

Restorative Punishment

Imposing a Discomforting Obligation to Make Amends

By Bas van Stokkom

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Christian Gade aims to promote restorative justice as a different, and potentially more constructive, form of legal punishment. I think that is a commendable goal.

Unfortunately, he does not develop a definition of this constructive punishment. In this contribution I will outline some contours of a restorative punishment concept, centred around ‘calling to account’ and ‘making amends.’ In doing so, the punished person has to commit himself to a restorative obligation.

It is actually incomprehensible that legal punishment is described so little in terms of ‘taking responsibility’ and ‘moral learning.’ Often, punishment still has the classic meanings of ‘intentional infliction of suffering’ and ‘deterrence.’ These formulae have been controversial for a long time, partly because they are linked to notions such as revenge, subordination and hostility. These concepts are no longer in line with penal perspectives such as behavioural change and compensation that have become characteristic of a democratic society.

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Many restorative justice thinkers — including Lode Walgrave (2008) — go to great lengths to demonstrate that a restorative sanction cannot and should not be a punishment. I think that’s not convincing because punishment is narrowed down to ‘intentional infliction of suffering.’ As Gade shows, there are many other definitions of legal punishment available. I opt for a definition in which punishment is understood as an ‘intentional discomforting’ intervention that encourages a sense of responsibility. This intervention should be non-harmful. The imposition of a bearable burden could encourage the offender to pay attention to his misconduct, thereby

initiating a moral learning process. I will emphasise that this restorative intervention does have punitive aspects. Just like imposing a take home punishment in the context of school, the imposition of reparation is an 'act of power' that entails restriction of freedom for the punished person. I will also argue that the restorative justice movement cannot afford to ignore humanistic conceptions and intuitions of punishment that are common at school and at home. There too, punishment counts as an obligation to learn and make amends, while the punished person has to deal with a restriction of freedom.

We need a broader view on the justification of punishment. Current penal philosophy still has an 'unhelpful hyper-focus on culpable adults, by states, often through imprisonment' (Coverdale and Wringe, 2022). This focus impedes comprehensive accounts of (potential) constructive punishments such as community service, suspended sentences, compensation orders and behavioural orders, which aim to stimulate moral learning. It also impedes reflection on punishment practices by non-paradigmatic punishing agents such as schools and sport clubs. In my opinion, a concept of legal punishment that includes restorative justice principles could be tailored much more on those types of punishment.

In section 1, I will briefly discuss Gade's views. Subsequently, I will criticise Walgrave's view in which punishment is equated with the intention to inflict suffering or harm. It is more fruitful to define punishment as an 'intentional discomforting intervention' (section 2). In section 3, I point out that when we shift attention to everyday contexts such as school and upbringing it becomes clearer that the essence of punishment is located in the imposition of obligations that encourage moral learning. Finally, I present a provisional conceptual framework of legal punishment which is based on restorative justice principles, that is, which is in line with the objectives of taking responsibility and making amends (section 4) and I offer some thoughts on civilising criminal justice *and* civilising criminal punishment (section 5).

The time when criminal courts focused solely on retaliation and deterrence is far behind us. Nowadays, punishment practices are implemented in a versatile manner.

Christian Gade's vision: some reflections

An interesting aspect of Gade's argument is that we should seek dialogue with people who work in criminal law instead of 'resisting' punishment *per se*. Within the restorative justice movement criticism of infliction of suffering often functions as a hostile construction (an 'enemy image') to disqualify 'the' criminal law. Gade opposes binary thinking in terms of 'we are in favour of making amends' and 'they are in favour of adding harm to harm' — according to De Hert and Gutwirth (2011), Walgrave places punishment in a false light because he is only focused on the traditional concept of inflicting suffering. In this context they speak – in line with Gade – about a 'polarizing scene setting.' This way of reasoning fails to recognise that diverse — and often conflicting — punishment objectives play a role among magistrates, including constructive objectives such as behavioural change and restoration (de Keijser, 2000). The time when criminal courts focused solely on retaliation and deterrence is far behind us. Nowadays, punishment practices are implemented in a versatile manner. The Dutch penal system leaves room for tailor-made interventions, such as imposing anti-aggression training in the context of behavioural orders. The current turn in the Netherlands to responsive law and problem solving underlines that retribution and deterrence do not have a monopoly. Therefore, the criminal justice system is not as punitive as many restorative justice thinkers claim. This does not alter the fact that the doctrine of intentional infliction of suffering still plays a remarkable role in orthodox criminal law theory.

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However, Gade's suggestion that restorative justice thinkers and doers can be part of the criminal justice 'system' goes too far in my opinion. After all, that system is geared to risk management and efficiently pushing through cases, which means that the human factor is quickly compromised. However, restorative justice thinkers and doers could promote constructive interventions where possible, for example, to prevent short-term detention through community service or home detention; see Claessen (2022). They can seek cooperation with professionals in and around the criminal justice system who advocate humanisation of punishment, including

professionals who are involved in community and drugs courts, therapeutic justice, victim support and victim-awareness courses in the probation service.

Unfortunately, Gade presents himself as a 'consequentialist' who believes that punishment programmes should be judged on the basis of measurable results. This brings instrumental thinking to the fore, focused on the impact of interventions, which easily conflicts with restorative justice communication and the language of regaining dignity and self-respect. Moreover, it is questionable whether this thinking can deal with duties of care, such as helping convicted persons who struggle with personal problems.

A strong point in Gade's argument is that the restorative justice movement should not get out of step when it comes to public ideas about punishment and penal intuitions. The idea that the general public would mainly rely on the populist rhetoric of harsh punishment is not correct. In everyday contexts such as schools and upbringing citizens embrace reasonable views on punishment. In the educational world, the formula 'intentional infliction of pain' is no longer endorsed. Punishment is more and more defined as an imposed exercise in moral learning; corporal punishment has lost its appeal (Turner, 2003).

Gade's merit is that he has opened up the discussion about the definition of punishment. There are many philosophical views of what punishment should entail, and 'intentional infliction of pain' is just one of them.

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Punishment as an intentional discomfoting intervention: some objections against Lode Walgrave's view

One of the leading restorative justice thinkers who has systematically criticised the concept of punishment is Lode Walgrave. Like Walgrave, I am in favour of expanding restorative sanctions in the criminal justice system, although I prefer to call these impositions punishment. I fully agree with him that intentional infliction of suffering is not at all an appropriate tool in the pursuit of restoration. Indeed, it is a serious obstruction (Walgrave, 2008, p. 49). That's why his criticism of Antony Duff's view of restorative punishment is correct. Duff emphasises that restorative punishment should be severe and painful. 'Hard treatment is not just *possible*, but a *necessary*,

method of communicating the censure that offenders deserve' (2001, p. 29). According to Duff, this harsh approach would force the punished person to concentrate on the norm violation and he is not allowed to divert attention from it. However, it is highly questionable whether suffering and harsh treatment are a reliable route to communication and moral learning. Typically, perpetrators experience suffering not as a contribution to a lesson to be learned, but as an indication that they have no control over their fate. His attention shifts from the harmfulness of the criminal act to his own suffering and the hardships that the punishment entails (van Stokkom, 2005; van Stokkom, 2016).

So far I endorse Walgrave's view. But it is too easy to equate punishment entirely with intentional infliction of suffering. Based on that line of thought, he can argue that painful obligations that are imposed without the intention to cause suffering — like restorative sanctions — are not punishments (Walgrave, 2013, p. 354--355). But it is by no means necessary to make the classical formula of intentional infliction of suffering the sole criterion of punishment.

... non-harmful obligations may indeed stimulate offenders to reconsider their behaviour and respecting other people's rights.

I will criticise Walgrave's view along two lines. Firstly, we can define punishment as a 'non-harmful, albeit still "discomforting," response to the offender' (Demetriou, 2012, p. 3). This intentional infliction of 'discomforture' makes punishment easier to defend. Whereas it is impermissible to intentionally harm another person, imposing discomforting obligations are not morally worrying *per se*. Many social realms comprise intentional discomforting practices which might be termed morally unproblematic such as therapy, athletics, religious rituals or the military. Moreover, non-harmful obligations may indeed stimulate offenders to reconsider their behaviour and respecting other people's rights. Philosopher Dan Demetriou (2012) claims that this 'educative defence' is the royal road to justify legal punishment. Punishment is 'educative' when it aims at improving the civic competences and responsibilities of the offender in some way.

Secondly, Walgrave points out that imposing punishment is an 'act of power' (2008, p. 49). At the same time, he includes sanctions under the restorative justice umbrella, arguing that, under some conditions, imposed sanctions can serve a reparative goal.

He defines a restorative sanction in terms of 'having to undertake repair-work' (2008, p. 48), for example doing work for the benefit of a victims' fund, or community service. Walgrave recognises very well that these reparative sanctions are coercive. But he doesn't point out why these restorative 'acts of power' would not comprise punitive aspects. In my view, it makes good sense to call an official imposed obligation to undertake repair-work a punishment. After all, this imposition entails a restriction of freedom. Contrary to what Walgrave suggests, the coercive aspects of restorative sanctioning and restorative punishment can have the same strength and intensity.

Educational Punishment

In order positively to distinguish practices of restorative justice from penal practices of the criminal justice system, many restorative justice theorists seem to focus on harmful punishments and the classic doctrine of returning evil for evil. These theorists, including Walgrave, seem to ignore the meanings of punishment in everyday contexts, at home and at school. At school punishment is no longer interpreted in terms of 'harsh treatment' or 'infliction of harm' — in educational sciences, a comparable debate is going on as in the restorative justice movement about the question of whether punishment can be legitimised at all. But that discussion focuses mainly on the question of whether children can be held responsible (see, for example Marshall, 1984 and Hobson, 1986). The idea has taken hold that the learning process which the punishment is intended to achieve, should not be hindered by discipline and aggressive treatment. To understand the essence of current punishment intuitions, it is important to focus on the imposition of take-home writing punishments. Characteristic of the teacher's intervention is the intention to discomfort the young person who has misbehaved, in order to instigate moral learning. This writing punishment should not be overburdening. Nor should a writing assignment be an exercise in copying lines. The purpose should be that students will realise what appropriate behaviour entails. They have to spend their time thinking about their misconduct and what they will (hopefully) do next time. They might explain their behaviour, why that behaviour is inappropriate, and how to correct

it for the future. Ideally, it should set in motion improvement of civic competences (respecting other people's rights; etc.).

If people take punishment for granted at home, at school and in sports clubs, it is difficult to explain that an imposed reparation task or repayment scheme is not a punishment (and 'only' a sanction). People might wonder why those obligations would not have punitive elements (an act of power; restriction of freedom) and they might think that restorative justice protagonists are beating around the bush.

Presumably, this is an important reason why the abolitionist mission to convince the public that imposing punishment is illegitimate will continue to meet great resistance. That mission goes against everyday intuitions such as the conviction that a young person who has once again done something unacceptable, must take on an uncomfortable but non-harmful burden, that he must feel. Restorative justice theorists cannot afford to simply ignore this kind of intuitions. This would alienate the movement from basic moral insights such as the idea that injustice must fail.

A definition of legal punishment, based on restorative justice principles

In this section I want to incorporate previous thoughts into a definition of legal punishment. I propose the following provisional definition: Punishment is censuring and calling to account an offender (who has committed a criminal offence), and is accompanied by the imposition of an effort obligation that encourages a sense of responsibility.

This definition consists of three components: (a) censuring and calling to account, (b) the imposed effort obligation and (c) encouraging a sense of responsibility:

a) Legal punishment communicates — publicly — disapproval of the criminal offence and this censure also contains an appeal to adhere to legal norms from now on. The punished person is addressed as a fellow citizen.

b) The punisher imposes an obligation and thereby restricts the freedom of the person found guilty. That intervention is the punitive aspect of the punishment. However, the imposed burden must be a bearable by-product of a good worth pursuing, namely behavioural change and/or offering satisfaction to the victim. The intention of the punisher is therefore limited to 'infliction of discomfort.'

c) The imposed obligation consists of a trajectory that encourages the development of a sense of responsibility. This trajectory aims to help the punished person to understand what he has done and encourages him to provide an appropriate response. The justice department is responsible for facilitating this; it must ensure that the punished person can take his responsibilities and make amends. This requires moral involvement of the punisher; he has duties of care.

It is important that the means of punishment and the way in which the punished person is addressed are in line with promoting a sense of responsibility. The imposed obligation should be bearable and the elements of restriction and coercion (complying with agreements and monitoring thereof) must be limited in such a way that they cannot thwart the fulfilment of the imposed tasks. In this way the punished person *can* commit himself to the punishment. The focus should be on delivering and fulfilling something, what the (potential) victim and society are entitled to (including the offender's behavioural change). Ideally, this involves a meaningful punishment trajectory — if possible consensually determined — that is tailored to achieving (self)restoration.

This definition raises many questions. I discuss some of them.

1. Firstly, the question is whether magistrates can distance themselves from a formal attitude towards convicted persons. After all, restorative punishment presupposes a committed attitude in which the punishing authority takes its duties of care seriously and takes into account the social circumstances of the punished person.
2. Another question is related to the assumption that the offender will improve his behaviour if he is offered a suitable programme. But does the convicted person always want to cooperate? It will be clear that accounting seasoned repeat offenders to their responsibility usually hits a hard wall. This suggests that in many cases the punisher has little choice but to resort to coercion and deterrence, although the execution of punishment must always provide opportunities for communication, repentance and self-reform.
3. A third question is whether imprisonment would fit within the definition set out above. If detainees are placed in a standard regime with few freedoms and

facilities, it is very difficult to stimulate a sense of responsibility. In that regime, punishment mainly has a repressive function. The question is whether a prison sentence can be called a punishment at all if we assume that legal punishment should not be inherently damaging and should not deprive the convicted person of civic responsibility. We could rather call imprisonment a repressive penal measure, where deterrence must mainly do the work.

4. A related question concerns the fine, which has little to offer from a moral-educational perspective. The learning process that fining initiates is often limited to reducing the chance of being caught. Often the fine is hardly felt as a burden; third parties can also take care of the payment.

This means that the punished person must be addressed respectfully, in such a way that he realises what he did to the victim.

The foregoing makes it clear that legal punishment is contained in a complex system with diverse, often conflicting objectives. It shows that developing a constructive overarching definition of legal punishment is extremely difficult. Perhaps imprisonment and the pecuniary penalty require separate legal definitions. Nevertheless, we could — reasoning from the principle of subsidiarity — give priority to a legal definition based on restorative justice goals. This means that the punished person must be addressed respectfully, in such a way that he realises what he did to the victim. He must earn his way back through restorative efforts. This punishment concept seems to fit better with current humanistic intuitions of what punishment should be, apart from state responses to serious and subversive crime.

Conclusion: civilising criminal punishment

One of the key questions raised by Christian Gade remains of great importance: how can we bring restorative justice from the margins to the mainstream of criminal justice? As pointed out, I believe that developing a constructive punishment concept can give the legitimacy of restorative justice practices a significant boost. I also believe that this could reduce punitive ambitions of magistrates.

Lode Walgrave — and related thinkers — considers punishment an unnecessary and obsolete concept and deems ‘restorative punishment’ a contradictory formula. He identifies punishment solely with ‘intentional infliction of suffering.’ Simultaneously, Walgrave (2013; 2022) argues for a criminal justice system in which restorative justice procedures and sanctions have a greater role. He believes that further civilisation of the criminal justice system is possible, despite the continuing trend towards harsher sentences. Viewed in the long term, the use of violence and coercion could be further reduced.

“After giving the state a monopoly on violence, and after making the use of violence more rational and more moderate, the next step is to reduce as much as possible the use of violence itself in the response to offending” (Walgrave, 2022, p. 633).

In my view, we should supplement the mission to civilise the criminal justice system that Walgrave passionately advocates, with the ambition to develop humane punishment concepts and practices. Christian Gade points out the following in this regard:

“By insisting that restorative justice is radically different from punishment, restorative justice advocates may — contrary to their intentions — play into the hands of those who want to preserve the status quo rather than developing future criminal justice systems in the direction of restorative justice” (Gade, 2022, p. 37).

Bas van Stokkom is a Criminologist and Research Fellow at the Faculty of Law of Radboud University, Nijmegen (Netherlands).

Contact: bas.vanstokkom@ru.nl

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