

Restorative Justice: Another Way of Doing Justice in Scotland?

Jamie Buchan, Edinburgh Napier University

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[30 mins. with 30 mins. Q&A]

Introduction

Good morning everyone and many thanks to Barbara for inviting me to speak here and for chairing, and to Alan for technical support; it's an enormous honour to be asked and to be on this wonderful programme. My name's Jamie Buchan and I'm a Lecturer in Criminology at Edinburgh Napier University, where I do research on community penalties, local partnership working and Scottish justice policy, as well as today's topic, restorative justice in Scotland.

I am quite early in my career and not a very experienced restorative justice researcher; unlike many restorative justice researchers, I'm not a practitioner either. However, I have tried in my work to bring my knowledge of Scottish criminal justice and the sociology of penal policy to studying restorative justice. This is what I will also be trying to do today.

I've been involved in a couple of restorative justice research projects as a Co-Investigator, led by my former colleague Giuseppe Maglione, with Laura Robertson as our Research Assistant on the first and Siobhan Butler as our Masters by Research student on the second. I'm also working on a couple of other projects, looking at risk mitigation in restorative justice and restorative justice in Scottish policing, but these are in very early stages, so I will confine myself today mainly to the projects that are actually complete.

I'll start with a little background, before moving on to talk about what restorative justice is, why it came into being as an alternative to traditional justice measures, and some advantages but also limitations and concerns. In the second half of the talk, I'll bring the focus to Scotland, where the government has been trying to promote more use of restorative justice. Our research suggests that restorative justice could be enormously beneficial to Scottish criminal justice, but that there are also significant systemic challenges to its expansion. Our study also chimes with a wider debate in restorative justice circles, one perhaps common to many politically radical or alternative movements - the tension between remaining true to founding principles or engaging with the system to try to change it.

Background

While I was thinking about this talk at the start of this year, I happened to see a couple of English news stories relevant to today's discussion.

You might remember the case of Bibaa Henry and Nicole Smallman, two Black women - sisters - who were murdered in London. Amid wider concerns over racism and the culture of the Metropolitan Police, it had emerged that two police officers took photographs on their phones and circulated them over WhatsApp. This was obviously very dehumanising and traumatic for the victims' families; it emerged afterwards that at least one officer had a history of sending racist messages. Both officers were jailed in December. But not long afterwards, the victims' mother, speaking on the BBC, said:

“I'm repulsed by them if I'm honest, and can't wait to meet Jaffer ... He said he would like to meet with the family and I don't believe he thought that that could happen but it will, because he said he wanted it to happen and I'm going to give him that invitation.”

(link: <https://www.bbc.co.uk/news/uk-england-london-59846780>)

Another story appeared a few days later, this time centring on the Labour MP Stephen Timms. Timms was badly injured when a constituent stabbed him in 2010;

speaking to GB News after the murder of the MP David Amess, he said

“I’ve recently had three letters from her which the police have given to me. I wasn’t aware of their existence until the police gave all three of them... They were written over a period, I think. And in the third of them she says she’s sorry about what happened. So we’re in a restorative justice process at the moment which may lead to me meeting her at some point before she’s released from prison... And I’d welcome that if that opportunity does arise. We’ll have to see whether it does or not.”

(link:

<https://www.gbnews.uk/news/stephen-timms-mp-says-he-would-welcome-meeting-woman-who-stabbed-him-in-2010/198216>)

I think the fact that these two things have been reported so close together, and that other news outlets picked them up so quickly, indicates something that there’s an increasing interest in and understanding of restorative justice in the UK. It’s also appeared recently in a few television dramas such as BBC Scotland’s *The Victim* and more recently the prison drama *Time*. I’ll now speak a bit about what restorative justice actually is, as well as some key issues and challenges in this field.

Introducing Restorative Justice

Restorative justice is often defined as a process “whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future” (Marshall, 1999:5). The ‘classic’ version of restorative justice entails a meeting between a person who has committed a harm or an offence, and the person who has been harmed - for concision, I’m going to use the words victim and offender here, but it’s worth saying that many restorative justice professionals prefer not to use this kind of language. Usually there is also a specially trained facilitator present - a social worker, charity employee or in some situations, a prison officer or police officer. Restorative justice must always be voluntary, on both sides.

That's the traditional model of restorative justice but it's only one possibility. Restorative justice can take place through letter-writing, through 'shuttle' mediation where somebody acts as a sort of go-between, or through other means. There's a very interesting organisation in Shetland, Space2Face, whose practice centres on art - they work with victims and offenders to create pieces of artwork that explore the particular crime and its impact.

The research I'll be talking about today is focused heavily on restorative justice within the criminal justice system, but restorative justice is often used in school settings or to resolve workplace disputes. At a much larger scale, we can see some quite similar principles playing out in things like the Truth and Reconciliation Commission which followed the transition from apartheid in South Africa, or the Gacaca courts which sought to promote healing and reconciliation after the Rwandan genocide.

The exact geographic origins of restorative justice aren't easy to pin down; in my own reading, I've seen Canada, the USA, Australia and New Zealand all claimed as its birthplace; usually this has been with an emphasis on the roots of restorative justice within the indigenous cultures of these countries - the claim being that restorative justice is a 'traditional' way of doing justice.

What we can perhaps be a bit more certain of is *when* and *why* restorative justice came into being. The 1970s was a period of rising crime and dissatisfaction about criminal justice systems in the Anglophone global North, taking place amid a wider crisis in the legitimacy of Western governments. This was felt across the political spectrum - leftists and radicals, alongside the antipsychiatry movement, highlighted the failure of criminal justice to address social harms and the imposition of 'rehabilitation' on the most marginalised in society; liberals pointed to failures in due process and human rights; conservatives argued that these systems were too 'soft' and pushed for harsher punishments and more use of imprisonment - of course it was largely the conservative voices who won out. Imprisonment rates in many Western jurisdictions, especially of course the US, began to rise sharply, and crime became very much more politicised, but this did not seem to resolve the crime problem.

There was also a growing awareness of the needs of victims of crime, whose role in traditional Western criminal justice systems, especially adversarial systems like ours, was to act as a witness in court on behalf of the state-led prosecution, not as an agent in their own right. For many victims this experience was disempowering and impersonal; for others, especially victims of sexual offences or domestic abuse, it was increasingly becoming clear that the justice system could be extremely traumatising as well as not bringing them justice. This was a key focus for feminist organising and for the nascent field of feminist criminology.

Of particular importance in the development of restorative justice was a pioneering article called 'Conflicts as Property', by the radical Norwegian criminologist Nils Christie, who argued that crime needed to be understood as conflict between individuals, and that the acknowledgement and resolution of conflict was essential to a healthy society. The traditional criminal justice response to crime, he argued, constituted the 'theft' of these conflicts by middle-class professional elites who dominated the legal profession. Christie argued that criminal justice needed to be largely dismantled and the conflicts returned to their proper 'owners'.

So restorative justice emerges from small experiments in New Zealand, Canada and elsewhere as an alternative way of doing justice - and one with some very exciting potential. Evidence consistently shows much lower rates of reoffending compared to traditional punishment and justice measures - perhaps because offenders are unable to deny the harm their crime has caused if confronted with it directly. This process is often difficult and highly emotive, but can also be a redemptive one in a way that more traditional and impersonal justice processes might not be.

Victims consistently report feeling empowered and less fearful afterwards, particularly if they can ask about why the crime happened - even if they don't get an apology. For some victims, it can be reassuring to know they were simply in the wrong place at the wrong time, rather than having somehow brought their victimisation upon themselves; in other cases, such as confrontational assault, restorative processes can be valuable because they can acknowledge - as our traditional criminal trials do not - that there is not always a clean separation between

offender and victim. Restorative justice can also reduce the victim's desire for revenge, potentially ending cycles of violence and retribution. And restorative justice can be especially successful in cases of serious violence and/or sexual offending - although this obviously requires particular care to avoid retraumatizing the victim. The film *The Meeting* is a particularly powerful account of this.

Restorative justice has tended also to see itself in terms of a focus on the community - in Christie's account, the rightful owner of the conflict in the first place. A successful restorative justice process can involve members of the community as stakeholders and can promote the reintegration of both offenders and victims. In this account, restorative justice appears as a 'ground-up', community focused response to crime, as opposed to the 'top-down' impositions of traditional criminal justice. This has been a particular feature of the restorative justice practice in Indigenous settings in places like New Zealand; in the UK and Europe, community involvement (itself a contested concept) is less central and harder to square with the use of restorative justice as a tool of criminal justice systems.

Restorative justice, then, seems to offer to fulfil the promise of 'justice and peace' - but it is not a panacea. It should always be voluntary on the part of victim and offender, but its use in some criminal justice systems as an alternative or diversionary measure raises questions about how voluntary it really is. Some victims, understandably, don't want to participate; it may also be less suitable for crimes without direct or clear victims. A highly process-focused and institutionalised implementation of restorative justice also risks making victims into tools for rehabilitating offenders, which clearly runs counter to the key principles of restorative justice.

Further concerns relate to questions of identity and power. I've already alluded to the necessity for extra safeguards in cases involving sexual offending, which is obviously a gendered crime; for similar reasons it's essential to take great care in using it to respond to domestic or family abuse, so as to avoid the perpetrator abusing the process to coerce their victim further. Roxana Willis (2020) has highlighted a class dimension in restorative justice, suggesting that middle-class victims are more likely to feel empowered to speak and to come across as articulate in explaining their

victimisation, while working-class victims might speak less and even downplay their victimisation.

Perhaps even more problematic are racist aspects of how restorative justice has sometimes been deployed and discussed. Claims about the origins of restorative justice in tribal societies can slide rather quickly into exoticising generalisations and stereotypes of these cultures as somehow especially spiritual and essentially pre-modern. That in itself is problematic, especially in countries where there is a substantial Indigenous population. As the Maori scholar Juan Marcellus Tauri (2016) has argued, it can actually lead to a vicious circle in which restorative justice is appropriated from indigenous peoples, stripped of its cultural context and used by justice systems (still dominated by white Europeans) against those indigenous peoples, all in the service of managing an 'indigenous crime problem' - the overrepresentation of Indigenous peoples in criminal justice systems in New Zealand, Australia and elsewhere - that is actually itself a result of institutional racism.

So, our support for restorative justice needs to be tempered with awareness of its limitations and potential critiques. Many of these however relate not to the idea of restorative justice itself, but to its use by or within criminal justice systems to deal with criminal harm.

I will now turn to Scotland and consider the development of restorative justice here in a bit more detail.

Our Research: Restorative Justice in Scotland

Restorative justice has been practiced in Scotland for some time, but only in quite small projects, often with short-term funding. It would be fair to say that it did not 'get off the ground' in the same way as in other jurisdictions, even England and Wales.

But there is now growing interest and awareness about restorative justice worldwide as a response to crime; within Europe, this has found expression in the 2012 EU Directive on Victims' Rights, which establishes minimum standards for the rights and

treatment of victims of crime. The Scottish Government responded to that with the 2014 Victims and Witnesses (Scotland) Act. In fact, though, this act said fairly little about restorative justice, and it wasn't until 2017 that the Scottish Government began to engage in a substantive way with restorative justice as a matter of policy; subsequently, a 2019 'Action Plan' promised to make restorative justice available nationwide by 2023, a goal to which the SNP recommitted - Covid notwithstanding - in last year's Holyrood election.

At the same time of course, the Scottish Government is increasingly under pressure to find ways to deal with crime and reoffending while also reducing our prison population; more than ten years after the report of the Scottish Prisons Commission, we are continuing to over-rely on imprisonment to deal with crime. Covid-19 has put enormous extra pressures on criminal justice - aside from the well-publicised and often very damaging impact on prisoners, there is a lengthy backlog of criminal trials and hundreds of thousands of hours of unpaid work left to carry out.

Our two research projects carried out interviews between 2018 and 2019; the first, funded by the Carnegie Trust for the Universities of Scotland, focused on mapping provision of restorative justice within Scotland. The second, an internally funded Masters by Research project, looked more specifically at restorative justice for adults and expectations and understandings among practitioners.

We have found that many practitioners are in favour of expanding restorative justice in Scotland, but sceptical about the ability of the Scottish Government to deliver on these goals - and that there are significant systemic challenges which stand in the way of achieving the Action Plan.

We focused our research on local authorities because of non-custodial penalties being organised largely through local authority social work departments. Our research found that restorative justice was available in only about a third of Scottish local authority areas - organised sometimes through justice social work and sometimes through charities commissioned by social work departments (especially the charity Sacro). Where it was available it tended to be only for young people as part of the Whole System Approach.

This has almost certainly changed since we carried out the fieldwork, but the dynamics of central and local organisation continue to have substantial impacts, here as elsewhere in criminal justice and much Scottish policy generally. The centralisation of 'marking' - the initial case processing carried out by the Crown Office - has led to fewer referrals to restorative justice, as prosecutors in faraway central offices are unlikely to be aware of restorative justice projects provided locally. This is a particular issue for restorative justice because of its traditional focus on local communities and contexts.

Our interviewees saw support from central government as essential, particularly for providing funding and training to achieve the central goal of the action plan. How to strike the right balance - between centralised support and assistance, but with local responsiveness and community focus - is a very significant concern for the action plan. Community Justice Scotland are currently engaged in providing national coordination for the local development of restorative justice; we have argued that there needs to be strong support for restorative justice from Scotland's central government, but with flexibility and scope for local and community-oriented approaches to develop in response to local needs (easier said than done!).

Information sharing between agencies has also been a challenge. Organising a restorative justice meeting requires criminal justice agencies to share the victim's details with each other. The initial development of Scottish restorative justice policy was happening as GDPR was being rolled out, leading to significant challenges in coordinating any sort of restorative justice activity. Again, one might hope that this has been partly resolved by now.

A further challenge, particularly for the charities, is the lack of consistent and stable funding for restorative justice projects; it is very difficult to develop a successful service, train and retain restorative justice facilitators, if there is no certainty it will be funded beyond the end of this financial year. Again, this is a wider issue for Scottish criminal justice. There are also significant inequalities in funding between local areas, going back many years, which have an impact here as elsewhere. A key implication of our research is that funding for restorative justice needs to be equitable

as well as sufficient, so that the benefits of restorative justice accrue not just to wealthy areas but also to poorer ones (which also tend to be those most affected by crime anyway).

Practitioners often acknowledged its potential for dealing with serious harm involving adults, which is in line with the evaluation evidence we have on restorative justice. But police officers and prosecutors - those with the power to refer cases for restorative justice - have tended to see it as appropriate only for dealing with young people, minor and first-time offending. If we are to realise the potential of restorative justice, we need to promote it as something that can 'work' for serious and violent crime as well.

But there is a much more critical question here, which is whether, by seeking to integrate restorative justice into our criminal justice system, we end up actually losing what makes it valuable. This is a wider issue in the restorative justice literature, known as the 'purist vs. maximalist' debate - the latter tendency arguing that only by becoming institutionalised within criminal justice can restorative justice 'maximise' its good.

Radical writers like Nils Christie (and, more recently, Giuseppe Maglione - 2020) align more with the purist tendency and may be critical of any governmental involvement with restorative justice, and certainly of the use of restorative justice by the criminal justice system. These scholars tend to be intensely critical of criminal justice generally and even of the state itself, and see restorative justice as a radical alternative which must stay outside of the state and may even form part of an alternative mode of social organisation.

On the other hand, the existence of the EU Directive on Victims' Rights, the 2014 Victims and Witnesses (Scotland) Act and the growing formalisation of restorative justice in other countries are clear evidence of an 'institutional turn' in restorative justice, in Scotland and elsewhere - which suggests that the maximalist tendency may be winning out in practice and policy.

In short, restorative justice faces the same challenge as many radical movements - does it try to remain an ideologically pure alternative to the system it criticises, or become part of that system and change it from within? I should say here that our interviewees were very sensitive to this, suggesting that institutionalisation of restorative justice in Scotland could draw more people into the justice system (net-widening) and that it may be necessary to separate restorative justice from justice social work so as to avoid conflicts of interest.

My *personal* concern here, which is not something that I have empirical evidence for and indeed something I hope won't happen, is that policy 'targets' like the 2023 goal of the Action Plan run the risk of creating perverse incentives, to meet the target without actually making the substantive change that the target is meant to signify. Ordinary and mainstream justice interventions like unpaid work or police cautions thus may be rebranded as 'restorative' while containing none of the restorative philosophy. That is perhaps a pessimistic view; certainly, it would please neither the purists nor the maximalists. We need to have not just more restorative justice, but also good restorative justice.

However, restorative justice also offers real opportunities for Scotland as a way of dealing with crime that can repair the harm on all sides, reduce reoffending, help victims and maybe help us to move towards a more understanding and less judgmental way of relating to each other. And there are particular opportunities for the social context of Scotland, as our colleagues Steve Kirkwood and Rania McGoran have written. Our use of justice social work (as opposed to a probation service) offers the chance to ground restorative interventions in a holistic approach to promoting social welfare, perhaps enabling social work to become more restorative while also counterbalancing the tendency of restorative justice interventions to reduce crime to conflicts between individuals.

Conclusion

So, to conclude very briefly:

Restorative justice is a potentially very powerful way of dealing with harm, including crime. For Scotland it may offer a chance to break out of our reliance on imprisonment and move towards a way of responding to crime that as well as being effective, centres forgiveness, healing and integration back into society - but there are controversies about how it is implemented within criminal justice, and indeed whether it should be implemented in criminal justice at all. We have highlighted these as well as more specific challenges for its planned expansion in Scotland. There are real opportunities in Scotland's recent embrace of restorative justice, but realising those opportunities might require us not just to add restorative justice to the criminal justice toolbox, but to use it to rethink our responses to crime and harm.

References and Further Reading

Websites and Other Sources

I mentioned a couple of BBC dramas that portray restorative justice, and both seem still to be available to watch online through iPlayer. *The Victim* (2019) is at <https://www.bbc.co.uk/iplayer/episodes/m00041yc/the-victim> and *Time* (2021) is at <https://www.bbc.co.uk/iplayer/episodes/p09fs2qh/time>. I'd particularly recommend the latter.

Further afield, the brilliant American prison podcast *Ear Hustle* has an episode centring on a restorative justice session available at <https://www.earhustlesq.com/episodes/2018/3/28/dirty-water> (with a text transcript as well). The episode lets you hear the meeting itself, which deals with some very difficult subjects around sexual offending and trafficking. What I think is particularly good about this episode is that it shows how these conversations can be really challenging and don't always end on the note of redemption one might hope for.

The restorative justice academic and advocate John Braithwaite has a useful website with an online lecture and plenty of reading material at <https://johnbraithwaite.com/restorative-justice/>.

Briony Friars in *The Guardian* (2021) - 'After I was arrested and sectioned, restorative justice offered me a lifeline'. <https://www.theguardian.com/commentisfree/2021/sep/01/arrested-sectioned-restorative-justice-police-victims>

The Meeting (2018) is a film in which Ailbhe Griffith, the victim of a violent sexual assault in Dublin, plays herself in a recreation of her restorative justice meeting. As you can imagine, it is sometimes difficult to watch, but an extraordinarily powerful film. Available to stream online (and free trailer) at <http://themeetingfilm.com/>.

Restorative Justice Network - <https://restorativejustice.org/>

Scottish Government *Restorative Justice Action Plan* (2019). This Action Plan sets out the goal of making restorative justice available nationwide by 2023. It's available at: <https://www.gov.scot/publications/restorative-justice-action-plan/> .

Space2Face <https://www.space2face.org/> - arts-focused restorative justice charity based in Shetland.

Why Me? <https://why-me.org/> - English restorative justice charity set up by one man who was the victim of a violent burglary, and the man who burgled him.

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