TOWARDS A COMPREHENSIVE & MORALLY JUSTIFIED THEORY OF PUNISHMENT

How should we respond to crime in keeping with today's human rights law, without having to compromise the theoretical justification of the principles we value as guiding in responding to crime?

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Abstract: This thesis will start out with a brief overview and discussion of the traditional theories of punishment. The aim of the discussion is to provide insight into the moral quandaries of both the instrumentalist/consequentialist and the deontological/retributivist approaches to punishment. In light of the overall aim in this thesis, to construct and defend a comprehensive and morally justified theory of punishment, it is this discussion of the consequentialist and retributivist approaches to punishment which serves the purpose of outlining the difficulties any new theory of punishment inevitably has to deal with. The subsequent discussion of the meaning of human dignity sheds some light on how to treat offenders as human beings with a 'basic right to justification'; whereby it is argued that the offender's human dignity is respected by punishing him for the criminal wrong he is responsible for. At last a brief discussion of restorative justice serves to introduce the theory of *restorative retributivism*, a theory which adopts and defends the retributivist approach to punishment while attending to consequentialist ideals by means of its structural set-up. Restorative retributivism thereby aims to provide a morally justified response to crime; a theory which acknowledges the moral authority of human rights law not just in order to be properly called 'comprehensive', but a theory which necessarily implies a focus on the respect for the human dignity of both offenders and victims to justify its response to crime.

Introduction

Punishment has been in existence since the very beginning of mankind and perhaps it is for this reason a generally accepted practice. Against all odds, for there seems little agreement on its supposed (main) purpose, let alone whether and how punishment could be a morally justified response to crime in the first place.

With the ultimate goal of constructing a comprehensive and morally justified theory of punishment I will try to answer the following question in this thesis: *How should we respond to crime in keeping with today's human rights law without having to compromise the theoretical justification of the principles we value as guiding in responding to crime?*

Accordingly, in the first chapter I will reflect on the justification for punishment by first reviewing the principles and purposes advocated by the traditional theories of punishment. In chapter 2 I will discuss what I think needs to be taken in consideration in constructing and defending a theory of punishment to be rightfully called 'comprehensive', the focus in this chapter will be on the concept of human dignity and its normative implications for the institution of punishment. Due to (the growing recognition of) the authority of international human rights law we can no longer rely solely on a theory of punishment which does not reach further than a mere theoretical justification for punishment itself, or when applied in practice, fails to live up to the obligations set forth by human rights law. Lastly, in chapter 3 I will discuss the theory of restorative justice, which I believe might be a potential candidate in providing the answer to the question of how to respond to crime based on morally justified principles without losing sight of the legal and moral authority of human rights law.

1. Traditional Theories of Punishment

Considering theories of punishment, we can roughly divide between retributivist and consequentialist theories. While the former focus on punishment itself as a form of 'deserved suffering', the latter hold that punishment is, and ought to be solely a means to a specific end, i.e. crime prevention (Bedau, Kelly 2010). Because of this consequentialist (or instrumentalist) approach to punishment, consequentialist theories are typically called 'forward-looking' (Bedau, Kelly 2010; Brooks 2012); the committed crime serves merely as a 'trigger' and has no meaning within the context of punishment itself (Hallevy 2013). According to this view, whether or not punishment is morally justified depends solely on the envisioned consequences of punishment. As such, the consequentialist approach stands in large contrast to the deontological approach of the retributivist theories of punishment. Retributivist theories are typically called 'backward-looking' (Bedau, Kelly 2010; Brooks 2012); the harm/burden of punishment is the actual purpose and the consequences of punishment for the offender and/or society have no influence on the imposition of punishment itself (Moore 1993).

In the first paragraph of this chapter I will elaborate on the primary purpose(s) of both retributivist and consequentialist theories of punishment and briefly reflect on some of these theories' reported or valued relevance of effectiveness in practice. In the second paragraph I will discuss these theories' justification for punishment in light of these purposes, and while I consider the arguments against the consequentialist theories in this paragraph sufficient proof of the consequentialist approach's implausibility, I do not purport to have exhausted the complete discussion regarding its justification for punishment; leaving it up to the reader to decide whether or not to agree with me. Although retributivism has its share of moral predicaments too, my aim in this chapter is to neither reject, nor support this theory but focus on the validity of some of the most compelling arguments against the retributivist theories. As such, the latter discussion serves mostly as a critical introduction to the theory I put forward in the third chapter.

1.1. The Purpose of Punishment

Retributivism, or (moral) desert, as a theory of punishment requires that an offender has to suffer for his/her offence. Although punishment in this perspective implies the intentional infliction of harm (which is generally believed as wrong in itself), the suffering, given that it is in proportion with the offender's wrong, is deserved (hence desert) and thereby justified. This desert is according to some of its proponents intrinsically good (e.g. Moore 1993). Others argue that the wrongdoer's suffering should be considered as that which he owes to the victim and/or society as a form of reversing an 'unfair advantage' (i.e. while others 'restrain' themselves, the offender has not) (e.g. Finnis 2011). The last few decades, especially in the Netherlands, citizens' support for 'hard treatment' (the intentional infliction of harm/burden) has considerably increased and particularly retribution (as one of the primary purposes of punishment), is highly acclaimed (Sociaal en Cultureel Planbureau 2002). The latter may be caused by what seems to be appealing to many, i.e. the capability of satisfying a (natural) need for vengeance.[1] In short, the purpose of punishment, according to the retributivist, is deserved suffering through punishment. The imposition of punishment is thereby built on the premise that the to-be-punished is an autonomous being who has wilfully chosen to commit the offence, knowing he/she is responsible for his/her actions (Pugsley 1979).[2] Perceiving punishment as that which the offender *deserves* means that we're not only justified in punishing the offender, it is also a duty to punish the offender (Moore 1993).[3]

Furthermore, in punishing the offender for his wrong, it is communicated to the offender that society condemns the offender's wrong. Punishment is therefore not only hard treatment but carries what Feinberg calls a 'symbolic significance' as well. The latter is typically known as the 'expressive' or 'communicative function of punishment' (Feinberg 1965; Duff, Marshall 2004; Duff 2005; Tadros 2011).[4] This

[1] The retributivist may however argue that retribution differs from vengeance and claim that the former is morally justified while the latter is not. I will discuss this further in the following paragraph.
[2] People who are not considered as (completely) autonomous (yet) are therefore not (entirely) responsible for their wrongdoing, e.g. children; people who suffer from mental incapacities and those who were forced to commit the offence.
[3] Not all retributivists agree on this duty to punish, see for example Corlett 2013.
[4] Tadros (2011) is however sceptical about the effectiveness of communication and its subsequent justification for punishment. His scepticism is thereby rooted in his preference for the consequentialist

'expressive function' of punishment is however not a way of forcing the offender to obey the law, since this would be failing to respect the offender's autonomy.[5] The purpose of punishment is still just desert, it does not aim for a change of heart - though it would certainly be welcomed - it only *expresses* the condemnation of the offence. The expressive function of punishment gives furthermore rise to the idea that there is an *obligation* to punish. For refraining from imposing punishment would not only be failing to treat an offender as he deserves and failing to be fair to those who did receive punishment, it would also be failing to reaffirm a certified norm. Refraining to impose punishment would be failing to take the violated norm seriously or could even be said to be an approval of the violation of the norm (Feinberg 1965).

At last, punishment is justified *solely* by what the offender deserves; the (potential) consequences of punishment are completely irrelevant. It would be nothing more than a welcomed by-product of the punishment if an offender decides to refrain from reoffending as a consequence (Pugsley 1979; Moore 1993).[6] A retributivist approach to punishment could therefore be extremely costly when applied in practice, for even if recidivism rates increase as a consequence of received punishment, they do not grant a justification for modifying punishment itself. Though, speaking in terms of what the offender deserves, one may wonder whether it is ever justified to put a price on moral desert. A 2009 survey-based study among the American public appears to confirm the latter idea, for regardless of the costs of punishment it seems that the urge to make offenders suffer prevails. The majority of the respondents in this survey on American 'supermax prisons' (supermaximum security prisons wherein prisoners serve their sentence in single-cell confinement; locked up for 23 hours a day with hardly any, or no interaction at all and no work opportunities), were of the opinion that even if supermax prisons would not amount

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approach to punishment - if we want offenders to realize they did wrong, why use the expensive measure of hard treatment; if we want them to be remorseful, why not communicate this with *words*?

[5] "*It is important to show that punishment, while it does involve a forceful attempt to make her listen and to persuade her, can and must respect her moral agency by leaving her in the end free to remain unpersuaded and unrepentant*" (Duff, Marshall 2004, 39).

[6] It might be highly problematic for a state to rely completely on desert as a justification for punishment. Should dangerous offenders be released after they have served their sentence? Can we justify releasing offenders if future (serious) offences are foreseen? According to Wood (1988) the detention of dangerous offenders who served their sentence can be justified if such 'civil detention' has no punitive aim, civil detention is thereby rather a form of quarantining (which is not punitive either). Wood: "*the retributivist can consistently hold that there are non-retributivist grounds for incarceration (such as social protection), so long as, of coarse (sic), such incarceration does not constitute punishment*" (Wood 1988, 433). Nevertheless, one may wonder whether civil detention is as much experienced as non-punitive in practice as it is meant to be non-punitive.

to a decline in crime rates, they would still support the institution of these supermax prisons (Mears, Mancini, Beaver, Gertz 2013). Although the researchers were careful in attributing the support for supermax prisons to specific beliefs among the public, stating that more research is needed, adherence to retribution served as one of the common denominators.[7]

Consequentialist theories of punishment, on the other hand, are 'forward-looking'; punishment is only a means to achieve a certain good. Since, according to consequentialism, it is the end that justifies the means, whereby the 'end' is understood as that which benefits the largest group of people (Timmons 2002), its perspective on punishment is that we are justified in punishing an offender if by punishing this offender we can prevent further crime and the harm imposed on him/her is outweighed by the benefits, i.e. crime prevention. Given crime prevention is the 'ultimate' goal of, and justification for punishment, it is the effectiveness in practice which should be determinative in deciding which specific approach to punishment is most justified (i.e. which approach is most cost-effective in terms of benefits and burdens). I will enlist here the three most well-known consequentialist theories of punishment.

Deterrence as a theory of punishment, aims to prevent crime by frightening people with the threat of punishment or, when the threat does not suffice, punishment itself (Gibbs 1975). The possibility of being punished, the severity and/or the celerity of punishment,[8] could therefore make crime 'unattractive' and consequently prevent people from breaking the law. Another consequentialist theory of punishment is rehabilitation, whereby crime prevention is believed to be achievable by 'curing' offenders. Since offences are usually rooted in for example drug or alcohol addiction, mental diseases, poor education and/or qualifications, there is a chance that turning to crime will no longer be seen as the only way out if there is a means to overcome these problems (Brooks 2012; Hallevy 2013). Rehabilitation consists in helping the offender and providing him/her with the opportunities to

[7] Adherence to retribution however strangely lessened somewhat if there was no public safety benefit. "*Across both models* [public safety benefit versus no public safety benefit], *holding a retributivist philosophy of punishment is associated with increased support for supermax prisons; however, the effect is stronger in Model 1* [benefit]. *The pattern is odd in that one would expect a retributivist philosophy to be absolute - punishment is for punishment's sake - and so, by extension, we would expect support for supermaxes to be constant, regardless of whether a public safety benefit accrues*" (Mears et al. 2013, 604).

[8] Celerity of punishment refers to how quickly punishment follows upon the offence (Gibbs 1975).

better cope with life and essentially reforming him/her into a law-abiding citizen who chooses to obey the law not because of the possible consequences in case he/she disobeys the law, but because of the inherent wrongfulness of the offence itself. Yet another consequentialist theory of punishment, the incapacitation theory, aims to prevent crime by making the offender physically incapable of doing any further harm (Barton 2005; Hallevy 2013).[9] Incapacitation usually comes in the form of imprisonment, though it could also refer to for example, the death penalty or chemical castration. Although there is no certainty regarding future harm, at least as long as the offender is incapacitated any potential criminal acts are prevented.[10]

Thus, for the consequentialist theories of punishment the committed offence serves merely as a trigger and the sole purpose of punishment is to prevent more damage from the offender's side. The justification of punishment therefore depends on its effectiveness, if it fails to for example prevent recidivism, it would be a sufficient reason to re-evaluate punishment and possibly come up with a different treatment for offenders. Contrarily, for the retributivist, 'effectiveness' has an entirely different meaning, referring only to whether or not punishment is justly imposed (i.e. following a fair trial; the offender's guilt is proven; the punishment is proportional to the offence, etc.). Effective punishment therefore appears to be within the control of those who impose punishment. For the consequentialist, on the other hand, whether punishment is effective depends largely on the offender's (future) decisions and actions, and it is the latter which appears almost impossible to control and ascertain.

Every study into the effects of the consequentialist 'designs' of punishment seems to have yielded conflicting, though mostly negative results (Lipton et al. 1975; Steele, Wilcox 2003; Dölling et al. 2009; Freiburger, Iannacchione 2011). Taking for example the deterrence theory of punishment which aims to prevent crime by (threatening with) punishment, whereby the 'benefits' of committing a crime may outweigh the cost of (potential) punishment - it is not surprising that not every (potential) offender calculates the costs and benefits of offending before his/her actual offence. Not only

[9] Those who support incapacitation as a preventive measure typically refer to incapacitation as a non-punitive measure; it is argued that to detain someone in order to protect society may be justified if such detention is not considered punishment (Wood 1988, *supra* note 6), or that civil detention is no less morally problematic than quarantining someone (Schoeman 1977). Another option is to combine the purpose of incapacitation with for example rehabilitation (Goldman 1982).

[10] Excluding crimes an offender may commit while incapacitated, for example attacking another inmate in prison.

would the offender have to have exact knowledge of the criminal law, i.e. what punishment would be imposed for the 'planned' offence, but also what the odds are of getting caught for the offence under the circumstances at hand. Moreover, a significant amount of offences seem to 'happen' impulsively.[11] And even if an offender refrains from committing a crime, it can be questioned whether this is because of the feared possible consequences in terms of punishment. The latter is in fact a major practical weakness of the deterrence theory. Sociologist and proponent of the deterrence theory, Jack Gibbs (1975), admits that deterrence is essentially unobservable. According to Gibbs we can only *infer* its effectiveness or ineffectiveness, since there is no direct evidence of actual deterrence. Either an offender is not deterred (he/she has committed the crime), or an offender refrains from committing the crime whereby deterrence could be one of many reasons not to offend.[12] Studies which have attempted to establish the deterrent effect of punishment have provided mostly conflicting results. An analysis of 700 studies (empirical; survey-based and experimental) into the effects of deterrence seems instead to suggest that the specific method of research (e.g. questionnaires; criminal statistics) influences the results as well as revealing an odd frequent consistency between the author's estimations and the eventual results (Dölling, Entorf, Hermann, Rupp 2009). The analysis does however indicate that the likelihood of getting punished has a greater deterrent effect than severity of punishment. Moreover, the influence of deterrence on reducing the number of minor offences seems significant, though it is disputed whether deterrence has any effect at all when it comes to serious offences. Despite the high number of studies reviewed, Dölling et al. stress the need for more research. Since we cannot find direct evidence of the effects of deterrence, any such research whereby conclusions can be based on inferences only, demands consideration and evaluation of an incredible amount of data, even if relevance seems only slight.

[11] It seems that the death penalty for example, has no effect on the number of serious offences such as homicide (Dölling et al. 2009). An explanation for the lack of a deterrent effect might be that offences for which one most likely will receive the death penalty are those committed without premeditation. A survey on inmates' opinions about the death penalty revealed that deterrence had no or hardly any effect. Inmates stated that these kinds of offences "*'are not planned' and that 'things go wrong'*" (Steele, Wilcox 2003, 303).

[12] Moreover, what might deter one potential offender doesn't necessarily deter another potential offender and what deters someone at one point may not deter the same person at another point in time (Brooks 2012).

Rehabilitation appears to be suffering the same fate as deterrence; in fact, its ineffectiveness is considered proven (Lipton, Martinson, Wilks 1975).[13] Whether rehabilitation is effective largely depends, amongst other aspects, on the quality of treatment; the environment wherein treatment is given and the offender's willingness to be treated (Cullen, Gendreau 2000). Poor treatment for example, should not automatically render rehabilitation ineffective, for proper treatment might have had a positive influence. Although the latter might be true - maybe we just haven't discovered the right treatment yet - there are only so many options before we are effectively 'moulding' offenders into law-abiding citizens. Nevertheless, it seems fairly impossible to make any claims about the *in*effectiveness of the rehabilitation theory if we can just sidestep questioning the theory's effectiveness by blaming it on poor execution. Whether or not we should indeed continue to invest our energy into designing the ideal treatment is a matter of discussion, though putting it in perspective, the current 'habit' of just locking everyone up does not seem to be effective either. According to Cullen et al. (2011) the latter has hardly any deterrent effect and could even turn out to be 'criminogenic', since "*social experiences of crime are likely crime generating*" (Cullen, Jonson, Nagin 2011, 60). So we might as well continue our quest, for according to Cullen and Gendreau, if there is a way to reduce recidivism, rehabilitation is the 'best bet' (Cullen, Gendreau 2000, 161).

Even though the consequentialist theories of punishment have trouble in justifying punishment due to questionable effectiveness, this does not automatically prove retributivism to be the 'winning' theory of punishment. It seems unsettling to keep the consequences of punishment completely out of discussion, besides, would there still be (as much) support for retributivism if the consequentialist theories of punishment were considerably effective in practice? Moreover, doesn't it seem rather stubborn to continue supporting hard treatment if this treatment, imprisonment in particular, proves to be 'criminogenic'?

[13] The study by Lipton et al. served as the ultimate proof of the ineffectiveness of rehabilitation for quite some time, although the study and drawn conclusions have been criticized and questioned as well; see for example Cullen, Gendreau 2000.

1.2. Justifying Punishment

Crime prevention is a goal definitely worth striving for, but using crime prevention as a justification for punishment runs into a practical and more importantly, a moral disaster. It is not just questionable effectiveness which troubles the consequentialist theories of punishment; these theories' characteristic ends-justify-means-approach is far more problematic.

First and foremost, since the purpose of crime prevention justifies the imposition of punishment, it seems impossible for the consequentialist theories of punishment to protect the innocent from getting punished if punishing the latter will lead to crime prevention.[14] Considering the theory of deterrence, we could incarcerate the guilty to deter them from reoffending, but we could likewise incarcerate the innocent to deter them from committing crimes in the first place. And while the theory of incapacitation escapes the issue of effectiveness (its goal is simply achieved when the offender is incapacitated, e.g. incarcerated), it similarly commits us to incapacitate both guilty and innocent people if that is what prevents crime. Though the proponents of the deterrence and incapacitation theory of punishment could argue that we at least constrain ourselves to only punish the guilty (i.e. 'rule-consequentialism'), it will be hard to harmonize such a rule with the overall consequentialist ideals. For if we could save several people from harm by punishing one innocent person, refraining from punishing the innocent person will leave us with quite the opposite of what we are essentially aiming for (Kaufman 2013).

Secondly, the consequentialist theories of punishment inevitably demand disproportionate punishments. Although (meeting) the demand of punishing offenders in proportion with their wrongdoing is highly complex itself, the consequentialist theories put the concept of proportionality in an entirely different and counterintuitive context. Considering the purpose of crime prevention, instead of imposing punishment in proportion with the committed offence, the offender is punished in proportion with the likelihood of him/her committing any future offences. This means that the severity of punishment depends on for example the level of deterrence (if a specific sentence for a specific crime does not prevent

[14] Thereby safely assuming we all agree innocent people should not be punished.

offenders from committing this crime, the sentence would have to be more severe in order to properly deter these offenders); the risk of recidivism (we would have to incapacitate offenders as long as it takes until we can safely assume they will not commit further crimes) and the demands of the treatment the offender is assigned to (what is believed to be the 'cause' of the offence, e.g. drug addiction, may demand treatment which (1) is not perceived as punishment in the first place and (2) is disproportionate compared to both the committed offence and the treatment of other offenders, e.g. someone who's committed a minor offence and someone who's committed a more severe offence may receive equally harsh or lenient punishment, depending on what caused the crime).

At last, the consequentialist theories of punishment either undermine, or fail to respect the autonomy of the (potential) offender. The deterrence theory of punishment for example, appeals merely to the 'inconvenience' of having to endure punishment, as Brownlee states "*the deterrent element of punishment gives people a prudential reason (relating to the prospect of punishment), not a moral reason, to refrain from breaching the law*" (Brownlee 2013, 4.1.). The deterrence theory presupposes that the only thing that keeps us from committing crimes is the likelihood and/or severity of punishment. And in much the similar way, the belief that the threat of punishment may itself stimulate 'law-abiding conduct', i.e. it creates the habit of obeying the law (Andenæs 1952), implies that people are to be 'conditioned' to obey the law. The idea that we need (the threat of) punishment undermines the will to not commit an offence just because it is immoral. Though, considering the treatment of offenders, the most controversial theory of punishment is undoubtedly rehabilitation. Rehabilitation implies the idea that crime is 'caused' by some personal problem for instead of acknowledging the offender might have chosen freely to commit the offence, it merely suggests that the offender lacks the proper skills to obey the law (Lewis 1953). Despite its purported aim to help offenders, its approach lacks the due respect for the offender's autonomy. And in preventing crime by merely incapacitating offenders, the theory of incapacitation puts forward the idea that the only thing that keeps offenders off crime is being physically unable to commit a crime. Instead of for example incarcerating an offender as a punishment for his wrongdoing, the offender is merely treated as a mindless animal that has to be 'caged' in order to prevent him from doing any further harm.

It seems not one of the consequentialist theories of punishment involves the idea that one should, or would not commit an offence simply because it is *wrong*. It might be argued that what matters is the eventual outcome, i.e. if implementation of these theories proves to be effective in practice there will be no crime to be dealt with, regardless of what does or does not prevent us from committing crimes, so *whatever works for you*. Nevertheless, the latter is least of all persuasive since most of us object to crime simply because it is wrong and feel that punishment should be imposed for the very same reason and this reason only.

According to the retributivist, punishment is justified because the offender deserves to suffer in accordance with, and as a response to his wrongdoing. Thus, when it comes to the imposition of punishment, the retributivist has no difficulty in drawing the line between innocence and guilt. On the other hand, we may still wonder whether it is ever morally justified to intentionally inflict harm on someone even if he or she supposedly deserves to suffer. The struggle to find a plausible answer to this question and a subsequently coherent theory of punishment seems evident due to the significant number of different retributivist theories, each trying to justify the infliction of harm in its own way (Cottingham 1979).[15] The problem is that the majority of these theories collapse into some form of consequentialism, e.g. satisfaction for the victim,[16] or try to 'ease the pain' by framing punishment as an 'intended burden' (Duff 2013), or explain it with a rather untranslatable metaphor, e.g. 'getting-even' or 'pay-back'. Although pay-back could make sense if one perceives the offender's punishment as bearing the cost of not having restrained himself before (much like the idea behind 'unfair advantage'), pay-back may also suggest harming the offender could somehow resolve the victim's pain or bring back a taken life. It appears retribution is merely an attempted rationalization of vengeful impulses, whereby retribution (supposedly morally justified) is somehow different from revenge (which is deemed immoral) (Kaufman 2013).

Instead of what appear to be mere attempts to avoid supporting some kind of revenge-theory, Kaufman makes the bold claim in proposing his own retributivist

[15] For different accounts of retributivism see for example Feinberg 1965; Moore 1993 and Finnis 2011.
[16] Harming the offender is justified because it leads to satisfaction for the victim as the desired outcome.

theory of punishment, that revenge and retribution are not distinct at all,[17] in fact, the 'essential moral status' is identical. According to Kaufman neither revenge, nor retribution should be understood as the intentional infliction of harm (whereby this harm satisfies some kind of blood thirst), for the harm involved in punishment is only an 'inevitable but unintended' by-product of defending and restoring the victim's honour. 'Honour' properly understood is not merely some status constituted by, or dependable on the opinion of others, but is something internal, i.e. the equivalent of, or something resembling, dignity/liberty/sovereignty/autonomy.[18] Kaufman specifically stresses that defending and restoration of the victim's honour are not consequentialist purposes of punishment, since "*the institution of the harm is constituted by and inseparable from the restoration of honor, not a means to restoration*" (Kaufman 2013, 140). Despite the promising justification for punishment as defending one's honour, there are many questions left unanswered. For it is still unclear how honour is supposedly a moral value and in what way it is either different from, or the same as the concept of dignity. For if 'honour' is merely another word for the concept of dignity, it should be questioned how the offender's wrongdoing can affect my honour in such a way that it needs to be defended or restored. Commonly understood, dignity is something the human being has *as* a human being, irrespective of whether this dignity is respected or not. There is no need for a defence or restoration of dignity since degrading treatment does not result in a loss or 'reduced level' of dignity, i.e. we do not claim that some people have less dignity because of the way they have been treated. Thus, if honour is the same as dignity, it should not be affected by someone's wrongdoing (hence, no justification for punishment as a 'defence of honour'). If, on the other hand, honour is different from dignity because a wrongdoer's act *can* affect one's honour, it remains unclear how defending this honour is not merely externally-oriented (i.e. constituted by, or dependable on the opinion of others). In what way is the punishment of the offender a defence of my honour, if not a way to express the need that the offender needs to reapprove my honour as a response to his earlier disrespect for my honour? If the latter applies, in

[17] Although revenge is typically private while retribution is carried out by a public and independent authority, these are merely procedural differences as opposed to moral differences (Kaufman 2013).

[18] Kaufman, quite harmlessly, uses the concepts 'dignity', 'liberty', 'sovereignty' and 'autonomy' interchangeably. Though, it is unclear whether honour and dignity (/liberty/sovereignty/autonomy) should be perceived as two different values or as both representing the value of either dignity or honour.

what way constitutes this need for re-approval (i.e. not a defence but rather *a means to* restoration) a justification for the infliction of harm on the offender? Kaufman's view on punishment as a defence of honour is promising, but unless it can be proved how and why honour is an internal value like dignity, but unlike dignity needs to be defended and restored, we are left with a questionable consequentialist means-to-an-end justification for punishment.

As previously mentioned, the consequentialist interpretation of proportionality, i.e. punishing an offender in accordance with the likelihood of future offending, is counterintuitive. Moreover, the principle of proportionality itself demands punishment should not be disproportionate to the *crime*.[19] Retributivism fully endorses this principle, its claim that an offender deserves to suffer in accordance with, and as a response to his wrongdoing, seems to be the very definition of proportionality. But why is 'proportionality' important? Von Hirsh suggests: "*It is because the principle embodies, or seems to embody, notions of justice. People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not*" (von Hirsch 1992, 56). But then, how should we, according to the retributivist, apply this principle in practice? It appears we can rule out the notion of 'strict equality' immediately. According to Brooks (2012) proportionality in the 'strict' sense implies impossible and bizarre punishments (e.g. rape or theft). To resolve this issue we could set a scale matching certain punishments with certain crimes as well as determine which penalty would serve for the most heinous crime, thereby ruling out cruel and degrading punishments. This means that the maximum penalty will have to serve for the most severe crime, no matter how evil the crime is. Though, according to Brooks it would be hard for the retributivist to justify such limits on punishment for if a murderer gets life-imprisonment instead of the death penalty, this punishment may not amount to what the murderer actually deserves.[20] Suggesting we essentially ought to impose 'evil' punishments for evil crimes if we wish to safeguard our idea of what Brooks calls 'proportional retributivism', is however undermining the fundamental retributivist value of respecting the offender as a human being. No matter how evil the offender's crime, we cannot impose punishment

[19] See for example the Charter of Fundamental Rights of the European Union (2010), article 49.3: "*The severity of penalties must not be disproportionate to the criminal offence."*
[20] Assuming the death penalty is harsher than life-imprisonment.

which is intentionally degrading for this would itself be a crime against humanity.[21] Thus, 'strict equality' is not implausible merely because it would lead to impossible and bizarre punishments, according to retributivism the idea of strict equality itself ignores the necessary precondition for justified punishment.

In the discussion of whether retributivism may lead to disproportionate punishment, an issue easily overlooked is whether retributivism can live up to the principle of proportionality in the first place. In trying to answer this question it is important to remind ourselves that the purpose of retributivism is just desert, not proportionality. When we try to pinpoint exactly what the offender deserves, proportionality may be an indicator (e.g. a murderer deserves a heavier penalty than a thief), but is more likely to become an obstacle. Let us, for the sake of argument, suppose with the retributivist that what I deserve for my wrongdoing needs to be at least burdensome for me. If I am guilty of for example stealing a bike, a crime which is (hypothetically) punished with a €100 fine, it is unlikely I will perceive this fine as the burden it is intended to be if I am a millionaire. Perhaps for me to perceive the punishment as burdensome the fine would have to be at least €10000. Even though the €100 fine is in proportion with my criminal act, to properly communicate condemnation and/or inflict the suffering I deserve, the retributivist will have to agree with the €10000 fine despite the fact that this punishment is highly disproportionate to the crime. Thus, proportional punishment seems rather a lucky coincidence as opposed to a necessary condition for just desert. But in effect, does this show retributivism is essentially unfair, or does it incline us to reconsider the fairness of the principle of proportionality itself - perhaps 'punishments scaled to the gravity of offenses' are not as fair after all?[22]

At last, retributivism is often criticized for its mercilessness. If one perceives deserved punishment as intrinsically good, refraining to impose punishment would be morally wrong. To impose punishment is therefore not only justified but also obligated according to some retributivists (e.g. Moore 1993), and logically speaking,

[21] This is essentially the Kantian view on punishment and proportionality (Pugsley 1979); a view which is not necessarily shared by all retributivists for one could argue that the offender has forfeited his right to such respect due to his own crime against the humanity of the victim.

[22] It appears the principle of proportionality is not applied in an exclusively 'objective' manner in actuality either, specific 'subjective' circumstances of a criminal case might call for harsher or milder punishment, e.g. the wealth of the offender; mental incapacities; age etc. (Fox 1993/1994). This understanding of the principle of proportionality would thereby be perfectly in line with retributivism, for these subjective circumstances may add or decrease the level of desert.

mercy would be a violation of this obligation. Contrarily, in *Responsibility and Punishment*, Corlett (2013) argues that the retributivist does not need to share this view of an alleged duty for the state only has the *right* to punish, not a duty. Despite what appears to be a consequentialist justification for the decision to refrain from punishment ("*...not every crime must be punished, perhaps because of practical considerations of resource capability or because some crimes are not worth punishing...*" (Corlett 2013, 127)),[23] according to Corlett mercy cannot save the offender from punishment. His discussion of the difference between forgiving and forgiveness clarifies this particular view. Whereas *forgiving* does not exclude someone's wish to have the offender punished, but is merely a decision to discontinue feelings of resentment, *forgiveness* does exclude the victim's wish for the offender to be punished. Forgiveness in this sense does require certain conditions to be met, most importantly a sincere apology from the offender. It is for this reason that forgiveness and mercy only make sense between the victim and the offender, the state for example, cannot decide to 'forgive' (in the sense of forgiveness) an offender for what he has done to a random victim. Corlett concludes that the state cannot show mercy to offenders, "[b]*ecause the laws of the state need to be public and predictably enforced in relevantly similar circumstances*" (Corlett 2013, 145-146), neither would it be morally wrong to impose punishment since the offender is still blameworthy for his offence regardless of the apology. What remains unanswered however is whether, if there is sincere forgiveness between the sole offender and the sole victim (thereby excluding 'forgiveness' on behalf of others), the state should still *enforce the right* to punish if the victim wishes the offender to go unpunished. Certainly the state should have the sole right to punish offenders if we wish to safeguard proportionality and impartiality within a legal community. Nonetheless, this right is grounded in the state's ability to be impartial and provide the means necessary to impose punishment in a (potentially) just manner, but does this right necessitate or even morally justify a rejection of sincere forgiveness between the victim and offender - a situation in which the state's role as the impartial mediator is essentially superfluous? If we adopt the retributivist approach to punishment we must acknowledge the duty to punish since

[23] It remains unclear what Corlett exactly means with these considerations, though suggesting that some crimes are not 'worth' punishing and 'practical considerations of resource capability' seem to imply some weighing of the costs and benefits of (not) punishing the offender. Although the latter is not inconsistent with the idea that the state has only a *right* to punish, it certainly seems not punishing an offender because of such considerations would be based on consequentialist grounds.

a denial of this duty is likely to result in a mere consequentialist justification for refraining to punish those who do deserve punishment. Nevertheless, one need not be a 'renegade' retributivist to concede to mercy (within the criminal justice system), for one might argue that victims of crime have a right to have their moral interests concerning punishment at least taken into account in the state's decision upon punishment (perhaps a milder punishment would be in order). I will discuss this issue of 'victim-participation' further in my defence of a specific understanding of *restorativism* in the third chapter.

2. Human Dignity, Responsibility & Punishment

Whereas the first chapter of this thesis focuses solely on the purpose and justification of punishment according to consequentialist and retributivist theories of punishment, I will continue the discussion in this chapter, though instead of adopting either the instrumentalist or deontological approach and aiming for an extensive overview of the discussion between the consequentialist and retributivist theories, I will review the subject of punishment from an 'outsider's' perspective, taking on the perspective of human rights law. Considering the aim in this thesis I find it necessary to reflect on punishment in a broad sense in order to take the first steps to what may become a morally justified as well as a comprehensive theory of punishment.

Accordingly, I will start with a brief discussion of the concept of human dignity and its relation with human rights and from there on discuss the normative relation between particularly human dignity, and the institution of punishment. Whereas human rights law explicitly prohibits 'cruel, inhuman or degrading punishment',[24] it is the notion of human dignity underlying this prohibition, which may tell us more about how convicted criminals ought to be treated in such a way as to not only respect their dignity *when* punishing them but more importantly, to respect their dignity *by* punishing them.

The Authority of *Human Rights*

In discussing punishment, whether concerning practical policy or theoretical justification, it is important to acknowledge the authority of human rights law.[25] Not only is this law legally binding, it carries moral authority as well (Donnelly 2009). The 'International Bill of Human Rights' (IBHR) comprises the 'Universal Declaration of Human Rights' (UDHR); the 'International Covenant on Civil and Political Rights' (ICCPR); the 'International Covenant on Economic, Social and Cultural Rights'

[24] "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*" (UDHR 1948, article 5; ICCPR 1966, article 7).
[25] With 'human rights (law)' I refer to *The International Bill of Human Rights*.

(ICESCR) and the Optional Protocols to these Covenants, and with "*[t]he coming into force of the Covenants, [...] States parties accepted a legal as well as a moral obligation to promote and protect human rights and fundamental freedoms [...]*" (Fact Sheet No.2 (Rev.1) IBHR 1996, 'worldwide influence of...'). Therefore, in defending a theory of punishment, we ought to keep in mind that a theory which implies a necessary or inevitable violation of human rights essentially stands no chance when aiming for comprehensiveness.

Human dignity is the foundation of human rights, as proclaimed in human rights law "*these [human] rights derive from the inherent dignity of the human person*," (ICCPR, ICESCR 1966, preambles) though other than the 'recognition' that this dignity is inherent, a definition of the concept of human dignity is not provided. It seems we are still not quite sure what human dignity actually is and it remains a mystery how human rights supposedly derive from this, yet to be defined, concept of human dignity (Beyleveld, Brownsword 1998; Stoecker 2011). On the other hand, whatever conception of human dignity we personally hold; whatever religious, philosophical or perhaps morally intuitive grounds for human rights, it appears there is universal agreement on the morality of these rights (Donnelly 2009). And considering human rights *law*, we need not agree on (or even know for that matter) how these rights came to be, as long as we can all agree on their status.

For a theory of punishment on the other hand, to adopt the human rights framework as grounded in human dignity, we need to first clarify the notion of human dignity. For a theory which itself tries to explain why certain conduct is right or wrong, it is neither the legal status of, nor universal agreement on human rights which explains the moral status of these rights. Hence, these rights need to follow from the theory's own moral principles as opposed to being mere practical restrictions imposed from 'the outside'. A theory of punishment needs to explain why for example torture is wrong according to this particular theory - perhaps grounded in its conception of human dignity - as opposed to rejecting the practice of torture on the sole basis that it constitutes a violation of human rights.

Considering the notion of human dignity, it seems we only have an intuitive understanding of 'human dignity' which is at best accessible in terms of a violation. According to some, taking a 'negative approach' (focussing on violations of dignity) might therefore be more successful in defining this concept than to start off with

trying to formulate a positive account of dignity (Margalit 1996; Stoecker 2011). Though, as Düwell states "*[i]t is impossible to determine which kind of actions are violations of human dignity without a positive account*" (Düwell 2011, 215). If we seem to know intuitively when someone's dignity is violated, we should somehow have an idea of what this dignity actually is. It goes beyond the scope of this chapter to fully discuss, and attempt to provide an all-inclusive definition of human dignity. Instead, to get a mere idea of the concept, I will adopt Düwell's ideas on what a positive account of human dignity should amount to and while a combination of the 'common features of positive accounts of human dignity' does not itself count as a full definition of human dignity, for now it might be something we can work with.

Düwell suggests that first of all, all human beings have dignity, this dignity is inherent (it is not something we acquire, but something we have in being members of the 'human family') and equal, thus excluding any kind of ranking. Secondly, human dignity constitutes the claim for certain rights, i.e. human rights, which in turn imply obligations (obligations towards one another as human beings and obligations as (political) institutions towards human beings). Thirdly, human dignity supposes the human being has an 'absolute value', a specific kind of value which cannot be weighed or measured against 'other' values. And finally, human dignity is 'overriding', meaning that human dignity will always be more important than any kind of (moral) consideration that conflicts with human dignity - thus excluding the permissibility of violating human dignity for whatever reason in the first place and secondly, human dignity will always be more important in case of a conflict between moral obligations (even if these moral obligations do not lead to a violation of dignity an sich, but do challenge the respect for human dignity, e.g. telling a lie).

With this understanding of human dignity in mind, a few preliminary points should be made before discussing the significance of human dignity in relation to the imposition of punishment. Firstly, since human dignity is inherent, being human simply implies human dignity, meaning one cannot lose this dignity. No matter how badly one's dignity is violated or how badly one has violated another human being's dignity, this violation does not result in a reduced level of dignity or the loss of dignity altogether, for human dignity is something the human being has *as* a human being[26]

[26] In the second paragraph of the first chapter I already suggested that human dignity is something the human being has *as* a human being. One may however ask which distinctive feature supposedly grants

(thus excluding the idea that convicted criminals could somehow lose their human dignity, or are not worthy of such dignity because of their actions). Secondly, human rights law does not prohibit the imposition of punishment overall, as stated, human rights law prohibits punishment which is cruel, inhuman or degrading (implying that these kinds of punishment do violate human dignity and are *therefore* prohibited).[27] Thirdly, although there seems to be a clash between the 'inalienable rights' of the human being and the (temporally) legally denied right to liberty, we essentially have to presume that this particular denial of the right to liberty does not imply a violation of human dignity.[28] The ICCPR for example, states: "*these rights derive from the inherent dignity of the human person*" (ICCPR 1966, preamble), whereas article 9.1 of the ICCPR states: "*Everyone has the right to liberty and security of person [...] No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*" (ICCPR 1966). This presumption, assuming the UN treaties are conceptually and philosophically coherent, seems to be secured by the first principle of the 'Basic Principles for the Treatment of Prisoners' (BPTP) stating: "*All prisoners shall be treated with the respect due to their inherent dignity and value as human beings*" (BPTP 1990, art. 1).[29]

While cruel, inhuman or degrading punishment is a violation of, or lacking respect for the offender's human dignity, one may wonder what the 'positive' connection is between the institution of punishment and respecting the dignity of the offender. If punishment in itself is not a violation of human dignity, in what way *does* it respect the offender's dignity? This question does not concern what kinds of punishment do respect the offender's dignity *when* punishing him or her, e.g. non-degrading punishment, but how the offender's dignity is respected *by* punishing him or her, thus the respect for human dignity as itself the justification for punishment.

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the human being this dignity and whether this dignity would be applicable to all human beings. If one for example considers the capacity to reason as the distinctive feature, one may wonder whether some human beings lacking this capacity (e.g. mentally disabled people) have human dignity. I do not have the space here to discuss this matter, though I think that we do not have to evaluate each specific token of the human race to state that the human race has this capacity (at least in potential) and that it is therefore that being human, being a member of the 'human family', implies having human dignity.

[27] Moreover, the explicit reference to the legality of the imposition of penalties in article 11(2) of the UDHR (1948) would be obsolete if punishment in general would be a violation of human rights.

[28] If the denial of the right to liberty amounts to cruel, inhuman or degrading treatment or punishment, the institution of punishment (in particular imprisonment) would have to be prohibited entirely.

[29] I specifically stress the assumption of conceptual and philosophical coherence between the treaties, since the Basic Principles for the Treatment of Prisoners is not legally binding.

From Düwell's enumeration of 'common features of positive accounts of human dignity' we can infer that the claim for human rights and having moral obligations towards one another presupposes an understanding of human beings as autonomous beings, i.e. beings with a capacity to determine their own actions.[30] Whether we should perceive autonomy as what grants human beings dignity, or whether autonomy is only a component of the notion of human dignity, is a question we need not answer here; what is important to realise is that autonomy is at least a fundamental component of human dignity and respecting human dignity implies respecting someone as an autonomous being. As such, autonomous beings are responsible for their actions - for they could have chosen to act otherwise - and are expected to be able to provide reasons for their actions as much as they have a right to be provided reasons for actions that affect them. According to Forst (2012) therefore, respecting someone's human dignity is to respect this person as a "*reason-giving and reason-deserving being - that is, as a being who not only has the ability to offer and receive reasons but has a basic right to justification*" (Forst 2012, 89). Thus, this basic right to justification holds that to claim any action as morally and/or legally justified, one ought to be able to provide and demand 'acceptable' reasons for this action. Such acceptable reasons are characterized, according to Forst, by reciprocity (mutual validity) and generality ('shareable' by all human beings, thus independent of subjective interests and values).[31]

The right to justification is of great importance in clarifying the connection between human dignity (using the positive approach) and the institution of punishment. For to respect the offender's human dignity is to *recognize* the offender as an autonomous, reason-giving and reason-deserving being; a person who is not just obliged to obey the law as a *legal person*, but also a person with his own values,

[30] I hereby aim to avoid the discussion of whether or not human beings have in fact 'free will'. From the perspective of human rights law it is human dignity and the subsequent claim for human rights, i.e. having moral obligations towards one another, which presuppose human beings are not (merely) subjected to natural causality but have the capacity to determine their own actions.

[31] According to Forst, this very 'right to justification', as a basic moral right, essentially underlies the normativity of human rights, for human rights are rights that no one can deny or violate with reasons which are 'acceptable' (i.e. reasons which conform to the criteria of reciprocity and generality). This means that respecting someone as an autonomous being, a being with the right to justification, implies his or her human rights ought to be respected, since there are no acceptable reasons for not respecting these rights (Forst 2012).

interests and moral convictions as an ethical and a moral person (Forst 2002).[32] This recognition of the offender as an autonomous being is fundamental, for punishment as a response to a particular crime expresses the idea that the offender could have acted otherwise, could have not breached the law but for whatever reason (depending on the offender's personal values; interests or maybe moral convictions) chose to nonetheless. With the imposition of punishment as a response to the offender's crime it is thereby communicated to the offender that his punishment is imposed because he is responsible for breaching the law, and considering the offender's right to justification, it is the state (having the sole authority to impose punishment) who has to (be able to) provide the offender with acceptable reasons that justify this punishment.

Acceptable reasons ought to conform, as mentioned, to the criteria of reciprocity and generality. Whereas law applies only to a certain community whereby acceptable reasons refer to what can and ought to be reciprocally and generally justified within this community, it is the institution of punishment in particular which demands acceptable reasons of a 'universal' character in case punishment concerns the infringement of human rights. When the state for example imprisons an offender, it is the (temporal) infringement of the offender's human right to liberty which ought to be *morally* justified. While human rights law proclaims certain rights and liberties, it refrains from imposing detailed instructions on how to legitimately organize society, it leaves each state free in establishing their own laws granted these laws do not violate human rights or amount to human rights violations. For this reason, "*[b]asic rights do indeed have a [politically determined and interpreted] concrete legal content, but they require moral justification: they form the core of the protection of the person, and, for moral reasons, this core cannot be limited in favour of ethical or practical considerations*" (Forst 2002, 85). Therefore, the infringement of the human right to liberty ought to be morally justified, reasons concerning what is for example ethically justified (reciprocally and generally) within a certain community do not trump the morality of the offender's human rights (recall also the element of overridingness).

[32] Forst (2002) distinguishes between four types of autonomy: the ethical autonomy; the legal-personal autonomy; the political autonomy and the moral autonomy of the person. As a legal person one is obliged to obey the law (as a citizen one is responsible for the law, as a legal person one is responsible before the law), disobeying the law may however be grounded in one's ethical and/or moral autonomy, meaning that one believes his or her personal ethical values and/or moral convictions trump the normativity of the law.

Given the current incomplete definition of human dignity, it is difficult to determine what specific reasons are acceptable for the state to morally justify punishment - would such reasons appeal to desert or perhaps the protection of society? For now these questions need not be answered, for the basic fundamentality lies in recognizing the offender as an autonomous being who deserves acceptable reasons for punishment as opposed to being subjected to mere (conditioning) methods to reform or incapacitate the offender (regardless of the potential advantages of these methods for the offender and/or society). Punishment cannot be morally justified when the offender is not regarded as a reasonable, responsible being, as a mere subject which needs to be reformed or 'caged', a being which at best only after being reformed is capable to wilfully obey the law. Morally justified punishment entails the recognition of the offender as an autonomous being with a right to justification and by punishing the responsible offender for his crimes, one essentially respects the human dignity of this offender as a legal person (responsible *before* the law), a citizen (responsible *for* the law), an ethical and a moral person retaining the freedom to pursue his own interests and to value or question the morality of legal norms.[33]

While Düwell's enumeration of common features of positive accounts of human dignity and the implications of Forst's ideas on the right to justification provide some insight in what it means to respect the offender's dignity by punishing them, we are still in need of an answer to the question what it means to respect the offender's dignity *when* punishing them. Only if we can provide and/or agree on a specific definition of human dignity will it be possible to answer the latter question. The importance of a proper definition of human dignity reveals itself in the discussion of for example the moral status of the death penalty. For even though the death penalty is not outlawed in international human rights law (although the *Second Optional Protocol* to the ICCPR 'aims' at its abolition), it is argued that this kind of punishment is degrading (Irene Khan, Secretary General (2001-2009) *Amnesty International* 2009). Yet the concept of human dignity seems unable to determine its moral status. If the death penalty aims to degrade offenders it would violate, or at least lack respect for, human dignity. Proponents argue on the other hand that the death penalty *itself* is

[33] Forst (2002), *supra* note 32.

not degrading.[34] Thus, if we want to know whether this punishment is in itself degrading, we need to know exactly what constitutes degradation and this, in turn, is impossible to determine when 'human dignity' lacks a proper definition.

In conclusion, to respect the offender's human dignity is to hold the offender responsible for his actions as an autonomous human being with a right to justification, a right to be provided with acceptable reasons for punishment as a morally justified response to offender's breach of the law. Although the institution of punishment may itself be morally justified, we still need to determine exactly what (respect for) human dignity means in concrete cases, for only a proper definition of human dignity can ascertain the acceptability of reasons for specific types of punishment such as the death penalty. Moreover, a clear definition of human dignity may - independent of human rights' legal and moral status within human rights law - clarify why we should value the individual human rights (for example the right to a fair trial (ICCPR 1966, art. 14.1) or the presumption of innocence (ICCPR 1966, art. 14.2)) and how these values derive from human dignity.

[34] See for example Van den Haag (1986): "*This degradation is self-inflicted. By murdering, the murderer has so dehumanized himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of execution. To believe […] that the degradation is inflicted by the execution reverses the direction of causality*." Furthermore, both Kant and Hegel argued that the death penalty affirms the offender's dignity in holding him, as a rational being, responsible for his actions (Kant, Hegel, as referred to by Van den Haag 1986).

3. Restorative Justice

When someone commits a crime, he damages the relationship between himself; the victim and the community. Instead of focussing on how to punish the offender for the damage, the theory of *restorative justice* focuses on how to restore the damaged relationship. This restoration is not a matter that concerns just the state and the offender, as is typically the case in court, but should involve 'all stakeholders in justice' (Brooks 2012). To this end, there are no trials in court but *restorative conferences* whereby all stakeholders (thus including the offender) get a chance to explain themselves or reveal in what way the crime has affected them (Brooks 2012; Johnstone 2013). The aim is to reach mutual understanding and to come to an agreement regarding the proper way to restore the damaged relationship.

In this chapter's first paragraph I will present a broad definition of restorative justice as a theory of punishment, one which allows for a variety of different understandings of, and perspectives on its core values and proposed purpose. In the second paragraph I aim to defend a more narrow understanding of restorative justice, or rather a subcategory, which I call 'restorative retributivism'. Finally, in the third paragraph I will discuss what role the victim should have in the criminal/restorative process and why this role is particularly important in light of respect for human dignity.

3.1. The Definition and Purpose of Restorative Justice

Within criminal justice restorative justice (or *restorativism*) is a relatively new approach to dealing with crime; offenders; victims and the community.[35] And while its use in practice suggests this approach is considerably successful (Poulson 2003), the underlying theory is underdeveloped and in lack of clear demarcations (Miller, Blackler 2000; Ashworth 2002; Dolinko 2003). Consequently, different understandings of restorative justice have emerged and even led to conflicting

[35] Restorative justice has been around for centuries but is relatively new within the criminal justice system (Poulson 2003; Menkel-Meadow 2007).

perspectives on how the restorativist response to crime ought to be justified.[36] My aim here is to describe that which characterises specifically restorative justice, i.e. the overlapping ideas that qualify theories which may differ quite radically from one another, as theories of restorative justice.

As mentioned in the introduction, restorative justice aims to restore the damaged relationship - caused by the offence - between the offender; the victim and the community. The community here does not involve *all* members of the community, for this would not be feasible and simply is not necessary, instead it refers to those who have been affected by the offence (e.g. relatives of the victim and the offender; those who have witnessed the offence). The restorative conference, which brings together the affected parties, aims at reconciliation by letting everyone have their say. With the help of an impartial mediator, these parties could discuss in what way they think the relationship could be restored, e.g. the offender could offer financial compensation or perhaps a sincere apology alone would be enough for the victim. In order for such a restorative conference to take place several conditions need to be satisfied beforehand: the offender needs to take responsibility for his actions and be willing to apologize to the victim, and the victim in turn should be willing to forgive the offender. If the offender is not willing to take responsibility or apologize for his actions there is no honest quest for restoration, and neither could the relationship be restored if the victim is not willing to accept the offender's apology. If either of the latter situations occurs, the case will be assigned to court after all (Brooks 2012).[37]

While the acknowledgement of accountability is of fundamental value to any theory and practice of restorative justice and the restoration of damaged relationships the purpose according to these theories and practices, it is particularly the justification for its response to crime and the legitimacy of consensus upon reparative/punitive measures, which has led to different conceptions of the theory of restorative justice and the value of 'restoration'.

Firstly, accountability is a necessary condition for a restorative conference to take place. If the offender does not see himself as responsible for an offence, we cannot

[36] See for example Braithwaite's (2003a) consequentialist approach versus Duff's (2003) retributivist approach.

[37] The latter applies if restorative justice is part of the criminal justice system; some argue that the practice of restorative justice should replace, or lead to a radical transformation of the criminal justice system (see for example Braithwaite (2003a) and Johnstone (2013)). In my opinion the latter is neither feasible nor preferable; this will be further discussed in the second paragraph of this chapter.

reasonably expect a genuine apology and genuine effort to make things right. Not only would such an apology be empty and futile, an effort to make things right needs to involve a recognition of the offence as wrong and as something he is responsible for (Duff 2013).[38] To get an idea of the diverging interpretations of restorative justice in light of accountability and the purpose of restoration, Dolinko (2003) argues that if one were to reach 'restoration' by tricking some innocent, weak person ['Jones'] into admitting accountability; thereby creating peace of mind in the (potential) victims and having the 'guilty' offender shape up his life (thanks to one of the conditions set during the conference), one is left with a highly questionable justification for punishment - allowing innocent people to get punished to achieve the goal of restoration. Dolinko hereby attacks the vision of one of restorative justice's prominent proponents, John Braithwaite, who supports a consequentialist conception of restorative justice (Braithwaite 2003a).[39] Braithwaite (2003b) in turn, rejects Dolinko's argument stating that according to his version of restorative justice, one cannot punish the innocent on account that this would "*risk the erosion of citizens' subjective sense of dominion*" (Braithwaite 2003b, 397). The risk that people will find out that Jones was knowingly held accountable for something he did not do is not worth taking since this would undermine the dominion of the people (i.e. wrongfully holding this person accountable is exercising state power in the wrong way and undermining what should rightfully be the 'dominion of the citizens'). Furthermore, even if for some reason we could know for sure that nobody would ever find out that Jones was actually innocent, it is the 'subjective sense' of dominion which excludes the permissibility of punishing Jones, for the officials cannot retain the right to punish the innocent whenever such punishment would lead to favourable consequences. This means that even if there never will be any case like Jones'; even if no innocent person is ever intentionally punished, the very right to punish the innocent stands in the way of the citizens' sense of being in power. Although punishing the innocent is

[38] It might be possible that the offender takes responsibility for his offence but does not regard this offence as wrong or has an indifferent attitude toward his criminal wrongdoing. This does not exclude the possibility to take part in a restorative conference, for the process itself (particularly listening to the stories of the victims) may make the offender realize the wrongfulness of his offence after all (Johnstone 2013).

[39] Dolinko refers to several of Braithwaite's publications, though his critique in the form of the example of 'Jones' is particularly directed at Braithwaite and Pettit's republican theory of restorativism (John Braithwaite and Philip Pettit. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice.* Oxford : Oxford University Press). In discussing the example of 'Jones' I will however refer to Braithwaite's response in 'Holism, Justice, and Atonement' (2003b) to Dolinko's critique.

illegal according to the republican theory of criminal justice, Braithwaite states: "*it is true that in the crazy case where punishment of the innocent is necessary to save all human life, any consequentialist would agree with such punishment*" (id. 2003b, 396). His support for not punishing the innocent while staying true to the consequentialist ideal of criminal justice relies however on the rather vague assertion that "*the question is whether there are any scenarios in the real workings of the criminal justice system where this would be permissible and where therefore it would be right to exonerate a person who has punished the innocent. Pettit and I contend that the answer is no [...]*" (id. 2003b, 396-397). If Braithwaite relies here on the claim that to punish an innocent person to save all human life is extremely unlikely to ever occur anyway, he would have to agree that at least in theory punishing the innocent would be justified. If on the other hand such punishment is never justified even if all human life can be saved by punishing an innocent person, one could question the value of the subjective sense of dominion as outweighing the value of all human life. As such, the republican theory appears to be a rule-consequentialist theory, running into the inevitable problem of conflicting principles and purposes.

Contrarily, from a retributivist point of view, it would not be a matter of 'risking the erosion of citizens' subjective sense of dominion', for holding someone accountable for something he did not do is simply wrong in itself. If we focus our attention on what is essentially the backward-looking component of the theory of restorative justice,[40] we cannot overlook or choose to circumvent (honest) accountability whenever this may lead to favourable consequences. According to the 'retributivist restorativist' there simply is no restoration if one of the conditions (i.e. honest apology from the person who *is* accountable) for restoration is not met. If it is discovered that Jones was innocent, one would have to admit that there never was any restoration, just like punishment was not deserved all along if it is discovered that the punished person was innocent. Thus, this accountability-condition makes it impossible to purposely hold the wrong people accountable to achieve restoration. Nonetheless, whether we should adopt a consequentialist or retributivist approach seems for now a mere personal choice, for restorative justice itself does not provide us with an answer (yet).

[40] Restorative Justice is both backward-looking and forward-looking. Its emphasis on accountability for past wrongdoing makes restorativism backward-looking, whereas the purpose of restoration is characteristically forward-looking.

Secondly, a proper dialogue between the involved parties is what defines an appropriate restorative conference. With 'proper' I mean a dialogue between the victim and the offender (who has taken responsibility for his offence) and possibly other stakeholders, a dialogue which itself entails the opportunity for each party to express and explain themselves, and provides the offender with the opportunity to show remorse (or may result in a remorseful attitude through the story of the victim). Such dialogue furthermore demands a respectful attitude from each party and the will to listen to each other's stories. And hopefully, this dialogue will create mutual understanding; stimulate feelings of empathy and provide each party with a genuine belief in (the possibility of) reconciliation (perhaps, but not necessarily, through some reparative measures)[41] and eventually restore the relationship (Young, Hoyle 2003).

What makes restorative justice as a practise appealing to many is that the victim is given a voice throughout the process. For long now, there is a general discontent about the victim's role within a criminal process, for the part played by the victim is over as soon as the crime is committed. And since the victim is merely represented (by the state) instead of given a voice, one might say that the case is essentially 'stolen' from the victim (Christie 1977). Moreover, being left out in the actual trial may be experienced by victims as being victimised once again.[42] This problem is widely recognized and although there are organisations that specify in helping victims of crime (e.g. *Slachtofferhulp Nederland* in the Netherlands), as Johnstone explains: *"...these* [organisations which aim to help victims] *are usually adjuncts to criminal justice. In the teachings of restorative justice, the goal of helping victims towards recovery from a deeply traumatic experience will be one of the core goals of the system itself. Healing victims will be a central component of criminal justice*" (Johnstone 2013, 55.).[43] Nevertheless, the participation of the victim in the process itself may

[41] Reparative measures may for example include financial compensation, agreeing to undergo treatment or doing community service.

[42] See for example the trial of 'R', who caused the death of a woman in a car crash (Gabbay 2005), 'R' received a lenient sentence for the fatality, due to his admired contributions to society and the fact that the crash was a result of negligence. In the end, the family of the deceased felt victimised once more, this time by the justice system.

[43] To get an idea of what a restorative conference may look like, see Liebmann (2007). The restorative conference between an offender and a victim has commonly the following set-up: "*1. Opening statement, introductions and ground rules. 2. Uninterrupted time - each person tells his or her story. 3. Exchange - opportunity for questions. 4. Building agreement, if appropriate. 5. Writing agreement - if appropriate. 6. Closing session, arranging follow-up. 7. Mediators debrief*" (Liebmann 2007, 74). For a brief case study and ethical analysis of three conferences with different outcomes, see Miller and Blackler (2000).

pose many questions and possible problems. Can we expect victims to *want* to be a part of the process? Should the victim have a say in deciding what reparative/punitive measures should be taken? What if the victim demands a measure which is disproportional to the crime? Should the principle of proportionality retain its current status? What role should the principle of impartiality play in a process involving parties that cannot be expected to be impartial? Instead of reviewing the answers that have been provided to these questions so far, I will turn to my own conception of restorative justice in the following paragraph and from this conception's perspective I will attempt to answer the preceding questions in the final paragraph of this chapter.

3.2. Justifying Restorative Justice

Restorative justice is both backward- and forward-looking, it acknowledges the importance of holding offenders accountable for their past offence while reaching beyond this accountability in aiming for restoration. Accordingly, it is the backward-looking component of this theory which prevents any response to crime in light of its desirable (potential) consequences; while the forward-looking component goes beyond focussing only on past wrongdoing in attending to the means of restoring the relationship and thereby carrying along the potential of crime-reduction and strengthening community bonds (Gabbay 2005; Brooks 2012). The struggle however lies in constructing a coherent theory based on this abstract notion, for such a theory would have to harmonize two components which seem to mutually exclude each other. In essence, the backward-looking component represents the deontological (i.e. retributivist) approach, while the forward-looking component represents an instrumentalist (i.e. consequentialist) approach. Is it at all possible to construct a theory which justifies its response to crime based on the accountability of the offender for his past wrongdoing *only*, while at the same time aiming for restoration, i.e. a goal which itself goes beyond the justification for this response? Or should such a theory perhaps prioritize the goal of restoration; respond to crime in light of this goal, using accountability as a mere side-constraint?

In the foregoing paragraph I discussed Dolinko's example of Jones who took the responsibility for a crime which he did not commit (believing he was responsible),

and while those who accused Jones knew he was innocent, it was the purpose of restoration which outweighed Jones' innocence. If we conceive restorative justice as a theory which justifies its response to crime based on the purpose of restoration, we will be confronted with the same objections as the traditional consequentialist theories of punishment.[44] Thus the purpose of restoration needs to be embedded in restorativism in a different way but cannot lose its status as a purpose all the same.

The wish to hold offenders responsible based on their wrongdoing, and at the same time aim for positive, further-reaching consequences of the process itself, is what lays at the heart of the so-called 'hybrid' theories of punishment (Brooks 2012). These theories encompass the values of both retributivism and consequentialism while attempting to exclude the morally objective components of the traditional retributivist and consequentialist theories of punishment. My conception of restorative justice as *restorative retributivism* resembles the idea of a hybrid theory. However, I do not think we can successfully combine the fundamental principles of these conflicting approaches into one coherent theory of punishment without undermining the values and/or principles of at least one of these approaches. Restorative retributivism is therefore a retributivist conception of restorative justice which attends to consequentialist ideals - not in theory - but in a mere technical sense. It is an approach which is constructed in such a way that it is *likely* to lead to the positive consequences hoped for. This vision largely reflects the 'Making Amends' Model' of von Hirsh, Ashworth and Shearing (2003), and Duff's views on restorative justice in general (2003; 2005). In what follows, I will present a brief outline of restorative retributivism, and argue for its position on important matters that have led to disagreement among proponents of restorative justice.

The restorative conference, as described in the former paragraph, is what defines restorative retributivism in practice, (granted the offender takes responsibility for the wrong; the victim is willing to listen to the offender and considers reconciliation (with or without reparative measures) to be at least a possibility), the conference

[44] As I mentioned in the introduction to chapter 1, I perceive these objections to sufficiently proof the implausibility of the consequentialist approach to crime. For this reason I will not discuss the consequentialist approach to restorative justice any further. Although one might suggest that accountability could serve as a principle in a rule-consequentialist sense, I do not consider this a plausible option either for rule-consequentialism itself undermines consequentialist ideals and carries along inevitable conflicts between principles and purposes (see chapter 1: paragraph 2, as well the brief discussion of Braithwaite's defence of the republican theory in the former paragraph).

brings together the affected parties (the victim(s); the offender(s) and possibly others), and with the supervision of an impartial mediator, aims at reconciliation by giving all parties the opportunity to explain their motives, express their grievances and ideas on how to restore the relationship. Nevertheless, restorative retributivism differs on certain theoretical matters which may be of influence in practice. Before I turn to these matters I wish to make a - for my account important - distinction between the concepts of *crime* and *criminal wrong*. With 'crime' I refer to the isolated incident, i.e. the illegal act itself (e.g. theft). With 'criminal wrong' I refer to this illegal act *plus* the circumstances of the act (e.g. the offender's motive; wealth; mental state) and the predictable as well as unpredictable effects of the crime (physical and psychological effects which may or may not be far-reaching, e.g. bone fractures; depression and anxiety).

According to restorative retributivism, the restorative conference itself is the response to a committed crime and is justified by the accountability of the offender alone. It addresses the offender as a moral agent responsible for his own conduct and expects the offender to be able to answer (i.e. provide *reasons*) for his violation of the norm(s). Nevertheless, accountability does not itself necessitate the response in the form of a restorative conference, for it may be that certain crimes or criminal wrongs are unsuitable for such a response or the victim is unwilling to participate in the restorative conference. It is therefore that restorative retributivism, as a practice, does not (aim to), and cannot replace the current criminal justice system altogether, but serves only as a possible alternative for the criminal trial in cases suitable for a restorative conference.[45] The criminal justice system has the authority, due to its institutional set-up, to determine guilt and set the standards for proportional measures/punishment. This system is therefore not only a 'back-up' in case the conference fails (i.e. no consensus) but has the authority to assign a criminal case to a restorative conference in the first place.[46] Thus, before the restorative conference takes place, the offender's guilt is to be determined by the independent authorities; if the conference fails, it will be the regular justice system which will decide on the outcome of the criminal case (which may or may not involve a second restorative

[45] Unsuitable cases are for example, (as mentioned) those in which the victim is unwilling to participate; victimless crimes, and cases in which the offender denies responsibility despite being guilty beyond reasonable doubt.

[46] I have adopted here the views of Duff (2003) and von Hirsch, Ashworth and Shearing (2003) on the role and tasks of the regular criminal justice system in the context of a restorative conference.

conference), and if consensus is reached in a restorative conference, it will be the regular justice system which will have the last word on the proposed reparative measures (if these measures are disproportional to the *criminal wrong*,[47] it is unlikely a 'consensus', and (if 'real' consensus is at least considered a possibility) the conference will need a rerun).

So far I have only argued for the justification of a restorative conference as a response to crime grounded in the offender's accountability for a criminal wrong and the appropriateness of such a conference as depending on the criminal wrong; the offender and the victim. I argued that offender-accountability is itself sufficient to justify the restorative conference. Now we must take a step further, for the restorative conference (like the criminal trial) is only the *initial* response to the criminal wrong, but not by itself a sufficient response. Since the restorative conference is only an alternative for a criminal trial, and moreover under supervision of the criminal justice system, we are inevitably confronted with the issue of punishment. If reparative measures are to be proportional to the criminal wrong, the measures cannot be too harsh, but not too lenient either! Moreover, it would be unfair if a restorative conference excludes punishment while the same case in court would result in punishment (the offender would be subject to variables independent of his own criminal wrongdoing, e.g. whether or not the victim is willing to participate in a restorative conference). This does not mean that punishment is justified because it is currently used in criminal justice, for we could then solve the problem by having the criminal justice system abolish the institution of punishment. Whether or not it is the outcome of a restorative conference or the decision of the court in a criminal trial, my point will be that the imposition of punishment is justified by the criminal wrong itself. Thus the inevitable question is: does a criminal wrong justify the imposition of punishment? In the following subparagraph I will briefly reflect on Duff's (2005) position on punishment as I consider this position to provide the best answer to this question.

According to Duff, in whatever way we respond to crime, we ought to address the offender as a responsible moral agent (which is also implied by my account and by

[47] My view is that the measures which are to be taken should not solely depend on the crime, but also on its after-effects and the circumstances of the case and offender. Thus, the principle of proportionality would be applied to a more profound understanding of crime *as* a criminal wrong. This view seems in fact to be in line with the current understanding of proportionality in criminal justice (*supra* note 22).

restorative justice in general).[48] In responding to the offender's criminal wrong, we communicate condemnation, a condemnation the offender deserves for violating the legal norms of society. It is particularly during a restorative conference that such condemnation is communicated or at least implied by the victim's expression of grief as (intentionally) caused by the offender. The burden of a reparative measure or hard treatment in the form of punishment depends accordingly on the seriousness of the criminal wrong. This does not mean that an apology is itself meaningless and cannot restore the relationship, for this is possible, but it is the more severe criminal wrong which cannot be resolved by a mere verbal apology alone. As Duff states: "*One function of hard treatment punishment, then, is to make it harder for the offender to ignore the message that punishment aims to communicate: it is a way of helping to keep his attention focused on his wrongdoing and its implications, with a view to inducing and strengthening a properly repentant understanding of what he has done*" (Duff 2005, 138). Moreover, in focussing the attention on the offender's apology to the victim and the community at large, it is "*hard treatment [which] gives material form, and thus greater force, to that apology* (id. 139)." Hopefully, the apology is honest, but obviously this cannot be guaranteed (the restorative conference may serve as a stimulation for the offender to be remorseful though). Nevertheless, hard treatment communicates to the offender that he *ought* to apologise and by being punished the offender at least goes 'through the motions', as Duff describes it, of apologizing required by his wrong. And whether or not the apology is honest, it is communicated to the victim and the community that the offender's wrong is taken seriously.

One might suggest that my account of restorative retributivism is merely retributivism with an empty referral to restorativism for it may appear that my account completely overlooks the status restoration as a purpose ought to have. As mentioned, my account is a retributivist conception of restorative justice which attends to the consequentialist ideal of restoration - not in theory - but in a mere technical sense. It is this 'technical' consideration of restoration as a purpose which makes the restorative conference the preferred option in choosing between a criminal trial and a restorative conference. While both the restorative conference and

[48] We cannot expect or hope for a successful outcome, i.e. consensus, if the offender is incapable of moral reasoning or if we fail to respect the offender as a moral agent, for the offender's consent would not live up to the conditions of an appropriate consensus as an agreement between two (or more) equal parties.

the criminal trial allow the imposition of punishment, with the former under the supervision of the system of the latter, it is the set-up of the conference which supports the aim of restoration. Whereas the structure of the criminal trial is less likely to reach or may even stand in the way of, restoration (due to its focus on the crime, or the criminal wrong at most - the victim has no role in the process - and the absence of an opportunity for the offender to reveal his story and show remorse to the victim and community), it is the restorative conference which aims for restoration through its set-up, i.e. it aims for restoration in a technical sense. This way, restoration remains the purpose of restorative retributivism without serving as a consequentialist justification for the conference to take place, and because the outcome of the conference still leaves us with a justified and sufficient response to criminal wrongdoing (reparative/punitive measures), the conference is not a failed enterprise when restoration holds off. The conference is constructed in such a way that it may lead to restoration, but in the end restoration still remains only something we can hope for.

3.3 Human Dignity and the Moral Interests of the Victim

In last paragraph of chapter 1 I put forward the idea that perhaps the moral interests of the victim of a crime should be taken into account by the state when deciding upon the offender's punishment. In this paragraph I will elaborate this idea and explain why I think the victim should have a role in the criminal process and what this role should entail at least, and at most.

First and foremost, the significance of the victim's role in the criminal/restorative proceeding is in itself fundamental when speaking of respect for the human dignity of the *victim*. To respect the human dignity of the victim means we ought to give the victim the opportunity to be involved in the criminal process and to take the moral interests of the victim into account in order not to use the victim merely as a means to bring an offender to justice. Although criminal wrongs are also public wrongs, i.e. the offender has violated the legal norms of society (Duff 2005), the victim is the primary subject of this violation whereas society is (ordinarily) only concerned with the violation of the norm(s). But to bring an offender to justice is not only requiring the offender to answer for his violation of the legal norms of society, but also requiring

the offender to answer for wronging the victim. Accordingly, to respect the victim is to provide the victim with the opportunity to express his ideas on what should be done to make things right for *him*. In what follows I will try to make clear what the victim's role in a criminal/restorative proceeding should encompass based on this idea of respecting the dignity of the victim.

Giving the victim a voice in the criminal/restorative process may be considered as compelling and in fact, plays a significant role in explaining the popularity of restorativism (Brooks 2012; Roach 2000). Although one might be hesitant to victim-participation - victims may finally have the direct and legal means to seek revenge - one needs to keep in mind that the purpose of restorative retributivism (in the form of a restorative conference) is restoration and to seek revenge is to undermine the purpose of restoration. Moreover, the idea that victims are generally vengeful seems to have been proven wrong both by past experiences with restorative conferences and people's ideas on what sentences they deem appropriate when provided with information about the specific circumstances of a criminal case (Young, Hoyle 2013).[49] Nevertheless, the final decision upon the punitive/reparative measures should not be in the hands of the participants of the conference alone for at least two reasons. Firstly, we cannot simply presume no participant will ever have the intention to just seek revenge; as Young and Hoyle (2013) state: "*[judicial] oversight is also needed [...] to cater for the occasional vengeful victim or community, or the conference agreement that is based on erroneous assumptions about the effectiveness of a proposed penalty or programme*" (Young, Hoyle 2013, 220-221). Therefore, the criminal justice system should have the power to ratify and enforce the outcome (i.e. the agreement)

[49] In chapter one 1 referred to a Dutch study which indicated the average Dutch citizen supports hard treatment and is likely to support hard treatment because of adherence to retributivist ideals. This punitive attitude is however likely to be (1) the result of a discontentment with the workings of the current criminal justice system - a discontentment which in turn is likely to be the result of being unable to understand the complex workings of the current criminal justice system (De Roos 2000), (2) the result of a misconception of the reality of crime and offenders due to the representation of crime and offenders by the media - the most heinous crimes receive the most media coverage (Rosenberger, Callanan 2011), (3) the result of what seems to be a confirmation of this representation of crime and offenders by politicians in order to gain votes - i.e. the 'get-tough' policy (Beckett 1997) and (4) an attitude which seems punitive due to the particular method of measuring public opinion, to for example ask whether sentences are too mild is an extremely general question and the answer to this question likely depends on the misconception of crime and offenders (due to media coverage of the most heinous crimes) and individual experiences with crime and the subsequent imposed sentences (De Roos 2000) which are in turn far too specific to generate a sufficient answer to a question that aims to cover the entire domain of crime and punishment. The point is that to think victims may be particularly vengeful and the idea that citizens (whether or not victims of crime) have a punitive attitude, is not necessarily true but could be the result of one or more of the abovementioned factors.

of the restorative conference and, if needed, adapt the proposed measures to exclude any particularly mild or harsh measures. Secondly, even if the agreement among stakeholders appears to be reasonable and appropriate, the final decision should not be in the hands of those who (despite good intention) cannot guarantee the procedural safeguards of impartiality and proportionality. The stakeholders (especially the victims) cannot be expected to be impartial, and living up to the principle of proportionality particularly in light of relatively similar criminal cases, seems impossible if one has never been (or perhaps a few times at most), involved in criminal/restorative proceedings. Thus, victims; offenders and other stakeholders can come up with, and agree on certain reparative/punitive measures, but it will be up to the state to determine whether these measures are in line with just procedure and to decide whether or not to follow through with the proposed measures.

It might be questioned what value the outcome of the restorative conference has if this outcome is to be ratified by the criminal justice system following strict procedures. If restoration is the purpose, why should the regular criminal justice system adapt the stakeholders' agreement if the measures are for example disproportionate to the criminal wrong? As I've suggested though, restoration is indeed the purpose, but not the justification for punishment. The imposed measure is justified by the offender's accountability and should be in accordance with the seriousness of the criminal wrong in order to properly communicate condemnation. Thus, being responsible for an offence together with the gravity of the criminal wrong essentially determine the gravity of the measure, even if a disproportionally mild or harsh punishment could serve the purpose of restoration. I also suggested (in footnote 47) that punishment should be determined in accordance with a more profound understanding of crime as criminal wrong (i.e. crime plus circumstances), this means that punishment is not necessarily in strict proportion with the gravity of the committed crime. And it is this particular understanding of the principle of proportionality which, in my opinion, is more likely to be affirmed by the outcome of the restorative conference (because of its attention to the circumstances of the crime)

as opposed to limiting the value of this outcome, an outcome which is therefore not systematically in need of adaptation by the overseeing justice system.[50]

Nonetheless, one may still wonder whether the state's final say in the outcome effectively diminishes the purported significance of the victim's voice. If the victim does not have the authority to decide upon the reparative/punitive measures to resolve, what is essentially a conflict between the victim and the offender (Christie 1977), why have a restorative conference in the first place? I think however that the significance of giving the victim a voice does not lie in the decision upon reparative/punitive measures, but instead lies in firstly providing the victim with the opportunity to be involved in the criminal process (Gabbay 2005) (i.e. to be heard) and secondly, to take the victim's moral interests into account. Whereas the former refers to 'telling the story' and proposing a certain reparative/punitive measure during a restorative conference, the latter refers to taking into account a call for harsher or milder punishment *beyond* what is essentially in proportion with the criminal wrong. I speak here specifically of *moral* interests, because the victim's demand for a disproportionately harsh or mild penalty cannot be valid if the reasons for this specific demand flout the criteria of reciprocity and generality (as discussed in chapter 2). Therefore, if the state decides to take the victim's moral interests/reasons into account, the latter ought to be at least 'acceptable'. Mere subjective interests or ethical values cannot be forced upon the offender if the offender cannot share these interests or values (moreover, if the victim's personal interests or ethical values serve as the reason for proposing a particular punitive or reparative measure during a restorative conference, it is unlikely that a consensus will be reached).[51] Instead, in case of forgiveness 'between' the victim and offender,[52] the victim *might* have a moral interest in absolution, or in case the offender's criminal act was for example motivated by racist values the victim might have a moral interest

[50] It could even be questioned whether an agreement upon punitive/reparative measures is at all reasonable (or 'real') if these measures are disproportionate (using the broader definition of proportionality) to the criminal wrong.
[51] It is hereby however crucial to understand that the victim's personal interests and values are to be respected (i.e. the victim's freedom to have his personal beliefs and values), but cannot be forced upon others (e.g. a harsher punishment cannot be imposed based on what the victim's religion prescribes).
[52] With forgiveness *between* victims and offenders I refer to Corlett's understanding of forgiveness (see chapter 1: paragraph 2).

in the imposition of a (supplementary) reparative measure.[53] Although the state retains the right to impose punishment in proportion with the criminal wrong, this right should not be converted into a purpose by disregarding a morally justified (i.e. 'acceptable') call for a disproportionate measure. Therefore, if the victim has a moral interest in (not) imposing a certain measure, it should be the duty of the state to first, take this moral interest into account and second, follow through with this measure if the victim's reasons for (not) imposing this measure are indeed morally justified.[54]

At last I have to admit that I may have opened a can of worms by arguing a state should refrain from imposing punishment if the victim wishes the offender to go unpunished and can provide acceptable reasons (i.e. forgiveness) for this wish. While following through the victim's request for a milder or harsher punishment may seem intuitively plausible, the decision to not impose punishment if the victim's wish is morally grounded seems to invite countless practical and moral issues. For when can we speak of 'true forgiveness'; what if the victim is convinced of an offender's apologetic stance when in fact the offender merely pretends to be remorseful in order to avoid punishment and what if the offender threatens the victim into asking for absolution? I am not an expert in the field of criminology but I do think that with the right amount of expertise (perhaps with the help of a team of criminological psychologists) it should be possible to ascertain in each individual case whether the victim's call for absolution is based on forgiveness in the most sincere sense. Moreover, disregarding the victim's morally justified call for absolution in order to avoid potential harm implies a mere consequentialist consideration for not granting the victim's wish. A more pressing issue however is whether the offender's remorse implies a duty to forgive this offender. Would it not be extremely difficult for a victim of rape to forgive the offender even if this offender is most apologetic and willing to do anything to make things right? Perhaps forgiveness should be perceived as a gift

[53] Such a reparative measure might consist in the temporal task of helping out in an organisation which organizes activities to stimulate intercultural relations.

[54] I would like to add that in suggesting to not follow through with a proportionate measure based on the victim's morally justified reasons for absolution in case of forgiveness, is not contradicting the statement in the foregoing paragraph that a mere verbal apology cannot resolve a criminal wrong. A mere verbal apology does not cover the offender's part when we speak of sincere forgiveness. Forgiveness entails most importantly the offender's admission of guilt; recognition of why the criminal wrong was *wrong*; the ability of outlining in what way he or she could make things right and the promise to the victim to not harm him or her again (Corlett 2013). Whereas a mere verbal apology does not necessarily imply that the offender truly understands the extent of his criminal wrong, forgiveness presupposes the offender does understand the extent of his criminal wrong and giving greater force to the apology in the form of hard treatment is therefore unnecessary.

only, and certainly the state cannot forgive an offender on behalf of an unforgiving victim. Nevertheless, if the only thing that stands in the way of mercy is the victim's *willingness* to forgive a truly remorseful offender (a willingness which essentially depends on personal interests and ethical values), and if absolution can be morally justified by forgiveness as an acceptable reason, would it be at all possible to argue that an unwilling victim has acceptable reasons for *not* forgiving the remorseful offender? I think the victim has no such acceptable reasons for not forgiving the remorseful offender; forgiveness is not a gift and to forgive a truly remorseful offender is therefore the morally right thing to do. However, this does not mean that the victim should call for absolution, for forgiveness does not necessitate absolution, but only constitutes a morally justified reason for absolution. Thus, there is a 'gift', and this gift is to ask for absolution *despite* the blameworthiness of the offender. This means that even if we can speak of true forgiveness, it is the offender's accountability which justifies punishment, and only the victim can decide to ask for absolution (granted acceptable reasons can be given, i.e. forgiveness); to not impose punishment despite the offender's accountability. Given the understanding of forgiveness as something which is only possible between the victim and the offender (i.e. we cannot forgive the offender on behalf of the victim), it is nobody else but the victim who can give this 'gift', who can ask for absolution grounded in forgiveness. Again, to respect the victim is to take the moral interests of the victim into account and to, in this context, refrain from punishing the accountable offender if the victim's wish to not punish the offender can be justified by sincere forgiveness.

Conclusion

In this thesis I discussed the leading traditional theories of punishment, I concluded in chapter 1 that consequentialist theories of punishment are morally objectionable due to a mere instrumentalist approach to punishment which most importantly implies the moral justification of punishing innocent people; punishing offenders in light of what they may or may not do in the future and lacking respect for the autonomy (dignity) of the offender by merely addressing the offender's prudence (one better obey the law to avoid the inconvenience of punishment), the offender's incapacity to obey the law (due to for example an addiction to drugs or mental disorders) or (what appears to be) a complete disregard for the offender's (moral) reasons for obeying or disobeying the law in making him physically incapable of doing further harm. I furthermore discussed retributivist principles for punishment and the validity of the objections against retributivism, a discussion which served primarily as an introduction to what I proposed as *restorative retributivism* in the third chapter.

Whereas the theory of restorative retributivism is far from sufficiently elaborated, this theory is essentially an 'answer' to the title of this thesis and an answer in potential to the question posed by this thesis. Furthermore, in reflecting on human rights law as a legal and more importantly moral authority, it is the value and due respect for the inherent human dignity which not only implies a prohibition of the violation of this dignity but moreover sheds a light on how the institution of punishment is actually justifiable by human dignity itself. And while the implausibility of the consequentialist approach is further highlighted (be it rather implicitly), the value and moral status of human dignity strengthens the deontological approach of the retributivist theories and ultimately clarifies the moral justification for the intentional infliction of harm/burden as a purpose of punishment.

Accordingly, the primary question posed in this thesis: *How should we respond to crime in keeping with today's human rights law without having to compromise the theoretical justification of the principles we value as guiding in responding to crime*? I attempted to answer this question by introducing a theory of punishment which, in holding offenders responsible for their actions, respects the dignity of the offender by recognizing the offender as an autonomous being who is not only capable of

providing reasons for his actions, but who also has what Forst calls a basic 'right to justification' implying that the moral justification for punishing this offender depends on the ability to provide acceptable reasons for punishing him. While the primary retributivist values are thereby kept intact, restorative retributivism does not deny the significance of consequentialist considerations, e.g. the protection of society. These consequentialist considerations do not justify punishment, but the purpose of the consequentialist theories is nevertheless achievable in a mere technical sense, i.e. the structural set-up of the restorative conference is likely to aid the purpose of crime prevention, e.g. mutual understanding may increase feelings of empathy towards the victim; may decrease feelings of anxiety and subsequent prejudices about offenders.

It is important to stress that neither restorative justice in general, nor restorative retributivism in particular aims to replace the current criminal justice system. While a restorative conference would make little sense regarding certain criminal offences (e.g. victimless crimes), it should not 'impose' its approach in cases which are in theory suitable for conferencing. Both restorative justice in general and restorative retributivism in particular should, for now, remain only acclaimed options of resolving a conflict, knowing why the offender committed the crime or overcoming the traumatic experience of the crime; hesitant or resisting victims who might experience conferencing as an additional burden should never be forced to take part in a conference. This does not mean that a theory such as restorative retributivism should not aspire to significantly improve or even replace the criminal justice system; instead it should encourage us to find ways for this theory to become the appropriate approach in those cases which are now deemed 'unsuitable'. For acknowledging the moral relevance of human rights law does not mean the theory is automatically 'comprehensive', and in order to become comprehensive, restorative retributivism must come up with a morally justified response to every single criminal wrong. It is therefore important to further develop this theory and increase its applicability to become at the very least a fundamental component of, but hopefully an appropriate replacement for the current criminal justice system.

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