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## CRITICAL REALISM AND ETHICS

The following four texts are edited versions of the presentations at the Critical Realism Day School on Ethics, University of London Union, 19 November 1999. The speakers were invited to address issues related to their recent or forthcoming books in the area of ethics.

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### Justice and Relationality<sup>1</sup>

I want to talk about dialectical critical realism in a practical ethical context. I hope I will be able to do it in a way that is of interest to a variety of people, both for what I have to say about using critical realist ideas, and about using them in the particular context of talking about justice. In my work, I am particularly interested in issues of crime and punishment and how ideas of responsibility and blame are deployed to explain what it means to ‘do justice’. That is the theme of my talk, but the focus on this issue will not be to the exclusion of broader issues in a critical realist, more precisely a *dialectical* critical realist, approach to ethics.

My target is a mode of thinking that I call ‘criminal justice thinking’, by which I mean a liberal philosophical position which dominates legal thinking about justice, and which has its source in Enlightenment-based, Kantian, ideas. On the philosophical side, the main line of thought is *retributive*, and legal practices and doctrines draw upon this to organise their general principles. We have a meshing of the philosophical and the juridical in criminal justice thinking, and I argue that the problems and dilemmas of such thinking stem from the fact that it can be seen as a subspecies of what from a dialectical standpoint can be described as ‘identity thinking’. I use the term ‘criminal justice thinking’ specifically to denote its participation in such a broader kind of philosophical problematic, of which more anon. To begin, however, I want to examine the main focus for this meshing of philosophical and juridical concepts, the idea of the responsible individual subject. Such a subject becomes the necessary condition for blame and punishment, but, as understood in the liberal tradition, it is a deeply problematic figure.

#### Kantianism and relationality

A critique of Kantian criminal justice thinking can draw upon a variety of concerns that relate to its essentially individualist form. From within liberalism itself, there are concerns about the relationship between individual and social justice. Can one talk about ‘doing justice’ by finding the individual responsible when society is itself at fault for creating criminogenic environments and gross inequalities? This raises a broad question of fairness, to be contrasted with the narrow claim that it is fair to punish the individual. *Retributive* justice only makes sense, it can be argued, within a broader, *distributively* just, context: you

can’t, in short, have ‘just deserts in an unjust society’.

Such a critique, however, remains within the Kantian fold, producing an unsolvable, *antinomial*, dilemma between the individual and the social. It is therefore unsurprising to find that other, more critical, standpoints have been developed. From a communitarian point of view, there is a second argument that the decontextualisation of the individual through an individualist philosophical framework abstracts and hypostatizes the real individual from her community or her social relations. Similarly, from a structuralist point of view, there is Barthes’ statement about law and personhood:

And this universal language (law) comes just at the right time to lend a new strength to the psychology of the masters: it allows it always to take other men as objects, to describe and condemn at one stroke. It is an adjectival psychology, it knows only how to endow its victims with epithets, it is ignorant of everything about the actions themselves, save the guilty category into which they are forced to fit. (Barthes, 1973: 45)

My own position is located between these two broad standpoints, the liberal Kantian on the one hand and the communitarian/structuralist on the other. A dialectical, relational critique views the individual of Kantian criminal justice thinking as an abstraction from social relations, a way of justifying state power in an unequal and oppressive society, a way ultimately of ‘blaming the victim’. It is therefore akin to the communitarian/structuralist position, but it sees such an approach at the same time as missing what remains of value within the liberal position. That is, a conception of the individual and her responsibility that reflects, without fully embodying, basic truths about what it is to be human. Human beings are more than our contexts or how we are constructed in social relations or communities. *Pace* the structuralist approach, behind liberal individualism there exists real human individuality, which includes the powers and capacities of the human agent. The challenge is to give this middle position, which endorses a critical realist view of the human agent as a real actor with emergent powers, real substance while holding on to a relational critique of the Kantian individualist model of criminal justice. Before approaching that issue, let us examine the dialectical critique of criminal justice thinking more fully.

### **Criminal justice thinking as identity thinking**

In *Dialectic: the Pulse of Freedom*, Roy Bhaskar employs Adorno's concept of 'identity thinking', and my argument is that 'criminal justice thinking' is a local variant on this. 'Identity thinking' is thinking in an analytical-logical mode, where its viability rests upon a fixed conception of identity. Such thinking involves, according to Bhaskar, the illicit employment of 'the logical norms of identity and non-contradiction' and a false 'presupposition of fixed subjects' (Bhaskar, 1993: 394). Analytical-logical thought derives its possibility from the idea of fixed identity, but what if identities are not fixed? What would be the consequence for analytical thinking? To the idea of the fixed subject, Bhaskar opposes the relational subject through the *entity relationalism* of a dialectical mode of thought. To adopt such an approach is

... to break with our ordinary notions of identity .... It is to see things existentially constituted, and permeated, by their relations with others; and to see our ordinary notion of identity as an abstraction not only from [its] existentially constitutive processes of formation (geo-histories), but also from [its] existentially constitutive inter-activity (internal relatedness).... When is a thing no longer a thing but something else?... [I]n the domain of totality we need to conceptualise entity relationalism. (Bhaskar, 1993: 125)

If subjects are not fixed, but relational, then an analytical mode of thought will be inadequate. Dialectics operate as 'the great loosener' of the analytical, which is not to say that it dismisses such thought, or the entities which such thought identifies in a fixed way. It is rather to see such thinking as essentially *limited* by its conception of its subject matter, an ontology of fixed subjects.

How does this relate to the idea of 'criminal justice thinking' as a local variant of 'identity thinking'? At the heart of such thinking is the idea of a responsible individual subject, who is readily identified in herself and is isolated from the social relations of which she is a part. This is an abstract subject, identified by the generic capacity to be 'the seat of a will and to act rationally'. It identifies in each individual fixed, general capacities of a psychological kind (to intend, to foresee, to act, to be in control, to be rational). These form the basis for a conception of a fixed subject, separated from other subjects, and identified with the single biological entity that is the human being. On this fixed and separate identity of the subject there depend the various philosophical and legal doctrines which make up ideas of responsibility and blameworthiness. Thus 'criminal justice thinking', and the validity of its analytical framework, is based upon the identity of a fixed, psychological, individual subject.

Deploying a dialectical, entity relational argument against this fixed, Kantian subject, my argument is that the core problem for criminal justice thinking is that of the *false and necessary separation* of individual from social being where the two are inherently and intrinsically connected. Let us look at the two aspects of this claim.

### **False separation**

Criminal justice thinking relies on a series of concepts which differentiate and distinguish agents, but these differentiations and distinctions generally break down, and are open to sceptical critique. They can always be, to use Derrida's word, deconstructed. The apparent solidity of the most basic categories requires very little critical focus before cracks and contradictions begin to appear. The result is that criminal justice thinkers are trapped within arguments in which the apparent resolution of a problem turns out to be its reformulation. The underlying difficulty is that the analytical categories deployed in such thinking have been falsely separated off from broader categories of which they are a part, and without which they are incomplete. Criminal justice thinking wrestles with this incompleteness without transcending it.

What kinds of separation are these? The core separation is that of the individual, with her abstract mental qualities, from the broader social relations of which she is a part. The major result of such a separation is the distinction, which pervades criminal justice thinking, between a formal or technical view of legal justice, based upon individual psychological characteristics, and the broader, substantive moral issues that are a part of judgments of responsibility, fault or blame. This separation of the individual from her social context instantiates an impossible separation of questions of 'moral form' and 'moral substance', creating a Kantian 'morality of form' at the heart of justice thinking. Such a morality, producing an antinomy of form and substance, considering only factual or psychological questions of the individual's control of her acts, ignores the moral content of the reasons why people act. It is therefore a morality that is inadequate to the proper judgment of wrongdoing.

Let me briefly illustrate the point with a highly simplified version of a legal argument. One of the first things a law student is taught is that there is a fundamental distinction between 'motive' and 'intention' and that the former is largely irrelevant to the question of criminal fault. Thus, a judgment of guilt for the crime of murder involves the formal moral finding that the person intended to kill or cause her victim grievous bodily harm. That is all that is required in terms of responsibility, which means that the formula cannot distinguish, for example, between the contract and the mercy killer. The substantive moral quality in the act is excluded by the focus on the psychological responsibility of the individual as an intentional agent, while the content of her intentional acts (summarised as her 'motive') is irrelevant. This may seem odd to an audience of non-lawyers, for good and bad motive is so obviously relevant to the normal way in which we judge, blame and praise, conduct.

It is odd for the law too, for it has to find ways of dealing with its own formalism. The central fact remains that, at the core of criminal justice thinking is an abstract, formal account of intention that is artificially separated from the broader questions of what morally the individual intended.

The legal-moral designation of a person as a ‘murderer’, however, still requires an understanding of the substantive moral quality of a killing, and this is a ‘lack’, either explicit or implicit, in the law. One consequence of this is a kind of moral ventriloquism, whereby issues of moral judgment speak through legal categories which only obliquely instantiate them. To make a broader point, one can say that modern forms of law *mediate* rather than directly reflect ethical relations. As a result, forms of Kantian justice thinking *demediate* and refract the relation between juridical and ethical judgment while claiming to pair them.

### **Necessary separation**

The obvious next question to ask is *why* the law should operate in this way, and this brings me on to the *necessary* nature of the separation between the individual and the social, between the formal and the substantive. Briefly, the problem for the law is that a concept of *individual* justice can *only* be achieved if such separations are made. If we want to pick out individuals and say that they are to blame for wrongs in a situation where wrongs are plainly social phenomena with structural causes, an analytical inscription and circumscription of the individual has to be achieved. Picking out the person and separating her from her context, for which she is largely not responsible, is a necessary requirement of a system that wants to blame individuals. The problem, of course, is that ‘what God has joined’ (to use a phrase), being-in-relation, the human and the social, cannot be put asunder, yet Kantian, individualist criminal justice thinking aims to do precisely this.

Bear in mind also that we are here in a realm of power, as Barthes reminds us, and that the hypostatisation of the individual emerges in a particular historical period as the result of the evolution of a new, middle class social order. The historical and structural context of the emergence of modern criminal justice thinking is the growth of the ‘well-ordered bourgeois state’ in the early nineteenth century on the back of the liberal Enlightenment. We are talking about the creation of a theory of justice and legal practice in a society that is conflicted, exploitative and oppressive, and the key functional significance of liberal individualism is that, in legal ideology and practice, it is able to deny this. An abstract universality of individual freedom in the philosophy seminar and the courtroom occludes the real, relational issues in a conflictual and violent society.

Thus in dealing with criminal justice thinking as a form of fixed, identity thinking, from its philosophical roots in Kant right through to the latest practical judgment of the House of Lords, we are dealing with a mode of thinking that is falsely separative, and so for necessary historical reasons. It is this real history, which Kantian views of legal ethics deracinate and demediate, which renders criminal justice thinking ripe for dialectical critique.

### **Relationality and real subjectivity**

So far I have presented a critical perspective on liberal individualism by locating its conception of the individual within a broader relational and historical context, from, as

it were, ‘the point of view of structure’. One of the strengths of critical realism, however, particularly in its dialectical form, is the insistence on a second viewpoint that is achieved by switching perspective to ‘the point of view of the agent’. So far this is missing from what I have said, and it will be objected that this is both a dangerous and an invalid omission. Without such a second standpoint, the relational or structural critique will dissolve or subsume any focus on real human individuality in the name of a critique of individualist ideology. Without the standpoint of the agent, the dialectical, relational critique will be akin to those varieties of structural and post-structural critique where the subject lacks any real substance.

For example, in the work of Foucault, despite his late efforts to redress the balance, the emphasis on discipline and governmentality as constituting the subject means that he finds it very difficult to give any sense to the reality of individual subjectivity or agency. Is the relational critique from a structural standpoint subject to the same problem? If it were, this would indeed be a dangerous omission because one loses any sense of what politically is of value within liberalism, its attachment to a model of rights and liberties which are related to its individualist assumptions. As I said at the beginning, I want to steer a middle course between structuralist and liberal critiques. I want to avoid the individualism of liberalism by revealing the relational qualities within individual human being. I do want, however, to hold onto a sense of the importance of the individual, and therefore not to go so far as the structural critiques I have so far developed into a dialectical-relational approach. Is it possible, on the basis of such an approach, to avoid the ‘pale subjectivity’ of the structuralists and poststructuralists?

The way forward is to recall the critical realist insistence on a model of human individuality in which human beings enjoy real and emergent powers by virtue of their nature, but are located in social relations which are both necessary to their being, and which are reproduced, and sometimes transformed, by them. This is Bhaskar’s ‘transformative model of social action’ resting upon his ‘emergent powers materialism’, and, in his dialectical turn, his conception of the ‘perspectival shift’ helps explain the possibility of synchronic standpoints of structure and agency. Human agency is a real feature of social life, even if its character, its possibilities and its futures are historically and structurally nurtured and mediated. Such a viewpoint gives rise to not one, but two, positions from which to read *la comédie humaine*. It stresses, from the agential side, the real character of the subjectivity refracted and mediated through modern liberal conceptions of the individual subject.

### **Relocating the Kantian individual: a blaming relation**

What is the consequence of affirming this middle path between structuralism and liberalism for a theory of individual responsibility and blameworthiness? What the structuralist or poststructuralist critique ignores is the real ‘first order’ significance of concepts concerning individual moral agency which Kantianism reflects,

albeit inadequately. Even *after* a critique of how individual subjects are produced, one needs to consider a Kantian question about the nature of individual moral agency. One must, however, find a non-Kantian way of answering it. To produce a critique of Kantian legal individualism is not to deny the significance of human individual agency as a central moral issue in processes of judgment and blame. Forms of responsibility need to be taken seriously, so that the question is how best to understand them, not to reduce them to an effect of something else. The problem is that the Kantian way of understanding responsibility, reflecting and rationalising legal modes, is falsely separative and non-relational, but I maintain that the Kantian *question* about the nature of responsibility still requires an answer.

In the dialectical critical realist approach, responsibility remains an attribute of human agents, so that the Kantian focus of the criminal law has real significance. The key difference between a Kantian individualist view of responsibility and a dialectical-relational point of view is that, for the latter, responsibility exists *both in and beyond individual moral agents in the same moment*. Responsibility is shared between the individual and the 'significant others' in her community or communities. Such a standpoint has profound implications for thinking about punishment and justice. If punishment remains a valid phenomenon within a relational approach, it must be reconciled with an understanding of the ways in which others, including potentially the punishing agency, are also to blame. Responsibility is not individual-fixated, as in Kantian criminal justice thinking though it is individual-relevant. In this view, blaming has to assume a much more ambivalent, open and discursive form than legal justice with its antinomy of the judger and the judged. Where on a dialectical view you find being-in-relation, there too you find 'blaming-in-relation'.

There is not time to elaborate on this position, but it

broadly leads to a sense of ethical judgment that in the same moment includes agents, structures and communities. A 'both/and' view of responsibility should be applied to situations where liberal theory focuses either on individuals or their communities in separation from each other.<sup>2</sup> (Such a separation remains present even where a government sloganises on the need to be 'tough both on crime and the causes of crime'). It also emphasises the socio-historical character of liberal philosophy and points to the need for real social change as the basis for change in our blaming ideas.<sup>3</sup> In the present period of stasis and seeming 'westernisation' of the world, such change seems a distant prospect. In the meantime, however, it serves as the basis for a relational critique of the dialectical limits of legal and philosophical forms.

### References


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### Notes


1. This paper draws on my *Punishment, Responsibility and Justice: a Relational Critique*, which will be published later this year by Oxford University Press.
2. For illustrations of the effects of such an approach in two very different contexts of blame and responsibility, see Norrie, 1997 (on the two boys who killed James Bulger) and Norrie, 1999 (on the guilt of Albert Speer).
3. See Norrie, 1996 for elaboration of this theme.


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