

Who Sets the Limits in Restorative Justice and Why? Comparative Implications Learnt from Restorative Encounters with Terrorism Victims in the Basque Country

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Abstract

The starting point of this paper is the 2012 Spanish Interior Ministry Plan for terrorism and other organised crimes regarding reparative programs. Comparative experiences of restorative justice in grave victimisations will be considered to point out their global growth and their positive impact for many victims in terms of recovery and minimisation of secondary victimisation. Secondary victimisation seems one of the major concerns of the 2012 EU Directive on the rights of victims in relation to restorative justice. This might not to be justified in the light of research results and, at the theoretical level, of given international specific standards that function as safeguards for victims, offenders and communities. Those safeguards will be confronted to the weight of public opinion, media and political interests. Diverse political interests are particularly present in most serious victimisations within the so-called punitiveness climate, but also within victims' interests related to memory for irreparable harms.

Key words

Criminology; victimology; restorative justice; victims; terrorism; secondary victimisation; Basque Country; forgiveness; recovery

Resumen

El punto de partida de este texto es el Plan del Ministerio del Interior español de 2012 relativo a los programas reparadores destinados a condenados por terrorismo y delincuencia organizada. Se consideran experiencias comparadas de justicia restaurativa en victimizaciones graves para señalar su expansión global y su impacto positivo para muchas víctimas en términos de recuperación y minimización de la victimización secundaria. La victimización secundaria parece ser una de las principales preocupaciones de la Directiva de la Unión Europea de 2012 sobre

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derechos de las víctimas, en relación con la justicia restaurativa. No obstante, esta preocupación no parece justificarse a la luz de los resultados de la investigación empírica y los estándares internacionales en la materia que funcionan como garantías para todos los agentes en juego, no obstante el peso de la opinión pública, los medios de comunicación y los intereses políticos. Las demandas de las víctimas de memoria, ante daños irreparables, se producen en un clima de punitivismo.

Palabras clave

Criminología; victimología; justicia restaurativa; víctimas; terrorismo; victimización secundaria; País Vasco; perdón; recuperación

Table of contents

1. Introduction.....	553
2. Comparative experiences of restorative justice in grave victimisations. Personal and social dimensions: vulnerabilities and power imbalances in relation to memory, collective efficacy and acknowledgement	554
3. The 2012 Interior Ministry plan on reparative programmes for terrorism and organised crime	557
4. Restorative justice international standards as theoretical safeguards for victims, offenders and communities	559
5. Public opinion and political interests: the broken link of micro, meso and macro issues	560
6. Concluding remarks	561
References	562

“La memoria no es un depósito; es, más bien, un flujo, una corriente, cuyo curso y caudal el paso del tiempo modifica ... Un momento de construcción sobre un momento de herencia...” (Juliá 2010, p. 335)

1. Introduction

Restorative justice, penal mediation and reparative justice, prevalent terms in the legal literature, garner sympathy from the Spanish executive¹ and judiciary. However, there is a lack of legislation and regulation on the topic² leading to a lack of publicly promoted and financed programmes³. In addition, the scepticism from and inertia within some legal professions play major roles in explaining the marginalisation of restorative justice.

Nevertheless, since the 1990s, these impediments have not stopped the expansion of restorative programmes (Tamarit 2012). Existing programmes address serious victimisations within the penitentiary system that extend beyond juvenile justice. Many programmes have been developed at the initiative of victims, victimisers, practitioners and volunteers. This process can be observed in other countries as well (Vanfraechem *et al.* 2010).

Regardless of the lack of consensus in definitions⁴, restorative justice programmes are broadly defined in this paper as practical schemes theoretically directed through free dialogue conducted by facilitators, to a balanced, simultaneous and interdependent empathy:

- a) towards victims via recovery and reparation,
- b) towards victimisers via active responsibility,
- c) and towards communities via restoration⁵.

Following Zehr's (1990) classical work, restorative justice represents a change of lenses through which to view the domain of criminal justice. Due to the lack of sustainable evaluation and research, we do not have accurate data on how this works in the Spanish and Basque contexts. The point of this paper is not so much to evaluate the actual impact of these more-or-less formal programmes addressing serious victimisations but to highlight their existence, even if on the margins, and to underline significant elements that question the hegemonic criminal justice system. We will try to explore, in criminological and victimological terms, who sets the limits of restorative justice, how and on which grounds, as well as who is affected. By concentrating on the subtitle of the workshop, *implication* is understood as repercussion or effect.

Avoiding chronocentrism (Rock 2005) and valuing existing theories, key concepts from different disciplines will be discussed in this paper to think about the present complexity of the Basque context. As social anthropologist Marilyn Strathern (2011) argues when discussing previous research, we should consider "... how we keep that work alive, because that life is bound up with how we live in the here and now: it requires an acute sense of our present circumstances. For as our ideas 'newly'

¹ At the central and autonomous level.

² In relation to the 2010 EU Directive on the rights of victims, the Spanish reform of current criminal procedural law will include the so-called *statute for victims*, where mediation is expected, primarily in the hands of prosecutors during the process of diversion.

³ For a discussion of the great divergence among cities and Autonomous Communities, see the website of the General Council of the Judiciary Power at <http://www.poderjudicial.es>.

⁴ In section IV, consideration will be given to the normative consensus reached in the international arena.

⁵ According to paragraph 3 of the ECOSOC Resolution 2002/12 on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, restorative process "*means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles*".

unfold we are able to ask fresh questions of what otherwise seem 'old' data—and it is in the freshness of our questions that past and present both live".

The study of the socio-political impact of restorative encounters with victims of ETA terrorism invites the reader to consider legal pluralism on the 'limits debate' (Varona 1996). Drawing from results of our own previous research, the ultimate aim is to engage in deeper debates in ways that relate to today's changing world as Hall and Winlow (2012, p. 1) propose for Criminology.

Particular consideration will be given to the case of the Basque Country. This paper is based on case studies through the documentary and narrative analysis of the expectations, perceptions and experiences of victims and offenders who participated in restorative justice, as well as other stakeholders' discourses (Varona 2012a, 2012b, 2013). The analysis is limited because we cannot offer the whole picture of the plurality of victims and victimisers⁶.

Comparative programmes of restorative justice for grave victimisations note the global growth of restorative justice and its positive impact for many victims in terms of recovery and the minimisation of secondary victimisation. We will relate this to the 2012 Spanish Interior Ministry Plan on reparative programmes for terrorism and other organised crime. Secondary victimisation is one of the major concerns in this plan and in the 2012 EU Directive on the rights of victims⁷. This might not be justified in light of research results (Sherman and Strang 2007, Bolivar 2011, Gavrielides 2011) and, at the theoretical level, due to the given international-specific standards that function as safeguards for victims, offenders and communities in restorative programmes. Before reaching some tentative conclusions, those safeguards will be briefly compared to the weight of current public opinion, media and political interests in the so-called punitiveness climate. This is connected to the victims' demands for justice for what has been called irreparable harms in the Basque context, expressed in terms of acknowledgement and memory⁸.

2. Comparative experiences of restorative justice in grave victimisations. Personal and social dimensions: vulnerabilities and power imbalances in relation to memory, collective efficacy and acknowledgement

The fact that national regulation in support of restorative justice programmes for adults exists in Spain only for terrorism and organised crime, traditionally considered serious crimes, might be an apparent paradox⁹. That paradox might be better explained if we consider that these programmes are implemented at the final stages of incarceration. Due to legal, social and practical reasons, restorative justice programmes seem to be more easily carried out during probation and re-entry (Barabás 2010, Citoyens et Justice 2008, H. Soleto, personal communication, Ejecución de penas y reparación, personal communication at the congress *El Estado de Derecho a prueba: Seguridad, libertad y terrorismo*, Universidad Carlos III, Madrid, 13 December 2011).

⁶ For a discussion of the general diversity of victims' reactions, see Echeburúa and del Corral (2009).

⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishes minimum standards on the rights, support and protection of victims of crime and replaces Council Framework Decision 2001/220/JHA.

⁸ In the philosophical sense explained by Mate (2011) and the practical description given by several indirect victims (Varona 2014a), cfr. Pérez (2010). For a list and information on deaths produced by ETA, see Cuesta (2000), Pulgar (2004) and Alonso *et al.* (2010). For other harms, see Calle and Sánchez (2004), Calleja (1999, 2006), Calleja and Sánchez (2006), Pagazartundúa (2006), Villa (2007), Martín-Peña *et al.* (2011), Salaburu (2011) and Larizgoitia *et al.* (2009). See also Beristain (1999, 2007). Cfr. for an ETA history Elorza (2006, 2011). For the concepts of heritage and memory, see Arregi (2011).

⁹ As in other countries, we gathered some pilot and individualised experiences of restorative justice in other serious crimes.

In contrast, since 2004, there has been a controversial legal prohibition of mediation for gender violence disputes at any Spanish judicial stage¹⁰. We can take this exclusion as an example of the common global arguments for the rejection of restorative justice for serious victimisations. Those arguments pivot on the structural power imbalance and victims' vulnerability¹¹.

Research tells us that many victims and victimisers of serious crimes are willing to meet, usually within prison or at the last penitentiary stage, and that most of these meetings seem to bring material, juridical and/or emotional benefits for both parties and for society (Strang 2002)¹².

However, the 2012 EU Directive holds a suspicious perspective on restorative justice as cause of secondary victimisation. The directive itself contrasts with international law produced by other international organisations. This is the case for the 2011 Istanbul Covenant on violence against women and the 2011 Guidelines for eradicating impunity for serious human rights violations, both coming from the Council of Europe. These two legal instruments do not preclude mediation in serious crimes, given certain guarantees.

These contradictions partly result from the difficulties of defining *grave* victimisations, *power imbalance* and victims' *vulnerability* when the victim's perspective is promoted and when political issues are at stake. Critical victimological studies underline the objective and subjective dimensions of victimisation and public safety that usually go unnoticed in court. However, they are as real as legal norms, procedures and politics, and they interact with the functioning of the legal system.

We use several comparative examples of other *serious* crimes that have been resolved with restorative justice, including terrorism in Ireland, Germany, Italy or Israel (Aertsen 2011)¹³. Restorative justice has also been considered in cases of organised crime for the Italian mafia¹⁴. Other types of serious victimisations that have used restorative justice are war crimes and crimes against humanity¹⁵, sexual crimes (including the abuses in the Catholic Church), homicides¹⁶, violent property crimes, white-collar criminality, road traffic crimes, bullying, work harassment, torture and abuses of power and domestic violence (including adolescent violence towards parents)¹⁷.

Some authors distinguish between a protective and a proactive element in the way restorative justice might address serious crimes¹⁸. The proactive model cares about potential vulnerabilities¹⁹, but it promotes an active role for victims and favours interdependent factors of resilience. It is understood that safeguards and supervision will protect victims from abuse; however, universal access to restorative services should be a priority. This would assure that equal opportunities

¹⁰ For the current legal provisions and debate in Spain, see Villacampa (2012) and Hernández (2013).

¹¹ For the asymmetry of social relations concerning restorative justice for domestic and sexual violence, see Stubbs (2004).

¹² For the meaning of emotions in the criminal justice system, see Karstedt *et al.* (2011).

¹³ Cfr. Colombian restorative programmes for FARC's members and paramilitary groups', including murders and hiding of corpses.

¹⁴ Encounters with secondary victims have taken place in Milan. Researcher Emanuela Biffi is currently working on the topic with Prof. Ivo Aertsen.

¹⁵ For different perspectives on transitional justice, see, *i.a.*, Williams *et al.* (2012).

¹⁶ Cfr. (Restorative) empathy circles, information provided at <http://www.facebook.com/events/526720247346104/>.

¹⁷ The Centre for Restorative Justice & Peacemaking offers training and courses for restorative programmes in serious crimes, including specifically terrorism. See at <http://www.cehd.umn.edu/ssw/rjp/Training/default.asp>.

¹⁸ Tinneke van Camp quotes some Canadian and Belgian programmes (2008). Cfr. Albrecht and Kilchling (2007).

¹⁹ For the case of ETA terrorism in the Basque Country, contextual vulnerabilities should be considered as key elements. For the relevance of situational ethics in cases of grave violations of human rights, see Rees (2008). For the context of child sexual abuse, cfr. Cossins (2008).

for different groups of victims are available without denying an individualised treatment for the offender, which is not opposed to victimisers' reintegration²⁰. Practitioners note the relevance of parties' attitudes and capabilities, the need for support, the subjective dimensions of victimisation and the victimisers' will of active responsibility. This proactive model follows, among others, Bush and Folger's (2012) theory on mediation or alternative processes.

Sociologist G r me Truc, researcher at the Marcel Mauss Institute (EHESS/CNRS, Paris), has recently applied the concept of John Dewey's public to those affected by the same terrorist attack in a way that does not isolate them from the rest of society²¹. He argues that this allows us to better understand the tension between an aristocratic vision and a democratic vision of victims. This can be seen in practice in the confrontation of different victims' associations in Spain, and it relates to the notions of vulnerability and universality described above.

This brings us to something fundamental in criminal justice. Restorative justice is not a question limited to two parties: victims and victimisers. Restorative justice in grave victimisations is particularly related to remembrance and memory as forms of justice (Mate 2008, 2011). The concepts of collective efficacy and acknowledgement, coming from different academic disciplines, which are based on the empirical observation of current social conditions and theoretical analysis, might help us at this point.

Sampson (2012) has identified the interaction channels of individual, neighbourhood, cultural and structural dynamics. Within the *Project on Human Development in Chicago Neighbourhoods*, multiple and longitudinal data on children, families and neighbourhoods were collected to demonstrate how individual perceptions, decisions, behaviours and social relations interact in neighbourhood contexts. Sampson holds an optimistic vision of the possibilities for the ability of neighbourhoods' policies to promote and support collective efficacy, defined as the ability of groups to respond and resist victimisation in an inclusive way. Neighbourhoods that show efficacy, related to the so-called social capital, utilise an inclusive (participatory) informal social control; they also share community expectations that favour social and interpersonal trust in an attempt to avoid inequality and promote altruistic relations in society²². To achieve this, the policies at micro, meso and macro levels should be coordinated.

Those policies for collective efficacy should acknowledge true democratic participation. Pinker's (2011) explanations of democratic participation in empathy circles throughout history can be contrasted to middle-range theories of the unequal distribution of democratic participation to different social groups, particularly in cases of terrorism²³, racism and different forms of power abuse (Mart n-Pe a *et al.* 2011).

Majid Yar has recently reconsidered the critical Criminology notion of social harm from the standpoint of Honneth's (1992) theory on recognition²⁴. In this sense, "... for recognition to work it must of necessity be a mutual relationship, one in which each recognises the other's autonomy, freedom and human value" (Yar 2012, p. 57). Institutions might be designed to promote this recognition, particularly at the

²⁰ For this issue, regarding the concept of vulnerable victims, see the 2012 EU Directive on the rights of victims. For a reflection on the concept of active rehabilitation in the Basque Country, see Altuna and Ustar n (2005).

²¹ Truc is developing his Ph. D. dissertation on an analysis of European reactions to terrorist attacks (11-S, 11-M and 7-J).

²² Cfr. Braithwaite's (1989) concept on the ability (and capability) of communities for reintegrative shaming.

²³ For terrorist victimisation in the Basque Country, see Arana *et al.* (2006), Bilbao and Etxeberria (2005), Fundaci n Fernando Buesa (2011) and Etxeberria (2010).

²⁴ On Honneth, in relation to the concept of injustice, see also Reyes Mate (2011).

level of formal political systems in the form of respect or legal rights²⁵. Furthermore, recognition

“can perform the analytical work of describing and classifying social harms and problems according to the specific needs that they refuse. Moreover, it can perform the moral-evaluative work of assessing different social arrangements, actions, and institutionalised processes according to the extent to which they succeed or fail in satisfying those needs whose realisation is essential to human flourishing” (Yar 2012, p. 60).

3. The 2012 Interior Ministry plan on reparative programmes for terrorism and organised crime

Only at the end of 2011 were restorative responses to the cases of ETA terrorism made public through the media. No official public evaluation of these encounters was available at the moment of delivering this paper²⁶. The initiative, Encounters, started as a penitentiary project in 2011 within a prison literature workshop for prisoners who had previously detached from the ETA (Varona 2014a).

Since 2006, these prisoners had rejected violence and consequently had been expelled from ETA. The Office for Terrorism Victims of the Basque Government together with central Penitentiary Institutions (Interior Ministry) organised the first encounters in 2011. At the time, both agencies were under the rule of the socialist party. A few encounters took place outside of prison because some victimisers were participating in a semi-liberty regime. Most victimisers were not the direct authors or co-operators in victimisation. One of the direct victims had been kidnapped and another injured. There were also two widows, five sons/daughters and one brother. Some victims came from outside the Basque Country. All encounters were face-to-face, except for one done by letter (Varona 2013, 2014c).

According to project organisers, the purpose of these meetings was to simultaneously encourage the victims' recovery and the victimisers' rehabilitation through the possibility of forgiveness, in a broad sense²⁷. Many victims explained to the offenders that they were relatives of the person killed so they could not forgive them in the strictest of terms. However, in practice, most people participating in these encounters experienced some effects from the offenders' remorse and desire to alleviate an irreparable harm. Most media and politicians welcomed the restorative encounters. However, the central victims' associations and the *abertzale left* rejected them²⁸.

Through interviews and a media analysis of the support and criticism for restorative justice, one finds that most stakeholders do not understand the origin of restorative justice, its international standards and what it means. Every stakeholder has his or her own conception of restorative justice, despite a common interest (Varona 2014b).

By the end of 2012, thirteen encounters between victims and ex-terrorists had taken place. The last two were held in June 2012 and differed from the previous

²⁵ For Honneth, the other two levels of recognition are solidarity (at the intra-group level) and love (at intimate relations).

²⁶ Cfr. Ríos and Etxeberria (2012) and Ríos *et al.* (2012). For a recent account on the encounters written by facilitators, victims, victimisers and policy makers involved in the programme, see Pascual (2013). See also the contributions of some facilitators to this volume.

²⁷ On the burgeoning concept of forgiveness in therapy and its relation to the criminal justice system, see, *i. a.*, Antonuccio and Jackson (2009), Baker (2008), Day *et al.* (2008), Ducommun-Nagy (2009), Freedman (1998, 2008), Freedman and Chang (2010), Thomas and Garrod (2002), Fraley (2001), Worthington *et al.* (2000) and Walker (1999). For a critical reflection on the politics of forgiveness in ETA terrorism, see Buesa (2006), Echano (2002), Cuerda (2007), Gómez (2006), Infante (2007), Campo (2007), Valcárcel (2011) and Martín and Páez (2000). For a comparative perspective, see Lefranc (2004, 2006, 2009) and Mallinder (2008).

²⁸ By *abertzale left* we refer to a coalition of different political parties under the actual name of *Bildu* that have recently rejected violence as a political tool, but agree with most ETA political objectives. It is the political group that best supports the majority of ETA prisoners.

ones. The central government, under the rule of the Popular Party after the November 2011 elections, took charge of the project, which had been paralysed for months (Varona 2013).

The original promoters criticised the Interior Ministry for giving the initiative to the victims, some of whom had demanded prisoners' collaboration to investigate other crimes, and for allowing some encounters to occur without facilitators (Urkijo *et al.* 2012).

The last two encounters were included within the Interior Ministry's rehabilitation programme presented at the end of April 2012²⁹. In addition to restorative encounters, the programme also addresses broader issues. It attempts to place offenders in prisons close to their homes³⁰ as long as they publicly reject violence and have separated from ETA.

According to the Interior Ministry plan, the aim of the encounters is to facilitate a voluntary procedure in which victims are asked for forgiveness. Forgiveness is conceptualised by Spanish law and produces juridical effects. It is required in order for inmates convicted of terrorism or organised crime to be placed in a third-grade prison (art. 72. 6 Organic General Penitentiary Act), as well as to obtain a favourable final prognosis report after conditional release (art. 90 Penal Code). Thus, 'Meetings are designed to satisfy this legal requirement' (Varona 2014c).

Following this plan, the encounter will always be initiated by the victims or the victims' closest relatives. Correspondingly, prisoners asking for forgiveness should be the direct authors or co-operators of the crime leading to the meeting. The brief text of the plan also states that the encounters should be sufficiently prepared to prevent secondary victimisation. It is also stated that reparation for the victim should be considered an essential part of penitentiary treatment or the serving of the imposed penal sanction for the purpose of rehabilitation.

This discussion of the encounters notes the relevance of reparation for material and moral harms: 'moral reparation within a treatment programme might bring very positive results in our penal execution system, both for victims and offenders'. Prison treatment team members should evaluate the rehabilitation of participants and document the changes for inclusion in the offender's file.

As mentioned before, most victims' associations expressed their opposition to the Interior Ministry plan. They feared that it could lead to impunity, even though the first encounters were planned so that no penitentiary benefit could be achieved just by taking part. However, this does not seem so clear in practice. With all of its limitations, the current program might be more honest. The transparency of the process is precisely what has provoked some of the victims' discontent. In addition, many victims feel that talking about forgiveness would create an extra burden for them (Varona 2013).

Most ETA prisoners, in line with the abertzale left, have rejected these encounters, as well as the whole Interior Ministry rehabilitation programme. They consider it humiliating. They demand collective answers in accordance with certain doctrines of transitional justice arguing for the possibility of amnesties and general pardons (Varona 2013, Díaz 2008)³¹. By contrast, according to media, prisoners coming from other terrorist groups (GRAPO and jihadists) and from organised crime have expressed their interest for the plan³².

²⁹ See the 2012 *Programme to develop a penitentiary policy of individual reinsertion within the legal framework* (Madrid, April 30). Retrieved from <http://www.interior.gob.es/press/programmea-para-el-desarrollo-de-la-politica-penitenciaria-de-reinsercion-individual-en-el-marco-de-la-ley-13712?locale=es>.

³⁰ In 1989, a disputed policy of dispersion of prisoners started in different Spanish penitentiary institutions in order to facilitate desistance.

³¹ For the case of Northern Ireland, see *i.a.*, McEvoy (2010) and McEvoy and McGregor (2008).

³² The Spanish Interior Ministry plan expects educational and training workshops for prisoners. In this sense, *reparative* encounters, as they are called now, are just one possibility within the programme

4. Restorative justice international standards as theoretical safeguards for victims, offenders and communities

The UN Basic Principles on restorative justice (2002) and the 2006 UN Handbook on restorative justice programmes³³ recommend that member states define the appropriate use of restorative justice in such a way that the focus is on relevant issues (sufficient evidence against the offender to justify an intervention, victims' and offenders' consent and personal safety) rather than on the nature of the offence³⁴.

According to the UN Principles, what is deemed *appropriate* may be defined in law or in policy, leaving this matter to the sovereignty of states³⁵. What is important is that the principles do not concentrate on the nature of the offence but on the legal safeguards within the restorative processes. Such safeguards include victims' and offenders' rights to consult with legal counsel and when necessary, to translation and/or interpretation; minors' right to the assistance of parents or guardians; parties' right to be fully informed of their rights, the nature of the process and the possible consequences of their decision; to non-discrimination; and availability of support.

In addition, due to the nature of restorative justice processes, there are specific safeguards designed to ensure valid and informed consent:

- 1) Parties have the right not to participate; neither the victim nor the offender should be coerced or induced by unfair means to participate in restorative processes or to accept restorative outcomes.
- 2) Participation will not be considered evidence of admission of guilt in future criminal proceedings.
- 3) Agreements should be voluntary, reasonable and proportionate. When appropriate, the agreements should be judicially supervised or incorporated into judicial decisions, as well as having access to judicial review and precluding prosecution for the same facts.
- 4) Proceedings should be confidential³⁶.
- 5) Failure to reach or implement an agreement should not be used against the offender in subsequent criminal justice for a more severe sentence.

Beyond the UN Principles, guidelines and standards by member states should govern the use of restorative justice programmes (para. 12 of UN Principles), including but not limited to the following five concerns³⁷:

- 1) The conditions for the referral of cases;
- 2) The handling of cases following a restorative process;
- 3) The facilitators' qualifications, training and assessment³⁸;

related to obtaining penitentiary benefits, conditional release or a semi-liberty regime for prison sentences.

³³ UN ECOSOC Resolution 2002/12 on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. The UN Handbook can be retrieved from http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

³⁴ See the Council of Europe: Recommendation (99) 19 on mediation in penal matters; Ministry Resolution N.º 2 on the social mission of the penal justice system –restorative justice– (2005); Recommendation (2006) 8 on assistance to victims; and Recommendation (2010) 1, on Probation Rules. In the sphere of the European Union, see articles 12 and 25 of the above mentioned new binding Directive on the rights of victims replacing the 2001 Framework Decision.

³⁵ Cfr. the 2012 EU Directive on the rights of victims and the Council of Europe Recommendation No. R (99) 19 on mediation in penal matters.

³⁶ "Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law" (para. 14)

³⁷ For the discussion of national guidelines in Australia, see National Justice CEOs Group (2011) with references to guidelines in Canada, New Zealand and UK.

- 4) The administration of restorative justice programmes; and
- 5) The standards of competence and rules of conduct on the operation of programmes.

The UN Handbook also refers to proposals for a detailed code of ethics in restorative justice including principles relating to parties' interests (needs and rights), such as the participants' feelings, particularly for sustained loss; the local community and society; the agencies of the judicial system; the judicial system itself; and the restorative justice agencies.

Paragraph 9 of the UN Principles indicates that "*Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case, and in conducting, a restorative process*". Thus, power imbalances are not an obstacle for restorative processes.

The afore-mentioned international normative body of literature and the comparative research on serious victimisations seem to be a good starting point for policy reform in countries such as Spain. However, no reform of Spanish policy and regulation has occurred for serious victimisations.

As mentioned before, the debate over the risks and opportunities of restorative justice in gender and domestic violence (Stubbs 2004, Shagufta 2010) resembles other countries' and Spain's discussion on its use for serious victimisations, including terrorist cases. Arguments are fixed to rigid principles, which in practice are not black or white, without much regard for the conclusions of the research from pilot projects and other programmes (Letschert *et al.* 2010). More consideration should be given to victims' and victimisers' attitudes, empowerment, community support and facilitators' capabilities relative to the notions of vulnerability and power imbalance.

5. Public opinion and political interests: the broken link of micro, meso and macro issues

Those notions of vulnerability and power imbalance relate to micro, meso and macro issues. The way justice interests are expressed by victims is conditioned by politics and the promises of the criminal justice system. Moreover, restorative justice programmes have to be handled within a mainstream justice system that is defined by an adversarial system (Finkelstein 2011) and professional inertias that do not correspond with restorative ideals.

In the case of terrorism in the Basque Country, political and contextual difficulties seem to aggravate notions of vulnerability and hinder the promotion of collective efficacy in cities, towns and neighbourhoods. Collective efficacy is based on the idea of mutual recognition at the human rights level. However, today there are no shared conceptions of peace and justice within the Basque society. For this reason, we have to study how the international safeguards work in practice in contexts with diverse interests and scarce resources to develop them.

Recalling the 2012 Oñati workshop on "Restorative Justice in New Arenas", chaired by Ida Hyde³⁹: "*concepts as justice and reconciliation are social constructs that can have different meanings*"⁴⁰. It is clear that the meaning of these concepts varies when referring to terrorist victimisations. However, once more, most research notes that it is precisely in grave victimisations that restorative justice seems to be more significant for direct and indirect victims.

³⁸ For severe violence cases, see Szmania (2006), Umbreit and Peterson (2010), Umbreit *et al.* (2012), van Camp and Wemmers (2011), van Droogenbroeck (2010) and Voss and Umbreit (2000).

³⁹ The study of restorative justice included family violence and restorative justice in the aftermath of war Cfr. Brouwer *et al.* (2002) and Derluyn *et al.* (2012).

⁴⁰ Retrieved from <http://www.iisj.net/iisj/de/2012-workshop-comments.asp?cod=7175&nombre=7175&nodo=&orden=True&sesion=1#workshop04>.

In any case, the link between restorative justice and forgiveness is not as clear as some stakeholders wish and others dare. Why forgiveness was introduced for terrorist crimes⁴¹ and what it means today are complex questions that have been discussed during the workshop. Paradoxically, forgiveness might be related to the demands of the victims' associations for fighting against legal, social or historical impunity (Asociaciones y Fundaciones de Víctimas del Terrorismo 2010), in accordance with international law on grave violations of human rights (Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos 2009). Human rights international law does not close the door to reconciliation or forgiveness as long as the two are not equal to impunity⁴². In any case, including the concept of forgiveness in the law makes things more complex for victims, victimisers and political interests. Some activists and supporters of restorative justice argue that forgiveness is a private issue, while others defend its public dimensions. Longitudinal research on the meaning and impact of forgiveness on different stakeholders is also needed, as well as studies on the role of the media.

The Spanish Interior Ministry Plan states that existing penal and penitentiary provisions on forgiveness and terrorism justify a new *reparative* programme. Before that plan, those provisions were used within general rehabilitation policy and for the first restorative encounters. However, restorative justice, as defined by international standards, does not relate much with those provisions, even if wide interpretations are possible. One comparative implication for law and policy-making in restorative justice for grave victimisations is that the excessive confusion over definitions only leads to more controversy, particularly for the victims, whose experiences reveal the complexities of the matter, particularly when participating in restorative encounters. Revision of current legislation and the Spanish Interior Ministry Plan is needed to address equal access for the majority of victims and victimisers in terrorism and in other crimes.

6. Concluding remarks

When examining restorative justice in grave victimisation, researchers in Spain face difficulties that are common to other fields of study: most programmes are developed without much publicity and attract little interest for external evaluations. One reason for this lies in the fear of possible political manipulation and misuse of results by diverse media and lobbies. The chances of political controversy are even higher for terrorism in the Basque Country. This evidence should give more relevance to critical independent research.

The informal and formal extension of restorative justice for the so-called serious victimisations tends to question the hegemony of the mainstream criminal justice system. It reveals the reality of legal pluralism and the contradictions in the limits of restorative justice with regards to the fixed concepts on the objective dimension of victimisation, as defined in the penal code and in paternalistic notions of vulnerability. From a quantitative point of view, this questioning is insignificant in terms of power and criminal policy and practice, but it seems quite relevant for criminological and social debate.

This questioning should not be simply read as if restorative justice programmes in these cases were inherently good. We should avoid transforming theory into something more similar to religious beliefs (Cabezudo 2011) or perhaps therapy (Nader 1991). Critical theory and research question false assumptions and study, such as why ideas emerge or become visible at certain moments, how ideas actually work through the analysis of the values at stake, who is concerned, and

⁴¹ More studies are needed on how forgiveness operates for different crimes within the Spanish juvenile justice system.

⁴² This is currently discussed within the transitional justice literature, even though it might not be applied as such to cases beyond transitions from war, generalised armed conflict or authoritarian regimes.

how power is distributed or controlled, particularly in the political and media arenas.

The lack of coherent legislation and regulation regarding restorative justice and the presence of professional inertias⁴³ have not stopped its development. Instead, they have encouraged restorative justice in creative ways, something unusual for the Spanish criminal justice system. However, this lack of legislation also implies marginalisation, inequalities and lack of democratic control. For these reasons and in consideration of empirical research, we have defended the idea of a right to access to restorative justice (Varona 2014b).

Martine Herzog-Evans argues that we can expect Criminology to pay “a human, therapeutic, restorative yet also scientific and practical attention to the sufferings of victims of crime” by questioning the idea that the victims’ demands are one of the causes of the current trend towards punitiveness (Herzog-Evans 2012, p. 10)⁴⁴. This might sound too optimistic, but we find an interesting point in this idea. Punitiveness is a globally used, fashionable concept. However, beyond assumptions and stereotypes, we do not know much about punitiveness, particularly with respect to the victims of serious crimes. The revision of the relative weight of victims’ association in politics and their own perception on the matter may elucidate this desire for punishment. It is possible that punitiveness is more related to general public fear of crime in the context of social anxieties and insecurities and to political manipulation (Kury and Winterdik 2013, Bourke 2005).

At this moment of social change, defined as crisis, Hobsbawn’s (2010, p. 193) reflection on the equilibrium between the use of force or coercion and the appeal to trust regarding social control is relevant. It brings us back to the timeless issues awaiting updated responses that should not be detached from diverse victims’, offenders’ and communities’ actual experiences.

Creating innovative adjectives for justice reveals a demand for new forms of defining victimisation and answering to it. Among those adjectives are restorative, integrative, procedural, therapeutic (Erez *et al.* (2011), collaborative, community-based, problem-solving, sustainable and transitional. All of them offer attractive opportunities for the study of their origin and connections, the gap between theory and practice, and the effects of those renewed forms of justice on different stakeholders and the criminal justice system.

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⁴³ Donoghue’s (2012) research on Magistrate courts in England and Wales reveals the relevance of professional identity for introducing changes into the legal system. The role of professional cooperation regarding attitudes and capabilities to do so, as restorative justice programmes demand, should also be considered.

⁴⁴ For a discussion of punitiveness, see, *i.a.*, Hall (2010) and Snacken and Dumortier (2012). In relation to jihadist terrorism, see Armbrorst (2010). In Spain, see Cerezo (2010) and Sánchez Tomás (2012). For the general discussion on today victim’s prominence, see Reyes Mate (2011), Wieviorka (2012), Cario (2004), Bassiouni (2011) and Hall (2010).

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