

CRITICAL REFLECTION ON THE SPANISH REGULATORY PROHIBITION TO DEVELOP MEDIATION PROCESSES IN GENDER-BASED VIOLENCE AND SEXUAL VIOLENCE.

Restorative Justice Theory & Practice Lab

Basque Institute of Criminology
University of the Basque Country

In relation to the general prohibition of mediation in gender violence, when the accused is an adult, according to the Spanish legislation (Law 1/2004), and regarding the recent extension of this prohibition for sexual violence (Law10/2022), the undersigned, members of the academia, researchers and practitioners in the field of restorative justice, drawing upon practical experience, current research findings and relevant international legal and policy documents wish to express the following:

1. The current prohibition is based on the assumption that the use of mediation may have negative effects, because of the presence of power imbalances and high vulnerability of victims in the case of gender-based and sexual violence and because of the danger of privatization of justice in addressing gender-based and sexual violence out of court, as if there was no public interest at stake. Moreover, it seems to be legally justified under article 48 of the Istanbul Convention to combat violence against women.
2. However, those assumptions do not consider the scientific evidence gathered during the last decades on this topic. Furthermore, the above mentioned article of the Istanbul Convention has been misinterpreted because it literally sets a prohibition only for *mandatory* alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the Istanbul Convention. Hence, it bans only compulsory mediation, which is something very far from the generally accepted good practice in restorative justice, where participation in a restorative process is carefully prepared in each case by a specifically trained facilitator and based on informed consent and *voluntary* agreement of all participants. The voluntary nature and the avoidance of secondary victimisation or revictimisation are, by definition, essential characteristics of every restorative justice process, as it is provided and practiced in criminal matters following international standards mentioned below. In addition, those standards let it clear that mediation and conciliation are not synonyms of Restorative Justice.
3. Drawing from consistent research and international legal standards, it can be concluded that:
 - Restorative Justice (hereafter, RJ), as an approach for addressing harm or the risk of harm through engaging all those affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved, is one form of innovative justice that can be added to conventional criminal justice mechanisms to improve the justice responses for victims of sexual crime and gender violence. It includes different forms of practices –beyond mediation and conciliation–, that allow all those affected to participate, whether they are directly or indirectly affected by the harm, and only if they freely agree to participate because, particularly, in the case of victims, there are some needs that ordinary criminal justice cannot meet. Moreover, secondary victimization cannot be fully prevented in the ordinary criminal justice.
 - Restorative Justice can work to repair the harm caused by the offence; increases the offender's sense of responsibility for the offence; provides an opportunity for the victim to receive reparation and/or an apology; provides an opportunity for the victim to ask questions and receive information from the offender; provides a means for victims to talk about how the incident impacted them; gives victims an opportunity to take back power back and maximize the opportunity to access to justice for victims, offenders and the community. Other aims associated with restorative justice in cases of sexual violence can include recovery or therapeutic healing for victims and offenders. In the case of intra-familial sexual violence, restoring family relationships may also be an important outcome (see annex I).

- Restorative Justice is always based on the informed and free will of all participants, on the balance between them and on the empowerment of the victim, never being introduced when one of the parties is not really interested or not ready to face it. These conditions are always carefully checked by specifically trained professionals before entering any restorative process. In particular, they can include specific assessment of gender based violence victims and offenders in order to verify the eligibility to enter this kind of process; specific training and follow up of processes, including external audits. In case of any risk of power imbalances or abuse, the facilitator will immediately stop the restorative justice process (see annex II-V).
- Restorative Justice is not a form of re-privatization of the violence, as long as it is conducted by a third party (an expert facilitator) involved on the request of a judicial authority with the supervision of the prosecution office.
- Moreover, a restorative process can help victims who don't trust the criminal justice or who fear secondary victimization to overcome the silence and find more support, including community support via activists', victim groups or public services for victims, to express and meet the unique needs of every victim (see annex VI).
- Research shows considerable evidence about Restorative Justice effectiveness for victims, offenders and communities, addressing the individual and the social harm in this kind of crimes. Research findings conclude that Restorative Justice processes offer victims the chance to reclaim their voice, by allowing listening to their dynamic needs and, at the same time, fostering offenders' accountability. Studies consistently state that restorative processes improve closure and healing for victims and achieve a very high percentage of satisfaction among victims, reducing their fear of further harm and reducing post-traumatic stress symptoms. Research furthermore confirms that Restorative Justice stimulates desistance from offending, decreases recidivism and increases compliance with restitution when compared to other traditional criminal justice processes (see annex VII).
- An empirical evaluation of existing research on RJ programmes for sexual crime in Australia, Belgium, Canada, Denmark, Ireland, New Zealand, the UK, the Netherlands and the US highlights that: 1) following their restorative meeting, conference or circle victims tend to feel the responsibility for the crime has shifted away from them to the offender; 2) many victims report that the process confers a sense of empowerment on them because of their participation in decision making and in the desired outcomes, with some victims suggesting they can 'put the crime behind' them following RJ; 3) apology and forgiveness are generally not key to the satisfaction of victims in the RJ process; 4) suitability of direct or indirect RJ interventions depends on the needs of the individual victims; 5) surrogate victims found participation in RJ circles to be enormously enhancing for their lives, even in cases where the RJ involved meeting with offenders who did not offend directly against them; and 6) a growing body of studies report improvements- especially important in the context of sexual violence as trauma can be extreme-in victims' wellbeing in the aftermath of RJ, such as: reductions in post-traumatic stress, reduction in fear and improvement in social and relational life, being able to talk about the offence and its resultant harmful effects (see attached resources).
- Most recent international standards promote a further use of Restorative Justice respecting the principles of non discrimination, including the overlapping of sources of discrimination known as intersectionality (see annex VIII). A general prohibition that affects mainly women in the criminal jurisdiction for adults implies a general exclusion of the above mentioned benefits shown by quantitative and qualitative research. At the same time, it shows a contradiction when mediation and conciliation is permitted in cases when the aggressor is a minor independently of the (female) victim's age.

From a more accurate knowledge about the conditions -professional standards and good practices- for the restorative handling of cases of gender violence and sexual violence, **this text aims to encourage a thoughtful conversation that informs a criminal policy.**

Contact us at: idoia.igartua@ehu.eus

Resources:

- Bolitho, J. & Freeman, K. (2016). *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms*. Royal Commission into Institutional Responses to Child Sexual Abuse.
- Braithwaite, J. (2020). Sexual assault, corporate crime and restorative practices, *International Institute for Restorative Practices Presidential Paper Series*, 2.
- Burns, C. J., & Sinko, L. (2021). Restorative justice for survivors of sexual violence experienced in adulthood: a scoping review, *Trauma, Violence, & Abuse*, 15248380211029408.
- Centre for Innovative Justice (2014). *Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community*. Centre for Innovative Justice.
- Coker, D. (2018). Restorative responses to campus sexual harm: promising practices and challenges, *The International Journal of Restorative Justice*, 1, 385-398.
- Community Legal Centers NSW (2019). Restorative justice after sexual assault, <https://www.clcnsw.org.au/restorative-justice-after-sexual-assault>.
- Daly, K. (2011). Conventional and innovative justice responses to sexual violence, *ACSSA Issues*, 12, 1-35.
- Drost, L., Haller, B., Hofinger, V., Van der Kooij, T., Lünemann, K. & Wolthuis, A. (2015). *Restorative Justice in Cases of Domestic Violence. Best practice examples between increasing mutual understanding and awareness of specific protection needs*. JUST/2013/JPEN/AG/4587) WS1. Comparative Report.
- Elbers, N. A., Akkermans, A., Soletto, H., Fiodorova, A., Grané, A., Tamarit, J. M., et al. (2020). *Fair and Appropriate? Compensation of Victims of Sexual Violence in EU Member States: Greece, Italy, Latvia, the Netherlands and Spain. Part II: State and Offender Compensation: Survey, Good Practices and Recommendations*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732186.
- European Forum of Restorative Justice (2017). *Effectiveness of restorative justice practices An overview of empirical research on restorative justice practices in Europe*. European Forum of Restorative Justice. Leuven, www.euroforumrj.org
- Gang, D., Loff, B., Naylor, B. & Kirkman, M. (2021). Opening pathways to restorative justice: Analysis of parliamentary debates on sex crime law reform in Victoria, Australia. *Social Politics*, 1-24.
- Keenan, M. (2014). *Sexual trauma and abuse: Restorative and transformative possibilities? A collaborative study on the potential of restorative justice in sexual crime in Ireland*. School of Applied Social Science, University College Dublin.
- Keenan, M., Zinsstag, E. & O’Nolan, C. (2016). Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations. *Restorative Justice: An International Journal*, 4(1), 86-114.
- Keenan, M. & Zinsstag, E. (2020). *When victims want to meet offenders: An international study on restorative practices for sexual violence*. Oxford University Press.
- Koss, M.P. (2006). Restoring rape survivor’s justice, advocacy, and a call to action. *Ann. New York Academy of Sciences*, 1087, 206–234.
- López, E.C., Koss, M.P. (2017). The RESTORE Program for sex crimes. Differentiating therapeutic jurisprudence from restorative justice with therapeutic components. In *Restorative responses to sexual violence. Legal, social and therapeutic dimensions*, 212-228. Routledge.
- McGlynn, C., Westmarland, N. & Godden, N. (2012). ‘I just wanted him to hear me’: sexual violence and the possibilities of restorative justice, *Journal of Law and Society*, 39(2), 213-240.
- Mercer, V., Sten Madsen, K., Keenan, M., & Zinsstag, E. (2015). *Sexual violence and restorative justice: A practice guide*. KU Leuven Institute of Criminology.
- Pali, B. & Sten Madsen, K. (2011). Dangerous liaisons? A feminist and restorative approach to sexual assault, *Temida*, 14(1), 49-65.
- Pereda, N., & Tamarit, J. M. (2019). ¿Ciegos ante la perspectiva de género o ciegos ante la evidencia empírica sobre la violencia en las relaciones de pareja? Comentario a Ferrer-Pérez y Bosch-Fiol, *Anuario de Psicología Jurídica*, 29, 85-87.
- Restorative Justice Council (2016). Restorative justice and sexual harm, <https://restorativejustice.org.uk/restorative-justice-and-sexualharm>.
- Hudson, B. (2002). Restorative justice and gendered violence: Diversion or effective justice? *British Journal of Criminology*, 42(3), 616- 34.
- Sten Madsen, K. (2006). Mediation as a way of empowering women exposed to sexual coercion, *NORA - Nordic Journal of Feminist and Gender Research*, 12(1), 58-61.
- Varona, G. (2018). Misunderstanding risk, migration and ethnicity in intimate partner violence. In *Intimate Partner Violence, Risk and Security*, 142-160. Routledge.
- Varona, G. (in press). Dancing the legal prohibition of restorative justice in IPV against women: Flamenco beats as encounter, *The International Journal of Restorative Justice*.
- Villacampa, C. (2021). Spanish criminal policy and the state pact on gender violence: a critical assessment. *SN social sciences*, 1(5), 1-20.
- Walgrave, L., Ward, T., & Zinsstag, E. (2021). When restorative justice meets the Good Lives Model: Contributing to a criminology of trust, *European Journal of Criminology*, 18(3), 444-460.
- Why me? (2021). Using restorative approaches for domestic and sexual abuse: A personal choice. Why me?
- Zinsstag, E., Keenan, M. & Aertsen, I. (2015). *Developing integrated responses to sexual violence: An interdisciplinary research project on the potential of restorative justice. Project Report*. Leuven Institute of Criminology.
- Zinsstag, E. & Keenan, M. (eds.) (2017). *Sexual violence and restorative justice: legal, social and therapeutical dimensions*. Rotledge.

SIGNATORIES

	NAME	AFFILIATION/OCCUPATION
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

