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What might a justice system which embodied restorative principles look like? What might be the judge's view – the view from the bench - of a more restorative justice system?

What might a justice system which embodied restorative principles look like? What might be the judge's view – the view from the bench - of a more restorative justice system? To answer such questions we need to give ourselves permission to dream. And what a wonderful dream it is – of a justice system where healing and changing behaviour is central, rather than retribution. Where the victim comes away restored and empowered, where the offender learns from his mistakes and develops understanding.

Of course this isn't all going to happen overnight. Working out the practicalities of implementation are live issues that also have to be considered, indeed the Restorative Justice Council (RJC) has been preoccupied with them for some time now, and professor Joanna Shapland's careful work has addressed some of them. What is key is that many of the foundations for this new environment are already in place.

The court experience

I sat as a Crown court recorder, a part-time criminal judge, for a dozen or so years. Before I heard of RJ, it struck me that an important factor that judges tended to look for when they were sentencing in criminal cases was remorse. It was sometimes a theme over lunch in the judges' dining room. Remorse seemed to have a big effect on the sentence.

Although not as big an effect as how recent the judge's last meal was, as research suggests: 'You are anywhere between two and six times as likely to be released if you're one of the first three prisoners considered versus the last three prisoners considered.' It seems that the more time there is between the judge's last meal and his sentence, the more severe the penalty. I found this both disturbing and a little familiar. So a practical tip if you have to be there - try to get into court soon after breakfast or lunch.

This idea of remorse was clearly something that was significant for all of us as sentencers, myself included. I concluded that its importance lay in the fact that if someone is remorseful, there is a better chance they will be less likely to repeat the offence - in other words that at some level their conscience has been touched. It may be that the notion of 'conscience' and 'offenders' may not often sit in the same sentence. Those of us who work criminal courts often see people who are pretty case-hardened, who have little empathy - probably since before they became involved with the criminal justice system - for those that they violate through crime.

So one of the questions that I started to puzzle about was how one could awaken that conscience. On the assumption that we all have the capacity to feel for another person, but that due to circumstances and upbringing it can become dulled, how could one awaken that sense of connectedness?

These thoughts crystallised with a particular case, a nasty robbery at knife-point of two ladies employed in a travel agents. Yet each of the four teenage defendants had his own appalling personal history. As I heard their mitigation it seemed to me that they were themselves victims, and had been in a cycle of punishment/wrongdoing/punishment since their early years. If there was any chance of changing the cycle, the offenders definitely needed to understand the consequences of what they had done to the victims. And maybe, I thought, the victims would benefit from hearing the

offenders' background and how they too had been victims. Certainly if I was going to pass a sentence that might change the pattern I needed the understanding and agreement of the victims.

Sadly it was not to be. But it led me to construct a rather simple model in my mind. Then I learned from the probation service that the process already existed, that there were people already doing it, and that it was called restorative justice. It became a really interesting and challenging notion for me, at the heart of which was this idea of building empathy, the connectedness between human beings, whether they be victims or offenders. I committed myself to support RJ as far as I could, and although I have now come to the end of my term as chair at the RJC, I continue wholeheartedly to support restorative justice.

Victim-centred justice

So to fast-forward these ideas to today and dream of what a restorative legal system might look like, the best summary for me is that it would be a victim-centred justice system. Many will be familiar with professor Howard Zehr's seminal work where he offered a definition of a victim-centred system. In passing I want to observe that the label 'victim' can be really unhelpful, as can the label 'offender'. One of the benefits of RJ is to separate the idea of who someone is from the acts that he does. So we are talking here about people's behaviours rather than their identity. Still it's a useful shorthand, so victim and offender [are used] for these purposes.

The headline is The Needs of Victims. These, says Zehr, are for information, validation, vindication, restitution, testimony, safety and support. These are the starting points of justice. Then he adds four sub-points:

the safety of the victim is an immediate priority, the justice process provides a framework that promotes the work of recovery and healing that is ultimately the domain of the individual victim, victims are empowered by maximising their input and participation in determining needs and outcomes and offenders are involved in the repair of the harm so far as possible. That is a pretty good description of what a victim-centred legal system might look like - certainly it's my vision and the vision the RJC is working towards - that every victim will have access to a quality restorative process, and implicitly every offender who is connected with such a victim will have similar access.

Key steps

So how might this ideal world come into being? One of the key steps must be legislation. Although the UK government has been less than enthusiastic about it so far, I believe that we are quite close to achieving what Joanna Shapland has called a statutory requirement or expectation for RJ to be part of every criminal process. While there might be some debate about whether it should be a requirement or an option, legislation is needed which would mandate a judge to adjourn a case so that a restorative justice process can take place. With our partners the RJC has prepared a draft amendment and I hope, indeed am quite optimistic, that within 12 months we will have legislation in place.

Another element of this ideal world we are speaking of is safety. Safety for victims is Howard Zehr's point of departure. There clearly the quality and standards of practice are absolutely essential. The RJC has been concerned to set up a register of practitioners to provide safety, both for victims and for the agencies that might use restorative process in the criminal justice world. Such standards would ensure quality, would build confidence in a restorative process, both in the community and in

criminal justice professionals and of course for the users. Ensuring that safety is one of the foundation stones of this brave new restorative world that we are talking about.

In addition the RJC has promoted best practice guidance and National Occupational Standards, all of them aiming at a situation where you can be as sure as you reasonably can that if you are to engage in a restorative process, it is going to be properly prepared for, properly managed and properly facilitated.

Implementation

So, how and where might the restorative process be implemented in building this restorative legal system? There are of course different stages at which it might be used. What happens before someone even starts to offend is a critical period that is beyond my scope here. But it could be said that the whole developmental process would ideally start with restorative approaches and attitudes in schools, with looked-after children and even - dare I say it - in families and family relations. A good example of this wider picture is the pioneering work with RJ in youth settings being done by Belinda Hopkins.

Then there is policing. Increasingly we see police officers who, perhaps after initial scepticism, are taking up RJ because it offers them a highly effective tool in doing their jobs. They are using diversion schemes as an alternative to charging, for example, the conditional caution, where someone may be arrested but not charged, and instead may participate in a 'street RJ' process. Provided that the agreed actions are followed up, no prosecution follows. An important factor encouraging police use of RJ is that since April 2012, the Home Office has agreed that such disposals will count as detections in each constabulary's 'clear-up' statistics.

The key idea is that prosecution does not necessarily follow arrest if some restorative process is agreed to and is, of course, complied with. This seems to me to be a step change in terms of our attitudes to crime, and the state's notional ownership of its resolution. Similarly the Neighborhood Justice Panels recently introduced into 15 areas by the Ministry of Justice as an 18-month restorative justice pilot scheme are opportunities to divert from the criminal justice system.

Designed to give both the victim and the wider community a voice, and the offender an opportunity to make amends and repair the harm they have done, the panels will look at how to resolve issues affecting the local area. Ensuring that communities have a say in their response to crime and anti-social behaviour that affects them is an essential part of the picture that we aspire to, and I believe are moving towards.

Other offending behaviour will be brought into the criminal justice system. At this stage prosecutors will also have the opportunity to divert. The idea of prosecutors initiating some diversionary restorative process is infrequent as yet, perhaps because awareness of RJ is not widespread. In Northern Ireland, however, something like one-third of cases are diverted by prosecutors to a non-judicial - and non-retributive - process. That is an approach that can and will become part of this restorative legal system that we are envisaging.

And then comes the stage when the case has gone into the criminal justice system proper, the offender has pleaded guilty and is going to be sentenced. Prior to sentence there is the opportunity for a restorative process, where the judge may initiate or allow an adjournment in order that the process can take place. Typically the resulting accord or agreed actions are reported back to him or her so that the restorative process can be incorporated into any community sentence passed, for example: action-plan orders, reparation orders.

Those actions might include, for example, drug treatment, or finding work, or even relocation (which seems to be a very significant factor in reducing reoffending). A hallmark of such a restorative legal system is surely that pre-sentence RJ is a matter of routine, both to the courts and the public.

Serious Crime

The evidence from the government's research is that RJ is even more effective with serious crime than it is at lower levels. The principles are the same in both - that stakeholders affected by an injustice need the opportunity to tell their story about its consequences and what needs to be done to put things right. So while it is little used in serious crime at present, one can imagine that in future an opportunity for RJ will always accompany and dovetail with the courts' own process. The victims of a substantial financial fraud might derive far more satisfaction from an opportunity to confront the fraudsman than a multimillion-pound trial in which they have no more than a walk-on part. It might even be that the perpetrator learns something from it too.

What might be possible in serious crime can also be built into regulatory offences. Professor John Braithwaite at the Australian National University has done a lot of work on responsive regulation. His real-life examples demonstrate that a process in which restorative justice is part of a regulatory enforcement process is perfectly feasible. His model is one in which the regulatory pyramid starts with persuasion and ends with licence revocation. There is a hierarchy of interventions, of which restorative justice and dialogue is the presumptive starting place.

Even in cases of sexual offences, we know there are circles of support, innovative and successful community contributions in close partnership with criminal justice agencies, which have been shown to result in a 70% reduction in sexual recidivism. Such processes will usually take place after sentencing while the offender is still in prison, and also post-release.

A final example of the use of RJ in serious crime is the proposed crime of ecocide. There is a powerful movement to make ecocide the fifth crime against Peace of the International Criminal Court. Broadly defined as the destruction, damage to or loss of ecosystem(s), and aimed at individuals rather than corporations, the use of a restorative process prior to sentence is built into the draft legislation. At a mock trial last year, two chief executives (played by actors) were found guilty of this crime. One, who accepted responsibility for his acts, agreed to take part in a restorative process.

The victims included representatives of indigenous peoples, future generations, wider humanity, bird life and a guardian ad litem on behalf of the earth. As well as the chief executive, the oil company representatives included the chair of the pension fund shareholders. The exchanges between them were fascinating. The oil company's position was 'we are providing what the world seeks, what all of us need'. The leader of the Haisla First Nations - who are in reality affected by shale-oil extraction in the Athabasca tar sands in Canada - articulated very powerfully how the lives of his people and many others were being destroyed by the extraction processes.

By the end of the restorative conference all the competing needs were somehow integrated in an action plan with a number of agreed points. They were made part of the chief executive's sentence, which was deferred for six months, in order that those steps might be carried out.

Interestingly there was a substantial difference between that sentence and that of the other executive who did not go through a restorative process, and was sentenced to four years' imprisonment. I was so horrified that I approached him afterwards to advise him that he should

appeal immediately because of the disparity of sentence. I hasten to say we were both out of role at that stage. Indeed both the trial and sentence were imaginary - except that sadly the oil extraction and environmental damage are taking place, and maybe there will be a crime of ecocide before too long. What was clear was that even with large-scale crime of that kind it is possible to have a restorative process that is not only feasible but highly workable and productive.

Prisons

The Penitentiary Act of 1779 provided for prisoners to be confined at night to meditate on penitence or remorse over their bad deeds. As a penitentiary, it was a place for reflection. This seems to have been the origin of a restorative prison, first and foremost as a humane alternative to the death penalty. But it also set out to provide people with an opportunity to reflect and to make amends in some way for what they had done.

Today imprisonment presents an opportunity for prisoners not only to reflect but to develop understanding with victims and survivors through RJ and other processes like the Sycamore Tree project. At present it is happening sporadically. In future the potential is for RJ to be used to address all disputes within the prison, with prisoners, staff and outsiders alike. The work of Tim Newell as a former prison governor has been very influential in bringing it into being.

Civil disputes

Of course justice systems include more than criminal justice. In the civil and commercial world of the law some of these changes are already taking place. Mediation is starting to seep into civil and commercial justice systems, both in the UK and elsewhere. As one example among many, the judges of the Egyptian economic court, similar to our Commercial Court, have been training in mediation skills. And not only training in mediation skills, but a smaller group of them have been training as trainers.

To impart the principles of dispute resolution by dialogue in that country at this time was a real privilege for me, and a real pleasure to know that this development can be sustainable. Knowing that lawyers and judges in many countries from Iceland to Bangladesh are taking up these ideas, one can see that the principle of resolving disputes by dialogue are being increasingly accepted and incorporated into civil legal systems. So in the civil commercial field, this more restorative approach is gaining ground, both in this jurisdiction and beyond.

An overview

In conclusion, what might an overview of a restorative legal world look like?

restorative policing, with street RJ being part of every police officer's armoury (if that the right word in a restorative context), or in his or her toolkit, police officers might actually be peace officers, where conflict resolution is their primary role, where those who are sent to prison are those who are dangerous and not susceptible to the kinds of change possible through RJ, restorative lawyers (although some might say that is an oxymoron) - for example, collaborative lawyers who look to resolve their clients' problems through negotiation, restorative magistrates. 'Every magistrate trained as a restorative justice facilitator' is a wonderful vision that came from then justice minister Crispin Blunt MP, and should give us all real hope that this dream can be realised, and lastly the idea of restorative sentencing - as an example the sentencing circles taking place in Canada, where the judge is part of a circle that sets out to arrive at a consensus for an appropriate sentence.

These seem to me to be the high points of such a restorative legal system – and I'd suggest that these are ideas whose time has plainly come.

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