Criminal Law's Person and Criminal Policy

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Introduction

Criminal justice makes assumptions about the properties of agents, human beings, and persons. These assumptions include autonomy, rationality, mentals states, intentional action, gender, bad character, and citizenship.[1] Together, they form the criminal law's person (CLP), which affects how we justify blaming and punishing individuals. My doctoral thesis will examine these silently assumed properties. Which fundamental assumptions are required from individual humans so that they can be blamed and punished? What properties are required for blaming and punishing, and are they justifiable? My hypothesis is that assumptions about CLP are presupposed without a deeper understanding of what they mean and how they are formed. The CLP assumed in criminal law is the one that is formed by society, its institutions, and their interests. In my doctoral thesis, those properties will be collected and their nature and implications for criminal justice will be critically studied.

The aim of the doctoral thesis is to construct a critical bundle theory about the assumed properties of CLP.[2] The view will be constructed by examining what properties, like capacities, concerning individual humans are assumed by the criminal law, how they are formed, and if they are contradictory. Thesis will provide a set of properties of CLP required by society for persons to be blamed and punished for their crimes. By critically analysing those assumptions, their meaning will be clarified, as they may be internally contradictory.

The assumed properties are problematic and internally contradictory because of the effects of different social interests. There are two main ways to define the properties of the CLP. My current hypothesis is that there is an individualistic side and a social side to those properties. Individualistic explanations and social explanations may give contradictory definitions to those properties if CLP can be seen as an autonomous and rational individual, or a person (for example, a citizen) can be seen as part of society. Rationality can be defined by an individual's capacity to react to reason, but according to psychology one can also say that individuals are not as rational as the rational choice model assumes. Different assumptions and ways to understand them

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1. E.g., Duff, 2007; Moore, 1997; Moore, 2020.
2. On the idea of bundle theory of legal personhood, see Kurki, 2019.

cause contradictions in particular properties, the CLP in general, and problems in how we use criminal justice.

The use of criminal law and punishment is social at its core. They are a part of social control and criminal policy. Blame and the use of punishment are partly[3] tied to the CLP, as the person must be able to understand its action and have other options concerning its action. Criminal policy, as one of the society's institutions, defines which properties are assumed from an individual and who can be seen as a CLP. In a welfare state, the definition of the CLP and its properties should be done fairly. There should not be problematic properties that can inflict punishment. Citizen class, wealth or skin colour should not affect punishment. I aim to provide a more transparent understanding of CLP and its properties by using political criminal law theory.

1.   What Is Criminal Law's Person?

CLP is the subject of criminal law. CLP should be understood as something broader than just blameworthiness or agency. It is the criminal law's assumed abstract idea of a human individual that can be blamed and punished for its actions. It is formed by a set of assumptions in criminal law, punishment theories, criminal policy and in some respects, criminological theories. It is a generalisation of the individual (natural) person as a psychological induvial and individual as a part of society.

CLP tells us about the assumed properties concerning the individual person and its psychology. It includes the assumed psychology and reasons for human behaviour in general in criminal law. Michael S. Moore argues that the suppositions concerning psychology are suppositions about the responsible subject. Those suppositions answer the questions "[w]ho or what can be morally responsible" and "what attributes a being must have to be held responsible". Those suppositions form the terms of a person and develop a criminal law theory of personhood.[4] Personhood concerns the features a person must have so that criminal law can be applied to the individual.[5] But CLP is not just the psychological assumptions (or metaphysical capacities) concerning the human individual. In addition to that individual side, the person is also a social and political actor.[6] CLP is also a social being and a part of the larger social-cultural group. CLP also has properties of this social side. Some of the properties are also defined more by politics than psychology.[7]

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3.   There are also requirements for the act and outcomes.
4.   Moore, 1997, p. 595.
5.   See Moore, 1997, p. 610. About legal personhood, see Kurki, 2019.
6.   Norrie, 2014, p. 36-38 and Neffine, 2021, p. 55-57.
7.   See e.g., Yaffe, 2018, p. 158-184 how children's limited political rights affect their culpability.

CLP is a social construction of the abstract individual behind the criminal law. Properties of CLP, like capacities and characters of criminal responsibility, are required by society for a person to be seen as a responsible subject who can be punished. For example, Nicola Lacey has argued that criminal responsibility legitimates the use of state power (use of punishment). Responsibility is an institution of the state, not just an abstraction.[8] CLP is not just a set of psychological or social assumptions. It is a requirement for blaming and punishing individuals. It is a justification for using criminal justice, and as a part of society, it should be studied by political philosophy.

2. Properties of the Criminal Law's Person

As the CLP is built up from several properties, it should be understood as a cluster of those capacities and characters. Visa Kurki has argued that legal personhood should be understood through the bundle theory of legal personhood. Legal personhood consists of numerous elements, not all of which always come together.[9] Similarly, I think there are other properties, like different capacities and characters, that the subject of criminal law requires. Some of the properties contradict each other and internally. Contradiction is caused by the various institutional interests that have been given to criminal law.

In my dissertation, I will collect and critically analyse those properties required from the CLP. By properties I mean several categories of assumption. Examples of those capacities, characters and abilities are autonomy, rationality, intentions, emotions, body, dangerousness, citizenship, and equality. They are philosophically loaded, as some of them concern metaphysics (e.g., free will), others relate to psychiatry and psychology (e.g., intentionality) and some are rooted in society's idea of justice (e.g., equality).

Usually, when criminal law theory defines who can be blamed and punished for an individual's deeds, it is an autonomous and rational agent. Moore has argued that "autonomy and rationality are to be understood by the concepts of acting, and acting for reasons".[10] The person can act for a reason, and the person must have the opportunity to act otherwise. Agency is a big part of the CLP, as the act of a crime makes an individual subject to criminal law. But this individualistic subject is also part of broader social groups. The person is an individual citizen of the state, but the person can also be characterised by other characters. There are also political and cultural categories. For example, humans are seen as equal citizens, and every human has human dignity that must be respected.

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8. Lacey, 2016, p. 1-24.
9. Kurki, 2019, p. 91-125.
10. Moore, 1984, p. 100. See also Moore, 1997, p. 614,

Rationality can be understood as the capacity to recognise and respond to reason. There are relevant reasons for one's action. Reasons can be beliefs, emotions, or other kinds of thoughts. A person is assumed to react to the threat of punishment, and the person recognises those reasons for action.[11] Autonomy is the capacity to choose to react to the reason to act. The person can choose and control its actions. Actions are seen as voluntary.[12] It relates to free will and the ability to act otherwise.

Some of those assumptions can be found in punishment theories and especially the discussion on why society uses punishment. These hypotheses concern the effect of punishment on human behaviour. Deterrence theories assume that fear of punishment will affect an agent's decision-making. In general prevention theory, humans are seen as moral agents whose morals can be reformed. But also, some of those assumptions have been questioned by sceptics of free will and the rational agent model.[13]

Some characters also affect criminal law. Nicola Lacey defines the characters as "a particular conception of how criminal evaluation attaches to persons and relates to identity".[14] I think that the CLP also includes citizenship,[15] as being a part of the group whose behaviour criminal law is aiming to guide. Criminal law's subjects are equal persons. But that equality may not actualise in reality.

The properties mentioned here are not all the capacities, characters, or assumptions. Others include control of emotion, capability to mental state and intentional action. I do not claim that the properties I will describe in theory are metaphysically necessary and sufficient conditions for blame and punishment. They are what society requires for the reactive attitude of blaming its citizens.

The problem in CLP is that some of those properties are contradictory to each other and internally. For example, causal explanation of behaviour may question the freedom of the person, but criminal law needs free will if society wants to blame persons for their actions. Another example would be that criminal law secures and violates citizenship; everyone is equal, but some people must be locked away. Some acts can be an excuse but not all. Some institutions and interests require thinking of the individual as a responsible person and some as unresponsible. Criminal policy can't wait for philosophers or scientists to resolve those metaphysical questions on the fundamental nature of a human being.

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11. See e.g., Duff, 2007, p. 39; Moore, 1984, s. 101.
12. See e.g., Moore, 1997 p. 610-614.
13. Discussions about the free will scepticism see e.g., Shaw – Pereboom – Caruso, 2019. Discussions about the rational choice in crime prevention see e.g., Reynald – Leclerc, 2019.
14. Lacey, 2017, p. 2.
15. About citizenship in the context of criminal justice, see e.g., Ashworth – Zedner, 2021; Duff, 2011.

3.   Forming the Criminal Law's Person

Different assumptions and ways to understand those properties come from different social institutions and their interest. For example, policy, economics, science, and justice require different things from a person. CLP is formed by properties of an individualistic and social person assumed and required by those institutions. The idea of contradiction is not new, as Alan Norrie thinks there is tension in criminal doctrine caused by "law's psychological and political individualism".[16] Also, Ngaire Naffine claims that there are two ways that criminal actors can be understood in criminal law theory: "a free-standing individual" and "the demographic or social model of criminal person".[17]

This forming of CLP causes problems in the use of criminal law and criminal policy as the two ways to understand individual/character/person in criminal law causes contradictions in criminal law and crime prevention. Modern liberal democracies assume the anatomy and rational subject of criminal law. They are the conditions for a subject to be punished. But this subject is also the subject of the state's control. It is also seen as part of the group, not just as an individual. There are two ways to understand the subject as an individual or part of society. This affects the properties that are assumed from those two subjects. Various institutions and primarily psychological and social ideas of individuals pull the CLP in different directions because of the different use and ideas of the assumed properties. Depending on the contexts, a person may be seen as free or not, as rational or irrational, as an individual or as part of a group. For example, autonomy can be defined as the capacity to act otherwise. But the person may not have free will because of determinism/neurons/history. Rationality can be defined by an individual's capability to react to reasons, but psychology may also indicate that individuals are not as rational as the rational choice model assumes.[18]

Punishment theories also shape the CLP. Deterrence theories are based on the idea that humans are rational agents; rewards and punishments influence their choices between different courses of action.[19] Critics of the rational choice theory believe that people do not make decisions according to these principles, since crime is not purposeful and rational.[20] Rational choice theories also give an overly simplistic account of the offender's psychology. The rational choice theory has faced a range of decision models, such as the dual-process

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16.   Norrie, 2014, p. 35-38.
17.   Neffine, 2021, p. 55-57.
18.   Reynald – Leclerc, 2019, p. 2.
19.   See about the rational choice perspective Cornish – Clarke, 1986 and about deterrence theories Nagin – Cullen – Jonson, 2018.
20.   E.g., Reynald – Leclerc, 2019, p. 1-3.

model.[21] Criminal law is also thought to affect persons by morality and legitimacy.[22] It is assumed to change the moral agent.

CLP can be seen to concern an individual person, as it concerns who can be blamed and punished for their deeds. However, criminal law is a part of society. It serves pragmatic interests, like security, utilitarian goals, crime prevention, social cooperation, civil order, and peace in society. CLP is part of politics and social reality. Several institutions and interests form CLP. Criminalisation, punishment, and responsibility serve those interests. Those interests of various institutions are not usually stated aloud. By investigating how those institutions and interests affect and form the assumptions of CLP, policymakers can think about how CLP should be considered so they can fulfil the aims of criminal policy. By clarifying those properties, the criminal policy can have better tools for policymaking that is more just.

4   Criminal Law's Person and Criminal Policy

In a welfare state, the use of criminal law should be fair. CLP should not be unequal, and punishments should not be used on those in society's weakest position. A just society is one of the main topics of political philosophy. Political philosophy seeks to define what would be the best way to organises the state. Political philosophy may inform criminal policy about the best way to organise a just society concerning crime and punishment. What properties and meanings should be used for the CLP, and can a more just criminal policy be achieved?

If the CLP is a set of contradicting conditions and properties formed by the interests and attitudes of different institutions, it can be seen as a problem for using criminal justice. The idea of humans should not be problematic or contradictory when it affects those who are subjects of the state's power regime, in this case, criminal punishment. Society seems to demand reactive attitudes of blaming and punishing. The least that society can do is to be clear on the reasons for which it uses punishment. With political criminal law theory and political philosophy one can tell which properties of CLP should be noted in using punishment and how to make that use more just.

With a better understanding of the assumptions and how they may contradict, society could have a clearer idea of how it believes criminal justice affects individuals. By looking at criminal law's individual not just as a psychological individual but also by using political philosophy, there is an opportunity to understand what society requires from the criminal individual. It can clear the assumptions and the use of blame that do not treat individuals equally. In this way, there could be an option for a criminal policy that is more just.

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21.   Kahneman, 2013.
22.   Lappi-Seppälä, 1995; Tyler, 1990.

5.   Conclusion

With my research, I aim to provide a critical bundle theory about the properties of CLP that society should consider when thinking about blame and punishment. CLP is the criminal law's idea of a human individual formed from properties like rationality and autonomy. The properties are affected by several institutions and interests.

A clear idea of the assumptions of human nature in criminal justice is crucial because we are unlikely ever to fully understand reality without any institutional assumptions. We can never conceptualise the fundamental idea of the blameworthy person without some presumptions. This does not mean that society should abandon responsibility, freedom, and rationality. They are worth wanting.[23] There seems to be a need for criminal law in society, and criminal law cannot wait until those metaphysical questions have been answered (if they ever will be). Society demands the responsibility, justification for punishment and idea of CLP now. But the use of punishment should not rest on contradicting or unjust demands. The reasons for blaming and punishing individuals need to be just and clear. That is why there is a need for understanding what CLP is.

Kontaktoplysninger

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23.   See Dennett, 2015, p. 167-188.

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