for it is in fact no punishment when any one experiences what he wills, and it is impossible for any one to will to be punished. To say, 'I will to be punished, if I murder any one', can mean nothing more than, 'I submit myself along with all the other citizens to the laws'; and if there are any criminals among the people, these laws will include penal laws. The individual who, as a co-legislator, enacts penal law cannot possibly be the same person who, as a subject, is punished according to the law; for, *qua* criminal, he cannot possibly be regarded as having a voice in the legislation, the legislator being rationally viewed as just and holy. If any one, then, enact a penal law against himself as a criminal, it must be the pure juridically law-giving reason (*homo noumenon*), which subjects him as one capable of crime, and consequently as another person (*homo phenomenon*), along with all the others in the civil union, to this penal law (Kant, 2007, p. 201).

The punishment strikes the sensitive being of the criminal, his empirical self, but it respects the pure subject. The reason lies in the third formulation of the categorical imperative: «Therefore, every rational being must so act as if he were through his maxim always a legislating member in the universal kingdom of ends» (Kant, 1993, p. 43). But as a cruel consequence, according to Kant, death penalty is still a way to honor the supreme interests of the pure reason. Because we shall not listen only to the cries of the assassin put to death but, says Kant, to the chant of gratitude for the *recognition* of his humanity! Kant's claim may well be seen as a kind of inhuman way of affirming humanity. He seems to grant the concrete inhumanity involved in punishment. This critic is of Marx. Marx claims that the subject of punishment is found nowhere, yes it is the legal subject who is punished and condemned, but it is altogether abstract and discarnate. It is the subject of an ideal and has only celestial existence. Punishment honors this subject but

it degrades the empirical subject, *i. e.* the true sensitive and living being. Kant's philosophy of penalty divides the subject in two: the pure subject of punishment (the moral subject of the law) and the concrete object of punishment (the empirical individual who suffers). The face of the suffering individuals appears in history, but it is an inessential part of history to Kant. In his book *Discipline and punish*, Foucault (1975) writes a counter history of bodies, which does not consider the subject of penalty in an abstract way. It is a history of bodies as subjects of power (to punish). And Foucault comes to a different notion of subject, not the autonomous subject of the law described by Kant but the subject produced through subjection or through power.

#### **SUBJECTION AND THE POWER TO PUNISH**

In the beginning of *Discipline and Punish*, Foucault describes the torture of Damien in 1757 on the Place de Grève. Damien was convicted of attempting regicide on Louis XV, and he was publicly tortured. Damien is in fact the last convict to be tortured publicly and punishment ceased to be some public spectacle of torture to become a much more discrete and secretive technique of power. Eighty years later, the imposition of surveillance and discipline had become the most popular mode of punishment. The question is why punishment ceased to be such a cruel spectacle. The answer is most likely not that people became more delicate, but that a new technique of power was then born. To understand Foucault's point, you have to remind that he does not think of power as a sovereign authority some people *have*, which would transcend the subjects of law, or exercise it *on* them.

But in thinking of the mechanism of power, I am thinking rather of its capillary form of existence, the point where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives. The eighteenth century invented,

so to speak, a synaptic regime of power, a regime of its exercise *within* the social body, rather than *from above* it. The change in official forms of political power was linked to this process. [It was the instituting of this new local, capillary form of power which impelled society to eliminate certain elements such as the court and the king. The mythology of the sovereign was no longer possible once a certain kind of power was being exercised within the social body. The sovereign became a fantastic personage, at once archaic and monstrous] (Foucault, 1975, pp. 26-27).

So if we want an answer to the question why the mode of punishment has changed so much within a century, we have to understand this change in terms of new techniques of power. The punishment-body relation is not the same as it was in the torture during public execution. The body now serves as an instrument or an intermediary: if one intervenes upon it to imprison it, it is in order to deprive the individual of liberty, which is considered a right for the modern individual. The body, according to this penalty, is now caught up in a system of constraints and privations, obligations and prohibitions. The pain of the body itself is no longer the constituent element of the penalty. We can even speak of a *non-corporeal* penalty, because the target of the new techniques of power is to produce or to bring up the subject of power as the subject of discipline, the man as an effect of subjection much more profound than himself. The technology of power is the very principle both of the humanization of the penal system and of the knowledge.

Foucault calls *discipline* the techniques of power used in punishment. The classical age (17<sup>th</sup> and 18<sup>th</sup> centuries) discovered the body as object and target of power (Foucault, 1975, p. 136). It gave a very special attention to the body that is manipulated, shaped, trained, that is the body which obeys, responds, becomes skilful and increases its forces. And it is very different from the sovereign power, which supremely consists in a right to put to death his subjects. Discipline is something different. Several new aspects in these techniques of power called discipline must be emphasized. To



begin with, *the scale of the control*: it was a question not of treating the body *en masse*, *wholesale*, but of working it individually; of exercising upon it a subtle coercion, of obtaining holds upon it at the level of the mechanism itself—movements, gestures, attitudes, rapidity—: it is an infinitesimal power over the active body. Then we shall emphasize *the object of the control*: the economy, the efficiency of movements, and their internal organization. Lastly, *the modality*: which implies an uninterrupted, constant coercion, supervising the processes of the activity. Discipline is the meticulous control of the operations of the body, which assures the constant subjection of its forces and imposes upon them a relation of docility and utility (Foucault, 1975, p. 137). «‘Discipline’ may be identified neither with an institution nor with an apparatus; it is a type of power, a modality of its exercise, comprising a whole set of instruments, procedures, levels of application, targets; it is a ‘physics’ or an ‘anatomy’ of power, a technology» (Foucault, 1975, p. 215).

And because as control is more important than body punishment, we assist to the birth of new technicians supplied with a new knowledge or expertise on human being: doctors, psychiatrists, and educationalists. The birth of human sciences (psychology etc.) is linked to this new technique of power, which needs an objective or an objectifying knowledge of the subjects produced, for example some knowledge of delinquency, on madness or on mental sickness. What is expected with this new mode of punishment is that it should strike the soul rather than the body. This comprehension of the power as a technique, and not as the exercise of a property belonging to some sovereign authority, cannot be reduced to domination, because where there is power, there is always resistance to it, Foucault tells us.

If we accept Foucault’s definition of power, we understand that the birth of prison is linked to a project for the transformation of individuals. People tend to suppose that the prison was a kind of dump for criminals, whose disadvantages became apparent during use, giving rise to the conviction that the prisons must be

reformed and made into means of transforming individuals. But this is not true: the programs of reforming the prisons and the statements of intention of transforming the individuals were there from the beginning. And the failure of the system comes with the system itself. In the beginning of the 19<sup>th</sup> century, it was already understood that the prisons, far from transforming criminals into honest citizens, serve only to manufacture new criminals and to drive existing criminals even deeper into criminality. «Although it is true that prison punishes delinquency, delinquency is for the most part produced in and by an incarceration which ultimately, prison perpetuates in its turn. [...] The delinquent is an institutional product» (Foucault, 1975, p. 301). It is said that the prison fabricated delinquents; it is true that it brings back, almost inevitably, before the courts those who have been sent there. But it also fabricates them in the sense that it has introduced into the operation of the law and offense, the judge and the offender, the condemned man and the executioner, the non-corporeal reality of the delinquency that links them together and, for a century and a half, has caught them in the same trap (Foucault, 1975, pp. 254-255).

If we return to the definition of discipline, the prison was then meant to be an instrument, comparable with—or no less perfect than—the school, the factories or the hospital, acting upon its individual subjects. Prison is the model, which makes it clear that the society is, at the classical age, a society of discipline. But, even in our neo-liberal society, Foucault's analysis does work, because prison is still an expression of generalized practice of power as to discipline and control individuals and populations (Foucault, 2008). Foucault is able to think of liberal and neo-liberal societies, because he has an original definition of government, as an art or a technique of power (also called *governmentality*), which can also be applied to our neo-liberal society. While the word government today possesses solely a political meaning, in the 18<sup>th</sup> century the problem of government was placed in a more general context. Government was a term discussed not only in political tracts, but

also in philosophical, religious, medical and pedagogic texts. In addition to control/management by the state or the administration, *government* also signified problems of self-control, guidance for the family and for children, management of the household, directing the soul, etc. For this reason, Foucault defines government as conduct, or, more precisely, as *the conduct of conduct* and thus as a term which ranges from *governing the self* to *governing others*.

With his concept of government, he is able to deal with neo-liberal governmentality, which is apparently not disciplinary. The principle of liberal governmentality is to govern less or as less as possible. But nonetheless if we can consider that we are no longer in a society of discipline, our liberal society is still a society of control and its new technique is bio-power: the power on life, exercised on the scale of the population and the territory, which affect the living being: for example natality, mortality, public health politics, sexual politics and norms, and even at the worst moment of history racial politics, and now public treatment of the so-called problem of illegal immigration, in fact it means dealing with the consequences of displacement of populations because of war, of State violence, and of misery and starvation in certain countries. But the issue Foucault leaves us with is the one concerning the subject of resistance. How does the subject produced by techniques of power, by norms, by norms of power more profound than himself, because he is produced by them, can resist to them? Foucault speaks most likely of strategies of resistance. But I think these strategies needs the existence, or the production of a capable subject and the culture of agency in people. So the production of such a capable subject (agency) is intersubjective. Subjects are indeed produced; they are produced by others perhaps not only through power but also through recognition. Recognition is a norm in human relation; it participates to the production of a capable subject. It is then on the very basis of the vulnerability to recognition, that we can speak of the capability or the agency of subjects. Injustice should be understood as misrecognition, disrespect *i. e.* as despise which damage people, in making them invisible, impotent or fatalist.

Axel Honneth is the contemporary philosopher who has given an interesting reinterpretation of the Hegelian notion of recognition. And restorative justice is an attempt to think of how people can be able to repair injustice and restore the capability of the victims.

#### **RECOGNITION AND CAPABLE SUBJECT**

In *Struggle for recognition* Honneth (1995), describes three spheres of recognition. There is no agency where one is currently deprived of *personal, legal or social recognition*. When supplied with these three forms of recognition, the subject feels self-confidence, self-respect and self-esteem, which means her identity formation is a thriving or a flourishing experience. Personal recognition provides the subject with self-confidence. Self-confidence has less to do with high estimation of oneself than with the capacity to express needs and desires without fear of being abandoned as a result. Self-confidence operates at such a deep level that usually it is only in extreme experiences of physical violation, such as rape or torture, that one's ability to access one's needs as one's own and to express them without anxiety can be shattered or broken. So this relation-to-self is very important. Self-respect is one's sense of possessing the universal dignity of persons. There is a strong Kantian element here: what we owe to every person is the recognition of and respect for his or her status as an agent capable of acting on the basis of reasons, as the autonomous author of the political and moral laws to which he or she is subject. To have self-respect, then, is to have a sense of oneself as a person; that is, as a morally responsible agent or more precisely, as someone capable of participating in the sort of public deliberation that Habermas (1987) terms *discursive will-formation*. The object of respect (including self-respect) is an agent's capacity to raise and defend claims discursively or, more generally, an agent's responsibility or accountability. And last, what distinguishes one from others should be something valuable. And to lack of esteem is to have

the sense that one has nothing of value to offer. Individuality and self-esteem are linked, and they are mostly situated in the division of labour, meaning your contribution to the society by your work, and it is experienced through solidarity.

Just to give an example, in France, there is a famous company, France Telecom, where there have been recently more than 25 suicides of employees all around the country. These suicides have to be related to new modes of management in the company. The management asked to the employees, as neo-liberal subjects, more flexibility and more mobility, unless they were under the threat of unemployment. Liberty in neo-liberal society is being identified to a complete indeterminacy or openness to the request of the liberal management. For example being able to do whatever you are asked, which is more or less in your field of expertise, and even to seize initiative to go further more in that direction, and also move in your country or abroad when you are asked to, to show how flexible you are. The management of France Telecom showed indifference and lack of emotion to the sufferings of their employees at work. But the people reacted, they responded and they found a way to resist to that kind of management with solidarity to the deceased colleagues and to the colleagues in general, which means they gained some social consciousness. So they were able to build the grammar of their struggle and to make it clear that the social treatment they were subjected to was really unfair. For example, on a silent march they phrase their feeling of injustice to the public opinion.

The possibility for sensing, interpreting, and realizing one's needs and desires as a fully autonomous and individuated person, in short, the very possibility of identity-formation, depends on the development of self-confidence, self-respect, and self-esteem. These three modes of relating practically to oneself can only be acquired and maintained intersubjectively, through being granted recognition by someone whom one also recognizes. The conditions for self-realization turn out to be dependent on the establishment of relationships of mutual recognition. These relationships go beyond:

- a. Close relations of love and friendship to include
- b. Legally institutionalized relations of universal respect for the autonomy and dignity of persons and
- c. Networks of solidarity and shared values within which the particular worth of members of a community can be acknowledged.

These relationships are not ahistorically given but must be established and expanded through social struggles. These struggles cannot be understood exclusively as conflicts over interests, and such struggles are moral in the sense that the feelings of outrage and indignation generated by the rejection of claims to recognition imply normative judgments about the legitimacy of social arrangements. This is the reason why agency is grounded on struggle, on the capacity to stand for something, because your identity, your sense of dignity or self-respect is outraged.

The intersubjective conditions for identity-formation provide the basis for a conception of ethical life, understood as a normative ideal of a society in which patterns of recognition would allow individuals to acquire the self-confidence, self-respect, and self-esteem necessary for the full development of their identities. Since, according to Honneth, the requirement of reciprocity is always already built into the demand for recognition; social struggles for the expansion of patterns of recognition are best understood as attempts to realize the normative potential implicit in social interaction rather than expression of a particular interest coming from corporatism.

This philosophical notion of recognition is central in the grounding of the practice of restorative justice in recent history of right. The form of recognition this notion is concerned with is the juridical recognition, the possibility of a relation to oneself, which is called self-respect. My conclusion deals with some aspects of this notion.

Restorative justice is a new sense of penalty where punishment is not so much the aim than the reconstruction of a relation, which

has been interrupted or damaged by violence and negation of the equality, which is the basis of democracy. We saw how penalty used to be grounded on sovereignty, and how punishment is a right concentrated in the sovereign State. But that penalty means the victims are not the central issue in this conception of justice, because what seems more important is the confrontation of the criminal with the law represented by the sovereign authority. A crime is an outrage against the sovereign or the body politics. Such a State monopoly on punishment serves to differentiate justice and revenge. Crime is no more against the State, it is not something we have to judge an evil from a religious or a political point of view, it is harming or inflicting sufferings to people. The evil in the crime is a sign of despise, of disrespect, which brings out an unequal relationship. Restorative justice is the restoration of the equality in the relationship and it makes it possible again. With restorative justice, the victim can enter in a face-to-face with the offender in the trial, which has become a scene of recognition, and punishment is not the necessary conclusion of the confrontation. The equality in the social tissue, the capacity and the identity of the victim, have been negated by the crime. And restorative justice tries to repair these social damages.

As an example, the Commission Truth and Reconciliation in South Africa exchanged the truth against amnesty; it was not possible to put half of the population in jail. So what was asked to the offenders is that the truth would be told by the offender before the victim as a sign of recognition of her sufferings. The punishment was in telling the truth. The victim could pardon or not, but the telling of the truth, the necessity of the offender to face one's act, was enough to bring back equality between the victim and the offender. Peace and social reconciliation is then grounded on truth and on the efforts of reparation made by the offender. Restorative justice offers a democratic sense of punishment.

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