ARTICLE

Promoting restorative justice as de jure punishment: a vision for a different future

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Abstract

Restorative justice has frequently been presented as a new criminal justice paradigm, and as something that is radically different from punishment. I will argue that this 'oppositioning' is problematic for two reasons: first, because some cases of restorative justice constitute de facto punishment from the perspectives of some positions on what punishment is; second, because restorative justice could reasonably be more widely adopted as a new form of de jure punishment, which could potentially increase the use of restorative justice for the benefit of victims, offenders and society at large. In connection with the latter, I want to present some preliminary thoughts on how restorative justice could be incorporated into future criminal justice systems as de jure punishment. Furthermore, I will suggest that 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.

Keywords: restorative justice, punishment.

1 Introduction

For the last seven years, I have served as a mediator in the Danish victim-offender mediation programme (*Konfliktråd*), and I have also been involved in the training of the programme's new mediators. As a mediator, I have observed how tough it can be for offenders to face their victims and other people whom they have hurt, and I have often thought to myself: 'Why not perceive restorative justice as an

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alternative form of punishment?'[1] However, in Denmark, it has normally been a taken-for-granted premise in discussions about restorative justice that it is something that differs from punishment. For example, prior to the establishment of the national Danish victim-offender mediation programme, a Danish Ministry of Justice committee debated whether restorative justice, in the form of victim-offender mediation, should be an alternative or a supplement to punishment in the Danish criminal justice system (Ministry of Justice's Committee on Victim-Offender Mediation, 2008). The committee recommended the latter, and it was later on implemented. What is really interesting here is that the committee simply assumed that restorative justice is different from punishment, without considering the possibility that restorative justice might also be seen as a form of punishment in itself. But perhaps this was not that surprising. Historically, restorative justice was introduced in the criminal justice literature as a new justice paradigm, which was claimed to be radically different from retributive justice and punishment (see Gade, 2018). The dominant trajectory of thought in the literature on restorative justice and punishment, with scholars such as Eglash (1977), Zehr (1985, 1990), Umbreit (1998), Braithwaite (1999) and Walgrave (2008), has subsequently been that restorative justice and punishment are radically different, while a minority of scholars – including Daly (2000, 2002, 2013), Duff (2002), Johnstone (2011) and Brooks (2017) – have suggested that there are similarities between the two (for additional examples and details, see Gade, 2021: 128-131).

In this article, I will argue that the 'oppositioning' between restorative justice and punishment is problematic.[2] First, I will unfold the point that some cases of restorative justice constitute de facto punishment from the perspectives of some

1 In this article, I follow Marshall's famous definition of restorative justice as 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (Marshall, 1996: 37; Marshall, 1999: 5). Mediation, conferences and circles are commonly highlighted as the primary examples of restorative justice, but several other practices – including community panels, victim surrogate programmes, truth commissions and more or less traditional justice mechanisms like *gacaca* in Rwanda, *mato oput* in Uganda and the Magamba spirit practices in Mozambique – have also been labelled as 'restorative justice' (see Bell, 2002; Boraine, 2000; Gade, 2013; Hansen & Umbreit, 2018; Mangena, 2015; Morris & Maxwell, 2001; Sherman et al., 2015; Skelton & Frank, 2001; Stuart & Pranis, 2006; Umbreit, Vos, Coates & Lightfoot, 2005; UNODC, 2020; Zinsstag & Vanfraechem, 2012). In this article, I will focus on mediation, conferences and circles, and it should be noted that my arguments are based on Marshall's definition of restorative justice.

2 I have turned the noun 'opposition' into another noun, 'oppositioning', which I define as 'a process where something is placed in opposition to something else'. The word 'oppositioning' has a political ring to it, which I like in the context of the debate on restorative justice and punishment. I do, in fact, very much see the early oppositioning in the field of restorative justice as a political process aimed at creating traction for the young restorative justice movement. Oppositioning may be a sound political strategy in the early years of a new movement or political party, but I will later suggest that at the current point in time, oppositioning is a problematic political strategy if one wants to further promote the use of restorative justice (see Section 4).

positions on what punishment is.[3] Second, I will argue that restorative justice could reasonably be more widely adopted as a new de jure form of punishment, which could potentially increase its use for the benefit of victims, offenders and society at large. I will end the article by presenting some preliminary thoughts on how restorative justice could be incorporated into future justice systems as a new form of de jure punishment.

2 Restorative justice as de facto punishment

Scholars do not agree on what punishment is. Against this background, I have previously presented a multidimensional punishment framework, which makes it possible to distinguish systematically between different conceptualisations of the nature of punishment (Gade, 2021). The technical details are presented in the previous article by means of formal logic and combinatorics, and in the present article, I will focus on highlighting some of the main points.[4] In its current form, the framework comprises nine dimensions, centred around the punishment statement '*X* punishes *Y* through *Z*'. The nine dimensions are listed in Table 1 together with a statement specifically related to each dimension.

Table 1 ***Nine dimensions of punishment***

Dimension	Statement
1. The guilt dimension	1. *Y* is guilty of an offence
2. The type-of-offence dimension	2. The question of whether or not *Y* is guilty is a legal matter
3. The experience dimension	3. *Y* experiences pain/unpleasantness through *Z*
4. The voluntariness dimension	4. It is involuntary for *Y* to be inflicted with *Z*
5. The authority dimension	5. *X* is a human legal authority
6. The perception-of-guilt dimension	6. *X* believes *Y* is guilty
7. The blame dimension	7. *X* blames *Y*
8. The intention dimension	8. *X* intends to inflict pain/unpleasantness on *Y* through *Z*
9. The self-punishment dimension	9. *X* is different from *Y*

3 I will distinguish between de facto and de jure punishment. De facto (Latin, 'in fact') punishment is something that is in fact punishment, while de jure (Latin, 'by law') punishment is something that is punishment by law – i.e. something that is *defined as punishment by law*. This means that something may be de jure punishment in one legal context, but not in another. Furthermore, as will be unfolded later, something may be de facto punishment, according to specific positions on what punishment is, without constituting de jure punishment. Similarly, something may be de jure punishment without being de facto punishment, according to specific positions on the nature of punishment.

4 What I present in this section is a shorter, more accessible and less technical outline of the punishment framework, which I think will appeal to a broader audience than the original technical version (the technical version may be consulted for details). The former article does not include any reflections on the adoption of restorative justice as de jure punishment, which is the main contribution of the present article.

Within each dimension, one can hold either a minimalist or a maximalist position. According to the minimalist position in dimension *r* (where *r* is a dimension number), it is necessarily true that if *X* punishes *Y* through *Z*, then *Statement r* applies (where *Statement r* is the statement of dimension *r*). For example, according to the minimalist position in dimension 1, it is necessarily true that if *X* punishes *Y* through *Z*, then *Y* is guilty of an offence. In contrast, according to the maximalist position in dimension *r*, it is *not* necessarily true that if *X* punishes *Y* through *Z*, then *Statement r* applies. This means that the minimalist position is more restrictive than the maximalist position in the same dimension because it – in contrast to the maximalist position – requires that a specific condition is fulfilled in order to have a case where *X* punishes *Y* through *Z*.

Previously, I have provided examples of scholars holding either the minimalist or the maximalist position in each of the nine dimensions, and these examples may be consulted by scholars who want to delve deeper into the punishment framework (Gade, 2021: 138-142). Methodologically, the framework has been developed through a literature review where I have added a new dimension each time I have managed to find a new statement for which at least one person believes that it is necessarily true that the statement follows from '*X* punishes *Y* through *Z*', while at least one other person does not believe that this is necessarily true (Gade, 2021: 138).[5] There may be punishment dimensions which I have not yet managed to identify, and adding such dimensions to the framework in the future would make the framework even more detailed.

A valuable contribution of the framework is that it makes it possible to distinguish systematically between a large number of different positions – more specifically, 512 different positions – on what punishment is, where each position represents a unique combination of being either a minimalist or a maximalist in each of the nine dimensions (for the technical details, see Gade, 2021: 132-138). For example, Hart, who was one of the most influential legal philosophers of the 20th century, seems to hold a punishment position that is minimalist in dimensions 2, 3, 5, 6, 8 and 9, and maximalist in dimensions 1, 4 and 7 (Gade, 2021: 134-135). For each of the 512 positions in the framework, it is necessarily true that if *something* (for instance a concrete case of fines, imprisonment or restorative justice) fulfils *all* the conditions of punishment that exist according to the specific position, then that *something* is a case of de facto punishment according to the specific position. This means, for example, that according to Hart's punishment position, a concrete case of restorative justice would constitute de facto punishment if it fulfilled the conditions of dimensions 2, 3, 5, 6, 8 and 9, that is, the dimensions where Hart's position is minimalist.[6]

5 The number of punishment dimensions is equal to the number of different statements for each of which at least one person believes it is necessarily true that the statement follows from the statement '*X* punishes *Y* through *Z*', while at least one other person does not believe this is necessarily true (Gade, 2021: 133).

6 Remember that for each punishment position in the framework, it is only the position's minimalist dimensions that provide conditions of punishment – the position's maximalist dimensions do not require that specific conditions are fulfilled in order to have a case where *X* punishes *Y* through *Z*, as explained above.

As previously demonstrated (Gade, 2021: 143-147), each of the nine minimalist conditions are fulfilled by *some* restorative justice processes if *X*, *Y* and *Z* are defined as below:

– *X* is one or more concrete participants in the restorative justice process other than the offender(s);[7]
– *Y* is the offender(s);
– *Z* is what *X* does to *Y* in the restorative justice process.

However, it varies how many of the minimalist conditions are fulfilled in concrete cases of restorative justice. For example, I mediated a case about threats that fulfilled the minimalist conditions of dimensions 1-3 and 6-9, while one of my road traffic accident cases only fulfilled the minimalist conditions of dimensions 1, 2, 6 and 9 (Gade, 2021: 148-149). By means of the formula that I developed in the previous article, it can be calculated that the former meeting constituted a case of de facto punishment according to 128 punishment positions in the framework, while the latter only constituted de facto punishment according to 16 positions (Gade, 2021: 148).

Since some concrete cases of restorative justice constitute de facto punishment according to many positions on what punishment is, I find it problematic to claim that restorative justice is a new justice paradigm that differs radically from punishment. Surely, there are variations with respect to whether concrete cases of restorative justice constitute de facto punishment according to the different positions in the punishment framework, but we are seeing similar variations with respect to whether concrete cases of current de jure forms of punishment constitute de facto punishment according to the different positions in the framework. Therefore, I will argue that the variations in the context of restorative justice do not make it unreasonable to adopt restorative justice as a new form of de jure punishment.

3 Restorative justice as de jure punishment

While restorative justice is often well-integrated into national criminal justice systems as either an alternative or a supplement to the systems' de jure forms of punishment, it is extremely rare that restorative justice is a form of de jure punishment itself, that is, something that is *defined as punishment* by the respective legal systems. However, an example of this would be the Norwegian youth punishment system, in which 15- to 18-year-old offenders can receive restorative justice *as a form of legal punishment*, as specified in Chapter 8a of the Norwegian Penal Code. Framing is important, and I will later argue that it may be reasonable to legally adopt restorative justice as a form of de jure punishment much more broadly – that is, as something that is defined as punishment by law – rather than merely as something that is legally defined as an alternative or a supplement to de jure punishment.

7 For example, *X* could be the victim(s), supporters of the victim(s), supporters of the offender(s), the mediator/facilitator or a combination of these.

Though concrete cases of restorative justice constitute de facto punishment from the perspective of several positions on the nature of punishment, as demonstrated in the last section, restorative justice is clearly different from the common de jure forms of punishment like fines and prison. However, this does not mean that restorative justice could not reasonably be adopted as a new form of de jure punishment in future criminal justice systems. In fact, every time a new form of de jure punishment has been adopted historically, it has been different from the previous ones. As a matter of logic: if the new form of de jure punishment had not been different, then it would not have been new. For example, when it became possible in Denmark to serve unconditional prison sentences for up to six months with an electronic anklet, this new de jure form of punishment differed from traditional prison because the offender would serve the sentence at home.

The question is, of course, whether the differences between restorative justice and the common de jure forms of punishment are so big that restorative justice would somehow not 'fit' in with the rest of the punishment system as a new form of de jure punishment. I will argue that this is not the case, and also that one should be careful not to exaggerate the differences between restorative justice and current de jure forms of punishment. In order to unfold this point, I want to delve into three areas where one might expect to find radical differences, but where the differences are arguably not that big after all: pain (experienced and intended), voluntariness and authority.

3.1 Experienced pain

In connection with pain, the maximalists in the experience dimension – that is, dimension 3 – do not believe that offenders necessarily have to experience pain/unpleasantness in de facto punishment. For example, Gendin states that:

> We cannot define the activity of punishment in terms of its subjective effects on each and every person who is punished … If we run through the normal channels of punishment then we may say a person is punished irrespective of the subjective effects they have had on him (Gendin, 1967: 236-237).

Since the maximalists in dimension 3 do not see pain infliction as a necessary condition of de facto punishment, the potential lack of pain in some cases of de jure punishment will not be a concern for them in regard to whether it makes sense to label these practices as 'punishment'. In contrast, the minimalists in dimension 3 are of the view that punishment is painful/unpleasant by nature, which implies that if a specific case of de jure punishment does not cause pain, then it is not a case of de facto punishment. This is why Geeraets, who is a minimalist in dimension 3, explains that 'If a person is covered by insurance, the unpleasantness of being required to pay compensation is relatively small, thus making it unreasonable to interpret this as punishment' (Geeraets, 2018: 28). Concerning this disagreement on the role of experienced pain in punishment, it is helpful to distinguish between de facto and de jure punishment. I believe Gendin's argument is valid for de jure punishment, but not for de facto punishment. Surely, the activity of de jure punishment cannot be defined in terms of its subjective effects on each and every

person who is punished. However, I agree with Geeraets that something is only de facto punishment if the offender experiences pain/unpleasantness. Thus, I am a minimalist in dimension 3.

For me and other minimalists in dimension 3, it is a matter of potential concern in relation to proportionality of punishment that the pain of de jure punishment varies considerably depending on the identity and life circumstances of the offenders (see Hayes, 2018). In fact, some offenders may be so little affected by specific cases of de jure punishment that it may be unreasonable to claim that they experience any pain at all. For example, a small fine may be very painful for a poor man, but may hardly have any effect on a rich man. Nevertheless, this does not mean that I or other minimalists in dimension 3 will argue that it is unreasonable to use fines as a de jure form of punishment. Instead, we all seem to accept that it makes sense to use fines as de jure punishment because fines are normally painful/unpleasant, even though some fines do not cause pain, and therefore do not constitute de facto punishment in our view. Therefore, it would also be unreasonable if minimalists in dimension 3 would argue that since it varies how much pain/unpleasantness offenders experience in restorative justice, restorative justice should not be used as de jure punishment. If we would argue that, then we should also – in order to be consistent – argue that current de jure forms of punishment, such as fines, should also not be used as de jure punishment because such cases involve the same kind of variations with respect to the experience of pain/unpleasantness.

In connection with the experience of pain, I would like to emphasise that restorative justice imposes considerable pain/unpleasantness on some offenders. For example, in the context of victim-offender mediation, Walgrave has explained that:

> Being confronted directly with the suffering and harm one has caused and with the disapproval of loved ones is a severely affecting burden. Apologising in front of others may be hard and humiliating. Experiencing pressure to make up for the harm is difficult to cope with. The process makes the offender feel a mixture of intense unpleasant emotions, such as shame, guilt, remorse, embarrassment and humiliation, which may have an enduring impact on his future life. Some offenders experience Victim-Offender mediation and compliance with the agreements as a 'double punishment' (Schiff, 1999) (Walgrave, 2008: 47).

In the context of conferences, Sherman and Strang have also stated that:

> [S]ome critics have called shaming conferences a 'soft option'. Interviews with the first 548 offenders in the study [the Reintegrative Shaming Experiments (RISE)] suggest that is not how the offenders see it, especially after experiencing over an hour under the spotlight of critical examination by family, friends, victims or community representatives sitting in a circle in a private room at a police station. Led by specially trained police officers, the conferences are emotionally intense discussions of what the offender did, whether the offender

> is sorry, and how the offender can repair the harm caused by the crime (Sherman & Strang, 1997: no page number; see also Sherman et al., 2015).

My experience as a mediator is likewise that it may be very tough for offenders to face their victims and other people they have hurt, such as the victims' or their own family members. Of course, offenders' experiences with restorative justice differ as already explained, but for some offenders, participation in restorative justice may feel like a greater punishment than current de jure forms of punishment (especially in case of mild de jure punishment, such as small fines or conditional prison sentences, where the offenders do not go to prison). If one only looks at the experience of pain/unpleasantness, then I do not see any reason why restorative justice could not reasonably be adopted as a new de jure form of punishment.

3.2 Intended pain

Moving on to the issue of the intentionality of pain, I want to start by pointing out that the maximalists in dimension 8 do not limit de facto punishment to intentionally inflicted pain. Kolber (2012), for example, explains that de facto punishment includes both intentional and unintentional hardship, and to unfold this point, he presents a thought experiment in which Purp and Fore receive the exact same treatment, but where the intention of the treatment differs. Kolber then explains:

> Despite the differing intentions that surround their treatment, we tend to think that Purp and Fore are punished by the same amount. The mental states of their punishers (be they judges, prison personnel, legislators, voters, or some combination of all of these) do not affect the *severity* of the sentences. So long as the duration of their sentences and the conditions of the confinement are the same, we think that they receive the same amount of punishment. Thus when assessing amounts of punishment, we consider not only intentional hardship but also certain unintentional hardship as well (Kolber, 2012: 3).

Since Kolber and other maximalists in dimension 8 do not consider the intention to inflict pain/unpleasantness to be a necessary condition of de facto punishment, the potential lack of such an intention in some concrete cases of de jure punishment will not be a matter of concern for them in regard to whether it makes sense to label the de jure practices as 'punishment'. This will, however, be a potential matter of concern for the minimalists in dimension 8. In fact, according to Walgrave, the intentions are essential:

> The crux lies in the intention (Wright, 2003). Equating every painful obligation after a wrong with punishment is based on a mistaken 'mental location' of the painfulness. It is the painfulness in the intention of the punisher that counts, not in the perception of the punished (Walgrave, 2008: 48).

Being a maximalist in dimension 8, I do not agree with Walgrave on this issue. On the contrary, I find Kolber's argument for why de facto punishment may also

include unintentional hardship convincing. Whether a person is de facto punished depends, in my view, on what is done to that person, and not on what is going on inside the head of the one who does it. Furthermore, I find it important to notice that the intention of the punisher is normally irrelevant with respect to how punishment is defined by law, that is, with respect to the definition of de jure punishment. For example, there are no references to the intentions of the punishers in the Danish Penal Code – and for good reasons, I would say, since the intentions of punishers are always to some extent subjective. The intentions may vary depending on the identity of the punisher (political orientation, etc.), and also depending on the case. Furthermore, in some concrete cases of de jure punishment, the intention to inflict pain on the offenders may be secondary to other intentions, like rehabilitation or restoration. In this connection, Johnstone has explained that

> many of those who advocate and support the practice of retributive punishment do not see pain delivery as an end in itself, nor as a crude form of deterrence, but regard it as an essential component (but only one component) of a more constructive, educative and reintegrative process (Johnstone, 2011: 90).

For example, Duff perceives restoration as the overall goal of retributive punishment (see Duff, 2002). To my knowledge, we are lacking solid empirical data on the extent to which punishers in de jure forms of punishment actually intend to inflict pain on those who are punished, and to what extent their intention to inflict pain is primary or secondary to other intentions.

Walgrave has claimed that there is no 'intentional infliction of pain' (Walgrave, 2008: 65) in restorative justice. However, there is clearly an intention to inflict pain on offenders in some cases of restorative justice. For example, the other meeting participants may intend to inflict pain on the offenders, which has been highlighted by McDonald with the example of a conference after a fatal traffic accident:

> His father [the father of Michael, who died in the accident] in particular had expressed a strong desire to punish Peter [the offender] and was eager to see that he said everything he could to make Peter feel the pain that Michael had felt and to ensure that Peter felt guilty and carried that guilt with him for the rest of his life (McDonald, 2012: 156).

As a mediator, I sometimes also intend the restorative justice meetings that I facilitate to be painful for the offenders. This is not because pain is my ultimate goal, but because I, either rightly or wrongly, believe that the experience of pain may help some offender to stop reoffending. But of course, just as intentions may vary in the current de jure forms of punishment, they may also vary in restorative justice. However, Johnstone has argued that:

> If pain is an inevitable, or even probable, consequence of restorative interventions, then (unless one adopts a perversely narrow interpretation of the term 'deliberately' [or 'intentionally']) someone who purposely puts an

> offender through a restorative justice process, thereby causing them pain, deliberately [or 'intentionally'] inflicts pain on them (Johnstone, 2011: 91).

It may be discussed whether this interpretation of intentionality is too broad. In any case, based on what I have presented above, I do not think the differences with respect to the intentionality of pain in restorative justice and current de jure forms of punishment, respectively, are so big that these differences *in themselves* should make it unreasonable for the minimalist in dimension 8 to adopt restorative justice as a new de jure form of punishment. However, even if it is possible to point to significant differences with respect to intended pain, I – and other maximalists in dimension 8 – would not regard these differences as decisive for whether it makes sense to adopt restorative justice as de jure punishment, because we do not limit de facto punishment to intended pain.

3.3 Voluntariness

According to the maximalists in dimension 4, it is not always involuntary for offenders to undergo de facto punishment. Hayes underscores that de facto punishment may sometimes be voluntary, and that offenders may even be eager to suffer their punishment:

> A probationer, for example, may be happy to participate in unpaid work as part of her order because she wishes to make reparations for her crime … Like Raskolnikov, she is eager to suffer her punishment and may even look to derive something positive from it. *But that does not mean that she does not suffer* [italic in original] (Hayes, 2018: 239).

In contrast, the minimalists in dimension 4 do not think there is such a thing as voluntary punishment. For instance, in a discussion about punishment and restorative justice, Garvey argues that:

> Ideally, the offender experiences remorse and repentance [in restorative justice], and thus shoulders willingly some burden or hardship in order to make amends. Moreover, because that burden is assumed willingly, it's no longer punishment; it's been transformed into a secular penance (Garvey, 2003: 303).

Being a maximalist in dimension 4, I do not think Garvey is right about this issue. On the contrary, since voluntariness does not preclude experienced pain, I agree with Hayes that de facto punishment may be undergone willingly. In connection with voluntariness, I would also like to emphasise that even though de jure punishment is always to some extent externally imposed, in the sense that the offender cannot choose not to undergo any punishment, there is a degree of voluntariness to some of the current forms of de jure punishment. For example, in the Danish criminal justice system, offenders have to submit an application to the Danish Prison and Probation Service if they would like to serve an unconditional prison sentence of maximum six months at home with an electronic anklet rather

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than in a traditional prison. Thus, in one sense, offenders who serve their prison sentence with an electronic anklet always do so voluntarily, but not voluntary in the sense that they could choose not to serve the sentence at all. Similarly, young offenders in the Norwegian youth punishment system have to consent to participate in a restorative justice meeting, but an alternative sentence of imprisonment may – based on a court's judgement – be executed in case the young offender does not participate. This is a kind of 'partial voluntariness'.

It should be noted that while some scholars see restorative justice as 'an approach to justice in which victim and offender *gather voluntary* [emphasis added] to discuss the effect of the crime and to find ways to repair the harm done' (Bolivar, Aertsen & Vanfraechem, 2013: 123), others are of the view that restorative justice may also include 'coercive sanctions' (Walgrave, 2001: 18). Furthermore, it is clear that some of the practices that fulfil Marshall's definition of restorative justice – see note 1 – are not voluntary. For example:

> In New Zealand, participation in the FGC [family group conference] is required of all youth who plead 'not denied', a more flexible plea than 'not guilty', to the offense with which they have been charged … Participation in the FGC by the offending youngster is not voluntary (Goren, 2001: 143).

In Denmark, participation in victim-offender mediation is supposed to be voluntary according to the Danish Victim-Offender Mediation Act of 2009, but as a mediator, I have experienced how the degree of voluntariness may vary in practice, for example when parents put pressure on minors to participate. Later, I will suggest that if restorative justice is adopted as de jure punishment more widely, restorative justice could either be a coercive sanction, or the use of restorative justice as de jure punishment could be based on the kind of 'partial voluntariness' that is already used in cases of home detention in Denmark, and also in the Norwegian youth punishment system (in Section 4, I will discuss whether coercive participation could be problematic).

3.4 Authority

According to the maximalists in dimension 5, it is not only human legal authorities who can subject others to de facto punishment. On the contrary, as emphasised by McPherson, 'Punishment can turn up in any human relationship. Lovers punish each other; parents punish their children; the State punishes criminals' (McPherson, 1967: 26). Other scholars are, however, of the view that punishment – in what they see as the primary sense of the word – 'must be imposed and administered by an authority constituted by a legal system against which the offence is committed' (Hart, 1959: 4; see also Ashworth, 1986: 113). This is another context where I think it is helpful to distinguish between de facto and de jure punishment. Personally, I am a maximalist in dimension 5 because I agree with McPherson that de facto punishment is something that can take place in any human relationship. However, if we talk about de jure punishment specifically, then I agree with Hart that it must be imposed (though sometimes under 'partial voluntariness') and administered by a legal system against which the offence is committed. Furthermore,

in this connection, I find it important to underscore that human legal authorities play an active role in some restorative justice processes. This is, for instance, the case in Canadian sentencing circles:

> At the start of a sentencing circle an inner circle of participants is formed including a judge, prosecution and defence counsel, a court recorder, the offender and the victim and their families. The inner circle is then surrounded by an outer circle of friends, relatives, and any interested member of the community … The judge's role is to oversee discussion and seek out answers to the following kinds of questions: What are the underlying causes of the crime? What impact has the crime had on the victim, his or her family, and the community? (Linker, 1999: 117; see also Stuart, 1996).

In other criminal justice systems, legal authorities do not participate in the restorative justice meetings. For example, the Danish victim-offender mediation programme does not normally include lawyers or other legal experts in the mediation meetings, and the programme uses civilians rather than police officers as mediators. In this connection, I want to emphasise that if restorative justice were to be used as de jure punishment more widely, then the meetings could be authorised by legal experts in the same way as other forms of de jure punishment. However, I do not think that legal experts have to be involved in carrying out the actual meetings. Similarly, legal experts authorise, but are not involved in carrying out the actual imprisonment when prison is used as de jure punishment. The actual imprisonment is managed by prison personnel.

4 Reflections on the adoption of restorative justice as de jure punishment

Many key thinkers associated with the development of restorative justice have envisioned different futures for the management of crime. For example, Eglash envisioned a future with creative restitution (Eglash, 1957, 1958, 1977), Barnett, a new restitution system (Barnett, 1977), Christie, victim-oriented courts (Christie, 1977), and Zehr, a future where restorative justice would replace retributive justice and punishment (Zehr, 1985, 1990).[8]

I place myself in this tradition of scholars envisioning different futures for the management of crime, and I am fully aware that in the end, it will be a political decision whether restorative justice is adopted as de jure punishment. What I have done in this article is merely to attempt to demonstrate that from an academic point of view, it makes good sense to adopt restorative justice as de jure punishment. In this connection, I have argued that some, but not all, concrete cases of restorative justice constitute de facto punishment from the perspectives of specific positions on what punishment is; just like some, but not all, concrete cases of the current de jure forms of punishment constitute de facto punishment from the perspectives of some positions on punishment. Furthermore, I have argued that though there are

8 However, Zehr later questioned his early dichotomy between two justice paradigms (see Zehr, 2002: 58).

of course differences between restorative justice and current de jure forms of punishment like fines and prison; these differences are not so substantial that they *by themselves* would make it unreasonable to adopt restorative justice as a new form of de jure punishment more widely. Surely, I do not expect all restorative justice scholars to agree with me, but I hope that they are willing to engage in an open-minded dialogue.

My position is that we should adopt a consequentialist approach to punishment, and use restorative justice as de jure punishment in those cases – and only in those cases – where evidence shows that restorative justice, compared to other forms of de jure punishment, is better suited to lead to the consequences that we value as a society. In a democratic society, it should, in my view, be the elected politicians who decide what these valued consequences are, and how much value the different consequences have in relation to each other. For example, valued consequences could be lower recidivism, increased victim well-being and lower economic cost, just to mention a few. If restorative justice produces better results than current forms of de jure punishment in relation to the valued consequences for specific crime types, then it would – based on the consequentialist approach that I suggest – be reasonable to adopt restorative justice as de jure punishment for these specific crime types.

If restorative justice is adopted as de jure punishment, then offenders could either be forced to participate, or their participation could be based on the kind of 'partial voluntariness' discussed in Section 3. The consequences of different models could potentially be tested by means of randomised controlled trials, and after gaining evidence about their relative effects, the model that is best suited to lead to the consequences that we value as a society could be chosen.[9] Evidence may show that coercive participation is problematic, but not necessarily. Some existing forms of restorative justice are not voluntary as already discussed, and as a mediator, I have personally had good experiences with meetings where young offenders participated under pressure from their parents. Such meetings may turn out to be constructive processes irrespective of the offenders' motivation prior to the meetings. In fact, the emotional dynamics and potential role construction that take place *at the meeting* may be more important with regard to the outcome than the initial motivations (see Asmussen, 2014; Rossner, 2013). Furthermore, I am also not that concerned that in a model based on 'partial voluntariness' offenders may take part in restorative justice in order to avoid other forms of de jure punishment. Related to this issue, we have recently conducted a survey in the Danish victim-offender mediation programme showing that out of the 84 offenders

9 Randomised controlled trials have already been used to test the relative effects of restorative justice and court punishment (see Sherman et al., 2015), and I am currently part of an ongoing Danish trial that tests the relative effects of victim-offender mediation and restorative justice conferences (see Sherman et al., 2021). Surely, there are several challenges in relation to measuring relative effects, including potential selection bias of treatment providers and different predispositions – motivation, willingness, personality, etc. – among the service providers who deliver the respective models/interventions. Nevertheless, though such challenges may always remain to some extent, randomised controlled trials are probably the strongest research design to test relative effects, and different strategies may be used to counter the existing challenges of such trials, including full or partial randomisation of service providers (Sherman et al., 2021).

in the study, 30 per cent replied that one important reason for their participation was the possibility of receiving a less severe sentence (Gade et al., 2020: 11).[10] However, 85 per cent of the 30 per cent also replied that they participated in order to provide an explanation, while 77 per cent answered that they participated in order to give an apology. In other words, offenders may have multiple motivations to opt for restorative justice, and potentially selfish or opportunistic motives may be combined with motives to do something positive for those who have been hurt.

It is possible to imagine various concrete models for how restorative justice could be used as de jure punishment. For example, in a Danish context one could test the effects of a model inspired by both the already existing system with home detention and the Norwegian youth punishment system. The model could be for all offenders irrespective of age, and it could look something like the following:

1 Offenders who receive a fine, a conditional prison sentence or an unconditional prison sentence for up to, for example, six months would receive an opportunity to apply to have their original punishment replaced by restorative justice as de jure punishment.
2 Representatives of the justice system would then screen the applicants based on predefined suitability criteria (at the moment, applicants for home detention are screened, just as offenders are screened for participation in the current Danish victim-offender mediation programme).[11]
3 If the offender is deemed suitable for restorative justice, then the victims would be invited to a restorative justice process. Different models could be adopted here: a model where restorative justice would only be used as de jure punishment if the victims agree to participate (which could potentially empower victims, but also put them under potential pressure from offenders), or a model where alternative quasi-restorative justice processes (UNODC, 2020: 37-38), such as community panels, are used if the victims do not want to participate (which could give more offenders an opportunity to participate in restorative justice, but also compromise some victims' sense of justice if they would prefer their offenders to receive other forms of de jure punishment).
4 It could be a requirement that a written agreement has to be formulated, and there could be broad predefined limits to what can be agreed ('broad' in order to give the participants ownership, and 'predefined' in order to protect the rights of all participants by defining certain limits).[12]
5 Representatives of the justice system could be tasked with monitoring whether offenders comply with the agreements, just as representatives of the Danish

10 In the Danish system, judges are allowed to take participation in victim-offender mediation into account when deciding on the severity of the court punishment. Nevertheless, nothing suggests that offenders who have participated in victim-offender mediation are punished less severely in the Danish court system than offenders who have not participated, and who have committed similar crimes (Kyvsgaard, 2016: 23).

11 Offenders may, for instance, be excluded if they have a severe drug abuse or severe psychological issues, or if they are not able to understand what it means to participate.

12 In some restorative justice models, the meetings always result in a written agreement about the future, while in other models, this is not the case. For example, in the randomised controlled trial that we are conducting in Denmark at the moment (see note 9), there are always written agreements in the conferences, but not always in the victim-offender mediations.

justice system currently monitor whether offenders comply with the rules for home detention or with the conditions of conditional prison sentences. In case the offenders do not uphold what they have promised in the agreements (e.g. receive treatment for alcohol problems, participate in an anger management course, or do something specifically for the victims), then offenders could receive the original de jure punishment instead, maybe after a couple of warnings.

This is just one among several potential models that could be tested. The reason why I think it is important to 'change lenses' (see Zehr, 1990) on restorative justice and adopt it as de jure punishment, rather than continuing to regard it as something radically different from punishment – and as something that only constitutes a possible *alternative* or *supplement* – is that this change of perspective could potentially bring restorative justice from the margin to the mainstream of criminal justice (London, 2003, 2011).[13] Surely, it is true that there has been growing support for restorative justice in recent years, but restorative justice still remains a relatively marginal activity compared to current de jure forms of punishment like fines and prison. The restorative justice movement may succeed in further increasing the use of restorative justice, but as long as restorative justice is not better integrated into our justice systems as a de jure form of punishment itself, then I am afraid that it will continue to be a relatively marginal activity. The call for punishment after crime will probably continue in broad sections of society, meaning that those who advocate that restorative justice should *replace* punishment will continue to be facing an uphill struggle.

In the early years of the restorative justice movement, it made sense from a strategic point of view to 'sell' restorative justice as a radically new justice paradigm. By means of this 'oppositioning' (see note 2), a lot of attention was created around the notion of restorative justice. In much the same way, new political parties often 'sell' themselves by claiming that they represent something radically different and new. However, when new parties later become established parties, they will be faced with political realities, and they will have to collaborate with the rest of the political system if they want to make real political differences. The same is the case for restorative justice. At the current point in time, it is – in my view – strategically much smarter, and also factually more reasonable, to argue that restorative justice should be adopted as a new form of de jure punishment.

Restorative justice could become a de jure form of punishment where offenders are really held accountable for what they have done in direct contact with victims and other people who they have hurt. Compared to, for example, imprisonment, this could be seen as a more 'modern' and constructive form of de jure punishment. Furthermore, this new form of de jure punishment would not be a 'soft' approach

13 According to my consequentialist approach, restorative justice should, of course, only be promoted and brought to the mainstream of criminal justice if it, compared with current forms of de jure punishment, is better suited to lead to the consequences valued by society. However, several studies have demonstrated various positive effects of restorative justice (see, for instance, Hansen & Umbreit, 2018; Sherman et al., 2015), and based on such findings, I assume that it would be reasonable to use restorative justice as de jure punishment in many contexts from a consequentialist point of view. However, evidence will be needed with respect to the specific models that may be implemented.

to crime. On the contrary, it may be extremely tough for offenders to be directly faced with the anger, disappointment and so on of the people who they have hurt. Furthermore, it may be a substantial burden for offenders to comply with the restorative justice agreements. Considering previous effect studies on restorative justice, this new form of de jure punishment could potentially be well suited to lead to consequences that may be valued in society, including lower recidivism, increased victim well-being and lower economic cost.

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