
The hydra-headed monster of sexual and domestic violence: a case for restorative justice?

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Abstract: The article seeks to ascertain the relevance of restorative justice in sexual and domestic violence, and also extrapolates in depth its relevance with respect to Daly and Cossins' arguments. While Daly seem to rely on her Sexual Assault Archival Study, as empirical evidence to hold that restorative justice can play a key role in providing victims of sexual assault justice, Cossins insists that the evidence is 'insufficient' to allow for restorative justices practices, and rather would prefer a legal reform. The question arises whether there could be a possibility for an integrated approach?

Keywords: restorative justice; sexual and domestic violence; criminal justice; archival study; Daly and Cossin's argument; gendered violence; stigmatisation.

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1 Introduction

The thrust of the essay is to ascertain the relevance of restorative justice in sexual and domestic violence. It begins by considering whether the term 'gendered harms' more appropriately describes sexual and domestic violence; and then acknowledges the reluctance of most writers to advocate a 'complete alternative' to the existing criminal justice system, despite its obvious failure to curb the trend of sexual and domestic violence. It also observes that in domestic violence cases the use of restorative justice measure without appropriate 'safety' measures has not been attractive. The second part extrapolates in depth the relevance of restorative justice in sexual assault cases using

Daly and Cossins' arguments. While Daly seem to rely on her Sexual Assault Archival Study, as empirical evidence to hold that restorative justice can play a key role in providing victims of sexual assault justice, Cossins insists that the evidence is insufficient to allow for restorative justices practices, and rather would prefer a legal reform.

2 Sexual and domestic violence: the right context

In different parts of the world, women are the most susceptible to violence.¹ A study conducted by the World Health Organisation (WHO) on domestic violence involving ten countries² amongst 24,000 women found that domestic violence is wide spread but with variations.³ The nature of the violence takes diverse forms which include sexual, physical or emotional abuse by an intimate partner (family member, authority figure or other related persons); honour killing to preserve family honour, and also, amongst others the systematic sexual abuse in conflict situations.⁴ It has been shown by experts that such violence could lead to devastating long-term health related consequences, even after the abuse has ended.⁵ It is a trend to be curbed by all means necessary. Sexual or domestic violence is not peculiar to females but extends to males⁶ and children as victim as well, and also within other varied contexts.⁷ It is apt to be cognisant of the variety of meanings and context of sexual and domestic violence.⁸ Daly suggests the use of the term 'gendered harms' as an 'umbrella concept', to include both sexual and domestic violence.⁹ However, Hudson suggests the use of the term 'gendered and sexualised violence'.¹⁰ It would seem preferred to consider cases in their peculiar contexts to avoid ambiguity.

3 Can restorative justice be a replacement?

The capacity of the criminal justice system to adequately handle the soaring cases of sexual and domestic violence has raised concerns in recent years, especially as it relates to its potential to achieve justice and safety for victims.¹¹ Hudson asserts that despite it being the dominant form of justice for years it has not proved effective in dealing with domestic and sexual violence. Busch also opines in agreement that 'one does not have to search far to discover the inadequacies of the court process for domestic violence victims.'¹² She cites the exclusion of victims from playing an active role in determining outcomes, failure to hold offenders accountable for their violence.¹³ Usually there is the rhetoric that the state has stolen crime from the parties of interest,¹⁴ Stubbs however contends that is not true for the criminal justice system which has for a long time ignored the women's call for protection (legal intervention).¹⁵ He states the rhetoric is 'inaccurate in its account of domestic violence'.¹⁶

The contention is that the traditional legal system does not provide for better satisfactory outcome. Despite the loopholes in the legal system there seem to be reluctance in advocating its replacement with restorative justice. Hudson concedes that the area is one of those 'hard cases'.¹⁷ Zehr calls for 'great caution' in the application of restorative justice principles in matters of domestic violence, which he sees a very

problematic area.¹⁸ Busch warns that 'there are risks in discarding the court system without establishing whether proposed alternatives are capable of providing as much protection as it presently does'.¹⁹ Daly rather jettisons the idea of 'replacing' the established court system with restorative justice.²⁰ Stubbs posits that 'the preference of some restorative writers to posit restorative justice as a complete alternative to criminal justice is ill advised'.²¹ There is really no consensus on what the scope of restorative justice should entail.²² Apart from New Zealand and Australia, other jurisdictions have excluded sexual offences from the restorative justice agenda, on ground that it is too lenient in the manner of its dealing.²³ The crime is seen as too sensitive or too serious to be handled by a restorative process.²⁴

Restorative justice focuses on repairing harm done to the victim while holding the offender accountable.²⁵ Usually in an informal process (different from the typical court setting) the victim is brought face to face with the offender along with his supporters or family members to make him take responsibility for the impact of his crime.²⁶ After the shaming process the offender is reintegrated, to prevent stigmatisation.²⁷ Restorative justice unlike the court process offers the victim the opportunity to participate in the decision making process; giving the victim a 'voice'.²⁸ By ensuring the offender takes responsibility for his behaviour, the victim is vindicated from blame or revictimisation; also restorative justice can help restore relationships if that is the desire of the victim.²⁹

Despite these attractive potentials of restorative justice some scholars share the view it could pose problems in peculiar cases of gendered violence.³⁰ They argue that the informal process can be used by the offender to control and blame the victim, rather than accept guilt. There is also the tendency to pressure victim to accepting outcomes. For instance, the victim may not want to see the offender again, and seeks legal intervention but the group maybe pressuring the victim to accept an apology or forgive.³¹ The informal process of restorative justice may only further permit the 'power imbalance' between the offender and the victim, and reinforce abusive behaviour. A face to face contact might do little to change the offender's behaviour. Daly suggests that restorative processes need not involve a face to face meeting, but victim and offender can be represented.³² In cases of gendered violence the support of a community (especially where it has an outdated perception or understanding of what constitute appropriate mannerism for females) to a victim, is doubtful. The community may only succeed in reinforcing male dominance and the culture of blaming victims. Though the restorative justice process allows for friends and family support there is the propensity the victim may have divided loyalties, and complicate the issue further.³³ Of more importance perhaps, is the symbolic implication; where the offender's crime is seen as been too serious to be treated lightly, and when this is not done, the perception is that the wrong message is sent to the offender.³⁴ Stubbs, with respect to dealing with domestic violence argues there is a need to seriously consider the option of combining community-based initiatives with the criminal justice system beyond the 'formal/informal dichotomy'.³⁵ Busch argues that there has been the propensity to prioritise reconciliation over the victim's need and legal right to safety.³⁶ She argues that 'it may be dangerously naive to believe that shaming and a process of apology and forgiveness will result in the perpetrator abandoning his use of violence'.³⁷ However, what is needed is a culture of safety, aimed at providing victims 'safety and autonomy' this is achievable through an 'integrated, coordinated government and community response' to issues of domestic violence.³⁸

4 Daly-Cossins' argument

Another major challenge to ascertaining the relevance of restorative justice in sexual assault cases is that there is not much empirical evidence as to its use.³⁹ Daly contends that the lack of empirical evidence is the reason why the debate on the rightfulness of restorative justice for gendered violence is 'polarised', and also because of 'the symbolic politics of justice in responding to violence against women and child victims'.⁴⁰ She conducted a study – the Sexual Assault Archival Study (SAAS) aimed at providing empirical evidence on restorative justice in gendered violence (the study does not however cover experiences of the victims, nor what was said in the courtroom or at the conference). The study compares conferencing and court approach to youth sexual offence to determine which legal intervention is preferred.⁴¹ The SAAS involved 385 cases with 365 young persons (226 court cases, 118 conference cases and 41 formal cautions) for over a six and half years (1 January 1995 to 1 July 2001). Of the 226 court cases the study show that 115 were proved of a sexual offence (51%) but out of the 118 conferences cases 111 were proved (94%). On the sanctioning process however it was found that, where a young offender pleads guilty there was a 'potential' for an officially recorded conviction, which compared to an admission in a conference there was no potential for conviction.⁴² The court could also impose a maximum detention time of three years meanwhile in a conference this cannot be done.⁴³ Daly explains that the penalty structure of the court is poised to mainly deter young people from offending by seemingly being harsh, but also focusing on rehabilitation and self-reformation through supervision and counselling as a secondary choice; but for conferences, it was mainly on rehabilitation and self-reformation together with verbal or written apology to victim, with community service as a secondary choice for punishment.⁴⁴ It was found that it took longer time to conclude a court case than of the conference; while the court case took about 5.7 months the conference case was 2.5 months, the court cases also frequently changed jurisdiction.⁴⁵ Daly argues that critics of conferencing fail to consider the victimising effect of the formal court process on victims of sexual violence, which is can be inferred from SAAS. She contends that they can only tell their story of how the offence affected them in very 'limited ways' unlike in a conference.⁴⁶

Furthermore, the post-SAAS offending analysis showed on the overall that the reoffending rate was higher for courts (66%) than conferences (48%).⁴⁷ Daly also finds through the SAAS research that a 'targeted programme for adolescent sex offending may have a greater impact on reducing reoffending than whether a case is finalised in court or conference'.⁴⁸ In effect, youths who have participated in the Mary Street Programme (engaged in counselling for adolescence sex offending) had a lower level of recidivism than those who did not take part in the counselling programme. She notes that Mary Street Programme is more used in conferences than in courts, though nothing stops the court from doing same.⁴⁹ She seems to suggest that a conference is more likely to engage in such programme than the court.

Daly also asserts that a 'major finding' in the SAAS is the fact that the court is a place where youth offenders can deny offending; the results show that out of 226 court cases, only 'half' (115, that is 51%) was proved unlike in conferences where 94% was proved. She stresses that the successful denial, has a lot to do with the difficulty prosecutors encounter in sexual assault cases.⁵⁰ The 'evidential hurdles are especially high in establishing guilt'.⁵¹ She argues that this study should challenge the thinking that the

court sends 'strong messages' (by imposing strong penalties on offending) or that it has greater potential to vindicate victims compared to restorative justice conferences;⁵² because it shows the formal court process cannot vindicate the harm suffered by victims – therefore victims should not assume it can.⁵³

Cossins expresses pessimism about the empirical evidence that claims restorative justice can better deal with sexual assault cases, which she considers as 'speculative'.⁵⁴ She contends that the experiences of those who went through a court process as distinct from a conference would be speculative unless the victims are surveyed and their satisfaction level measured.⁵⁵ This was not the criteria used for SAAS. Cossins, to establish her claim that the restorative practice of conferencing is an inappropriate tool to deal with 'child sexual abuse'⁵⁶ uses two conference cases from the In-Depth study.⁵⁷ The first case involved Rosie a 12 year old assaulted by Rick, a 17 year old army cadet; at the conference Rick never admitted the claims of indecent assault. She thought at the end that the undertaken reached was too lenient since it required the offender to undergo counselling and send a written apology. There was no requirement of community service. Overall, she was happy with the apology, and the impact of the conference. The second case Cossins refers to involves Tanya a victim of sexual abuse by her step-brother for over three months; she also had conflict with her parents who believed she was part of the problem. Tanya like Rosie had resisted the idea of conferencing because she felt it was going to be a soft option – she wanted him in prison. At the end the undertaking required that the offender write an apology, purchase a gift and a card for her, was not to be alone with her and to attend a counselling session. She was clearly displeased with the outcome. Tanya would not consider the apology as sincere, and thought the purchase of gift was 'stupid', neither did she consider the conference to have helped her. Cossins asserts that both cases help show the limits of the use restorative justice, as shown in the lenient agreement, intimidation of the victim during the process, and the offender's partial admission (and not accepting responsibility).⁵⁸ Cossins believes if Tanya had gone to court she would have had a better option because she would have avoided the experience of intimidation and fear; and also engage the benefits of the 'vulnerable witness protection' (which allows the victim to give evidence in court via CCTV). She opines succinctly, that 'the court process does benefit the victims of sexual assault, since the vast majority of victims involved in court cases did not have to testify and were at no risk of re-victimisation.'

However, Daly doubts the authenticity of this assertion; she notes that the CCTV recordings which Cossins says guarantee the vulnerable witness protection (as applicable in most Australian jurisdiction) is limited to just the 'committal proceedings and prosecutor's evidence in chief'.⁵⁹ So in essence the cross-examination could still be intimidating. Concerning the undertaken to buy gift for Tanya, Daly thinks it was an inappropriate and poor conference practice,⁶⁰ she argues that reconciliation or the victim's forgiveness must not be seen as a goal of restorative justice for any offence.⁶¹

Furthermore, Cossins concedes the need for radical reforms as a response to the failings of the trial process in the legal system;⁶² however, Daly notes that a plethora of evidence on court response to sexual assault suggests legal reform 'alone' is not apt.⁶³ Daly argues for the need to encourage more admission to offending; she argues that a change of societal attitude is needed towards sexual offending, so that it becomes less punitive and stigmatising, because suspects are not going to admit to offences if they knew they were going to face a future of shame.⁶⁴ Daly also advocates as a step to change, apart from admissions, that effective treatment programmes has to be embraced,

‘not just with conferences or restorative justice’.⁶⁵ Both Daly and Cossins agree that there is a need for appropriate treatment programmes. Importantly, the SAAS reports that recidivism prevalence was low for all young offenders who had undergone the treatment programme, whether through the conference or court. Cossins hold to this finding to state that ‘the main issue concerning sex offenders is the need to mandate the treatment rather than the process by which the offender arrives in the treatment programme.’⁶⁶ Daly however seem to identify a unique difference with the conference process; she argues the process allows victims to describe the effects of an offence on them, also participants are able to challenge offenders when they make excuses or deny the seriousness of the offending.⁶⁷ This kind of ‘interaction and communication’ in her view can be utilised in the criminal process as well. Cossins however maintains her position that since the emphasis is on the treatment programme as the best option, not necessarily a determinative approach of court or conference then there is no need for a private conference process given the seriousness of the offence and the need for ‘assured and measurable outcomes’.

5 Conclusions

If anything is obvious, is that the criminal justice system have failed to adequately provide protection and justice for victims of sexual and domestic abuse. While on one hand there is the need to deal with offending seriously, there is also the need to take maximum care not to revictimise the victim, or stigmatise the offender, such that his reintegration into the community becomes impossible. This could have offensive repercussions. The Sexual Assault Archival Study (SAAS) as conducted by Daly suggests that a reduction in recidivism does not stem from either a court or conferencing approach, this therefore seem to strike a meeting point. While legal reform is commendable, it must also seek to include the treatment programmes and allow for restorative practices such as victim participation in the process, to enhance satisfaction levels, and prevent revictimisation. Even Daly concedes that the established court system cannot be replaced with restorative justice, but what can be done in our view is an incorporation of necessary strategy to help curb the trend of sexual and domestic violence. An integrated approach is the key.

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- 32 Daly (n 8) 77.
- 33 For instance, the same person may be the supporter of both the victim and offender (a parent of a boy who sexually abuses the sister).
- 34 Daly (21) 338.
- 35 Stubbs (n 14) 46.
- 36 Busch (n 11) 243.
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- 38 Ibid 247; She cites the Pennell and Burford Model of conferencing which adequately developed a strategy to prevent violence (during and after the meeting); the model ensured that right and professional participants were invited, and properly prepared for their roles.
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- 40 Daly (21) 350.
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- 48 Ibid 350.
- 49 Ibid 351.
- 50 Ibid 351.
- 51 Ibid 353.
- 52 Ibid 351.
- 53 Ibid 353.
- 54 Cossins (32) 362; at 363 she states that 'while advocates propose that restorative justice will 'heal the harm', this is not a universal finding'.

- 55 Ibid 368; Daly (21) 341. The SAAS by Daly only sought to answer questions about the court and conference in relation to sexual offences, but did not involve interviewing victims or about their experience with the legal process or conference processes.
- 56 Daly in her reply emphasised that her research is limited to ‘youth’ sexual offending not as imagined by Cossins – ‘child sexual abuse’, would mean an adult who sexually abuse a child, Daly (n 8) 562.
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- 58 Cossins (32) 370.
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- 66 Cossins (32) 374.
- 67 Daly (n 8) 564.