



**COMMUNITY OF
RESTORATIVE
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The use of restorative justice in prisons and by probation services

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Structure of the presentation

- Definitional issues
- Restorative justice and the gap between theory and practice
- Models of delivery and use in Europe
- Benefits and risks/challenges
- Other issues to consider

My background

- Researching and lecturing in RJ at the School of Law, University of Leeds (UK)
- Current research explores the challenges in realising restorative principles, using police forces and 'RJ Hubs' as case studies (explained more later)
- Founder, Community of Restorative Researchers
- Trained as a restorative practitioner & practicing circle facilitator
- Visiting Fellow, Durham Restorative Hub (UK)
- Member, Ministry of Justice Virtual Experts Group on Restorative Justice
- Co-managing a project to implement restorative justice within the University of Leeds

Previously:

- Visiting Scholar, Institute of Criminology, KU Leuven (Belgium)
- Researcher, Restorative Solutions (Victim experiences of post-sentence RJ)
- Project Manager, Restorative Justice Council (Using RJ with young adults: Maturity and desistance)

Process-based/dialogic definitions

- “Any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)” – Recommendation No. R (99) 19
- Same definition used in Directive 2012/29/EU (though it calls it RJ, not Penal Mediation)
- What does “participate actively” mean? Must there be communication between the parties? Do both parties *have* to participate to qualify as RJ? What about other stakeholders?
- Any process “that brings those harmed by crime, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward” – Restorative Justice Council; Ministry of Justice (England and Wales)
- Three key elements of RJ: 1) Voluntary, two-way communication between stakeholders, who 2) engage in dialogue to address harm, and 3) collectively make decisions on how to repair harm (Christie, 1977; Zehr, 1990; McCold, 2000; Walgrave, 2000; Schiff, 2007; Hoyle, 2010)

Definitional difficulties...

- Many working in this area are *ideologically in favour of 'restorativeness'* (whatever that means to them), i.e. they consider themselves to “subscribe to a restorative theory of justice” (Bagaric & Amarasekara, 2001)
- Consequently, some see RJ an ‘ethos’ (Lofty, 2002; Gavrielides, 2007) or as a set of principles (Zehr, 1990; Graef, 2001) that can be applied to the administration of criminal justice as a whole
- E.g. McCold (2006): “Restorative Justice is a paradigm, not a program”
- E.g. Pali (2014): “RJ is a normative discourse about how justice should be done in the context of a democratic state”
- This is important because of the tension between “principled” and “pragmatic” approaches to policymaking and delivery in RJ

Definitions (cont.)

- The purpose of defining RJ narrowly (i.e. as a process or “justice mechanism”) is to make a necessary distinction between dialogic practices and other practices (Daly, 2016), BUT...
- The advantage of an ethos-based definition might be that it is broad and conducive to developing notions of a “restorative prison” underpinned by “restorative culture” (e.g. where people in positions of authority do things *with* prisoners rather than *to* or *for* them [Watchtel, 2011]), BUT...
- The advantage of the communication/process definition is that it is *intentionally narrow* i.e. reduces the scope for policymakers and practitioners to “stretch the concept” to include anything they think is good

Which practices qualify as RJ?

- Circles of Support and Accountability (Thomas, et al., 2014)?
- Surrogate victims?
- Unrelated victims e.g. Sycamore Tree
- One-way communication e.g. letters of apology?
- Victim awareness work?
- Reparation w/o communication e.g. compensation orders?
- Indirect reparation e.g. community service?



The gap between theory and practice in RJ

- Some of the principles have been linked to the safety (i.e. safeguards) and effectiveness of RJ (McCold & Wachtel, 2002; Tyler, 2006; Gavrielides, 2007) e.g. voluntariness, harm-focus, equal and respectful treatment of participants (facilitator impartiality)
- ‘Mind the gap’ (between theory and practice) i.e. the principles are not always implemented in practice (Daly, 2003; Cutress, 2015)
- RJ implementation will involve prison/probation managers/practitioners having a lot of discretion in policymaking/practice
- Some facilitators may lack the ability (i.e. understanding and skills) and/or the inclination to adhere to principles in practice (Sherman, et al., 2015; Marder, 2016)
- This is one key area of risk, particularly in the use of RJ with serious crime...



The risks of discretion...

“[In practice] restorative justice is anything that happens in a room with restorative justice written on the door.”

(Achutti, 2015)



Models of delivery

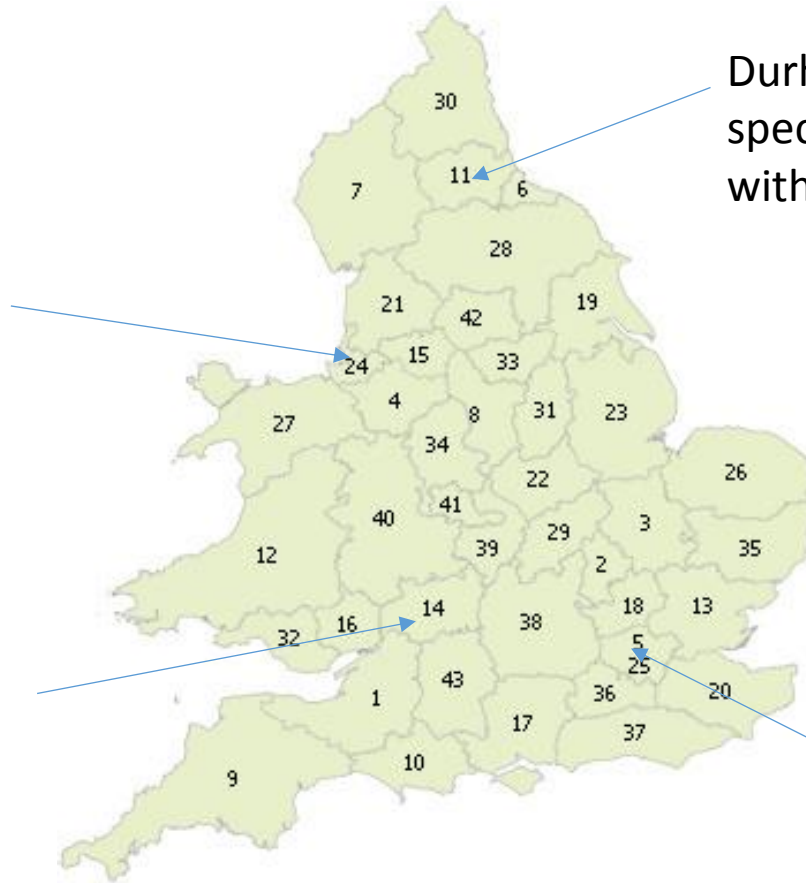
- Generalist professionals working for traditional justice agencies (i.e. probation and prison officers who facilitate in addition to their existing work/caseloads)
- Specialist professionals working for traditional justice agencies (i.e. a prison hires/trains a full-time RJ facilitator)
- Specialists working for specialist public agencies (e.g. NI Youth Conferencing Service)
- Volunteer facilitators recruited by traditional or specialist public agencies (requires case supervision)
- Non-state actors – grants, tenders or case-by-case payment? Volunteer or staff facilitators? Referral processes? Co-facilitation with justice professionals?
- Who coordinates the use of RJ in an area/jurisdiction e.g. multi-agency partnerships? Government department? Informal agreements? Formal information sharing agreements?

England and Wales: A postcode lottery or responsive implementation?



Cheshire (put out to tender, non-profit contacted provider, contract switched hands after two years)

Gloucestershire (multi-agency partnership run by specialist public agency with volunteer facilitators *and* probation co-facilitation)



Durham (generalists, IOM, specialist public agency with volunteer facilitators)



London (tender won by a “consortium” of Catch 22, IARS, Restorative Solutions and Khulisa)

Legislative framework, post-sentence use (E&W)

Youth Justice and Criminal Evidence Act 1999: Referral Orders

Children sent to court for first time and plead guilty – around ¼ of appearances before the youth court – referred to a Youth Offender Panel with one Youth Offending Team worker and two lay member (volunteers), young person and their guardians, victim supposed to be invited...

Participants discuss the offence and its impact, before reaching an agreement on a 'contract' - if completed, the conviction is considered to be 'spent'; if breached, the offender is re-sentenced.

Referral Orders represent “the most significant attempt to integrate principles of restorative justice into youth justice in England and Wales” (Earle, 2008: 284) – official guidance emphasizes ‘restoration, reintegration and responsibility’ BUT “a clearly coercive, penal context” (Crawford and Newburn, 2003)

Offender Rehabilitation Act 2014: Rehabilitation Activity Requirement

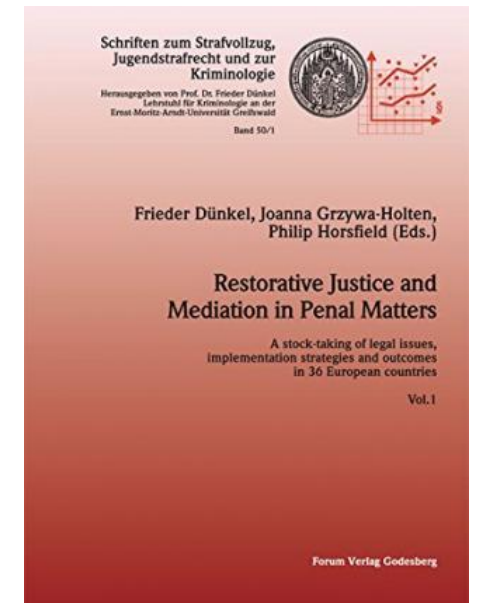
Judges can include a RAR in a suspended sentence or community order. It gives probation discretion to use any rehabilitative activity they offer “such as restorative justice” (s.7)

No evaluation... no implementation plan... NOMS capacity building project undertaken at a time of massive cuts and privatisation... (Wigzell and Hough, 2015) - see

<http://www.icpr.org.uk/media/39384/Final%20RJ%20Report%20-%2026%2003%202015.pdf>

Elsewhere in CoE jurisdictions...

- Public agencies or systematic funding of non-state, large jurisdiction agencies in some countries e.g. Belgium, Northern Ireland, Norway (and Austria, Czech Republic?)
- Use in individual prisons in Belgium, Slovenia, Hungary, etc. (Marien, et al., 2010) but no jurisdiction seems to offer it to prisoners systematically...
- ‘Moral entrepreneurs’ in others e.g. Vidia Negra, FORSEE Research Group in Hungary/Romania
- Some places have some history of small VOM projects via ADR lawyers e.g. Poland, Bulgaria
- Some countries with little RJ practice seem to have penal mediation in statute e.g. 2005 Code of Criminal Procedure, Turkey (Coronas, 2006; UNICEF, 2009; UNDP, 2009) Mediation Act 2004, Bulgaria (Chankova, 2015)
- See Dünkel, Parosanu and Horsfield (eds) (2015), ‘Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States’, published by the International Juvenile Justice Observatory. Available online at: http://www.ejjc.org/sites/default/files/volume_i_-_snapshots_from_28_eu_member_states.pdf
- See Dünkel, Grzywa-Holten and Horsfield (eds) (2015), ‘Restorative Justice and Mediation in Penal Matters: A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries’, published by Forum Verlag Godesberg



Benefits

- Desistance (Shapland, et al., 2008; Robinson and Shapland, 2009; Strang, et al., 2013; Sherman, et al., 2015; Lauwaert and Aertsen, 2015; 2017; Bouffard, et al., 2016; Claes and Shapland, 2017; Marsh and Maruna, 2017; Pelikan and Hofinger, 2017)
- Young people/young adults and maturation (Crawford, 2010; Marder, 2013)
- Victim satisfaction and psychological health/recovery (Dignan, 2005; Angel, et al., 2005; Daly, 2006; Schiff, 2007; Rugge and Scott, 2009; Shapland, et al., 2011; Van Camp and Wemmers, 2013; Bolivar, et al., 2015; Vanfraechem, et al., 2015) – catharsis/closure/reductions in PTSS from expressing oneself, asking questions, humanising the offence, less fear/anger
- Building trust and legitimacy of justice agencies: working *with* people, procedural justice (e.g. Braithwaite, 2002; Tyler, 2006; Wachtel, 2012; 2013)
- Return on investment from reduced reoffending, diversion from prison, less conflict/improved climate within prisons, etc.
- Staff job satisfaction (Marder, 2016 – delivery experienced positively by facilitators)
- Changing the culture of justice agencies – more problem-solving, victim focused, getting to the root of the problem, focus on negotiated agreement, more nuanced understandings of crime problems and their impact

Risks

- Power imbalances with some serious crimes e.g. domestic violence, serious violence, stalking, sexual offences (Delgado, et al., 1985)
- Specific vulnerabilities e.g. mental health, PTSD
- Victim (or offender) retraumatisation
- Public apprehension and misunderstanding (i.e. PR/marketing issues)
- Poor quality delivery – gap between theory and practice, facilitators must have understanding, skills, inclination AND time/resources/information, etc.
- Discretion and corruption – the need to trust practitioners with delivery
- Many ‘regular’ problems with RJ are magnified with serious crime e.g. what if a victim is (or FEELS) pressured into participating or into accepting outcomes that they don’t want?

Ultimately... high risk, but also high reward, AND the risks are manageable!

Challenges

- RESOURCES – training, staff time for preparation/follow-up, location to deliver, etc.
- Avoiding up-tariffing if intent is to divert from prison using e.g. intensive alternatives to custody, Home Detention Curfew/tagging
- Institutionalisation – “Stretching the concept” of RJ for managerial/punitive purposes, or conflation with other “good” things (Marder, 2016)
- What is realistic? The gap between theory and practice (e.g. you can’t always achieve reconciliation/forgiveness) – managing the expectations and dogmatism of penal reformers
- Cultural or ideological aversion in some societies (e.g. Matczak, 2016 – do people want to express their feelings to each other?)
- Cultural/ideological aversion in justice agencies = misunderstanding or poor practice?
- Practical issues to working in prisons and with victims e.g. barriers to entry (for non-state actors) and obtaining victim information (who controls this in different countries?), also their location (e.g. how does the victim get there?)
- How to monitor/regulate delivery without stifling innovation and responsiveness?

Regulating delivery

Post-sentence RJ can be complex and risky because it involves people who may have been traumatised or may have other serious problems – how to ensure safety and effectiveness?

- Regulation before the event e.g. training, CPD, accreditation (individual- or service-level), requiring permission from a superior, risk assessments, best practice guidelines and other written guidance
- Regulation during the event e.g. co-facilitation, scripted delivery model, spot checks
- Regulation after the event e.g. transcripts, recording practices and their review (i.e. performance management AND using recording practices to maximise reflection), complaints/accountability procedures and remedies

Further issues to consider

- The scope of a project i.e. which offences/participant characteristics does a project have the capacity to use RJ with?
- When should it be offered, how, by whom and in what order?
- Who else is invited?
- Resources – two facilitators? Long-term preparation, support and follow-up? Capacity to deliver interventions agreed upon as outcomes?
- Scripted or unscripted practices?
- Collect and promote case studies of “transformation” and “catharsis” – use multimedia?
- No need to reinvent the wheel: risk assessments, organisational and national policies, facilitator CPD, training programmes, etc. – a need to ensure that we learn from (and make use of) information about what works!
- Evaluation of implementation and delivery inc. collection of baseline data and use of control groups – justice agencies could link up with EFRJ and/or local universities?

What about...

- Restorative justice as a way to resolve conflicts/respond to offences or abuses in prisons or in the probation service (offender-offender, offender-employee, employee-employee, employee(s)-management)
- RJ with offenders and their families i.e. to rebuild/maintain social bonds (Calkin and Mukasa, 2017)
- Deradicalisation?
- Restorative justice for miscarriages of justice?
- RJ in immigration detention centres and mental health institutions (i.e. non-criminal incarceration)?
- Sequential Circle Processes i.e. *proactive* use of RJ in prisons – can be used to encourage reflection, to discuss issues, to consult, for staff meetings, build relationships between prisoners/staff
- Restorative-style reintegration ceremonies upon release from prison?

Towards a Council of Europe Recommendation and/or European Restorative Justice Rules: No need to reinvent the wheel!

- Declaration of Leuven on the Advisability of Promoting the Restorative Approach to Juvenile Crime
<http://heinonline.org/HOL/LandingPage?handle=hein.journals/eccc5&div=47&id=&page=>
- Ibero-American declaration
<https://www.tdh.ch/en/news/adoption-ibero-american-declaration-restorative-juvenile-justice>
- World Society of Victimology
<http://www.worldsocietyofvictimology.org/wp-content/uploads/2014/12/Draft-Convention.pdf>
- EU directive – CONSIDER THAT COUNTRIES ARE STILL LOOKING FOR WAYS TO IMPLEMENT THIS!
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>
- UN Handbook on RJ
https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf
- ECOSOC basic principles (currently up for review)
<http://srsrg.violenceagainstchildren.org/sites/default/files/documents/UN%20Resolutions/ECOSOC%20resolution%202002-12.pdf>
- Victims in restorative justice at the post-sentence level: A manual (Carrington-Dye, et al., 2015)
https://tst-publikationen.uni-tuebingen.de/xmlui/bitstream/handle/10900/63300/Carrington-Dye%20et%20al_Manual_RJ_Victims_Post-Sentencing_2015.pdf?sequence=1&isAllowed=y
- European Forum for Restorative Justice – lots of useful resources and papers on, *inter alia*: building social support for RJ; conferencing in Europe; peacemaking circles; initiation and accessibility; judicial training.
<http://www.euforumrj.org/publications/research-reports/>

A restorative prison?

According to Coyle (2001), ex-Governor of Brixton Prison, a restorative prison would:

- create more awareness among convicted prisoners of the impact of crime on victims and implement programs of direct mediation, conferencing and indirect communication between victims and offenders as standard
- be educational
- create a new direction for activities within prisons so that prisoners would spend some of their time working for the benefit of others
- remodel the way disputes are settled within the prison, incorporating restorative principles into grievance and disciplinary procedures
- build a new relationship with the community outside the prison to emphasize the need for prisoners to be reconciled with the wider society and be received back into it (i.e. resettlement programs).
- See also Toews (2006), Dhimi, et al. (2009)

Restorative prison – a contradiction in terms?

- Borrows from notions of restorative principles and RJ as an ethos, but...
- Offender-focus of prisons may make it difficult to maintain a focus on the needs of victims (Van Ness) – will prison officers be able to focus on victim's needs?
- Victims would have to come into prison if they want a face-to-face meeting, the idea of which can be quite intimidating, especially for traumatised/young people
- Prisons encourage accountability to the law, not to victims (Guidoni)
- Prisons deny offenders autonomy, making it difficult to take positive measures to change their lives and narrative identities – RJ can be motivational, but any motivation can evaporate quickly in a prison environment
- Prisoners may participate for reasons other than victim healing e.g. parole boards
- Competing with the criminogenic environment of the prison, and with the destruction of social bonds caused by imprisonment
- A significant percentage of people in prison have mental health issues, which can be brought on or exacerbated by prison conditions and environment
- Overcrowding, staff shortages and absence of services can make RJ difficult to organise – or prevent them from being prioritised (30-40% cuts in staff/resources as part of austerity in England and Wales)

A modest approach

- RJ is about all stakeholders equally – existing guidelines either focus on the victim at the expense of the offender, or focus on V and O at the expense of other stakeholders
- Guidelines need to balance the provision of general principles and tangible standards
- The big problem is awareness in societies and justice agencies – we can use the process for promotional purposes...
- Bear in mind that the systems do not support the application of RJ (e.g. by using speed as a measurement of success in courts – the system logic is outcome focused!)
- A need to distinguish between two-way communication practices and other ways of using the principles to underpin activities e.g. the restorative prison

Prominent cases of post-sentence restorative justice in the media (England and Wales)

- Jo Nodding

Article: <http://www.theguardian.com/society/2011/jan/27/restorative-justice-confronted-rape>

Video: <https://vimeo.com/27590008>

- Peter Woolf

Article: <http://www.theguardian.com/society/2008/jun/11/restorative.justice>

Video: <https://www.youtube.com/watch?v=A1s6wKeGLQk>

- Margot Van Sluytman

Article: <http://www.macleans.ca/news/canada/im-sorry-im-sorry-im-sorry/>

Video: <https://www.youtube.com/watch?v=b65xefiHB1M>

Laura Coel, Paul Kohler, Jacob Dunne... plus many more!