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Restorative Justice, Sexual Violence and The Criminal Justice System

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Abstract

In addition to the more conventional approaches of the criminal justice system, this article suggests that there is a need for restorative justice as another method of addressing sexual crime. In support of this view, the present article explores the possibility of a hybrid justice system based on a complementary relationship between restorative justice and the criminal justice system. An analysis of the limits of the criminal justice system and the need for restorative justice in the contentious area of sexual violence will be followed by a detailed examination of key justice considerations when trying to marry both criminal justice and restorative justice perspectives. Such considerations include the meaning of justice, legislation, sentencing principles, due process, victims' rights and the location of restorative justice within/alongside/outside the criminal justice system. The aim of this article is to determine whether it is possible to reconcile two seemingly juxtaposed methods of justice delivery in the context of sexual violence in order to create a hybrid system of justice that best protects and responds to the rights and needs of victims and offenders.

Key words: restorative justice; sexual violence; criminal justice

Restorative Justice, Sexual Violence and the Criminal Justice System

Introduction

The criminal justice system plays a key role in addressing sexual crime, as it does in addressing so many other aspects of criminal behaviour. In recent times, largely in response to the perceived inadequacies of the criminal justice system in relation to sexual crime, restorative justice³ (RJ) has emerged as an additional method of dealing with sexual violence, which some scholars consider as complementary to the criminal justice system (Daly, 2011; Shapland et al., 2006). Other scholars describe it as an alternative justice paradigm (Zehr, 1985; Johnstone, 2003, p. 22). However, as restorative justice theory and practice have continued to develop in respect of the problem of sexual violence, it has been increasingly argued that restorative justice should not be viewed in opposition to the criminal justice system but rather as a complementary justice system to it (Daly, 2001; Daly, 2011). In order for legal systems around the world to comprehensively address the problem of sexual violence, restorative justice and the criminal justice system could accommodate and support one another as part of a hybrid system of justice.⁴

³ Restorative justice is an umbrella term for a number of restorative approaches, including (but not limited to) conferencing, victim-offender mediation/dialogue and circles. During the restorative conference/meeting/dialogue/circle, victims and offenders come together to resolve collectively how to deal with the aftermath of the offence. Restorative justice approaches are based on the premise that the offender owes a specific debt to the victim which can only be repaid by making good the damage caused through some type of restitution. In the instance of sexual violence, restitution can take many forms including an apology, a commitment or an agreement. A written or verbal agreement may form a key element of a restorative justice process. Some restorative justice programmes measure the completion of a restorative case in accordance with the offender's performance of an agreement drawn up during the restorative justice meeting. The agreement may contain a variety of provisions such as a requirement that the offender must complete a therapeutic programme. For a detailed consideration of the key definitions, concepts and approaches of restorative justice, see Keenan, M. and Joyce, N. (2013), 'Restorative justice and sexual violence: Ireland joins the international debate'.

⁴ In referring to the concept of a hybrid system of justice within any given jurisdiction, we acknowledge from the outset the differences that distinguish common law jurisdictions from civil law jurisdictions (although some countries such as Germany and Japan combine elements of both). These differences lie in the main sources of law. Although common law systems make extensive use of statutes, judicial interpretation of legal principles is the most important source of law, which gives judges an active role in developing rules. To ensure consistency, courts abide by precedents set by higher courts examining the same issue. In civil law systems, by contrast, legislation is seen as the primary source of law with the courts basing their judgments on the provision of codes and statutes. Codes and statutes are designed to cover all eventualities and judges have a more limited role of applying the law to the case in hand. Common and civil law jurisdictions also differ in the context of criminal procedure. Although there are exceptions to this distinction, the judge in civil law systems generally plays an active supervisory role in case investigation, whereas in common law systems investigation is the responsibility of the police and the judge adjudicates on the evidence presented to him in court by the prosecution and the defence.

The first section of this paper briefly evaluates established approaches taken by the criminal justice system to address sexual violence and explains why there is a need for restorative justice as a form of justice delivery that complements the criminal justice system as it currently stands. The second part of this paper focuses on reconciling restorative justice with the following core features of the criminal justice system as they relate to sexual violence: the meaning of justice; legislation; sentencing principles; due process and victims' rights. How restorative justice could work within/alongside and outside of the criminal justice system will also be considered.

Part 1: The Criminal Justice System and Sexual Violence: Why there is a Need for Restorative Justice

For many years, the approaches taken by criminal justice systems to address sexual crime have been considered inadequate and criticized for being 'archaic, incoherent and discriminatory' (Burnside, 2006, p. 1). However, in the last 30 years, there have been major changes in various jurisdictions concerning sexual offences reflecting a shift in how sexual crime is understood (Fileborn, 2011, p.5). A number of legislative and other reforms have been introduced to criminal justice systems around the world that have led to improvements for victims of sexual crime, including: the extension of the statute of limitations in historical sexual abuse cases (Doyle, 2012, p. 3); limitations on the evidence that may be introduced about a complainant's past sexual history (Fileborn, 2011, p. 6); the use of victim impact statements (Miller, 2013, p. 2); and recognition of marital rape as a criminal offence (Department of Justice, Equality & Law Reform, 1998, p. 19).⁵

Although the above reforms have led to many positive changes within criminal justice systems for victims, there still exist a number of shortcomings. For example, the Irish criminal justice system has been criticized for: (1) failing to as yet provide a statutory definition of consent; (2) providing that evidence of the complainant's past sexual history may still be permissible in certain cases upon an application by the defence to the trial judge (Leahy, 2013); and (3) limiting the legal representation that victims of sexual crime can have to matters relating to the complainant's past sexual history (Bacik, Hanley, Murphy & O'Driscoll, 2010). Other jurisdictions are more progressive in this area of law. For example,

⁵ Stubbs (2003, p. 23) suggests that while we may attribute 'symbolic value' to these legal reforms, they are 'likely to be limited in effectiveness' due to the 'resilience of cultural mythologies about women and about sexuality'. Therefore, we need to first and foremost challenge cultural (mis)understandings of sexual violence.

Australia, Canada and the United Kingdom all provide a statutory definition of what constitutes consent and a list of circumstances where consent does not exist (Ministry of Justice, 2008, p. 11).⁶

While the literature tends to examine the progress made by criminal justice systems in addressing sexual violence within specific national contexts, which makes it difficult to obtain global overviews of developments,⁷ there are nevertheless some limitations that are common to many jurisdictions. These limitations include: high rates of attrition; the victim's role confined to that of a witness; a lack of offender accountability; insufficient offender reintegration; and the limited role that the community plays in criminal proceedings. These shortcomings will be discussed below with reference to the role that restorative justice could play in addressing such pitfalls.

High Rates of Attrition

High levels of attrition in sexual offence cases within the criminal justice system have been of concern to academics and practitioners across a range of disciplines for some time (Lea, Lanvers & Shaw, 2003, p. 583), marking the complex nature of sexual violence (Keenan & Joyce, 2013). According to one Irish study⁸ just under one-third of all prosecutable rape cases⁹ were arraigned and of those, two-fifths resulted in a criminal conviction (Hanly, Healy & Scriver 2009, p. 365). An international comparative study on rape in Europe found that eight out of 100 Irish rape cases reviewed as part of a case-tracking sample¹⁰ resulted in conviction (Lovett & Kelly 2009, p. 74). The high rate of attrition in sexual offence cases within the criminal justice system is an international problem. In the past 15 years in Australia, Canada, England and Wales, Scotland and the United States, victimization surveys show that 14 per cent of sexual violence victims report the offence to the police (Daly & Bouhours, 2010, p. 565). Of these, 30 per cent proceed to prosecution, 20 per cent are

⁶ See for example the Section 273 of the *Criminal Code of Canada*, R.S.C. 1985, c.C 46, which since 1992, has defined consent in sexual assault cases as follows: "consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question."

⁷ Some scholars have looked at the global developments in the area of legal reform of sexual crimes. See for example: Daly & Bouhours, 2010; Daly, 2011; and Frank, Camp & Boutcher, 2010.

⁸ The Irish study involved a national survey of 100 women who experienced rape in Ireland since 2002. 597 files from the office of the Director of Public Prosecutions (DPP) were also reviewed along with 173 Central Criminal Court cases and 25 transcripts of contested trials.

⁹ The study defines 'prosecutable cases' as the total number of cases excluding those cases in which the complainant had withdrawn the complaint. Over one-quarter of rape complainants withdrew their complaints.

¹⁰ The case tracking sample is drawn from across the Republic of Ireland as a whole, which has a population of 4.25 million. Between April and September 2004, 100 cases were selected sequentially from a sample of cases originally reported as rape generated by the police data system, PULSE.

adjudicated in court, 12.5 per cent are convicted of any sexual offence and 6.5 per cent are convicted of the original offence charged (p. 565). There appears to be a consistently widening 'justice gap' (Temkin and Krahe, 2008, p. 588) between the number of sexual offences reported and arrests for these crimes. In the US, 1 in 4 forcible rapes reported to police in 2008 resulting in an arrest as compared with a ratio of one in two throughout the 1970s (Lonsway & Archambault, 2012, p. 150).

It has been argued that due to high rates of attrition, the criminal justice system produces fewer prosecutions in cases of sexual assault than is desirable (Naylor, 2010, p. 662) and while restorative justice should not be viewed in opposition to retributive justice (Daly, 2001), high rates of attrition in sexual offence cases necessitate a more flexible justice approach whereby victims can have some access to justice, if not directly through court proceedings. Restorative justice may offer such a possibility either as part of the criminal justice system or beyond it (Daly 2011, p. 1) for those cases which never result in criminal proceedings for a variety of reasons. Elsewhere we have argued that if the criminal justice system cannot process many of the sexual crimes that are committed, the survivors of sexual violence are nevertheless entitled to seek some form of justice pursuant to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (Keenan & Joyce, 2013). In addition to meeting the needs of all survivors of sexual violence whose cases may or may not be processed by the criminal justice system, restorative justice could therefore help to reduce the high levels of attrition in cases of sexual violence if it were to operate within, alongside and outside of the justice system.

Victim as a Witness in the State's Case

Victimology, which is defined as the study of victims and victimization, has emerged in recent decades amid growing discontent with the current criminal justice system (Rogan, 2006, p. 140). The beginnings of the victims' movement can be traced to the development of the academic study of victimology in the post-war period when von Hentig (1948) published what many consider as the founding text of victimology (Hall, 2010, p. 16). Critically, victimology as a discipline was concerned specifically with victims of crime and has contributed to the establishment of victim surveys as the primary method of ascertaining victim satisfaction with various aspects of the criminal justice system (p. 16). Christie (1977, p. 5) notes that the criminal justice systems of many countries have effectively 'stolen' the conflicts from victims who are so thoroughly represented by the State for most of the court

proceedings that they are pushed completely out of the area. This theory is exemplified in practice by the establishment of the Office of the Director of Public Prosecutions in Ireland in 1974 which automatically restricted the victim's participation in the justice system to that of a potential witness (McGovern, 2002, p. 394). Within the criminal justice system, despite the introduction of victim impact statements, the victim has limited participation in the prosecution and investigation of his/her own case (Strang, 2002). Many scholars argue that the victim's role as a witness in the State's case can re-traumatize and re-victimize the complainant (McDonald, 2011, p. 63) since the hostile environment of the criminal justice system may contribute to 'secondary victimization'¹¹ of sexual assault victims which some victims have described as a form of 'secondary rape' (Parkinson, 2010, p. 3). Hudson (1998) maintains that restorative justice, by contrast, transforms the humiliated victim of criminal proceedings into an active claimant. Gabbay (2005, p. 358) states that, in restorative justice processes, the victim is no longer regarded merely as a witness but is granted a substantial role in the justice system. Unlike the criminal justice system that largely excludes the victim from the justice process, restorative justice situates the displaced victim at the centre of the justice process by ensuring that victim participation and respect are key features of justice delivery (Wemmers, 2009).

Lack of Offender Accountability

Research highlights that the key to making the trial process meaningful to victims (including victims of sexual assault) is the early acknowledgement of guilt by defendants who are in fact guilty (Naylor, 2010, p. 663). All of the current features of the criminal justice system militate against this (p. 663). The court process does little to encourage offenders to understand the consequences of their actions or to empathize with victims (Zehr, 2002, p. 14). On the contrary, the criminal justice system requires offenders to look out for themselves and they are essentially discouraged from acknowledging their responsibility since they are afforded limited opportunities to act on this responsibility in concrete ways (p. 14). Due process encourages private secrecy and a denial of guilt and a culture of secrecy regarding past offending (Keenan, 2012, p. 105). At the same time the public interest in sexual offenders is high as they are publicly subjected to scrutiny and vilification, mainly through the media. This dual perception of sex offenders as 'shameful pariahs' and 'public personae'

¹¹ 'Secondary victimization' means that many victims of crime are victimized a second time through poor treatment at the hands of criminal justice system itself.

(Mercer and Simmonds, 2001, p. 171) means that the criminal justice system effectively alienates offenders from society while simultaneously discouraging offender accountability. Ikpa (2007, p. 301) notes, however, that in contrast to the criminal justice the restorative process does require an immediate acknowledgement of guilt from offenders. She adds that in addition to an admission of guilt from the offender, restorative justice also provides victims with the opportunity to face their offenders, to receive an apology, and to exact some kind of reparation for the harm done. Restorative justice makes both the victim and the offender key figures in the justice process, ensuring that the offender cannot hide behind legal representation and other aspects of due process (p. 301). Restorative justice also focuses on the offender as a person and through reintegrative shaming (Braithwaite, 1989), the offender accepts accountability and escapes from the invisible prison of stigma that holds so many sex offenders captive.

Insufficient Reintegration of Sex Offenders by the Criminal Justice System

The criminal justice system can hinder rather than actively facilitate the reintegration of sex offenders into society. One of the factors that precludes successful reintegration is the stigma attached to sex offenders (Keenan, 2012). The criminal justice system does nothing to alter the misleading media depiction of sex offenders as monsters who are inherently different from the rest of society and other offenders (Meloy, 2006, pp. 82-83). Instead, by introducing more punitive legislation in response to the media's attitude to such offenders, the criminal justice system fuels rather than abates the stigma that separates sex offenders from the rest of society. Prison, which is one of the key features of retributive justice, has also been found to have a damaging effect on prisoners, impairing their ability to function in the outside world following incarceration (Haney, 2003, p. 33). In effect, prisoners become institutionalized and unable to live outside of the prison environment. In spite of this fact, the criminal justice system has inadequate support structures in place to effectively reintegrate sex offenders back into the community. Reintegration of sex offenders into the community is often aimed primarily at managing risk factors rather than promoting reintegration (Russell, Semour & Lambie, 2013, p. 55).

Reintegration following incarceration is most successful if sex offenders have more comprehensive reintegration plans in place and the reintegration is matched to the needs of victims and communities (Russell, Seymour & Lambie, 2013, p. 55). For this reason, restorative justice can support and complement the criminal justice system by providing

additional methods of reintegration of offenders that are not simply focussed on managing risk factors (McAlinden, 2011). Restorative programmes processing sexual crimes have reported that restorative justice can contribute significantly to offender reintegration within the community and within the family setting (Roberts, 1995; Julich et al., 2011; Stulberg, 2011), particularly when restorative justice is carried out in conjunction with some form of therapy (Stulberg, 2011). Circles of support and accountability, which are restorative in spirit, have been found to be beneficial to sex offenders reintegrating back into the community (Wilson, Cortoni & McWhinnie, 2009; Bates, Macrae, Williams & Webb, 2011), although such programmes are offender-focussed programmes and therefore only partly-restorative (Hannem, 2013) as they do not include victims in the process.

Limited Role of the Community in the Criminal Justice System

It is widely accepted that combatting crime requires the input of ordinary citizens and communities (Department of Justice & Equality, 2011, p. 3). At the same time, the public has expectations of the criminal justice system and its general capacity to protect communities and to deal with offenders (p. 3). The relationship between the community and the criminal justice system is therefore quite complex since the community is at once a victim of crime (crime is seen as an offence against the State), and an important collective, responsible for the welfare of its members (both victims and offenders). The community is thus required to seek and facilitate a remedy for the crime and for the healing and integration of all its members (Pranis, 2007). However, the criminal justice system does not generally recognize the community as a victim of crime (thus the injury to the community remains unrepaired) nor does the criminal justice system involve the community in crafting an appropriate resolution which promotes healing or community peace (Pranis, 2007). Restorative justice initiatives on the other hand have demonstrated that by actively including the community in the justice process as a victim of crime and as a solution to the crime, the benefits to the community, victims and offenders are manifold (Couture et al., 2001; Geske, 2007). The strengthening of community bonds, which could be described as a type of informal social control, is one important outcome for communities that occurs when restorative justice encourages a sense of interdependence among victims, offenders and their communities (Braithwaite, 1989, p. 84-94). Effective reintegration of offenders, improved well-being of victims and a reduction in sexual crime are some of the additional benefits that can be reaped from actively involving the community as a collective in the justice process (Couture et al., 2001).

It is apparent from the above findings that the criminal justice system as it stands has many limitations when it comes to responding to and addressing sexual crime. However, some of those gaps in the criminal justice system could be filled by restorative justice as a form of justice that can complement and strengthen the criminal justice system to increase the repertoire of responses to victims, offenders and communities affected by sexual crime.

Part 2: Reconciling Restorative Justice and the Criminal Justice System

Having determined that there is a need for a hybrid system of justice that encompasses elements of both restorative justice and the criminal justice system as it currently stands, this section focuses in detail on the theoretical and practical aspects of how a hybrid system could work. A hybrid system of justice that integrates restorative justice into the criminal justice system is not a new concept, as evidenced by the Canadian legal system which has incorporated elements of restorative justice into the very core of its criminal justice system (Archibald, 2005). However, taking our cue from the Canadian experience, we argue that by reconciling restorative justice with the criminal justice system in accordance with key justice considerations (such as legislation, sentencing principles, due process and victims' rights), it may be possible to create a hybrid system of justice across several jurisdictions, bearing in mind the distinctions between common law and civil law.

Reconciling the Terms 'Restorative Justice' and 'Criminal Justice System'?

How a problem is 'language'd' influences the core features that become seen as central to how the problem is depicted and understood (Keenan, 2012, p. 96). Understanding and reconciling the language of two seemingly oppositional methods of justice delivery is therefore important in helping us establish a relationship between restorative justice and the criminal justice system that is conceptually complementary rather than oppositional. At first glance, the term 'restorative justice' appears to be at odds with the term 'criminal justice system' for two reasons: (1) there is a lack of conceptual clarity in the literature as to the precise meaning of the terms 'restorative', 'restitution', 'reparation' (Daly & Proietti-Scifoni, 2011) before one would attempt to try reconciling the terminology of restorative justice with the criminal justice system; and (2) the focus of the former is on restoration of people and relationships while the latter centres on the criminal and the crime as opposed to the person harmed and the relationships affected.

Nevertheless, it may be possible to work with the word ‘justice’ - which is key to both restorative and retributive justice - to try to find some conceptual complementarity. The Oxford dictionary (2013) defines justice as ‘just or fair behaviour’. So how can justice be simultaneously associated with the binary processes of restoration and retribution? According to Daly (2014, forthcoming), we need a broader understanding of justice as a concept that will reconcile many forms of just or fair treatment, including restorative and retributive justice approaches. She has coined the term ‘pragmatic justice’ which places multiple pathways of formal and informal justice under one umbrella. Daly (2014, forthcoming) argues that justice should not be measured on the basis of retribution alone but in accordance with the victim’s definition of justice. For example, does the victim measure justice on the basis of being heard or does he/she associate justice with compensation or imprisonment and punishment of the offender?

Daly’s flexible victim-centred interpretation of justice is based on the premise that what constitutes justice for one victim may not constitute justice for another and she argues that it should necessarily remain a broad concept in order to cater for the needs of all victims of sexual violence. Following Daly’s argument we suggest that justice should include normative and phenomenal dimensions that can be represented both in legislation and practiced in a hybrid justice system. This broad concept of justice would encompass a subjective victims’ interpretation of justice which would complement the existing normative definition of justice contained in legislative instruments and applied in practice, thus providing victims with what Daly describes as a ‘menu of justice options’. This would enable individual victims to choose a particular form of justice delivery, such as restorative or retributive justice or both. It is not just the process of justice that needs to be flexible but the very concept of ‘pragmatic justice’ needs to remain broad to achieve optimal justice for all as part of the creation of a hybrid system of justice.

Legislation and International Instruments

Legislation and international instruments are core features of any criminal justice system and they are becoming increasingly relevant to the development of restorative justice at a national and international level. The *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2002) establishes the international benchmark for restorative justice processes. On a European level, the Council of Europe *Recommendation no. R(99)19 [15 September 1999] concerning mediation in penal matters* encourages the use

of restorative justice practices by Member States and most recently EU law has put victims' rights on a statutory footing by virtue of the *EU Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* which replaces *Council Framework Decision 2001/220/JHA*. While the Framework decision could be described as vague, the new EU Directive sets out clearer guidelines and recommendations whilst simultaneously granting Member States a significant degree of flexibility to enact RJ practices and legislation.¹²

Regarding national legislation, from a comparative perspective, some jurisdictions are more progressive than others in placing restorative justice on a statutory footing. For example, the common law jurisdiction of New Zealand has introduced legislation on restorative justice on an incremental basis for juveniles (*Children, Young Persons and Their Families Act 1989*) and subsequently adults (*Sentencing Act 2002*; section 7 of the *Parole Act 2002*; section 9 of the *Victims' Rights Act 2002*; and section 6 of the *Corrections Act 2004*). The common law jurisdiction of Canada has broadly advanced the legislative basis of restorative justice by virtue of amendments made to the sentencing principles contained in the *Criminal Code* in 1996. The 1996 principles encourage the use of community-based sentencing and draw on key restorative elements such as the need to promote a sense of responsibility in offenders and for them to acknowledge and make reparation for the harm they have done to their victims and the community (Daubney, 2005). In the landmark case *Gladue* (1999), the judiciary recognized for the first time restorative justice and the aforementioned 1996 principles indicating that restorative justice has been firmly established as a form of justice delivery alongside the criminal justice system as part of a hybrid system.

In contrast to developments in New Zealand and Canada, the UK and the Republic of Ireland have followed a more cautious approach in adopting legislation on restorative justice. However, recent developments indicate that changes are imminent. In the UK the *Crime and Courts Bill 2013* (now the *Crime and Courts Act 2013*), which provides for the option of restorative justice for adults at the pre-sentencing stage, received Royal Assent on 26 April 2013 (Restorative Justice Council, 2013). The Bill makes it explicit that courts can use their

¹² As a form of secondary legislation, the *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* is binding on EU Member States as to the result to be achieved, though it leaves it to the respective national authority to decide how the Community objective set out in the directive is to be incorporated into the Member State's domestic legal system before a specified date.

existing powers to defer sentencing to allow for a restorative justice activity to take place and has been described by the Restorative Justice Council (RJC) as ‘the biggest development for restorative justice in England and Wales since legislation introducing referral order panels to the youth justice system in 1999’ (RJC, 2013). In an Irish context, legislation on restorative justice is currently confined to juvenile offenders under the Children Act (2001). However, with a number of established pilot projects underway in the sphere of adult restorative justice and increasing political support for restorative justice in Ireland (Gavin & Joyce, 2013), it is hoped that Ireland might follow in the footsteps of the UK and consider placing adult restorative justice on a statutory footing in the future.

The civil law jurisdiction of Belgium demonstrates that placing restorative justice on a statutory footing may be key to establishing a hybrid system of justice which allows for the option of restorative justice. In Belgium, restorative justice operates as a form of justice delivery alongside the criminal justice system. On 22 June 2005, Belgian parliament passed a law that added victim-offender mediation to the Code of Criminal Procedure (Van Garse, 2006). The 2005 Act provides that restorative justice is complementary to the Belgian judicial system at each level, from the police level to the prison setting, covering victim-offender mediation for adult offenders in the instance of minor crimes and more serious crimes such as rape (Buntinx, 2007). Restorative justice processes for adults are provided by two external mediation services known as Suggnomé (in the Flemish region) and Médiante (in the French-speaking part of Belgium) and since restorative justice was placed on a statutory footing, both organizations have reported substantial increases in the numbers of referrals received from the criminal justice system (Suggnomé, 2013; Médiante, 2013). Similar to developments in Canada, the Belgian experience highlights that legislation is key to reconciling restorative justice and the criminal justice system to create a hybrid system of justice.

Sentencing Principles

When attempting to reconcile restorative justice with the criminal justice system, it is necessary to consider how restorative justice could interact with established sentencing principles. Ashworth and von Hirsch (1998, p. 44) have identified four essential sentencing

principles: rehabilitation¹³; deterrence¹⁴; incapacitation¹⁵; and proportionality¹⁶ (also referred to as ‘just deserts’). The objective of a sentencing principle is *to provide justification for the punishment imposed on the offender* (p. 44).

As per O’Malley, the Supreme Court has recognized proportionality as the main sentencing principle in operation in Ireland (Joyce, 2010). Denham J in *DPP v M* in the Court of Criminal Appeal stated that:

‘Sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand, a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed inter alia in a plea of guilty, which in principle reduce the sentence’ (*DPP v M*, 1994, p. 318).

The above excerpt from *DPP v M*, which upholds the constitutionally derived principle of proportionality, emphasizes that the courts must consider the best interests of both the individual and the public, whilst simultaneously condemning the crime committed (Constitution of Ireland, 1937). According to O’Malley, proportionality may establish the outer limits of the sanction to be imposed, becoming what he describes as a ‘distributive principle’, measuring the most suitable sentencing object - deterrence, rehabilitation, incapacitation or just deserts - in a given case (Joyce, 2010). Proportionality as a distributive principle would therefore govern how one or more objects such as deterrence, rehabilitation, incapacitation or just deserts could be more suitable than another in a particular case (Law Reform Commission, 1993).

The debate over the extent to which restorative justice may be integrated into proportionate sentencing has resulted in the examination of restorative justice as a proportionate response to the harm occasioned as a result of an offence (Kirchengast, 2009). Commentators such as Eliaerts and Dumortier (2002, p. 210) seem to favour O’Malley’s interpretation of

¹³ Rehabilitation aims to reduce future crime by changing the behaviour, attitudes, or skills of the offender. Based on the assumption that offending has specific causes, the focus of rehabilitation is on identifying and remedying these factors.

¹⁴ The objective of deterrence-based sentencing, which may constitute individual or general deterrence, is to influence future levels of offending through instilling fear of future consequences in either the individual offender, society at large, or both.

¹⁵ Incapacitation, which is generally achieved through imprisonment or another form of incarceration, aims to protect the public from future offending.

¹⁶ The proportionality between the seriousness of the offence and the severity of the punishment currently comprises one of the basic principles of sentencing.

proportionality as they submit that proportionality in restorative justice does not imply the use of strict retributive proportionality. Rather, Eliaerts and Dumortier (2002) call for a proportionality that sets the retributive limits within which victims and offenders can agree on forms of reparation (p. 210).

For sentencing in restorative justice, it is not sufficient to simply consider the degree of harm caused in order to decide upon the accountability of the offender: the potential benefits of the sanction are also crucial (Walgrave, 2001, p. 32). Walgrave (2001) adds that contrary to punitive justice, the context of the sanction is not pre-determined but is dependent on the needs and rights for restoration for the victim, community and society. Many critics of restorative justice would be quick to highlight the perceived problems associated with a sanction that cannot be pre-determined. However, according to Dworkin (1963, p. 324), in every mature legal system, there are cases in which the rules of law dictate no result and which therefore force the judge to *choose* a solution, that is, to exercise *judicial discretion*. As regards judicial discretion and the law, one must be aware that in the Irish jurisdiction at least, if a restorative justice process takes place at the sentencing stage, the outcome of the process (including the sanction to be imposed) must (presumably) be ultimately referred back to the judge who should have the final say. This is due to the fact that Article 38 of the Constitution stipulates that, in the administration of justice, ‘criminal matters’ are exclusively a judicial function (Ward, 2008, p. 6). The Constitution does not define ‘criminal matters’, but because of expansive judicial interpretation in cases such as *Re Haughey (1971)*, it is clear that these matters include trial, conviction and sentencing (Ward, 2008, p. 7). We argue that judicial interpretation may also include restorative justice processes.

Some commentators, who have interpreted proportionality as a ‘just deserts’/punitive rationale rather than a distributive principle, argue that the limiting requirements of proportionality take shape through a set of requirements that call for the consideration of the offence on the one hand, and the punishment on the other (Kirchengast, 2009). In an Irish context, however, the role of proportionality as a ‘distributive principle’ appears to pave the way for restorative justice under the objects of rehabilitation, deterrence and perhaps an additional object such as restitution. With proportionality functioning as a ‘distributive principle’, objects such as rehabilitation and restitution (which are the main features of restorative justice) could be taken into account when sanctioning an offender, as exemplified

by the hybrid sentencing system established in Canada.¹⁷ Sentencing policies in Canada invoke traditional punitive, rehabilitative and corrective elements yet deploy them in a new hybrid system involving a formal criminal trial as the predominant model with an informal restorative justice model as an increasingly significant additional form of justice delivery (Archibald, 2005).

Von Hirsch, Ashworth and Shearing (2003, p. 40) suggest that if sentencing policies are to give proper consideration to restorative justice, RJ advocates need to specify the aims and limits more carefully by: prioritizing goals; specifying means-ends relationships; providing guidance for deciding individual cases; and imposing fairness constraints on severity of dispositions. This advice is pertinent as, if Irish sentencing policy is revised in the future to include the restorative model of justice, the aims and limits of RJ must be carefully set out so that the appropriate sentencing principles can be tailored to accommodate restorative justice.

Alternatively, a new sentencing principle of ‘restoration’ could be introduced with proportionality functioning as the distributive principle. This principle is referred to in some jurisdictions as the principle of ‘restitution’ but we put forward that for the purposes of clarity and consistency, ‘restoration’ is preferable. Restoration is based on the premise that the offender should put right the harm that his or her conduct has caused and has gained recognition as a sentencing principle in common law jurisdictions such as New Zealand and Canada. It may encompass monetary payments to the victim, an apology or another culturally specific act of recompense (Daubney, 1988). The principle of restorative sentencing is a central element in many restorative justice programmes and it often extends beyond reparation orders to encompass a restorative process aimed at agreement between the victim, the offender and their communities as to how to restore the balance and repair the harm caused by the offence (Ministry of Justice, 1997).

¹⁷ In 1996, the sentencing principles in the Canadian Criminal Code were amended to encourage the use of community-based sentencing and focus on restorative elements such as the need to promote a sense of responsibility in offenders and for them to acknowledge and make reparation for the harm they have done to their victims and to the community. In fact, paragraph 718.2(e) of the Criminal Code states that ‘all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.’

As discussed above, RJ advocates also need to consider the role of the judiciary insofar as it might consider restorative solutions among other sanctions when adjudicating on criminal matters. Moreover, as this section highlights, in theory, sentencing policy is capable of accommodating alternative sanctions such as restorative justice which would complement the criminal justice system as it currently stands. However, this issue merits further attention by academics, members of the judiciary and the legislature.

Due Process Considerations

Due process is a central feature of the criminal justice system and if we are to reconcile restorative justice with the criminal justice system as part of a hybrid system, we need to consider how restorative justice accords with the essential aspects of due process. In an Irish context, Article 38.1 of the Constitution of Ireland (1937) guarantees that no person shall be tried on a criminal charge 'except in due course of law'. This right has been endorsed by the judiciary on numerous occasions. For example, in *State (Healy) v Donoghue (1976)*, Higgins CJ proclaimed that the constitutional right to due process inherent in Article 38.1 must be considered in accordance with the concepts of justice, prudence and charity set out in the Preamble of the Constitution.

Due process consists of a series of rights which are essentially legal protections against a variety of familiar abuses occurring during the arrest, interrogation, trial, sentencing and detention of suspected criminals (Nickel, 2007). Due process dictates that those accused of crimes have a right to trial without excessive delay, and if the case goes to trial the proceedings must be fair and open, and the accused must enjoy the presumption of innocence, the right against self-incrimination, and a right to the assistance of counsel (Nickel, 2007). According to Campbell (2005, p. 19), there is a risk that restorative justice may restrict the above-mentioned due process rights. The presumption of innocence, the right against self-incrimination, the right to a fair trial and the right to legal counsel will thus be discussed in the following four sub-sections within the context of restorative justice.

1. Presumption of Innocence

Due to the fact that most restorative justice systems require an offender to acknowledge responsibility before being referred to a restorative justice programme, it has been argued that the right to be presumed innocent is largely abrogated (Ross, 2008, p. 6). This right is not violated in restorative justice cases that take place at the post-adjudicatory stage because the offender has already been found guilty (Ikpa, 2007, p. 312). However, as the offender must accept responsibility for the harm caused to participate in restorative justice, Holmboe (2013) warns that in cases where restorative justice is offered at the early stages of the criminal justice system, we must guard against restorative justice processes that may lead to false confessions or to plea bargaining. By leaving it to the police to find out 'what happened', Daly (2013, p. 27) relies on the assumption that the case is clear when it reaches the restorative justice system. However, Holmboe (2013) and Ward (2008) put forward the view that the different outcomes between an ordinary criminal case and a restorative justice case may lead to untrue confessions and the pivotal question arises whether the accused person has incentives to 'assume a responsibility' that is not grounded in what really happened. He may compromise his own right to the presumption of innocence in the more pragmatic interest of seeking a lenient outcome. On the other hand, he may re-victimize the victim by 'pretending' to accept responsibility in his own best interest as the higher order motivation.

In those general cases where offenders wish to accept responsibility and participate in RJ at the pre-sentencing stage of normal proceedings, the accused could retain the right to terminate the restorative process if he felt that the process could compromise his integrity and instead opt for an adversarial or inquisitorial justice process during which his guilt would have to be proven (Moore, 1993, p. 19). Such a safeguard for the presumption of innocence in the instance of restorative justice must be incorporated into restorative justice processes (Walgrave, 2008, p. 159). However, Campbell (2005, p. 18) notes that even if an offender accepts responsibility for an offence during RJ, if there are court proceedings in the future to process a sexual crime through the criminal justice system, offender accountability during restorative justice does not indicate the intention of the offender at the time of the offence. Therefore, prosecution would still have to establish that the offender had the necessary *mens rea* in order for there to be a conviction (p.18).

Article 13(b) of the *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2002) provides some guidance on safeguards in this regard as it stipulates the following: ‘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’. However, Article 13(b) on its own is insufficient and it is submitted that restorative justice advocates need to develop more comprehensive safeguards to prevent the right to be presumed innocent from being infringed in restorative justice processes.

2. Right against self-incrimination

It is often argued that if a restorative process breaks down, what is said in the restorative justice process has the potential to be used against the offender in a later criminal proceeding (Reimund, 2005, p. 685). In order to guard against such self-incrimination, it is essential that the offender’s participation in restorative processes is voluntary (Ikpa, 2007, p. 323) and accompanied by legal advice. In addition, Bird and Reimund (2001, p. 10) emphasize the importance of confidentiality safeguards to prevent what is being said in one context being used for a different purpose in another. Bird and Reimund (2001) note that a privilege for statements made in the course of a restorative conference may be waived in certain circumstances, such as public interest, thus precluding an absolute privilege of confidentiality. In most jurisdictions, the law requires that ‘justice be administered in public’¹⁸ and public interest is therefore an accepted element of justice delivery that enables the public to participate in ensuring a fair and just system of law (Joyce, 2011, p. 115). However in spite of the law on public interest, in Belgium the Act on Victim-Offender Mediation, which was passed on 22 June 2005 and which covers serious crimes including sexual violence, stipulates that mediation is confidential (Buntinx, 2012, p. 3). According to Belgian legislation on confidentiality in the context of restorative justice, there can be communication to the court, but only when both parties agree (p. 3). These provisions on confidentiality safeguards in the context of RJ provide an exemplary approach to confidentiality that precludes the erosion of the due process right against self-incrimination. Nonetheless, while Belgium sets a positive precedent with respect to confidentiality

¹⁸ *Bunreacht na hEireann* (The Constitution of Ireland), Article 34.1, available at <www.irishstatute.ie> (last accessed 25 August 2013).

safeguards, the issue of confidentiality safeguards merits further scrutiny by restorative justice scholars and practitioners within common law jurisdictions.

3. Right to a fair trial

It is argued that restorative justice can compromise the right to a fair trial when the offender is not willing to plead guilty or feels compelled to enter into a restorative process (Warner, 1994). However, as the offender's participation in restorative processes must always be on a voluntary basis, the offender must always have the option to choose an adversarial process if he feels his right to a fair trial would be otherwise violated (Van Ness, 1997, p. 11-12). Therefore, RJ in itself does not circumvent the right to a fair trial.

Warner (1994) is concerned however about double jeopardy¹⁹ when consensus cannot be reached at a restorative meeting and the matter returns to court without agreement. Braithwaite (2003, p. 55) categorically states that an unsuccessful restorative justice process would not lead to double jeopardy when referred back to the court, as the adversarial justice analogue would seem to be a retrial after a hung jury²⁰ or appeal of a sentence decision rather than retrial after acquittal. No one would call this absolute jeopardy. However, while agreements are an important aspect of restorative justice meetings, they are not necessarily so in all cases. The 'meeting' itself often holds the key to a good outcome, especially in those cases where for a variety of reasons there are not criminal proceedings as high attrition rates indicate.

4. Right to legal representation

The question of legal representation is one that has been much discussed in the context of restorative justice (Akester, 2002, p. 2). Restorative justice can pose a problem for the right to counsel as critics have acknowledged that restorative justice often leaves lawyers out altogether or diminishes their role in the process (Ikpa, 2007, p. 313). Ross (2008, p. 6)

¹⁹ The double jeopardy rule states that where a trial process has concluded, a person should not be put at risk of being punished again for the same offence. The rationale for the rule lies in the public interest in protecting individuals from the trauma of repeated prosecutions and to encourage confidence in the criminal justice system (Law Reform Commission, 2006)

²⁰ A hung jury is a jury that is unable to agree on a verdict. The result is a mistrial.

submits that it is important for lawyers to have a role in restorative justice processes, although he adds that lawyers may need to adjust their understanding of what it means to look out for and act in their client's best interests by defining that interest in broader terms rather than just by avoiding conviction or receiving the most lenient sentence. It could do well for lawyers to understand the psychological 'invisible prison' that many sex offenders inhabit in light of their criminal history (and the stigma attached to it) and how engaging in RJ can have enormous benefits for them on an emotional level (Keenan, 1998). Taking into account the requirement of voluntary consent to participate in restorative processes and the right to be fully informed before giving such consent, legal assistance becomes almost unavoidable in restorative justice (Eliaerts & Dumortier, 2002, p. 213). However, rather than fighting for a particular outcome, the lawyer's role in restorative justice is to ensure that the offender's elementary rights are safeguarded; that the offender avoids consenting to cooperation in the restorative process where the offender sees himself as innocent (p. 214). The right to legal counsel is not compromised by restorative processes: rather, the role of the offender's lawyer in restorative processes simply differs from his role in the conventional justice system.

Victims' Rights

Although traditionally, human rights law used to be concerned almost exclusively with the rights of criminal defendants, international human rights law has recently developed an extensive legal framework protecting victims' rights (Soroichinsky, 2009). The State's obligations to those who have suffered a sexual crime, which strikes at the human rights concepts of human dignity and bodily integrity, are much wider than working for the conviction of a perpetrator and support and care for victims must therefore be a higher priority (Stern Review, 2010, p. 11).

In an Irish context, in 1999 the Department of Justice and Equality published the Victims' Charter, which addresses all aspects of the criminal justice system from the victim's perspective (Department of Justice, Equality & Law Reform, 1998) and in 2005, the then Minister for Justice and Equality established the Commission for the Support of Victims of Crime to devise an appropriate support framework for victims of crime (Commission for the Support of Victims, 2005). In a European context, in 2012, *Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* replaced *Council Framework Decision*

2001/220/JHA. The primary aim of the EU Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings. The Directive places particular importance on restorative justice practices in the context of victims' rights.

Although RJ appears to cater for the needs and rights of victims, from a legal perspective, it is important to have safeguards in place to prevent power imbalances and thus re-victimization of the victim in restorative processes. Violence, including sexual violence, creates power imbalances between the parties (Hooper & Busch, 1993, p. 8). This is a major concern for victim advocates who see in informal processes a high probability for the re-victimization of victims unless the proceedings are prepared and managed well (Daly, 2002, p. 87). Unless the process of facilitation can compensate for any power imbalances that may exist between the parties, there is a major risk that the agreements reached will reflect the views of and outcomes desired by the dominant party (Hooper & Busch, 1993, p. 8). Here we emphasize that the training of RJ practitioners working with sexual violence cases is crucial. We suggest that facilitators must have additional training in sexual violence and trauma work. Article 12 of the *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* outlines 'safeguards in the context of RJ services including ensuring victims not be re-victimized, that the process be voluntary, and that both victim and offender be given full information about the process and potential outcomes'. As an additional protection for victims, as well as for offenders, Article 12 also includes a confidentiality safeguard. As the *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* is binding on EU Member States, confidentiality safeguards must be set out by Member State legislation governing restorative justice practices.

The Charter on Victims' Rights and the international instruments governing restorative justice and the rights of victims of crime promote restorative justice as a justice process that recognizes and upholds the needs and rights of victims. However, as mentioned in the above paragraph, if such rights are to be respected in RJ processes, careful implementation and continued adherence to procedural safeguards will be essential to ensure that victims are not subject to re-victimization. Restorative justice scholars and practitioners also need to consider victims' legal rights when victims who have engaged in restorative justice post-sentencing or

outside of the criminal justice system in victim services and therapy clinics seek to initiate criminal or civil proceedings at a later stage in their healing journey. If the victims' justice needs change over time, do they still have the right to engage in further criminal proceedings in spite of possible erosions to offenders' due process rights. This is a critical issue that raises several questions about the relationship between restorative justice and the statute of limitations in cases of sexual violence.

Situating Restorative Justice Within/Alongside/Outside of the Criminal Justice System

There is a lack of consensus as to whether restorative justice should be available as a form of justice delivery within, alongside or outside of the criminal justice system in the context of sexual violence (Daly, 2011; Koss & Achilles, 2008). The analysis seems to suggest that it is best to offer restorative justice at all stages of the criminal procedure so that the parties themselves can choose the right moment to engage in restorative processes (Buntinx, 2007, p. 3), although in their analysis of RJ programmes for sexual violence Koss & Achilles (2008, p.3) found that pre-charging diversions are viewed less favourably than post-sentencing approaches.

The possibility of referrals at all stages is important for victims and offenders as they may not feel themselves 'ready' for it at one point, but may well change their mind at a later stage when they feel more prepared (Shapland, Robinson & Sorsby, 2011, p. 183). Referrals made to many programmes come from public prosecutors at the post-charge or pre-sentencing stages of the criminal justice system (Koss, 2013; Julich, Buttle, Cummins & Freeborn, 2010; Daly, 2006; Couture, Park, Couture & Laboucane, 2001). Some programmes accept referrals post-sentencing at the incarceration stage (Umbreit, Vos, Coates & Brown, 2003; Miller, 2011; Miller & Hefner, 2013; Roberts, 1995). Other restorative justice programmes for sexual violence are facilitated by victim and advocacy services and referrals are made outside of the criminal justice system by victims (Keenan & Joyce, 2013; Pali & Sten Madsen, 2011).

Regarding the precise location of restorative justice programmes in the context of the criminal justice system, some programmes are situated within the criminal justice system (Umbreit, Coates, Vos & Brown, 2003; Patrilli, 2010, Achilles, 2000) while others take place alongside the criminal justice system (Daly, 2006; Buntinx, 2007, Koss, 2013). Some restorative justice programmes operate outside of the criminal justice system (Keenan &

Joyce, 2013; Pali & Sten Madsen, 2011), while other programmes that are based in the community and collaborate in some way with the criminal justice system (Roberts, 1995; Miller, 2011; Stulberg, 2011; Couture et al., 2001). Ultimately, the lessons emanating from the programmes under discussion in this section indicate that there is no ‘wrong’ stage for restorative justice (Shapland, Robinson & Sorsby, 2011, p. 183).

Conclusion

Analyses of criminal justice systems around the world have highlighted the limitations of retributive justice in addressing sexual violence (Daly & Bouhours, 2010; Lovett & Kelly, 2009; Lea, Lanvers & Shaw, 2003; Lonsway & Archambault, 2012) and the need for a broader understanding of justice that incorporates both retributive and restorative forms of justice delivery under one broad justice umbrella (Daly, 2011; Daly, 2014, forthcoming). Under Daly’s proposed model of justice, restorative justice would not replace the criminal justice system as it stands but rather, it would complement existing justice practices by offering victims of sexual crime a menu of justice options to choose from, encouraging a more robust, all-encompassing justice system that promotes greater victim participation, offender accountability and community involvement in justice delivery. While this paper has underlined the shortcomings of criminal justice systems in addressing sexual crime and highlighting the need for restorative justice, Baroness Stern emphasizes that high rates of attrition have taken over the debate on sexual violence to the detriment of other important outcomes for victims (Stern Review, 2010). We agree with this view on two accounts: (1) the success of any legal system in addressing sexual crime shouldn't be measured according to conviction rates but rather, according to the needs and rights of victims, along with their unique perceptions of justice; (2) we have been made staunchly aware of the limitations of the criminal justice system and it is time to actively address the unmet needs of victims of sexual crime. We have established in this paper that the needs of victims can be effectively met by reconciling restorative justice with the criminal justice system. Now is the time to move beyond mere consideration of restorative justice as a method of addressing sexual violence. Jurisdictions around the world need to take concrete action.

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