

## A Study of the Epistemological Foundations of the Justification of State Punitiveness based on the Construction of Offenders as Enemy

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### Abstract

Perhaps one of the oldest and most pervasive tools that states use to justify their mistreatment of offenders and to oppose minorities is to build a dual enemy-citizen structure by implementing “naming” strategy. The genealogy of criminal law disputes is located in a continuum of punitiveness with a hostility-orientedness and antagonistic content on the one hand, and tolerance with the themes of friendship and dialogue on the other. The present article tries to show the hostility-orientedness approach in reaction to the offenders by way of thought experiment and axiomatization of theoretical propositions. As per the thought experiment conducted, a wide range of theories with various epistemological foundations stood against each other. These can be classified into, 1) theories based on linguistic consensus and dialogue (Rousseau, Arendt, Habermas, and Garland), and 2) Otherness theories (Jacobs, Schmitt, and Agamben). The causal explanation of punitiveness according to the extracted propositions showed that the root of hostility-orientedness tendency lies in the way governments expect and confront the socialization of social forces, regarding their type and way of socialization, in a way that if socio-moral duties and social principles are not carried out the way the government’s desire, the Otherization of the society will be on the agenda. To hold this tendency back, though, a revision of the epistemological system of criminal law (criminalization and sentencing), finding a solution for delinquency by considering the social context, and implementing a corrective approach based on tolerance and dialogue are required.

**Keywords:** *Epistemology, State Punitiveness, Hostility-orientedness, Tolerance, Thought Experiment.*

### 1. Introduction

The genealogy of criminal law is located in a continuum of security-orientedness with the aim of homogenizing society and with the themes of conflict and antagonism on the one hand (hostility-orientedness), and with direction of reform and treatment as well as the themes of consensus and dialogue on the other (friendship-orientedness). These two tendencies are signs of punitive and tolerant criminal justice systems respectively.

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Rousseau's contractualist approach, Arendt's human rights approach, Habermas' "communicative action" approach, and Garland's social approach are instances of are instances of criminal justice system based on tolerance and reform. Rousseau's approach holds that the social contract between the members of the society and its acceptance prevents disorder in the society; yet, if someone commits a crime and violates the contract and society at his own will, the authorities need to prosecute him and announce to the public that the social contract has been violated by him and that such a person is not considered a member of the community. Arendt tried to show that the consequences of the division of Europe after World War II was the overnight appearance of millions of stateless and helpless refugees and the conversion of large numbers of religious-ethnic minorities into second- or non-indigenous citizens. Habermas' approach maintains that the goal of communicative rationality is to reach to an understanding between actors which eliminates the possibility of disagreement in a problematic relationship. Garland's criminology of the self holds the offender as an ordinary human being who may commit a crime due to biopsychological disorder or social deprivation. His criminology of other maintains that criminals are a group of offenders who are different from "us". Such criminals cannot be understood as ordinary human beings.

On the contrary, Jacobs's punitiveness approach, Schmidt's institutional violence, and Agamben's exclusion-making and suspension of law are instances of security-oriented and differential approach. Jacob contends that, undoubtedly, the criminals who rise up in fundamental opposition to the existence of a political system must be considered enemy. For Schmidt, a political affair is nothing but a friend-enemy distinction, and violence is inherent in the politics; in fact, the political arena makes it possible to distinguish friend from enemy. Agamben also asserts that exception is a fabricated situation by the government to subject individuals or groups to its own rejection and denial by the suspension of law; and through this suspension, people who fall into the constructed framework of exceptions are removed from the realm of law.

## **2. Methodology**

The present paper applies the qualitative method and thought experiment, and adopts a descriptive-critical viewpoint. A thought experiment is an analysis of an argument about a fictional story that is performed with the aim of confirming or disproving a hypothesis or theory. Thought experiments are used as evidences to justify the truth or falsity of reasonings, and they are not mere intuitions at all. A thought experiment, just like an actual experiment, acts as an innovative tool. This method of research, without standing in need of new experimental data, makes it possible to achieve a new "epistemic" situation. Carrying out thought experiments makes it possible to examine criminal law disputes based on the friend-enemy binary opposition. Moreover, drawing the boundaries of punitiveness-tolerance and its opposition in the structure of social order makes it clear how to regulate society by the criminal justice system and its epistemological foundations.

### **3. Results and discussion**

State-centered centralism accompanied with a sense of authoritarianism has a higher punitive capacity than society-based or social system based on state-society synergy. That is because in these kinds of communities, the government, equipped with instrumentalism and demagoguery, and with a justification of violence in public opinion, and by media stereotyping and highlighting public security, seeks to establish its position by demarcating its self/other or friend/enemy. It is clear that the weakness of states in the socialization of desirable normative regimes, especially with an authoritarian attitude and a redefinition of actors in the self-other/friend-enemy continuum, will lead to disorder and inefficiency. The impossibility of building linguistic consensus and social harmony, especially the rational establishment of normative regimes, may lead to social exclusion, a deprivation causing social conflict and antagonism, growing moral outrage, lack of social cooperation and the occurrence of various types of criminal phenomena (such as organized crime, corruption, etc.). Theoretical and probative evidences show that government punitiveness based on the construction of offenders as enemy will make social integration impossible; a convergence that focuses on the content of social cohesion and solidarity in the relationships between the judiciary and civil society, especially members of society. Reaching a common language and linguistic agreement on issues such as crime and criminals through accepting Others and an intersubjective relationship will be able to eliminate the unilateral and monopolistic tendency of the government. This will also pave the way for the social integration of minority groups, and also the return of criminals to the society. To hold this tendency back, though, a revision of the epistemological system of criminal law (criminalization and sentencing), finding a solution for delinquency by considering the social context, and implementing a corrective approach based on tolerance and dialogue are required.

### **4. Conclusion**

As per the thought experiment conducted, a wide range of theories with various epistemological foundations stood against each other. These can be classified into, 1) theories based on linguistic consensus and dialogue (Rousseau, Arendt, Habermas, and Garland), and 2) Otherness theories (Jacobs, Schmitt, and Agamben). The causal explanation of punitiveness according to the extracted propositions showed that the root of hostility-centered tendency lies in the way governments expect and confront the socialization of social forces, regarding their type and way of socialization, in a way that if socio-moral duties and social principles are not carried out the way the governments desire, the Otherization of the society will be on the agenda.

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