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Procedural justice and persons with mental illness who offended

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1. Introduction

Over a period of five years (2014-2019), Ghent University funded a large multidisciplinary research project “Developing multidisciplinary strengths-based strategies for mentally ill offenders” (BOF14/GOA/006) in which six professors and five PhD students from different departments (i.e. criminology, special education and psychiatry) have collaborated. The main objective of this multidisciplinary study was to develop strengths-based alternatives – in relation to the dominant risk-oriented approach – towards persons with mental illness who offended (PMIO). The study was explicitly grounded in a strengths-based approach focusing on capacities, capabilities and strengths of PMIO and their families, rather than on their shortcomings. The study had five research tracks with a central place for the experience of PMIO and their family. Overall, not less than 319 different individuals (286 PMIO and 33 family members) participated in focus groups and in-depth interviews, organised in a diversity of living and treatment contexts (Aga et al. 2019).

This paper discusses the results of a research track of the project that focused on procedural justice as experienced by PMIO (Wittouck, 2019). The law and judicial procedures and measures affect the (psychological) well-being of those involved (i.e. therapeutic jurisprudence). One of the aspects that has an important role is the interaction between professionals and persons involved in judicial procedures and measures (Wexler, 2016; Winick & Wexler, 2015). According to the theory of procedural justice,
which specifically deals with interactions between power holders and citizens, the way in which these interactions come about (i.e., the decision-making process) is at least as important as the outcome of the interaction (i.e., the decision) (Blader & Tyler, 2015). In our study, we aimed at gaining insight into how PMIO experience interactions with professionals that are involved in the effectuation of an internment measure (i.e. court-mandated treatment with judicial supervision following not criminally responsible adjudications in Belgium), and what they consider to be important in relation to these interactions.

2. State of the art

PMIO are highly prevalent in the criminal justice system. One way of responding to PMIO is subjecting them to court-mandated treatment which is typically combined with ongoing judicial supervision. Examples of court-mandated treatment are drug or mental health courts, treatment in forensic psychiatric hospitals, not criminally responsible adjudications, and (community) jail or prison diversion programs (Hiday & Burns, 2010). Court-mandated treatment aims reducing recidivism and improving mental health outcomes in PMIO, and succeeds to a certain extent in this goal. However, relatively little is known regarding how court-mandated treatment works (Polaschek, 2019).

Previous research has shown that the working alliance, a collaborative relationship between an individual and a professional aiming at overcoming the individual’s difficulties, plays a pivotal role in the process and outcomes of court-mandated treatment and/or judicial supervision. The importance of this working relationship has also been acknowledged by PMIO themselves (Coffey, 2006; Serran & Marshall, 2010; Skeem, Louden, Polaschek, & Camp, 2007). However, the development and maintenance of the working alliance is challenged in the context of court-mandated treatment due to a tension between care and control which is related to the different roles and goals of the mental health system and the criminal justice system respectively (Ward, 2013). Guiding principles are necessary to further develop forensic and correctional rehabilitation models with respect to how mental health and/or criminal justice professionals can take both care and control into account while working with PMIO during court-mandated treatment. Targeted research is necessary to develop such guidelines (Barnao, Ward, & Casey, 2015; Epperson, Thompson, Lurigio, & Kim, 2017).
Only a few empirical studies have directly addressed the tension inherently present in working alliances between PMIO and mental health and/or criminal justice professionals during court-mandated treatment. In these studies, relational fairness has been suggested as a means to reconcile the tension between care and control in these alliances (see for instance Epperson et al., 2017; Skeem et al., 2007). Relation fairness can be related to procedural justice theory. Procedural justice theory is a relational model specifically addressing interactions between power holders and their public and posits that people attach major importance to the process ('how') next to the outcome(s) of interactions with power holders ('what'). Indeed, in the context of court-mandated treatment, professionals from the criminal justice system as well as professionals from the mental health system are holding power towards PMIO. An interaction with a power holder will be perceived as procedurally just, even when the outcome of the interaction (such as a decision) is unfavourable, when the interaction is characterized by the following dimensions: 1) 'neutrality', experiencing the power holder as objective and unbiased, 2) 'voice', being given the opportunity to express one's view, 3) 'respect', experiencing to be treated with dignity and respect, 4) 'trustworthiness', experiencing to be treated with genuine concern and consideration, 5) 'information', experiencing to receive sufficient information and clarification regarding the interaction and decisions, and 6) 'performance', experiencing the power holder to deliver good work and doing a good job (Tyler, 2013; De Mesmaecker, 2014; Lind et al., 1990). Experiencing procedural justice or injustice during an interaction with a power holder affects attitudes, emotions, and behaviour of the person involved towards the interaction and the subsequent outcome(s), such as satisfaction regarding the interaction, acceptance of the decision, feelings of self-worth and social acceptance, motivation and cooperation. Procedural justice theory has hitherto mostly been applied to law enforcement and court settings. According to procedural justice theory, experiencing procedural justice during interactions with power holders involved with court-mandated treatment programs can facilitate the therapeutic process (Blader & Tyler, 2015). Previous research showed that interactions resembling procedural justice in the framework of judicially supervised treatment can influence its process and outcomes — e.g., in regard to mental health and recovery, and in regard to recidivism and desistance (see Wittouck & Vander Beken, 2019).

3. The study
In the study, we have focused on the potential role of procedural justice theory as a normative framework for power holders working with PMIO as a means to develop and maintain working alliances with PMIO. The main research question was: How do PMIO experience their interactions with power holders from the criminal justice system and the mental health system during court-mandated treatment, and how do these experiences relate to the theoretical dimensions of procedural justice theory?

A qualitative inductive empirical study was carried out in which the lived experiences of persons subjected to an interment measure (PSIM) regarding their interactions with power holders during court-mandated treatment are put at centre-piece. Semi-structured interviews were administered of a heterogeneous sample of PSIM in Flanders. Of these interviews, 35 were analysed to address the present research question.

4. Results

All dimensions of procedural justice were identified in the accounts of PMIO regarding their interactions with power holders during court-mandated treatment. Evidence was found for the importance of the traditional procedural justice dimensions of respect, trustworthiness, voice and neutrality, as for the dimensions of information and performance that were recently proposed to extend procedural justice theory. In line with previous research (Skeem et al., 2007), an additional dimension of procedural justice is proposed in the context of court-mandated treatment: “authoritativeness”. The dimension of authoritativeness relates to the difficulties concerning the presence of both care and control during interactions between PMIO and power holders in the context of ongoing court-mandated treatment. An authoritative approach consists of making compromises or shared decision making, being firm but fair, and employing positive pressures to motivate compliance. Thereby a power holder can approach care and control as requirements of each other, align the recovery and desistance paradigm with court-mandated treatment programs, and develop and maintain beneficial working alliances with PMIO.

In essence, it is important for PMIO to be treated as human beings. Such an approach includes the following aspects: power holders should 1) employ a friendly, polite and calm approach, 2) recognize and acknowledge their strengths, difficulties and needs, 3) work towards solutions and re-integration instead of merely aiming punishment, 4) actively involve PMIO in ongoing decision-making processes,
5) provide information and explanation regarding the purpose, content, and goal of every treatment and judicial aspect of court-mandated treatment and regarding expectations of PMIO, 6) perform their jobs in a professional and consistent manner, 7) and be authoritative instead of authoritarian.

5. Conclusion

Our study shows the potential of a procedurally just approach that reconciles the tension between care and control in the development and maintenance in working alliances between PMIO and power holders in the context of court-mandated treatment.

The aspects of a humane approach as formulated by PMIO should be further elaborated on -by a conjunction of PMIO, power holders and scholars-, and integrated in forensic and correctional rehabilitation models with respect to attitudes and behaviour of mental health and/or criminal justice professionals towards PMIO (Barnao et al., 2015). Doing so, power holders can be reminded of how their (verbal and non-verbal) behaviour can influence change processes and (compliance) behaviour in P(M)IO (De Mesmaecker, 2014; Winick & Wexler, 2015). The development and maintenance of beneficial working alliances between PMIO and power holders should be regarded as equally important as the administration of strategies and techniques (Ward & Brown, 2004). Wexler (2016) states "procedural justice is so basic that it ought to be part of all courts at all times". Actually, our findings point out that procedural justice is so basic that it should be part of every interaction in the criminal justice system and the mental health system, especially in the context of court-mandated treatment, at all times.

Congruent with a compliance-based approach, procedural justice could be exploited as a mere means to empower power holders (Tyler, 2013). In this case, resistance can be a way to ensure agency (Rubin, 2017; Tew, 2006). However, procedural justice can also be approached from a strengths-based human rights perspective, with its emphasis on human dignity, social recognition, autonomy, and effective participation (Ward & Syversen, 2009), congruent with a legitimacy-based approach based on voice, neutrality, trust and respect (Tyler, 2013) In the context of coercion, procedural justice can reconcile care and control as it balances the rights of the individual and the community in the context of coercion (Skeem et al., 2007). Therefore, and when considering a human rights perspective, coercive
interventions and measures, should always be a last resort, also within court-mandated treatment. Formal social control and coercion may keep people from offending but it does not support them in developing prosocial behaviour (Bottoms, 2001; Tyler, 2013). In the context of a legitimacy-based approach, compliance instead of resistance can become a way agency to ensure agency. Procedural justice thus becomes a means to empower PMIO too (Tew, 2006).

References


程序正义与有刑事违法行为的精神病人

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一、引言

近五年来（2014-2019），根特大学赞助了一项名为“从优势入手，为有实质犯罪行为的精神病人建立多学科对策”（BOF14/GOA/006）的多学科研究项目，来自不同院系（即犯罪学、特殊教育学、精神病学）的六名教授和五名博士生合作参与了这个项目。相比于主流的风险导向路径，本次研究的主要目的是为有实质犯罪行为的精神病人（PMIO）建立以其自身能力优势为基础的对策方案。本研究直接建立在以发掘行为人自身能力优势为基础（strengths-based）的社会学研究方法之上，聚焦于有实质犯罪行为的精神病人及其家庭的能力、潜力与优势，而非着眼于其劣势。研究分为五条路径，其中最关键的就是有实质犯罪行为的精神病人及其家人的体验。总的来说，有619人（包括286名有实质犯罪行为的精神病人和33名家庭成员）参与了在多样化生活和治疗环境中进行的焦点小组和深入访谈（Aga et al. 2019）。

本论文探讨了该项目中一条路径的研究结果，该路径聚焦于有刑事违法行为的精神病人所体验到的程序正义（Wittouck, 2019）法律和司法程序及措施会对行为人的心理健康产生影响（即实证法学者所研究的法的实证效果），其中一个重要的方面就是司法程序和措施中专家与行为人之间的互动（Wexler, 2016; Winick & Wexler, 2015）。程序正义是一个专门研究权力主体与公民之间互动关系的理论，根据该理论，这些互动产生的方式（即决策过程）至少和互动的结果（即决策本身）一样重要（Blader & Tyler, 2015）。在本研究中，我们致力于发现以下内容：在有刑事违法行为的精神病人和参与实施拘留措施（即比利时法院针对无责任能力的刑事违法人的强制治疗）的专家的互动过程中，他们体验如何，以及他们认为有哪些与之相关的重要因素。

二、已有研究综述

有刑事违法行为的精神病人在刑事司法系统中非常普遍，应对有刑事违法行为的精神病人的研究是一种方式是，使他们接受法院的强制治疗，这种治疗通常与正在进行的司法监督相结合。法院强制治疗的情况包括：毒品法庭、精神卫生法庭、司法精神病医院所涉及的有刑事违法行为

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但不具有刑事责任能力的精神病人的治疗，以及（社区）看守所或监狱转处计划中所涉及的精神病人的治疗（Hiday & Burns, 2010）。法院强制治疗的目的是减少再犯和改善有刑事违法行为的精神病人的精神卫生状况，并在一定程度上实现了这一目标。然而，关于法院强制治疗如何起作用，人们仍然知之甚少（Polaschek, 2019）。


关于如何直接处理有刑事违法行为的精神病人与精神卫生和（或）刑事司法专业人员在法院强制治疗期间内在的紧张合作关系的实证研究比较少。在这些有限的研究中，有人提出将关系公平（Relation fairness）作为调和合作中治疗和控制之间的紧张关系的一种手段（see for instance Epperson et al., 2017; Skeem et al., 2007）。关系公平可以与程序正义理论相联系。程序正义理论是一种关系模型，专门处理执法者与其公众之间的互动（interaction），并假定人们非常重视执法者互动的过程（“什么”）和结果（“如何”）。事实上，在法院强制治疗的情况下，刑事司法体系的专家人员以及精神卫生体系的专家人员都对有刑事违法行为的精神病人持有权力，与执法者的互动将被视为程序公正，即使互动的结果（如决定）是不利的，互动的特征表现为以下维度：1）“中立”，体验作为客观和公正的执法者，2）“表达”，有机会表达自己的观点，3）“尊重”，体验被尊重和尊重对待，4）“信赖”，体验真正的关心和考虑，5）“信息”，体验获得足够的与互动和决定有关的信息和证明，以及 6）“执行”，执法者优质的服务和做好自己的工作（Tyler, 2013; De Mesmackecker, 2014; Lind et al., 1990）。在与执法者的互动中所感受到的程序上的公正或不公正，会影响当事人对互动及其后续结果的态度、情绪和行为，如对互动的满意、对决定的接受、对自我价值感、社会接受度、社会动力和社会合作的感受。迄今为止，程序正义理论主要应用于司法和执法领域。根据程序正义理论，在与参与法院强制治疗项目的执法者互动时，体验程序正义可以促进治疗（Blader & Tyler, 2015）。之前的研究表明，在司法监督治疗的框架下，类似于程序正义的互
动会影响其过程和结果——例如在矫正精神问题方面以及预防再犯罪方面（See Wittouck & Vander Beken, 2019）。

三、有关本研究的概述

在本项研究中，我们着重探讨了程序正义理论作为一个规范性框架的潜在作用。执法者与有刑事违法行为的精神病人在该框架范围内合作，并以此作为发展和维持其合作的一种手段。本文主要研究的问题是在法院强制治疗过程中，有刑事违法行为的精神病人如何体验其与来自刑事司法体系和精神卫生体系的执法者之间的互动，这些体验与程序正义理论的理论维度有何关联？

本文采用定性归纳式的实证研究方法，以受拘禁的有刑事违法行为的精神病人在法院强制治疗过程中与执法者互动的实际经验为中心。采用半结构式访谈的方法对佛兰德斯的一个异质性样本进行调查。我们对其中35个访谈进行了分析，用以解决目前研究的问题。

四、研究结果

考虑到精神病人和执法者在法庭授权治疗（程序性治疗）期间的互动，程序正义理念在有刑事违法行为的精神病人的诉讼中都应被给予格外重视。有证据表明，程序正义中的传统理念，如尊重、信赖、表达与中介，以及近期提出的知情权与履行性等理念，对其具有重要意义。我们结合先前的研究（Skeem et al., 2007），在法庭授权治疗（程序性治疗）的机制内提出了一个程序正义中的概念：“权威性”。权威性的概念与法庭授权治疗（程序性治疗）期间精神病人与执法者之间存在的治疗与控制下的博弈有关。具备权威性的措施应当具备妥协性与决策参与性，该措施要求严格的同时也主张公正，并且强调以正向激励的手段促进秩序。因此，执法者需要兼顾治疗与控制的理念，并且在法庭授权治疗（程序性治疗）期间兼顾康复与强制，并且结合精神病人诉讼项目进行更可持续发展的工作。

事实上，坚持人性化对待有刑事违法行为的精神病人具有重要意义，为此应具备如下方面的要求：执法者应当1）采取友好、礼貌与平静的态度；2）认识到受众的感受、难处及需要；3）以解决问题与重塑精神行为为导向进行工作，而非仅仅为了惩罚；4）加强精神病人决策过程的参与；5）对有关于工作目的、内容与各个治疗目标以及强制性待遇提供信息公开与合理解释，并且充分考虑精神病人的期望；6）保证工作过程中的专业性与公平性；7）以权威性理念代替专制性理念。
五、结语

对于调和有刑事违法行为的精神病人和执法者在法院授权的合作中的治疗和控制之间的紧张关系的问题，我们所研究的这种符合程序公正的方法有着广阔的发展前景。


与基于合规的方法一样，程序正义仅是为执法者赋权的方法（Tyler, 2013）。在这种情况下，不作为成为保障机能的一种方式（Rubin, 2017; Tew, 2006）。然而，程序正义也可以建立在以发挥行为人自身能力优势的基础上，强调个人尊严、社会认同、意思自治和有效参与（Ward & Syversen, 2009）。这与强调表达、中立、信任和尊重的基于合法性的方法具有一致性（Tyler, 2013）。在存在强制力的情况下，程序正义可以平衡个人和社区的权利，进而平衡治疗和控制之间的关系（Skeem et al., 2007）。因而，从保护人权的视角出发，在法院强制治疗中，强制性的干预措施应始终作为最后的手段。正式的社会控制可以起到威慑作用，但却不能促使人养成合乎社会规范的行为习惯。在基于合法性的方法中，积极的合规行为取代不作为成为保障机能的方式（Bottoms, 2001; Tyler, 2013）。程序正义因而也可以成为赋权应对有刑事违法行行为的精神病人的一种手段（Tew, 2006）。

一、参考文献


