Restorative Practices and the Heart of the Criminal Justice System

Abstract

Over recent years there has been much talk of redressing the balance in the criminal justice system, with Ministers having said often that legislation and policies are aimed at placing victims at the heart of the justice system. This talk will suggest that such claims are often questionable, but that one key exception is where restorative practices are employed.

In his lecture, John Scott will offer a human rights analysis of restorative justice as a means of having both victims and offenders at the heart of the criminal justice system.

I am honoured to have been asked to deliver the annual SACRO lecture which is held in continuing tribute to the late Professor Derick McClintock, one of the pioneers in the field of criminology in the UK as well as the first Chair of Criminology at this university. Coincidentally, tomorrow night sees the annual Drummond Hunter Lecture held by Howard League Scotland in honour of the man who was the Howard League in Scotland for many years and who was a pioneer of penal reform and an abolitionist, even though the tide was moving for many years in the opposite direction. I only ever introduce our Chair and speaker for that lecture but there is a personal element because Drummond was a member of our committee when I first joined it in the 1990s. Sadly, I never met Derick McClintock and so I am not in the same position as at least one previous speaker who has given this talk in his honour who had actually been taught by him. This forced me to do some homework on the man and it threw up a nice coincidence, especially given the subject I had chosen.

Many of you may know this but there is a collection of essays dedicated to Derick McClintock entitled “Support for Crime Victims in a Comparative Perspective”. It was published in 1998, 4 years after his death. It provides a great insight into the man and his work, but perhaps even better for my purposes, the book starts with the text of his talk in 1993 entitled “Victims and Criminal Justice” and this sets the scene for the contributions that follow in the book. Those who knew him pay tribute in the book to his pioneering work in the field of what was then called “victimology”. Better still for tonight was the fact that the talk was delivered to the Howard League in Scotland, albeit it must have been just before my time. I am fairly sure, however, that Drummond would have been present and I can picture these 2 great forward-thinkers exchanging ideas and putting the justice system to rights.

And so I like to think that there is some symmetry in this talk being delivered tonight by the present Convenor of an organisation which benefitted from Derick’s wisdom over 20 years ago. I think that Derick would have welcomed the topic chosen in his honour this year as he was ahead of the times in his consideration of victims of crime.

One further coincidence is that the speaker tomorrow night for the Drummond Hunter Lecture is the LJC, Lord Carloway, who gave the Derick McClintock lecture last year. I believe that he may develop some of the themes he outlined to this audience then and so I hope that many of you can attend back here tomorrow night as well.
Caveats

But now I need to move on from coincidences to caveats. I have to offer a number of these at the outset. Our criminal justice process is the subject of much discussion and debate. It features on a daily basis in our press and other media. These discussions often proceed on the basis of truncated facts and sweeping assumptions, or at the very least generalities which fail to reflect all of the many nuances which exist in actual cases. Speaking in generalities saves time and effort. It seems to be thought by some editors, wrongly to my mind, that great detail might deter readers or viewers.

Thus, in certain papers all acquittals are described as Mr X walking free; all crimes are serious; all victims demand retribution. Indeed, speaking on our behalf freely and without consultation, they tell us that society wants to “lock ’em up and throw away the key”. I regret the primary colour depiction of a system of infinite shades, variations and subtleties but it often seems that we have little choice. I do except from this criticism Alan Robertson of Holyrood Magazine, who is here tonight, and, usually, the Herald.

Definitions

Tonight I may speak in general terms due to time restrictions but please do not think that I regard restorative justice as a panacea for all ills. By RJ I mean those processes which have the aim and effect of repairing the harm done to people by crime, and the healing of relationships brought about by the parties in a conflict working together to resolve the issues. RJ encounters can benefit victims, empower communities, and change the attitudes of offenders.

For perhaps obvious reasons, RJ will never be compulsory, whether for offender or victim.

It will not work for everyone but then neither does any current process. While we seem prepared to give infinite chances to prison to demonstrate that it can work, and while Scotland may be the home of criminal justice pilots, sadly it seems to me that restorative justice is one area where we are too timid, too averse to considering the positive outcomes here and elsewhere, and too tied to what we have always done. As a consequence we are not really in control of what our justice system or process is doing. For example, does anyone really think that 7,731 people need to be in prison in Scotland today, with around 17% of them on remand? The Prison Commission reminded us of what we already knew and yet still the population has risen in the last 6 years, albeit there have been signs of slowing and some positive changes. It has risen because of various decisions rather than by mere accident which means that we are actually in charge of its increasingly unwieldy dimensions, albeit there is often a shrug of the shoulders and defeated acceptance of this as inevitable. But, despite austerity, when money is needed to build prisons it is found, with an extra £15 million being found for HMP Inverclyde in just over 1.5 years. While I recognise the considerable good work being funded in the community and also that it is not all about funding, there is still a primacy given to prison in our system and a failure to find appropriate funding to the same extent outside prison walls.

My main support for RJ comes not from financial considerations but, even in the USA, there is support for moves away from the use of imprisonment as the answer to all criminal justice
questions and this is to some extent because of increasing realisation of the waste of money involved. Justice reinvestment is one of the new buzz-phrases as they start to try to reverse the insanity of their penal policy.

I mention this because RJ is much cheaper than prison too, so for those making decisions based on budgetary considerations, it is well worth a look.

**Heart of the System**

Before I say a little about restorative practices, I want to say a little about that apparently crowded place – the heart of the criminal justice system. I think it has always been recognised that the accused is at the heart of the system but, in recent years, there have been increasing demands from some and apparent acceptance by Government Ministers that the heart of the system should be expanded so that it can be occupied by victims along with the accused, or sometimes even by victims on their own. Legislation has sometimes been offered as a means of securing this relocation of key participants.

Now it may just be me but, whatever the good intentions, it seems that the heart of this system has not changed. For my part I doubt that it ever will.

What is described as “placing victims at the heart of the system” translates into treating them with greater respect and providing greater information about the process and its outcomes. No one can argue against such basic courtesies. Remembering how things were when I first started to practise in court 28 years ago, it was absolutely essential that greater respect be afforded to victims and witnesses. Information is also key to ensuring that they feel that they are properly respected and involved to a greater extent, consistent with their wishes.

The problem with the rhetoric around such basic steps is the claim that it involves relocation of victims to the centre of the system. This is essentially meaningless. The criminal process is involved in trying to determine whether guilt has been proved. Obviously guilt is accepted by accused persons more often than it requires to be established by a trial. Thereafter the process involves trying to identify the appropriate disposal of the case and of the offender. The State has taken the conflict from the victim, or stolen it as some would have it. Victims in our system are largely dispossessed and side-lined, even if treated with respect and provided with information.

So to those whose rhetoric raises unachievable expectations about victims having a central role in our current system can I suggest that they look instead at restorative justice as a means of giving genuine effect to such claims of significant rearrangement of the geography of the system so as to allow a truly central role for both offender and victim?

Turning firstly to the involvement of the offender in RJ, it might be thought that there is no way in to an appropriate conversation with an accused person so as to open up the possibility of a restorative process. I disagree. Experience elsewhere shows that it can be done. Even here, as part of my day job I have to tell accused persons that they may be entitled to a discount in sentence if they plead guilty at an early stage. That advice is given to the innocent as well as the guilty. There is no evidence that this advice results in pleas of guilty from the innocent.
In the same way, an innocent person is unlikely to want to participate in a restorative process which is likely to require discussion, explanation and apology for admitted behaviour.

Next I consider the human rights dimension. In advance publicity I offered a human rights analysis of restorative justice for victims and offenders. In fact the area has been the subject of specific provision internationally, at UN, Council of Europe and European Union level.

Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters (Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies)

...Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders’ sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

I. Definition

These guidelines apply to 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).

II. General principles

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.

2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.

3. Mediation in penal matters should be a generally available service.

4. Mediation in penal matters should be available at all stages of the criminal justice process.

6. Legislation should facilitate mediation in penal matters.

8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.
9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.

12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their participation in mediation in penal matters.

13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.

14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.

There is a UN Resolution from 2002 entitled Basic Principles on the use of restorative justice programmes in criminal matters. There is a UN Handbook from 2006 on RJ Programmes.

There is international guidance on every aspect of RJ, including availability, training, time limits, confidentiality, victim safety, the need for research. There are particular provisions in relation to young offenders and children.

And from the EU there is the 2012 Victims Directive establishing minimum standards on the rights, support and protection of victims of crime, which replaced the 2001 Framework Decision on the Standing of Victims in Criminal Proceedings. It was the 2012 Directive which led to a change in the law by way of the Victims and Witnesses Act. Although inspired by the Directive, when it was tabled the Bill had no mention of RJ. This is despite Article 12(1) making it clear that member states should ensure “that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services” and in Article 12(2) that, “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”. A Scottish working group on RJ proposed that this should be remedied by the insertion of a clause establishing a right for victims to request access to a restorative process with the person responsible for the crime or offence committed against them, and that this would be separate from the formal criminal justice process. In November the Justice Committee, at Stage 2 of the Bill, agreed an amendment which would have placed a duty on Ministers to make provision, by regulations, for the referral of victims and offenders or alleged offenders to restorative justice processes. When the matter was debated in Parliament a compromise position was reached whereby the amendment was revised, removing the duty on Scottish ministers and replacing it with the ability for Scottish Ministers to issue guidance relating to the referral of individuals to and the provision of restorative justice services. The Cabinet Secretary stated, “I…agree that more consideration should be given to the potential benefits of restorative justice to victims” and “there are compelling reasons for adopting a more flexible approach than would be possible through a statutory scheme” not least the importance of protecting both persons harmed and persons responsible from being drawn into restorative processes to which one or both parties are not fully committed.
What comes of this diluted section remains to be seen. In practice, with the right will, it could be just as effective as the original version. Otherwise it could just lie there as another reminder of missed opportunities.

In short, there is no doubt that in suitable cases the use of restorative practices will be entirely compatible with ECHR and other international justice standards.

So what of victims? What is the problem in securing RJ processes for them as a matter of right? Unlike many logjams the blame cannot be laid at the door of “human rights”, although I am sure that some will make the suggestion. In fact, as I have said, there is recognition in international human rights law of the value of RJ.

When asked there are few who will express outright opposition to restorative justice, albeit some hefty qualifications may be attached. Much more often there is a rather vague, and frankly meaningless, support for RJ. “It might work in South Africa, or with children but it wouldn’t work in the mainstream here”. For a system which likes to try to make advances based on evidence, this is disappointing. On the evidence I would suggest that we could already have attempted to pilot RJ much more widely, including with more serious charges. We could have looked at using it throughout the system, not just in youth diversion.

My suspicion is that people are frightened of getting it wrong. We make assumptions about victims which get in the way of some of them being able to participate in RJ and perhaps feel at the heart of the system. From recent meetings I understand that Victim Support representatives are wary of mentioning RJ because they cannot be certain that it is available in their area. Better to make no mention rather than raise hopes of a meeting which cannot be facilitated.

It is not a priority for victims groups and that also is understandable but the absence of the issue from their agenda means that it is often ignored. So we carry on for the most part in just doing the same thing over and over in the formal system. By contrast in England there are strong supportive messages about RJ on the Victim Support website. No doubt this support has been informed by its experience in providing RJ services with Government funding. Should we be looking at something similar?

I have little doubt that some who go through the regular justice system will find some satisfaction in their experience. Some accused who are acquitted may feel that their innocence has been vindicated, albeit their acquittal usually says more about the actual test which is addressed in court – has guilt been proved beyond a reasonable doubt. Some victims may feel that giving evidence gave them their day in court and any subsequent conviction was an essential stage in their attempts to put the crime behind them. They may see conviction as demonstrating that they were believed and accepted as reliable reporters of their experience as victims. Sentencing may, or may not, see them feel further recognised and supported in dealing with their experience.

But many come through the system, whether as victims, witnesses or accused (or social workers, lawyers and even Judges), and are left feeling pretty unsatisfied. I can give examples with which you may be familiar.

Sometimes in court the defence lawyer offers a public apology from the offender to the victim and their family. I have done so on some occasions when that has been a specific part
of my instructions. However, when I see such apologies offered in court or reported in the media, I must say that I can understand the response of many victims - that an apology offered in this way is no use as a means of showing genuine remorse. Its very public nature can work against it, and the fact that it is prayed in aid in mitigation can also undermine it.

Many victims would like an apology but a proper apology needs to be more than an often throwaway line in a plea in mitigation. Sometimes a personal letter can help, although some victims wish no contact from the offender. But our own experience of life tells us that the most convincing apologies are delivered face to face.

Despite that, and the other facets of RJ, its use in our system is extremely patchy. A recent mapping exercise, in which some here were involved, confirmed what we suspected about prevalence and good practices – in summary RJ use is pretty isolated in the adult system.

There was also a seminar organised by the Scottish Consortium of Crime and Criminal Justice (SCCCJ), at which the ‘Ripple Effect’ DVD was shown. This is a film produced by South West Scotland CJA in 2012. It features 10 victims of crime speaking about their experience. It has been used as a catalyst for RJ.

Of course there are many in Scotland who are involved in providing RJ processes, and there are stout advocates as well. I should mention SACRO. As a matter of impression SACRO are leaders in the field in Scotland when it comes to RJ and restorative practices. There is also the Scottish Centre for Crime and Justice Research, the Centre for Youth and Criminal Justice, the Restorative Justice Council, the European Restorative Justice Forum and Mary Munro. There is also the newly formed Scottish Restorative Justice Forum which I understand will be chaired by Professor Shapland who carried out the research into RJ in England.

There has been work by SACRO with survivors of childhood abuse at Quarriers Homes. Some of this work can be linked to the use of restorative practices in Truth and Reconciliation Commissions in places like South Africa and, closer to home, in Northern Ireland. There seems to be wider cultural acceptance of RJ in such places, whether as a result of long-standing practice or from its use to deal with more recent community trauma. There is RJ in schools and residential child care settings. There has even been some research here although not on the scale of England.

In England the Government funded a £7 million 7 year research programme looking into restorative justice. Professor Joanna Shapland found that in randomised control trials of RJ with serious offences (robbery, burglary and violent offences) by adult offenders:

• The majority of victims chose to participate in face-to-face meetings with the offender, when offered by a trained facilitator

• 85% of victims who took part were satisfied with the process

• RJ reduced the frequency of reoffending, leading to £8 savings for every £1 spent on restorative justice.

Expert independent criminologists Professor Lawrence Sherman and Dr Heather Strang state that the reduction in the frequency of reoffending found in this research was 27% - that’s 27% less crime, 27% fewer victims following RJ.
Alongside the Sentencing Green Paper in December 2010 the Government published their own further analysis of the data behind the Shapland reports, quantifying the size of the reduction in the frequency of reoffending following RJ as 14%.

This strong evidence of an impact on reoffending is backed up by evidence from Northern Ireland where Youth Conferencing forms the main approach to all youth crime; and by international research evidence.

Cost-benefits

Working from the data in Professor Shapland's reports, the Restorative Justice Council and Victim Support presented the Government with evidence that providing restorative justice in 70,000 cases involving adult offenders would deliver £185 million in cashable cost savings to the criminal justice system over two years, through reductions in reoffending alone.

The Matrix Report - an independent expert analysis of the economic benefits of restorative justice - has revealed that restorative justice would likely lead to a net benefit of over £1billion over ten years. The report concludes that diverting young offenders from community orders to a pre-court restorative justice conferencing scheme would produce a lifetime saving to society of almost £275 million (£7,050 per offender). The cost of implementing the scheme would be paid back in the first year and during the course of two parliaments (10 years) society would benefit by over £1billion.

There was also a report released in July of this year by the Institute for Public Policy Research, entitled “EVERYDAY JUSTICE MOBILISING THE POWER OF VICTIMS, COMMUNITIES AND PUBLIC SERVICES TO REDUCE CRIME”. It concluded that greater use should be made of RJ. It said:

Crime harms victims and communities, and the criminal justice system currently does too little to directly repair that damage. This report has shown that we can both improve public confidence and reduce reoffending by putting victims and communities at the heart of the system, while at the same time delivering a more holistic approach to how we manage offenders in the community. It is time to mobilise the collective power of all relevant actors and institutions, both inside and outside the formal justice system, to achieve reparation for harm done and rehabilitation for offenders.

There are numerous examples of that collective power in action, available on websites supported by some of those here this evening. I will give just one on the basis that it seems to be the first Scottish example. It came from Edinburgh.

This case involved one person harmed who had been seriously assaulted by four young girls. The case had received a lot of media attention and, in terms of restorative justice, it was the first of its kind in Scotland.

The person harmed made it known to the Court that he wished to meet the four girls and tell them the effects of their unprovoked assault on him. Three face-to-face meetings were arranged; two of the girls were sisters so they attended the same meeting.
The outcome of these meetings was an action plan in which the girls agreed to attend a day’s training at the brain injury clinic at Edinburgh’s Astley Ainslie Hospital, which gave them a comprehensive insight into the potential consequences of their offending behaviour.

The person harmed was able to make his voice heard effectively. The outcomes for him included a regaining of control in his daily affairs; he was more confident and has since become an advocate for this process and assisted as a surrogate victim in another case.

The court received a brief report on each of the face-to-face meetings which was taken into account in sentencing. The Sheriff sentenced the girls to three years’ probation.

While mainstreaming such processes for serious crime may be too much too soon for Scotland, it is worth noting that the outcomes for all, especially victims, are often even better in more serious crimes. Can we continue to ignore that for long?

To try to stop the side-lining of RJ it is important to continue to build a coalition of stakeholders that will push and advocate for greater provision of RJ – Howard League Scotland wishes to be continue to be a part of that.

That things have always been done a particular way is, on its own, never a convincing reason to leave them as they are. The work of John Carnochan and the Violence Reduction Unit shows that it makes sense to challenge all preconceptions and prejudices. Old is not always bad, but neither is new.

The 2010 Derick McClintock lecture was delivered by the CSJ. He said:

We need to do things differently at all levels. We cannot simply ask you to do more for less. If we carry on doing what we've always done, in the way we've always done it, we won't get any change.

He was referring specifically to CPOs but his comments are relevant to the use of RJ.

In conclusion I would like to refer back to some words from the book of essays in honour of Professor Derick McClintock. In the Preface, the editors, Ezzat Fattah and Tony Peters, drew on then current thinking and expressed the belief that “restorative justice is the way of the future, that it will become the dominant or even the sole way of doing justice in the 21st century.” This ties in with the bold claim that RJ has been ‘the dominant model of criminal justice throughout human history for perhaps all of the world’s peoples’.

Well, here we are some 16 years on. I appreciate that they may have intended to refer more to England than Scotland but, even so, what can we say about that hopeful prediction? Is RJ the sole way of doing justice now? Is it the dominant way? Is it really a significant part of our system of justice at all? It may feature in youth justice and children’s hearings to some extent. Individuals in the system may use restorative practices or techniques, perhaps through training, perhaps instinctively. But, as a means of delivering not only justice but healing as well, it has been side-lined for too long in the mainstream.

RJ offers the best opportunity in at least some cases to put the victim at the heart of the justice system.
In appropriately chosen cases it can deliver speedy and effective outcomes for victims and offenders. It offers apologies. It can offer the answer to the question “why”. It contributes to desistance.

It has not been mainstreamed here although it has in other countries. The results elsewhere are encouraging, to the extent that discussion elsewhere is now about its use in more serious crimes. There is a quote from a victim of a serious crime on the RJC website in an English case:

"I left the meeting feeling on top of the world and for me it was closure. I know not every victim would want to have a face to face meeting with the offender, but it should not be left to the victim to have to ask for restorative justice."

I sense that we may have missed an opportunity, or perhaps even several opportunities, when it comes to RJ, but it is not too late.

As the predicted dominant or sole way of doing justice RJ had a lot to live up to. But recognition as best newcomer has to be turned into delivery or else it is easy fall into the “where are they now” category. Elsewhere it has been delivering. It has been delivering here when given the opportunity. Let’s hope that the new section in the 2014 Act and an expanded coalition of the willing see us move from apathy or lukewarm approval to rediscovery of the evidence, increased use of RJ in Scotland so we can gather more evidence and a reinvigoration of the whole idea of RJ.