



**JUSTICE OUTSIDE THE BOX:
THE RESTORATIVE APPROACH
TO ANTI-LGBT HATE CRIMES**

Olga Jubany (Ed.)

EDITOR: OLGA JUBANY

UNIVERSITAT DE BARCELONA

DESIGN: MARIAN COPPIETERS

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CHAPTER 1: CONTEXTUALISING RESTORATIVE JUSTICE AS AN ALTERNATIVE TO THE PUNITIVE APPROACH

OLGA JUBANY

“I would define restorative justice as one that pays attention, not to the punitive field, or punishment imposed by a Penal Code, but to the restoration of a situation of normalcy”

[Technical adviser for LGBTI and equality policies, Spain]

INTRODUCTION

At face value, the concept of Restorative Justice may seem to be a combination of two self-explanatory connected concepts, to refer to a form of justice that focuses on restoring, thus repairing. However, the complexity and wide range of interpretations possible that both these terms signify, makes restorative justice a puzzling paradigm of justice practices, entailing a complex framework for different understandings and treatments of conflict, with a lengthy intellectual and practice-related history. A testimony of this complexity is the different meaning that we each give to the concept of restorative justice, even among those of us who work closely in this area, in a distinct or even opposite understanding, especially with regard to the recognition of certain mechanisms as models of restorative justice expressions, or even to one's own understandings of justice. Depending on the discourse, the approach or the lived experience embedded in the diverse understanding of restorative justice, we find that this paradigm and set of practices appears to a greater or lesser degree to be recognised as an alternative to a procedural or punitive understanding of justice. Although it is a central element of research and legal

practice in various fields, even for many justice experts and professionals, it is still also a concept with a wide range of interpretations, all framed within a rather non-conforming paradigm.

To explore this widely used, yet diversely understood concept of restorative justice, we must start by reviewing its origins and development. To this aim, this chapter begins by briefly examining the broad arenas of restorative justice, from its origins to how it has become a common framework for current practices and studies. The chapter continues by considering the increasing complexity of the different mechanisms, practices and experiences that can be engaged with the notion of restorative justice, to then explore the application of this paradigm and broad view of interpretations to the resolution of LGBT hate crimes. These various formulations include the results of the investigation that grounds this book. The chapter concludes with an introduction to the different aspects of restorative justice as addressed by the contributions that compose this edited volume.

RESTORATIVE JUSTICE

Despite Restorative Justice being perceived by victims, professionals and even most scholars as a recent justice practice, the connection of this term to Indigenous and customary procedures in a wide range of cultural and social settings, and to other related notions — such as community justice, peace-making, or transitional justice, means it is not such a recent paradigm (Blagg & Anthony 2019). Bearing this connection in mind, we must, however, avoid any trivialisation of the association between restorative justice practices to Indigenous peoples. As Zellerer and Cunneen (2001) have argued, these connections may “disavow the complexity and variations in Indigenous dispute resolution mechanisms” (Zellerer & Cunneen 2001: 246-247). Furthermore, some over simplistic correlations tend to be supported on the rhetorical assumption that the punitive approach has only been present in recent Western history, whilst Indigenous societies relied on a sort of restorative legitimacy, distorting “the diversity of Indigenous cultures and the variety of sanctions used by Indigenous peoples within their specific cultural frameworks” (Cunneen 2007, p 298).

In order to reveal a more accurate connection to the roots of restorative justice as is used nowadays, we can refer to the concept Restorative Justice that first appeared in a Christian context. The concept appears in several texts ranging from the mid-nineteenth century to the early twentieth century, “without any

explanation of its meaning”, and without a clear “connection between these texts and the later restorative justice literature in the second half of the twentieth century” (Gade 2018, 29). These few mentions of the concept² focused on the notion of forgiveness and the acknowledgment of guilt or responsibility, as opposed to the execution of punishment for a crime. These early references tended to also focus on the repairing dimension, presented as a benefit for offenders and for society – understanding this benefit within a Christian context, thus considering it “deservedly hailed by all well-thinking men, as beneficial to the clergy, and to the people, as a great act of restorative justice (Members of the Church of Ireland 1834, cited by Gade 2018, 29).

Yet, whilst we can trace the coining of the term restorative justice to the mid XIX Century, these references are very vague and far apart. For almost a century the study and use of the concept remained very limited, and it was not until the 1970s, particularly through the works of scholars such as Albert Eglash and Howard Zehr (Gade 2018; Kiyala 2019; Van Ness 1993), that it became the focus of interest again, grounding the current understandings of restorative justice, theories and practices that would continue through the twentieth century until today. This debate framed restorative justice more specifically in terms of a path for resolution of a conflict that belongs to the parties, rather than as a formal punitive system (Christie 1977). A frequently quoted seminal article by Zehr (1985) argued for the importance of differentiating between what the author labelled as retributive justice and restorative justice. The former was characterized by the interpretation of a crime as a violation of the state, with a focus on blame or guilt, with relationships of opposition under defined laws, the imposition of a punishment or pain in order to prevent recidivism, and a justice system based on intent and process. The latter, on the other hand, was characterized by an understanding of conflicts between parties caused by an offender, where the process was defined by dialogue and negotiation.

2 Following a study conducted by Christian B. N. Gade (2018) the concept Restorative Justice appears in at least six texts from the pre-1950 period: *The Christian Examiner and Church of Ireland Magazine* (Members of the Church of Ireland 1834); *The Signs of the Times* (Armstrong 1848); *Thoughts on a Continuation of the Book of Common Prayer used in the Church of England* (Stow 1856); *A Woman’s Story* (Abbots 1863); *An Inquiry Concerning Justice* (Mechem 1916); and *Address of Mr. Manuel Fourcade, Bâtonnier of The Order of Advocates*, etc. (Fourcade 1924).

The reconciliation and restoration of both parties was the key goal for a justice system based on relationships (Gade 2018, 31; Zehr 1985).

This debate, which grounded our contemporary understanding of restorative justice, set the basic tenets of the concept as particularly dependent on specific circumstances, such as legal systems and awareness, as well as on cultural worldviews of justice and crimes. Critically, this interpretation widens its application to a myriad of experiences whilst, at the same time, it sets boundaries on the application of restorative measures to specific sets of offenses, offenders, situations, and sociocultural contexts (Braithwaite 2004; Latimer et al. 2005; Takagi and Shank 2004). As such, restorative justice became a context-dependent conceptualisation of justice, determined by the relation between conflict, damage, resolution and restitution.

Thus, within this multifaceted debate on the conceptualisation of restorative justice, more complex than can be outlined here ³, we can recognise a common ground for a current definition as “an approach that offers offenders, victims and the community use as an alternative pathway to justice”, based on “the safe participation of victims in resolving the situation” and on the possibility for the offender to “accept responsibility for the harm caused by their actions” (UNODC 2020, 4). This definition, which echoes all previous debates, is offered by the United Nations Office on Drugs and Crime, and incorporates a key aspect which is the possibility of an alternative experience for victims of harassment, discrimination, and hate crimes, in any process of reparation, as opposed to traditional or procedural forms of justice.

A crucial dimension in this understanding of restorative justice, is the centralisation of the victim, as it fully integrates reparation for the harm done. This makes restorative justice a victim-centred paradigm, which now incorporates the views and experiences of, not only the victims themselves, but also of those working with victims. In more concrete terms, this translates into an approach by which the victim-offender mediation becomes the core mechanism for the creation of a safe space for direct or indirect dialogue between

3 See, for instance, González and Buth (2019).

the parties.

This understanding of restorative justice engages directly with all parties, which implies that it also depends on the different lenses and experiences of all parties, or even on the stage of the process of reparation. Thus, the different definitions and conceptualisations of the term “restorative justice” widens even further towards the “diverse and evolving nature of restorative justice approaches around the world” that we have today. Within this panorama of approaches, some used definitions focus on “the participatory aspect of the process and on encounters and active participation through dialogues”, while others highlight “restorative outcomes such as reparation, victim recovery and offender reintegration” (UNODC 2020, 4). Further approaches highlight the role of accountability and the reduction of recidivism (Kiyala 2019, 183), with other authors underscoring the deep historical roots of customary forms of justice, from which restorative justice is “a rediscovery of past practices which are simpler, local, informal and more effective in dealing with criminals and their victims” (Jaamdar 2017, 42). In addition, this also embraces the stance from the perspective of offenders that focuses on the reduced recidivism, highlighting the potential transition from a traditional “passive responsibility” of offenders to an “active responsibility for making things right into the future” (Braithwaite 2004, 28).

From all stances, though, restorative justice draws on a paradigm of conflict resolution, damage rehabilitation, and justice that seeks to reinstate victims’ dignity and wellbeing, by means of an active participation in a direct or indirect resolution procedure. This is also clear in the definition included in the EU Victims’ Rights Directive as “*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 criminal offence through the help of an impartial third party.* (EU Victims’ Rights Directive, Directive 2012/29/EU)”

On this ground, restorative justice becomes a particularly relevant approach for addressing the harm caused by anti-LGBT hate crimes - the focus of the investigation on which this paper and book is grounded. The restorative justice approach proves a constructive and promising alternative, as opposite to that of traditional or procedural justice, in terms of offenders’ rights, and of particular added value for the victims.

As has been presented by recent studies (Walters et al 2020), for most victims of anti-LGBT hate crime it is important to have a clear recognition of the damage caused to them, as well as to be able to engage with the process with a more active role. For offenders this approach may also give them the opportunity to participate more actively in restorative procedures even when their victims do not want to directly face them, as several indirect measures may be deployed such as: letters and other asynchronous communication devices, and techniques that involve alternative or surrogate victims. As such, restorative justice provides an option to engage in repairing the harm done, even when no direct encounter is considered feasible, which is important for both victims and offenders. This is always, evidently, under the fundamental requirement that the participation is voluntary for both, victims and offenders, and that to start the process offenders assume the responsibility for the harm caused by the crime.

Yet, the potential of restorative justice allows consideration of practices and perspectives beyond those of victim-offender mediation, or even of those practices explicitly labelled, understood, or named as restorative. This conceptual flexibility has been a research necessity: the fact that restorative justice is a seldom-known perspective about which awareness is lacking both among professionals and victims, makes it necessary to go beyond the explicit label to capture the wide range of existing restorative practices and needs. This understanding also responds to the practical conceptualisation argued for by restorative professionals, by which restorative justice may be understood as a paradigm or restoration-focused perspective, rather than as a definitive set of practices, and as such must acknowledge its wide range of approaches and practices.

RESTORATIVE JUSTICE AND HATE CRIMES

Besides the wide interpretations and practices framed within the restorative justice approach, a fundamental factor always present, as we have seen, is the central role of reparation or restoration of the victim’s dignity and wellbeing. This entails a more individualised view of justice with and active agency and full participation by all parties. This is another fundamental aspect why restorative approaches are a particularly fruitful alternative in cases and circumstances of anti-LGBT discrimination and hate crimes, which tend to have not

only individual consequences for the victims, but also wider, collective victimization effects.

The experiences of victims of anti-LGBT hate crimes may be fraught with a wide range of difficulties. As has been widely evidenced, these victims tend to experience secondary victimization, emotional duress, and feelings of isolation. They may relive their experience when filing formal complaints, and they may face negative reactions from public authorities, close friends and family. Furthermore, data from the European Union's 2019 LGBTQ victimisation survey (FRA 2020) highlights how victims of anti-LGBT hate crimes, harassment, and discrimination rarely report their experiences, due to a widespread mistrust of public authorities and of the effects of their complaints. In addition, this form of mistrust and a set of specific barriers that victims face when engaging with national and other law enforcement systems, are amplified by the wider societal or local forms of oppression and violence, which may also hinder the reporting of and response to these cases⁴. Similarly, the specific motivation and circumstances of these crimes and forms of discrimination may affect the likelihood of the formal complaint and action, as the FRA data signals towards key differences in reporting patterns among gay men, lesbian women, bisexual men and women, intersex, and trans victims, amongst others.

Moreover, the harms of hate crimes are likely to indirectly affect entire communities of people who can experience similar traumas to those of direct victims (Walters, 2019). That is, hate crimes not only undermine the victim's dignity and impact negatively on the individual, but also send a message to those belonging to the wider group: that they do not deserve recognition, respect, or equality (Godszisz and Viggiani 2018). Hate crimes, in this manner, violate the basic principles of human dignity, social equality and coexistence. This makes repairing the damage caused by these crimes also a community matter and responsibility.

Hence, the restorative approach becomes critical in these circumstances. As evidenced by the empirical findings, restorative mechanisms involve more

opportunity for participation and agency for victims. This translates into higher levels of satisfaction with the process, rather than with conventional criminal justice systems. It also translates into reduced recidivism or reoffending, significant willingness to participate among informed victims and offenders, increased community engagement and involvement, amongst other benefits (UNODC 2020).

In addition, from the victims' perspective, restorative practices offer them the possibility to voice their experiences and needs, which is critical to most victims, particularly in cases of anti-LGBT hate crimes (Walters et al 2020). This is achieved by involving them as an active party, as opposed to traditional forms of justice and standard trials in which their active participation is often very limited. Restorative processes offer victims an opportunity to participate in tailor-made encounters or practices with or without their offenders, and the willingness and flexibility also to respond to the victims' needs: they may choose to participate or not in specific forms of practice, as facilitators or practitioners may offer direct or indirect techniques at different moments or timings. This temporal flexibility is also a critical benefit for the victims, as it relates to their emotional situations. Restorative measures may be adapted to the best timing, evaluating the victims' preparedness and willingness, and adapting the process to their needs (Van Camp and Wemmers 2013), instead of making them relive their victimisation experience at a particular moment set by a court. This flexibility and adaptation also includes the possibility to avoid facing the offenders, which may be important for some victims. To this aim, not all restorative measures require the two parties to face each other, and procedures are often adapted to avoid direct encounters.

The wide range of crimes and cases, including those regarding anti-LGBT hate crimes and discrimination, requires restorative measures to be accommodating and flexibly applied, drawing from the experience and training of professional facilitators that focus on the wellbeing and agency of the victims. The flexibility and the adaptation to the circumstances and needs of each case and victim extend to the specific techniques employed, but also to the approach and timing of restorative justice.

4 As stated in the latest report by the European Union Fundamental Rights (FRA 2021).

A CRITICAL [RE]VIEW TO RESTORATIVE JUSTICE: THE LIMITS

Exploring both, discourses and practices, of restorative justice, reveals how this approach stimulates many encouraging discourses, but also stirs several criticisms, as many academic and professionals have some reservations about the principle – as opposite to that of criminal justice, but mainly about its application. Whilst a theoretical understanding of the concept of restorative justice may be appreciated and even embraced by most scholars and professionals, when it comes to the application of the different mechanisms many reservations arise. Beyond the criticisms arising from those defending the strict approach to the “rule of law”, a main concern is directed towards the protection of basic rights and values, including “concerns over abuse of due process; absence of procedural rights and protections; excessive, disproportionate or inconsistent outcomes” (Cunneen 2007). As Cunneen points out, these may also refer to a potential undermining of the defendant’s rights at the investigatory, adjudicatory and sentencing stages of the criminal justice system.

The significant distancing of restorative justice from traditional or procedural justice tends to provoke uncertainty due to expectations and common practices. Among professionals that are mostly used to a series of standardised practices, a paradigm shift may provoke doubts and even negative reactions, as it may entail training, different roles, and even a reduction of their decision-making power. Also among victims, justice may be understood as a zero-sum game, in which a party must lose so that another one may win. This punitive-centric perspective, may make restoration a shocking paradigm, that may not be understood as a proper form of justice within the “rule of law”.

Further hesitations tend to relate to the explicit applications of restorative justice to specific crimes or cases, such as to those in which there might be a clear power imbalance. In some European countries, such as Spain, for instance, mediation is explicitly forbidden for gender-based violence cases, from the perspective that it may entail unnecessary secondary victimisation and that the crime is based on a clear power imbalance (Walters 2014). Hate crimes and discrimination cases such as those motivated by anti-LGBT prejudice may be understood as another set of cases for which the application of restorative measures can be problematic for the same reasons. The doubts held by professionals or victims may relate to all forms of anti-LGBT hate crimes and discrimination, or they may be limited to some cases deemed more or less

feasible for this approach.

This reticence to engage with restorative justice processes often arises as the consequence of the wide range of differing and even conflicting understandings of restorative justice itself, as discussed previously, as well as the variation with which justice itself may be conceptualised (Gavrielides 2008). The clash between punitive and restorative approaches to justice, as well as the relevance of differing understandings of *neutrality*, *impartiality*, or *agency* highlight the heterogeneity of understandings of justice, as well as of the different agents’ roles. It is against this background of cultural values and practices that the different legislations and programmes of restorative justice intertwine ⁵.

Moreover, such wide range of understandings of justice and restoration is not easily harmonised with the fixed definitions, protocols, and visions found in legislation. Still, the various needs of victims of crime, and the relation between procedural and restorative justice, have been addressed by various legal instruments at the European level, setting standards for Member States in these issues, with no lack of complications and impediments.

A EUROPEAN LEGAL FRAMEWORK FOR VICTIMS’ RIGHTS AND RESTORATIVE JUSTICE

Beyond the difficulty of identifying and applying a common ground amongst the diversity of understandings and interpretation of restorative justice, a further major challenge faced in relation to this paradigm is the identification of legal mechanisms that allow the development of a restorative justice approach. This is a particularly challenging goal in an EU legal framework, which is so strongly dominated by the prioritisation of the punitive justice approach. We must consider that not only do such legal mechanisms have to allow a focus on the reparation of harm – beyond punishment, but they also have to assume that “the victim is no longer pleading for help on the basis of their vulnerability, pressing needs and deservingness, but demanding that the state should take seriously what it owes the individuals living within its territory and

⁵ In this regard, chapter 3 offers an in-depth analysis of different perspectives on the application of restorative justice on hate crimes.

their human rights" (European Agency for Fundamental Rights 2019). This means that the articulation of restorative justice through law enforcement has to be based on a will to empower victims, thus accepting a victim-centred legitimacy (Van Dijk 2011, 2015). This implies embarking upon the challenge of provoking a cultural change, to reach a common mind-set among those working in the judicial system, to prioritise victims and reparation (Bahr and Melum 2017).

With this in mind, we can examine the existing mechanisms and legal paths currently used to implement and develop restorative justice mechanisms within the EU legal framework. Amongst these, the most fundamental tool for supporting and protecting victims' rights across Europe is the *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*, often referred to as the *Victims' Rights Directive*. This is a piece of European Law which came into force on 15th November 2012, as the culmination of the growing awareness of victims' needs and rights within many western liberal democratic countries, both within and outside of the European Union. The Directive is legally binding across EU Member States, and it specifically references restorative justice and vulnerable groups, as will be further explained below.

In addition, further instruments that refer to restorative justice at the European level are the *CM/Rec (2018) 8 Council of Europe recommendation concerning RJ in criminal matters*, and the recent *EU Strategy on Victims' Rights 2020-2025*, although we must consider that both these instruments have several limitations. The first one is not legally binding for Member States but a recommendation, which is considered the most innovative in European legislation on restorative justice, as it calls for a more balanced approach to victim and offender needs, aiming for a broader shift to a criminal justice system that adopts a more restorative culture. The second, and most recent instrument is the first EU Strategy on Victims' Rights and frames the Commission's work for the period 2020-2025. This mainly invites other actors, including EU Member States and civil society, to take action for victims' rights. This instrument particularly considers the specific needs of victims of gender-based violence, and

6 The Directive sets out legal obligations in the form of minimum standards that EU Member States should provide for victims of crime (McDonald 2012).

also addresses the particular needs of victims of hate crimes.

Thus, the Victims' Directive is currently the predominant framework when resorting to restorative justice. This focusses on ensuring minimum standards on the rights, support and protection of victims of crime, which recognises a crime as a violation of individual rights, as well as being socially harmful, and is legally binding for Member States. The Directive provides victims with rights regardless of whether the crime is reported to the police, and irrespective of the relationship between the victim and the offender (Jubany et al 2019). It is also the first binding EU legislation that addresses restorative justice, with a perspective that goes beyond mere mediation, defining restorative justice as "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 criminal offence through the help of an impartial third party"

(Directive 2012/29/EU, article 2, 1.d).

The rights under the Directive can be summed up as: the right to be treated with respect and consideration by the criminal justice system; the right to be informed about procedures, outcomes, rights and entitlements; the right to access victim support services; and the right to free legal aid, to be heard within proceedings and to claim compensation (Van Dijk and Groenhuijsen 2018).

Looking at the most relevant paragraphs of the Directive with reference to anti-LGBT hate crimes and restorative justice, we find that the Directive recognises crime as a wrong made against society and a violation of the individual rights of the victim (paragraph 9). The Directive also addresses the need to treat all victims without discrimination based on any ground, including gender expression, gender identity and sexual orientation, when accessing services, including restorative justice services. Further, paragraph 56 addresses gender identity and sexual orientation when defining victims' needs based both on their identity and on the type of crime. This stipulation, however, is referred to in a general manner for protecting victims' rights and not specifically for restorative justice services.

The Directive also recognises the benefit of restorative justice services for victims (paragraph 46), whilst emphasising that measures are needed to prevent secondary and repeat victimisation, intimidation and retaliation. In this regard, it highlights that the primary consideration of restorative justice services

should be the interests and needs of the victim, repairing the harm done and avoiding further harm. Whilst the Directive does not require Member States to guarantee access to restorative justice for victims of crime, Article 4 states that victims have the right to receive information from the first competent authority they encounter, and this includes information about the available restorative justice services. This means that all victims of crime should, if they come into contact with authorities, at least be informed about the existence of restorative justice services.

In this regard, Article 12, on the right to safeguards in the context of restorative justice services, is the most relevant to improve the development and implementation of restorative justice in Member States, highlighting that victims who choose to participate in restorative justice processes should have access to safe and competent restorative justice services with at least the following conditions: First, the restorative justice services should be used only if they are in the interests of the victim, subject to any safety considerations, and should be based on the victim's free and informed consent, which may be withdrawn at any time. Second, before agreeing to participate in the restorative justice process, the victim should be provided with full and unbiased information about that process and the potential outcomes, as well as given information about the procedures for supervising the implementation of any agreement. Third, the offender needs to acknowledge the basic facts of the case. Fourth, any agreement should be arrived at voluntarily and may be taken into account in any further criminal proceedings. Fifth, discussions on restorative justice processes that are not conducted in public should be confidential and should not be subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest. Finally, Article 12 also states 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.

Thus, using all the mechanisms that are already in place, restorative justice may effectively respond more adequately to the needs of victims of hate crime than that of punitive traditional justice mechanisms. In contrast to this, restorative measures provide victims with agency, a more positive experience of justice, and, above all, an opportunity to be listened to and understood, as well as to avoid or reduce secondary victimisation. The European Union's Vic-

tims' Rights Directive is a legal instrument that responds, among other issues, to the needs of victims regarding restorative justice. However, the EU-wide nature of the Directive, as well as its transposition and implementation throughout the different Member States makes it necessary to consider how these rights and obligations are being implemented, and how the victims' rights have been promoted or are being promoted. As such, this book presents an original analysis into how restorative justice is understood, particularly for the treatment of anti-LGBT hate crimes and discrimination, and how current programmes and strategies may respond to victims' needs.

BOOK CONTRIBUTIONS AND DEBATES

To address these key questions, doubts and debates, addressed throughout this paper, this edited volume offers some critical discussions around the concept of restorative justice applied to anti-LGBT hate crimes. All of the chapters are aimed at stimulating academic debate but also at contributing to the understanding of this paradigm among civil society, justice practitioners, hate crime victims, policymakers and anyone interested in the topic from different approaches and experiences. The contributions are grounded on the findings of the empirical research conducted over two years (2019-2021) across six countries in Europe: Belgium, Bulgaria, Italy, the Netherlands, Poland and Spain. These cases represented a variety of traditions, struggles and experiences regarding LGBT rights and the countering of LGBT-phobia, and also depict different legal traditions and frameworks for the application of restorative justice. This diversity was key in the investigation, as it was the multiplicity of expectations of what restorative justice is and what it can offer to victims, offenders, and society as a whole, which greatly varied depending on the professionals' perspectives on justice and the victims' needs. The research conducted aimed to explore this wide diversity of perspectives and experiences of restorative justice applied to anti-LGBT hate crimes across Europe,

7 See the European Forum for Restorative Justice's briefing paper about the Directive's regulation of restorative justice: www.euforumrj.org/sites/default/files/2019-12/efrj-briefing-paper-rj-in-the-victims-directive_0.pdf

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CHAPTER 1: CONTEXTUALISING RESTORATIVE JUSTICE AS AN ALTERNATIVE TO THE PUNITIVE APPROACH

by adopting a core ethnographic approach to focus on the experience of the professionals and the voice of the victims.

These contributions open with a paper by Malin Roiha that sets the background of hate crimes in Europe, consistent with its two main dimensions: as a criminal offence; and as a motive driven by bias directed towards a victim because they possess or are perceived to possess a 'protected characteristic' determined as such by national laws. The chapter reveals how the damage caused by hate crimes is likely to indirectly affect entire communities of people who can experience similar traumas to those of direct victims. The author argues that hate crimes not only undermine the dignity of the direct victim impacting negatively on the individual, but also send a message to those belonging to the wider group: that they do not deserve recognition, respect, or equality. The chapter also presents a detailed contextualisation, rationale and methodological approach of the research conducted, exposing the relevance of the idiosyncrasy of each case study.

In the second chapter, Ignacio Elpidio Dominguez explores how the experiences, knowledge, and expectations held by professionals allows us to delve into a series of differing and even conflicting perspectives of restorative justice, agency, and justice itself. The author argues how professionals' direct experiences and knowledge about restorative strategies, hate crimes, and the specific needs and circumstances of victims of anti-LGBT hate crimes varied greatly, as did their expectations about what restorative justice may offer to these victims. The chapter analyses expectations of what restorative justice is and what it can offer to victims, offenders, and society, depending on the professionals' perspectives on justice and the victims' needs. It shows how, regardless of the victims' willingness to participate in restorative strategies, there is still a set of obstacles most professionals face, as a widespread lack of awareness, calling for a need for public campaigns to promote the right to restorative justice services, in addition to other rights for victims.

In the fourth chapter, Seeking reparation for the crime, Jordi Mas Grau and Carme Montserrat, explain that whilst hate crime legislations have offered legal protection to some vulnerable individuals and groups, this paradigm does not necessarily guarantee reparation of the harm caused to the victim, whilst at the same time it renders invisible the structural dimension of LGBTphobic violence. Grounded on the empirical findings, the authors sustain that atten-

tion is focused on the punishment of the offender, while the needs of the victims are often underestimated, and often re-victimized. The chapter analyses how, for many victims, restorative justice is a mechanism that should be explored as an alternative or a complement to punitive justice, as the opportunity for the victim to be heard and to receive the recognition of the offender are important possible outcomes. Yet the authors call attention to the fact that this should always be with the maximum guarantees for the victims, especially in the fight against secondary victimization.

In the final contribution, by Jordi Mas Grau, José Antonio Langarita and Pilar Albertín, the debate is directed towards the idea of achieving reparation. This is focused on the importance of experiences of cooperation and professional training related to hate crimes and restorative justice. The authors underline how professionals in all the countries highlight the lack of training that combines the two areas, that is, training that addresses how to apply restorative justice in hate crimes. This contribution also voices the experiences and opinions of victims in this regard, to show that there is still a large number of LGBT people who consider that professionals in the judicial sphere and those responsible for public safety do not have the necessary skills to adequately attend to victims of this type of crime and to offer them an empathetic and respectful treatment. Furthermore, the chapter exposes how victims consider that both legal professionals and the police, tend to reproduce the logic of hetero- and cisnormativity, concluding that there is a need for education and training in restorative justice among legal professionals, in order to construct a more victim-centred and restorative culture in the judicial system.

The contributions victim-centred approach and its participatory practices, makes it a very stimulating alternative to the criminal justice system, challenging the discourses of criminalisation and punishment. Yet, adopting such an approach is not always an easy option, as it inevitably implies the recognition that the justice system should go beyond the classic and overriding punitive understanding, making us think about justice from outside the box.

CHAPTER 2: EXPLORING DIVERSE SOCIOPOLITICAL CONTEXTS AND LEGAL FRAMEWORKS AS A BACKDROP TO RESTORATIVE JUSTICE PRACTICES FOR ANTI-LGBT HATE CRIMES

MALIN ROIHA

INTRODUCTION

The LGBT survey conducted by the European Union Agency for Fundamental Rights (2020) revealed that members of the LGBT community across Europe are victimised more often than members of the general population and that hate crimes cause more harm to the victim than when compared to their counterparts of victims of similar crimes without a bias motive. As evidenced by this survey, LGBT people still experience violence and discrimination on the grounds of their sexual orientation and/or gender identity or expression (SOGIE) in all areas of life. For example, in the 12 months before the survey 42% of LGBT people in the EU had felt personally discriminated, and this number increases to 60% in the case of transgender persons. Furthermore, 11% of respondents had experienced hate crimes in the form of physical attacks in the past 5 years, a percentage that rises to 17% if we look only at the statistics for transgender people. Considering this data, it is undeniable that the rights of LGBT people are far from fully guaranteed.

Looking closer at the specificity of hate crimes⁸, a hate crime always comprises two elements: first, a criminal offence, that is, an act that constitutes an offence under ordinary criminal law. Second, a bias motive directed towards a person because they possess a 'protected characteristic' determined as such by national laws. These depend on the country and include e.g. gender, sex, sexual orientation, gender identity, disability, 'race', nationality, language, so-

8 The terms 'bias-motivated violence', 'bias-motivated crimes' and 'hate crimes' can be used interchangeably (FRA 2021)

cial status, belief or religion. However, hate crimes do not only affect individuals with these protected characteristics, but may also affect individuals who are perceived as belonging to a certain group.

Returning to the FRA survey, fewer than one in seven (14 %) LGBT respondents say that they reported the most recent hate-motivated physical or sexual attack to the police (FRA 2020). This tendency not to report violence to the police or other authorities is also in line with the results of the research carried out in the Divercity and Come Forward projects (see e.g. Godzisz and Viaggini 2018; Jubany, Langarita Adiego and Mas Grau 2021). One of the common reasons people give for not reporting a hate crime is that they believe that nothing would change even if they did report the crime (FRA 2020). Another commonly cited reason is mistrust in the authorities and in the judicial system. Further, even when reported, hate crimes may not be categorised as such⁹ or as we shall see later in this chapter, some countries do either not have hate crime provisions in their criminal code or do not include sexual orientation or gender identity in the list of protected characteristics.

In addition, according to the data collected in the [SupportVoC project](#) (Jubany et al 2019), the criminal process often generates secondary victimisation and lacks the restorative effects that victims need. Consequently, combating secondary victimisation, strengthening victims' trust in the reporting authorities and the judicial system and ensuring a restoration of the harm caused by the crime should be a priority to ensure victims' rights and to advance LGBT equality.

HETEROGENEOUS SOCIAL, POLITICAL AND LEGAL CONTEXTS

This publication showcases the results from research and activities implemented in six countries that belong to different socio-cultural contexts and geographical locations, covering East-West, South-Central-Northern Europe.

9 Different countries also have different systems for recording hate crimes. In countries with a perspective-based definition of anti-LGBT hate crimes, if a victim or witness thinks an identity has been targeted with hostility they have the legal right to have it recorded as a hate crime. Nevertheless, for prosecution, supporting evidence of the motivation is needed, e.g. the use of hateful slurs heard by others than the victim, membership of a far-right group, or a prior prosecution for hate crime (Williams 2021).

This means that they represent a variety of traditions, struggles and experiences regarding LGBT rights and the countering of LGBT-phobia, as well as different legal traditions, frameworks and programmes for the application of restorative justice. This heterogeneity has brought an excellent opportunity for enriching the transnational exchange of experiences and practices, as well as for ensuring that the findings and outcomes may be applied in different contexts. The following sections provide a brief overview of the differing socio-legal contexts regarding LGBT rights and hate crime provisions in these countries.

LGBT RIGHTS

In terms of LGBT civil rights, amongst the countries analysed, during the very first years of the 21st century, the Netherlands (2001) and Belgium (2003) were established as world pioneers in the legislation of the so-called love rights, that is, same-sex marriage and adoption. Spain soon followed, modifying its Civil Code in 2005 to include these rights. Belgium also stands out for other love rights, such as giving lesbian individuals or couples the right to access public artificial insemination with anonymous donors (Eeckhout and Paterotte 2011).

In contrast, in Bulgaria and Poland, the constitutional principle of the law, which establishes marriage as a union between man and woman, prevents same-sex marriages. Similarly, in Italy, the legislator is not obliged by the Constitution to recognise the right to same-sex marriage. Nevertheless, same-sex unions are regulated in Italy. The case of Poland is particularly relevant, having been a relatively tolerant country in the early 20th century, with homosexuality being decriminalised as early as in 1932. Today, however, it is among the EU countries most reluctant to accepting sexual and gender diversity at legal and political levels.

Regarding transgender rights, as in the case of love rights, the countries involved present very different contexts. For instance, Poland and Bulgaria do not have a legal gender recognition law and consequently, the legal change depends on a court decision. Furthermore, in Bulgaria judges tend to request the sterilisation of the transgender person. In Belgium, Italy, the Netherlands and Spain, the experienced gender is recognised through the consolidation

of specific “gender laws”. Nonetheless, some medical requirements are established also in these countries, such as a psychiatric diagnosis, thus consolidating a pathologising and binary model that excludes non-binary genders and gender-fluid persons.

LEGAL MEASURES AGAINST BIAS-MOTIVATED VIOLENCE AND DISCRIMINATION

Despite the existence of anti-discrimination laws in all these countries, sexual orientation or gender identity and expression (SOGIE) are not included as protected criteria in all the legal frameworks, nor have all of these countries elaborated specific legislation for protecting LGBT people and prosecuting LGBT-phobia.

Taking a closer look at the legal frameworks for antidiscrimination and hate crimes in these countries, Belgium has since 2007 implemented a strong framework for antidiscrimination through three laws : The Gender Act, the Antiracism Act and the Antidiscrimination Act. These laws identify 19 protected discrimination criteria, including SOGIE. Following the implementation of the antidiscrimination legislation, the Belgian Government created two independent inter-federal agencies responsible for monitoring discrimination - including SOGIE - and to assist victims, including LGBT people: the Centre for Equal Opportunities and Opposition to Racism (Unia) and the Institute for the Equality of Women and Men (IGVM). Although the Belgian Criminal Code does not define “hate crime”, it does provide for several penalty-enhancements in case of specific offenses if the motive for crime is hatred, contempt or hostility towards a person because of one or more protected characteristics, such as sexual orientation. The Criminal Code also refers to this as the “reprehensible motive”. While in 2014 the discrimination law was amended so that gender identity and gender expression¹⁰ were included in the notion of direct discrimination based on gender, the Belgian Criminal Code has not been amended to include gender identity and gender expression as references.

In Bulgaria, even though the law recognises some hate crimes, the list of motivations constituting aggravating circumstances does not include SOGIE. This means that if reported, bias-motivated crimes targeting LGBT people are not

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Act of 22 May 2014 amending the law of 10 May 2007

conceptualised as hate crimes but are treated as “hooliganism”. The Criminal Code prescribes hate crimes in Chapter III: Crimes against the Rights of the Citizens and in the absence of a definition of “hate crime”, the concept used is “crimes against the rights of the citizens”. Further, although the law criminalises some deeds motivated by hatred, or instigation of hatred towards people based on ‘race’, ethnicity or nationality, and religious or political belief, there is no general increase in penalty for bias-motivated crimes. The Bulgarian Protection against Discrimination Act protects citizens from discrimination on the grounds of sex and sexual orientation, but not on the grounds of gender identity or sex characteristics. An amendment of the Act from 2015 states that the protected characteristic “sex” under art. 4, para. 1 includes cases for the change of sex. However, the Act does not specify what is considered “a change of sex”. Therefore, it remains unclear whether the person is supposed to have undergone only social transition or any medical transition procedures. The Act uses the Bulgarian word “пол/пол”, which is used both for sex and gender.

In Italy, the Constitution does not explicitly prohibit discrimination based on SOGIE, but its arts. 2 and 3, dedicated to human rights protection and to a general principle of equality and non-discrimination, could be interpreted as offering protection of the rights of LGBT people. Nonetheless, within criminal law, LGBT people are only offered limited protection: Whilst Italy has established hate crime laws, the list of aggravating circumstances includes ethnicity, race, nationality or religion as protected grounds, but does not consider SOGIE. Therefore, anti-LGBT hate crimes, when reported, are investigated as common crimes and punished accordingly to their common discipline.

In the Netherlands, on the other hand, the concept of hate crime is not included as such in the Criminal Code. The ‘Discrimination Guideline’ applies to general offenses, such as violence or assault, with a discriminatory aspect, which must coincide with one of the grounds referred to in Article 137c of the Criminal Code. These include ‘race’, religion or belief; heterosexual or homosexual orientation; physical or mental disability, and gender identity. Next to general victims’ rights, that is, rights applying to all crime victims, there are certain procedural rights that have been developed specifically for victims of hate crime and other vulnerable victims. According to the Prosecutorial Guidelines regarding Discrimination, for instance, victims of hate crime have the right to be informed about decisions - including the reasons for these decisions - not

to prosecute or to discontinue prosecution, to dismiss or conditionally dismiss a case.

In the case of Poland, the criminal law does not define as such hate crimes or hate speech. Nonetheless, the Criminal Code still includes some crimes that belong to this category, including the use of and incitement to violence or unlawful threat towards a group of people or an individual person on grounds of their national, ethnic, racial, political or religious affiliation or because of their lack of religious belief (art. 119); public insulting of a group of people or an individual person on grounds of their national, ethnic, racial or religious affiliation or because of these grounds the physical inviolability of another person is infringed (art. 257). However, there is no general penalty enhancement for hate crimes in the Criminal Code. Consequently, there is no obligation to provide higher penalties for offenses such as homicide, arson, damage to property or theft, even if they are motivated by racism or xenophobia, even though such crimes may be considered jointly with the crimes described in the above articles. Further, the exhaustive character of the list of grounds makes it impossible for a court of law to read SOGIE into this list. Still, provisions that make the court consider the motivation and the manner of conduct of the offender are sometimes applied by judges to handle an anti-LGBT motive as an aggravating circumstance. Furthermore, in chapter 32 of the Penal Code, “Crimes against public order,” which pertains to active participation in an unlawful assembly, knowing that the participants are jointly committing a violent assault on a person or property (art. 254), the protected characteristics are not explicitly listed, thus opening up possibilities for their wider use.

Finally, and similar to the cases of Poland and the Netherlands, in Spain the Criminal Code does not refer specifically to “hate crimes”. Nonetheless, several articles consider bias-motivated offences. In this regard, article 22 regulates the aggravating circumstances of a crime, in which gender, sexual orientation and sexual identity, among others, are included. Sexual orientation and gender identity are also covered as protected categories in art. 134, which regulates discrimination in work and employment; art. 510, which addresses the incitement to discrimination, hatred and violence against persons and/or groups, including the grounds of sexual orientation or gender identity; art. 511 and 512 on discrimination in services; art. 170.1 on threats against groups; and art. 173 on crimes against moral integrity (Aguilar 2015). Further, whilst until 2015 the Criminal Code only mentioned “sexual orientation”, the Organic Law 1/2015 of 30 March, introduced the concept of “gender identity” among the protected categories, with the aim to cover transgender people. In addition

to the Criminal Code, other specific laws have been established in Spain to ensure equality and non-discrimination in different areas of life, including employment, education, public spaces, sport, services and electronic commerce. Other than these specific non-discrimination laws and provisions of the Criminal Code and Constitution, the national legal framework in Spain does not have any generic law for LGBT equality. Nevertheless, the majority of autonomous regions have developed administrative or civil laws aimed to protect SOGIE characteristics and combat LGBT-phobia.

Referring to these differences in legal frameworks, the lack of recognition of sexual orientation and gender identity as protected characteristics in hate crime legislation clearly has an impact on the protection of the rights of the victims of anti-LGBT hate crimes, as these in some of the countries are not recognised as particularly vulnerable crime victims with specific protection needs. They also risk suffering from secondary victimisation in their contacts with law enforcement agencies, to a higher degree than victims in countries where law enforcement officers have received specific training for addressing hate crimes. This comes with the consequence that LGBT persons might not even consider reporting to the police.

Furthermore, in terms of the research carried out and explored in this publication, the differences in the recognition of hate crimes in the criminal codes of the countries, have also impacted on the conceptualisation of hate crimes and restorative justice: the lack of recognition of anti-LGBT hate crimes as a specific category of bias-motivated crime adds an important obstacle to the task of identifying specific practices and strategies in applying restorative justice to cases of hate crimes. This has meant that more informal and broader understandings of 'hate crimes' and 'restorative practices' have been used throughout the research, where some of the cases analysed might not have been legally recognised as hate crimes – or in some cases even as crimes – in some of the countries. The research has also brought up for discussion cases and processes that might not fall under criminal law, but rather under an antidiscrimination, administrative or civil legal framework.

Further, even in the countries where hate crime laws exist, and where SOGIE characteristics are defined as protected characteristics, the statistics of anti-LGBT hate crime cases that reach restorative justice services are near to non-existing. This is in part because - as we have seen - these cases are often

not categorised as hate crimes during reporting or prosecution. As evidenced by restorative justice practitioners in Spain, anti-LGBT hate crime cases sometimes reach restorative justice programmes, but under the categorisation of common crimes without the aggravating circumstance. Then, only when embarking upon a restorative justice process the motivation behind the crime surfaces. This lack of statistics and of formal legal definitions of anti-LGBT hate crimes, has made interviews with professionals and victims sharing their experiences a crucial tool to gather further knowledge on how restorative practices are currently applied or can be applied in cases of anti-LGBT hate crimes.

DIVERSE REALITIES - SIMILAR NEEDS OF VICTIMS

As we have seen, the social and legal contexts of the countries involved in the research are very diverse. Nevertheless, the need for the harm caused by a hate crime to be addressed and repaired is likely to be similar across the countries due to the specific characteristics of anti-LGBT hate crimes. In this regard, hate crimes are unique in that they attack a group characteristic that the victim holds or is perceived to hold (Walters 2019). The harm of hate crimes may be accumulated over time, through various incidents, and may have many effects on the victims on several levels including emotional effects such as fear, anger, self-blame, hypervigilance in online and physical spaces; social impacts such as damaged confidence, social isolation, avoidance of certain places, withdrawal from sources of support; health-related effects including depression, anxiety, eating disorders, insomnia, stress-induced physical illness; economic effects such as missing work or damaged educational or work prospects; effects related to self-expression including self-censorship, fear of speaking out, fear of being open about their LGBT identity; and finally community effects such as harm and feeling of vulnerability for friends, family and LGBTI community, and a sensation of fear among the community.

As Walters (2019) highlights, the specific vulnerability of victims of anti-LGBT hate crimes relates to two different elements of victimisation: first, the risk of victimisation is increased for certain groups due to their identity. The second element relates to the level of harm that victims are likely to experience as a direct result of their targeted victimisation. As explored by Jordi Mas et al in chapter four of this volume, hate crime victims interviewed across the countries express both very similar needs and often also similar encounters with the justice system. In this regard, restorative justice may contribute to repairing the harm done to the victim, through having an active role in the restor-

ative process, receiving responses from the offending party, and being provided with a space to explain how the crime affected them. This, in turn, may lead to recovering a sense of control, particularly in cases where the crime has been committed in a context that they frequent in their day-to-day life.

Nevertheless, very little research has been conducted on the application of restorative justice to anti-LGBT hate crimes, particularly from qualitative and mixed-methods approaches. To fill that gap, the research presented in the present volume sets out to unravel the perspectives of, on the one hand, victims of anti-LGBT hate crimes, and on the other hand, professionals working in restorative justice and/or with LGBT persons and victims of anti-LGBT hate crimes, including restorative justice practitioners, victim support organizations and civil society organizations. The aim has been to understand how restorative justice can best be applied to address the needs of victims of anti-LGBT hate crimes, both as individual (direct) and collective (indirect) victims. In the next section, the methodological approach will be further explained.

A RESEARCH AND ACTION IN-DEPTH APPROACH

Through qualitative and quantitative research as well as subsequent workshops and training actions in Belgium, Bulgaria, Italy, the Netherlands, Poland and Spain¹¹, this applied participative research has aimed to enhance the rights of victims of anti-LGBT hate crimes through analysing the application of restorative measures in cases of anti-LGBT hate crimes. Due to the focus on victims of crime and on the professionals who work with victims from different perspectives, the methodology employed has highlighted the relevance of experiences, perceptions, and expectations. Whilst a mixed-methods approach has been applied, the key methodology has been ethnographic research, as a path to unveil not only discourses and practices but also dissonances, perceptions, and the relations among these. In this way, the voices from the ground have been actively integrated in the research and in the subsequent actions.

¹¹ The interview extracts are referenced with the country's acronym: BE for Belgium, BG for Bulgaria, IT for Italy, NL for the Netherlands, PL for Poland and ES for Spain.

INTERVIEWS WITH PROFESSIONALS

The interviews with professionals were conducted during the spring of 2020 and aimed to gather a representative sample among the different backgrounds and profiles who work within the justice systems, restorative justice services, hate crimes, and victims of other crimes. In total 104 professionals were interviewed across the six countries. Due to the COVID-19 pandemic, most interviews were conducted online through tools such as Skype, Zoom, Microsoft Teams, as well as phone calls. However, a few interviews were conducted face-to-face in Belgium, Bulgaria, and Italy.

The sample across the six countries was composed of restorative justice experts such as scholars, practitioners, advocates, and mediators; NGO professionals, including lawyers, psychologists, and social workers; justice professionals such as lawyers, prosecutors; policymakers and representatives of public institutions, as well professionals from victim support services. Despite the explicit aim of significant representativeness, different factors have affected this objective. For example, in Poland the political situation in the country meant that no representatives from public justice institutions were interviewed, as their superiors did not give their consent for participation. Further, the COVID-19 pandemic and the necessary adaptation of work and communication may have biased the representativeness of our sample, as professionals who had adapted more quickly to online forms of communications may have been slightly more readily available to participate.

SURVEY

With the aim to reach a broader sample of civil society organizations than those involved through the interviews, the research included a survey aimed to gather the experiences and perspectives of the main LGBT associations and other civil organizations involved in the struggle against discrimination and hate crimes, in relation to applying restorative justice in cases of hate crimes. A questionnaire was developed structured according to the guiding themes of the research to, on the one hand, ensure that all objectives were addressed and on the other hand to guarantee the triangulation between quantitative and qualitative data. Taking into consideration these objectives, the questionnaire was divided into five sections, including socio-demographic information; information on the organization; knowledge about restorative

justice; perceived training needs; the positioning of the organization in relation to restorative justice.

To disseminate the survey, a comprehensive list of relevant civil society organizations was elaborated for each country. These lists included, on the one hand, LGBT organizations, and, on the other hand, other anti-discrimination organizations working on advice, follow-up and support to victims, and/or civil rights, covering different fields of anti-discrimination including racism, xenophobia, islamophobia, antisemitism, Romaphobia, aporophobia, and other grounds. Before making the survey publicly available, it was piloted among a small sample of professionals from an LGBT organization in Spain.

The survey was conducted online across the six countries, in each country language, using the Limesurvey software. It was made available during 1.5 month during the spring of 2020. Of the 737 organizations that were contacted, 288 finally responded, making up a response rate of 39%. Nonetheless, there are important differences in response rate between the participant countries: from 75% (Poland) to 11.9% (Belgium). Among the 288 questionnaires received, 239 were finally analysed, as the remaining responses did not contain the minimum information required as basis for analysis.

INTERVIEWS WITH VICTIMS

The interviews with victims of anti-LGBT hate crimes were originally postponed due to the onset of the COVID-19 pandemic, as the research teams considered that the online interview process could not guarantee the necessary condition of a safe space for these interviews during lockdown. Interviews with victims of hate crimes require a comfortable and friendly atmosphere, with the conversation developed in a safe and intimate place, where their privacy can be guaranteed. All these requirements could not be met by means of online interviews during the period of lockdown, as safe spaces could not be guaranteed for all victims. Because of this, the interviews with victims of anti-LGBT hate crimes were finally postponed to the spring of 2021.

A total of 39 interviews were conducted across the six countries with the aim to explore the perceptions and experiences of victims of anti-LGBT hate crimes of the justice system and particularly of restorative justice, regardless whether

they had been personally involved in a restorative justice process or not. The sample included lesbian, gay, bisexual and transgender (LGBT) persons, who had either been victims of an anti-LGBT hate crime or who had experienced a high level of discrimination based on their sexual orientation and/or gender identity. The sample also aimed to include LGBT diversity (e.g. avoiding gay overrepresentation) and an intersectional approach in terms of ethnicity, origin, gender, age, functional diversity, intending to reflect the heterogeneity of LGBT persons.

WORKSHOPS WITH PROFESSIONALS FROM THE JUSTICE SYSTEM AND REPRESENTATIVES OF LGBT NGOS

Finally, a series of workshops across the six countries also contributed with valuable insights as well as a further triangulation of the research results. Six national workshops with a total of 96 participants, in addition to a transnational workshop with 31 participants, were held in early 2021. The main objectives of the workshops were to gather professionals to exchange experiences, tools and practices linked to restorative justice and the fight against LGBT-phobia; to identify barriers to restorative justice in cases of anti-LGBT hate crimes; to present good practices identified during the research phase; to network among organisations and professionals and understand each other's added value in increasing access to restorative justice for victims of anti-LGBT hate crimes. The starting premise for the workshops was that even in those countries more advanced in restorative justice and/or LGBT rights or hate crime prosecution, joining the two areas still requires dialogue and a merging of perspectives and experiences. Despite the previous lack of experience in joining the two areas, during the workshops each country found elements ranging from the first seeds being planted in terms of anti-LGBT hate crimes and alternative methods of conflict resolution to thorough strategies that recognise the need for dialogue between victims and offenders following harm.

CONCLUSION

As a backdrop to the following chapters of this volume, this chapter has highlighted the heterogeneity of the legal and social contexts of the countries involved in the research. These differences mean that victims across these countries have a very varying degree of protection of their rights and access to justice. These differences have also added an extra layer of complexity to this comparative research, in terms of identifying and mapping strategies for applying restorative practices in cases of anti-LGBT hate crimes. As discussed

by Ignacio Elpidio Domínguez in the following chapter of this volume, whilst many restorative justice practitioners do have some experience with cases of anti-LGBT hate crimes and feel confident that restorative justice can contribute to repairing the harm caused to the victims of these crimes, there is a general lack of specific programmes or protocols for applying restorative justice to hate crimes, as well as of realistic statistics of how many cases actually reach restorative justice programmes.

Consequently, the methodology in terms of identifying different strategies, practices, attitudes and beliefs in relation to restorative justice and anti-LGBT hate crimes has been crafted based on a mixed methods approach, aiming for a broad inclusion of professional categories able to share their knowledge and experiences of applying restorative justice to anti-LGBT hate crimes. Nevertheless, also the voices of victims have been crucial to understanding how a person victimised by a bias-motivated crime may perceive restorative justice as a means to repairing the harm and giving them back a sense of control, as discussed by Jordi Mas Grau and Carme Montserrat in chapter 4.

At the same time, in addition to gathering new knowledge, in most of the countries involved, the research has also meant the first intent to join the areas of anti-LGBT hate crimes and restorative justice practices. The activities themselves, through their participative approach and action-orientation, have been a starting point for building joint paths between LGBT organizations and restorative justice practitioners, to better address the needs of LGBT victims and to repair the harms caused by anti-LGBT crimes at both the individual and the collective level.

IGNACIO ELPIDIO DOMÍNGUEZ RUIZ

INTRODUCTION

The relevance of the professionals' perspectives draws from their various experiences with the justice system. The wide range of professional backgrounds and perspectives may be the most defining reason for the different, occasionally conflicting perspectives regarding what restorative justice is and how it may contribute to the treatment of anti-LGBT hate crimes and discrimination. The ethnographic perspective presented in this chapter ensured the production of detailed information as well as the intersection of expectations and practices. As such, the analysis of the different professionals' experiences and beliefs allowed us to contrast a series of commonalities and dissonances, as well as a set of knowledge and practice gaps to be bridged with clear training and cooperation needs.

“When we are talking about restoring, what does it mean? Is it restoring the debt of society, is it restoring a person's life? It is a complex concept.”

(NL-P-1, researcher and scholar)

KNOWLEDGE, BELIEFS AND PRACTICES OF PROFESSIONALS IN RELATION TO RESTORATIVE JUSTICE

Throughout the interviews, professionals from all six countries displayed different levels of theoretical and practical knowledge, experiences, and ideas about restorative justice, its possible techniques, and its foreseeable outcomes. The comparison between the six countries indicates how the professionals' different knowledge about the concept of restorative justice depends on a

series of factors, such as their corresponding country's implementation and divulgation of restorative justice, the professional's educational background and past and present fields of activities, as well as their past experiences.

“A justice that tends more, not so much to the punitive terrain, to the punishment imposed by a Penal Code, but more to the reinstating of the normalcy situation via a meeting between the victims and their aggressors [...]. In other words, it would be a reparation of the victim’s dignity thanks to, I’m not sure if it’s the word, an exercise of pedagogy with the aggressor.”

(ES-P-4, LGBT technical adviser)

Within these and other countries the restorative justice experts acknowledged that experiences and information in their field are understandably different from NGO professionals. Their views and knowledge were also predictably more nuanced as a consequence of their professional background. For instance, Belgian professionals discussed different views on restorative justice, such as debates on the nature of conflict — seen by some of them as a property that must be given back to the involved parties (Christie 1977) — and on the role of the victim-offender relationship and of apologies. NGO professionals, on the other hand, showed a more limited knowledge and experience with the concept and practice of restorative justice, except for those who had already received some training on restorative justice. The widespread lack of clear or specific knowledge of restorative justice among these professionals coincided with both a clearer notion of mediation for most professionals and doubts about the feasibility or appropriateness of restorative practices for LGBT NGO or victims — as expressed by some Belgian, Spanish, and Polish professionals.

However, some restorative justice experts and practitioners acknowledged

and responded to these doubts, as they commonly arose throughout their practice. Spanish restorative justice experts, for example, understood these doubts as consequences of the NGO professionals' usual role and as an effect of common misconstructions of restorative justice as neutral mediation among equals. Italian restorative justice professionals, on the other hand, highlighted the need for a broader knowledge of this field among all involved parties: law practitioners, restorative justice experts, and so on. They acknowledged a lack of experiences or cases of restorative justice for LGBT-related cases, and this could be understood as a key factor for this knowledge- and experience-gap between different professional backgrounds. However, throughout the different interviews in the six participant countries, several binary oppositions or conflicting viewpoints were unveiled and analysed, and as such they can be seen as consequences of different paradigms or understandings not only of restorative justice but of justice itself, as shared and realised by the professionals.

No professional was able to mention a single specific restorative justice programme for anti-LGBT hate crimes and discrimination, and in most countries this absence was also extended to hate crimes in general. However, they were able to discuss at length their views on the feasibility and appropriateness of restorative practices for anti-LGBT discrimination and hate crimes cases. Broadly speaking, most of them praised the theoretical possibilities of restorative justice for most cases, whereas some of them — depending on the country, either some or most LGBT NGO professionals — ruled out the possibility of the application to anti-LGBT hate crimes in general or limited them to the absence of some circumstances. For example, a single professional from Italy and several ones from Belgium and Poland considered that major crimes in general should be excluded in order to avoid secondary victimisation, whereas several NGO professionals from Spain argued that cases with physical violence, extremist ideologies as a motivation, and victim-offender power imbalances should not be tackled with restorative measures. Some of the participants from the Netherlands, on the other hand, explained that their experience as LGBT NGO professionals show them how LGBT people frequently believe that the justice system in itself is not for them, and as such even restorative measures would be difficult to implement. Similarly, participants from countries without specific SOGI- or SOGIESC-related legislation argued for the difficulty of the victims trusting the justice system.

At the same time, professionals that drew mostly from their experience as restorative justice mediators and facilitators, as well as from victim support

services and other institutions, argued for the appropriateness of these practices for anti-LGBT hate crimes and discrimination. Most of these professionals — and to some extent some of those from NGOs, depending on the country — argued for the benefits of restorative justice as compared to traditional trials and justice procedures. They argued particularly for the appropriateness of these practices for hate crimes and discriminations, mostly understood as cases motivated by beliefs and values that can be challenged through empathy-producing techniques such as restorative measures. The generation of empathy, of understanding another party's perspective — chiefly, that of the victim — may be the key element of the potential of restorative procedures.

“The more distant you feel the other person, the more likely you are to hurt them. The more you perceive them as yourself, as a closer (person), as a human being, similar to you, the less likely you are to hurt them.”

[BG-P-4, NGO and RJ expert]

In this regard, it was highlighted that human rights issues are particularly well-suited for restorative measures, as they entail the analysis and transformation of motives, beliefs, and worldviews, as well as specific individual and collective relations. In fact, a Polish public official argued that *“it is hard to find better crimes for the use of restorative justice”* (PL-P-18, fundamental rights NGO representative). Related to this idea, Italian professionals precisely argued for the usefulness of these practices with cases that involve fundamental rights and dignity, as compared to minor crimes for which they may be less productive.

A VICTIM-CENTRED APPROACH

Regarding the victims' use and awareness of restorative justice services, most interviewees were aware of the potential benefits and usefulness of restor-

ative processes, particularly when compared to traditional justice. According to some respondents, restorative processes can give agency back to the victims, as in traditional trials they tend to have a limited and unsatisfactory role, often suffering from secondary victimisation. Victims may be productively and satisfactorily heard and understood with restorative practices, while they may also be understood and even brought into contact with the offender, if they are willing and prepared to do so. Other professionals explained the necessary requirements for said procedures to be taken into consideration, such as informed consent, the parties' will and preparedness, a safe environment, constant monitoring of the parties' needs, and a detailed attention to the procedure's best timing and place. The voluntary character of restorative practices also entails the possibility for the victim to refuse engaging in these practices: *“The opportunity to say ‘no’ also gives the victim power and strength”* (NL-P-6, RJ expert and advisor).

Professionals from most countries, while praising the concept or practice of restorative justice, did not limit the benefits of this paradigm to benefits for the victim. Besides a more active role, a better understanding, and a more satisfactory experience for the victim, the actual realisation of fines and other compensations was deemed more feasible via restorative processes, as compared to procedural penal cases. They also mentioned other advantages related to both the offender and society as a whole or as a collection of groups. First, the reduction of the offender's recidivism was highlighted as a key effect of restorative justice, as compared to traditional punitive justice measures. This effect was explained as a consequence of the process of making offenders understand the damage caused. Second, the role of community involvement via organisations or representatives was emphasised as a way to provide a more satisfactory and effective justice and social change.

The victims' willingness to participate and awareness about restorative justice processes was also discussed by the professionals, with varying remarks depending on their professional background and experiences, particularly from those with direct contact with victims. Most argued that victims do not tend to be aware of the existence of these procedures and services, due to the lack of public campaigns and information and to the difficulty of accessing pertinent information. Both Belgian and Polish professionals explained that this lack of awareness is generalised among victims of any type of crime, while

some Spanish NGO lawyers also argued for the role of a widespread lack of knowledge about basic rights and legal information. However, most restorative justice practitioners argued that once the victims become familiar with these procedures, they tend to be interested in participating in them, even though it may vary according to their specific situation. It may depend on the case's severity, or on age, cultural capital, and other demographic factors, but further research is needed in this aspect.

The doubts held by many NGO and victim support professionals signalled a deep concern with the victims' wellbeing, and as such they were understood by the interviewed restorative justice practitioners. As was already mentioned, restorative justice experts were ready to counter the various doubts, and answered with a clear defence of the victim's role as the centre of the restorative paradigm. Nuanced issues, such as the difference between neutrality and impartiality, were mentioned, and several facilitators argued for an idea of balanced partiality from which the victim's wellbeing and needs are the core of a tailored process. As such, they countered a notion of a direct encounter, or victim-offender mediation, with a neutral mediator, and argued for the prioritisation of the facilitators' preparedness and of the victim's needs.

The need to adapt the techniques and measures to the circumstances of each case — argued for as the *adequacy paradigm* by a Spanish restorative justice practitioner and scholar (ES-P-11, scholar and RJ expert) — explains the wide range of direct and indirect practices described by the professionals. Some of them, with an indirect approach, responded to the lack of the offender's willingness to participate or to show remorse, but also to the lack of willing and prepared victims for processes with prison inmates, for example. Broadly speaking, the professionals with direct experience with restorative justice practice argued for the utmost importance of analysing each case and situation in order to ascertain the most appropriate for a mediation or encounter, if it exists, or in order to devise other measures if the direct encounter is not feasible.

“We cannot generalise that in certain types of cases reparation of the damage can consist of this, this, and this, right? One victim of a hate crime might want an honest apology, another could want some measures to be taken.”

(PL-P-17, human rights official and expert)

For instance, most Italian professionals also argued for a case-by-case criterion in order to analyse appropriateness of restorative measure, and this is a perspective also defended by all restorative justice practitioners from Spain and several ones from the Netherlands. This paradigm or criterion was particularly described or defended in opposition to categorical or broad limitations of restorative measures by NGO and judiciary professionals. One of the Dutch professionals highlighted a key aspect: that of the victim's will and informed decision. Besides the case-by-case analysis, it was argued that the victims must freely and consciously choose whether they are ready and willing to participate in a specific restorative process, after having been given enough information, and without feeling any form of imposition.

BEYOND VICTIM-OFFENDER MEDIATION

As a consequence of this *adequacy paradigm*, or this defence of a case-per-case basis for restorative processes, a wide range of specific techniques was argued for, tailored to the needs and circumstances of the case, victim, and offender. Issues such as the parties' willingness to participate, the victim's emotional state, and the availability of resources for the processes were mentioned as key factors. This view contrasts with the expectation of restorative justice as only victim-offender mediation, a view implicitly or explicitly held by other professionals, chiefly LGBT NGO personnel. This direct encounter, or victim-offender mediation (VOM), is the most frequent technique conceived and practiced by the interviewed professionals, and tends to be conducted by trained mediators from NGOs and public institutions. Practitioners with more experience in the field described other techniques and practices that go beyond this encounter, such as the more collective restorative circles and conferences, and family group conferences, in which different parties and occasionally oth-

er members of the community with differing roles and responsibilities share a space. Several professionals discussed a current ongoing debate regarding the limitation of restorative justice to only mediation, on the one hand, and the fact that many VOM practices lack basic restorative values.

RESTORATIVE INTERVIEW

The *restorative interview*, as described by a professional from Catalonia's public Restorative Justice Service, was argued for as a particularly productive practice for dealing with victims of hate crime. It constitutes a safe space and a space for active listening, without judgement, in which the victim may explain their experiences and feelings. It is also an opportunity for the victim to discharge some of the stress and duress suffered after a crime. This interview does not require the presence or willingness of other parties beyond the victim, but it can be a gateway to entering into a dialogue or other type of restorative process later on, as it might generate a higher level of acceptance of restorative justice. This practice, named otherwise or without a specific label, is also being used by some LGBT NGOs that focus on victim support, as a contrast between the traditional justice's focus on facts as opposed to a victim's need to share an experience or narrative.

Some restorative justice experts described the use of restorative interviews, joint encounters, circles, conferences, but also offenders writing letters to real or imaginary victims, the use of surrogate or proxy victims or offenders, and so on. While discussing the potential benefits of collective practices such as conferences they also mentioned the need to include more involved agents, such as community representatives, prison staff, neighbours, and NGO members. Other interviewees described specific cases in which the mediators and facil-

itators provided tailored measures to the cases' circumstances, or examples of reparative practices that go beyond restorative justice: for instance, a sentence for antisemitic hate crime included the mandatory viewing of a specific film for a group of football hooligans, whereas an antidiscrimination organisation oversaw the collective cleaning and painting over hate speech and racist graffiti on the walls of a Nigerian restaurant in Warsaw.

Despite the lack of explicit, specific restorative justice programmes for these cases throughout the six countries, most interviewees recommended the adaptation and use of already existing restorative practices, as a consequence of their known and foreseeable effects. For instance, a professional advocated for a step-by-step approach based on what is already being used in the Netherlands for racist and religious hate crimes: the programme includes several steps in succession that are individually assessed, starting with proper knowledge about the group discriminated by the offender, the contact with the group or a surrogate, a more detailed knowledge about the group's needs and problems, and ending with the offender's remorse and public apology. Other Dutch professionals mentioned the relevance of thematic meetings between offenders and mediators or facilitators, as techniques without the direct contact with victims that can be used to change the attitudes and empathy of offenders.

Belgian professionals, on the other hand, advocated for the relevance of broad principles or values that must take precedent when analysing and designing restorative practices for hate crimes: the centrality of the victim, a functional communication, and the acknowledgment of the offender's actions and hate motivation. One practitioner argued for the usefulness of an existing practice known as the flag system, which aims to facilitate the communication between practitioners and children and their parents, thanks to the employment of signs or flags when talking about difficult topics such as sexuality, relationships, and violence. Another practice they advocated for was the use by the police in Belgium of a checklist for the report of judicial facts and possible hate motivations behind crimes. The checklist was elaborated in collaboration between the Belgian Equality Body Against Discrimination (UNIA), the diversity department of the Antwerp police force (PZA), and the judicial follow-up service of PZA, with the goal of facilitating a constructing dialogue with the victim, as compared to a more classic question-answer method.

Finally, professionals from the Netherlands, Spain, and Bulgaria advocated for the particularly promising potential of collective restorative practices,

such as conferences and circles. Several organisations are already using them with minors, imprisoned offenders, and other target groups, with differing characteristics such as the inclusion of other indirectly involved parties, or the implementation of health and social services for the participants. These professionals argued for the role of LGBT NGOs and communities, that may be present via representatives as part of the process or as a direct or indirect victim. This possibility was explicitly defended by Spanish restorative justice practitioners as a way to include the LGBT NGO that tend to act as gatekeepers for the victims' participation, and as a way to ease their doubts about the usefulness of restorative practices. This incorporation of NGO representatives to restorative circles and conferences, however, would require a different role from those they are used to, such as psychologists and lawyers in charge of the first immediate response and support and of the traditional trials. Italian professionals also recommended collective measures with the participation of LGBT NGOs as useful instruments for breaking down anti-LGBT stereotypes and biases. During the international workshop held within the project several professionals explicitly enumerated the potential roles of NGOs and other community representatives as part of restorative processes: as involved parties or indirect victims, as providers of support for some of the parties, or as a lobbying force for the legislation or implementation of restorative justice.

POSSIBLE ROLES FOR NGOS

- ▶ NGOs and other community representatives may play different roles within restorative processes:
- ▶ As direct or indirect victims: they may participate as involved parties, as part of a community who has suffered damage.
- ▶ As providers of support for some of the parties: they may support victims or offenders towards the goals of the restorative process.
- ▶ As lobbying agents: they may lobby for the legislation or implementation of restorative justice.]

CONCLUSION

To sum up, the perspectives of involved professionals shed light on the diverse yet related experiences, knowledge, and expectations regarding the role of restorative justice. As a paradigm of harm reparation, restorative justice entails a series of roles, agencies, and responsibilities significantly different from those of procedural or traditional justice. As such, the different possible procedures focus on the solution of a conflict between parties as well as on the reparation suffered by the victim.

Voluntary participation, willingness, communication, and the key role of a facilitator are among the main common traits of restorative measures. The attention given to the victim's reparation and to their emotional wellbeing makes restorative justice a particularly promising paradigm for victims of hate crimes and discrimination such as those of anti-LGBT motivation. Secondary victimisation, the collective yet individual nature of their experiences, and the frequent mistrust in the authorities — based on experiences of discrimination by the authorities — make these victims usually dissatisfied with traditional or procedural criminal law, and as such they may benefit from alternative or complementary measures. The wide range of emotional and physical states in which these victims may find themselves also relates to the inherent flexibility of restorative measures: these procedures may be tailor-made according to the circumstances and needs of each case and victim, regarding timing, communication, specific techniques or measures, and even the promotion or the avoidance of a direct meeting with the offender. This flexibility and attention to the needs of each case requires restorative justice professionals to be adequately trained, while also requiring resources that allow for accommodating diverse needs and timings. Finally, the diversity of potential restorative practices also includes the possibility of more participants being involved, such as NGOs and other community representatives. Restorative circles and conferences, but also possible techniques, allow communities to be represented and be involved as part of wider-reaching conflict solution processes.

4 **CHAPTER 4: SEEKING REPARATION FOR THE CRIME. THE EXPERIENCES OF LGBT PEOPLE**

**JORDI MAS GRAU
AND CARMÉ MONTSERRAT**

INTRODUCTION

LGBT people experience violence and discrimination in all spheres of social life. According to the 2019 EU LGBT Survey (FRA 2020), 11% of the people interviewed had been physically attacked in the five years prior to the survey, while 42% had felt discriminated against based on their sexual orientation and / or gender identity in the previous year. In the EU, one of the ways to combat prejudice-based violence and discrimination has been the hate crime paradigm, a criminal typology adopted by European governments and transnational organizations such as the OSCE. Combating this type of crime has been a political priority due to the seriousness and multidimensionality of the damage caused, since it affects the safety and well-being of people, target groups and society as a whole, violating the principles of human dignity, social equality and coexistence (OSCE nd).

However, the paradigm of hate crimes has received criticism both from the scientific field and from political activism, questioning whether the punitive model really reduces social violence against a specific group. In this sense, this paradigm is considered to focus on individual expressions of violence, overshadowing the systemic nature of such violence (Langarita Adiego et al 2019). Likewise, the fact that the focus is placed on the punishment of the offender leaves the victim in the background and whose needs must be satisfied with the court ruling (Spade & Wilse 2000).

Considering these limitations, voices have been raised that explore alternative or complementary ways to the paradigm for addressing hate crimes, such as restorative justice. From this model it is considered that, for the reparation of the harm caused by crime, something more is needed than the criminal punishment of the offender, since for the victims it is essential to have the opportunity to express their feelings and emotions, and even obtain the recognition of the offender of having done wrong (Des Rosiers et al 1998).

This chapter will analyse the experiences and opinions of LGBT people regard-

ing hate crimes and restorative justice. The data for the analysis come from in-depth interviews with this population group carried out within the framework of the 'LetsGoByTalking' project. In total, 39 interviews were conducted in six European countries: Belgium, Bulgaria, Spain, the Netherlands, Italy and Poland.

WHEN REPARATION IS SOMETHING MORE THAN A JUDICIAL SENTENCE. THE LIMITS OF THE HATE CRIME PARADIGM

The people interviewed have a notion of anti-LGTB hate crimes that goes beyond the criminal dimension. While the vast majority point to physical violence as the defining feature of this type of crime, others also include discrimination based on sexual orientation and / or gender identity. In this sense, a Polish interviewee divided hate crimes into three categories: verbal violence, social exclusion and physical violence (PL-V-02). An interviewee from Spain defines hate crimes as:

“Any violation of fundamental rights, such as not being allowed to enter a women’s locker room because you are transgender, insulting you on social networks or, the most serious, that would be a physical attack” (ES-V-02).

The fact that their notions about hate crimes do not conform to criminal typology shows that for LGBT people it is also essential to combat the subtlest violence, the “symbolic violence” (Bourdieu 1998) that is based on socially shared beliefs and meanings and that are reproduced on a daily basis. This highlights the limitations of the hate crime paradigm, ineffective in combating less overt violence that does not constitute a crime classified in the Criminal Code: “Reporting was nonsense: the offence was not serious enough according to the legal system and most probably there would have been no punishment for the offender” (IT-VI-01).

Most of the people interviewed have experienced some form of violence that can be classified as a “hate crime”. However, few of them have reported the incident to the authorities, something that highlights the fact that hate crimes are markedly underreported (FRA 2014). The reasons for not reporting them are multiple, from distrust of authorities, fear of reprisals, fear of having to “come out of the closet” and fear of secondary victimization.

One of the reasons is mistrust towards the authorities, especially the police

and judicial authorities (OSCE 2014). In this way, there is the feeling that the victim will not be taken seriously, or that they will even be blamed for having suffered the attack, so the complaint will end up going nowhere:

“Victims of LGBTI hate crime don’t report hate crimes because they don’t feel like they’re taken seriously by the police” (BE-VI-01).

“Victims of anti-LGBT hate crime are afraid of the justice system since they perceive it somehow as ‘hostile’ for them” (IT-VI-01).

“When I reported the hate crime that I experienced, I turned to the police. My experience with them was very distant, it felt like they just asked me the standard questions and that was it. After answering those few questions, I was able to leave” (BE-VI-03).

Another reason for not reporting hate crime is the fear that the judicial process will entail having to “come out of the closet” in front of people to whom sexual orientation has not been revealed. In this sense, a Spanish interviewee (ES-VI-03) reports that, during the trial for assault, he had to clarify, before the eyes of his parents, why the aggressor knew that he was homosexual (and he knew because he had been seen leaving a cruising area). Likewise, the fear of reprisals for having reported a hate crime is another reason that makes reporting difficult:

“I think if you have been bullied or attacked by a group, one would hesitate to report it to the police, because one would be afraid of the consequences, the group might come after you” (NL-VI-01).

The fear of experiencing secondary victimization is one of the main reasons that leads victims to give up their efforts to report offences. This is the case of a Spanish interviewee (ES-VI-01) whose car was painted with swastikas and homophobic messages. When calling the police, the officer told him that he had to go to the police station to file a complaint, but he refused because it would have entailed having to drive around his town, in sight of his neighbours, with his car painted.

The following quote highlights the multiple forms secondary victimization takes:

“You do not report a hate crime, firstly, for the delegitimization of your version, because you know that they will not believe you. And revictimization: having to explain two or three times (...) But then there is the environment of the aggressor, and the harassment that you can suffer in social networks” (ES-VI-07).

Structural and institutional violence is closely linked to secondary victimization. The hetero- and cis-normative regime, which identifies and punishes sexual and gender dissidents, is the framework in which hate crimes are inscribed and acquire meaning. That is why any strategy aimed at combating anti-LGBT violence that ignores its systemic nature is doomed to failure.

Likewise, in countries like Poland, anti-LGBT hate crimes are not legally recognized, and the authorities and the media are determined to deny, and even persecute, sexual and gender diversity:

“It is so common that the execution of any rights, or access to the justice system in this area would simply be impossible, because suddenly all LGBTQ+ persons should really just sue the media and the Polish government” (PL-VI-01).

“The society does not treat them seriously [hate crimes], making comments such as ‘You could have not showed yourself in public’, ‘You could have not said what you are’, ‘You could have not displayed affection in public’, ‘You could have not said that you are like this in that particular place ‘ (...) ‘You could have not dressed in a certain way’, ‘You could have not had that haircut’, ‘You could have not worn earrings’, and so on, and so on” (PL-VI-04).

Finally, the hate crime paradigm shows its weaknesses when applied improperly. Although it was created to confer special protection to socially stigmatized groups that are subjected to violence based on prejudice, currently there are countries like Spain where hate crimes are being used by some sectors

to prosecute civil disobedience, crimes against state institutions, a fact that implies a corruption of the founding spirit of the paradigm:

“In fact, I understand that the category of ‘hate crime’ is being used perversely. It is a category designed to protect and offer justice to people violated by social structures: women, LGBT people, racialized people, etc. But instead it is being used as a hate crime against the police. And the police are part of the structure that reproduces this violence” (ES-VI-03).

As we can see, although it must be recognized that the paradigm of hate crimes has offered legal protection to specific people, it does not help to raise awareness of the structural dimension of the violence. In this way, attention is focused on the punishment of the offender while the needs of the victims are underestimated (who may even be revictimized) and the structural dimension of the violence is obscured.

IS RESTORATIVE JUSTICE AN ALTERNATIVE FOR VICTIMS?

The vast majority of those interviewed were not familiar of restorative justice. Although after the interviewee was informed of the definition and some respondents recognized its techniques (especially victim-offender mediation), there is a general lack of knowledge of existing restorative justice programs in the countries analyzed. Some of the people interviewed misunderstood restorative justice as a claim for the restoration of the crime, a fact that shows how important it is for them to receive something in return for the harm suffered:

“When I make a complaint, I hope there will be a restorative judicial sentence” (ES-VI-01) ‘

“(RJ) It’s about how to compensate for the damage done. I’m just not sure how it could be compensated for” (PL-VI-10).

Still, quite a few of the people interviewed were in favour of restorative justice when given its definition. The possibility of being able to express their experiences and emotions, and of receiving the repentance and recognition by the aggressor, were the most outstanding aspects to describe the potential of

mediation between the victim and the offender:

“I would have accepted [the offer to follow a restorative justice process] because I think it is important that I can tell my story and express my pain. The offender needs to understand what he did to me and the extent to which this has had an impact on my life”. (BE-VI-01).

“The most important outcome for me would be that the perpetrator actually recognizes what he/she/they did wrong. That they understand why a hate crime is so painful” (BE-02).

As pointed out by a Polish interviewee (PL-VI-04), restorative justice involves conceiving justice in the long term, and not as an immediate action that punishes the offender. Rather than the individualized vision of the criminal model, this interviewee highlighted the restorative model as a way to create awareness that acts of hatred have a social root.

Among the defenders of restorative justice, there are voices that criticize the ineffectiveness of the punitive model in addressing hate crimes. In this sense, it is considered that this model does not guarantee the victim the restoration of the crime, nor does it guarantee the resocialization of the offender:

“I don’t think the penal system works to transform people’s ideas and practices (...) I believe that the penal system is an activation of a logic of punishment, and I do not believe that anyone stops having a homophobic discourse or practices for this reason. If it is a serious crime, they can put you in jail. And jail is of no use to reform absolutely anyone” (ES-VI-3).

However, there is also reluctance about the possibility of following a hypothetical restorative process. There is even the paradoxical case of people who are in favour of restorative justice, but who acknowledge that they would have rejected mediation to address the crime they suffered. It is, therefore, an acceptance of restorative justice as an abstract concept, and a rejection when what it means is to personally undergo the process:

“Restorative justice could be applied in anti-LGBT hate crimes, yet I wouldn’t want to talk to the offenders. Will you apologize for having painted my car? OK. I apologize but tomorrow you will call me ‘fag-got’ again” (ES-VI-01).

Other people interviewed accept restorative justice as a possibility, but establish a series of requirements for its application. Thus, it is considered that it should not be applied to physical attacks, but only to verbal ones “because they are easier to deal with and do not require much from the offender” (PL-VI-04). While there are also voices that argue that restorative justice should only be applied after the offender has been criminally sentenced.

These cases are illustrative of the reluctance among victims to accept restorative justice as a viable option. One of the main reasons given in this regard is the fear of facing secondary victimization. In this case, restorative justice is conceived as a process that requires the assumption of emotional consequences:

“The victim has to relive this situation once again, discuss it, process it, and in the presence of strangers (...) and their oppressor, so it really is a hard thing to do, and a challenge for that person” (PL-VI-07).

Another strong argument for rejecting restorative justice is the feeling of a lack of belief at the possibility of the offender showing his repentance: “I don’t know but if she / he could recognize responsibility for my suffering and I’m afraid that it might not happen and it would be worse for me” (IT-02). With this position, there is an underlying belief that repentance is a chimera:

“There are minds that you cannot fix, there are minds that do not let themselves ... do not listen” (ES-VI-05).

“For a person who stops, insults and threatens, mediation will not make them change” (ES-VI-09).

It is within this critical approach that we find those people who directly reject victim-offender mediation:

“I don’t want to have any contact with someone who has insulted me. I don’t know if a mediation process would be something that I would feel comfortable with (...) Because this is a person with ideas, an ideology and practices that go against the way I am in the world” (ES-VI-03).

As we have seen, for many victims, restorative justice is a mechanism that should be explored as an alternative or complement to punitive justice. The

opportunity for the victim to be heard and to receive the recognition of the offender are the main potentials detected (Tamarit & Luque 2016). However, there is also reluctance towards the possibility of following a restorative process. In this case, it is the fear of secondary victimization, the resistance to believing in the remorse of the offender, as well as doubt about the reparative capacity that this process can provide the victim. The data show that victims are inclined to explore restorative justice, but always after having received all the necessary information and with the maximum guarantees for them, particularly when protecting them from secondary victimization.

On the other hand, it is necessary to visualize and implement the restorative justice paradigm within the framework that structures and orders society. This means that the paradigm has to be traversed by a non-heteronormative logic where diversity is valued in all its senses, and in specifically sexual and gender diversity. Only in this way can we transform the subjectivities of the offender and the victim, awaken the true belief and confidence that the people can exist in more equal conditions when facing the conflicts generated by inequality.

5 **CHAPTER 5: WORKING FOR REPARATION. TRAINING NEEDS AND COOPERATION**

JOSE ANTONIO LANGARITA AND PILAR ALBERTÍN

INTRODUCTION

As has been observed in previous chapters, there is room for improvement when it comes to fully guaranteeing reparation of harm for anti-LGBT hate crimes. There are difficulties for the judicial process to guarantee reparation of the harm done. Similarly, there is a lack of confidence (and even open mistrust) on the part of the victims towards the police and judicial authorities, who are blamed for a lack of preparation and skills necessary to care for victims. This fact can lead to a lack of legal recognition of anti-LGBT hate crimes, as well as secondary victimization processes that affect the well-being of the victims and their willingness to file a complaint, although there are differences between national regulatory frameworks. To counteract these difficulties, it is essential not only to have legislative guarantees, but also to intensify both cooperation between organizations and institutions and the training of the professionals involved.

This chapter will analyse the needs for cooperation and professional training in relation to how anti-LGBT hate crimes and restorative justice are handled. For this, data was extracted from in-depth interviews with professionals and LGBT people, as well as from the survey with professionals and members of anti-discrimination and civil rights organizations.

THE NEED FOR COOPERATION AND TRAINING. THE VISION OF PROFESSIONALS

Cooperation between professionals of the judicial system and LGBT organizations is essential to improve victims' access to institutional care services (Langarita et al 2018). All professionals interviewed underscored the relevance of cooperation as part of their usual activities, both within and outside of restorative justice and LGBT-related tasks and practices. Several professionals analysed or evaluated the success of such cooperation from the perspective of their goals and roles, and as such their opinions were more positive or more negative depending on the results of the practices and schemes. Several professionals praised existing cooperation programs and practices in their countries. These initiatives were mostly local or regional examples.

For instance, Italian professionals explained that in some cities (Milan, Brescia, Bergamo, Piacenza, Reggio Emilia, Florence, Bologna, and so on) there are organizations offering restorative services that work with offices for criminal execution and prosecution, social services, and, broadly speaking, with the justice system. Regarding the situation in the Netherlands, the participants highlighted the existence of current cooperation experiences. The Dutch professionals recommended existing cooperation practices between police forces, NGOs and anti-discrimination offices. Similarly, in Belgium the professionals mentioned the existence of strong interagency cooperation for anti-LGBT hate crimes, with a slower or less significant track record for these cases with restorative justice measures. The Spanish professionals mentioned several cooperation practices for either restorative justice services or anti-LGBT hate crimes, but none that combined both fields. Regarding Poland, the professionals mentioned the necessity for the cooperation between all parties involved in restorative justice practices, and they provided two different evaluations of the current situation: while the scholars and theoreticians believed that the existing cooperation is functioning well, those professionals who directly work as mediators or facilitators were more sceptical of the nation-wide cooperation programs. As for Bulgaria, the professionals were able to mention examples of good cooperation within different restorative justice programs, but none regarding anti-LGBT hate crimes. This can be understood as a consequence of the legal situation of LGBT people and their protection.

Besides existing cooperation practices, all professionals underscored the need for more and better cooperation, as well as other activities. While Italian professionals argued for awareness-raising campaigns for promoting restorative

12 This section has been elaborated on the basis of Olga Jubany et al (2020). Transnational and comparative report. WP2: Restorative justice in current Europe: Qualitative and quantitative transnational research.

practices among LGBT people and NGO professionals, Spanish NGO professionals argued that the lack of personnel and of funding - both in public administrations and in grants for NGOs - are to be blamed for the current state of cooperation practices. Significantly, Polish professionals spoke more of the cooperation within the fields of restorative justice and of anti-LGBT hate crimes, but not as much between both areas. This divide is consistent with the arguments by Dutch and Belgian professionals for more and better communication between the aforementioned fields, as a way to promote restorative justice services and to provide a more satisfactory experience for victims and professionals. Bulgarian professionals explained that on many occasions the institutions and organisations address different aspects of the same issues with their practices and projects, but they do not cooperate in their everyday work, apart from specific projects. In this regard, Polish professionals praised the role of international cooperation and research projects as a form of networking, training, and cooperation that positively affects the whole restorative justice sector in the country.

Training is one of the most frequent existing cooperative practices throughout the six countries, and it is a field in which LGBT NGOs, justice operators, restorative justice experts, and/or policy makers have frequent exchanges. The existing training programmes can be divided into those focusing on LGBT and hate-crime related contents and themes, and those related to restorative justice. Professionals from Italy, Poland, Belgium and Spain, for example, mentioned existing or upcoming training courses and initiatives that, drawing from LGBT NGOs or public institutions, provided sensitivity and diversity training for police officers, prosecutors, education professionals, judges, and so on. As for restorative justice-related training, professionals from the Netherlands, Poland, and Belgium described existing practices that focus on the possibilities of restorative measures, their needs and procedures, the different techniques possible, as well as existing good strategies.

The disconnection or gap between LGBT and restorative justice training practices and professionals from both fields was mentioned by professionals from all six countries. There was an explicit training need for professionals from different backgrounds and activities, who underscored the relevance of bridging the knowledge gaps and of providing the necessary information so that the professionals better understand other perspectives. As such, professionals

recommended LGBT-related training for restorative justice practitioners — as part of the already existing training with justice operators, as well as restorative justice-related training for NGO professionals.

Attention to victims of anti-LGBT hate crimes needs to be provided with a comprehensive perspective that takes into account all phases of the process, from the initial attention to the victim after the fact through to sentencing and the consequent legal and social implications. In other words, each professional who supports victims, in each phase of the social and / or legal care process, should be trained in issues of sexual and gender diversity and their implications for personal experiences, as well as having a trained eye to identify the specific aspects that must be taken into account when faced with a crime motivated by sexual orientation, gender identity or expression.

Regarding restorative justice, these training needs become evident if we consider the results from the survey conducted with professionals and members of NGO working in the fields of anti-discrimination and civil rights. In general, the low confidence of respondents regarding their knowledge in relation to restorative justice should be stressed. On a scale of 5 (1. None - 5. Total), 32.7% of respondents indicated having little or no confidence regarding their knowledge about restorative justice, whilst 22.4% responded “to a large extent” or “total”. However, the majority of respondents indicated to having knowledge of restorative justice to a “moderate extent” (34.9%). Similarly, the overwhelming majority of respondents (75.7%) indicated they were not aware of the restorative justice programs put in place in their country, and even 7.9% responded -mistakenly- that there are no restorative justice programs in their country. Only 16.4% of respondents knew of some existing restorative justice programs.

Regarding the need for training on LGBT issues, the relevance of receiving such training was high (7.7/10). However, while the majority of countries score 8 and 9 in most of the topics, Bulgaria stands out for its relatively low scores (around 6). In this country, two issues seem to not be very relevant, especially if we compare their score (6) with the overall table: social, emotional and psychological assistance to victims of anti-LGBT hate crimes, and the first contact with those victims.

Regarding the specific LGBT topics to be covered, the most relevant ones were the adoption of an intersectional perspective of oppressions (8.54/10), social prejudices against LGBT people (8.27), LGBT concepts, terminology and inclusive language (8.08), and specific needs of LGBT victims (8.03). On the

other hand, the least relevant were the barriers to access to restorative justice by victims of anti-LGBT hate crimes (7.58), the first contact with victims of LGBT hate crimes (7.59), and strategies and techniques for applying restorative justice in anti-LGBT hate crimes. According to these results, it should be highlighted that among these NGO professionals, two of the least demanded topics for training were linked to restorative justice.

THE NEEDS FOR COOPERATION AND TRAINING. THE VISION OF THE VICTIMS

Asked about training and awareness needs, most of the LGBT people interviewed agree that there is a clear need for professional training (especially for judges, prosecutors and police) linked to dealing with anti-LGBT hate crimes. The priorities of LGBT people are perfectly reflected in the following quote:

“It is very important that professionals receive training on restorative justice, but it is even more important to train on the specific areas that care for the LGBT community entails” (BG-VI-8).

The priority of improving training in the care of victims of anti-LGBT hate crimes clearly shows the need for victims to be recognized as victims of hate, to receive respectful treatment and to avoid secondary victimization. As a Belgian interviewee points out, in order to provide adequate assistance to victims, professional skills related to active listening and recognition of the suffering caused, as well as the identification of hate crimes must be strengthened:

“The victim should always be central within justice. They have to move on with their lives despite the consequences of the harm done. The most urgent training needs for judicial and police authorities are those related to the identification of anti-LGBT hate crimes and the assistance to victims” (BE-VI-01).

To ensure a victim-centred approach that fully guarantees reparation for harm done, victims consider that it is necessary for justice professionals to acquire skills to work with the psychological dimension of the victim (BE-VI-02), work on empathy and the fight against their own prejudices (BG-VI-01), and learn to use a language that respects the LGBT reality (PL-VI-01), especially in relation to the recognition of the felt identity of transgender people.

In relation to the security forces, there are still many misgivings and much mistrust among the victims towards their professional development, and there are opinions that consider it to be an institution that reproduces hetero- and cis-normative logic and violence. In this regard, a Polish interviewee considers that the police “do not know the law or the needs of the victims” (PL-VI-02). In a similar sense, a Spanish interviewee reveals the need for improvement of the knowledge of the police regarding the LGBT reality, as he explains that he once accompanied a transgender woman to file a complaint at the police station and the officer who attended them asked them what they meant by “LGBT” (ES-VI-03).

As we can see, it is important for victims to intensify awareness among justice professionals and the police regarding sexual and gender diversity, and to equip them with the necessary professional skills to guarantee adequate care for victims of anti-LGBT hate crimes. However, there are also victims who are sceptical of the effectiveness of vocational training. In this regard, one interviewee considers that legislation, action protocols and training courses are of little use if professionals do not have personal values that are respectful of sexual and gender diversity:

“I can train the police (...) I can explain what hate crimes are, what the protocols are (...) But I am training this policeman as a policeman, but as a person... If he is chauvinist, then he will continue to be one. If you are educated in a homophobic culture, no matter how much they force you to follow a procedure at work, you do not change the way you are” (ES-VI-01).

If protocols are of little use for this interviewee if the professional has values that are not very sensitive to the LGBT reality, another interviewee (ES-VI-07) considers precisely that the establishment of clear protocols of action is decisive to ensure a good professional development of judges, prosecutors and police, whom the interviewee considers to be, for the most part, sexist and homophobic.

Beyond the need for professional training on the LGBT reality and hate crimes, for some of the people interviewed (those who are in favour of restorative justice) it is also important to improve training in this form of alternative justice among jurists. As one interviewee points out, these professionals have been trained in traditional punitive justice, so they must explore alternative and novel ways that can enrich their work:

“Jurists are committed to criminal justice, and this way has been seen to be ineffective against hate crimes. Therefore, they have to discover more about other ways such as RJ, in order to find other ways to repair the victim for the crime suffered” (ES-VI-07).

CONCLUSION

As we have seen, in the countries analyzed there are experiences of cooperation and training related to hate crimes and restorative justice. Regarding cooperation, there are strategies for joint work between government agencies and civil rights organizations. With regard to training, there are training programs to improve the care of victims of hate crimes and the acquisition of skills to apply restorative justice. However, professionals in all the countries analyzed regret the lack of training that combines the two themes, that is, that addresses how to apply restorative justice in hate crimes. Similarly, professionals recommend improving training on the LGBT reality among restorative justice professionals, and improving restorative justice training among professionals and members of LGBT organizations.

Regarding the experiences and opinions of the victims, most of them consider that there is a clear need for professional training (especially for judges, prosecutors and police) involved in dealing with anti-LGBT hate crimes. There is still a large number of LGBT people who consider that the professionals in the judicial sphere and those responsible for public safety do not have the necessary skills to adequately attend to victims of this type of crime and to offer them empathetic and respectful treatment. Furthermore, some of the interviewees consider that both legal professionals and the police reproduce the logic of hetero- and cisnormativity. Apart from this need for training, victims point out the desirability of promoting training in restorative justice among legal professionals, in order to provide them with innovative tools that can complement their skills in criminal justice.

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OLGA JUBANY, PHD.

Accredited Full Professor. Director of the European Social Research Unit, Departament d'Antropologia Social. Universitat de Barcelona.

MALIN ROIHA

Doctoral Researcher. European Social Research Unit, Departament d'Antropologia Social. Universitat de Barcelona.

IGNACIO ELPIDIO DOMÍNGUEZ RUIZ, PHD.

Researcher. European Social Research Unit, Departament d'Antropologia Social. Universitat de Barcelona.

JORDI MAS GRAU, PHD.

Postdoctoral Fellow. Grup de Recerca en Ciències Socials Aplicades. Universitat de Girona.

CARME MONTSERRAT, PHD.

Senior Researcher. Liberi. Grup de Recerca en Infància, Joves i Comunitat. Universitat de Girona.

JOSE ANTONIO LANGARITA, PHD.

Senior Researcher. Grup de Recerca en Ciències Socials Aplicades. Universitat de Girona.

PILAR ALBERTÍN, PHD.

Senior Researcher. Grup de Recerca en Envel·liment, Cultura i Salut. Universitat de Girona.

JUSTICE OUTSIDE THE BOX: THE RESTORATIVE APPROACH TO ANTI-LGBT HATE CRIMES

Restorative justice draws on a paradigm of conflict resolution, damage rehabilitation, and justice that seeks to reinstate victims' dignity and wellbeing, by means of an active participation in processes based on direct or indirect dialogue. From the victims' perspective, restorative practices offer them the possibility to voice their experiences and needs, which is critical to many victims, particularly in cases of anti-LGBT hate crimes.

This volume offers some critical discussions on restorative justice applied to anti-LGBT hate crimes. The contributions are grounded on the findings of empirical research conducted across six countries in Europe: Belgium, Bulgaria, Italy, the Netherlands, Poland and Spain. These cases represent a variety of traditions, struggles and experiences regarding LGBT rights and the countering of LGBT-phobia, whilst also depicting different legal traditions and frameworks for the application of restorative justice.

The different chapters are aimed at stimulating academic debate, but also at contributing to the understanding of this paradigm among civil society, justice practitioners, hate crime victims, policymakers and anyone interested in the topic from different approaches and experiences.

