

Restorative justice and youth sentencing: The rules of the playground forgotten

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Introduction

It could be said that a many of life's important lessons are learnt on the playground. It is the place where we learn to interact with other people and develop many of the social skills that we take for granted. Our first encounters of commercial transactions are trading toys or games with friends; we begin to understand rules and regulations through playing sports; we learn how to develop relationships with our peers; and we learn about the uglier sides of human nature through experiencing and witnessing bullying, fighting and cheating. It is through the latter of these experiences that we also first encounter and experience the concepts of natural justice, and restorative justice (RJ).

When experiencing these events we have a gut reaction to the wrongs committed to and by our peers because we have an innate sense that there are right or good, and wrong or bad, ways to act and treat each other. The school playground as a microcosm of society feels the ripple effects of these events. We learn that there has to be a resolution and that we may have to say "sorry" and make it up to our friends or peers, or if they wish, to agree to leave them alone. At the most basic level these interactions and offers to make amends are RJ in practice between young people. They help the cuts and bruises of our sometimes brutal interactions with others, heal.

For a long time the mainstay of criminal justice policy was the deterrence of bad behaviour through punishment. This article looks briefly at how the youth justice system (YJS) has attempted to move forward and incorporate the rules of the playground into its sentencing philosophy and practice, and focuses on where it falls short.

'No more excuses': A new youth sentencing philosophy and practice?

The modern YJS arguably dates back 100 years to the Children and Young Persons Act 1909, which established separate courts to try children and young people. This was an early recognition that children and young people deserve special attention within the criminal justice system (CJS). Not a great deal had changed until the Labour government of 1997 promised to bring about a major reform of the YJS with the White Paper, 'No More Excuses'.¹ At the heart of this reform was a supposed change in the YJS philosophy of sentencing. This would focus less on deterrence and more on the use of RJ to promote responsibility, reparation and rehabilitation. The paradigm shift was subtly enshrined by section 37 of the Crime and Disorder Act 1998 (CDA 1998), which states that "the principal aim of the youth justice system [is] to prevent offending by children and young persons". This is a slight difference from the aim of the adult CJS, where the focus is on the 'reduction' of crime.²

1. **Home Office (1998)** *No More Excuses - A New Approach to Tackling Youth Crime in England and Wales*, London: HMSO, <http://www.homeoffice.gov.uk/documents/jou-no-more-excuses?view=Html>
2. **Sentencing Guidelines Council (2009)** *Overarching Principles - Sentencing Youths. Consultation Guideline*, http://www.sentencing-guidelines.gov.uk/docs/consultation_guidelines_overarching_principless_sentencing_youths.pdf.

The most substantial influence of RJ in the new regime occurred with the introduction of:

- Reparation Orders, under section 67 CDA 1998, which would require the offender to make the reparation to specified persons, that is a victim, or to the community at large.
- Referral Orders under section 1 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), which entails the referral of young offenders to multi-agency Youth Offending Panels (YOPs) and subsequently Youth Offending Teams (YOTs). The young person and YOP come to an agreement about a series of activities that the young person will carry out, which, under section 8(2) YJCEA 1999, may include mediation sessions with any...victim or other person or unpaid work or service in or for the community. The Youth Justice Board specifically state the aim of these agreements are “to repair the harm caused by the offence and address the causes of the offending behaviour.”³

From these provisions, it would appear that there has been a step change in sentencing philosophies from a heavy emphasis on retribution to restoration and reparation. However, the Reparation and Referral Orders are only available in limited circumstances (by virtue of the YJCEA 1999 and the Powers of Criminal Courts Sentencing Act 2000) and will generally not be considered for repeat offenders, more serious crimes that might otherwise attract a custodial sentence, or offences that must be tried and/or sentenced at the Crown Court.

Furthermore, the activities that make up a Referral Order are selected from a menu containing other punitive and rehabilitative activities, reducing the likelihood that a restorative option will be chosen and possibly diluting the restorative nature of the outcome. With that in mind the thrust of RJ philosophy in the YJS clearly has its limits, which leads to a questioning of whether YJS has really changed or whether it is more of the same with a couple of restorative options thrown in for good measure.

Furthermore, fundamental to the philosophy of RJ is its victim-led approach. The restorative process seeks to empower the victim to take a lead to ensure a satisfactory outcome is reached, which helps heal the emotional and psychological wounds often caused by crime. The process also brings the young offender face-to-face with the harm caused, encouraging an understanding of the effects of his or her actions and the impetus to take some responsibility. However, in the YJS model the victim is not always required to be a part of the process, with the YOP sometimes taking the victim's role. In such circumstances it is difficult to imagine how a young person would be able to fully understand their actions from talking to a panel of unknown adults. It must surely be the case that if the victim does not want to be part of the process then RJ cannot take place. If the process continues with the offender agreeing some sort of restorative activity to the community, then it might take on a distinctly punitive feel. Worse still is the fear that when the victim is not present restorative activities become tick box exercises, with the focus being on completing the Referral Order, rather than achieving meaningful reparation, healing and rehabilitation.

3. Youth Justice Board website <http://www.yjb.gov.uk/en-/yjs/SentencesOrdersandAgreements/ReferralOrder/>

If there are gaps in the new YJS philosophy it would be unsurprising if there were not gaps in practice too. Let's start by looking at spending. A study by the Centre for Crime and Justice Studies published in 2008 found that 64% of the Youth Justice Board's spending was on custodial places, which was ten times more than was spent on preventative measures. Effective RJ is an expensive enterprise requiring professional expertise and possibly months of time per case (see other articles from practitioners in this journal). If RJ is to be expected to change the YJS then it would seem logical to shift investment away from custody and into RJ practice.

This leads us to the next dilemma; inconsistent RJ practice on the ground. There are no fixed standards of RJ practice, no single prescribed RJ training programme and no accreditation of RJ practice or training within the YJS. The likelihood is that there is a mix of exceptional practice, with skilled and knowledgeable practitioners, and the exact opposite. Surely, without investment in training and accreditation to ensure consistent high standards there will be some young people who will be getting a raw deal.

It is a harsh criticism, but when seen from a bird's eye view, the changes brought by the revamped YJS philosophy seem less acute, and the use of RJ less genuine than might be imagined from reading the rhetoric. The RJ flavoured sentencing options appear more like roses planted in a bed of weeds, destined to be overgrown and suffocated.

RJ sentencing from the youth perspective

The above is somewhat abstract, so what might all these changes look like to a young person on the ground when faced with his 'restorative' sentencing options? Might he even know or believe it to be restorative in the first place? Our young offender is most likely to be from a poor background, suffer from familial abuse, be excluded from school and perhaps from a Black, Asian or minority ethnic background. He might have encountered the police on a few occasions before by being stopped and searched. He might have even been moved on from a public place if loitering with friends or even been subject to Dispersals Orders or Anti-Social Behaviour Orders. He most likely has few aspirations and hopes and may even feel failed by society. He has been convicted for the first time for theft from a small local shop and been referred to a YOP. The members of the YOP and YOT may have received little or no training on restorative practices and as part of the Order he agrees with the panel to remove graffiti from the walls of his local area.

Our young offender's experience of RJ is likely to be coloured by his life experience and encounters with CJS on previous occasions, and from the experience of Independent Academic Research Studies (IARS) experience young people view the CJS and its agents as oppressive and authoritative. It is therefore likely that his RJ 'sentence' will just be seen as another punitive measure and lose its essence and power to change young people's minds and hearts.

Time to learn some lessons

The UK is not alone in its endeavour to introduce RJ into the CJS to deal with youth offending and there are many opportunities to learn. IARS is currently involved in a comparative research and campaigning project between the UK, Germany and Hungary to understand and share RJ best practice. The project will take place over three years and is being funded by the European Commission.⁴ The project presents a unique opportunity to learn from other countries that have arguably been more successful in incorporating RJ into their CJS than the UK. It also presents an opportunity to gather youth-led evidence on what young people think about the effectiveness of the UK's restorative disposals. Taking note of this work will enable practitioners and policy makers working in the CJS to evaluate the efficacy of their work and reflect on the road that still needs to be travelled to make RJ a mainstream practice UK.

Conclusion

To enliven the spirit of RJ within the YJS, surely the philosophy and practices need to be more deeply embedded than they currently are, by making a number of changes including:

- Expanding the use of RJ with young people to a broader range of offences: IARS and ROTA recently carried out a study on the use of RJ with hate crime called the Restoring Relations Project and found that the processes are just as well suited (and possibly better suited) to more serious crimes.⁵
- Expanding knowledge of RJ philosophy and practice within the YJS and CJS agencies: a young person might encounter a myriad of agencies after committing an offence, from the police, to probation and the spirit of RJ will surely have better effect if all agencies participate.
- Training and accreditation: This is vital if young people are to be given a good service and more importantly the chance to really make amends for their crimes and enable victims and offenders to move on with their lives in a positive way.

The YJS should take a look at itself and think about what needs to be done to ensure the rules of the playground are clearly recognisable and visible in the YJS.

4. You can find out more information about this project and follow its progress at www.iars.org.uk

5. <http://www.rota.org.uk/pages/RRP.aspx>