AGAINST PENAL INSTRUMENTALISM

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In John Braithwaite and Philip Pettit's book *Not Just Deserts*, the authors advise governments to develop a strategy of reduction of the use of punishment (decrementalism) (Braitwaite, Pettit, 1990:140).

What struck me when I read it was that the Netherlands can be considered a country where such a strategy was part and parcel of traditional criminal policy. For more than a century, incarceration has gone down, reaching an all-time low around 1975, with no more than 17 prisoners per 100,000 inhabitants (Van Ruller, 1986:67).

The Netherlands was well known for its lenient penal climate, and most Dutch policy makers were proud of it: the dominant belief was that nothing good would come of punishment anyway. It was only a sometimes inevitable evil, to be avoided if possible.

Unfortunately, exactly at a time when authors from abroad were taking the Netherlands as an example for other countries (Rutherford, 1986; Downes, 1988), the Dutch government took a deliberate turn in a much more punitive direction in the white paper "Crime and Society" of 1985.

Here, a (so-called "rational") policy was announced of making criminal justice "consistent, consequent and credible" (again)[1] as a means to control crime. In view of the spectacular rise of (especially property) crime, the machinery of penal law had to be tuned up in terms of effectiveness and efficiency.

In fact, more and more severe punishment was proclaimed as an urgent need to make the citizens law-abiding (again) and to keep society in hand. A strategy of deliberate incrementalism with regard to punishment was chosen.

Four target groups were indicated in this new policy, which also indicated the "products" that were to be delivered to each of them:

Target Group	"Product"
Perpetrators	Punishment
Potential perpetrators	Credible threat of punishment
Law-abiding citizens	Norm confirmation through punishment
Victims	Acknowledgement of victimization

If we look at how these target groups are to be addressed by the agencies of criminal justice, we see the centrality of punishment. Only for victims, punishment (of the ones who victimized them) was not always a part of the answer, since in many cases culprits would not be found. But if they would be found, punishment would follow.

Another aspect of this new, unprecedented governmental policy on crime control was the distinction between severe (organized) crime and less severe but very frequent forms of offending (from then on, not to be called "petty" crime).

To combat severe and organized crime—mainly connected to the illegal markets of drugs, weapons and prostitution—punishments were to be made both more frequent and more severe. A budget of more than 200 million guilders per year was earmarked for intensified law enforcement and for expanding the prison system. A massive prison building programme was launched (from 4,000 cells in 1985 to around 15,000 today), and detection and prosecution of organized criminals was to be facilitated by an increasing amount of powers for the police and the office of public prosecution.

This implied, among other things, a deformalization of procedural criminal law to the limits of what is still acceptable under the rule of law.

Smaller and more common offending was not to be counteracted primarily by criminal law but by preventative efforts of local administrations, the citizens themselves and by making use, if possible, of other disciplines of law such as administrative law. But the criminal law—punishment—still had to be the "stick behind the door," in case the preventative efforts had apparenty failed. (Budget: 45 million guilders for the whole planning period of 1986–1990.)

Although this second track of the criminal policy of 1985 has in fact stimulated a whole series of preventative programmes, it also fundamentally relies on punishment and does not imply a strategy of reduction of the use of punishment.

We can see this clearly when we realize that every detected and reported offense will—under this policy—be interpreted as a failure of the preventative efforts and will have to be dealt with in a punitive mode, since punishment is declared to be the systematic backup for preventative efforts.

This is enough of an explanation of what I want to talk about: "penal instrumentalism." It means, firstly, viewing and using punishment as an instrument of social policy, but secondly, ignoring the conditions under which punishment can indeed be an instrument to achieve certain aims, as well as ignoring the limits to be imposed on the use of punishment.

Like all "-isms," (for instance, "sociologism"—making use of a sociological explanation for a phenomenon that is not sociological at all), instrumentalism exceeds the inherent limits of application, producing negative but largely ignored effects of such importance that they cannot be called merely side effects any longer.

Penal instrumentalism has led to an astoundingly different picture of criminal justice in the Netherlands today. The penal climate is not lenient anymore, but willingly and demonstratively punitive and becoming still more punitive.

If we look at incarceration, the number of prisoners per 100,000 people was 87 in 1997 and is now above the European average. If we look at the length of unconditional imprisonment, we get the following picture (in absolute numbers) if we compare 1980 with 1998:

	1980	1998
Up to 1 month	8,944	10,804
1 to 6 months	4,500	10,129
6 months to 1 year	1,104	3,253
1 to 3 years	646	2,625
3 years and longer	175	896
Total	15,369	27,797

In addition to more prison sentences, there is a spectacular rise in the application of community service ("werkstraffen") orders, too, for adults, from less than 100 in 1981 to almost 16,000 in 1986 (*Sancties in Perspectief*, 2000).

In spite of the increased repression, levels of registered crime are still quite high, and there even seems to be an increase in violent crime. In view of this, a further expansion of the prison system is foreseen, and even the humane tradition of one prisoner per cell has been abandoned to facilitate a larger amount of prison sentences.

Contrary to what might have been the case before 1985, restorative justice has no or a very small chance of getting accepted in the Dutch criminal justice system, even, I would say, in the margin of the system, let alone as a fundamental alternative to punishment (which is defined by the deliberate imposition of pain by a legal authority as a consequence of committing a criminal offence).

The main cause of this is the now widely accepted idea of the absolute necessity of punishment as the answer to crime. This widely shared belief is a consequence of a prolonged dominant discourse by politicians along the lines of the "Crime and Society" plan and the execution of this plan since 1985.

Every new shocking criminal incident and every seeming increase in registered crimes of whatever nature are now seen only as indications that the punitive instruments are still failing and still need to be sharpened.

The "insatiability" that Braithwaite and Pettit have indicated has proven to be a reality in Dutch penal policy, and there is now an urgent need to consider the question of how we can turn this development around in a more constructive direction.

I hope to contribute to this turnaround by delivering a critique of the reigning instrumentalist interpretation and use of punishment.

Since we are looking at penal law, there are two kinds of instrumentalism that need to be considered: legal instrumentalism and the penal instrumentalism that I have been illustrating above but which still needs to be analyzed.

Legal Instrumentalism

Let us first briefly look at characteristics of legal instrumentalism in general and at some of the relevant critique (Schuyt, 1985:114):

1. Law is viewed as a neutral means to achieve certain ends.

This ignores the fact that law has its own intrinsic values and that it is therefore not neutral. The values intrinsic to law have to do with ideas of justice, liberty, equality and participation in debates about social arrangements.

2. Law is subordinated to politically selected values.

This implies that the political elite does not see itself as subordinated to the rule of law.

The elite uses the instrument of law to create a social order of its preferred political design, which will not necessarily be a legally just order. It can, for instance, aim at the structural exclusion of certain groups or individuals from legal rights and social opportunities.

The degree of legal protection of rights of citizens (legal subjects) becomes dependent upon the political interests of the ruling elites.

3. Law is a means of steering from the centre.

This suggests that society and all or most of its social phenomena can be decisively influenced in the desired direction from the centre of political power (top-down control).

This idea ignores the complexity of social phenomena and social processes and the fact that human beings intentionally act and react upon interpreted circumstances and developments.

Society is not only and cannot only be decisively shaped by government: quite the other way around, law should be decisively shaped by the characteristics of social interaction in the various contexts to be regulated.

4. Law is output-oriented (consequentialism).

Consequentialism implies that the instruments of law will be evaluated and adapted in view of the measurable effects. These effects are judged according to the politically selected criteria.

This reconfirms the only "technological" nature of law in this perspective and overlooks that consequences can and will be judged quite differently, depending on the value-orientations of differing social groups.

5. Use and effects of law must be monitored by social science research.

Social sciences are first helpful to develop a diagnosis of social problems, indicating the kind of (legal) instruments to be used. Once implemented, social sciences are used to evaluate the results, leading to adjustments in the instruments used.

The fallacy here is that social sciences can deliver empirical information and scientific analysis but can never replace normative judgements.

This reconfirms the dominant "goal orientation" of legal instrumentalism. Important values can appear as irrelevant or as obstacles to achieving the selected aims, for instance, transparency of detection and gathering evidence for the courts versus the effectiveness of combatting organized crime implying secret operations.

Penal Instrumentalism

Penal law is characterized by its finality, which is to apply the right to punish. From the beginning, the use of punishment in the public arena has been defended in terms of either retributivism or consequentialism. Evidently, it is the consequentialist view of punishment that coincides with legal instrumentalism.

As we can clearly recognize, in the "Crime and Society" plan described above, there is a stress on general prevention (deterrence for potential offenders, norm confirmation for law-abiding citizens, so as to prevent them from considering offending also). In the course of its implementation, the stress on effectiveness implied that "special prevention" come in focus again, predominantly by "incapacitation" and if at all possible, by rehabilitation.

It is all about influencing the behaviour of the population at large and the apprehended offenders particularly, in the direction of compliance with the norms underlying the criminal law.

Characteristics.

1. So the first and foremost trait of penal instrumentalism is the willingness to use the threat and the imposition of punishment as an instrument to influence social behaviour.

Without using that terminology, the Report on Decriminalisation of the ECCP of the Council of Europe (1980) has developed a good portrait of penal instrumentalism, mentioning these further traits.

2. Penal instrumentalism hopes to achieve its aims only by focusing on (suspects and) perpetrators.

3. Penal instrumentalism systematically overestimates the positive effects of the punitive system and systematically underestimates the negative effects of the punitive system.

Here there are three especially noteworthy negative effects:

1. The induction and growth of fear and anxiety in society by the emphasis on (the need for) punitive social control

2. The unequal distribution of (particularly the more severe) punishments over social layers, leading to an over-representation of the socially most vulnerable groups in penal institutions

3. The level of stigmatisation and of inducing criminal identities and careers

Since the third negative effect is associated with recidivism (19,000 Dutch (ex)convicts today are so-called “high-frequency recidivists,” and recidivism after imprisonment is in general around 80 percent), this third effect feeds into the first effect: the penal system reproduces its own criminal population and fear of crime.

Because of this imbalance in considering costs and benefits, punishment tends to be unjustifiably pictured as a means to achieve something good, as a positive duty in order to guarantee social freedom.

4. Penal instrumentalism tends to ignore or underestimate the social control possibilities offered by other legal or non-legal social institutions. Hence, the tendency to pay only lip service to the subsidiarity principle.

Of course, ever-growing investments in the hardware of the criminal justice system (prisons) imply that an ever-decreasing part of the public expenditure becomes available for other social institutions. Their "natural" preventative capacities—of schools, for instance, through effective secondary socialization—become undermined. Defective school systems become a reason for claiming the need for more punitive social control.

In this way, penal instrumentalism provokes a negative spiral in which punishment appears as an urgent need to preserve social order: a social order which is in fact being undermined by an excesssive recourse to punishment.

A Brief Critical Analysis of Prevention Through Punishment

There are ideas about prevention that permanently seduce people into thinking of punishment as an effective tool to construe or preserve a desired social order. There is the idea of general prevention on the one hand and special prevention on the other. Let us look briefly at the social adequacy—the degree of realism—of these ideas.

The notion of general prevention comprises two versions: a negative one (deterrence) and a positive one (normative education, reinforcement of norms).

The negative strategy depends on a credible threat of punishment, inducing the desirable refrainment from breaking the law, which implies a number of conditions that are only rarely fulfilled:

- A more or less fixed penalty system (tariffs)
- Adequate knowledge of prohibition and sanction
- A rational and calculating attitude of actors (not compulsive/impulsive) (Pompe: "petty passions and great pleasure in calculating")
- Transparency of consequences before acting
- Actors making the same calculations of negative and positive consequences as the legislator, regardless of their individual biography and social circumstances
- A high risk of detection and prosecution
- A widely-known risk

If we look at these conditions, we may assume that only in the less important patterns of social interaction and the less serious forms of offending—traffic violations, for example—regulations with fixed penalties may in general have the supposed behavioural effects. But even there, it proves to be very difficult to have a decisive influence on behaviour, as shown by the very limited effect of, for instance, camera monitoring of roads to control speeding.

But whenever the offences we consider are more important for offenders and their victims and more complex in their social causation, the

model is completely inadequate. In fact, it had already been abandoned in the early 19th century, when individualisation—implying flexibility instead of fixation—of punishment appeared to be necessary.

Widely disregarded or underestimated counterproductive effects of this approach are:

- The induction of defiance of authority
- The development of strategies to avoid punishment, which may have important negative conesquences for society (e.g., the development of illegal organisations)
- Its own tendency towards escalation

In the positive strategy, the stress is on the criminal conviction, which rejects the deviant action and reconfirms the social norm underlying the broken law. There is no doubt that this is an inherent property of every criminal verdict. The point here is that judgements by civil courts also have this property, as well as all other formal and informal ways of sanctioning. This is what defines the negative sanction per se: the rejection of something wrong.

So the crucial question here is why or when this rejection must be expressed by a criminal sanction: there is great importance in holding on to the "ultima ratio" principle in answering this question. Punishment is ethically a negative action (the deliberate infliction of conditions, intended to be painful), and using it really should be the last resort.

If we look at special prevention here, we also see two versions: negative special prevention, which is expressed in the aim and practices of "incapacitation," and positive special prevention, which expresses itself in the ideal of rehabilitation. What I want to focus on here is positive special prevention.

For a long time, criminal justice systems have been trying to execute the classic and most characteristic sanction of deprivation of liberty in such ways that "rehabilitation" to a law-abiding life would result.

In the 1970s, the failure of this attempt led to the demise of the rehabilitation idea (Martinson, 1974), and for some time, people tended to believe that "nothing works."

But soon after, research was done that showed that there are certain ways of sanctioning that seem to be effective in terms of preventing relapse. It must be mentioned, however, that reliable scientific evidence for effectiveness of sanctions is inherently difficult and perhaps even impossible to get. Most studies known in the Netherlands are methodologically defective in some ways.

What seems to be the general picture of more effective sanctions is that they do not typically consist of deprivation of liberty, but of restriction of liberty in the framework of programmatic forms of atten-

tion for the personal and social problems of the culprit and his or her social network.

Recent Dutch meta-research has shown that community service, intensive educational courses and intensive probation are among the more effective sanction types. Noteworthy is that they seem to become more effective, the more personal attention is given to individual problems.

A list of conditions contributing to greater effectiveness comprises the following factors:

- The negative sanction is combined with positive sanctions (reinforcement of wanted conduct, rewards)
- There is an explicit connection between offence and sanction
- The perpetrator is approached as a reasonable individual with the capacity to reflect and learn
- Attention is given to the reasons for the sanction and its meaning
- The perpetrator is approached as one entitled to personal attention
- There is an affective relationship between the sanctioning and the sanctioned actor

Now, does this list contradict instrumentalist assumptions and attitudes? I think so, because these conditions seem to refer to building authentic, constructive relationships to deal with both the consequences and the "causes" (backgrounds, motives) of individual offending behaviour.

An instrumentalist approach would, I think, be immediately recognized by the offender as lacking the integrity that is the "hidden" condition that makes all other factors contributive to rehabilitation.

Now, for the time being, within the framework of criminal justice, sanctions that have these positive properties go under the name of "punishment." But it should be recognized that we are looking at a whole new generation of sanctions, not primarily oriented anymore to imposing suffering but intending to be socially constructive. And what I will contend now is that restorative justice is the approach that offers the better cultural and symbolic environment to create the conditions for constructive sanctioning, provided it refrains from becoming instrumentalist and/or manages not to become instrumentalized.

One of the problems that I want to draw attention to at the end of this paragraph, still looking at criminal justice, is that the aims of general and special prevention may in many cases destroy each other. Punishments that may be acceptable in view of special preventative aims may be unacceptable in terms of deterrence and vice versa. Especially when negative general prevention prevails, conditions for special prevention—as listed above—will be endangered because criminal procedures will then be characterized by the tendencies:

- to declare irrelevant and disrespect authentic views of those directly involved
- to underdevelop the social diagnosis
- to neglect or underestimate communicative opportunities
- to narrow down normative information to "punishment" (as the expression of the power to define and repress deviance)

Even when the execution of imprisonment is done with the best intentions and in the perspective of rehabilitation, the risk is high that de-integration and stigmatisation will be longlasting and devastating, effects of demonstrative punishment motivated by ideas of negative general prevention.

Restorative Justice and Constructive Sanctioning

First of all, it should be remembered that the primary aim of restorative justice is not to punish the offender, but to restore the damages of offences as well as possible for the victim(s). Its procedures, however, make the offender responsible and try to persuade the offender to make up for what he did. And if offenders are not willing to take responsibility, they will be adjudicated and an obligation to restore the damages could be imposed. The key criterion for success in a restorative justice approach lies not in the impact it has on offenders, but in the degree to which damages are restored.

Since these damages include the moral and other more symbolic damages, as well as damages to offenders themselves, the ideal is restorative procedure with the active participation of the offender. If this is not possible, restorative outcomes can, in many cases, still be achieved.

Restorative justice appeals to all those directly involved in the offence and its consequences, and invites them into a collective dialogue and reflection about the meaning(s) of the damaging event.

It is important to realize that in its appeal to the offender to recognize the basic facts and to take responsibility for the consequences, restorative justice establishes sanctions (expresses rejection of the wrong act).

But precisely because of its participatory, dialogical and narrative character, the restorative procedure offers important opportunities for changing definitions, implying chances for personal development. It is these definitions that construe the perspectives in which other behavioural choices become available:

- Self-definitions (perception of biographic history and future)
- Definitions of the problematic conduct
- Definitions of "the others"
- Definitions of relations

A crucial precondition here is that the offender voluntarily invests himself in this procedural investigation of "self" in relation to "the others."

This means that restorative justice cannot really be instrumental: it offers nothing more, or less, than opportunities.

In the Netherlands (and elsewhere), pressures are exerted on proponents of restorative justice to show its effectiveness in terms of reduction of recidivism. When this happens, the restorative praxis is not looked at from the angle of its own values, but as an instrument to produce the effects that criminal justice hopes (but largely fails) to achieve.

I think it is crucial for proponents of restorative justice to respond to these pressures, not by trying to prove a greater preventative effectiveness, but by challenging the idea that recidivism can be decisively determined by any "unilateral" action of whatever nature by legal authorities or fellow citizens.

We must convince them that we need to have the authentic participation of offenders, that we need their decision to include our legitimate interest in their own perspective(s). This implies that we ourselves also express our need for restoration of the social relations that are endangered by the offence.

Contrary to the exclusionary idea of punishment, there is a permanent need to include individuals into meaningful social practices and networks to be able to organize and maintain normative feedback on conduct (n.b.: inter-vision not super-vision). Ways of inclusion can be "imagined" (Pavlich, 2002) and designed during restorative conferences, and the construction of future inclusive relations can begin with the execution of the agreed (and approved) restorative plan.

The "community sanctions" (mentioned above) that seem to have a greater effectiveness in the criminal justice framework may be expected to be even more effective when they are the result of a restorative procedure. But there can be no guarantee, and the whole idea of guarantees should be rejected.

A reduction of recidivism could be a possible effect of precisely the inclusive and narrative qualities of the procedure and its value orientation, instead of a goal orientation.

Morris and Maxwell (2001: 261) concluded from their initial research into the effects of the New Zealand family group conferences (FGC):

> The most important findings, however, are that FGC can contribute to lessening the chance of reoffending even when other important factors such as adverse early experiences, other events which may be related to chance, and subsequent life events are taken into account.

Critical factors for young people are:

- having a conference that is memorable
- not being made to feel a bad person
- feeling involved in the conference decision making
- agreeing with the conference outcome
- completing the tasks agreed to
- feeling sorry for what they had done
- meeting the victim and apologizing to him/her
- and feeling that they had repaired the damage.

In other words: subjective participation is the key.

Endnotes

[1] It was part of the ideological construction of this white paper to talk about making criminal justice credible "again": this suggests that it was once credible as an effective crime-controlling institution. In reality, the meaning (and possible effectiveness) of criminal law has always been inherently problematic.

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