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Restorative Responses to Sexual Violence: Challenging Perceptions

Email: marie.keeenan@ucd.ie
Outline of Presentation

- Locate My Interest in RJ
- Understand why some victims and offenders of sexual crime want RJ
- Identify some of the key areas of international debate regarding RJ in cases of SV
- RJ and the Rule of Law – compatible or incompatible
Locating my Interest:

Justice for Victims
Accountability of Offenders
Healing for Both
Extent of Sexual Violence in Ireland

- 30.3% Irish Females, 23.6% Irish Males - sexual abuse in childhood

- 25.6% Irish Females, 12.4% of Irish Males - sexual assault in adulthood

- 42% females and 28% males sexual violence over life-time (SAVI, 2002: xxxii)
Recent Features of Criminal Justice

- Reporting on Increase [increase by over 50% 2008-2012]

- Attrition rates Increase [decline in sexual violence cases prosecuted e.g. in rape cases 73% in 1977; 19.5% 2007; 15% in 2012 (Lovett and Kelly, 2009; CSO, 2014)]

- Conviction rate low [100 cases of rape, 8 convicted] (Hanley et al, 2010) [Just over 2% rape cases 2007 resulted in conviction]
Victims: Criminal Justice Mechanisms

- Evidential Threshold “Beyond Reasonable Doubt” problem in (a) cases proceeding to trial and (b) in securing convictions

- Secondary Victimization by process itself

- CJS cannot provide therapeutically-sensitive remedy for the trauma and disempowerment experienced by many victims of sexual violence.
Victims: Civil Justice Mechanisms

- Civil Justice System [Costly, Lengthy and Adversarial]

- Evidential Threshold “On Balance of Probability”

- Adversarial Nature and Hard to follow up for settlements

- Many victim survivors cannot take this option
Justice Gaps for Victims……

Accountability Gaps for Offenders…..

Healing Gaps for Both……even where there have been Conventional Justice Responses
Victimization is a process – not a category or identity
Justice is a process – not an event or intervention
Diverse experiences of victimization;
Diverse demands for justice
Multiple goals for justice which can change over time (Daly, 2014)
Restorative Justice:

What is it and Why do Victims want it and Why are Offenders willing to Participate
What is RJ

- An approach to crime that focuses on repairing the harm done to people and relationships

- What harm has been done?
- What needs have arisen?
- Whose obligation is it to meet those needs? (Zehr 1990).
RJ as a Framework

- For thinking about ways of humanizing justice
- Of bringing victims and offenders together … with Community involvement ….sometimes
- Using Various Methodologies… in SV cases…VOM/VOD; Conferencing; Circles
Principles of RJ

- A Victim-led approach to Justice
- Participation is voluntary (Koss 2014);
- Offender must take responsibility… for the harm done (Continuum of responsibility);
- Safety of all is paramount
- Preparation is key
- SV- Facilitators… RJ, Trauma and SV
Why do Victims Want it? Are Offenders willing to Participate?

Reference:


[researchrepository.ucd.ie/bitstream/handle/10197/6247/Sexual_Trauma_and_Abuse%3B_Restorative_and_Transformative_Possibilities.pdf?sequence=1]
Sexual Trauma and Abuse: Restorative and Transformative Possibilities (2014)

- Qualitative Study, Oct 2012 - May 2014,
- 149 People interviewed (30 victim – survivors; 23 offenders)
- Interviews on average 2-3 hours [some less]
- Analysis using Atlas ti
Why Victim Survivors want RJ

- Face the Offender …with Statements
- Face the Offender …with Questions
- Face Fears
- Healing
- As a mechanism of Accountability
Understanding but Not Excusing Sexual Violence

Family Reconciliation

‘Getting out of Relationship’ with the Offender

‘Change the Memory Card’

Apology and Forgiveness
Why Offenders would agree to Participate in RJ

- Debts owed, Moral Obligation
- Opportunity for Victim’s to Confront person who harmed them
- For Victim to ask questions and get ‘Honest’ answers
- Apology and Expression of Sorrow
Healing for Victim, Offender and families of both

Desire to see Victim Move on with their Lives

Forgiveness....

RJ would fill a gap in the CJS
For some - too much time had Elapsed – moved on, trauma

That RJ would be promoted as alternative to CJS - with exception: Intra-familial and Young Offenders

Ownership and Control of Decision-Making

State Support and Legitimacy – Bottom Up and Top Down
Concerns - Offenders

- Adversarial Culture of CJS and Relationship between RJ and CJ
- Court Orders prohibiting contact with Victims
- Institutional Inertia
Summary

- Victims: RJ not as Alternative to CJS but Additional Justice Mechanism
- Offenders would take part if requested to do so
Some Key Areas of International Debate Regarding RJ in Cases of Sexual Violence
Daphne III Funded Research JUST/2011/DAP/AG/3350
Developing Integrated Responses to Sexual Violence: An Interdisciplinary Research Project on the Role of Restorative Justice


Is RJ Dangerous for Victims?

- Re-victimization
- Re-traumatization
- Power-imbances
- Safety

- Voluntary Participation
- Preparation (Risk Assessment of Offender? Victim?)
- Physical and Emotional Safeguards
- ‘Time out’
- Training of Facilitators
- Direct vs Indirect Meetings
Are Sex Offenders suitable for RJ

- Could they Manipulate the process?
- Could they further damage the Victim?
- Risk assessment
- Preparation, Preparation, Preparation
- Listen to Victims
Is RJ Suitable for Sex Crime?

Due process rights:
- Presumption of innocence
- Right against self-incrimination
- Right to fair trial

Practice Responses
- Participation is voluntary
- Right to withdraw from RJ process at any time
- Procedural safeguards such as confidentiality safeguards...
- Lawyer with New Role..
Restorative Justice, Criminal Justice and the Rule of Law
Relationship of RJ to CJS


- If we constrain ourselves to Therapeutic Jurisprudence – which centres on legal mechanisms and legal actors - are we serving Victims and Offenders well – or are we limiting the range of justice options for victims?

- Timing of RJ

- Ultimately…. Who decides?
Concern 1

Additional Justice Mechanism

Or

Alternative Justice Mechanism
Concern 2

- How to Operationalize in Cases in which there has been a conviction
  - Legislation not necessary – Policy Decision and Procedure
  - Designated Agency
Concern 3

- How to Operationalize in cases that are either:
  - Not reported or beyond statute of limitation
  - Investigated but no prosecution
  - Prosecuted but no conviction
  - RJ and the Moral Conundrums
More Complex Response

- Legislation – Canada, New Zealand, Belgium, Norway
- Separation of Processes
- Parallel Proceedings
- Confidentiality Safeguards
- RJ may or may not be taken into account by trial judge depending on the Legislation
- RJ at all stages of the criminal justice process
- Practice guides and standards by the Ministry
- Designated Agencies
Reconciling RJ, CJ and the Rule of Law

- The *public interest* aspect of sexual crime and the concerns of the State, the Rule of Law and protection of communities

- The protection of *due process* for offenders

- The *private interests* of victims’ *(victims’ rights)* (offenders and communities) in the aftermath of sexual violence.
As part of the repertoire of guidelines for considering the import of RJ in penal matters, the Council of Europe in 1999 (Council of Europe R (99)19) and the UN in 2002 issued basic principles on the use of RJ programmes in criminal cases (UN, 2002).

These principles, which are almost identical in the two texts, offer some protections against the erosion of the offender’s right to the presumption of innocence.
Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings’ (Clause 8)
Right to consult with legal counsel concerning the restorative process and … minors should have the right to the assistance of a parent or guardian’ (Clause 13 (a) – (c)).
‘Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision’ (Clause 13 (b)).
Public Interest Aspect

Example New Zealand - Project Restore

1. A commitment to participate in sex offender or other necessary therapy on the basis of an assessment for perpetrators who have not been prosecuted;

2. An agreement - recompense to victims (if desired) and other behavioural commitments on the part of offenders

3. Therapy and support services for victims as required.
‘Member States shall facilitate the referral of cases, as appropriate to restorative justice services, including through the establishment of procedures or guidelines on the conditions for such referral’

While the Article does not oblige Member States to introduce RJ services if they do not have such mechanisms in place in national law, it nonetheless creates a climate in which Member States might usefully consider such initiatives.
Conclusions

- Legislation has played a part in reconciling RJ and criminal justice (Belgium, New Zealand, Canada).

- Placing RJ on a statutory footing may be necessary for establishing the legitimacy of RJ as a justice mechanism alongside conventional criminal justice.

- Legislation alone is insufficient to ensure the implementation of RJ in cases of sexual violence (Norway, Finland).
Social support for RJ and the existence of a committed suitably qualified pool of facilitators in the field of sexual trauma and violence are also necessary.

Finland, for example, where legislation for RJ in all type of crime is on the statute book for many years few cases of sexual crime are referred for RJ because of cultural reticence and the ambivalence of the mediation and RJ services regarding the suitability of sexual crime for RJ.
The Practice is happening ‘Under the Radar’ in many jurisdictions.

Time to consider Innovations in Justice Responses to SV as well as continuing to improve Procedural Justice and Conventional Justice Mechanisms.

Work with Imagination as well as Evidence.

Proceed with Courage as well as Caution.
Thank You

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