



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

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**EUROPEAN COMMISSION - JUSTICE
PROGRAMME OF THE EUROPEAN
UNION, 2021**

BRUSSELS, BELGIUM.

ISBN: 978-84-09-35078-0



This publication was produced as part of the project LetsGoByTalking: Innovative paths through restorative justice for victims of anti-LGBT hate crimes, co-funded by the Justice Programme of the European Union (2014—2020).

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ACKNOWLEDGEMENTS

This publication builds upon a two-year investigation, funded by the European Union's Justice Programme (2014-2020), conducted by multi-disciplinary research teams across six European countries.

The authors would like to acknowledge the invaluable efforts of all the teams involved in the investigation ¹:

Universitat de Girona (Spain), Çavaria (Belgium), European Forum for Restorative Justice (Belgium), Avans University of Applied Sciences (the Netherlands), Uniwersytet Wrocławski (Poland), Università degli Studi di Brescia (Italy), and Bilitis (Bulgaria).

We would also like to extend our warmest gratitude to all the persons who have contributed greatly to the research with their time and sharing their experiences, particularly through their participation in the interviews, survey and workshops.

This includes most notably the victims of anti-LGBT hate crimes and the professionals working with these crimes, without whom the investigation and this publication would not have been possible.

¹ LetsGoByTalking project, co-funded by the Justice Programme of the European Union under grant agreement n° 875763.

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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.

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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.

