



SAFE.TO.BE BY SPEAK OUT
PROJECT



HANDBOOK

SAFETOBE: HANDBOOK

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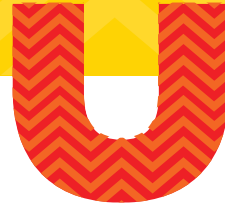
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The potential of Restorative Justice in Hate Crimes

**An expert essay collection and practical considerations in 9
European countries**

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ACKNOWLEDGEMENTS



CONSORTIUM

Safe To Be by Speak Out is a European project involving nine EU member states. The project goals of Safe To Be are threefold: at the beginning of 2020 the consortium developed a toolkit to raise awareness within victim support services and law enforcement about the impact of hate speech and hate crimes on the LGBTI community. In front of you is our second output – a handbook on restorative justice and the application of this conflict resolution technique on hate crimes intended for professionals. The third and final focus of Safe To Be is the development of a website for (and by) the LGBTI community that offers an empowering counter-narrative on online hate messages and incidents (www.speakout-project.eu).

All organisations involved in Safe To Be are connected to the LGBTI communities in their respective countries, and have experience on the topic of hate crime and hate speech that they wish to put into the service of their communities and of professional stakeholders.

BILITIS FOUNDATION

Bilitis is the oldest still running LGBTI organization in Bulgaria. Its activity begins in 2004 as a support group for lesbians and bisexual women and gradually includes trans and intersex people in its leadership. Today Bilitis actively advocates for eliminating all forms of discrimination and achieving full equality for LGBTI people in Bulgaria, through its work in different spheres such as: community organizing, advocacy, conducting research and trainings for professionals in different fields.

ÇAVARIA

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çavaria is the umbrella organisation of over 120 registered LGBTI+ associations which are given support and free training. Together they represent the LGBTI+ community in Flanders and Brussels. In addition to this, an equal opportunities initiative is in place aimed at wider society. çavaria stands up for LGBTI+ people by working at the structural level. çavaria campaigns, informs, creates awareness, lobbies and represents opinions. The free and anonymous service Lumi offers assistance and serves as a way to report discrimination. ZiZo Magazine is çavaria's public online voice.

EHRC (ESTONIAN HUMAN RIGHTS CENTER)

EHRC Estonian Human Rights Centre is an independent non-governmental human rights advocacy organisation. The mission of EHRC is to work together for Estonia that respects the human rights of each person. EHRC develops its activities according to the needs of the society. Our focus is currently on the advancement of equal treatment of minority groups and diversity & inclusion and the human rights of asylum seekers and refugees. We also monitor the overall human rights situation in Estonia and publish bi-annual independent human rights reports about the situation in Estonia. EHRC is governed by an independent Council, representing a range of views and societal groups.

FELGTB

FELGTB The Federación Estatal de Lesbianas, Gais, Trans y Bisexuales (FELGTB) is the largest LGTBI organization, with 55 members in Spain and one of the largest in Europe. It is one of the few LGTBI organizations in the world that has consultative status with the United Nations and it is declared of public utility. With almost 30 years of history, it is the reference in the promotion and defense of rights for LGTBI people. It is responsible for the national call for the LGTBI Pride demonstration in Madrid, in which more than half a million people participate every year.

GALOP

Galop is the UK's LGBT+ anti-violence charity. For the past 35 years it has provided advice, support and advocacy to LGBT+ victims and campaigned to end anti-LGBT+ violence and abuse. Galop works within three key areas; hate crime, domestic abuse and sexual violence. Its purpose is to make life safe, just and fair for LGBT+ people. It works to help LGBT+ people achieve positive changes through practical and emotional support to develop resilience and to build lives free from violence and abuse.

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HÁTTÉR SOCIETY

Háttér Society, founded in 1995, is the largest and oldest currently operating lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) organization in Hungary. Háttér's aims are calling attention to the problems faced by LGBTQI people; providing support services; exploring the situation and needs of LGBTQI people; mainstreaming these concerns in laws and public services; protecting the human rights of LGBTQI people and countering discrimination against them; promoting the health and well-being of LGBTQI people; encouraging the self-organization of LGBTQI communities; and preserving and spreading LGBTQI heritage and culture.

ILGA PORTUGAL

Founded in 1995, ILGA Portugal is the largest and the oldest NGO in Portugal striving for equality and against discrimination based on sexual orientation, gender expression and identity and sex characteristics. Our mission is the social integration of the lesbian, gay, bisexual, trans and intersex population and their families in Portugal through a program of social support that improves the quality of life of LGBTI people and their families; through the fight against discrimination based on sexual orientation, gender expression and identity and sex characteristics; and through the promotion of full citizenship, Human Rights and gender equality. We are a national organization and although we are based in Lisbon, we also have a project and an office in Porto. ILGA Portugal has a strong diversity policy and very active groups devoted to specific topics such as Lesbian issues or Trans issues, as well as a group devoted to Rain-

bow Families. We are members of ILGA Europe's Advocacy Network, founding members of NELFA, correspondents for IDAHO, members of FRA's Fundamental Rights Platform and of the Advisory Council of the Portuguese Commission for Citizenship and Gender Equality (national mechanism for equality).

LGL

- 12** LGL The national lesbian, gay bisexual and transgender (LGBT) rights association LGL is the only nongovernmental organization in Lithuania exclusively representing the interests of the local LGBT community. LGL is one of the most stable and mature organizations within the civic sector in the country as it was founded on 3 December 1993. The main principle that characterizes the activities of the association is that of independence from any political or financial interests, with the aim of attaining effective social inclusion and integration of the local LGBT community in Lithuania. Based on its expertise in the fields of advocacy, awareness raising and community building, accumulated during twenty years of organizational existence, LGL strives for the consistent progress in the field of human rights for LGBT people.

MOZAIKA

Mozaika Association of LGBT and their friends MOZAIKA (LGBT un viņu draugu apvienība MOZAIKA) is until now the only LGBT organisation in Latvia. It was established with the aim of to improve the situation of LGBTI persons in Latvia, including the improvement of the legal framework that protects LGBTI persons from discrimination, hate-crime, hate speech, as well as legislation aimed at the recognition of same-sex families in Latvia. MOZAIKA provides broad-spectrum engagement opportunities for the LGBTI community and its supporters, as well as providing professional training and resources for researchers and other stakeholders.

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INTRODUCTION AND FOREWORD BY EDITORS



The European Union is an alliance of different countries, values and people. Yet, the motto of the Union is 'united in diversity', meaning that differences that we as humans hold and share, form the foundation of our shared European identity. You have opened on your screen or hold in your hand a handbook that is put together by civil society organisations and experts across Europe who value human rights of everyone and stand up for the rights of LGBTI community.

This Handbook is a compilation of expert essays and country chapters on history, policies, practices and procedures that have shaped and are being used in the field of restorative justice. It will guide you through the evolution of the topic and give you insight of current situations in different countries. It focuses more specifically on the possibilities and challenges that restorative justice approaches have and can have in case of LGBTI hate crimes.

Lesbian, gay, bisexual and intersex (LGBTI) people experience discrimination, harassment and violence in different areas of life. These phenomena but also our social environments that do not value human diversity may lead to hate crimes that are criminal offenses against a person or property motivated in whole or in part by an offender's bias against victims real or perceived identity. Hate crimes are special types of crimes, they cause feelings of vulnerability, anxiety, anger, and shame but also spread fear and anger throughout communities. So the question is: how do we address the problems of hate crime and other bias based human conflicts in ways that productively incorporate the values of diversity, respect, accountability, and ultimately reconciliation?

There is no easy fix to people's attitudes and prejudice, but restorative justice offers some good approaches to deal with the root causes and consequences of a hate crime. Restorative justice views crime much broader than just breaking the law and deciding on the punishment. Any crime causes harm to people, relationships and community the victim belongs to. Restorative justice practices focus on repairing the harm caused by crime and reducing future harm through crime prevention. It also gives active role in the process to the victim and offers the perpetrator a possibility to understand the cause of the crime.

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In today's age of global knowledge and technology, our interconnected network of LGBTI rights organizations have much to contribute to the discussion about restorative justice so that it would meaningfully serve our community. Yet it often seems that wherever we are in our journey towards a society that fully respects human and LGBTI rights, we still have a long way to go. At the same time, the journey is much easier if you have sorted out the fundamentals and know the tools available. It is our hope that this handbook will introduce and facilitate many good practices in working toward safer Europe for LGBTI people, and peaceful coexistence for everyone.



RESTORATIVE JUSTICE MODELS: DEVELOPMENT CONTINUUM

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INTRODUCTION

During the last decades in pursuing alternatives to the unsatisfactorily functioning criminal justice system in a global context, some old approaches to crime and conflict have been rediscovered. One of the main ones, although in a new format and connotation, is Restorative Justice (RJ), and enormous expectations have been assigned to it in recent years. Lately, this concept and the models through which it is functioning have made significant progress in Europe and worldwide and have received considerable attention from scholars, professionals, and politicians. In addition to traditional practices that have enjoyed a revival, new models and approaches have been developed and experimented.

The philosophy behind RJ is to manage harm done and to restore the victim and offender to their original status as much as possible. RJ presents an alternative to established modes of trial and punishment and seeks to include the community and society as a whole in the restorative process. Among the most significant RJ values is respect for human dignity, solidarity, accountability,

non-discrimination regardless of gender, race, religion, ethnicity or sexuality, active participation of citizens within democratic societies. RJ recognises the interdependence and diversity of people and the critical importance of the quality of relationships to individual wellbeing and social cohesion.

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This study aims to make a brief overview of the genealogy and the evolution of RJ models, their developments and expansion through the years and in different countries, and to present the extremely diversified RJ landscape. The main objective is to offer a choice for the most appropriate response to hate crime whenever and wherever it is committed.

1. RESTORATIVE JUSTICE – AN OLD TRADITION IN MODERN SOCIETY. HISTORICAL EVOLUTION

Both the emotional roots and the rationale of restorative justice are based on religious ideals, among others. But today, only some RJ advocates understand and represent restorative justice as an application of faith-based principles of reconciliation, restoration, and healing (Hadley, 2001). At present-day RJ values are usually described in purely secular terms. Although the key restorative justice features remain the same, they are inevitably interpreted differently in a modern context. The validity of the main assumptions of restorative justice, e.g., wrongdoing as misbehaviour, which requires teaching, as well as the need to emphasise returning to the balance/harmony (Ross, 1996), is reconfirmed. Still, we cannot do it in the same way and probably not to the same degree as it was done centuries ago. It would be hardly believable and even utopian to think that RJ could be tinned, carried through time, and used in the same format as the indigenous people have done. In its original form, restorative justice seems to be already quite-of-date, so new dimensions have been revealed.

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Fortunately, the fundamental restorative justice values and grounds, although expressed in modern language, have remained the same. The crime victim is an icon for RJ protagonists (Zehr, 1995; Wright, 1996 and 1999; Umbreit, 2001). Now, as before, restorative justice is not done because it is deserved but because it is needed. Restitution is a means of restoring both parties; reconciliation/restoration is the goal (Zehr, 1985). A lot more could be added here, e.g., some people put the emphasis on dialogue, some on community involvement.

Restorative justice continues to be considered as a way to transform conflict into cooperation and to minimise pain delivery (Christie, 1982). Restorative interventions aim at improving the quality of life of the victim, the offenders, the families, the neighbours, etc. Restorative justice is widely recognised to be a less destructive and less costly alternative to conventional criminal Justice. A great advantage for the contemporary person is the confidentiality of the restorative process. All these widely accepted arguments could drive us to the conclusion that RJ today is a crossing point of modern pragmatism and spirituality.

There are many definitions of Restorative Justice. One definition calls it a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future (Marshall, 1999). Other definitions stress the outcome that is the restoration of damages to the victim and also to the community (Weitekamp, 1999). Restorative philosophies include not only the way of reacting towards crime. They are used to address a broad scope of problematic areas that cannot adequately be tackled by repressive measures, like "bullying" in schools, labour conflicts, migration problems, mass crimes.

In its original form, RJ is designed to heal the ways in which crime hurts relationships between people who live in a community. Crime is seen as something done against a victim and the community – not simply as a lawbreaking act that violates the state. Restorative justice involves the victims as well as offenders. Restoration of the harm of victims is possible only when offenders take responsibility for their actions and for the damage they have caused. Restorative justice aims at getting the community involved in a variety of preventative and responsive programs to bridge gaps between people, build their sense of safety, and strengthen community bonds (Zehr, 1985).

The history of RJ starts with the old traditional practices of Maori, Native Indians of America, Africans, and Aborigines. The new Western wave began with the first Victim-Offender Mediation – an experiment in Kitchener, Ontario, Canada, in the early 1970s when a youth probation officer convinced a judge that two youths convicted of vandalism should meet the victims of their crimes. The Kitchener experiment evolved into an organised Victim-Offender Reconciliation Program funded by church donations and government grants with the support of various community groups. Following several other Canadian initiatives, restorative practices have spread throughout the United States. At the end of the 1980s, Family Group Conferences were developed in New Zealand. Since then, there has been a proliferation of new and varied models of RJ.

The current restorative justice movement in Europe is associated with the early 1980s, but the debate on how victims and offenders might be given an opportunity to confront and resolve issues

related to crime is not new. Critical criminologists paid attention to the shortcomings of the criminal justice and its incapacity to assure peace in social life. Nils Christie (1977) described how lawyers expropriate conflicts from people and often deprive them of any possibility to reach resolution independently. This is done by most other experts as well. Restorative justice has been proposed as an alternative to criminal justice or juvenile justice.

In the last quarter of the 20th century, pilot projects and primary legislation were introduced in several European countries. By 1998 there were more than 900 mediation programs (Lauwaert and Aertsen, 2002). One of the latest compendiums about restorative justice and mediation in penal matters (Dünkel, Grzywa-Holten, and Horsfield, 2015) reveals that in 36 European jurisdictions continue to exist and function a considerable variety of models.¹ The flexibility and non-formality – essential RJ features – allow the merger of models, forming hybrids, inventing new interventions. So it could be a daring claim that now RJ is genuinely on the globe (Chankova, 2011).

1 For this study restorative models, restorative interventions, restorative practices, restorative programs despite some differences will be used interchangeably.

2. THE GEOGRAPHICAL SPREAD OF RJ MODELS

A) BASIC RJ MODELS DISSEMINATED WORLDWIDE

VICTIM-OFFENDER MEDIATION

- 20 For some time, *victim-offender mediation* has been almost the sole model of restorative justice. Now it is the most widely applied model – in the majority of the European countries and across the world – and is considered as a universal and classical RJ instrument. Victim-offender mediation (VOM) is defined as any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in finding together a resolution of matters arising from the crime through the help of an impartial third party (mediator). VOM can be done both in direct and indirect ways. Direct mediation represents a face-to-face meeting, in the presence of a trained mediator, between the victim of a crime and the person who committed that crime. Indirect mediation does not include face-to-face meetings, and the mediator plays the role of a “go-between” or a “shuttle” to enable communication between the victim and the offender. VOM has a legal basis in most countries, especially (but not only) for juveniles (Chankova, 2002).

Many mediated cases involve relatively minor crimes committed by first-time offenders. However, serious and violent crimes are excluded – neither in theory nor in practice – and some programs in Europe and North America especially include the more severe cases, e.g., murder, sexual assaults, and violence in families and partnerships. In the majority of countries, VOM is primarily a way to divert cases from the criminal justice process. Consequently, referrals are made by the public prosecutors or – where this is legally possible – by the police. A positive outcome often leads to discontinuance and avoids sentencing. If not the prosecutors, then the judges take into account the results of mediation and do not sentence. Of course, this can only happen if both victim and perpetrator agree to communicate the outcomes of the process to the prosecutors and/or judge. In Belgium, for instance, this is an absolute requirement. If only one party or none of them agrees to disseminate, the facilitator or mediator is not allowed to talk about this. Successful VOM is at least a mitigating circumstance.

Mediation is applied at every stage of criminal procedure. It is recommended to use this instrument at an earlier stage – then the positive effects (saving time, costs, human resources, emotions, etc.) are more and stronger. Several projects have dealt with mediation after the sentence or during the execution of the prison sentence (Aertsen, Mackay, Pelikan, Willemsens, and Wright, 2004). Lately, some newer RJ models, other than VOM, have been offered.

FAMILY GROUP CONFERENCING

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Firstly, family group conferencing should be mentioned. This process, specially designed for minor offenders, brings together the "stakeholders" – victim, offender, family, friends, and key supporters of both, and possibly representatives of agencies, for example, social services, probation, and police in finding a solution on how to address the aftermath of the crime. The meeting is usually facilitated by an independent facilitator. This means that the facilitator is independent of the offender and the victim but could be affiliated with the police or some juvenile social services. In some models, after all views have been stated, the family of the offender has a private meeting time to draw up a plan which is submitted to the whole conference for acceptance (Hudson, Morris, Maxwell, and Galaway, 1996). In addition to the objectives of VOM, conferencing also seeks to enable the offenders to recognise the impact that their offences had not only on the victims and their families but also on their own families and friends, providing an opportunity to restore those relationships. Because conferences tend to involve a wider circle of the involved people, including the individuals who may be in a position to work with and support the offender, conferences processes are particularly useful as a means of ensuring that the offender follows through the agreed outcome. Other members of the group frequently have a continuing role to play in monitoring the offender's future behaviour and ensuring that he or she complies with the rehabilitative and the reparative measures that he or she agreed to (Handbook of Restorative Justice Programs, 2020).

COMMUNITY CONFERENCING

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Secondly, community conferencing has to be pointed out. This term is mainly used for a process similar to the family group conferencing for adult offenders. In some places, there are procedural variations. For example, the facilitator may be a police officer; may follow a prescribed script. Victims could also be encouraged to bring families and supporters. There may be a "time-out" for considerations of the parties separately from each other, or there may be no private time – all parties remain in the room throughout. Since participation in these formats is voluntary, it is possible to maintain greater flexibility than in the traditional system.

The agency or community group to which the offender is referred is also responsible for the monitoring the offender's compliance with the terms of the agreement and may or may not function under the direct oversight of the law enforcement or justice officials.

CIRCLES

Thirdly, circles (before called – sentencing circles) – these are a more recent restorative process that already is relatively widespread in different countries. Depending on the focus they could be mainly problem-solving circles (for a specific issue, e.g. circles in schools in the UK) or peacemaking (for broader purposes – in the turbulent Roma society in Hungary). Initially, they are based on the values and traditions of North-American aboriginal peoples. The meetings are firmly community-based, with victims, offenders, their families, and supporters, and any other interested member of the community and criminal justice personnel participated as equal members. To differ from other conferencing models, a "talking piece" is used to manage the communication as it is passed around the circle. Participants are given uninterrupted time, in turn, to say whatever they wish related to the purpose of the circle when they hold the talking piece. Circles are a non-sentencing option; they are used to resolve a community problem, to provide support and care for victims or offenders, etc. (Raye and Roberts, 2007). There is practical evidence that the circle could be implemented in cases of intercommunal conflict and hate crime. They can also be used to build better relationships and reduce violence within prisons and other detention facilities.

The newer models as compared to victim-offender mediation show many advantages: more impact on participants; greater community involvement – the network of both victim and offender, neighbourhood, school; moreover, they manifest that justice and restoration are not private and personal issues but matters for the community and all those who have been affected; they work towards long term solution by also addressing broader problems if needed, etc. Of course, there are some disadvantages, too: it is more difficult to organise them, higher costs can be generated, etc.

DIALOGUE MODELS

Throughout the centuries, different forms of *dialogue*, often with neutral or wise third parties involvement, have been widely used to resolve conflicts, including those between victims and offenders. The exchange is an essential part of most restorative justice programs, although from the US till Japan, there are many models named "victim-offender dialogue" or of the same kind. To the restorative dialogue, the following essential characteristics are attributed: it is inclusive, in that it invites all stakeholders to participate in a process to meet their needs and interests; it is grounded in restorative principles and values, and facilitation is conducted in such a way that participants are free to communicate with each other by sharing experiences, emotions, and perspectives. In the "indirect dialogue model," the victim and the offender do not come together physically – the interaction is done through letters, videos, or verbal comments made to the facilitator who passes them along to the other party. In the "facilitated victim-offender dialogue" (prototype of VOM), the parties interact directly with the assistance of a mediator. The theory and practice also differentiate "facilitated victim-offender-supporter dialogue" (associated with conferencing model), "facilitated all-party dialogue" (associated with circle model), "guided dialogue," and "directed dialogue," where the facilitator's role is more active (Raye and Roberts, 2007).

B) SPECIFIC RJ MODELS APPLIED IN DIFFERENT COUNTRIES

REFERRAL ORDERS

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In the UK, *referral orders* have been introduced. They are used extensively with young, first-time offenders, who admit their guilt to crimes considered not sufficiently dangerous to require custody, but serious enough for the offender to be charged. In these cases, the courts must refer young offenders to a Youth Offender Panel. The panel is composed of two trained volunteers and one official. It aims to provide a constructive forum for young offenders to confront the consequences of their offence and to agree to undertake a program of meaningful activity. This program may include provision for, *inter alia*, reparation, mediation or community work. The terms of this agreement may not be less than three months or more than 12 months in duration.²

RESTORATIVE CAUTIONING

Restorative cautioning for juveniles is practised by the **Thames Valley Police** for nearly two decades. It uses the family group conference method to caution young offenders for a wide variety of criminal offences. Since 1998 all cautions, reprimands and final warnings for juveniles in this area have used a restorative conference approach. Often conditions are imposed on the offender, and in restorative cautioning, those may include meeting with willing victims or community representatives, making apologies, paying restitution, or performing community service. The offender is encouraged to think about the effects of his or her actions on the victim, but the victim is seldom present (Hoyle, Young, and Hill, 2002). Conditional cautioning for adults was introduced in the British Criminal Justice Act 2003.

² www.gov.uk/government/publications/young-offenders-referral-orders. Accessed 22 March 2020.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746365/referral-order-guidance-9-october-2018.pdf. Accessed 22 March 2020.

RESTORATIVE CONFERENCING

In the UK and Ireland, *restorative conferencing* has been introduced in some places. This is a slight variation of the restorative cautioning and typically accompanies a warning, but supporters, as well as victims and offenders, meet together in a conference with a trained facilitator. Outcome agreements set out what the offender will do to address the harm done. Reparation and also involvement in a rehabilitative program – to tackle the underlying causes of offending behaviour – may be agreed upon³.

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TRUTH AND RECONCILIATION COMMISSIONS

Truth and reconciliation commissions (TRCs) are predominantly *ad hoc* instruments used for transition and recovery from the repressive rule and internal conflicts. They are dealing restoratively with past, severe and widespread human rights abuse and violence, even genocide. TRCs have been largely used in South Africa after the end of apartheid. Victims of gross human rights violations have been invited to give statements about their experiences, and some have been selected for public hearings. Perpetrators of violence could also give testimony and request amnesty from both civil and criminal prosecution. This a court-like restorative justice helped for the establishment of free democracy in South Africa and generally evaluated as successful. Many other countries applied this model under various names after periods of internal unrest, civil war, and dictatorship (Parmentier, 2001).

C) RESTORATIVE INTERVENTIONS IN NORWAY

Norway, without any doubt, can be defined as one of the countries, not only in Europe but also in a global context, with advanced criminal policy, often setting the standards for other countries. It is characterised by a traditionally low crime rate, relatively liberal penal legislation offering an extensive range of response measures, and a small number of prisoners. Historically, Norway manifests a humane treatment of offenders, minimising the criminal repression, using a variety of non-custodial measures, placing a high priority on socialisation and reintegration of offenders into the community,

3 www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales. Accessed 22 March 2020.

with the active participation of the latter. Furthermore, in Norway, there has always been shown a particular attitude and a strong concern towards victims of crime. Therefore, not surprisingly, the eminent Norwegian scientist Nils Christie, in the 70s of the previous century, formulated the theory that globally changed the whole concept of modern penal policy.

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For decades, proceeding from these considerations, Norway has been applying a penal policy that ranks it among the most developed penal systems at the European level, of which restorative justice is an integral part. The genesis of the idea of restorative justice in Norway has its deep roots in the attempts to find an adequate response to juvenile delinquency. Previous methods for counteraction have shown their inefficiency. The search for a new paradigm at first leads to mediation and then to other models – conferencing and circles for solving the problems, though applied since recently and in a narrow range.

The new Norwegian Mediation Services Act has been effective since 1 July 2014⁴. It kept the achievements of the previous framework, but at the same time, significantly upgraded it. The Act regulates innovatively the already classical method of victim-offender mediation, applied towards adults and minors. Simultaneously, for the first time, it regularises new RJ instruments employed specifically to minors (aged 15-18): so-called “youth punishment,” reserved for more serious offences, and “youth follow-up.” The contents of the measures consist of a youth conference, preparation of an individually adapted youth action plan, and follow-up of the plan. The main objective is that minors should not be sent to prison, so even when determining this penalty is practically inevitable, more efforts are made to divert them away from effective implementation.

These measures are applied under conditions set out in the Penal Code. In practice, they are based on the New Zealand model of conferencing, transformed into the Norwegian reality. Under the Norwegian penal law when imposing “youth punishment,” the court determines the duration of the measure, which varies between six months and two years, in exceptional cases – up to 3 years, during which period the person is supervised by specialists in order to prevent further development of their

4 LOV 2014-06-20-49, last consolidated LOV-2018-12-20-114

criminal career and exercise a positive influence on the latter one. The court determines the alternative measure of imprisonment that would be imposed in the event of default of the "youth punishment." The term of the measure "youth follow-up" is one year. In some instances, this measure can be undertaken at the initiative of the prosecutor.

In both measures, the central element is the youth conference. The Mediation Service, which is the basic structural unit implementing VOM and other RJ practices, begins preparations for an extended meeting with the minor shortly after referral of the case by the court. The session is led by a coordinator who ensures the presence or representation of affected persons. Those can be representatives of the Administration of prisons and probation services, the school, children's social services, health, and social care or others related to the convicted person, to the victims, or the case as a whole. The aim is to engage a broader range of people and institutions together to take further care of the minor (Chankova, 2017).

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The new measures are considered as a valuable addition to the Norwegian system of punishment and execution of penalties as, according to the Execution of Sentences Act 2001,⁵ the correction services shall also offer RJ. Despite some criticism about potential unforeseen consequences of the system (e.g. youth punishment could be considered to contradict the aim of general deterrence and the public sense of justice when it is used for rather serious offences) and the limited practice, there are definite positive signals that these measures are a better opportunity for the victim and the offender (Holmboe, 2017).

D) RESTORATIVE APPROACHES IN THE EAST

There is a considerable body of research pointing out that restorative approaches have traditionally been the predominant pattern in the Eastern tradition. Japan and the Japanese system of resolving conflicts have been held to be an example of restorative justice (Braithwaite, 1989; Haley, 1989 and 1997, etc.). It is claimed that in Japan, there is a strong cultural commitment to include a restorative concept. These authors maintain that for ages, the Japanese society has used informal methods of dispute resolution that support harmony (the principle of *wa*) among members of the group. While

5 LOV 2001-05-18-21

other systems emphasise punishment, incapacitation, or rehabilitation, Japan appears to emphasise non-violence and harmony. From the initial police interrogation to the final judicial hearing for sentencing, the vast majority of those accused of criminal offences confess, display repentance, negotiate for their victims' forgiveness, and submit to the mercy of the authorities.

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The cultural foundations for their approach are regarded to be firm. Apology and pardon are considered by many authors as dominant threads in the Japanese social fabric. John Braithwaite has argued that attempts at reparation and reform are most likely to be successful when emotions such as shame are evoked in a manner that does not degrade or stigmatise the offender but rather condemns the offending behaviour, and is followed by gestures of reacceptance into the community of law-abiding citizens (the concept of Reintegrative shaming). In support of this argument, Braithwaite points to the roles played by apology and forgiveness in everyday life in Japan, and the emphasis on achieving reconciliation. This accent on apology and forgiveness is seen throughout the justice process. It is possible for an offender or representative to approach the victim before going to court. This informal mediation, *jidan*, seeks to create a restitution agreement between the victim and the offender for material and emotional damages in civil cases and criminal matters. Although *jidan* is an informal out-of-court-settlement between the parties, the outcome may affect the formal court proceedings. In the Japanese theory, however, there are doubts as to the restorativeness of the apology/forgiveness cycle. Scientists such as Yoko Hosoi and Haruo Nishimura (1999) interpret the period as leaving the victim out of the process as well as not allowing for "true remorse" on the part of the offender.

So, although from the outside, it looks like that Japanese society is maintaining *wa* by relying on a cycle of "apology and forgiveness," a closer inspection shows that this cycle is more a *habitus*, an exercise of a social obligation. It seems to work quasi "objectively." A good example is "a letter of apology" (*shimatsusho*). *Shimatsusho* is a written statement of apology, in which a wrongdoer admits his/her fault, regrets deeply, pledges oneself never to repeat the misbehaviour, and requests to be dealt with in a lenient manner. Sometimes the wrongdoer offers some money or other articles as a symbol of heartfelt regret. The perpetrator is ordinarily requested to write and submit a *Shimatsusho* to the employer or teachers (as workplaces and schools are the common places where it is applied) to avoid recourse to formal legal proceedings. *Shimatsusho*

sometimes obscures sensitivity to the guilt of the wrongdoer as well as the pain of the injured party and works mainly in favour of the offender (Hosoi and Nishimura, 1999).

There is a further view expressed that Japan has no “restorative sentencing options” (Hamai and Ellis, 2008). Besides, although the most common interpretation is that Japan has a shame culture and apology is highly appreciated, it is recognised that often apology is offered to avoid group exclusion. If offenders can indicate their repentance, they will be reintegrated in the *uchi*-world (inner circle, home, group). This is the only example that comes close to “reintegrative shaming.” That is why it is concluded that the reintegrative function of these declarations is limited – it is less integrative and exclusion preventive. Therefore, the most persuasive reason for Japan’s low crime rate can be found in the nature of society before, rather than after, a crime has been committed (Chankova and Kirchhoff, 2009).

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There is scientific evidence that RJ in China is progressing well (Shen, 2016). The primary categories of the Confucian philosophy – *li* – the moral code of the relations in a harmonious society and *ren* – the idea of altruism and humanity are successfully incorporated not only in crime prevention but also in the modern RJ concept and practices. Restorative ethos is an integral component of the policy towards juvenile delinquency in Hong Kong and Thailand, although the scope of application and the name of methods vary (Chankova, 2011; Wong, 2019).

E) RJ OUTSIDE OF CRIMINAL JUSTICE

The modern restorative justice movement got its start in the criminal and juvenile justice arenas. It is now capable of influencing virtually every aspect of those systems. However, on the European scale, there was a heated debate: should RJ be limited to application in criminal justice or implemented broadly. Walgrave (2008) opts for a “restricted definition,” addressing only criminalisable matters and not all other conflicts in schools, welfare work, neighbourhoods. Others claim that there are enough arguments that RJ is part of a broader concept, which has been called “restorative practices” and includes successful developments of RJ in different fields – schools, prisons, community, and at the workplace (Hopkins, 2004;

Liebmann, 2000). We can dare say that RJ has already transgressed the level of the criminal justice system and has been implemented in many new domains.

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The use of *restorative approaches in schools* already becomes common. Mediation and notably its school version "peer mediation" are used as a response to bullying. Circles are applied in many classrooms to allow students a safe place to express feelings, fears, or ideas while learning the rules of respect and listening to others. Conferencing is widely used when serious problems arise. Peaceful conflict resolution skills acquired at school can also be used in out-of-school situations. Through restorative approaches, young people learn to be accountable for their actions. These approaches foster awareness, raise moral standards and self-esteem, and help to create a culture of inclusion and belonging. However, the "boom" of using restorative practices in school is still forthcoming.

There are many *restorative initiatives* taking place in **prisons**. Some relate to the victim-offender relationships, others to conflict resolution among prisoners or the operation of prisons themselves. The rich restorative justice toolkit also includes various *victim awareness and empathy programs* – some are designed for delinquent youths, but predominantly they are corrections-based. When victims or offenders would like to meet, but the other party will not or cannot do so, groups of victims meet with unrelated groups of offenders in a surrogate process (the offenders did not commit the crimes against those particular victims). During the meetings, the victims, offenders, and sometimes community representatives talk about the causes and consequences of crime. The aim is to lead prisoners to consider the effects of their behaviour on their victims (Walker, 1999). Now it is experimented in Belgium, too.

3. ANALYSIS

Different RJ models are functioning in different environments. It is not possible to compare them. Moreover, the same model applied in different countries leads to different outcomes. It could only be claimed that every model has a right to life if the fundamental RJ principles, values, and standards are observed and if it serves well the needs of victims, offenders, and communities.

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In some countries (France, Finland, Norway, Poland), the facilitators are volunteers. In other countries (Austria, Germany, Belgium), the intervention is highly professionalised. The inclusion of volunteers is somewhere a consequence of lack of funds to pay professionals, but in general, these are two competing visions about RJ developments.

There is variety in the relationships of RJ models to the criminal justice system. In some countries, we find exclusively system-based programs (penal mediation in Belgium). In other countries, there are primarily community-based programs (certain initiatives in France, Germany, etc.). Consequently, there has also been diversity in the role played by criminal justice institutions in the adoption of RJ programs. While in Norway and Finland, mediation arose entirely autonomously alongside the neighbouring fields of probation and victim support in Austria, France, and the Czech Republic, probation or victim support have played a central role. Local and regional developments of RJ models are still the norm; nationwide spreading is an ideal to be pursued. Funding from central governments in many countries is a sign that RJ models are considered necessary on a national scale.

Summarising the latest processes in Europe, it could be said that there are good prospects for further developments of RJ models in criminal proceedings. The expectations are that RJ practices will be primarily applied, both for juveniles and adults. Family group conferencing and community conferencing probably will be further developed and institutionalised on a nationwide scale. The expansion of circles is expected in some countries. Community-based models will also evolve.

However, there is also someplace for scepticism, when RJ practices (mainly VOM) are converted into nothing else but an instrument in vertical justice. There are opinions expressed that greater use will

be made of RJ but that it will be co-opted within the values of the formal criminal justice system; even so, it may remain marginalised, and all the more so if it attempts to maintain some independence from the system (Fattah, 2004). The idea for the institutionalisation of RJ risks perversion of the original RJ philosophy through cooptation and instrumentalisation (Aertsen, Daems, and Robert, 2006). More recent research shows that these fears are exaggerated and RJ is more and more firmly established and functions well in symbiosis or autonomously from the criminal justice system (Cornwell, Blad, and Wright, 2013).

Victim support groups may favour the opinion that promoting the interests of victims and those of offenders in some situations may conflict. In the endeavours to help offender rehabilitation, the need for the victim to feel secure is overlooked. However, in a well-implemented restorative program, the needs and interests of victims and offenders should not be in conflict. Victims and offenders have a common interest in putting things right.

It should be emphasised that the legal, political, or social context in which RJ is implemented in a particular country strongly affects how it is applied. In the countries from the continental law system, the legal context is crucial for further developments of RJ practices. The need for a legal framework is generally recognised both for the credibility of RJ and for funding on a regular basis. The prevailing opinion is that statutory underpinning creates a demand for cases, but when statutory underpinning is lacking, case referrals depend on the discretion and the goodwill of criminal justice officials. But this is so even if the legal foundations are present.

The importance of political context is also broadly recognised as it directly affects criminal policy. The ruling party allocates funds and sets priorities, and this is crucial for RJ as well. Authoritarian governments are keen on compulsion. A more conservative climate in social and legal politics does not favour RJ.

Regrettably, a negative example should be given with Bulgaria. The Bulgarian policy, particularly in relation to human and victims rights and criminal justice, is far from being qualified progressive. The lack of understanding and the misinterpretation of the so-called "gender issue" led to the non-ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No.210, named Istanbul Convention), which even was declared by the Constitutional Court unconstitu-

tional (Ilcheva, 2019). Despite the explicit delegation of the Mediation Act 2004⁶ (art. 3, para.2), the forthcoming (that time) Penal Procedure Code (2006) to regularise the application of victim-offender mediation, due to lack of vision about the modern criminal politics and keeping different “vested interests” in the current *status quo*, it is not done even yet (Chankova, 2014). In the meantime, according to the latest developments of the Penal Code, criminal politics is becoming more repressive. In the governmental Updated Strategy to Continue the Reform of the Judicial System⁷ 2014, Restorative Justice was mentioned as a priority, but so far no legislative actions followed. All these put Bulgaria behind other European countries and deprive the Bulgarian citizens of the opportunity to use RJ instruments.

Quite interesting developments of RJ is observed in the Netherlands. During the last decades, various local “bottom-up” interventions emerged and failed. State-funded pilot projects in the Hague and Rotterdam had been initiated but despite exciting experiences, had stopped after several years. For an adequate understanding of the development of restorative ideas and practices in the Netherlands three main factors are revealed – the vital role of diversion in the Dutch criminal law, the role of the victim and the critical research and reflection of restorative ideas and practices worldwide, which has been partly inspired and developed by Dutch research in the field of victimology (van Drie, van Groningen, and Weijers, 2015). Victim studies made clear that there are strong doubts about the desirability of RJ procedures for several categories of victims, mainly victims of severe crimes and traumatised victims (although there are opposite opinions in the literature). This has resulted in a critical reflection on RJ principles, benefits, and risks, and restriction of application nationwide as the Dutch government has opted for a clear victim orientation. Also, this played an essential role in the caution toward giving more room and regulation of RJ. With a right-wing government and a populist party in a rather strong position, the current political climate put the emphasis on punishment and does not generate great enthusiasm for RJ practices in the Netherlands.

6 State Gazette No 110 /2004

7 <http://www.strategy.bg/StrategicDocuments/View.aspx?id=957>. Accessed 27 May 2020.

The observations on the Baltic states show some similarities. Restorative justice seems to be not high on the agenda of the penal policymakers in Lithuania, where only some RJ elements could be noticed (Gruodyte, 2014). Stagnation or even delay in establishing of contemporary criminal justice in other countries in the region is marked (Pettai, E-C. and Pettai, V., 2015). Definitely, these do not stimulate restorative initiatives even from the NGO sector and impede the building of restorative society.

- 34** The meaning of social context should also be underlined. The development of RJ is vastly influenced by the existing systems and cultural environment. When a society is more widely aware of RJ, it is always more favourable to its use. Not surprisingly, in many countries, in Europe particularly, the main engine for RJ establishment and application is the academia and NGOs. They do play a crucial role in developing RJ models and practices, launching pilot projects, setting infrastructure, organising education and training, etc. It will not be an exaggeration to claim that the NGOs are the leading provider of RJ services. Some examples:

Foresee Research Group⁸ (FORESEE – Hungary) is an NGO that works in consultancy, prevention, intervention, and network building in the field of constructive conflict solution, restorative justice and prevention of social polarisation and exclusion. Foresee's a multi-agency team of researchers and facilitators work with disadvantaged groups, local communities, schools, NGOs, as well as with practitioners and policymakers in areas of criminal justice (victims, offenders, probation, prison), social welfare and education. Foresee flexibly applies a range of techniques as mediation, conferencing, peacemaking circles, family group conferencing, facilitated discussions, and one-to-one restorative dialogues. Foresee has recently finished its pilot project on mediation and restorative justice in prison, working with inmates, families, victims, as well as staff and generally explores new methodologies that are suitable to issues of hate crime, extremism, and for deradicalisation interventions. They have produced several videos concerning the method of different dialogue approaches in schools, in local communities, and within the judicial system. In 2018 Foresee Research Group received the European Forum for Restorative Justice's Award (Mirski, 2018).

Restorative Justice Nederland⁹ (RJN) is a centre of expertise and innovation in the field of RJ. It is active in three domains: within civil society (schools, neighbourhoods, workplace), within the criminal justice procedure and in detention and aftercare. RJN is executing research, providing advice and capacity building and lobbying in an environment which is not always easy. Through its Restorative Justice Academy, that consists of ten experienced RJ trainers, capacity building is provided for mediators, judicial professionals and other relevant practitioners. For example, around 500 prison staff have received a one day RJ masterclass in the last years. RJN is also consulted by policymakers of the ministry of justice and judicial organisations that are developing and implementing an RJ policy. RJN has worked out several tools to embed and further RJ within legal organisations (e.g. an organisational RJ maturity grid; a format for an RJ action plan that is implemented in all prisons). Together with the University of Maastricht, a legislative proposal has been developed to introduce provisions governing RJ services into the Dutch Code of Criminal Procedure (Wolthuis, Claessen, Slump and Van Hoek, 2019).

The first Victim-Offender Mediation Program in Albania was introduced in 2001 by the Albanian Foundation for Conflict Resolution and Reconciliation of Disputes (AFCR)¹⁰, as part of its strategy for developing mediation in criminal matters in Albania. Various components like promotion and awareness-raising activities, workshops, conferences and training with justice stakeholders, and the positive outcomes of mediation provision in juveniles cases had a high impact on the legal changes, mainly reflected in the Code of Criminal Justice for Children (CCJC, approved in 2017), which contains a set of articles that provide for the use of restorative justice program and mediation as a diversion measure for juveniles. Mediators have been specially trained for this. Due to the promotion by AFRCR, RJ is a well-known concept among juvenile justice specialists and also by civil society organisations now. Other central interventions by AFRCR include supporting policy and law implementation, harmonisation of legislation for the performance of restorative justice programs for adults and consolidation of existing services with resources. AFRCR has prepared a very ambitious plan for Restorative Justice Activities in Albania in the context of the RJ Strategy for Change 2019.

9 <http://www.restorativejustice.nl/>

10 <https://www.mediationalb.org/index.php?lang=2>

All these are evidence about the crucial role of the specialised NGOs for the progress of RJ.

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The very long history of the criminal justice systems worldwide makes them reliable and dependable; however, also in a way less flexible and rigid, and this does not favour the development of new approaches. In some countries, the emphasis is on maintaining the current structure of the criminal system, resulting in the marginalisation of RJ practices. The still-existing opposition from the legal actors, at least in some places, perhaps because of fear of losing power, further impedes the process. All these arguments can be brought into the consideration that social control is the essence of criminal law, and that horizontal methods of social control have to be considered before repressive vertical methods are applied.

Many international organisations and instruments at the supra-national level encourage or even require member-states to introduce VOM and other RJ practices in their legal systems. The UN Resolution 2002/12 on Basic principles on the use of restorative justice programs in criminal matters¹¹ and the Handbook on Restorative justice programs (UN, 2006 – 1st ed. & 2020 – 2nd ed.)¹² have to be explicitly mentioned. In this aspect, the Council of Europe is very active. In 1999 the Committee of Ministers adopted Recommendation (99)19 on mediation in penal matters¹³, which set out the principles of VOM as guidelines for member-states. A follow-up study in 2002 showed that this recommendation has been remarkably influential. In 2007 the Council of Europe adopted another soft-law act – Guidelines for a better implementation of the existing recommendation concerning penal mediation¹⁴. The newest Recommendation CM/Rec (2018)8 of the Committee of Ministers of the Council of Europe concerning restorative justice in criminal matters¹⁵ aimed at its further endorsement as an effective instrument for alternative criminal law dispute resolution.

11 Adopted by ECOSOC on 37th Plenary meeting 24 July 2002, available at: www.refworld.org/docid/46c455820.html. Accessed 2 April 2020.

12 https://www.unodc.org/documents/justice-and-prison-reform/2001146_Handbook_on_Restorative_Justice_Programmes.pdf. Accessed 22 May 2020.

13 https://search.coe.int/cm/Pages/result_details.aspx?Objec-tid=090000168062e02b. Accessed 1 April 2020.

14 <https://rm.coe.int/1680747759>. Accessed 1 April 2020.

15 https://search.coe.int/cm/Pages/result_details.aspx?Objec-tid=09000016808e35f3. Accessed 1 April 2020.

The role of the EU should also be emphasised. The Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA)¹⁶ was a landmark instrument. The member-states of the European Union were obliged to adapt their national laws so as to afford victims of crime a minimum level of protection. It also provided that member-states must promote mediation in criminal cases for appropriate offences. More recently, Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing the minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA¹⁷ has in details developed many rights that should be provided to the victim, both in and outside the criminal proceedings. Under the Directive, restorative justice practices can only be used if they are in the best interest of the victim and its safety is ensured. It put the accent on safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. The Directive requires before agreeing to participate in an RJ process the victim to be provided with full and unbiased information about the process and the potential outcomes as well as information about the procedure for supervising the implementation of any agreement. In this sense the Directive is too cautious, it considers RJ as something we should worry about, we should be careful for, and has a defensive nature towards RJ. However, it yet recognises that restorative justice can be of great help to victims. Member States are required to facilitate the referral of cases where appropriate to restorative justice services.

A significant number of non-governmental organisations have been established worldwide to further promote restorative justice in general or in specific fields, and they function quite efficiently, supporting the international exchange of information and mutual help, exploring and developing the theoretical basis of RJ, stimulating research and assisting the development of legislation, training, and services¹⁸ (Chankova and Kirchhoff, 2010).

16 Official Journal of the European Communities, 22.3.2001, L 82/1-4

17 Official Journal of the European Union, 14.11.2012, L 315/57

18 European Forum for Restorative Justice – www.euforumrj.org/, Restorative Justice Council – www.restorativejustice.org.uk/, International Institute for Restorative Practices – www.iirp.org/, Transforming Conflict – www.transformingconflict.org/, and many other.

4. APPLICATION OF RJ TO HATE CRIME

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Restorative justice offers plenty of opportunities for reaction to different offences and resolving various conflicts. Hate crime, generally defined as a crime where the perpetrator's prejudice against any identifiable group of people is a factor in determining who is victimised, should not be excluded. Hate crimes, and in particular race hate, are ancient phenomena, but they have long been ignored by policymakers. Only recently have they become a significant area of concern for public policy. And it is inevitable as beyond racially and religiously motivated incidents, ageism, disabilism, and sexism also lead to hate crime. It is often reported that LGBTI communities have experienced numerous and wide range of homophobic acts – verbal threats, physical assaults, murder, etc. The anti-LGBTI crime deserves particular attention as it directly affects fundamental human rights and represents a highly sensitive issue. In search of practices and policies that can bring balance to community tensions and address integration issues and inequalities, RJ principles and practices might be appealed. The significance of communities as parties in hate crime suggests that restorative idea might indeed be well suited for a holistic approach. According to RJ's theories, restorative norms have the potential to address sensitive and complex issues such as hate crime. Restorative practices are founded upon the principle of inclusion, respect, mutual understanding, and voluntary and honest dialogue. Restorative encounter is fundamental to building cross-cultural bridges and integration. That is why RJ instruments, being a non-retributive but effective intervention in the legal sphere of the victims (and the offenders), are very appropriate, and their application should be promoted.

It deserves to mention the Sussex Hate Crime Project, funded by the Leverhulme Trust. The aim of the project was to examine the indirect impact of hate crime – how hate attacks on members of the community affect the thoughts, emotions and behaviour of other members of that community. The project focused on LGBT and Muslim communities and used a variety of research methods. Among the key findings, not surprisingly, we read:

- “61% of LGB&T and Muslim participants prefer restorative justice (RJ) as a criminal justice response to hate crime than an enhanced prison service
- LGB&T participants perceived RJ to be more beneficial to the victim and the offender and were more satisfied with RJ compared to an enhanced sentence.”

(Paterson, Walters, Brown, and Fearn, 2018).

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Respondents to interviews reading about the RJ intervention thought it to be less likely to make the offender bitter and revengeful than participants who read about the prison service. Responders were also less angry and sad about the RJ arrangements than the prison sentence and were more satisfied with it. By perceiving RJ to be more beneficial for offenders and victims, RJ also thought to be more advantageous to the LGB&T community and society as a whole than the prison sentence. Hence, targeted communities view RJ to be an especially useful response to hate crime.

There are many good examples of successful application of RJ instruments in hate and anti-LGBTI crime. Here a case study of a *Restorative conferencing in school* will be presented. In its centre is the Braithwaite's theory of "re-integrative shaming" arguing that the offenders should be confronted with the full consequences of their action but in a situation of support and care.

THE INCIDENT

A ten-year-old boy uses foul racist language towards a teacher of East African background. The Teacher (and other children who witness this) complain to the Headteacher. The boy admits what he said. The Head immediately puts the boy on fixed-term exclusion. The Teacher contacted the Teacher Union, who advises him to seek police advice. The School Police Officer proposes a restorative approach. All directly involved are asked if they would be willing to participate in restorative conferencing. All agree. Preparation takes place. The conference is held in a room in a quiet area of the school. Facilitated by the Police Officer, the actual meeting lasts 40 minutes. The Teacher and a friend, the boy and his mother, and the Headteacher attend.

THE PROCESS

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The facilitator makes sure everyone knows who is who and then sets out the purpose of the meeting. In turn, he asks the Teacher and pupil to set out what exactly happened and what they felt then, and what they feel now. Then he asks the Mother and the Head what they felt when they heard about the incident and what they feel now. After that, in turn, the facilitator asks who has been affected and what needs to be done to put the harm right. The moment of maximum impact on the boy is when the mother turns to her son and says: "I have to go back to work and tell my workmates my son has used racist language. You know that most of them are from Pakistan. How will they feel about me?"

THE OUTCOME

1. The boy makes an apology to the Teacher, who feels it was genuine. "It was just words. I didn't know it hurt you so much. I'm sorry."
2. The boy then offers after school to work for the Teacher doing display work in the classroom. He does this.
3. The boy, returning the next day into school, in his own initiative tells the pupils who saw the incident what happened. They are satisfied and realise that the school takes racist issues seriously.
4. The boy never uses racist language again in school.
5. The Teacher Union concerned rings the Head some weeks later to say how pleased they are with the outcome".

(Chankova and Poshtova, 2006).

Impressive literature on the application of RJ initiatives in response to hate crime has already been developed; many pilot projects have been launched. But neither RJ and hate crime are referenced in legislation everywhere. This remains a challenge for policymakers, practitioners and researchers. Conceptualising of RJ as a potential remedy for hate crime is necessary. Because RJ seems to offer a form of dialogue that may help break down the fears, stereotypes and causes of hate crime (Gavrielides, 2015).

The conclusions of the already existing research about the effectiveness of using the restorative approach when tackling hate-motivated offences (Walters and Hoyle, 2012; Walters, 2014) have to be reconfirmed; the practice needs to be intensified.

CONCLUSIONS

The experience shows that there are many different ways and domains of applying restorative justice. There have been trials and errors. But it is already sure that restorative approaches could transform the way in which many societies are currently organised and make them safer, crime-free places. In a time when the community becomes again a more definite factor and globalisation shows some counterproductive results (taking note not only of COVID-19 outbreak and the response to it) returning to the traditional approaches of conflict resolution is not a chimaera.

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These brief overview and analysis allow some policy recommendations to be formulated, which will hopefully enhance further extension and proliferation of RJ in different domains, countries, legal systems:

- It is time to go beyond local and regional developments of RJ models which are still the norm; nationwide spreading is an ideal to be pursued.
- The need for a legal framework is generally recognised both for the credibility of RJ and for funding on a regular basis, at the national and supra-national level.
- The further strengthening and empowerment of non-governmental organisations are proved necessary to accelerate the progress of RJ.
- More research, more evaluation, networking, and work to influence institutions and politicians are of utmost importance. Continuous international cooperation, dissemination of information, and exchange of knowledge and experience are the right direction of RJ developments. Sharing models of best practices and ideas are essential.¹⁹

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KEYWORDS: Restorative Justice, model, evolution, spread

¹⁹ This paper is based on some previous research works of the author, which have been revised and updated.

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USING RESTORATIVE JUSTICE IN CASES OF LGBTI HATE CRIME (ENGLAND AND WALES)

LINDA MILLINGTON, WHY ME?

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KEYWORDS: Individual, Restore, Harm, Good Practice

1. INTRODUCTION

Restorative Justice has been used for a number of years in cases of LGBTI hate crime, although it is only recently in the United Kingdom that it has gained visibility in academic and institutional circles. With the drive to use Restorative Justice more with this type of crime, and to standardise policies around it, it is particularly important to develop practice in this area. There is a need to make Restorative Justice accessible and appropriate for LGBTI people who have experienced hate crime.

The purpose of this article is to map out the considerations that need to be taken to conduct Restorative Justice for cases of LGBTI hate crime. It includes key points as they arise at each stage of the Restorative Justice process – from before initial contact has been made, through to debrief and beyond. Whilst core Restorative Justice processes tend to remain unchanged regardless of the crime or participants, additional measures may need to be taken to increase accessibility for certain groups and adapt to individual requirements.

The content within this article is derived from Why me?'s work on Restorative Justice and hate crime. Why me? is a charity that campaigns for victims to have greater access to Restorative Justice across England and Wales. Why me? also operates a service that delivers Restorative Justice for those who are harmed by crime and those responsible for harm. Over the past three years, Why me? has conducted work addressing all types of hate crime, releasing two papers on how to increase access to Restorative Justice for anyone affected by hate crime. Why me? also received two year's funding to develop a LGBTI hate crime and Restorative Justice

project across London. One of the purposes of this project was to develop good practice in facilitating Restorative Justice with LGBTI hate crime. The article draws on the results of both projects, LGBTI hate crime casework, carried out by Why me?'s national Restorative Justice service, and from wider research on the subject. This article will use data gathered through interviews with practitioners and LGBTI services conducted in December 2019.

Disclaimer: Some of the findings in this article are the product of conversations Why me? had with people and organisations who belong to specific minority groups. Their feedback is informative, but not necessarily representative. Why me? was not able to speak to representatives from every minority group that can be affected by hate crime.

2. TERMINOLOGY

The terms 'harmed' and 'harmer' are used throughout this article to describe those harmed by an incident and those who are responsible. These terms cover people involved in a criminal incident, as well as incidents, which were not criminal, but caused harm.

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The term 'Restorative Justice' is also used, although 'restorative practices' can describe methods of addressing harm outside of the criminal justice system. Restorative practice facilitates dialogue between people to address the impact of harm. It can be used in a number of settings including schools, the workplace and in the criminal justice system.

LGBTI is used as an umbrella term to describe people of all minority sexual orientations and gender identities, including lesbian, gay, bisexual, pansexual, trans, non-binary, queer, asexual and intersex.

The difference between hate crimes and hate incidents is that hate incidents do not meet the threshold for criminal behaviour. In England and Wales, when a hate incident becomes a criminal offence it is defined as a hate crime (Citizens Advice website). The Crown Prosecution Service will need sufficient evidence to convince the court that the crime was motivated by or demonstrated hostility (Crown Prosecution Service website). Whilst 'hate crime' is the term used in this article, Why me? advocates that Restorative Justice can also address hate incidents.

3. WHAT IS RESTORATIVE JUSTICE?

Restorative Justice is a process that gives someone who has been harmed the chance to communicate with the person who caused the harm about the real impact of the incident. It empowers them by giving them a voice and can help them to move forward and recover. For harmers, the experience can be incredibly challenging as it confronts them with the personal impact of their actions. Restorative Justice treats all participants with respect. The practice ensures that all parties are kept safe and that no further harm is caused.

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A restorative process can be used for all types of crime, including cases where someone is serving a long prison sentence. Why me? works with victims of domestic violence, serious assault, rape and those who have lost family members to murder, all of whom have benefited from Restorative Justice.

Restorative Justice conferences, where the harmed person meets the harmer, are led by a trained facilitator who supports and prepares the people taking part and makes sure that the process is safe. Sometimes, when participants do not want a face to face meeting or it is not safe to do so, the facilitator can arrange for the two parties to communicate via letters, shuttling information between them, recorded interviews or video. Restorative Justice is voluntary, meaning that both parties must be willing to participate for it to go ahead.

4. LGBTI HATE CRIME IN THE UNITED KINGDOM

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The police and the Crown Prosecution Service for England and Wales have agreed to define hate crime as “any criminal offence which is perceived by the victim or any other person to be motivated by hostility or prejudice” (Crown Prosecution Service website) against race, religion, sexual orientation, disability or transgender identity. In England and Wales, examples of hate crimes can include assaults, murder, criminal damage, sexual assault, burglary and harassment. Hate incidents could include verbal abuse, bullying, threats of violence and online abuse (Citizens Advice website).

Bachmann's and Gooch's 2017 research, conducted on behalf of Stonewall, indicates the level of LGBTI hate crime in the United Kingdom. Their key findings include:

- One in five LGBTI people have experienced a hate crime or incident because of their sexual orientation and/or gender identity in the past 12 months.
- Two in five trans people have experienced a hate crime or incident because of their gender identity in the past 12 months.
- The number of LGB people who have experienced a hate crime or incident in the last year because of their sexual orientation has risen by 78 percent since 2013.
- Four in five LGBT+ people who have experienced a hate crime or incident did not report it to the police.
- One in ten LGBT+ people have experienced anti-LGBT+ abuse online directed towards them personally. This increases to one in four for trans people directly experiencing transphobic abuse online (6).

LGBTI hate crime is also significantly underreported. Most LGBTI people who have experienced a hate crime do not report it to the police or other agency/support organisation (Bachmann and Gooch 12). Evidence collected as part of the National LGBT survey identifies a number of reasons for the lack of reporting. They include: fear of the reaction victims may receive from the police, a perception that the crime was not serious enough, the repeated

frequency of hate crime incidents across a person's life trajectory or reporting would not lead to any change (Government Equalities Office 13). Older LGBTI people can be less trusting of the police due to previous criminalisation of their sexuality. The Sexual Offences Act 1967 first legalised homosexuality in England and Wales. Further legislation applied across the United Kingdom culminated in 2000 with the age of consent set at 16 for both heterosexual and homosexual acts.

5. THE BENEFITS OF USING RESTORATIVE JUSTICE TO ADDRESS HATE CRIME

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Restorative Justice can provide an alternative way to address LGBTI hate crime as it is an independent process, addressing the harm experienced by an individual. It also can take into account the recurrent nature of hate crime. The benefits of Restorative Justice can be most powerful for those harmed by serious crimes, as they often experience the greatest long-term harms. Hate crime is a serious offence which can have a lasting impact on the people affected. This means that Restorative Justice is a particularly important option for them, as it has the potential to address this lasting harm by allowing them to seek answers about why the incident happened, explain how it made them feel, and regain a sense of power and control.

Restorative Justice can challenge prejudice. For example, one victim of LGBTI hate crime told Why me? that he would relish the opportunity to meet the harmer through Restorative Justice, so that he could challenge their views about his sexuality and discourage them from inflicting hate again (Why me? "Making Restorative Justice happen for hate crime across the country" 3). The act of education empowers people affected by hate and can help them to recover from the incident.

Restorative Justice also encourages empathy and understanding, making many people affected by hate crime feel it is worthwhile (Walters, Chapter Seven). This can be uniquely beneficial for those harmed by hate crime, as the crimes committed against them are often motivated by prejudice. Challenging this prejudice and showing their humanity can undermine the beliefs which drive people to commit hate crime (Why me? "Making Restorative Justice happen for hate crime across the country" 3). Restorative Justice humanises the harmed to the harmer. It is much easier for someone to shout obscenities at a gay couple walking down the street, hand in hand, than it is to sit with them and hear that they are suffering from panic attacks as a result.

The long-term impact of Restorative Justice could reduce the number of hate crimes committed, although further research is required. Evidence has shown that Restorative Justice reduces reoffending by 14% (Ministry of Justice "Green Paper Evidence Report" 64).

6. ESTABLISHING PARTNERSHIPS AND REFERRAL PATHWAYS

The key to the success of Why me?'s London LGBTI Restorative Justice hate crime project has been the close collaboration with specialist agencies, such as Galop, the anti LGBT+ anti-violence charity. The first stage of the project was to consult and cooperate with LGBTI organisations to understand their and the LGBTI community's needs, issues and barriers. Organisations that Why me? contacted included Galop, Elop, Metro, Mosaic, the Peter Tatchell Foundation, Stonewall and Stonewall Housing.

During 2019, Why me? delivered a series of awareness sessions, including a pan London event to 17 organisations with presentations from Galop, the Metropolitan Police Service and the London's Major's Office for Policing and Crime. This has resulted in case discussions with Galop, and further work is to be carried out with Stonewall Housing to offer their clients the opportunity to engage with Restorative Justice.

It can take time to establish partnerships between restorative services and LGBTI organisations and referrals rates are likely to be slow at first. Considerable investment is required to ensure that referral processes are clear and safe. It is also essential that communication and data-sharing protocols are understood by all parties. Having single points of contact in each organisation who will manage the referral process helps with this.

Between July and November 2019 Why me? received five referrals from Galop. One case has resulted in a restorative meeting. Why me? found that the presence of a Galop representative to support the person affected by hate at this conference was extremely beneficial. They were also able to see how Restorative Justice works in practice and deepen their understanding of its benefits. Restorative services should provide opportunities for LGBTI partner agencies to observe restorative conferences so they are better able to explain what happens when making the offer of Restorative Justice.

Restorative services should provide regular feedback to the referring agency on the progress of a referral or at the very least after the restorative intervention has completed with details of the outcome and any feedback from the participants. Regular updates to the referrer means, for example, that they can follow up with a service user if the restorative service has lost contact. Consent to update the referring agency is obtained at a first meeting with a service user. It is important to provide case updates to the referring agency so any behavioural patterns can be identified.

7. TRAINING IN RESTORATIVE JUSTICE AND LGBTI ISSUES

A key element to ensure success of any project to increase the use of Restorative Justice with LGBTI hate crime cases is to deliver appropriate training to both Restorative Justice professionals and those working with the LGBTI community. It is suggested that restorative services and LGBTI organisations set up reciprocal arrangements for the delivery of training. Why me? has only allocated cases to their facilitators who have completed LGBTI awareness training. All Why me?'s facilitators are volunteers with two members of staff managing the restorative service and who also provide support to the facilitator team.

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Ideally, training for Restorative Justice professionals working with LGBTI communities should be carried out before referrals for LGBTI hate crime are accepted. Why me? commissioned Galop to deliver a customised package for staff, board members and facilitators. Any such training should cover a number of areas including understanding what hate crime is, barriers to and reasons for reporting hate crime and its impact on people and communities. Restorative facilitators should be made aware of different sexualities and gender identities and appropriate terminology for each as well as LGBTI culture. It is important for facilitators to know that hate crime can be intersectional and is linked to other crimes. For example, disabled LGBTI people may be victims of hate not only because of their sexuality but also their disability. Training programmes can also cover the potential benefits and risks of using restorative approaches with LGBTI people.

A half day Restorative Justice awareness training should be delivered to all staff and volunteers who may refer hate crime cases for Restorative Justice. The content of such training could include a description of Restorative Justice, how the process works, the different models of delivering it and how Restorative Justice can help people affected by LGBTI hate crime. Case studies, how to make the offer of Restorative Justice and how to refer to a restorative service should also form part of the training.

To gain a greater insight into how Restorative Justice services and LGBTI organisations work, it may be beneficial for staff and volunteers to shadow each other. It is also suggested that in addition to awareness training, that at least one member of staff from a LGBTI referring agency should undertake restorative facilitation training to help their understanding of the process. A longer-term goal would be to train more frontline workers in specialist agencies to deliver Restorative Justice themselves. There is also a need to recruit and train more people from the LGBTI community as Restorative Justice facilitators.

8. PERCEPTIONS OF THE SUITABILITY OF RESTORATIVE JUSTICE

Some professionals see Restorative Justice only as a way of disposing of minor crimes. This does not capture the full scope of Restorative Justice. (Why me? "Making Restorative Justice happen for hate crime across the country" 4). Restorative Justice can be used for all types of crime, including cases where someone is serving a prison sentence. It can be used in conjunction with a court sentence or in place of a prosecution. Hate crimes are complex and sensitive but this should not necessarily preclude a victim of hate from being offered the opportunity of taking part in Restorative Justice.

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Why me?'s research found that perceptions differ as to whether Restorative Justice is suitable for hate crime cases. Some people are sceptical about using Restorative Justice for hate crime, due to the fear that the process could cause further upset (Gavrielides 21-24). There is a potential reluctance to expose them to people with potentially very different ideological beliefs and hateful attitudes. Anecdotal feedback received by Why me? found that some people who had experienced hate said they would have welcomed the chance to have Restorative Justice, whilst others said that they would not have accepted it. There was concern that they would find the process upsetting, but none of them said that someone affected by hate should not be able to make this decision for themselves (Why me? "Making Restorative Justice happen for hate crime across the country" 4-5).

In a paper delivered to Why me?'s "How to use Restorative Justice for Hate Crime Conference" (October 2019), Mark Walters presented evidence of LGBTI people's perceptions of the use of Restorative Justice and enhanced penalties (such as longer prison sentences for hate crime). A survey carried out as part of the Sussex Hate Crime project found that LGBTI people perceived Restorative Justice as more likely to reduce reoffending, help harmers' understand the impact of their crime, help victims of hate to recover and gives them a greater say than enhanced penalties.

People who have experienced identity-based crimes may have a series of complex needs such as mental health or substance misuse problems. They may also have increased vulnerabilities because of their experience of previous LGBTI hate crime and the

nature of hate crime itself. With hate crime, the person hates you because of who you are which can impact on people's sense of safety. Many people harmed by hate crime, not just LGBTI hate crime, experience siege mentality, where they are constantly on edge looking for the next incident of abuse. However, such needs may not necessarily constitute a barrier to taking part in Restorative Justice. The people affected can be worried about being seen to be vulnerable, so it is important for facilitators to be respectful, and that their priority is to keep them safe. Restorative facilitators will adapt their practice to manage such needs and where possible engage with relevant agencies that are also supporting an individual. Facilitators will discuss with service users if they identify a potential need and will refer/signpost to another agency including LGBTI services. It is, therefore, important for restorative facilitators to be aware of services in the local area.

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9. EMPOWERING THE HARMED TO ACCESS RESTORATIVE JUSTICE

Professionals working with those harmed by hate crime have a vital role in enabling them to learn about Restorative Justice. This includes the police, those providing victim support services and LGBTI agencies.

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Why me? campaigns that all victims of crime must be offered information and the opportunity to take part in Restorative Justice. People affected by LGBTI hate crime should have the same access to Restorative Justice as anyone else. It is important that the offer to take part is made throughout a victim's journey within the criminal justice process. Those affected by hate crime should be empowered to make decisions about Restorative Justice themselves. People affected by hate crime have a variety of reasons for wanting to take part in Restorative Justice; they may have questions such as 'why me?', 'why was I targeted?' or they may wish to explain the impact of the hate crime to the perpetrator. The best person to decide if Restorative Justice could be suitable and a referral is made to a restorative service, is that person themselves.

It is important that where individuals do report, they are made aware of their right to information about Restorative Justice (Ministry of Justice "Code of Practice" 35) and when they do not feel able to report, they are able to contact Restorative Justice services directly.

10. INFORMING PEOPLE ABOUT RESTORATIVE JUSTICE

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For many people, who experience hate crime all their life, they only tend to report after a number of incidents. This means that they may not be well placed to take part in Restorative Justice at that point. If there is greater awareness of the use of Restorative Justice for LGBTI hate crimes, then more people may come forward to take part. Those affected by crime often side lined by the criminal justice process and Restorative Justice can help with this.

Research has demonstrated that where possible the offer of Restorative Justice should be made by a trained restorative practitioner, preferably in a face-to-face meeting and any prior contact, for example by telephone, should aim to secure a face-to-face meeting. It is also recommended that the term 'Restorative Justice' is not used in early conversations with participants as it can be off-putting and perhaps confusing. It is beneficial to explain the process first without giving it a label (Restorative Justice Council "Improving victim take up" 15).

However, the initial offer to take part in Restorative Justice may come from the police, a victim services' agency or other support agency. It is often a police officer who makes first contact with a victim of hate crime, followed by a victim support officer where required (Why me? "Making Restorative Justice happen for crime in your police area" 6).

Some police officers see Restorative Justice only as a way of addressing a crime, using as part of or an alternative to an out of court disposal, such as a community resolution or caution. This can prevent them from discussing restorative options for anything other than minor crimes. Their high workloads also put pressure on them to clear cases quickly meaning that clear referral routes to Restorative Justice are important to encourage the option to be considered (Why me? "Making Restorative Justice happen for crime in your police area" 6). However, care should be taken to ensure that people who have been harmed do not feel pressurised into taking part in Restorative Justice.

Victim support staff can also be selective about when they raise the option of Restorative Justice. There is a tendency to only raise Restorative Justice when they think the person is likely to accept it, rather than letting the person make that decision for themselves. Banwell-Moore's research on the barriers to participation in Restorative Justice found that victim staff considered "whether the victim engaged with them; whether they were upset or angry; and whether or not they expressed pro-social motives or displayed altruistic tendencies" when deciding whether to raise Restorative Justice (Why me? "Making Restorative Justice happen for crime in your police area" 6).

Many victim support staff never give those affected by hate crime the option to consider Restorative Justice. This may be due to a misconception that Restorative Justice is only suitable for minor crimes and a lack of confidence on the part of staff to make an offer (Why me? "Making Restorative Justice happen for crime in your police area" 6).

People working with those harmed by LGBTI hate crime could use a process called 'virtual conferencing' to help them explain Restorative Justice. The method uses a series of questions:

1. Imagine that person who caused the harm is in the room with you now. What would you say to them?
2. How do you think they will respond to that?
3. What questions would you ask?
4. Do you think you could actually say these things to them face to face? (Brian Dowling and Why me? 2)

Why me?'s collaboration with Galop has shown the benefits of the Restorative Justice offer made by professionals who are already engaged with people affected by hate and have in-depth understanding of their needs. It is essential that such professionals have a good understanding of Restorative Justice, including its benefits, to be able to recognise when the process may be of value. Considering the potential mistrust of the police, if the offer of Restorative Justice is made from elsewhere, this could encourage more people to engage with Restorative Justice.

10.1 TAKING FORWARD A REFERRAL

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Either the harmed or harmer can initiate Restorative Justice. However, referrals may not be considered by restorative services if they involve domestic violence and/or sexual abuse and are initiated by the harmer. In England and Wales, restorative services are funded by the local Police and Crime Commissioners and the criteria for acceptance of referrals can differ across restorative services. Restorative facilitators will continually assess throughout a restorative process to ensure that it remains safe for all parties to take part. They will consider motivations for taking part, the level of responsibility that the harmer takes for their actions and whether any restorative process will lead to an increased risk of harm. Restorative Justice is voluntary for everyone to take part and either party can withdraw from the process at any time.

Restorative facilitators always consider and manage referrals on a case by case basis, led by the needs and the wishes of the person who was harmed. One of the guiding principles of restorative practice is that facilitators remain neutral and "ensure their restorative practice is respectful, non-discriminatory and unbiased towards all participants," (Restorative Justice Council, "Restorative Practice Guidance" 8). As the LGBTI community includes a wide of variety of people, it is vital that all interventions are tailored to the individual. Restorative Justice can offer this personalised approach and provides people with another option if they feel they cannot pursue a crime in the traditional way.

Restorative Justice can take place at any point during the criminal justice process although generally it is after a decision has been made on the outcome, for example, after sentencing or an out of court disposal (caution, community resolution) has been delivered. It can be carried out alongside a court sentence whether the harmer is in custody or the community. Restorative Justice can take place if the police have decided to take no further action in response to an incident, for example, if it did not meet the criminal threshold, and all parties agree to take part.

Why me? and Galop's experience has found that people harmed by hate crime may want to take part in Restorative Justice with an individual/organisation who was not directly responsible for an incident, but still caused harm. For example, if an assault took place in a public space, such as a pub, club or gym, and the person responsible cannot be identified, the person affected may benefit

from a restorative process with the staff at the venue, if they feel that what happened was not taken seriously. This gives the person harmed the opportunity to explain the harm that they have experienced. Similarly, Restorative Justice could be used to build relationships with agencies such as the police when an individual or group feels misunderstood, even if they were not directly responsible for a crime. With any such case, facilitators should explore with the feelings of the person affected towards the person responsible for the crime to check that they are not transferring their anger at what happened to the other party in the process.

11. THE RESTORATIVE JUSTICE PROCESS

Once a restorative service has received a referral, the Restorative Justice process will include a number of distinct steps which can be summarised as follows (for harmed-initiated referrals).

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1. Initial contact made by the facilitator either by telephone or letter.
 2. An initial meeting with the harmed to explain Restorative Justice, explore their feelings about what happened and discuss what they would like to achieve.
 3. The facilitator makes contact with the harmer, whether they are in prison or in the community, to have a similar conversation about Restorative Justice and their motivations for taking part.
 4. If both parties agree to Restorative Justice, a series of preparation meetings will be carried out until everyone is ready to proceed.
 5. A face-to-face meeting or other form of Restorative Justice (see below) takes place.
 6. Follow up will take place with all parties and feedback gained on what they thought about the restorative intervention.

11.1 DIFFERENT MODELS OF RESTORATIVE JUSTICE

Research has shown that participants think that restorative meetings (or conferences) are the most effective way of delivering Restorative Justice (Atkinson et al 48). These meetings involve a harmer and harmed meeting face-to-face, with a restorative practitioner facilitating the meeting. Restorative conferences generally take a scripted approach with the first part focussing on what happened and thoughts and feelings relating to what happened. The second part of the meeting allows the participants to discuss how the harm can be put right. A restorative meeting allows the person who was harmed to have their voice heard in a controlled, secure environment, which has the ability to be deeply empowering.

However, participants may not wish to communicate in this way or it may be unsafe for them to meet. Restorative Justice can be carried out by letters, shuttle mediation (where the facilitator passes information between the participants) or by video/audio conferencing. These are known as indirect restorative processes.

A letter exchange, for example, may be offered to those harmed by LGBTI hate crime. In some cases, a face to face meeting could be traumatising for people affected by hate, if there is a concern that the harmer could say something that revictimizes them. A letter could be less daunting and more therapeutic in such cases. All letters are checked by the facilitator to ensure they do not contain inappropriate content, for example, the wrong use of a pronoun, and it is good practice for the facilitator to be present when the recipient reads the letter, in line with their wishes. However, Why me?'s interviews with LGBTI services suggested that restorative letters not be a popular approach. This could be because potential participants prefer to meet with their harmers face to face.

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Why me?'s research has identified that the use of proxy victims, where appropriate, may be a positive adjustment to the restorative process for hate crime (Why me? "Making Restorative Justice happen for hate crime in your police area" 9). This can be arranged when the person affected does not want to take part in a face to face meeting themselves but would like another person to step in on their behalf. This would usually be someone from the same community as them. The proxy speaks directly to the person who has been harmed to learn their views and feelings, and represents them in a restorative meeting.

Many people Why me? spoke to were positive about the idea of proxy victims. Some people, who did not think that they would have the time or the emotional resilience to go through Restorative Justice, said they would gain comfort from knowing that someone who had experienced similar discrimination was making their case for them.

Using proxies for a restorative process in hate crime cases is common practice in some police forces. It can be a useful tool when using restorative approaches as part of a conditional caution. Securing the consent of the person affected and preparing them properly is not always possible in the time available, so having a proxy that can relay their feelings can allow a restorative process to go ahead where it would not otherwise have happened. However, the benefit

for the directly harmed person is sometimes not as significant in such cases. It is also important for restorative services to consider the welfare of the person acting as the proxy.

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Speaking to a supportive facilitator about the impact of a crime can be beneficial in itself even if it does not lead to a face-to-face meeting or other type of restorative process. This is known as a restorative conversation. Due to the voluntary nature of Restorative Justice, harmers have the choice not to take part. Whilst this can be disappointing for the person affected, it can provide a sense of closure. The opportunity for them to talk about their thoughts and feelings can be healing itself. Restorative conversations can lead to the harmed changing their minds about wanting to take part in a face to face meeting, as they feel that a restorative conversation has provided them with what they needed.

11.2 GENERAL CONSIDERATIONS FOR REFERRERS AND RESTORATIVE SERVICES

Referrers should provide as much detail as possible to restorative services about a person's preference as to who they would feel comfortable with as acting as their restorative facilitator – male/female, gay/heterosexual, cisgender/transgender. Other relevant information could include gender identity and their preferred pronoun if the person is happy for this information to be shared. Restorative services can then be mindful about their needs when allocating facilitators to a case.

Any preferences should be rechecked by the restorative service when they make first contact with the harmed. For some small restorative services, it could be problematic to find a person from a limited pool of facilitators with a similar background to the harmed, particularly if the process will be managed by two facilitators. Good practice is for two facilitators to be allocated to complex and sensitive cases, such as hate crime. This is one reason why it is essential for all facilitators to undertake LGBTI+ awareness training prior to managing LGBTI hate crime cases. LGBTI people want to know that they are understood without having to explain to the practitioner what it feels like to be gay, trans etc. Restorative facilitators must ensure that they remain neutral and be able to recognise that their own experiences may affect their impartiality, particularly as they will need to build rapport with people who have caused significant harm. This is another reason why a co-facilitation model for hate

crime processes is so important as well as to have a supportive case supervision structure in place. Case supervisors provide advice and oversight to individual cases and there is a strong argument for case supervision to be provided in LGBTI hate crime cases jointly by an experienced restorative practitioner and a professional working in the LGBTI field.

Why me? has found it invaluable to have support from an organisation such as Galop that can be called on to provide advice and guidance on facilitating LGBTI hate crime cases. Ad hoc advice has been given by Galop to the restorative facilitators to clarify understanding about a participant's needs.

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It is important that the restorative facilitator understands the context of the hate crime against the community that they are working with, so that they can appreciate the kind of stereotypes which could be re-victimising. The harmed may not fully understand what a hate crime is and the facilitators may need to explain this. They may also feel reassured if the facilitator emphasises to them that what happened was not acceptable and, if appropriate, is a crime. Taking them seriously, even if the facilitator does not think a hate crime has been committed, will help to build a rapport.

It is essential at the start of the restorative process, that facilitators discuss with participants the appropriate terminology, such as which pronouns, to use. There may be circumstances where a person's gender identity changes during the restorative process so facilitators may need to recheck with a participant their preferred pronoun on a regular basis. If a facilitator does use the incorrect pronoun, the best approach is to apologise briefly and move on.

Facilitators should be sensitive to the possibility that a person may not be 'out' to everyone. In order for the harmed to be supported appropriately, it is important that such issues are handled sensitively and an individual's wishes for privacy and confidentiality are respected. Particular care should, therefore, be taken when making initial contact with a LGBTI person, as well as when communicating throughout the restorative process. Introductory letters, for instance, should not make reference to the fact they were a victim of a hate crime. When making contact by telephone, facilitators will always check that it is safe for the person to talk. It may be helpful to send a text message prior to making a call. Facilitators should also be

mindful of who may listen to any voicemail messages. Throughout the restorative process facilitators will check with all parties what information can be shared and with whom.

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Care should be taken when selecting interpreters who may be involved in a restorative process and they should be fully briefed prior to any contact with participants as to the purpose of Restorative Justice. Is the interpreter from the same community as the harmed and are there any risks from 'outing' them? Is there the potential for them to hold any prejudicial views?

Facilitators should consider whether a professional from the LGBTI community should be present at any meetings with the harmed, including at the face to face meeting with the harmer. This could be, for example, the person who referred the case to the restorative service who has established a rapport with the person who was harmed. Facilitators should ask, when they first make contact, who the harmed person would like to be present at any meeting. This could also include a friend or family member who may act as a supporter (see below).

11.3 RISK ASSESSMENT

Every restorative intervention will be risk assessed before it can go ahead. Facilitators will identify and record all risks and how they will be managed. Risks can include, for example, the mental health needs of a participant or whether there is a danger of further harm. Risks will be assessed on an ongoing basis. A restorative process can still go ahead in a safe and secure way if appropriate adjustments are made. A restorative intervention will only not go ahead where there are practical barriers which make it impossible to proceed or there are serious safety concerns which cannot be overcome.

All restorative facilitators will assess the extent to which the harmer accepts responsibility for what happened, whether they deny that they caused harm and their level of remorse. For example, if the harmer denies that they carried out an offence then there is a serious risk of re-victimised during any restorative process. A harmer who does not see that their actions or words have consequences, particularly, in LGBTI hate crime, may not be suitable to take part in a restorative conference. There is an added level of complexity if the harmer admits to the primary offence but does not necessarily

acknowledge that there was also an element of hate. The facilitator must address this with the harmer during preparation phase for a restorative intervention and with consent, the facilitator can explain the perceptions of the person who was harmed. Restorative facilitators will make the harmed aware of these risk factors, and help them to come to their own conclusions as to whether they would wish to continue with a restorative process in such circumstances.

11.4 PREPARATION FOR ALL INCLUDING SUPPORTERS AND OBSERVERS

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All participants, including supporters and observers¹, must be fully prepared for a restorative process prior to it taking place. Thorough preparation will manage everyone's expectations about what the restorative process can and cannot do including the potential that the other party can withdraw at any time. Preparation for a restorative process is likely to involve difficult questions for both parties as the facilitator works with them to help them decide on what they want from the process, what they want to say to the other party and potentially confront long held values and feelings. It is important to be honest with the harmed that Restorative Justice may not focus on all of their needs and can only address the issues arising from the particular crime/harm for which they have been referred to Restorative Justice.

Preparation meetings should take place in a space where the harmed feels safe. Preparation meetings take place in the harmed's home or a public space, such as a quiet area of a café. However, such venues may not be appropriate when working with LGBTI people if, for example, they are not 'out' with other members of their family or they live/socialise/work in close proximity to the harmer. Many incidents of LGBTI hate crime are neighbourhood based. A potential venue for a preparation meeting could be the office of the referring agency. Facilitators will be guided by the participants' choice in the venue.

1 Supporters can be family/friends or professionals who support the emotional or physical welfare of a participant. Observers may have an interest in attending a restorative meeting for their professional development but will take no part in the meeting.

At the time of writing, facilitators are adapting their practice in light of the restrictions imposed by the Covid-19 situation. There has been an increase in the use of both telephone and virtual methods to engage with and prepare participants. There are a number of risks involved in using technology to facilitate restorative processes, such as whether participants can talk safely, or whether the conversation is recorded, that facilitators must consider if participants choose to engage in this way. It is envisaged that there may be an increased use of virtual preparation following the easing of Covid-19 controls.

As part of the preparation, facilitators should agree in advance with the harmed about how to approach situations where the harmer commits a perceived micro-aggression, such as 'dead-naming' (using someone's birth-name when this has since changed) or 'mis-gendering'. Some trans and non-binary people would want the facilitator to call out these behaviours, while others would prefer to do it themselves or not address it at all. How micro-aggression is dealt with could form part of the ground rules for a face to face meeting, according to the wishes of the person affected.

During the preparation phase for a restorative process, the facilitator will discuss with harmers their own and other's attitudes, thoughts and feelings about the hate crime as well as their motivation for taking part in Restorative Justice. It is important for facilitators to ascertain if the harmers have taken part in any programmes to address their understanding of hate crime; such programmes may be available for those serving a prison sentence, for example. The facilitator will challenge inappropriate comments and help them to reflect on their behaviour. During the preparation, the facilitator will ascertain whether the harmer is likely to make any prejudiced comments during a face-to-face meeting. The facilitator should explore the potential for such views being aired during a restorative meeting with the person who was harmed and discuss the impact this may have on them. A meeting should only go ahead if the person affected appreciates that such comments may be expressed and the risk of potential re-victimisation has been managed.

There is also a risk that the harmed, their supporters or the harmer's supporters may hold or share prejudicial views. Again, it is the role of the facilitator to explore these views during preparation. It is good practice for the facilitator to meet face to face with supporters and observers prior to the day of the restorative meeting. Why me?'s facilitators have experienced an occasion when a supporter, who they had not previously met, accompanied the harmed on the day

of the meeting. It may not be possible for supporters to be present during the restorative meeting as this may impact on the power dynamics between the participants. The facilitator will have to make a judgement call as to whether adequate preparation is possible in the time available. This may involve an honest conversation with a participant as to why the supporter cannot be present. In the case example given, the supporter did take part in the meeting although the feedback from the facilitators indicated that this affected how the harmed presented themselves.

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Participants in a restorative process may perceive that the process takes a long time. For example, it can sometimes take time to access a person who is in prison. Facilitators should agree with participants when and how regularly they will update them on their case and there may be occasions when there is no progress to report.

11.5 THE RESTORATIVE MEETING

Restorative meetings can take place in a wide range of locations, including community centres, schools and prisons. Ideally two rooms should be available to accommodate space for a break out area if a time out from the meeting is required. With the exception of prisons, restorative meetings should be held in a neutral venue which may mean that venues such as police stations, probation offices and supporting agencies' offices are not appropriate for the facilitation of LGBTI hate crime conferences. Consideration should be given as to whether it is appropriate for the meeting to take place at the place where the incident occurred.

Restorative services are currently considering the appropriateness of holding restorative meetings virtually in light of the Covid-19 restrictions. This is emerging practice and how risks of facilitating a meeting in this way will be managed are still being discussed.

The use of ground rules for a restorative meeting creates a respectful environment and can mitigate against the possibility of inappropriate remarks or behaviour during the conference. Facilitators will discuss and agree ground rules with participants during the preparation phase and these will be stated at the start of the meeting. If a participant breaches a ground rule, then the facilitator

will address it during the meeting, for example, by calling out the behaviour or suggesting a time out. How a potential breach is managed will be agreed with the person harmed during the preparation phase. Restorative meetings usually also start with a description of the harm and this may be an opportunity to emphasise to all participants that the harmed perceives the incident as a hate crime.

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Apologies or forgiveness are not pre-requirements for a restorative meeting to take place. Harmers often feel that if they say “sorry” then the word may not have meaning and does not adequately express what they want to say. Similarly, many people who have been harmed may not wish to forgive the person responsible for the harm that they have caused.

Restorative meetings may result in a deepening understanding of why certain actions were taken. For example, in one *Why me?* case example, the harmers were able to explain company policy for the management of incidents to the person who was harmed. The harmers apologised for their actions which was accepted by the harmed. The harmed reflected that the restorative meeting gave them the opportunity to speak to the people who they felt harmed by, in way that was not influenced by bias.

Restorative meetings may end with an outcome agreement which all parties have signed up to. Outcome agreements reflect the wishes and the suggestions of the participants and not of the restorative facilitator. Examples of actions that form an outcome agreement could include the harmer undertaking a programme to address their harmful behaviour, or agrees to the harmed being updated on their progress through their sentence (in criminal cases). Outcome agreements for hate crime cases could include the harmer carrying out reparation activities for the local LGBTI community, for example.

If all parties are happy, after the formal part of the meeting, there is an offer of refreshments. Often this can be the most restorative part of the meeting as it is an opportunity for everyone to communicate in a more relaxed manner.

11.6 AFTER THE INTERVENTION

It is good practice for restorative facilitators to follow up participants after a restorative process, in line with their wishes. This can include a check in telephone call a few hours after a restorative meeting to a face to face meeting a week later. The purpose of follow up is to discuss with the participants their feelings and to check whether they achieved what they wanted from the process. Follow up may also consider if there is a need for further restorative work, such as a letter exchange. The amount of follow up required is very much on a case by case basis, depending on the needs of the participants and whether any outcome agreement actions require monitoring. Facilitators will have discussed with participants during the preparation phase their exit strategy for ending their involvement.

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Once the restorative process has finished, formal feedback is usually sought from all parties. Why me?'s policy for the collection of feedback is that a staff member who has not been involved in the case will request the feedback. Feedback is important to enable organisations to evaluate their service to continuously improve.

12. EMPOWERING PEOPLE WHO HAVE BEEN HARMED TO SPEAK OUT ABOUT RESTORATIVE JUSTICE

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Why me? has found that an effective way to promote Restorative Justice is by empowering those who have been through the process to speak out about their experience. Restorative Justice ambassadors carry out a range of activities from telling their stories on the Why me? website to working with Why me? to influence policy makers. They also help to raise the profile of Restorative Justice within the criminal justice sector. By creating better awareness of Restorative Justice among 'need to reach' communities, we foster a better understanding of its benefits and encourage more people to seek it. Feedback on the training that Why me? provided to LGBTI groups indicated that it would be of benefit for a LGBTI ambassador to be part of any presentation.

Gareth Thomas is the first professional rugby union player to come out as gay. His case is probably the most famous example of someone using restorative justice to address a homophobic hate crime. Gareth was punched in the face in a homophobic attack in Cardiff. In a video, he explained that he had been the victim in his own city of a hate crime for his sexuality and that he had requested that police take the course of restorative justice because he thought the person responsible could learn more that way than any other. South Wales police reported that a 16-year-old boy not only admitted to the attack, but apologised to Gareth following a successful restorative justice process. At the time, the case received significant media attention, demonstrating how Restorative Justice can be used effectively to deal with a LGBTI hate crime (The Guardian online).

There may be risks for LGBTI people becoming ambassadors as the role may be public. Why me?'s ambassadors have the choice as to whether they wish to remain anonymous or not. When speaking to a prospective ambassador, Why me? will explore with the person their thoughts and feelings about the role and any potential implications it may have for them.

13. CONCLUSION

A common theme throughout this article is that any Restorative Justice process should be tailored to individual needs. Restorative facilitators work on the basis that one-size does not fit all. Restorative Justice can be a powerful tool to address LGBTI hate crime when it is facilitated well. Whilst much of this article explains good practice for any Restorative Justice intervention, it should always be delivered in the context of the client group it seeks to help.

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There is a need for further research into what works well in Restorative Justice and LGBTI hate crime based on the facilitation of cases. Currently, there are relatively few examples, such as Gareth Thomas, that restorative services can draw upon to demonstrate the benefits of a restorative approach. With more people willing to speak out, even anonymously, then more people are likely to come forward wanting to take part in Restorative Justice.

ABOUT WHY ME?

Why me? is the only national charity campaigning for victims to have access to Restorative Justice in England and Wales. We run campaigns, conduct research, influence policy, and support organisations which deliver Restorative Justice. Why me? also runs a national Restorative Justice service.

Further information about our work can be found at www.why-me.org and we can be contacted by email at info@why-me.org.

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RESTORING RESPECT: ADDRESSING ANTI-LGBTQ HATE INCIDENTS ON UNIVERSITY CAMPUSES THROUGH RESTORATIVE JUSTICE

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LIVANA KAYALI AND MARK A. WALTERS

KEYWORDS: hate crime; LGBTQ; student; restorative justice; university.

Universities not only provide opportunities for advanced study and academic qualification, but they serve as springboards to adult life. The university environment is a space in which students can explore their value systems, preferences and beliefs, interact with a more diverse set of peers, and develop an outlook and an independence that will carry through to their next phase of life. For many Lesbian, Gay, Bisexual, Transgender or Queer (LGBTQ) students, this important developmental stage can occur within what can, at times, feel like an increasingly homophobic and transphobic climate. These sometimes hostile environments can be compounded where universities have few effective means of safeguarding LGBTQ students against harm.

Within the United Kingdom (UK) recorded anti-LGBTQ hate crimes have risen sharply over the past five years, with anti-trans hate crime offences increasing by 317% and sexual orientation-based hate crimes increasing by 216% to 2,333 and 14,491, respectively (Home Office 2019). Despite optimistic suggestions that these figures represent an increase in reporting rates, as against an actual increase in incidents, randomised population surveys from the same period indicate an increase in both anti-LGBT attitudes among the British public, as well as in the overall incidence of anti-LGBT hate crimes and incidents outside of official reporting records (Walters 2019).

The university sector has absorbed and mirrored these disturbing trends. A survey conducted by the National Union of Students (NUS) in higher or further education showed that 31% of lesbian,

gay or bisexual (LGB) students in the UK had experienced at least one hate incident related to their sexual orientation some time during their studies (NUS 2011a); while an even higher percentage of trans students had experienced such abuse, with 55% reporting experiences of threatening, abusive or insulting words, threatening behaviour or threats of violence (NUS 2011a). In addition, a 2019 media investigation into 92 universities in the UK found that hundreds of students had been sanctioned for posting homophobic, racist, transphobic, sexist, antisemitic, or Islamophobic comments on social media in the last three years (Marsh 2019). More troublingly, studies have also shown that students who have experienced hate incidents are less likely than those who have experienced non-hate related incidents to report their experience, with the vast majority of hate incidents going unreported (NUS 2011b).

In recognition of the serious problem of hate and prejudice in the university sector, in 2018 the Higher Education Funding Council for England (HEFCE, recently reorganised into two separate bodies: the Office for Students and Research England) announced that it would provide grants worth £4.7 million to institutions of higher education to improve and enhance safeguarding against hate crime, sexual violence, and online harassment through its Catalyst Student Safeguarding fund (AdvanceHE 2018). This chapter discusses some of the findings of a project undertaken as part of this funding initiative in order to evaluate the appropriateness of restorative justice (RJ) for campus-based anti-LGBTQ hate incidents. The central aim of this project was to draw on the growing body of evidence surrounding the value of RJ approaches in addressing hate crime, hate incidents, and hate speech by establishing a RJ practice at two UK universities.

Named "Restore Respect", the programme was officially launched in October 2018 and has been operational since. Restore Respect aims to empower universities and students alike to address both the causes and consequences of prejudice and hate on university campuses. The programme at University A states that those who report in will:

... receive information about the different dialogical (talking) approaches that will be available to address any harms that have been caused. Where appropriate, participants in the programme may also have an opportunity to explore ways of helping to challenge identity-based prejudice on campus.¹

1 http://www.sussex.ac.uk/studentlifecentre/issues/restore_respect. Accessed May 2020.

The initiative is based on RJ theory and practice, which advocates the use of an inclusive dialogical process that focuses on identifying harms and how these harms can best be repaired (Zehr 2015). Based on research demonstrating the effective use of RJ for hate crime (Walters 2014), the project represents the first UK-based scheme to develop a restorative programme specifically for the purpose of addressing hate crimes and incidents at university. Through its establishment, Restore Respect was intended to provide a model and guide for the application of restorative approaches to hate incidents at other institutions in the UK (and further afield).

The programme is managed by fully trained restorative practitioners (also known as facilitators) across student services and the student union at one of the universities, and via student operations and support at the other. Effort was made to train and engage practitioners from across university services as well as the student union in order to help ensure the integration of an institution-wide RJ approach, as recommended by UUK (UUK 2016). The programme provides a reporting mechanism for hate incidents and hate crimes to either the university or student union and offers support to anyone who has been involved in an incident on campus that is perceived to be motivated by identity-based prejudice. The Restore Respect programme was launched at the two pilot universities as an entirely voluntary programme that is separate to any formal disciplinary processes. As part of the programme, 107 staff members underwent training to respond to hate and prejudice “restoratively”², while 11 staff members undertook advanced three-day training to become the programme’s restorative practitioners. The three-day training course incorporated in-depth instruction on hate crime and its impacts, as well as the theory and practice of RJ. Facilitators were trained to employ “restorative listening” in the first meeting with a reporting student. Often, this initial restorative listening process is enough to make an individual feel heard and understood. However, the restorative facilitator can also explore the possibility of a Restore Respect supported intervention with the student. These interventions aim to engage the person being

2 Training involved: information on what is hate crime, hate incidents and hate speech?; restorative justice values and principles; and exercises on asking restorative questions, which included asking: 1. What happened? 2. What were you thinking? And now...? 3. How did that feel? And now...? 4. What’s been the hardest thing for you? 5. Who else has been affected? See further: Safeguarding Students Against Hate and Prejudice on University Campuses: Developing a Restorative Practice (Toolkit): <https://www.sussex.ac.uk/webteam/gateway/file.php?name=toolkit--safeguarding-students-against-hate-and-prejudice-on-university-campuses.pdf&site=67>. Accessed May 2020.

held responsible (and possibly others closely connected to the incident) in direct or indirect dialogue about what happened, why it happened, what harms resulted from it, and what should be done to repair those harms. Overall, Restore Respect facilitators promote a response to the incident that focuses on responsibility and reparation rather than on labelling, punishing, or stigmatising those being held responsible.

The Restore Respect project was a multi-stage, multi-faceted project, encompassing a research-evaluation arm and a programme coordination arm. As such, a programme coordinator based at University B was given responsibility for establishing the programme and training new facilitators while a researcher (Kayali), based at University A, bore responsibility for researching student experiences of on-campus hate and prejudice and then evaluating the establishment of the programme across the two universities (henceforth referred to as University A and University B) over a one year period. Both components of the project were overseen by a principal investigator (Walters) based at University A.

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The first stage of the research project explored student experiences of prejudice and hate on campus and their views of reporting procedures at their respective university. For this purpose, four focus groups and 14 interviews were conducted with a total of 41 students – 31 students from University A and 10 students from University B – between May and June 2018. Qualitative methods were relied upon for data-gathering in order to more sensitively capture the voices of marginalised individuals and the types of experiences, needs, and views that reporting data have thus far failed to illuminate. The composition of participants included, but was not limited to, self-identified women and non-binary students, Black, Asian and minority ethnic (BAME) students, disabled students, students who identified as LGBTQ, and students from minority religious backgrounds. A number of these characteristics were intersecting, and we therefore heard from several students who felt marginalised as a result of their identification with more than one identity category. For this reason, the findings are not representative of LGBTQ students, but offer insights into LGBTQ student experiences of hate incidents and their perceptions of university responses. Final-stage research aimed to examine the project's impact on university culture and processes around safeguarding students. This involved the completion of surveys and feedback forms by participants of the various training sessions, and eight semi-structured face-to-face or telephone interviews with staff members trained as restorative practitioners.

THE DAMAGING EFFECTS OF HATE ON LGBTQ STUDENTS

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The specific types of incidents that LGBTQ students described themselves as having experienced or witnessed at university included (but were not limited to): homophobic verbal attacks; transphobic abuse; transphobia within student groups; perceived exclusion or hostility on the grounds of gender, disability, sexual orientation, race, ethnicity, or religion; offensive comments relating to gender identity; a general lack of appreciation of identity difference and the experiences of minority groups. Incidents such as these can leave LGBTQ individuals feeling shocked, angry, anxious and isolated. Research conducted by Herek et al (1999) has shown that victims of anti-LGBT hate crimes are more likely to experience negative emotional harms compared to victims of similar non-hate motivated offences. In their study they found that victims of anti-LGBT hate crimes experienced depression for up to five years compared to non-hate victims whose depression lasted two years. The heightened negative consequences of anti-LGBTQ are the result of the precarious social position that LGBTQ people occupy in society (Herek 2004). Victims know that they have been targeted, not for what they have said and done, but because of who they are. This can challenge a person's sense of self and their place in the world. For some, they will internalise these emotions of fear and anxiety and transpose them into shame. This can lead to some victims believing that they are deserving of their victimisation and that they should have acted or behaved differently in order to avoid it (Herek 2004).

Incidents of hate can also have harmful behavioural consequences as LGBTQ people seek to avoid further victimisation. For instance, the Sussex Hate Crime Project, a large scale study on the impacts of LGBT hate crimes in the UK, found that feelings of vulnerability and anxiety caused by anti-LGBT hate crimes are likely to lead to individuals avoiding certain locations and to them increasing security measures (Paterson et al. 2019b; Walters et al. 2020). However, for any student who has been targeted, but particularly for students living on campus where they live, study, and socialise, there will be few avenues for them to avoid spaces where they have previously experienced or seen anti-LGBTQ abuse. One LGBTQ student illustrated this issue in the following way:

You're at a cafe and someone won't give you something, or gives you a certain attitude ... If you said this to someone they'd be like, "Ok, so someone had an attitude." But if it happens to you everywhere you go, every single time, for no specific reason, things like that are going to affect you. They're going to make you not even want to go out sometimes. And when you're at uni you should be able to enjoy your life.

As the student observes, social isolation, withdrawal, and other avoidant behaviours are some of the commonly documented behavioural responses to hate crime victimisation (Paterson et al. 2019a: 994). It is important to note that these impacts are likely to ripple out to the entire community of LGBTQ people on campus who witness or hear about individual incidents (Paterson et al. 2018; 2019a; 2019b; Walters et al. 2019). Other LGBTQ students are likely to perceive incidents as a symbolic attack on the entire LGBTQ student community, leaving many fearful that they will be next (Perry and Alvi 2012).

Within this study, many students explained that hate incidents had left them feeling unsafe on campus and in the wider city beyond it. Participants variously expressed shock, anxiety, anger, shame, depression, exclusion, isolation, alienation, or emotional exhaustion, consistent with the types of heightened impacts that hate crime victims are more likely to suffer than victims of non-hate motivated crimes. Far from being limited to the period of university study, these sorts of emotional impacts are likely to reverberate throughout a victim's life. Evidence indicates that students with high levels of psychological distress will continue to demonstrate high levels of distress in their professional careers, with negative impacts further manifesting in their academic performance, professional competency, and physical health (Samaranayake et al. 2014: 14).

THE DRAWBACKS AND DANGERS OF STANDARD UNIVERSITY RESPONSES

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As noted above, research has previously shown that anti-LGBTQ hate incidents go widely unreported. For instance, a NUS survey on anti-LGBTQ hate incidents found that just 8–13% of incidents involving prejudice against the victim's sexual orientation were reported to the victim's institution (NUS 2011: 41). Those individuals who did report most frequently chose to do so to academic staff (42%) or student officers (29%), while only 12% reported to non-teaching staff (NUS 2011: 4). Our qualitative research identified similar reporting patterns. Of the types of incidents of hate that research participants described themselves or others as having experienced, the majority were *not* reported to the university. A small number of incidents were reported to academic staff, a smaller number to student support services, and one to campus security. For the students who claimed that they received an adequate response, it was frequently only after they had attempted several reporting channels or approached a number of people.

In the Restore Respect study, students gave four primary reasons for not reporting a hate incident to their university. These were: that they were not certain of where at the university they should report it to; they did not feel that the incidents they had faced were "serious enough" to warrant the involvement of the university; they feared that their experiences would not be understood or taken seriously; their uncertainty surrounding the process, including around the handling of personal information (see Kayali and Walters 2018). This general uncertainty about the nature of university responses was in many cases enough of a barrier to students, particularly as they were highly conscious of the potential opportunities for re-victimisation and re-traumatisation posed by reporting processes. This was expressed by the following interviewee, whose flatmate had begun to consider gender transition:

She decided to cut her hair really really short, and after two weeks she bought a wig because she was being molested in the bathroom [and told], "This is not your bathroom! Are you a girl or are you a boy?" [...] I understand those people – like, why they don't want to do anything [in terms of reporting]. But I'm not sure if they don't want to do anything or they don't know what to do. Like, I don't know... if I complain, what's going to be

the procedure? Is my identity going to be taken care of, or not? Whether I'll be confronted with the guy or not? Whether I'll have to ... I don't know, you know? So it's difficult to even encourage people to just let the university know about this incident, because I, on my own, don't know what's going to happen. So I can't [tell] you to go and report this incident because ... And I was about to do it by myself, like, "This happened to me", just to take the risk for her to know what the procedure is. But I didn't even know where to go.

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Students also commonly expressed the belief that their issues did not seem serious enough to be of concern to the university or to be worth taking through typically long and taxing official procedures. As one explained, "it seems like you either can do nothing or you can go down kind of very formal routes, and there needs to be something in the middle." This was a particularly significant barrier for students who experienced what may, in isolation, or from an outsider perspective, be considered a "minor" incident or micro-aggression.³ In many cases, however, emotional impacts accrue from accumulative harms, which link together within a "continuum of prejudice and discrimination that is ingrained in almost all aspects of a victim's life" (Walters 2014: 63). One student remarked:

I feel like maybe as an LGBT, BAME [student] it's hard to speak to someone unless you definitely know they can relate or understand you in a certain way. [...] Because you may say something, and someone else hears you say it, and they might not understand how much of an issue that is. It can be something so small but that happens to you every day of your life.

Also common was the perception that standard institutional responses are overly bureaucratic, slow, impersonal, or lacking in empathy. More specifically, a notable view was that the impact of hate incidents would not be fully appreciated by university staff members, who would be more concerned with statutory compliance than with attempting a compassionate response. Having come out as a trans woman partway through her degree, one student spoke of the lack of recourse she felt when witnessing and experiencing hate crime and hate incidents within student groups.

3 Micro-aggressions are seemingly inconsequential conduct and comments that emphasise a person's "difference" in a stereotypical or pejorative way. An example might include asking a gay person when they first decided/realised they were gay (the message could be construed that being gay is a choice).

Importantly, despite experiencing multiple marginalisation at the intersection of her identities while at university, this student *still* felt that the reporting process would not be warranted or worthwhile:

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So, on the one side you've got the fact that I'm autistic and I used to identify as gay before I came out as trans. And there has been a lot of hate crime [...] which I didn't want to report because I thought ... it's just pointless, and it's just over nothing and, I don't know, kind of this massive procedure. And, there was the fact that I pass off as a cis white man, although I'm not. And because of that I've been in places where certain demographics of people have said stuff about these various groups. And in terms of like, obviously, the fact I've got a privilege of "passing" [in] these groups, and the fact that I'm not personally being attacked ... but on the inside it makes me feel quite upset.

An additional challenge that has been identified in relation to young LGBTQ people is a reluctance to report hate incidents out of an ambivalence to notions of vulnerability implicitly communicated by standard frames of reporting processes (Gatehouse et al. 2018). In the Restore Respect study, perceptions of university reporting procedures mirrored reported perceptions of the criminal justice system's reporting process, reflecting the similarities between the two. In UK universities, anti-LGBTQ hate incidents tend to fall under the purview of 'student misconduct' policies and associated student disciplinary procedures. The structure and approach of these procedures are quite uniform across the sector, reflecting traditional models of criminal justice in their focus on determining wrongdoing and addressing it through punitive sanctions (Kara and MacAlister 2010: 444; 446; Gallagher Dahl et al. 2014; Karp 2004; Lindsay 2017). In most cases, a misconduct offence will first be classified as either "major" or "minor", in accordance with a standardised hierarchy of offences, before then undergoing an investigatory process as deemed appropriate. Following this, a disciplinary panel or panel member will decide on the seriousness of the offence and the appropriate sanction/s that should be imposed upon the student/s found responsible. Where a student who has been harmed by an incident is actually involved in a disciplinary process, it is usually only as a witness to the investigation. They will normally be excluded from the decision-making process and, in many cases, will not be informed of its outcome. Where the university addresses any impacts on the students harmed by misconduct, it is normally through the provision of on-campus counselling which, as in the cases of the two universities involved in the project, are commonly

over-booked and under-staffed. It is easy to see how, in such a model, LGBTQ students would perceive university responses as reproducing victim/perpetrator narratives, where the LGBTQ student who reports a hate incident is depicted as passive and vulnerable. Not only does this model reproduce such a dichotomy through its legalistic approaches, it also does so by denying targeted students ownership and control over the outcomes of their cases – thereby, in effect, rendering them passive in the process. These depictions not only risk furthering the experiences of othering and stigmatisation students may already face but, particularly when the sole remedy offered to harmed students is counselling, also recall the historic pathologising of LGBTQ identities (Rofes 2004: 42; Formby 2014: 627). Moreover, aside from the fact that such university procedures tend to discourage student reporting of hate crimes and hate incidents, studies have also demonstrated that they have minimal to no learning or behavioural impacts on students (Nelson 2017: 1274; Neumeister 2017: 97). Indeed, one study has pointed to an *increase* in recidivism as an impact of such responses (Khey et al. 2010: 155).

These findings highlight the clear need for universities to develop interventions that demonstrate appropriate understanding of the impacts of anti-LGBTQ hate incidents, are easily accessible to students, that respect and protect students' personal information, and that respond to students' experiences of anti-LGBTQ hate and prejudice with demonstrated commitment and sensitivity. Importantly, while responses should highlight the harms of anti-LGBTQ hate, they should avoid reproducing negative and reductive narratives of vulnerability and instead aim at processes that both empower students and enhance awareness.

ADVANTAGES OF A UNIVERSITY -BASED RESTORATIVE JUSTICE PRACTICE

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Almost universally, staff and student research participants spoke positively about the prospect of a restorative programme being established at their university and believed that it would encourage more students to report incidents. LGBTQ students were also confident that restorative responses were likely to lead to more enduring outcomes than standard disciplinary approaches, including the prevention of future hate incidents from happening to them or others in their community:

I think when you speak to students, if you gave them the choice between the perpetrator is disciplined or the perpetrator is taught that whatever it is is wrong and the perpetrator doesn't do it again, they'd choose the perpetrator doesn't do it again ... I think ... students understand that sanctions don't often do much, and so that kind of response aspect is quite important.

Such assessments chime with the evidence presented by the extant literature on RJ, which shows that victims are typically more interested in reducing future harm than they are in punishing offenders (see e.g., Walters 2014).

For almost all LGBTQ participants, the prospect of a restorative programme being established at their university represented a valuable opportunity to address deeply rooted issues surrounding hate and prejudice and effect a transformation of behaviours and attitudes. In particular, students highlighted the inclusive dialogical process offered by RJ as a meaningful way of challenging homophobic, biphobic, or transphobic behaviour. As one student explained:

I think like dialogue sessions with students that perpetrate hate speech – I mean it depends on the case – but would be quite useful in... making them understand why what they've said is harmful. I think especially with...hate speech, a lot of the time like people say these things, and chant these things, and shout these things, or whatever – and... they don't think that it's actually harmful. They understand that someone might call them "homophobic", but they don't think that it's actually hurting someone,

they just think that like its hurting society, kind of thing... It's not hurting an individual, and it's not making that person feel targeted and upset and, like, violated. That's the issue a lot of the time.

By ensuring that victims feel listened to and play a central role in the resolution of their case, RJ processes have been shown to (partly) alleviate the emotional traumas of hate crime (Walters 2014; see Strang 2002 more generally). Student participants anticipated these outcomes when favourably noting RJ's emphasis on empowering individuals and groups affected by hate. Contrasting standard university responses to hate incidents, in which students cede control to a disciplinary panel and a closed investigation, a restorative programme was understood to enable students with greater ownership over their cases by empowering them with an active role in their directions and outcomes. As one of the Restore Respect facilitators noted, this went a considerable way toward redressing one of the main alienating aspects of disciplinary processes:

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They don't want to go down that conventional path of putting in a complaint or [going through] that formal process where they lose all their agency, and where they don't feel particularly heard because everything is taken away from them and someone else is validating their experience. And restorative justice could very easily be an answer to that. [...] I've learnt a great deal about how [restorative justice] works in practice [through the Restore Respect programme]. I knew vaguely what restorative justice meant [...] but I didn't appreciate why it's effective, and the fact that it's effective because of agency. I didn't get that the current systems, the way they are, take that away from people, and that's why they feel re-victimised. So that's a huge, huge thing.

In addition, both staff and student participants believed that restorative practices were more likely to offer learning opportunities for all involved, which meant that students could be able to initiate a transformation of attitudes and behaviours. As a facilitator explained:

The thing is, unless you're making people understand and creating empathy, you've got to be really really careful that you're not just preaching at people. People have got to have that response from their heart in order to be able to change their way, I feel. And I feel that with restorative justice you could hear about the harm that you'd done to that person, and I think that in some ways it's kind of the only solution, really, in order to make people change their opinions.

Interestingly, the use of RJ appeared to be an empowering experience not just for students, but also for pastoral staff, who had previously described themselves as being inhibited by “clunky” institutional procedures, and also lacking the tools to enable more meaningful responses:

90 *From the conversation I had with the student it seemed to me that using the restorative justice tools meant that they felt heard and that they felt like someone cared. And from my perspective it was very empowering for me, because I felt like I had something worthwhile to offer as far as these tools.*

Whether Restore Respect will go on to help reduce the harms of anti-LGBTQ prejudice on campus and assist in a cultural change that recognises more the needs of LGBTQ students is yet to be seen. Further research on the outcome of cases and the experiences of participants will hopefully be carried out in the future.

LIMITATIONS OF THE UNIVERSITY CONTEXT FOR ENACTING RESTORATIVE RESPONSES TO ANTI- LGBTQ HATE INCIDENTS

While the receptiveness of students and staff to the Restore Respect programme heralded positive outcomes, several factors common among universities challenged the effective functioning of a truly restorative practice. Of these, perhaps the most obvious was the issue of understaffing as well as the lack of adequate time and resources provided to pastoral staff. While such practical realities may not seem particularly relevant to the positive operation of a restorative programme, the care and attention required in many cases of hate incidents hinges on such considerations. Related to concerns regarding staffing was a conspicuous lack of practitioner diversity. The disproportionately low number of LGBTQ staff members among facilitators – risked low confidence levels among students even prior to engagement with the programme.

Moreover, without well-defined support from central university structures and divisions, practitioners were unsure about the sort of practical support and latitude they would be given in arranging restorative processes and outcomes. Staff and students were wary of the prospect of Restore Respect representing yet another “add-on” initiative; being temporarily heralded by their university, before dissipating due to tokenistic commitment to access and equality and a failure to properly integrate RJ approaches into the policies, procedures, and structures of the university.

All of the above issues are rooted in the both the relative invisibility of LGBTQ students in UK universities, as well as the cisheteronormative climate that pervades UK campuses. With regard to the former, LGBTQ students were left out of systematic institutional monitoring until 2015, when they were given the option to declare their sexual orientation or trans identity via the University College Admission Services’ (UCAS) application form (Marzetti 2018: 701).⁴ Aside from implicitly communicating an institutional disregard for LGBTQ student experiences, this exclusion has only furthered the

4 It is notable that students with other protected characteristics (such as religious belief, race, ethnicity, or disability) had been officially monitored before this time.

lack of understanding that exists around the experiences and educational outcomes of LGBTQ students (Formby 2015; Marzetti 2018: 701). This is reflected in the general cisheteronormativity that research has shown to exist across UK universities, presenting itself in the curriculum, the classroom, student events, student spaces, societies, facilities (with a lack of gender-neutral toilets, for example), student residences, and relationships (Formby 2015; 2017; Keenan 2014; Gunn, 2010).

92 It is unsurprising, then, that discussions with LGBTQ students revealed a deep sense of mistrust of university responses, extending to new initiatives aimed specifically at minoritised student groups. This was also found to pose a challenge to the Restore Respect programme, where general mistrust was coupled with an inadequate understanding of RJ or the amount of control that it affords reporting students:

I saw a student today who I spoke to about [a restorative approach], and she was absolutely terrified. She said that she doesn't like confrontation. I tried to explain that confrontation would not be part of the process whatsoever, but she – as I'm sure many students would – just wanted it to go away, and just wanted to remove herself from the situation, because that was easier. [...] So yeah, I think there are some problems with trust in the idea of it. So maybe there's some work to do about increasing awareness of restorative practice more generally around the university. Knowing that it's there is good, but just understanding what it is and the positive outcomes of it might be useful.

Certainly, staff recognised that building trust and awareness of the programme would be difficult until programme participants had had the chance to foster word-of-mouth among student groups. As such, trust-building was seen by many to be a slow process, but one which also needed a more demonstrated commitment on the part of the university.

CONCLUSIONS AND IMPLICATIONS

The transformative potential of restorative practices to address anti-LGBTQ hate incidents appears particularly fitting in the university context which, ostensibly, aims to foster critical engagement and discovery. However, universities are also institutions that operate in accordance with a specific organisational logic. The introduction of restorative practices to address anti-LGBTQ hate incidents, therefore, requires an understanding of the unique student, staff, and faculty body, and also of the constellation of structures, processes, and policies that govern university interventions into student conduct. Common to many of these will be the types of challenges and limitations outlined in this chapter. The need for clarity regarding how a restorative practice will function alongside, and in concert with, existing policies and procedures, such as those associated with student discipline.

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Perhaps more important than these concerns, however, is the need to initiate a more generalised effort to understand LGBTQ student experiences of hate crime, hate incidents, and hate speech, and also to counter cisheteronormativity in university curricula, classrooms, residences, sports teams, and societies. While RJ can be effectively used to enhance awareness among the university community – the onus should not solely fall upon LGBTQ students to educate their peers. Indeed, the recognition that more meaningful work should be done to change institutional cultures, attitudes, structures, and understandings is a necessary foundation upon which both trust and awareness can be built.

These issues notwithstanding, the Restore Respect project demonstrated the value of RJ in the university setting – providing a more hopeful opportunity for students to repair the harms caused to them personally and to their identity group. Further, RJ also provides an important means of countering the alienating and stigmatising trope of LGBTQ students as vulnerable and passive, while obliging the student community to bear accountability for enhancing their awareness and sense of moral responsibility.

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HATE CRIMES, HATE SPEECH, AND RESTORATIVE JUSTICE: THE BELGIAN EXPERIENCE

PAUL BORGHS

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Belgium has an extensive legal framework for punishing hate crimes and hate speech. The legal framework allows for alternative sanctions and restorative interventions. However, in practice it appears that little use is made of these options.

In this paper, we will first provide an overview of the legal framework in Belgium in relation to hate crimes and hate speech. This will be followed by an examination of the alternative sanctions and restorative interventions that are possible at the level of the prosecution and the courts. Then, based on aspects such as the case-law on LGBTI-related hate crimes and hate speech, we will determine the extent to which alternative sanctions and restorative interventions are being applied. Finally, we will look at the bottlenecks that are causing the underuse of alternative sanctions and restorative interventions and we will suggest ways of addressing them.

1. THE BELGIAN LEGAL FRAMEWORK ON HATE CRIMES AND HATE SPEECH

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For a limited number of crimes, the so-called hate crimes or bias crimes, the Belgian Penal Code provides for an aggravation of the penalty if the perpetrator acted on the basis of a reprehensible motive. There is considered to be a reprehensible motive when one of the motives of the perpetrator consisted in hatred, contempt or hostility towards the victim because of a protected characteristic. The protected characteristics include sexual orientation and gender. These include the following crimes: voyeurism, sexual assault, rape, criminal negligence, stalking, arson ...¹ The increased penalty can be applied optionally by the court.

An exception to this optional application is the aggravation of penalties for blows and injuries, manslaughter, and poisoning.² For those crimes, it is mandatory for the increased penalty to be applied if the offender acted on the basis of a reprehensible motive. Moreover, this increased sentence not only applies to the protected characteristics of sexual orientation and gender, but also to the protected characteristic of gender reassignment. The derogation that applies to these crimes is the result of an amendment to the Penal Code in 2013.³ In 2012, a young gay man was murdered in Belgium.⁴ The homophobic hate crime caused quite a stir and led to a tightening of the legislation. As a result, however, the crime of murder was removed from the list of hate crimes, because, since the most severe punishment (lifelong confinement) was already applicable in such cases, it was not possible to apply a mandatory increase in the penalty.

- 1 Article 377bis Penal Code (voyeurism, sexual assault and rape), article 422quater Penal Code (criminal negligence), article 438bis Penal Code (assault on personal liberty), article 442ter Penal Code (stalking), article 453bis Penal Code (defamation and slander), article 514bis Penal Code (arson), article 525bis Penal Code (destruction of buildings), article 532bis Penal Code (destruction and damage to movable property) and article 534quater Penal Code (graffiti and damage to immovable property).
- 2 Article 405quater Penal Code (manslaughter, blows and injuries and, poisoning).
- 3 Law of 14 January 2013 amending article 405quater of the Penal Code and article 2 of the Law of 4 October 1867 on extenuating circumstances, Belgian Official Gazette 31 January 2013, p. 5.000.
- 4 Borghs, Paul. "The Gay and Lesbian Movement in Belgium from the 1950s to the Present." *QED A Journal in LGBTIQ Worldmaking*, vol. 3, no. 3, 2016, p. 59.

As for hate speech, it is mainly penalised based on the criminal law provisions of anti-discrimination law that punish publicly and maliciously incitement to discrimination, segregation, hatred or violence against individuals or groups on the basis of a protected characteristic.⁵ The protected characteristics include sexual orientation and gender.

In Belgium there is a separate regulation for press offenses. These are subject to adjudication by a court of assizes, in other words, before a jury of the people, with the exception of press crimes motivated by racism or xenophobia.⁶ In practice, however the courts of assizes are not convened for press crimes. As a result, non-racist press crimes are not prosecuted in practice. Racist press crimes, on the other hand, are prosecuted before the ordinary criminal courts. The Belgian Cassation Court ruled that distribution of written texts via social media should be equated with distribution via the press.⁷ When there is incitement through written media, including social media, to discrimination, segregation, hatred or violence against, for example, homosexuals, this is subject to de facto criminal immunity.

5 Article 22 Antidiscrimination Law (Law of 10 May 2007 to combat certain forms of discrimination, Belgian Official Gazette 30 May 2007, p. 29.016), article 27 Gender Law (Law of 10 May 2007 to combat discrimination between women and men, Belgian Official Gazette 30 May 2007, p. 29.031) and article 20 Antiracism Law (Law of 30 July 1981 to punish certain acts inspired by racism or xenophobia), Belgian Official Gazette 8 August 1981, p. 9.928).

6 Article 150 Constitution.

7 Cassation Court 6 March 2012, AR P.11.1374 and P.11.0855.

2. ALTERNATIVE MEASURES

In Belgium, the collective term alternative measures is used for alternative sanctions and restorative interventions. The latter focuses more on the needs of the victim and the victim is (more) actively involved. An example of each will be given below.

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In 2017, some football supporters raided a building where Roma people were staying. The football supporters were armed with sticks and were carrying Bengal lights fireworks. Prior to the raid, a call had been sent out for the raid via WhatsApp. A number of the football supporters were sentenced to an alternative sanction, namely to visit the Kazerne Dossin in Mechelen. In addition, they had to work on strengthening their independent and critical thinking, as well as paying attention to the functioning of group dynamics.⁸ During the Second World War, Jews and Roma were transported from the Kazerne Dossin to the concentration camps. It is now a museum about the holocaust and human rights.

In 2004, a seventeen-year-old student (along with several companions) raided a shelter for asylum seekers at night. Three asylum seekers were beaten and injured. A restorative measure was agreed. The minor-aged offender, two victims, a representative of the Belgian equal opportunities centre Unia⁹, a representative of the Federal Agency for the Reception of Asylum Seekers Fedasil and a police officer took part in a restorative group conversation led by an independent moderator. The perpetrator fulfilled several agreements: he wrote a personal letter to the victims, paid for the damage, received training about racism and performed a service in the asylum centre.¹⁰

8 Criminal court Ghent 7 October 2019, www.unia.be.

9 Unia is a public institution that is competent for, among other things, the Anti-discrimination Law and the Antracism Law.

10 "Des coups et blessures racistes à la déclaration d'intention", www.unia.be.

3. ALTERNATIVE MEASURES AT THE LEVEL OF THE PUBLIC PROSECUTOR'S OFFICE

3.1. CIRCULAR COL13/2013

In 2013, a circular COL13/2013 on discrimination and hate crimes was issued in Belgium by the Minister of Justice, the Minister of the Interior and the Board of Prosecutors General at the Courts of Appeal.¹¹ This circular makes the approach to discrimination, hate crimes and hate speech by the police and the public prosecutor's office significantly more efficient.

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The circular provides, for example, for appointing reference persons within the police and the public prosecutor's office. The circular also contains detailed guidelines on recording acts of discrimination, hate crime and hate speech. The circular regulates cooperation between the police, the public prosecutor's office, Unia and the Institute for equality between women and men.¹²

The circular states that for criminal offenses against anti-discrimination law – involving serious harm to the victim's physical integrity, arson, criminal organisation, repetition of offences or acts that seriously disrupt public order – the public prosecutor must take the following measures insofar as mediation in criminal matters cannot be considered: appoint an investigating judge¹³ to obtain an arrest warrant or to summon the perpetrator directly before the criminal court. .

For other criminal offenses against anti-discrimination law, the public prosecutor's office must take one of the following measures: bring the perpetrator before the criminal court, initiate mediation in criminal matters, propose an amicable settlement, voluntarily

11 College of Public Prosecutors. Circular on investigation and prosecution policy on discrimination and hate crimes, Joint Circular No. COL13/2013, 2013.

12 The Institute for the equality of women and men is a public institution that is competent for, among other things, the Gender Law.

13 The public prosecutor's office can refer a case to an investigating judge, for example when certain investigative acts have to be carried out (such as pre-trial detention, searches, communication and computer tapes ...). A judicial investigation is then conducted under the direction and responsibility of an investigating judge.

dismiss the case and issue a reprimand to the perpetrator (this is the so-called Praetorian probation) or refer the criminal case to the administrative authorities when it is legally possible to impose an administrative sanction.

3.2. MEDIATION AND MEASURES PROCEDURE

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Criminal mediation (or mediation in criminal cases) was reformed in 2018 to become the mediation and measures procedure.¹⁴ It is a voluntary procedure.

The public prosecutor's office can, under certain conditions, ask the suspect (who caused damage to a known victim) and the victim to agree to mediation about compensation or repair of the damage. In addition, the public prosecutor can propose measures to the suspect. These measures can be: following medical treatment or appropriate therapy, providing services during free time or following training. The measures can also be presented separately from mediation between the suspect and the victim.

If the suspect has fulfilled all the conditions, no criminal prosecution will be carried out against them. The public prosecutor's office is assisted by the judicial assistants of the Justice Houses in mediating between the suspect and the victim and in the concrete interpretation, follow-up and monitoring of the conditions.

Due to the mediation and measures procedure, the victim is given a limited input because the damage is often regulated through an indirect dialogue between the suspect and the victim. For some victims, this is enough to feel appreciated. With regard to the suspect, the mediation and measures procedure provides the opportunity to focus on assistance, services and learning measures.¹⁵

¹⁴ Article 216ter Code of Criminal Procedure.

¹⁵ Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, p. 18.

3.3. AMICABLE SETTLEMENT

The public prosecutor's office can, under certain conditions, propose an amicable settlement to the suspect of a crime.¹⁶ If the suspect pays a certain sum of money, no criminal prosecution is carried out against them. The suspect must first have arranged compensation for the victim.

Instead of dismissing the charges, the amicable settlement allows consequences to still be ordered by the public prosecutor's office. The payment counts as an unquestionable presumption of his liability and can be used by the victim in civil proceedings. However, the amicable settlement is less suitable for dealing with hate crimes and hate speech because the underlying motivation of the suspect cannot be mentioned and there is little room to deal with the issue of discrimination itself.¹⁷

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3.4. PRAETORIAN PROBATION

Circular COL13/2013 states that dismissal for reasons of expediency should be excluded if the public prosecutor's office does not at least draw attention to the rules of conduct in force.¹⁸ The public prosecutor's office can dismiss the charges and order a reprimand in relation to them, as well as compliance with certain conditions. This is called Praetorian probation.

¹⁶ Article 216bis Code of Criminal Procedure.

¹⁷ Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, p. 17.

¹⁸ College of Public Prosecutors. Circular on investigation and prosecution policy on discrimination and hate crimes, Joint Circular No. COL13/2013, 2013., p. 15 and 18.

4. ALTERNATIVE MEASURES AT THE LEVEL OF THE COURTS

4.1. MAIN AND ADDITIONAL PENALTIES

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Courts can impose several main sentences¹⁹ including imprisonment and/or a fine. Under certain conditions, a community service²⁰ or an (autonomous) probation penalty²¹ can be imposed.

4.2. COMMUNITY SERVICE SENTENCE

A community service sentence means that the convict must perform free work in his free time at a government agency, a non-profit association or a foundation.²² The duration of the community service sentence is at least twenty hours and at most three hundred hours.²³

In 2019, a significant change was made to the Penal Code.²⁴ When the judge convicts a person under the criminal provisions of anti-discrimination law and imposes a community service sentence, the judge can now give instructions that the implementation of the community service sentence be related to, respectively, the fight against racism or xenophobia, discrimination, sexism and negationism, in order to reduce the risk of recurrence of such crimes.

The community service sentence offers the opportunity to indirectly influence the perpetrator's ideas – stereotypes, prejudices and attitudes. The community service sentence brings the offender into contact with people who do not come from the offender's

19 Article 7 Penal Code.

20 Article 37octies Penal Code.

21 Article 37octies Penal Code.

22 The (autonomous) community service sentence is always combined with a substitute imprisonment or fine, which is applied when the community service sentence is not carried out by the convict.

23 Article 37quinquies Penal Code.

24 Article 37quinquies, § 4 Penal Code (as amended by Law of 5 May 2019 amending the Criminal Code in order to promote alternative measures for dealing with crime inspired by racism or xenophobia and to better combat recidivism with regard to discrimination, Belgian Official Gazette 28 May 2019, p. 51.915).

delinquent environment. The positive interaction with those people can form the basis for adjusting negative ideas on the part of the perpetrator. When the community service sentence can be carried out at a place somehow related to the crime, such as a centre for LGBTI youth, the link between the punishment and crime will become even clearer.²⁵

The provision of services during free time, which can be imposed by the public prosecutor's office in the context of the mediation and measures procedure, offers the same opportunities. The provision of services during free time aims to guide the suspect with a view to social and professional integration. This is in contrast to the community service sentence which is punitive in nature.

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4.3. AUTONOMOUS PROBATION PENALTY

The autonomous probation penalty entails that the convicted person must comply with special conditions for a period determined by the court.²⁶ The duration of the autonomous probation sentence is at least six months and at most two years.²⁷

In 2019, a significant change was made to the Penal Code.²⁸ When the judge convicts a person under the criminal law provisions of anti-discrimination law and imposes an autonomous probation sentence, the judge can now give instructions that the implementation of the probation sentence be related to, respectively, the fight against racism or xenophobia, discrimination, sexism and negationism, in order to reduce the risk of recurrence of such crimes.

25 Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, pp. 17-18.

26 The (autonomous) probation penalty is always combined with a substitute imprisonment or fine, which is applied when the probation penalty is not carried out by the convict.

27 Article 37octies Penal Code.

28 Article 37octies, § 4 Penal Code (as amended by Law of 5 May 2019 amending the Criminal Code in order to promote alternative measures for dealing with crime inspired by racism or xenophobia and to better combat recidivism with regard to discrimination, Belgian Official Gazette 28 May 2019, p. 51.915).

4.4. LEARNING MEASURES

A learning measure cannot be imposed as an autonomous punishment with regard to adult offenders. However, such a measure can be imposed by the public prosecutor's office in the context of the mediation and measures procedure or by the court as a condition for probation.²⁹

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A learning measure offers the opportunity to directly influence the perpetrator's ideas. The offender's negative stereotypes, prejudices and attitudes can be discussed and adjusted through cognitive or behavioural interventions.³⁰

4.5. PROBATION SUSPENSION AND PROBATION DEFERRAL

The courts can declare a perpetrator guilty, but decline to pronounce a conviction during a certain probation period (this is the suspension of the sentence). The courts can also pronounce a sentence, but decide that the sentence should not be enforced, or only partially executed, during a given probation period (this is postponing the execution of the sentence).³¹ The suspension and postponement can be revoked if the person concerned commits new crimes during the probation period.³² Probation conditions may be linked to the suspension and the postponement which the person concerned must observe during the probation period (probation suspension and probation deferral).³³

29 Article 216ter, § 1 Code of Criminal Procedure, article 370octies Penal Code and article 1, § 3 Probation Law.

30 Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, pp. 17-18.

31 Article 1 Probation Law.

32 Article 13 and 14 Probation Law.

33 Article 13 and 14 Probation law.

5. MEDIATION

Restorative mediation is complementary to criminal proceedings. Any directly concerned party has the possibility to request mediation at any stage of the criminal proceedings and during the execution of the sentence.³⁴ Restorative mediation is always on a voluntary basis and is confidential.

In the case of restorative mediation, a neutral third party (a mediation service) is called upon to facilitate communication between the parties and to help the parties reach an agreement on the rules and conditions that can lead to pacification and restoration.³⁵ A successful restorative mediation does not result in the criminal proceedings being dropped. The parties may agree to notify the court of the result of the restorative mediation. The court can then take this into account.³⁶

The restorative mediation actively involves the victim in the process of recovery. In addition, restorative mediation makes it possible to focus more in-depth on the reprehensible motive on the part of the perpetrator. The victim can express their feelings directly towards the perpetrator, giving the victim an identity. Certainly during a face-to-face meeting, the victim gets visibility and it becomes more difficult for the perpetrator to maintain certain prejudices. A direct meeting with LGBTI youth, for example, can make the perpetrator realize that their prejudices about them are unfounded.³⁷

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34 Article 553 Code of Criminal Procedure.

35 Article 3ter Preliminary Title Code of Criminal Procedure.

36 Article 163, 5th paragraph and article 195, 5th paragraph Code of Criminal Procedure.

37 Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, pp. 28-29.

6. JUVENILE SANCTION LAW

In principle, juvenile sanction law applies to minors who commit crimes³⁸. The aforementioned Circular COL13/2013 on discrimination and hate crimes states that the prosecution will initially orient the case towards a mediation procedure (except when it is necessary to refer the case to a juvenile court).³⁹

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The public prosecutor's office can, if the victim has been identified, propose restorative mediation to the minor, the victim and the parents of both. If they accept the proposal, they will work with a neutral mediator to find a solution, including the relational and material consequences of the crime. If the mediation succeeds, this will, or may, lead to the discontinuance of criminal proceedings.⁴⁰

The youth judge and/or juvenile court can also (and preferably) propose restorative mediation, in addition to a restorative group conversation.⁴¹ In a restorative group conversation, the minor, the victim, their social environment (parents, family, friends ...) and all useful persons (police ...) will talk as a group, together with a neutral mediator, to find a solution to the conflict, taking into account the relational and material consequences. The recovery-oriented group conversation makes it possible to pay attention to the public dimension of the consequences of the crime.⁴² The youth judge and/or juvenile court will take the agreement reached into account.⁴³

38 In principle, since, from the age of 16, subject to certain conditions, minor-aged perpetrators can be tried as adults.

39 College of Public Prosecutors. Circular on investigation and prosecution policy on discrimination and hate crimes, Joint Circular No. COL13/2013, 2013, p. 18.

40 Article 12 Flemish Decree on Juvenile Delinquency (*possibility of dismissal*) and article 97 Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection (*dismissal*).

41 Article 20, § 1; 22; 29 § 1 and 30 Flemish Decree on Juvenile Delinquency and article 101, § 3; 108 and 115-117 Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection.

42 Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, pp. 27-28.

43 Article 22, § 10 and 30 Flemish Decree on Juvenile Delinquency and article 117, § 1, 6th and 7th paragraph Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection.

Juvenile sanctions fall largely within the competence of the Communities in Belgium.⁴⁴ As a result, the legal provisions and sanctioning options differ in the different regions of Belgium. Possible sanctions are, for example, having the minor come up with a positive project⁴⁵, having the minor propose a written plan (with, for example, the commitment to repair the damage, to follow a training or learning project ...) ⁴⁶, imposing training or a learning project⁴⁷, imposing a provision of services during free time,⁴⁸ ...

44 In this contribution we mention, by way of example, (only) the regulation applicable in the Flemish Community and the French Community.

45 Article 13; 20, § 2, 1°; 23; 29, § 2, 3° and 32 Flemish Decree on Juvenile Delinquency.

46 Article 101, § 3; 108 and 118 Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection.

47 Article 11, § 1, 3° and 4°; 20, § 2, 3°; 25, § 3, 3°; 29, § 2, 5° and 34 Flemish Decree on Juvenile Delinquency and article 108, 2th paragraph, 4° and 120, 1st paragraph, 5°-7° Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection.

48 Article 20, § 1, 3°; 25, § 3, 4°; 29, § 2, 5° and 34 Flemish Decree on Juvenile Delinquency and article 101, § 1, 2° and 108, 2th paragraph, 3° Decree of the French Community on the Code of Prevention, Youth Assistance and Youth Protection.

7. ALTERNATIVE MEASURES IN PRACTICE

Notwithstanding the various legal options available, it appears that in practice little use is made of alternative measures in the context of LGBTI-related hate crimes and hate speech.

110 The figures available show that the public prosecutor's office makes only limited use of the mediation and measures procedure, the amicable settlement and the Praetorian probation in the context of hate crimes and hate speech. Only 5 to 6% of the cases are handled through these three measures.⁴⁹ The large number of cases that are dropped for technical reasons or for reasons of opportunity – more than 65% – is noteworthy.⁵⁰

In order to determine the extent to which the criminal courts apply alternative measures, an analysis was made of the case-law on LGBTI-related hate crimes and hate speech published on the Unia website. Circular COL13/2013 states that the public prosecutor's office sends a copy of all judgments and decisions on hate crimes and hate speech to Unia. The Unia website therefore provides a good picture of known case-law.⁵¹

An analysis of the case law on LGBTI-related hate crimes and hate speech shows that at the level of the criminal courts, only limited use is made of alternative measures. For the perpetrators of LGBTI-related hate crimes and hate speech:

49 Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (Committee for the evaluation of the federal anti-discrimination legislation). *Premier rapport d'évaluation*, 2017, pp. 112-113 and Unia. *Evaluation Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination*, 2017, p. 30.

50 Vandenbruwaene, Patrick; De Keyzer, Franky and Van der Veken, Bart. "Diversiteit, verdraagzaamheid en handhavingsbeleid", *Rechtskundig Weekblad*, no. 32, 2015-16, p. 1251.

51 The analysis covers 28 judgments of the criminal courts in Belgium from 2009-2019 involving 47 offenders.

- Imprisonment was ordered in 70% of the cases, with or without a fine⁵² – these prison sentences were ordered to be suspended (55%), effective (27%) or with probation deferral (18%).
- A community service sentence was ordered in 21% of the cases, with or without a fine.⁵³
- In 7% of the cases the conviction was suspended.
- In 2% of the cases a fine was imposed.⁵⁴

When probation conditions were imposed, these usually concerned general conditions such as: finding a job, seeing a psychologist, avoiding contact with certain people...⁵⁵ In two cases, the condition was imposed to follow training in relation to the aggression problem.⁵⁶ In one case, the condition was imposed to receive training on citizenship and respect for diversity.⁵⁷

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No figures are available on restorative mediation.⁵⁸

Limited case law is available on LGBTI-related hate crimes and hate crimes committed by minors. In the known judgments, the following sanctions were imposed by the juvenile courts: a reprimand⁵⁹, a learning measure⁶⁰ or a provision of services during free time.⁶¹ In one case, a minor-aged perpetrator of an LGBTI-related hate crime was sentenced by the juvenile court to following an individualized educational project lasting up to 20 hours. This lawsuit involved a sixteen-year-old student who had beaten a homosexual passer-by and made homophobic statements. Following the incident, the victim was incapacitated for work for months. Unia had made the proposal to impose an alternative learning measure and the

52 In a number of cases, a fine subject to suspension or probation deferral was imposed.

53 In a number of cases, a fine was imposed but suspended.

54 Suspended.

55 Criminal court Brussels 28 June 2012, criminal court Brussels 14 July 2016 and criminal court Bruges 7 March 2018, www.unia.be.

56 Criminal court Antwerp 30 November 2017 and criminal court Ghent 12 December 2018, www.unia.be.

57 Criminal court Huy 13 June 2019, www.unia.be.

58 Unia. *Evaluation Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination*, 2017, p. 30.

59 Juvenile court Leuven 16 March 2005 (2 judgments), juvenile court Leuven 20 April 2005 and juvenile court Antwerp 8 November 2012, www.unia.be

60 Juvenile court Antwerp 8 November 2012 and juvenile court Brussels 25 January 2017, www.unia.be

61 Juvenile court Brussels 25 January 2017, www.unia.be

juvenile court agreed. The project was developed by the local operations of Unia, Merhaba, çavaria and the non-profit organisation Jong.⁶² The project involved the perpetrator talking to a representative of Unia. He then participated in two workshops at the Pride & Privilege conference organized by çavaria and Merhaba. In the evening, the perpetrator joined the solidarity march organised in memory of Ihsane Jarfi (the young gay man who was murdered in Belgium in 2012). Finally, the perpetrator also had a conversation with a judicial assistant.⁶³

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Even outside the context of LGBTI-related hate crimes and hate speech, little use seems to be made of alternative measures.⁶⁴ We have already given two examples above.⁶⁵ Additional examples can be found in the case law. For example, a former federal MP who was convicted of publicly denying the Holocaust was required to visit a concentration or extermination camp annually, for 5 years, and write a report to publish on his Facebook page.⁶⁶ A man convicted, among other things, of spreading hate speech, had to analyse an article to which he had referred. Subsequently, he had to write an essay on it with a focus on the issue of fake news and the distortion of historical truth.⁶⁷

62 Merhaba is an association for LGBTI with a migration background, çavaria is the umbrella organisation of Flemish LGBTI associations and vzw Jong is a local initiative on well-being for young people.

63 "De la violence homophobe au projet éducatif individualisé", www.unia.be.

64 Commission d'évaluation de la législation fédérale relative à la lutte contre les discriminations (Committee for the evaluation of the federal anti-discrimination legislation). *Premier rapport d'évaluation*, 2017, pp. 112-113 and Unia. *Evaluation Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination*, 2017, p. 30.

65 In the section "Mesures alternatives" on www.unia.be some more best practices are mentioned, such as a visit by the perpetrator to the Kazerne Dossin or to a mosque or an association for Muslims.

66 Court of appeal Brussels 20 September 2017, www.unia.be.

67 Court of appeal Brussels 11 June 2019, www.unia.be.

8. BOTTLENECKS AND POLICY RECOMMENDATIONS

How come alternative measures are rarely applied in practice?

In reality, it appears that there are few structural learning pathways and training programmes available that fully take into account the specific nature of hate crimes and hate speech and the perpetrators of this type of crime.⁶⁸ Setting up individual processes involve (prohibitively) high costs. With regard to community service sentence and provision of services during free time, relevant placements must be found. Not all placements are open to perpetrators of hate crimes or hate speech, or can offer an appropriate framework. Placements involve practical considerations, such as the offender's transportation options.⁶⁹ Sending a specific perpetrator to a placement location should also be "ethically" responsible to the provider of the placement. Moreover, an important element for the success of alternative measures is the commitment and capacity of the judicial assistants and the Justice Houses.

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A first recommendation is therefore that alternative measures only make sense if a structural and adapted supply of placements is effectively available. The actors who have a steering role, the judicial assistants and the Justice Houses, must have sufficient resources to fulfil their mission.

Many alternative measures are voluntary. The perpetrator must confess the offenses and demonstrate an intrinsic motivation to cooperate in an alternative measure. In addition, perpetrators of hate crimes and hate speech are not a homogeneous group. A division often used in Belgium (in connection with hate speech) is between those acting out of conviction, instrumentalists (or activists) and incidentalists.⁷⁰ Perpetrators acting out of conviction act on the basis

68 Vandenbruwaene, Patrick; De Keyzer, Franky and Van der Veken, Bart. "Diversiteit, verdraagzaamheid en handhavingsbeleid", *Rechtskundig Weekblad*, no. 32, 2015-16, p. 1255.

69 Leuven Institute of Criminology et al. *Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine*. Centre for Equal Opportunities and Opposition to Racism, 2012, pp. 19.

70 Vrielink, Jogchum. *Van haat gesproken? Een rechtsantropologisch onderzoek naar de bestrijding van rasgerelateerde uitingsdelicten in België*. Maklu, 2010, pp.466-655.

of beliefs (often extremist right-wing or religiously inspired) and instrumentalists (or activists) aim to provoke (often for politically inspired reasons). These two groups regard criminal prosecution positively, partly because they want to use the media attention it brings to help achieve their goals. Incidentalists – the largest group – are not driven by underlying ideas and their statements are often one-off occurrences. Criminal prosecution often has serious consequences for this group and can lead to self-censorship.

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A second recommendation is that the profile of the offender should be taken into account when imposing alternative measures. Incidentalists would tend to benefit more from mediation and dialogue. The procedure before the criminal court, whether or not linked to alternative sanctions, would be especially useful for those acting out of conviction and instrumentalists (or activists). The courts could organise thematic hearings dealing with different files on hate crimes and hate speech. Such theme sessions can have an important social signal function.

Last but not least, it is important to pay attention to the victim's side. Victims of hate crimes and hate speech are selected because of their sexual orientation, for example, and the perpetrator wants to send the message that they are not welcome in society. In hate crimes and hate speech, it makes sense for the victim to cooperate in the recovery. In practice, there is often unwillingness, both on the part of the perpetrator and the victim, to meet. When their social and cultural background is too different, the rift between the perpetrator and the victim can cause them to fail to meaningfully communicate. At present, victims often participate only to a limited extent in the alternative measure and have little input, for example in determining the conditions imposed on the perpetrator. In a number of cases, the perpetrator targets entire population groups and there is no individual victim. Even then it is important that the targeted group as such gets a voice and that it responds to the stereotypes, prejudices and attitudes of the perpetrator.

A third and final recommendation is therefore that the victim's side – as an individual or as a group – should be adequately monitored when applying alternative measures. For example, in the mediation and measures procedure, it would be possible to systematically incorporate a moment of direct dialogue between the perpetrator and the victim. Care should be taken to ensure that the victim does not undergo secondary victimization in that encounter.

HATE CRIMES MOTIVATED BY SEXUAL ORIENTATION AND GENDER IDENTITY – THE EFFECTS OF RESTORATIVE JUSTICE ON VICTIMS AND VICTIMIZERS

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CHARO ALISES

KEYWORDS: homosexuality, transgender, restorative justice, victim, victimizer, hate crimes.

1. INTRODUCTION

Restorative justice has emerged as a set of responses that aim to provide justice to crime victims in a restorative rather than punitive sense. The restorative model allows people to intervene directly in conflict resolution, making justice more participatory. Furthermore, it is an ideal instrument to satisfy the material and psychological needs of victims. This system is also beneficial for the victimizer, since the encounter with the victim makes them more aware of the harm caused and generates responsibility for it¹.

This article analyses the characteristics of the victim and the victimizer of a hate crime, the restorative procedures that are most efficient in this case and the effects of restorative justice on the involved parties.

Spanish Law 4/2015 of 27 April, on the Standing of Victims of a Crime, establishes in Article 15 that victims can access services of restorative justice in legally established terms for the purpose of obtaining due material and moral reparation for the harm resulting from a crime as long as the following requirements are met:

1 Gordillo Santana, Luis F. , *La justicia restaurativa y la mediación penal*, Iustel, Madrid, 207.

- a. that the offender has recognized the essential facts from which their responsibility is derived.
 - b. that the victim has consented after receiving in-depth and impartial information about the content, the possible outcomes and the procedures for it to be effectively implemented.
 - c. that the procedure of mediation does not entail a threat to the safety of the victim and its development does not risk possible material or moral damage to the victim.
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 - d. that it is not legally prohibited for the crime that has been committed. The confidentiality of the procedure is established, and it is determined that the consent of the parties to participate in the mediation can be withdrawn at any time.

The confidentiality of the procedure is established and it is determined that the parties may revoke their consent to participate in the mediation at any time.

With respect to hate crimes, the feasibility of restorative justice processes raises certain questions. In this regard, the inequality between the victim and the perpetrator must be taken into account. This entails the risk that the process may result in damage to the victim and reproduce the situation of domination. In hate crimes, a transformative model that eliminates the prejudices that are at the genesis of these criminal offences would be advisable. The transformative model seeks to overcome the obstacles that prevent the achievement of personal relationships based on concord and respect.

It is therefore fundamental to take into account the possible imbalance between the victim and the victimizer when designing restorative strategies that are effective for both the victim and the victimizer so that the process is effective for all parties involved.

It should be borne in mind that the benefits of a restorative process cannot be limited to the restorative outcome from which it can be derived as well as that the restorative model allows the victim to participate directly in the matter affecting them, which also has beneficial effects.

The role of the community in the process must be oriented towards strengthening the position of the victim and generating a transformation towards egalitarian and non-discriminatory social relations that have effects on the aggressor, the victim and the people around them.²

2 Aguilar García, Miguel Ángel, "Manual práctico para la investigación y enjuiciamiento de delitos de odio y discriminación", Ed. Centre d'Estudis Jurídics i Formació Especialitzada, Generalitat de Catalunya, Barcelona, 2015, p. 297.

2. DISCUSSION

THE EFFECTS OF RESTORATIVE JUSTICE ON VICTIMS OF HATE CRIMES MOTIVATED BY SEXUAL ORIENTATION OR GENDER IDENTITY

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Article 3 of the Standing of Victims of a Crime establishes the individual assessment of victims in order to guarantee their needs regarding protection. In order to do this, personal characteristics, the nature of the offence and the severity of the caused harm need to be analyzed. Specifically, the Standing mentions that special consideration will be taken concerning victims of crimes committed on the basis of sexual orientation or gender identity. When extrapolating this to the sphere of restorative justice, it is understood that an analysis of the specific circumstances of those belonging to the LGBTI community (lesbian, gay, trans, bisexual and intersex people) is necessary in order to establish an effective restorative procedure that compensates victims for the damage caused by the crime in all areas of their life. Avoiding the so-called "loneliness of the victim" after the trial and verdict is a humanitarian matter, and defending their rights is a priority issue.³

The Proposal for a Directive of the European Parliament and of the Council of 18 May 2011 established the following:

Certain groups of victims including victims of sexual violence, bias crime such as gender-based violence and race hate crime, and victims of terrorism often require specialist support services due to the particular characteristics of the crime they have fallen victim to.

There are specificities that set LGBTI hate crime victims apart from other victims of these types of offences that need to be taken into account when addressing restitution of damage. Their family and community may not be prepared to deal with hate crimes members of the LGBTI community suffer from in their immediate environment. Furthermore, it is not uncommon for LGBTI community members to be devoid of an external family system that can support them in the event of suffering an aggression. Families of LGBTI commu-

3 Ibarra, Esteban, "Metodología de intervención con la víctima del delito de odio", Cuaderno de análisis, Movimiento contra la intolerancia, nº44, 2012, pp. 64-75.

nity members sometimes do not acknowledge – nor accept – the sexual orientation or identity of their children. In many cases, not being heterosexual means giving up the stability of a social position as a means of accessing resources and entails abandoning those forms of protection, shelter and institutional support.⁴

In addition, the intersections of the lives of lesbian, gay, bisexual and trans people must be taken into account based on variables such as race, ethnicity, nationality, religion, disability, disease, sex or social condition, among others. In this sense, it is mandatory to analyze how this intersectionality affects the multiple discriminations that LGTBI community members may suffer and to what extent they hinder their healing. It is also necessary to study intersectionality from the point of view of the victimizer, who may have perpetrated the crime motivated not only by a prejudice towards sexual and gender diversity but has also attacked the victim for other reasons, such as racism, misogyny or hatred for a specific religion. This sum of biases needs to be addressed to ensure the success of the restorative process.

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The intensity of psychological trauma caused by a hate crime depends on the victim's experience. There are greater degrees of vulnerability and psychological consequences in LGBTI hate crime victims in comparison to other groups: the myth of invulnerability is destroyed, their self-esteem is weakened and their concept of a logical and rational world is broken. It is likely for the victim to suffer from anxiety disorders, depressive disorders, sleep disorders, self-blame and a loss of trust in others. The trauma derived from the crime also changes the victim's habits, making them avoid places they used to go to and reject interaction with other members of the LGBTI community. It can also lead to internalized homophobia and even thoughts of suicide.⁵

From a psychological point of view, restorative justice as a healing process can have positive outcomes for the victim, including, among other things: the possibility of living in a more harmonious environment without fear; moving past the events that caused

4 Ahmed, Sara, "Vivir una vida feminista", Edicions Bellaterra, Barcelona, 2018, p.297.

5 Conference: "Víctimas de odio y salud mental", given by Dr María Dolores Mojarro Práxedes, Associate Professor of psychiatry of the Psychiatry Department of the University of Seville, as part of the Sessions on Hate Crimes and Discrimination organized in the Illustrious Bar Association of Seville on 17 October 2017.

the harm; increasing positive reinforcement that can improve their psychological and physical health; and feeling more understood not only by the offender but also by the community, thus avoiding discriminatory and stigmatizing treatment.

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In order for the restorative process to be effective and bring benefits to LGBTI victims, it should safeguard their psychological well-being and avoid their revictimization. It must be provided with the necessary mechanisms that allow for a person affected by a crime to be healed. An effective restorative justice system can diminish victims' guilt, strengthen their self-esteem and restore their trust in society, rooting out the self-perceived rejection of their sexual orientation. It is fundamental for victims to not perceive the world as a hostile and dangerous place.

The process of making the perpetrator responsible for the LGBTI victim, together with other restorative mechanisms, can contribute to the healing of the victim, and to this end, the healing power of forgiveness must not be lost sight of. Forgiveness can have positive psychological effects: not living in torment, shaking off the yoke of the past, improving health (e.g. better sleep, more relaxation, less use of drugs), reconciling with oneself and regaining inner peace. In a way, forgiving is not doing anyone any favors, but rather the victim doing themselves a favor. Forgiveness is synonymous with liberation. The person who forgives experiences a decrease in the degree of resentment towards the other. In this way, their behavior towards the offending person becomes less negative and their attitudes less distant or less aggressive. Without forgiveness, there is no present or future, only a past that cries out for reparation and that generates resentment or contained anger. In this way, getting rid of a grudge contributes to getting rid of a burden that can be unbearable. Memory without anger, without vengefulness, closes rather than opens wounds.⁶

6 Echeburúa Odriozola, Enrique. "El valor psicológico del perdón en las víctimas y en los ofensores", Eguzkilore: Cuaderno del Instituto Vasco de Criminología, nº 27, pp. 65-72, 2013.

THE EFFECTS OF RESTORATIVE JUSTICE ON VICTIMIZERS OF HATE CRIMES MOTIVATED BY SEXUAL ORIENTATION OR GENDER IDENTITY

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When it comes to victimizers of hate crimes, there are different kinds of classifications, all of them equally valid. However, in this article we will focus on Sullaway's classification, which establishes four basic groups of victimizers⁷: those who pursue new experiences, adrenaline and acknowledgement are motivated by peer pressure, etc. (thrill motivated); those who see in the stereotype of the victim an attack on their way of life, access to job opportunities, etc. (defendant offenders); those who believe their actions are guided by a superior mission inspired by political or religious ideology (mission offenders); and those who seek revenge for a previous attack by targeting someone from the same group (retaliatory offenders).

Some studies demonstrate that perpetrators of these types of crimes are in many occasions ordinary people with a profile far removed from the violent and maladjusted stereotype usually associated with skinheads, for instance. This would confirm that there are indeed more prejudices than those being admitted to and that said prejudices can lead to criminal behaviour. When it comes to hate crimes, the existence of a societal problem is raised, a problem that could be appropriately solved through restorative justice, which goes beyond the punitive approach.⁸

In cases of crimes motivated by sexual orientation and gender identity, victimizers act upon their feelings of homophobia and transphobia. These feelings are motivated by ongoing social bias towards members of the LGBTI community. These prejudices are originated by the rigidity that still exists regarding human sexuality, since gender binarism and compulsory heteronormativity still prevail as the only acceptable way to guide desire and affectivity. In the same way, gender expressions that do not correspond to those normatively imposed are also subject to social rejection. These may be considered hate crimes, the most serious consequence of the discrimination towards non-normative sexual orientations and gender identities.

7 Sullaway, M., "The Psychology of Hate Crime Law, Victims and Offenders", in Parks, G.S./Jones, S./Cardi, W.J. (Editors), "Critical Race Realism. Intersections on Psychology, Race, and Law", The New Press, New York (USA), 2008, pp. 235-245.

8 Iganski, P., "Hate Crime and the City", Police Press, Bristol (UK), 2008, pp. 22-24.

The restorative process should follow a transformative approach that removes prejudices against members of the LGBTI community and deactivates the victimizer's misconceptions about sexual and gender diversity. Asking for the forgiveness of a specific person for causing them harm is of no use if the victimizer continues to feel prejudice against the group the victim belongs to – in this case, the LGBTI community. In this regard, it is important to remember that one of the characteristics of hate crimes is that the victim is singled out for belonging to a group or community, which is in turn also impacted by the crime.⁹

Restorative justice should lean towards humanizing the victim in the eyes of the victimizer so they can understand the pain they caused to another human being. The dehumanization of the victim is a fundamental element in understanding the commission of a hate crime. Degrading certain groups of people to a subhuman status, considering them worthless lives, is the precursor to hate crimes against these people.¹⁰

As a part of the restorative process's transformative role, collaborating with LGBTI organizations can be very beneficial since they can teach victimizers about the reality of sexual and gender diversity, allowing them to leave behind the false beliefs that drove them to commit the crime. An example of this is having someone who has been convicted of a crime carry out community service in an LGBTI organization. These types of activities are an opportunity for victimizers to be in direct contact with the LGBTI community, humanizing the members and understanding their reality. Only in this manner can victimizer intervention effectively prevent them from repeating the offence.

Positive experiences have already been carried out with people convicted of hate crimes motivated by the victim's sexual orientation or gender identity, especially in online hate cases. Thanks to the collaboration of LGBTI organizations with professional medi-

9 The OSCE (Organization for Security and Co-operation in Europe), defines hate crimes as "any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence is selected because of a real or perceived connection, attachment, affiliation, support, or membership of a group that may be based upon real or perceived race, national or ethnic origin, language, colour, religion, age, physical or mental disability, sexual orientation, or other similar factors".

10 The term worthless lives, was used by Violeta Friedman, holocaust survivor and human rights activist.

ators, the victimizers have come to understand the suffering that their actions have caused the victims by apologizing and showing regret for their actions. These procedures have also succeeded in satisfying the needs of the victims, improving their recovery.

Regarding the participation of LGTBI entities in restorative processes, the capacity of these organizations to face this task will have to be considered, taking into account the lack of human and material means that, unfortunately, is usually a constant in these associations. Likewise, when it comes to these organizations, it is necessary to observe the necessary measures to preserve the security of their environments so that the restorative process does not pose a danger to the peace and harmony of these groups. By way of example, the LGTBI association of which I am a member participated, with a very positive result, in an experience of restorative justice. It was a case, which occurred in May 2019, of a man who was denounced for spreading, through social networks, denigrating messages towards members of the LGTBI community. Some colleagues from the association participated in the process and made this person see how humiliating his messages to LGBT community members were and the damage he was causing. The man ended up acknowledging his mistake and apologizing.

3. CONCLUSIONS

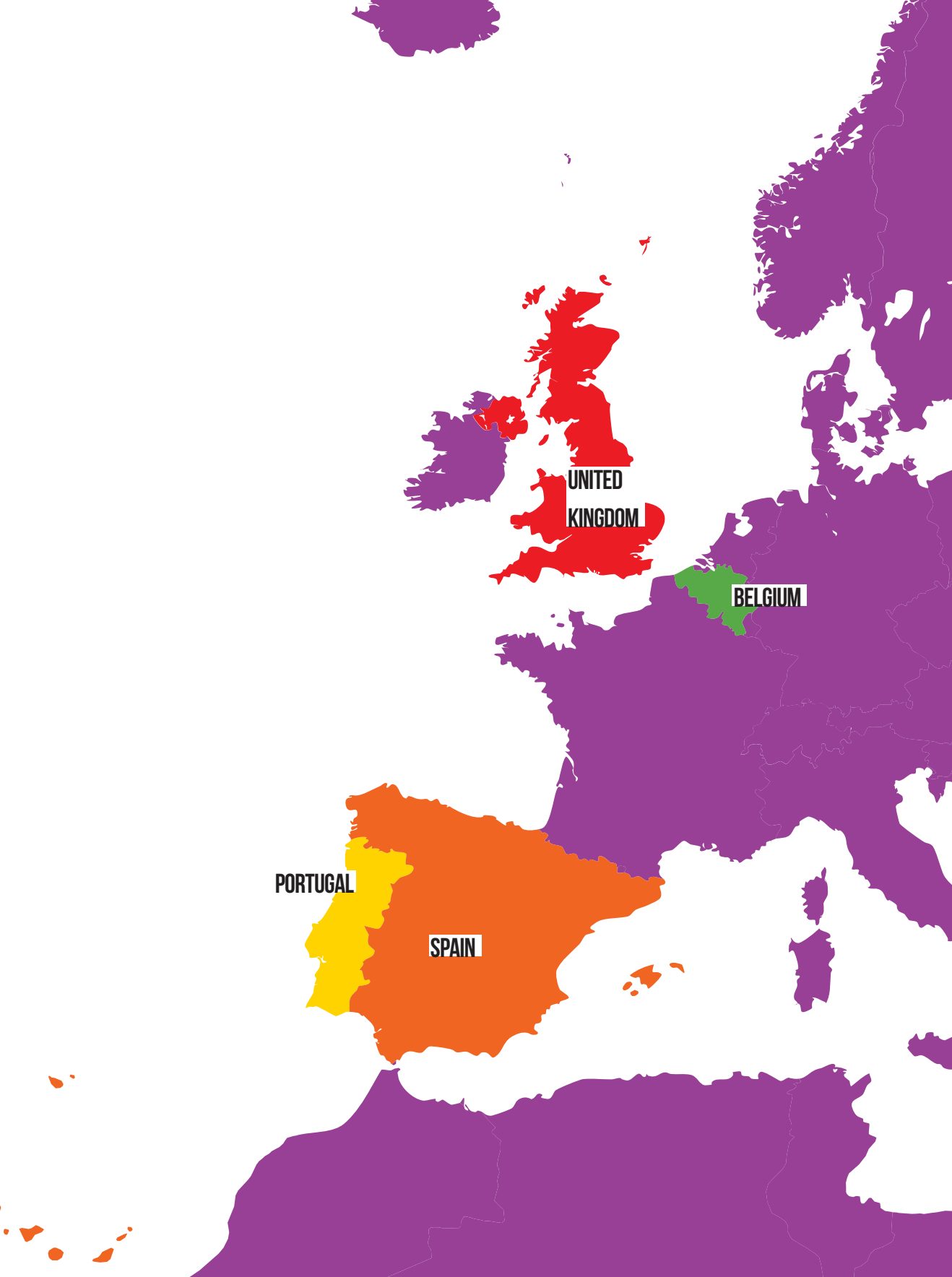
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When it comes to hate crimes motivated by sexual orientation and gender identity, restorative justice arises as a possibly more efficient model than justice that is strictly punitive since it can help root out the cause of the crime and therefore prevent repeat offences. For this to happen, the procedure should efficiently eliminate the victimizer's prejudices against members of the LGBTI community, given these prejudices are the motive for committing the criminal offence.

When opting for restorative justice, it is important to keep in mind the possible inequality between the victimizer and the victim to avoid the same power imbalance that caused the crime. Therefore, it is necessary to know the circumstances of both parties to guarantee an effective process.

An effective restorative procedure should serve to heal victims as much as possible, restore their self-esteem and trust in society and root out the self-perceived rejection of their sexual orientation or gender identity. It is also important to not lose sight of the healing power of forgiveness that can allow victims to free themselves of the negative feelings caused by the crime. As for victimizers, restorative justice can help eliminate the very prejudices against members of the LGBTI community that drove them to commit the crime, ensuring that they do not repeat the offence. In order to reach this goal, it is recommended that they collaborate with LGBTI organizations that can provide victimizers with the necessary tools to deactivate their rejection of sexual and gender diversity. Working with members of the LGBTI community helps victimizers humanize them because dehumanization of victims is one of hate's strongest instruments.

KEYWORDS: homosexuality, transgender, restorative justice, victim, victimizer, hate crimes.



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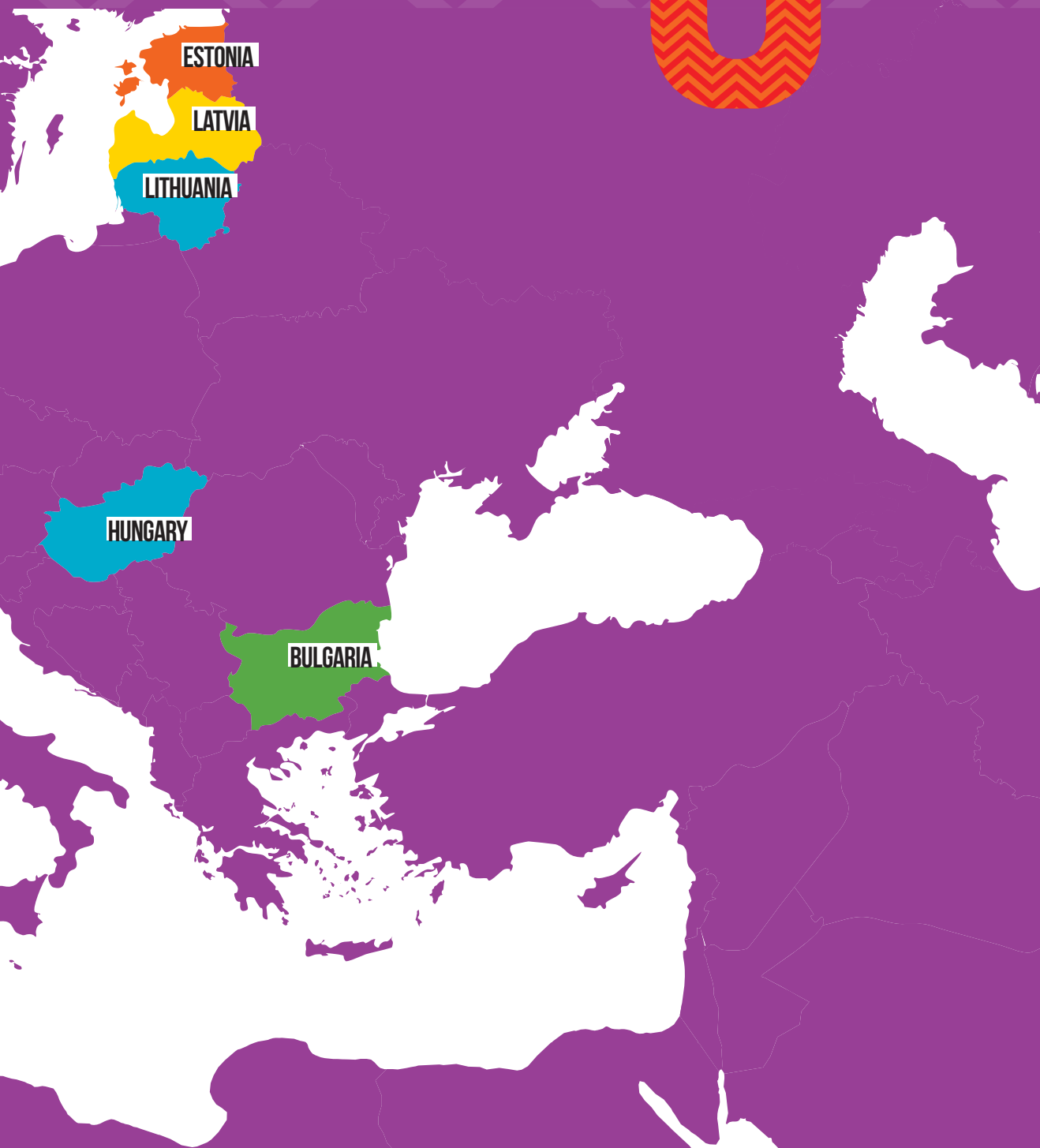
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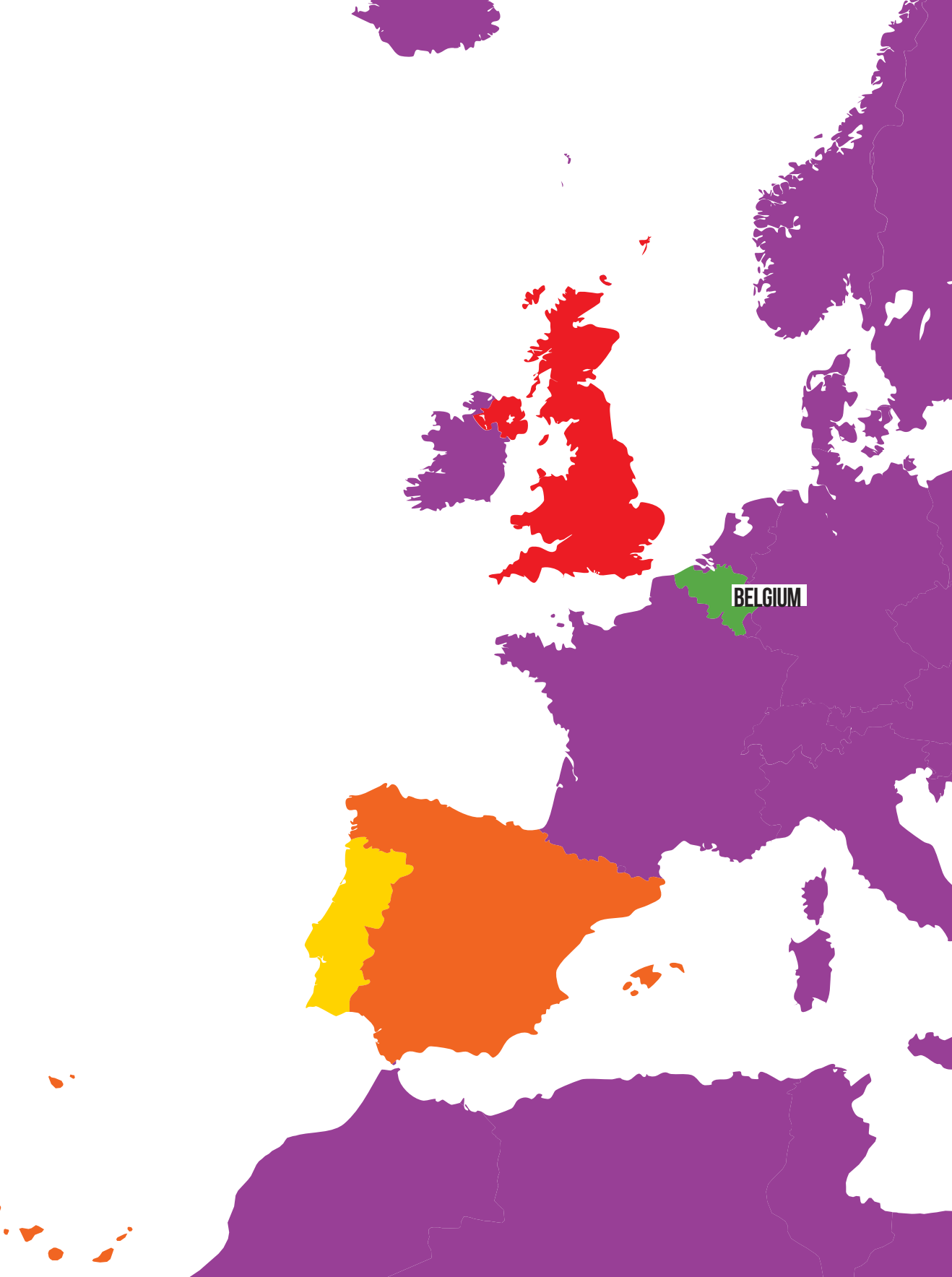
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NATIONAL CONTEXTS





BELGIUM



BELGIUM



BELGIUM

COUNTRY STATISTICS

Attitudes towards LGBTI people in Belgium are better than in most European countries. According to the Eurobarometer (437/2015), no less than 81% of Belgians believe that LGB people should have the same rights as heterosexual people. 61% of respondents would feel comfortable or indifferent seeing a gay male couple showing public displays of affection, compared with 80% in the case of heterosexual couples.

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In regards to trans people, attitudes are only marginally better than the European average. 36% would feel comfortable with sons or daughters in a relationship with a trans person, while 41% would feel explicitly uncomfortable.

In 2018, Belgium (çavaria) participated in the project "Call It Hate: Raising Awareness of Anti-LGBTI Hate Crime", which lasted for 24 months (from January 2018 to December 2019). Call It Hate's aim was to raise awareness of anti-LGBT hate crime among the general public and within LGBTI communities, to emphasise the need to report and to empower victims.

Findings from the initial research phase of the project, which had 1,000 respondents, show that Belgians recognise that hate crimes have a bigger impact on their victims than other crimes. However, the level of empathy strongly depends on the situation. There is less empathy for a victim when they were part of a Pride parade or when they were drinking, or for a trans person who works as a sex worker. The group to which the LGBTI person belongs is also a factor in the level of sympathy a victim of an anti-LGBTI hate crime receives. There is most sympathy for lesbians, followed by gay men and then bisexual people. Trans people who are the victims of hate crimes are at the bottom of this list. The research also showed that, generally speaking, Belgians are no proponents of penalty enhancements for hate crimes.

The frequency at which anti-LGBTI hate crimes occur in Belgian society is not known. The most important conclusion we can draw in talking about prevalence is that there is a big “dark number” of underreporting.

Belgium hasn't reported official statistics about hate crimes to the ODIHR since 2013. Official police reports, however, registered 187 cases of LGB violence in 2016, and 107 cases in 2017. There is no available data on transphobic hate crimes.

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Experienced violence due to sexual preference (D'Haese, Dewaele & Van Houtte, 2013):

- 89% verbal/psychological
- 31% physical
- 22% material
- 41% sexual

Experienced violence due to gender identity (Motmans, T'Sjoen & Meier, 2015):

- 80% verbal/psychological
- 27% physical
- 18% material
- 32% sexual

Police crime statistics use data that was registered in the General National Database. This is a police database that records official reports from the court system and administrative police. The figures on LGB phobia that are published only relate to violations of the anti-discrimination law. The codes that the police has to use to register crime in this database, the nomenclature, is not detailed enough to recognise hate crimes.

RESTORATIVE JUSTICE

NATIONAL DEFINITION

Belgium uses the term "alternative measures". This includes everything that isn't a "traditional penalty", such as fines, imprisonment or community service. When there is an educational or restorative aspect to the sentence, this is called an alternative sanction or restorative intervention.

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The aim of criminal mediation in Belgium (now: "mediation in criminal matters" or "*Bemiddeling in Strafzaken*") is to settle disputes without the intervention of a judge. Some say this method "returns the conflict to the parties": the victim regains some control over the conflict and the perpetrator is given the opportunity to directly repair damage they inflicted.

LEGISLATION

A law on mediation came into force in Belgium in 2005. The Public Prosecution Service can initiate criminal mediation, propose an amicable settlement or impose a praetorian probation for certain criminal offences against the anti-discrimination legislation. This law gives anyone involved in criminal offences access to mediation. At the same time, it is kept out of the judicial process and penal sentence unless all parties agree they want to include it (see below). Since 2019, the Belgian Court can also impose alternative sanctions.

The legislation on restorative justice in Belgium is quite thorough. However, there are important flaws according to the experts interviewed during the research phase of Safe To Be in 2019 ([link](#)). For instance, there is no structural policy that establishes a framework for restorative justice procedures. The application of alternative measures in practice (such as a trajectory at an LGBTI organisation) now depends entirely on the commitment of individuals and on the capacity of civil society.

It should be noted here that drawing up a realistic framework is not that straightforward. A successful mediation process always requires a case-by-case response that is meaningful and in line with the specifics of the situation.

A mediator noted the following on Belgian legislation:

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"The traditional criminal law has its strengths and weaknesses. We would like restorative justice to be an addition to this [...] to meet those weaknesses and to offer added value where criminal law does not meet the needs of people."

Anonymous, Safe To Be 2019

MODERATOR

The organisation that the Belgian justice department reaches out to for mediation and restorative justice is Moderator. Since the inclusion of restorative justice into Belgian criminal law in 2005, Moderator has been officially involved in restorative proceedings. In order to safeguard the voluntary and confidential nature of restorative proceedings, Moderator acts as an independent organisation. Moderator can't be called in as a witness in proceedings.

Extrajudicial cases are not mentioned in legislation, however, which means that there are no funds for people who can't (or don't want to) report a crime. This is significant for anti-LGBTI hate crime cases, due to the underreporting of these cases and them not making it into police databases (see below).

Such as restorative justice as a concept, Moderator also isn't very well known in Belgian society. They make their mission and activities known to the people they work with in law enforcement and victim services, but there is a need for structural information and awareness raising about restorative proceedings and mediation in broader society.

VZW PARCOURS

Parcours offers restorative justice and alternative forms of settlement to minors convicted of a youth offence. "Crimes" committed by someone under the age of 18 aren't called crimes, but a *MOF* (als Misdrijf omschreven Feit, loosely translated to "an incident described as a crime"). Parcours makes sure they consider the needs of everyone involved – the minors themselves, the parents, the victims and, if possible, their social context.

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The services Parcours provides are:

- Restorative mediation

The most successful restorative mediation includes a face-to-face meeting. If this is not an option (due to a lack of consent from one of the parties), the mediator will convey a message, story or expectation from the perpetrator to the victim and vice versa. If a meeting can take place, the mediator will accompany and support both the victim and the perpetrator. Restorative mediation is imposed by the public prosecutor's office and is always voluntary.

- Community service

When a minor commits a MOF, the juvenile court can impose community service. In essence, this is voluntary, although there would be repercussions if the minor refuses to agree to perform the community service.

- Learning project

Learning projects are weekly meetings of 2 hours between the minor and a supervisor from Parcours on topics such as setting and respecting boundaries, following rules and why that is important in society, etc. Learning projects serve a therapeutic role and, like community service, are imposed by the juvenile court.

— HERGO

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HERGO stands for restorative group consultation (Herstelrechtelijk Groepsoverleg). It is a facilitated group discussion between the victim and perpetrator, parents, police officers, support figures and/or other societal stakeholders. A HERGO investigates the possibilities for restoring the damage done in a MOF. People who were not directly involved in the MOF, but are affected by the incident because of their citizenship, are also invited. HERGO is imposed by the juvenile court and is voluntary in itself; however, as with community service and a learning project, there are consequences associated with a refusal.

Aside from these, VZW Parcours also tries to facilitate extrajudicial mediation, despite a lack of funds for these cases.

PRINCIPLES OF RESTORATIVE MEDIATION

A crime is more than an infringement of a law or rule of law; it is an infringement of relationships between people. Restorative justice not only looks at the punishment, which is what criminal justice does, but also at the causes and consequences of a crime, and what could facilitate recovery. People are given the opportunity to speak out about what the conflict meant to them.

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"You get a pallet of needs, wants, expectations ... and then we can see: can the other party respond to this, can the context respond to it, can the judiciary respond? [...] How can the perpetrator assume their responsibility? What does the victim need in order to be able to function in society again?"

Mediator, Safe To Be 2019

Restorative justice gives victims an instrument through which they can actively participate in the search for a solution or recovery. They are able to speak out in a safe space, under the guidance of a professional mediator. If all parties involved give their consent, a link can be made with the judicial system. In that case, an agreement is drawn up and signed by the people involved. The content of this agreement depends on what the parties want to communicate. This could be a financial arrangement, a specific message or outcome of the mediation, or simply a statement that a mediation procedure has taken place. This option gives parties a potential platform to make their voice heard by the judge and make a direct addition to the judicial file. The legislation states that the judge must consider this feedback, although they remain autonomous in their judgment.

The voluntary nature of restorative mediation is of important value. This means that each party is free to accept or refuse the request to enter into a restorative procedure. This also means that many procedures never get started, or that people drop out in the middle of the mediation process. It also means that proceedings can be initiated at any time during criminal proceedings and can be filed by anyone involved.

"Sometimes feelings of guilt or insight come later. This can happen with a suspect or a convict who says look, I have caused people suffering and I want to take responsibility. Or on the other hand, a victim who says I did not want to mediate before the verdict because I did not want that mediation to play in his favour. But now, afterwards, I am open to it."

Anonymous, Safe To Be 2019

ALTERNATIVE MEASURES

Below is a brief summary of the various alternative measures available in Belgium. The circular COL 13/2013 plays an important role in everything to do with the legal status of hate crimes. It was published as a framework for law enforcement and the judicial services on working with hate crimes. The circular mentions options in regards to alternative measures at the level of the Public Prosecution Service; mediation, amicable settlement and praetorian probation.

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More information on each of these points can be found in Paul Borghs' article "Hate Crimes, Hate Speech, and Restorative Justice: the Belgian Experience".

- Alternative measures at the level of the public prosecution service
 - Mediation

A voluntary procedure between the suspect/perpetrator and victim. Aside from mediation in itself, it may involve measures such as therapy or performing a service. See Paul Borghs' article in this handbook for more information about mediation.

- Amicable settlement

Criminal prosecution can be avoided by means of a financial compensation proposed by the public prosecutor. This is less suitable for hate crimes, however, as the underlying motivation of the crime is not addressed.

- Praetorian probation

The public prosecutor reprimands the perpetrator and files the case without consequences. The reprimand is meant as a wake-up call.

- Alternative sanctions at the level of the courts
 - Community service

The convict performs a task at a government agency, a non-profit organisation or a foundation. Since 2019, the judge has had the option of relating the community service to the crime committed, which may lead to the sanction having an educational value.

- Autonomous probation penalty

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The convict is held to set conditions for a certain period time period. Since 2019, the judge has had the option of relating these conditions to the crime committed, which may lead to the sanction having an educational value.

- Learning measures

Learning measures can only be imposed on minors as an autonomous punishment. For adults, however, the judge can impose learning measures as probation conditions. The public prosecutor can impose a learning measure in the context of mediation and measures.

- Trial suspension and trial postponement

In the event of a trial suspension or postponement, the judge can impose probation conditions on the person involved.

- Restorative mediation

Restorative mediation can be initiated by any party at any stage of the criminal procedure. The victim and perpetrator are brought into contact with each other, and facilitated by a professional mediator (like Moderator). This can have a restorative effect on the victim and an educational effect on the perpetrator. The outcome of the mediation is not automatically communicated back to the court, unless both parties agree. The judge then has the option of taking this into account in their judgment. See above for more information about mediation.

- Youth sanction law

Before reverting to a juvenile judge, the prosecution will usually recommend a mediation procedure for minors (see Parcours). If all parties accept mediation, this can lead to a lapse of the criminal action.

APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIMES

"When restorative mediation is successful, the other person doesn't see a pathetic victim anymore or a monstrous perpetrator; instead they see that this is a colleague, a son, a good parent with a troubled past."

Anonymous, Safe To Be 2019

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WHAT IS A HATE CRIME?

DEFINITION

A hate crime is a criminal offence that is motivated by prejudice towards particular groups of people. They are "message crimes" intended to spread fear and feelings of vulnerability among targeted communities. As such, they not only affect individuals directly, but the entire social group the individual belongs to. Certain communities are disproportionately targeted because of their race, belief, sexual orientation, gender, national origin, language, disability, social status or other characteristics.

Hate crimes always consist of two elements: a criminal offence and a bias motive.

Criminal offence: the act that is committed must constitute an offence under ordinary criminal law.

Bias motive: the act is committed because of a prejudicial bias against a particular societal group. This motive does not need to involve extreme "hatred" towards the victim. Most hate crimes are driven more by everyday feelings such as hostility, resentment or jealousy towards the target group.

To be recognised as a hate crime by law, the bias must be directed towards a victim because they possess a "protected characteristic".

BELGIAN CRIMINAL CODE ON HATE CRIMES

The Belgian legislation on hate crimes, hate messages and press crimes is complicated. Additionally, instinctive and legal definitions of a hate crime do not always coincide: something might feel like a hate crime while it is actually not a hate crime according to the letter of the law.

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The Belgian Penal Code does not provide a definition of hate crimes. However, it does include several penalty-enhancement provisions for specific offences if the motive for a crime is hatred, contempt or hostility towards a person because of a protected characteristic such as sexual orientation.

This is also commonly referred to as the "reprehensible motive" and is found in these sections of the Code:

- Indecent assault and rape
- Manslaughter and intentional inflicting of bodily harm
- Negligence
- Deprivation of liberty and trespassing
- Stalking
- Slander, defamation and desecration
- Arson
- Destruction of buildings, trains, ships, machinery
- Destruction of, or damage to edibles, merchandise or other movable property
- Graffiti and damage to immovable property

All of these offences include sexual orientation as a protected characteristic. Crimes in this list that are committed with a bias motive will therefore be eligible for penalty enhancement.

"Manslaughter and intentional inflicting of bodily harm" is the only article that deviates from the others:

- It's the only offence that includes the protected characteristic "sex change"
- It's the only offence in which a penalty enhancement has to be applied. In all other cases, it is in the hands of the judge.

This means that a transphobic motive will only be eligible for penalty enhancement in manslaughter and the intentional inflicting of bodily harm. In February 2020, "sex characteristics" was included in the penal law. Intersex people are as of now explicitly protected against discrimination by Belgian legislation.

In 2014, the notion of direct discrimination on the basis of gender was expanded to include gender identity and gender expression (in the anti-discrimination law). However, the Penal Code has not been amended. Apart from Art. 405 quater – manslaughter and intentional inflicting of bodily harm – the Penal Code does not take into account transphobic motives.

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RESTORATIVE JUSTICE AND ALTERNATIVE MEASURES IN HATE CRIMES

The underlying idea of applying a penalty enhancement to hate crimes is that these crimes invoke a ripple effect. Due to the bias motive towards an entire societal group, not only is there a direct victim, but with them everyone who shares the same characteristic becomes an indirect victim as well. For that reason, hate crimes are often referred to as "message crimes" in that they carry a societal message of exclusion. The aggravated circumstance signals to society that prejudice-motivated hatred is not accepted on a societal level. Mediation processes can be a powerful tool in this.

Despite the broad legal framework around restorative justice and alternative sanctions on the one hand, and the high number of hate crimes (although often underreported) on the other, few to no hate crimes find their way to mediation and alternative sanctions, as the quote below shows:

"None of my colleagues has dealt with a hate crime so far, apart from one colleague in Limburg. So it really is a minority and it is bizarre. Because it fits in perfectly with what we do."

Mediator, Safe To Be Interviews

A possible reason for this could be that the victim prefers to forget what happened and simply moves on with their life. The "Call It Hate" investigation showed that this is an important reason for victims not to report a hate crime to the police. In addition, being confronted with a person who showed hatred or hostility is not

self-evident. As with all crimes, it depends on the parties involved and their willingness or ability to participate. The difference in why crimes that weren't inspired by hatred or hostility find their way to restorative justice, and hate crimes don't, may well lie here: in the willingness of the parties involved. Being prepared to participate in a recovery process is not possible for every victim.

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However, the mediators interviewed counter this by saying that fear and feelings of being targeted are always present in a victim, regardless of the type of crime, as these quotes from mediators show us:

"If people are afraid because they have no image of the perpetrator, they might start seeing him everywhere. It can be important to get a face. Not every man is a threat, for example."

Mediator, Safe To Be 2019

"You have people who realise they were just in the wrong place at the wrong time. And then there are those who do not want to know about mediation, who want maximum punishments, or who felt their honour was too violated."

Mediator, Safe To Be 2019

"It would make sense that the worse the victim was hurt, the less willingness to get involved in such a process, but it really depends on the victim."

Mediator, Safe To Be 2019

But it is not just about the willingness of the victim. There are also different types of perpetrators, and not all are susceptible to mediation.

"A boy had made anti-Semitic statements on his Facebook page. He had to take a course and a guided visit to the Dossin barracks [a Holocaust museum in Mechelen]. Afterwards, he wrote a letter to the victim apologising and saying: "I did not know all those things, I now have a different view of them."

Mediator, Safe To Be 2019

The interviewee indicated that the boy in question could be categorised as an “incidentalists”; a perpetrator who does not act with a mission or out of a fundamentalist philosophy (“convictors”), but from ignorance and without realising the consequences of their actions for the victim. Alternative trajectories can be much more effective with these types of offenders because of their educational value, where the more classic penalties – such as imprisonment and monetary fines – can have disproportionate consequences and a negative democratic effect.

“... The Justice Department is not going to work with someone who completely denies their wrongdoing [...] It starts with a sense of guilt, that you realise you have done something wrong and you have to repay society. If there is no realisation that you did something wrong, there is no basis.”

Mediator, Safe To Be 2019

Despite the fact that there is a need for a structural framework (as stated above), it is important to assess the specifics of the case and the people involved. Categorising people is not always possible or even desirable. A policy framework can provide direction, but it is still necessary to work according to the individual needs and specifics of the situation.

RESTORATIVE JUSTICE IN ANTI-LGBTI HATE CRIMES

The discriminatory motive is the main characteristic in a crime motivated by hate. Wherever possible, efforts should be made to improve the prejudiced attitudes the perpetrator has towards the societal group they were targeting. Alternative sanctions can serve an educational purpose to address these attitudes (e.g. by working at an organisation or following a course related to the crime).

We should continue investigating whether restorative justice could be applied in cases of hate crimes, hate messages or discrimination. Provided certain conditions are fulfilled, victim-offender mediation can have a better long-term effect than a mere punishment or a monetary fine. Although a recovery-oriented approach will not always be possible, it should at least be presented as a viable option for the people involved.

Awareness needs to be raised about restorative justice and alternative measures in justice departments and law enforcement agencies, as well as in broader society. Sufficient knowledge about the matter should be made available so that each party involved can assess for themselves which practice or method has the most likelihood of succeeding.

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All interviewees in the 2019 Safe To Be research phase indicated that they had little to no knowledge of the application of restorative justice for hate crimes. The reasons for this are manifold, and can partly be attributed to the large number of unreported cases. Since organisations aren't funded to take up extrajudicial cases and victims are often not aware that the option of restorative justice exists, there aren't many hate crime cases that reach the mediation services.

A mediator mentioned a case in which someone on an LGBT dating site was targeted and became the victim of a robbery. This case had reached the police, but the victim was unwilling to cooperate in a recovery process because they didn't feel comfortable coming out again.

In contrast, another mediator gave an example of a successful mediation procedure following online transphobic verbal abuse and death threats. Both the perpetrator and victim accepted the mediation proposed by the police. The mediator tells:

"The victim told me she felt the man should be aware of the consequences of his actions. Mediation gave her the opportunity to say what exactly affected her and why she lodged a complaint. I then brought those people together and they talked a lot. She indicated that she did this [the mediation] not for herself, but for the trans community in which the suicide numbers are high. The man immediately apologised and said, "I have no problem with you at all. I don't know why I did that to you." Here were two people who seemed to be very far apart but they managed to find common ground [...] If these people ran into each other on the street now, that wouldn't be a problem."

Anonymous, Safe To Be Interviews, 2019

Finally, several interviewees pointed out the strength of the organised LGBTI community in Flanders. Organisations like çavaria can offer support in mediation processes or as a guide during alternative sanctions. A young boy who had attacked a gay man in the streets went through an alternative process in which he had to attend an LGBTI conference. The conference was dedicated to a gay man who was murdered in 2012 (Ihsane Jarfi). The boy was given the chance to talk to the father of the murdered man at the conference, meet LGBTI activists and participate in awareness-raising workshops. He wrote a report afterwards that showed how the experience completely changed his perspective.

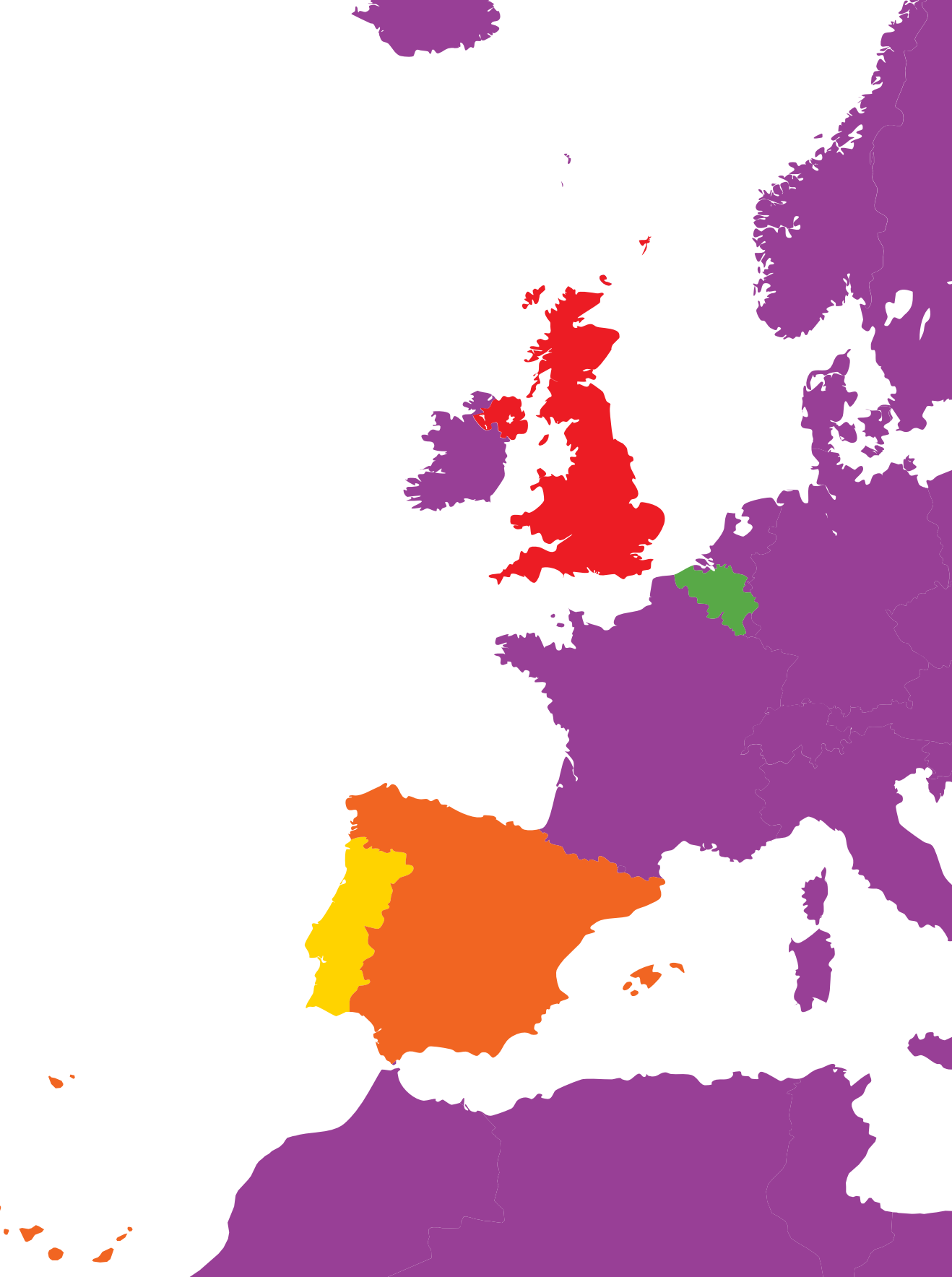
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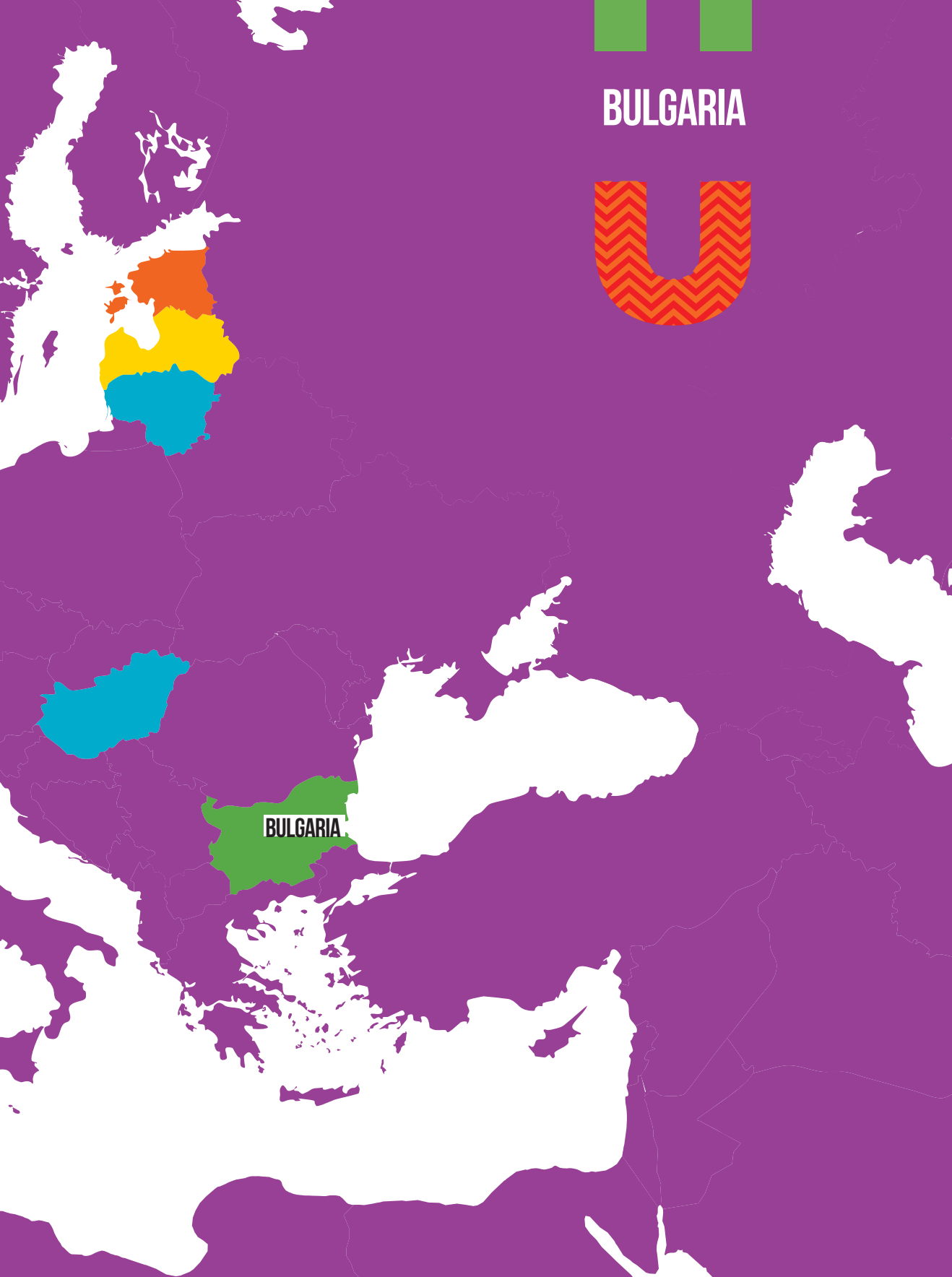
In conclusion, the individual needs of those involved must always be considered. Interviewees stated that the hate motive in itself should not be a stumbling block to start a restorative procedure, as long as there is willingness and/or feelings of guilt within the perpetrator, and enough professionalism to take care of the victim's needs.

POLICY ADVICE

The policy advice below was provided by interviewees in the research phase of Safe To Be (2019). There are a number of consistencies with the policy advice given by Paul Borghs in his article "Hate Crimes, Hate Speech, and Restorative Justice: the Belgian Experience", which can be consulted above.

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- Set up a structural framework that takes into account different types of offenders, victim care needs and organisational capacity in society.
 - Release some of the current pressure on organisations that provide mediation and restorative justice by increasing their subsidies. Look into the potential of non-profit organisations specialised in certain topics – like sexual orientation and gender identity – and support them in setting up a restorative justice service.
 - Provisions for aftercare are non-existent in current legislation. Mediators can take matters into their own hands and call up the people involved in the restorative process, but it is left up to their own initiative and dedication. Recidivism in perpetrators could be noticed by the police services, but the link is not always made.
 - Create a fund for extrajudicial cases. This could provide relief for people who – for whatever reason – can't report to the police but would benefit from a restorative process. As an additional benefit, this could give more insight into the dark number of underreporting in hate crime cases, both anti-LGBTI and otherwise.





BULGARIA



BULGARIA

BULGARIA

RESTORATIVE JUSTICE IN BULGARIA

BY ELENA EVSTATIEVA

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This text is a short description of restorative practices in Bulgaria and in this sense of the development of restorative thinking. Bearing in mind that there is still no sustainable community and a clear core in which to collect data and conduct in-depth research, it should be seen solely as the author's opinion based on their personal experience and practice, with all relevant limitations.

EVOLUTION OF RESTORATIVE JUSTICE IN BULGARIA

As early as the 1990s, Restorative Justice was of interest to several professionals and organizations working independently and in isolation from each other, associated mainly with colleagues outside the country. From then until now, the development of restorative thinking in Bulgaria can be divided into three main stages:

1. Stage of accumulation of knowledge and search for new criminal policies.

Sporadically, projects were implemented by various organizations, which, however, did not lead to significant legislative changes. At this stage, the context in which those interested in RJ worked was characterised by investment in the judiciary and the desire to reorganise and develop it. A number of legislative changes were made relating to the harmonisation of national legislation with European legislation; new, more effective policies were sought both in the field of criminal proceedings and in the field of civil procedure as well as all spheres of social interaction. Restorative justice was perceived as an exotic practice and a way of thinking that was inapplicable in the national context. The positive result of this period was the deepening of knowledge about the philosophy of RJ among

the interested teams and their professionalisation in the field. At this stage, two main centres emerged: Neofit Rilski South-West University, and a few years later – PF Bulgaria. In the first one, Prof Dr Dobrinka Chankova taught and created a circle of young lawyers who were researchers in the field. The first publications in Bulgarian on restorative justice had long been only by her. Graduate and PhD students around her later began to publish their own analyses and research in the field of RJ. Neofit Rilski South-West University was the university where the presentation of RJ was permanently present in the curriculum, although as a part of the criminal justice and procedure courses. PF Bulgaria, a Community for Conciliation Justice, introduced restorative practices in its work with inmates from Sofia Prison and Vratsa Prison, which ten years later became one of the prototypes of the European restorative communities. Back in 1999, PF Bulgaria hosted the PFI World Congress, where one of the main topics was reconciliation. Then, for the first time, Bulgarian policymakers, ministers and experts had the opportunity to hear about RJ and its application in criminal justice and in serving a prison sentence.

In 2005, the Mediation Act was adopted, and this formed high expectations, which have been assessed today by many lawyers as unrealistic. The legislator failed to connect mediation with Criminal Justice, although Art. 3 of the Mediation Act reads, "Mediation is also conducted in cases provided for in the Criminal Procedure Code". It was as if an attempt was made to introduce RJ through a controversial restorative practice instead of doing this through the "gateway" of RJ values and principles. The issues that were discussed then were related more to the systemic problems of the judiciary, which were to be solved by this law, rather than problematising the really important problems and needs of the users of the law.

In the same year, another major change in the legislation was made – the introduction of the probation measure, which expanded the opportunities for community participation in the implementation of corrective and punitive measures. Here, too, there were expectations among professionals and the NGO sector that these would lead to more effective implementation of a corrective policy and a reduction in the sense of injustice among those affected by criminal justice, as well as overcoming the isolation of convicts and their families. For a long time, however, the effect recognised by the public and

experts was reduced to a decrease in the number of people sentenced to serve time in prison and a greater scope and follow-up of criminal offenders. To this day, probation is seen as an opportunity to distance a person from crime, but with a lack of sufficient proactiveness and community involvement. One of the challenges that still seems insurmountable is its inclusion in criminal measures and its integration into the country's penitentiary system. However, more and more specialists see an opportunity to introduce restorative practices.

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2. Rethinking criminal policies and expanding the circle of professionals interested in restorative justice.

After the adoption of the Mediation Act, a considerable resource was allocated for promotion of mediation. A new professional guild was created of mediators. To date, 2,530 mediators and 47 training organizations have been registered in the Unified Register of Mediators with the Ministry of Justice. The positive effect of the adoption of this law (apart from creating an opportunity for the out-of-court settlement of disputes) was the deeper interest provoked among a small core of magistrates, lawyers and social scientists. Due to this, Nils Christie visited Bulgaria in 2014 and his works were published in Bulgarian, which visibly influenced the development of restorative thinking among lawyers. During this period, a Council for Restorative Justice was established under the Minister of Justice Hristo Ivanov (Minister from 2014 to 2017), which ceased to function shortly after his resignation.

In these two stages of development and promotion of RJ in Bulgaria (of pioneering and solitary research and practice, and subsequent professionalisation and spread) there's another segment, which we often miss in the description of the processes, but is extremely important nevertheless: the development of organizations advocating for victims. The important result is that victims of crime were gradually beginning to emerge from the "blind spot" of society and state, and public support was being sought for their care – in a common and more comprehensive definition and behaviour of institutions to victims of crime. The latter also happened under external pressure, thanks to Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

3. Development of a community of professionals with restorative thinking and application of restorative practices within the existing legislation.

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This period differs in that the pursuit of association and the emergence of a community of professionals applying and developing restorative practices begins, despite the lack of a consolidating norm. Some of them are among the pioneers in the field in Bulgaria, others are professionals and magistrates who contributed to the publication of Nils Christie's books in Bulgarian, and others again are very young colleagues or those who have intuitively and independently reached restorative thinking, through other scientific fields or their own practice.

In 2016, the more active celebration of the International Restorative Justice Week began with meetings between various professionals, students, discussions and book presentations. In 2016, a blog for restorative justice in Bulgaria was launched – www.restorativejusticebg.com – where materials in Bulgarian, resources and national practice are being published. The publication of literature related to restorative justice has continued – *The Little Books of Restorative Justice* by H. Zehr in 2018 and *The Little Book of Circle Processes* by Kay Pranis in 2019.

2018 marked the beginning of annual conferences on restorative justice. The conferences are organised by an independent initiative committee, and its members have changed in the three years. The aim of the conferences is to create an opportunity for a meeting between all stakeholders, and to present practice, achievements and research. Speakers from Bulgaria and various countries and the EFRJ are invited. The conferences present practice in various fields, including litigation, education and social services.

NATIONAL DEFINITION AND LEGISLATION

A common definition of restorative justice in the national legislation has not been adopted. It can be said that the different groups of specialists adopt the definitions that reach them through the transfer of knowledge from projects and their participation in international professional networks, as well as the literature available in Bulgarian. Only in the last two years, thanks to Recommendation CM/Rec(2018)8 of the Committee of Ministers to the Member States concerning restorative justice in criminal matters (Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies), standardisation has begun in the understanding of restorative justice, including among police officers.

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In these provisionally outlined three periods of accumulation of knowledge, search and rethinking of criminal policies, and development of restorative thinking and practice by various organizations, there have been no significant legislative changes to drive and support a widespread application of restorative practices. Moreover, experience with the Mediation Act has shown that top-down processes are not particularly successful. Repeated attempts have been made for legislative changes, including those related to the so-called juvenile justice. So far, without success.

There are no clear statistics on how many of the total number of court cases (mostly in civil disputes) reach mediation. According to unofficial data, this is about 1% of all cases. In 2016, The Ombudsman of Bulgaria sent a recommendation to the Minister of Justice to take steps for the introduction of mandatory mediation. On 25 September 2019, a round table dedicated to the topic of "Mandatory Mediation" was held, hosted by the Supreme Bar Council. Again, the question of the small number of cases and their scope and the exclusion of criminal cases was raised. As can be seen from the Ombudsman's recommendation, it also did not include mediation in criminal cases, although the Mediation Act referred to criminal proceedings. The last such attempt to create a law based on the principles and values of RJ was the draft law on diversion from criminal proceedings and imposition of educational measures on minors, which was published for public discussion on 27 September 2016. The draft law was stopped due to numerous objections and a lack of agreement in the public discussion.

However, the topic of "restorative justice" entered the Strategy for reform and development of the judicial system of the Ministry of Justice of Bulgaria. Although RJ was one of the blank fields during the report on the implementation of the Strategy in June 2019, its inclusion in the document is a huge step. In 2019 and 2020, the NIJ organised two online trainings for magistrates and judicial officers in restorative justice. The adoption of the CoE Recommendation cited above gave a new impetus and a sound framework for both the natural processes of development of a community of RJ professionals in Bulgaria and for a healthy impact on government policies in this direction. On 7 May 2020, the Council of Ministers of the Republic of Bulgaria adopted the new concept for criminal policy 2020–2025. Here I quote a part of the message of the press service of the Council of Ministers, which illustrates the thinking about RJ. "The principles of the current concept of criminal policy are in line with the fundamental provisions of modern criminal law, with the leading ones among them being: argumentation, compatibility and consistency of legislative changes; proportionality of penalties; increasing the participation of victims in criminal proceedings and promoting restorative justice; compliance of the legal framework with the standards obligatory for Bulgaria according to the law of the European Union and the international law in the criminal field."

In confirmation of the last two came a public procurement procedure, again of the Ministry of Justice of the Republic of Bulgaria, dated 25 June 2020, (this is at least the second such notice in the last 2 years) for "Providing assistance to victims of crimes under Art. 9 and Art. 11, para. 3 of the Assistance and Financial Compensation to Victims of Crimes Act by financing victim support organizations in appellate judicial districts in the Republic of Bulgaria".

APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIMES

WHAT IS A HATE CRIME?

In Bulgaria, there are no specialised programmes on implementing RJ practices in cases of hate crimes. Furthermore, anti-LGBTI hate crimes are invisible in national legislation. While Bulgarian law recognises some hate crimes, the list of motivations constituting aggravating circumstances does not include sexual orientation, gender identity or gender expression. If reported, hate crimes targeting LGBTI people are treated as hooliganism. LGBT victims' rights are not assured: the transposition of the Victims' Rights Directive has been insensitive to the support and protection needs of this group. The Penal Code (Penal Code of the Republic of Bulgaria, 1968, amended 2017) proscribes hate crimes in Chapter III: Crimes against the Rights of the Citizens. In the absence of a definition of "hate crime", the term which is used is "crimes against the rights of citizens". There is no general penalty enhancement for hate crimes although the law criminalises some deeds motivated by hatred, or instigating hatred towards people based on race, ethnicity or nationality, religious or political belief. These are as follows:

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- Article 162 imposes legal sanctions on the incitement and proselytising of discrimination, violence and hatred based on race, nationality or ethnicity, by means of speech, print or other mass media.
- Paragraph 2 of Article 162 penalises any deeds of violence or damage to the property of someone, based on race, nationality, ethnicity, religion or political beliefs.
- Article 163 criminalises participation in crowds that attack other groups of the population, based on their race, nationality or ethnicity.
- Articles 164 to 166 criminalise actions against religious freedoms and actions that incite hatred on the basis of religion.

NATIONAL HURDLES

Bulgaria is heading in the right direction in the implementation of restorative justice, but there are still many barriers on the way. Here we list the main ones:

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- Lack of a consolidating norm in national legislation on RJ practices.
- The introduction of a new professional figure in the person of the facilitator and related issues: is this the same as a mediator, what is their role, is it a matter of translation or are they really a different figure. Especially in our reality, where for too long and among a large number of specialists, mediation and RJ have been perceived as identical. It is not clear how the legislator will deal with this issue. Would they consider the latest recommendations of the Council of Europe for the introduction of RJ in criminal proceedings and, if so, how?
- Lack of national infrastructure to support victims of crime, or one that is currently being built.
- Lack of national infrastructure for the implementation of restorative practices.
- Poor knowledge of the philosophy of RJ among policymakers, which makes them subject to the general fear that RJ protects the offender, thus depriving them of strong arguments. It makes them timid, both in promoting and introducing legislation, which is restorative in spirit.
- Public attitudes clearly manifested in every criminal act that has entered the media and the answer given by political decision-makers – desire to increase restrictions and punishment.

The latter, together with the historical accumulation, the “failures” of the pioneers, the enthusiasm of those attracted later and the publication of literature in Bulgarian, promotes and stimulates the desire for association and meetings between professionals. The challenges that this fragile community still seems to face are the same as in the first period, but the attitudes of the legislature, the judiciary and the executive have changed significantly since the beginning of this process. One of the specific developments of communities and society is that they are far more emancipated than in the 1990s and are increasingly self-organising.

EXPERIENCES AND GOOD PRACTICES

Over the years, in the course of development of restorative justice in Bulgaria, several practices have been developed that are significantly sustainable in their application, and some of them are still developing today.

— 2003–2016

Restorative communities in the prisons in Sofia and Vratsa by PF Bulgaria. The experience of participants in the Restoration Community is in two stages: 1) External programme – 4 months, which is in preparation for accommodation in the Adaptation Environment Centre; 2) Stay in the centre for a minimum of 6 and a maximum of 18 months, depending on the sentence. From 2003 to 2005, 72 convicts went through the Adaptation Environment programme: 24 of them going through both stages and 48 through the external programme of the Adaptation Environment Centre. Of the convicts who went through the programme in this period, there is information for recidivism in 2 persons, both of whom did not go through the full programme. The organization is currently preparing to launch work on the STP programme, a quasi-restorative programme in detention facilities.

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— 2010–2013

PF Bulgaria and Caritas Ruse created a model of social service for children with deviant and delinquent behaviour based entirely on the principles of RJ and its practices. The total number of children covered in the short and long term in both cities exceeds 600 children.

— 2005

SAPI piloted FGC as a practice to support children at risk and help their families care for them. After a long break, since 2017 SAPI has resumed its work on restorative practices, developing work with child victims of crime and their families. SAPI are among the pioneers of restorative justice, and they piloted a model for FGC in 2005–2006. Today, they are again in the field of RJ with mediation between child victims of crime and perpetrators;

— 2015–2018

IGA – Pazardzhik developed a service for sex offenders based on support circles for their reintegration into the community. The model was presented at the first national RJ conference in 2018

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- Since 2013, the Tulip Foundation has been developing a model of family group conferences for working with children at risk in the community, with the main partners being municipalities, schools and the Local Commissions for Combating Juvenile Delinquency. Today, the Tulip Foundation works to modify its good practice for cases of convicted persons. The Tulip Foundation (2012–2014) supported and piloted in a few municipalities, through various organizations, a model of FGC for the prevention and strengthening of parental capacity with the aim of deinstitutionalisation and the subsequent criminalisation of children at risk.

In a non-representative study presented at the conference "Geography of Restorative Justice in Bulgaria", the map of restorative practices showed the following:

RESOURCES AS AT JUNE 2019

TRANSFER OF PRACTICE AND KNOWLEDGE FROM:

- USA and Europe
- Adapted and recognizable Bulgarian experience
- Main areas of transfer: victim-offender mediation, FGC, offender support circles and restorative communities

RELATIVE SUSTAINABILITY OF THE PRACTICE: 54%

TRAININGS OF SPECIALISTS FROM DIFFERENT INSTITUTIONS AND COMMUNITIES

(police, prosecution, General Directorate "Execution of Sentences", judiciary, mediators, schools, legal community, NGOs, other)

- Basic training of specialists
 - introduction to the philosophy of RJ – 230.

TYPE OF PRACTICE IN WHICH THE SPECIALISTS WERE TRAINED:

FGC – 130, Circle Process – 70, Victim-Offender Mediation – 120

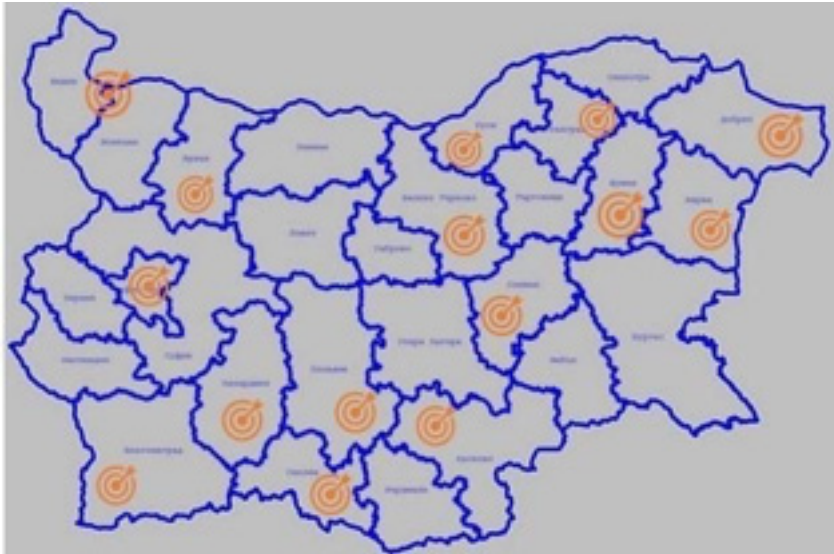
Available Bulgarian trainers – 12

STATE POLICY

- Lack of coherence between action plan and developed policies
- Low priority of the topic
- Lack of joint action between experts and decision makers
- The question is still standing as to what extent and how decision-makers "recognize" the available expertise as such.

Territorial scope of conducted projects and trainings

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CONCLUSION AND POLICY ADVICE

The tasks before RJ advocates again seem to be mainly related to the promotion of the philosophy and knowledge of RJ. After all, one of the most powerful factors turned out to be the translation into Bulgarian of texts fundamental to the philosophy of RJ, the creation of texts by Bulgarian specialists and practitioners, research, and the teaching of academic figures.

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One of the results of the annual events and conferences is shedding light on a phenomenon whose dimensions cannot yet be clearly outlined: an intuitive and fragmentary integration of restorative practices by individual organizations and civic groups, without, however, self-determining and placing themselves in the field of RJ. Examples of this are: movement for democratic education, FGC with the aim of strengthening the family system (although the latter define themselves as part of RJ), circle processes in various innovative schools. Achievements and good results are described through various social sciences and concepts, depending on the professional training of those who introduce them, without referring to RJ. The roots of this phenomenon can be found in the healthy forces of a society that is constantly looking for approaches to self-preservation and healing, and naturally comes to "repair the damage" in a humane approach and one that is fundamental to our healthy relationships – the "restorative" one. By reproducing it without describing and theorising it through its inherent philosophy. Another strength of this phenomenon is that it develops from the bottom up and in this sense is more stable and well placed. These movements stemming from civic initiatives and groups demonstrate an emancipation of civil society and a change of attitude. Taking responsibility for the processes and restorative thinking, which is an extremely good prerequisite.

The "failure" over the years to create a "consolidating norm" for RJ in national legislation should not necessarily be seen as a weakness, but rather as a healthy signal from communities of a lack of preparedness in public attitudes and insufficient expertise in the first stages of development of restorative thinking in Bulgaria.

The title of the last national conference in June 2020 is a clear sign of the trend that is emerging in professional thinking in the field. "Restorative justice here and now: Opportunities for Restorative Practices in the Current Legal Framework and Meeting the Challenges of COVID-19". Practice is evolving and getting ahead of legislative changes. Opportunities are being sought in the existing legal framework, irrespective of the state's readiness to take steps in this direction. This is, to some extent, the natural course of the process and also gives a better perspective to the legislator – to undertake reforms with the better preparedness of experts and the wider community.

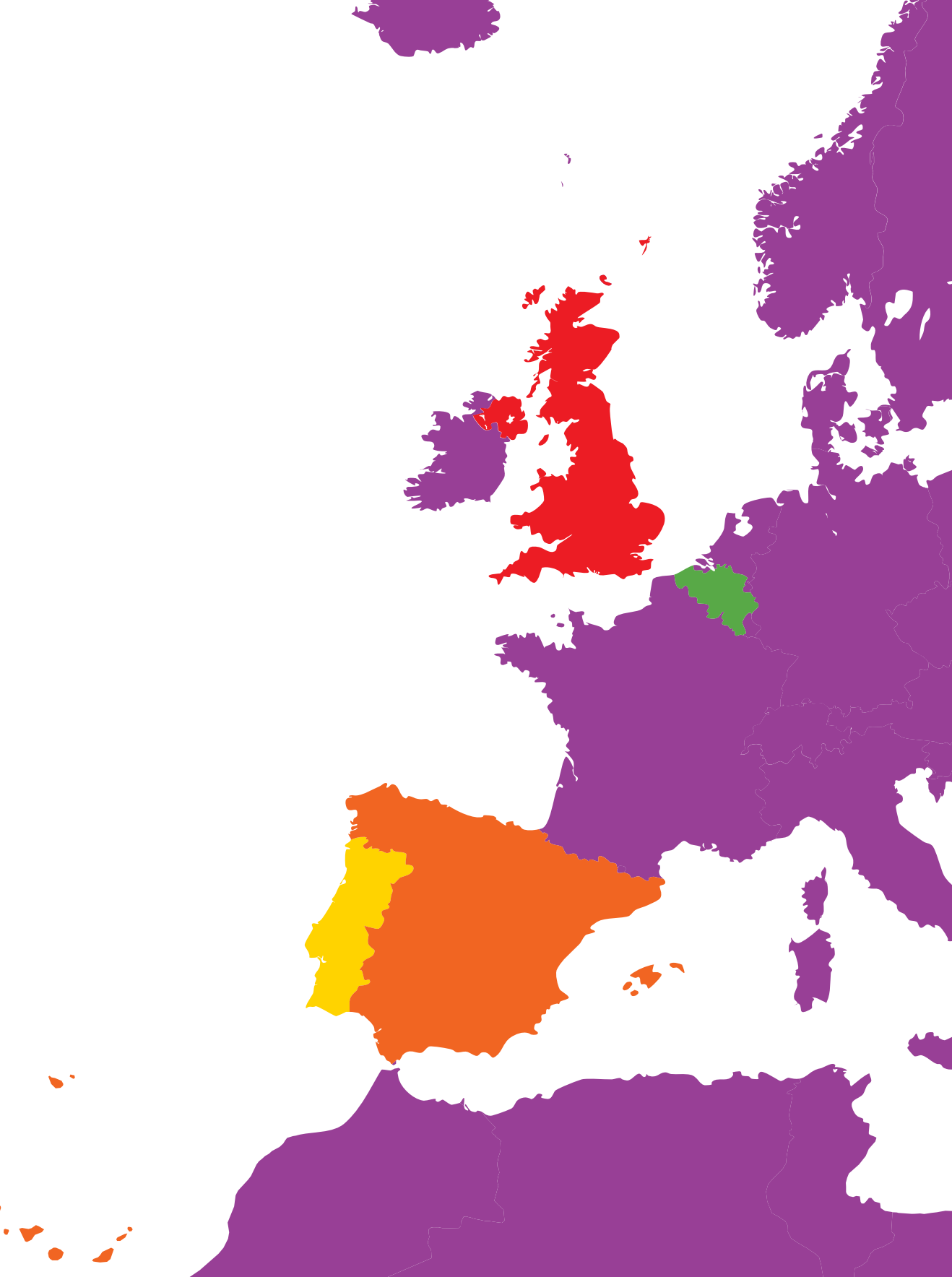
Providing more opportunities for meetings and a broad dialogue between different professional groups and communities is an important step in hearing all the pros and cons, to understand the fears and the resulting resistance to RJ. Problematising RJ means problematising the interests of all those affected by crime, the community and society. Everyone should have a voice in this discussion.

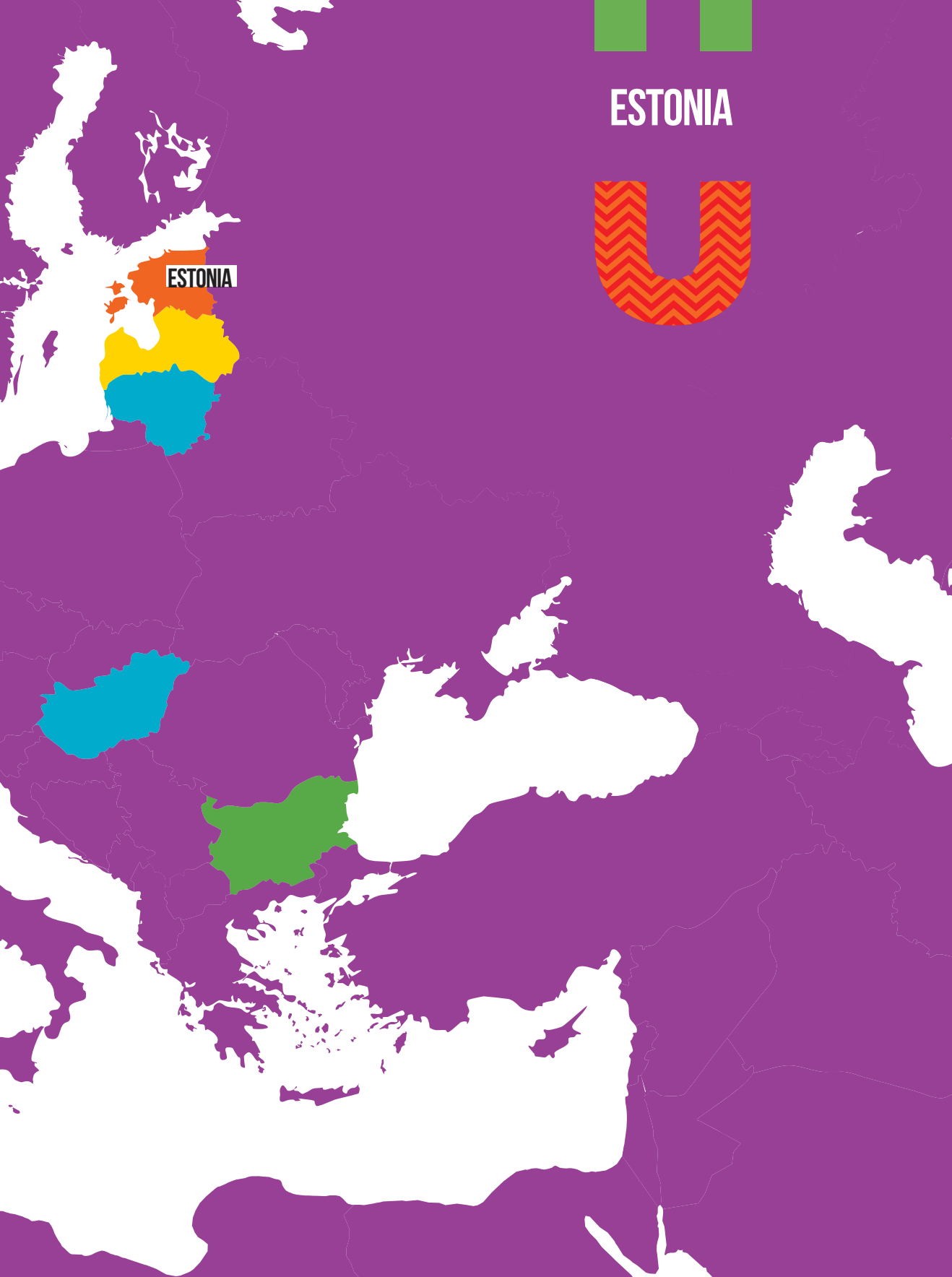
A study of the real picture of RJ, the experience gained over the years and the creation of a database with trained professionals would give a clearer picture of the state and hidden resources of knowledge and experience. It seems to me that this is the next important task in this movement.

A crucial step forward would be the development of a policy for building infrastructure – both of specialists applying restorative practices and of organizations supporting victims of crime.

Another important step Bulgaria needs to take in order to tackle anti-LGBTI hate crimes is to criminalise them. This can happen by including SOGIESC as protected characteristics in Art. 162 and 163 of Chapter III: Crimes against the Rights of the Citizens of the Penal Code. This would make it possible to create RJ programmes that focus on anti-LGBTI hate crime cases.

My personal experience, as one of the participants in the process described here, is that the adoption of CoE Recommendation CM/Rec(2018)8 of the Committee of Ministers to the Member States concerning restorative justice in criminal matters restored justice and corrected misunderstandings accumulated over the years the field of RJ. This also seems to be the "prince" who will kiss the "sleeping beauty" – the accumulated expertise and knowledge through projects, own research and numerous trainings – and will "awaken" her with an enabling environment, arguments and a clear framework achieved in the recommendations. The actions of political decision-makers in recent months have shown a readiness for more active work on the introduction and development of policies in support of restorative justice.





ESTONIA



ESTONIA



ESTONIA

COUNTRY STATISTICS

In terms of LGBTI rights, Estonia has taken some important steps forward over the past 5–6 years and scored 38% in its Rainbow Europe ranking in 2020. The societal attitudes towards LGBTI people are mixed rather than being mostly negative or positive. In June 2019 the Estonian Human Rights Centre published the results of an opinion survey that looked into people's attitudes towards LGBT topics in Estonia¹. Similar surveys were also conducted in 2012, 2014, 2017 and 2019 by an independent research company.

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The main finding of the latest survey was that, more than ever, respondents agree that gays and lesbians should be protected against discrimination in the workplace, education and access to goods and services. On 1 January 2016, the Registered Partnership Law, which had been passed by the Estonian Parliament in 2014, entered into force. According to the aforementioned survey, the opponents of the Registered Partnership Act are for the first time clearly in the minority; only 39% of Estonian residents do not support the Registered Partnership Act, while 49% support it.

At the same time, the 2019 survey also shows that attitudes in many areas have not changed significantly compared to the last survey. For example, 41% consider homosexuality totally or mostly acceptable, 52% respondents still consider homosexuality totally or mostly unacceptable, and 7% have no opinion. Compared to 2017, these numbers have remained exactly the same.

1 Estonia, Estonian Human Rights Centre and Turu-uuringute AS (2019), available at: <https://humanrights.ee/app/uploads/2019/06/2019-LGBT-aruanne.pdf>

RESTORATIVE JUSTICE

LEGISLATION, DEFINITION AND NATIONAL CONTEXT

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The general mindset in Estonia is still rather punitive. According to a study about traditional and alternative methods of punishment, imprisonment is often the most preferred of all types of punishment in Estonia². Nevertheless, the past 20 years have demonstrated the emergence of restorative justice, leading to several initiatives to develop the necessary infrastructure and human capacity.

There is no legal definition for restorative justice in Estonia; the concept is presented in national legislation under the term "Conciliation". Conciliation and mediation are often used synonymously in the Estonian context. The mediation service is a public service and mediation (conciliation) procedures are carried out as a public service offered by the Social Insurance Board. The funding of the conciliation procedure is guaranteed by the State budget. There is still room for discussion as to whether current mediation procedures are restorative in a genuine sense, but the mediation system is a step forward from the State in recognising the values that inspire the restorative justice approach.

First, the measure of victim-offender mediation (conciliation) was introduced in the Juvenile Sanctions Act in 1998, but restorative practices were first mentioned in 2000 when the Victim Support Act was discussed. In 2003, the Victim Support Act came into force and introduced change in state politics towards a more restorative approach. Conciliation between the victim and offender can be applied either as part of the criminal proceedings or independently from those proceedings.

2 Kokkuvõte Eesti elanike, politseinike, prokuröride ja kohtunike karistushinnangutest 2014 https://www.just.ee/sites/www.just.ee/files/karistushinnangud_kokkuvote_eesti_elanike_politseinike_prokuroride_ja_kohtunike_karistushinnangutest.pdf

CORRESPONDENCE TO CRIMINAL JUSTICE

In 2007, a section on conciliation in the Code of Criminal Procedure came into force, which allows for prosecutors and judges to refer a case to mediators and mediation. The consent of the suspect or accused and the victim is necessary for application of the conciliation procedure. The Prosecutor's Office or court will send the order on application of the conciliation procedure to the conciliator for organisation of the conciliation. A conciliator will then formalise the conciliation as a written conciliation agreement, and it must be signed by both the suspect or accused and the victim. If the mediation is successful, the criminal investigation will be terminated and there will be no criminal record for the perpetrator. If the perpetrator fails to perform the obligations imposed on him or her or commits another intentional criminal offence against the same victim within six months after termination of the proceedings, the criminal proceedings will be resumed.

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Termination of criminal proceedings on the basis of conciliation by numbers³:

2017 – 830 cases

2018 – 789 cases

2019 – 815 cases

3 Communication with the Ministry of Justice, 30 June 2020.

APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIMES

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There is no specific law prohibiting hate crimes and no specific restorative justice approach regarding LGBTI hate crimes. Hate-motivated criminal incidents are investigated and prosecuted under the general provisions of the Penal Code. The Code does include a provision prohibiting incitement of hatred, among other grounds based on sexual orientation. This prohibition does not work in practice – it has been applied on only a few occasions. The problem lies in the wording of the provision, according to which only such an incitement of hatred is punishable, which poses an immediate danger to the life, health or property of a person. In addition, Estonia has no legislation regarding enhanced penalties or aggravating factors for crimes against LGBTI people or any other group.

Despite missing specific law prohibiting hate crimes, in 2016 the state added the possibility for police officers to register reported hate crime cases. Also, the guiding instruction has been developed to assist police officers in recording the crime as a hate crime. The police registration system enables police officers to tick a special box, marking a case as a hate crime.

EXPERIENCES AND GOOD PRACTICES

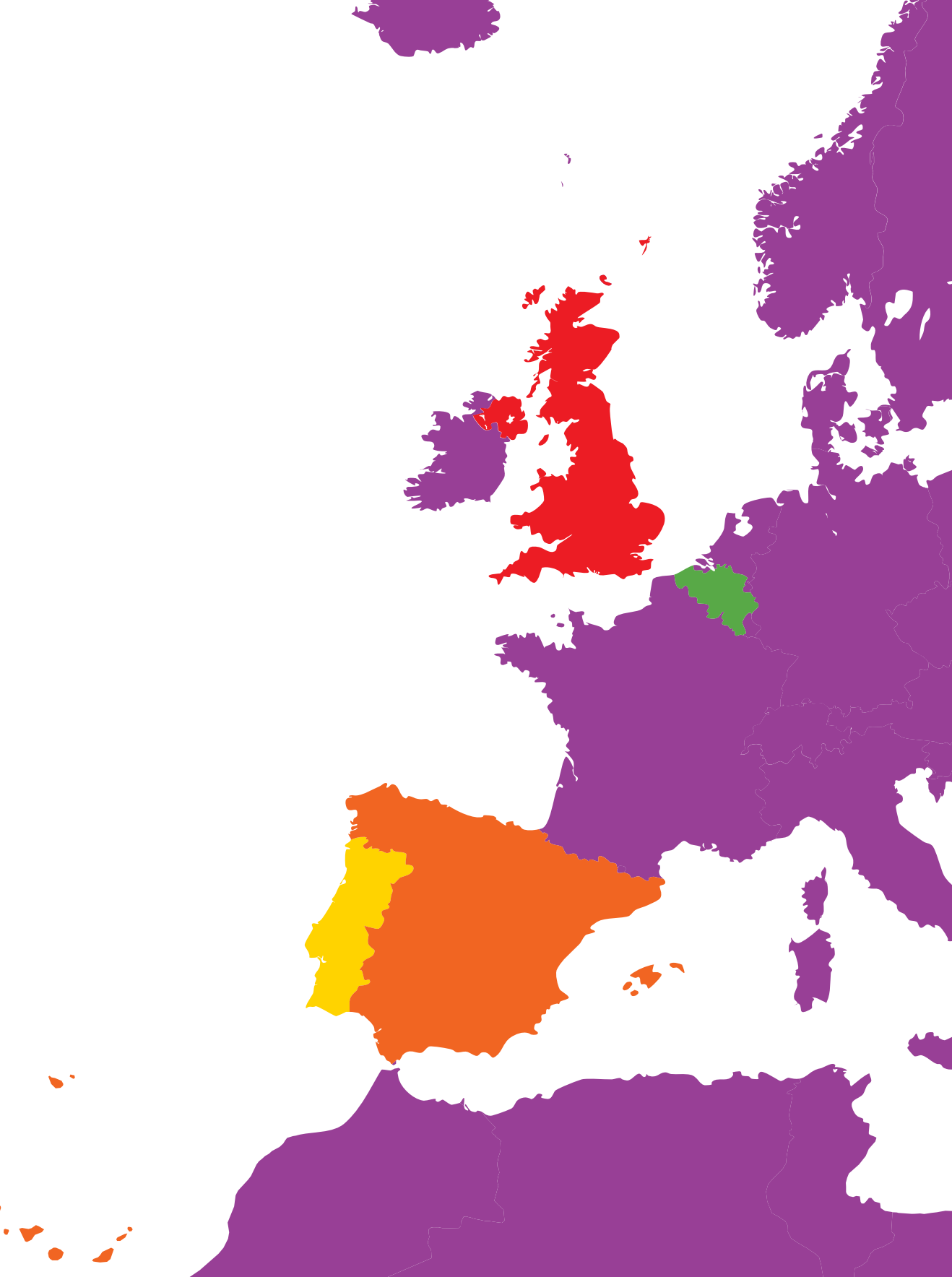
At the beginning of 2019 the Social Insurance Board launched a Restorative Justice volunteer programme. The aim of the programme is to find, involve and train future volunteers who will offer restorative meetings and circles facilitation. The duration of the training programme is around 80 hours and in total more than 80 future volunteers will be trained. The volunteers' knowledge and services will compliment current mediation (conciliation) procedures with an in-depth restorative justice approach.

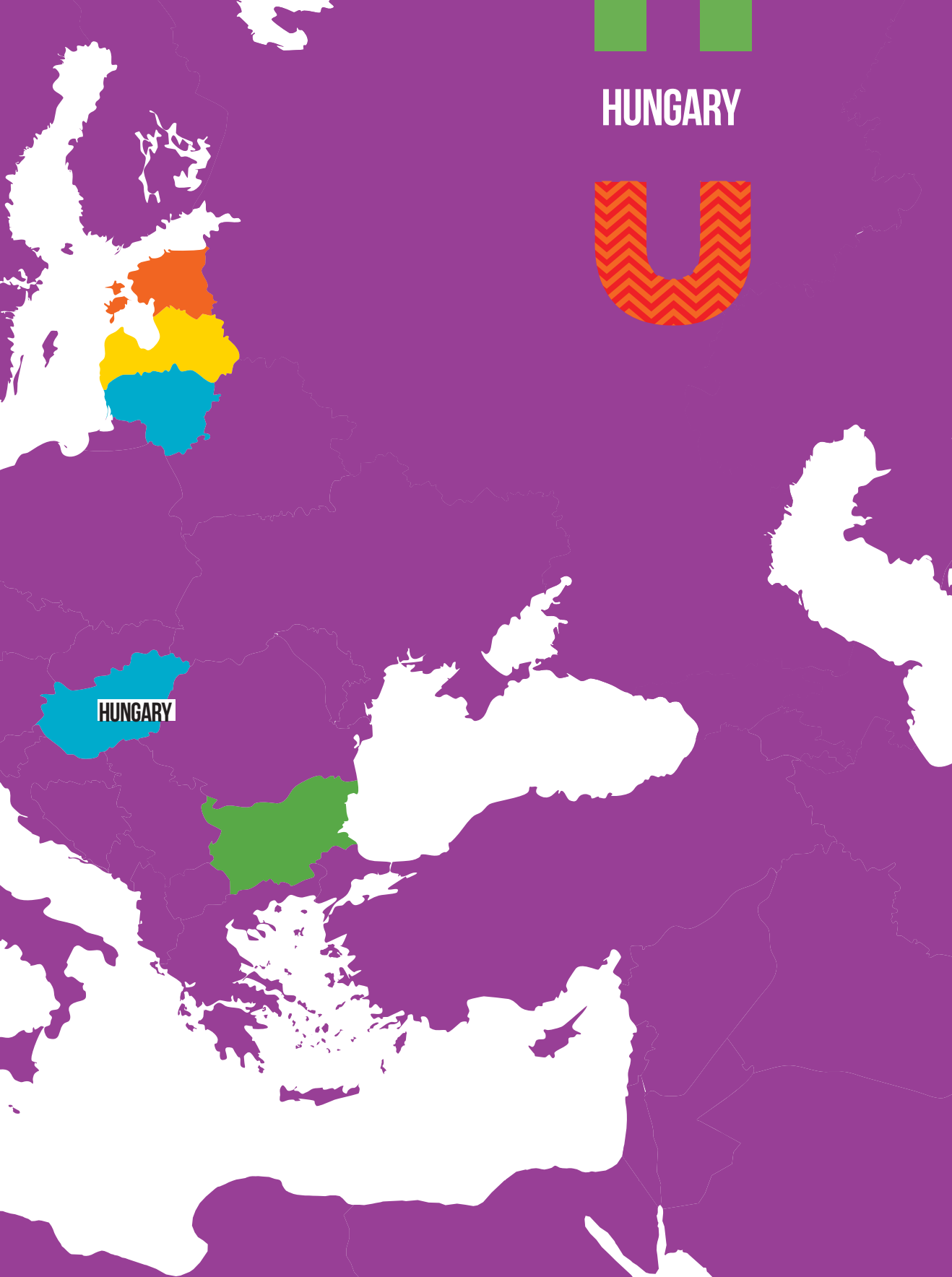
POLICY ADVICE

Since the legislative and practical development of restorative justice in Estonia is still at an early stage, the practitioners interviewed for this project stressed the need for discussion and the visibility of restorative justice. Some practitioners raised concerns about the actual intentions of offenders in taking part in restorative justice procedures, and some doubts were raised about the involvement of volunteers.

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The main policy advice for the State, Social Insurance Board and restorative justice practitioners is to continue to introduce and implement restorative justice and its processes. In addition, the recommendation is to consider implementing restorative practices beyond mediation (conciliation), i.e. police level, prosecutor's level, during court hearings and in prisons. These practices can be implemented alongside the criminal proceedings or pause proceedings depending on the need and the nature of the case.





HUNGARY



HUNGARY



HUNGARY

COUNTRY STATISTICS

The number of registered hate crimes in Hungary is very low. In 2019 only 37 cases including all grounds were registered nationally, of those 2 were based on sexual orientation and 2 on gender identity.¹ Underreporting of anti-LGBTI hate crimes is well documented by research in Hungary. A large-scale survey research in 2010 by the Institute of Sociology of the Hungarian Academy of Sciences and Háttér Society (1674 respondents) found that only 15% of those respondents who had been victims of violence due to their sexual orientation made an official report. Research by the Fundamental Rights Agency (FRA) published in 2019 (4059 Hungarian respondents) found that although 35% of LGBTI respondents in Hungary said they had been harassed due to being LGBTI the year before the survey, and 11% had been physically or sexually attacked in the 5 years preceding the research, only 5% went to the police to report the last incident of physical or sexual attacks. Due to the low number of hate crime cases registered, statistical analysis on the application of restorative justice in (anti-LGBT or any) hate crime cases would not yield any meaningful results.

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1 Response of the National Police Headquarters to a freedom of information request by Háttér Society, 29000-197/20-28/2020.KOZA

HATE CRIME LEGISLATION AND DEFINITION IN HUNGARY

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Hungarian law does not refer to “hate crimes” or “hate speech” *per se*. The Criminal Code, however, defines and punishes bias-motivated criminal acts with explicit reference to sexual orientation and gender identity. There are two groups of relevant criminal acts: *sui generis* acts, where the description of a criminal act explicitly refers to bias when defining the motive and the aim of the criminal act; and other criminal acts that do not contain an explicit reference to bias motive, but qualifying circumstances² refer to “malicious motive,” which – based on the consistent case law of the courts – includes bias motive based on someone’s belonging to a social group. The following criminal acts defined by the Criminal Code³ can be regarded as LGBTI relevant hate crime provisions:

as *sui generis* acts that explicitly refer to sexual orientation and gender identity:

- violence against a member of a community (CC Article 216);
- incitement against a community (CC Article 332);
- indirectly, listing malicious motive as a qualifying circumstance:
- homicide (CC Article 160), assault (CC Article 164), illegal restraint (CC Article 194), defamation (CC Article 226), unlawful detention (CC Article 304), offending a subordinate (CC Article 449).

Sex characteristics (intersexuality) *per se* is not mentioned in the law, but since the list of protected characteristics is an open ended one, such bias motive is also implicitly covered both in the case of violence against a member of a community and inciting to hatred against a community.

2 A *qualifying circumstance* is a feature of a criminal act specifically included in the definition of the crime in the CC that imposes a higher sanction for the act.

3 Act no. C of 2012 on the Criminal Code, hereafter also referred to as Criminal Code or CC.

Violence against a member of a community (CC Article 216) is a crime committed by someone who

“(1) displays an apparently anti-social behavior against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, aiming to cause panic or to frighten others; this felony is punishable by up to three years of imprisonment;

(2) assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by applying coercion or duress to do, not to do, or to endure something; this felony is punishable by one to five years imprisonment”.

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The Criminal Code also lists qualifying circumstances that result in higher penalties. Punishment is two to eight years imprisonment if violence against a member of a community is committed by carrying a deadly weapon, by causing a significant injury of interest, by tormenting the victim, in a group of 3 or more persons and / or in criminal association with accomplices (CC Article 216(3)).

Preparation for this criminal act is also a misdemeanor punishable by up to two years imprisonment (CC Article 216(4)). Preparation means providing the means necessary for or facilitating the committing of a criminal offense; inviting, volunteering or agreeing to commit a crime (CC Article 11(1)).

Incitement against a community (CC Article 332) is a felony committed by “any person who before the public at large incites hatred or violence against the Hungarian nation, any national, ethnic, racial or religious group, or certain societal groups, in particular on the grounds of disability, gender identity or sexual orientation.” The perpetrator is punishable by up to three years of imprisonment.

While the legal framework on hate crimes can be considered adequate, efficient response to hate crimes is hindered by underreporting and systemic failures resulting in the under-enforcement of existing legislation. The most typical such systemic failures are:

- under-classification: disregarding the bias motive, and pressing charges for less serious crimes,
 - failure of the police to intervene in case of hate crimes or to conduct crime scene investigation,
 - failures of the authorities to take investigative steps, such as interviewing relevant witnesses, obtaining camera footage in time, or requesting data from foreign authorities.⁴
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4 Cf. Working Group Against Hate Crimes (GYEM): *Shadow report to the sixth periodic report of Hungary to the International Covenant On Civil and Political Rights to the United Nations Human Rights Committee*, February, 2018

RESTORATIVE JUSTICE: HISTORY, CONTEXT AND LEGISLATION

LEGISLATIVE HISTORY

The method of restorative justice appeared on the European policy agenda with the adoption of the European Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA); its Article 10 prescribes that Member States shall seek to promote mediation in criminal cases for offences which they consider appropriate for this sort of measure, and that they shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account.

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In 2006, as part of the transposition of the Framework Decision, the Criminal Code⁵ and the Code of Criminal Procedure Act⁶ was amended, and a new legislation, Act no. CXXIII of 2006 on mediation activity applicable in criminal proceedings (hereafter Criminal Mediation Act or CMA) was adopted. This defines mediation as a conflict resolution procedure that aims at achieving a written agreement between the victim and the perpetrator, an agreement that resolves the conflict and facilitates reparation and future compliance (CMA Article 2(1)).

The National Crime Prevention Strategy (2013-2023)⁷ sets as an aim to be realized by the state that victims have more information on and access to restorative justice instruments. The strategy describes restorative justice as an instrument of victim support, noting that the concept of restorative justice recognizes the needs of victims to be not only treated as witnesses providing first hand information on a crime, but as persons who are entitled to emotional, mental, physical and material rehabilitation. The strategy also mentions restorative justice in its chapter on crime prevention.

5 Act no. IV of 1978 on the Criminal Code, Article 36; replaced by Act no. C of 2012 on the Criminal Code, Article 29.

6 Act no. XIX of 1998 on the criminal procedure, Articles 221/A and 459; replaced by Act no. XC on 2017 on the criminal procedure (hereafter: Criminal Procedure Act or CPA), Articles 412-415.

7 Government Decision no. 1744/2013. (X. 17.) on the National Crime Prevention Strategy (2013-2023)

CURRENT LEGISLATION

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Article 29 of the Criminal Code declares that perpetrators are exempt from punishment if they show **active regret**, that is if they admit to the crime and participate in mediation procedure. The Article also lists the crimes in relation to which prosecutors or judges can decide upon referral to mediation procedure; these include crimes against life, bodily integrity and health, crimes against liberty, crimes against human dignity and certain fundamental rights, as well as crimes against property if these constitute a misdemeanour or a felony punishable with maximum 3 years imprisonment. In case the maximum penalty is between 3 and 5 years, the perpetrator will be found guilty, but the punishment can be reduced fully. However, mediation is excluded if the perpetrator is a repeat offender, if the crime resulted in death or was committed in a criminal organization, or if the perpetrator committed the crime under probation. Since incitement against a community and most forms of violence against a member of a community are punishable with maximum 2, 3 or 2-5 years of punishment, **mediation can be used in these cases of hate crimes**. However, if the hate crime involves e.g. more than three perpetrators or is committed with a weapon, the maximum penalty is 2 to 8 years, so mediation cannot be used.

It is also worth noting that only cases in which a criminal procedure is taking place can be referred to mediation. The actor who can refer the case to mediation is the prosecutor. This step can be proposed by either the defendant or the injured party (or their legal representatives), or the prosecutor themselves (CPA Article 412(2), CPA Article 391(1c)). Both the defendant and the injured party have to agree to the case being referred to mediation. Mediation can be applied in the case of criminal procedures involving both adult and juvenile offenders.

SUMMARY OF REPARATIVE METHODS IN CRIMINAL PROCEDURES

REPARATIVE METHOD	KEY ACTOR	LEGAL BASE
Mediation	prosecutor, probation officer, attorney at law	CC Article 29 CPA Articles 412-415 CMA
Rules of behavior complementing conditional suspension of prosecution	prosecutor, probation officer	CC Articles 69-71 CPA Articles 418-419
Rules of behavior complementing probation or suspension of prison sentence	judge, probation officer	CC Articles 69-71
Reparative work	judge, probation officer	CC Article 67

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Other restorative methods can also be applied as parts of conditionally suspending the prosecution of a case (CPA Articles 418-419), probation (postponing the sentencing) (CC Article 65), or in case the execution of a prison sentence is suspended (CC Articles 69-71). In the case of adults, **involving probation officers** (that is, obligatory regular meetings with them) in such cases is a possibility, but in the case of minors a must (CC Article 119).

Another instrument in the hands of judges who want to lean on restorative methods is ordering **reparative work** (CC Article 67). This can be applied in the case of offences as well as criminal acts if the punishment is not more than 3 years according to the Criminal Code; in this case, the judge postpones the sentence for one year, and orders the perpetrator to fulfill "reparative work," or "work performed in amends." This work can take 24 to 150 hours. If a perpetrator proves that they performed the assigned work within a year, they are not punishable any more. Perpetrators can work for state or local government maintained institutions, civil society organisations of public interest, as well as church-owned legal entities.

Mediation procedures can be conducted by **specially trained probation service officers**, based on territorial jurisdiction or by **specially trained attorneys at law** contracted by the state (CMA Article 3). Mediators must participate in a 60 hours long training on the theory and practice of mediation, and then in practical training defined by a Ministry of Justice Regulation.⁸

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Based on the examination of conditions and after personally interviewing the parties, if they both agree, **the prosecutor decides upon the suspension of the procedure and the referral of the case for mediation** (CPA Article 394(2)). During the mediation procedure, the parties have the chance to talk about their experience and feelings related to the criminal incident, the perpetrator can take responsibility for his or her action, apologize, and the parties can **come to an agreement** upon the remedy or reparation of the damage caused by the criminal act (CMA Article 13). This agreement is then put in writing by the mediator, and signed by the parties. The fulfillment of the agreement is supervised by the mediator, who then submits a report on the fulfillment of the agreement to the prosecutor or judge. If the agreement is fulfilled, Article 29 of the Criminal Code on "active regret" is applied.

Mediation is not compulsory, and it is free for both parties. Besides natural persons, legal persons can also be victims of crimes in Hungary (CPA Article 50), so legal persons may also participate in a mediation procedure. The technique mediators apply is that of direct mediation: thus the perpetrator and the victim of the crime must meet personally (CMA Article 11). The parties can agree upon any kind of redress: financial reparation or any personal service, the physical recovery of the damage, or participation in any kind of treatment or therapy.

A significant number of hate incidents take place in educational settings involving minors, where special rules apply. Decree 20/2012 of the Ministry of Human Resources on the operation of educational institutions contains alternatives to disciplinary proceedings, namely that disciplinary proceedings may be preceded by a conciliation procedure, the aim of which is to evaluate the events, and to conclude an agreement between the defendant and the injured party to remedy the situation. Such a procedure can only be fulfilled if both parties (and, if they are minors, their parents)

8 63/2009. (XII. 17.) Ministry of Justice Regulation on Mediators' Professional Training and Vocational Training

agree. The suspect (or the parent) must be informed about the possibility of a conciliation procedure in a written format. The parties have 15 days to come to an agreement, otherwise the disciplinary proceedings must be carried out. The conciliation procedure must be moderated by an adult who is accepted by both students: the victim and the perpetrator. If the two parties come to a written agreement, the disciplinary procedure must be suspended until the injury is rectified, but for a maximum of 3 months. If the injured party (or the parent if the injured party is a minor) does not ask for the continuation of the disciplinary proceeding during the period of suspension, the procedure shall be dismissed.

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KNOWLEDGE OF RESTORATIVE JUSTICE BY PROFESSIONALS

Police and judicial professionals interviewed were aware that restorative justice is an alternative method for administering justice, which aims at restoring damages suffered by an individual and a community (as well as relationships) because of a criminal act. The distinction between restorative and retaliatory justice is rooted in professionals' views upon the aim and function of punishment, the role of responsibility and emotions, the position of the victim and the restoration of the imbalance caused by the criminal offence. Our interviewees, however, were unable to assess the experience and satisfaction of hate crime victims with mediation, as they could not recall any concrete examples or personal experience with the use of mediation in hate crime cases. They rather focused on the (assumed) willingness of perpetrators to participate in restorative processes, and the beneficial impact in mediation on perpetrators who might become more conscious of the results and effects of their actions. All interviewees mentioned that the practice of restorative justice is based upon the principles of mutual respect and understanding, as well as voluntary and sincere dialogue.

RESTORATIVE JUSTICE IN (ANTI-LGBTI) HATE CRIMES

Our interviews conducted within the framework of the Speak Out project with police, a judge and mediators revealed that mediation procedure is basically **never applied for hate crimes** in Hungary, and only very **few judgements contain restorative elements**, e.g. rules of behavior during probation. This can be partly explained by the fact that very few hate crimes are reported in the first place, and hate crimes that are reported and prosecuted as such tend to be more serious, where mediation and reparative work cannot be applied due to restrictions in the legislation. It is not accidental that the justice judicial professionals interviewed only mentioned hate crimes involving serious injuries, and were skeptical whether restorative methods could work in this context.

Our judge interviewee talked about the application of restorative methods in criminal proceedings – and her rather lonely work in this field. She talked about the application of measures that have restorative characteristics: *“I favour postponed sentencing. I think this has a preventive potential. I also prescribed rules of behavior. I prohibited someone’s participation at political events ... and ordered him to visit the Holocaust museum. In the reasoning of the judgement I explained that hatred is most often caused by the perpetrators not knowing the people they hate. It is easy to make people believe that the ones they must hate are not human beings. But they can get to know them if they sit down to talk to them. In a case of anti-Semitic vandalism, I also delivered postponed sentencing, and made them read a novel and write a diary on it. I also talked to the probation officer and asked for feedback on their reading process. Probation officers have a central role in this.”*

Police interviewees, however, told that they cannot imagine restorative justice methods (especially mediation) in the case of hate crimes: *“Perhaps when it is a crime against property, but not when it is really degrading for the victim... I think the victim is so affected that I cannot really imagine how mediation would work.” “I don’t know, really. There was this case in Szeged when a couple was attacked and beaten because the perpetrator thought they were migrants. Well, after this attack and the beating, I do not think mediation would work.”* Both police and other justice professional interviewees were skeptical about whether such dialogue can be realized between

perpetrators and victims of hate crimes, although this opinion was most pronounced by one police officer who only had direct experience with hate crimes causing serious injury.

The reluctance of criminal justice agencies to use restorative methods in hate crimes cases is confirmed by the experience of Háttér Society. The association provides legal assistance to victims of homophobic and transphobic discrimination, harassment and violence since 2001, with over 200 cases handled annually in recent years, about a dozen of which would qualify as hate crimes every year.

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Restorative methods emerged in only two cases: in 2010 a young gay man was heading to the opening ceremony of the annual Budapest Pride Festival. In one of the nearby streets he was verbally harassed, called a fagot, and punched in the face. Two perpetrators, both of them minors, were identified. While the police investigated the case as violence against a member of the community, the prosecution decided the attack was not motivated by bias, and qualified the incidents as disorderly conduct. They suspended prosecuting the crime ordering both perpetrators to participate in training to develop their social skills and ways of expressing themselves.⁹ The case ended up being prosecuted in court since the perpetrators committed other crimes during the time of suspension, including bias motivated assault of a homeless person, for which they were found guilty for violence against a member of a community.

The other case took place in 2013: two gay men and two women were heading towards the starting point of the Budapest Pride March with a large rolled-up rainbow flag on a pole in their hands. A few hundred meters from the starting point they were stopped by three men in their twenties who kept asking them if they were going to the Pride March. One of the perpetrators took up a fighting position, and kicked one of the gay men, who as a result fell to the ground. Only one of the perpetrators was identified by the police, and the victim suggested the case be referred to mediation, to which the suspect also agreed. The prosecution service, however, rejected to refer the case to mediation arguing that according to guidance from the Prosecutor General mediation is not possible in case of hate crimes, because firm and visible criminal justice response is needed in such cases.¹⁰

9 Budapest District I and XII Prosecution Service, Bfk. 4907/2010.

10 Budapest District XIV and XVI Prosecution Service, B.XIV/8856/2013.

The low number of hate crimes cases where restorative methods emerged, and the failure of these procedures shows that in spite of the relatively favorable legal and policy environment, restorative methods currently do not work well in case of (anti-LGBTI) hate crimes cases in Hungary.

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As our judge interviewee elucidated, there are restorative practices that are applied complementary to a punishment or in place of a punishment in which not all characteristics of restorative approaches appear (most importantly, voluntary participation, and dialogue between the perpetrator and the victim). There are practices that can be interpreted as restorative because of their results: the restoration of perpetrators' attitudes towards a community, their reintegration to society, etc. This can be achieved for example by prescribing rules of conduct to accompany postponed sentencing.

We also talked with mediators about the significance of avoiding secondary victimization and traumatization, about the usage of language and terminology, and clarifying the framework of communication. We plan on incorporating their insightful advice into our future training activities. They also talked about the importance of being aware of one's own prejudices, of LGBT – (and especially trans-) specific information in the training of mediators, and their general awareness of the situation and marginalized and stigmatized groups. The mediators we interviewed also highlighted that mediators would need special training on (anti-LGBTI) hate crimes, bias, the special trauma hate crimes cause, as well as on terminology. As of now, the training of mediators does not contain any information on LGBTI hate crime victims and how to work with them.

POLICY ADVICE AND RECOMMENDATIONS

1. Building and maintaining cross-sectoral, multi-agency partnerships between civil society organizations and public bodies

Hate crimes are a complex social problem, which require coordinated action between law enforcement and criminal justice agencies, victim support and offender reintegration services on the one hand, and civil society organizations representing minority groups most at risk of victimization on the other. Collaborative strategy building, joint training and awareness raising projects, and data sharing can serve as the backbone of such cooperation

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2. Training law enforcement and justice professionals

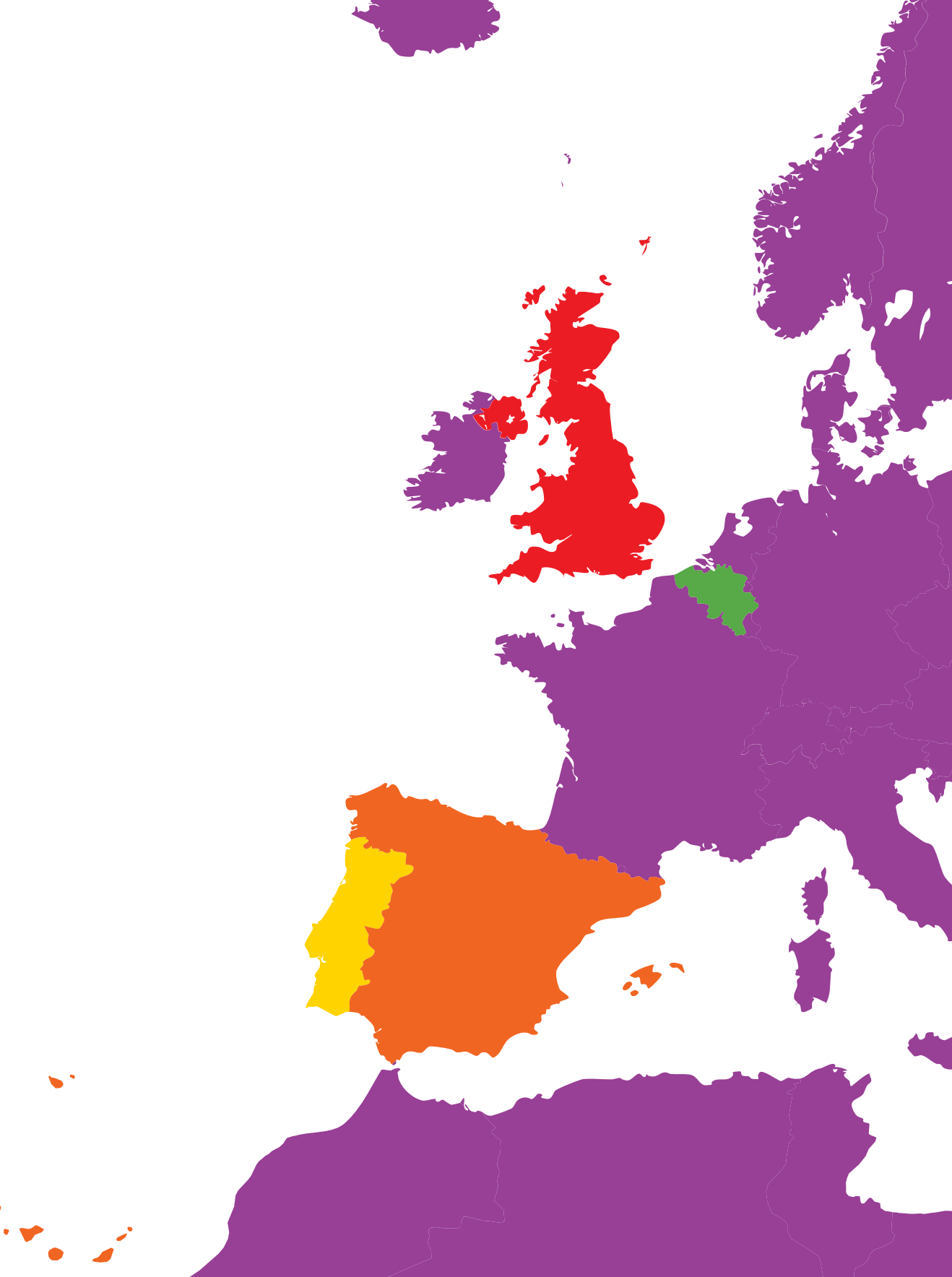
All law enforcement and justice professionals should have more information on anti-LGBT hate crimes (and hate crimes in general), the impact of hate crimes on victims, causes of underreporting, mediation and other restorative techniques in criminal procedures. They should also be trained about how to avoid secondary victimization, as well as correct terminology and respectful language to be used when working with victims of homo – and transphobic hate crimes.

3. Supporting community based restorative justice programmes to deal with hate crime especially in educational settings

In many countries, restorative justice practice has proved particularly successful in schools and in the youth context in general. It is of particular importance to monitor and tackle bias motivated harassment and violence in educational settings. Restorative justice can be empowering for youth, who can thus learn to resolve their conflicts, and deal with their own prejudices by encouraging dialogue.

4. Using education as a tool to prevention and combat hate crimes

Education is considered by many experts the most effective measure to prevent hate crimes. This is based on the premise that the cause of hate crimes is generally misunderstanding and ignorance. The best place where preventive work can be applied is schools and other settings attended by youth, as children's minds are more susceptible to new ideas than those of adult offenders.





LITHUANIA



LITHUANIA

COUNTRY STATISTICS

Lithuania remains among the least LGBT – inclusive countries among the EU Member States. Recent European Union Agency for Fundamental Rights (FRA) survey (2020) findings revealed that 55% of Lithuanian LGBTI respondents felt discriminated against in 8 areas of life, which constitutes the highest rate among all EU Member States. 44% of Lithuanian survey participants said that they avoid holding hands with their same-sex partner in public fearing that they might be subjected to threats, assault or harassment. According to Eurobarometer on Discrimination 2019, 53% of Lithuanian respondents agree with the idea of LGBT equality while the European average constitutes 76%.

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According to *Call it Hate* survey (2019)¹ nearly every second respondent stated that they would feel comfortable having an LGBT person as a neighbour. At the same time, almost 40 per cent expressed negative feelings. Gay, lesbian and bisexual people seem to be more easily accepted as neighbours than transgender people.

In regards to the hate crime situation, LGL recorded five likely homophobic bias motivated incidents in 2019, including arson of the LGL office for which the pre-trial investigation was indefinitely suspended without identifying the perpetrator.

In November-December 2019, LGL also reported 1,002 anti-LGBT posts, which were removed by a social media platform. This was the highest number among the 39 parties participating in the fifth evaluation on the Code of Conduct on Countering Illegal Hate Speech Online².

Methodological recommendations of the new version of the pre-trial investigation regarding hate crimes and inciting hate speech were approved by the Prosecutor General's Office of the Republic of Lith-

- 1 <https://www.lgl.lt/en/files/2019-Awareness-of-Anti-LGBT-Hate-Crime-in-the-European-Union.pdf>
- 2 https://ec.europa.eu/info/sites/info/files/codeofconduct_2020_fact-sheet_12.pdf

uania and came into force³ on 1 April 2020. This new instrument presents the concepts of hate crimes and hate speech, the criteria and specifics of their delimitation, as well as other concepts relevant to the identification and investigation of this type of crime, concepts of vulnerable groups, the main principles of pre-trial investigation and organisation, international communication and qualification of crimes.

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There is no sufficient statistics to objectively illustrate the use of Restorative Justice in Lithuania. However, in a 2009 survey⁴ conducted by "Spinter" and delfi.lt, around half (48%) of the Lithuanian respondents were in favour of capital punishment, which reveals the predominance of punishment culture in Lithuanian society. The Lithuanian criminal justice system is also one of the most repressive among other EU Member States, with current legislation prescribing some of the longest sentences among the EU countries; however, it is starting to slowly change. In 2014, Lithuania had the third highest number of prisoners in the EU, according to statistics from the Council of Europe. The high prison population in conjunction with the high level of re-offending allows us to presume that there is an overall lack of desired effectiveness in the Lithuanian penitentiary system, in which the application of restorative justice measures are relatively seldom applied.

3 <https://www.lgl.lt/en/?p=23669>

4 <https://spinter.lt/site/lt/vidinis/menu/top/9/home/publish/MTEzOzk7O-zA=>

RESTORATIVE JUSTICE

NATIONAL DEFINITION

Currently there is no official definition of restorative justice laid down in Lithuanian national law. Academic literature uses definitions formulated by Howard Zehr, Margarita Zernova and Gordon Bazemore, among others.

However, Article 4 (5) of the the Law on Probation of the Republic of Lithuania describes the following among the Purpose and Principles of Probation:

***Implementation of the restorative justice:** i.e. remedial measures taken during probation to ensure reconciliation and mediation between the victim and the probationer in order to compensate for the damage caused by the crime.*

Thus, the implementation of restorative justice is regarded as one of the purposes and principles of probation; however, it does not provide a detailed definition of restorative justice itself.

LEGISLATION

Although current Lithuanian criminal legislation does not establish a restorative justice institute or provide a comprehensive approach to restorative justice regulations, it does integrate a few restorative justice features.

Under Article 2 (5) of the Law on Probation of the Republic of Lithuania, *probation* is described as a **conditional alternative to imprisonment** (suspension of the sentence of imprisonment and conditional release from a correctional institution), which entails the supervision of a probationer.

Under Article 67 (2) of the Criminal Code of the Republic of Lithuania, an adult person whose penalty is suspended or who is conditionally released from a correctional institution may be subject to **participation in the programmes addressing violent behaviour**, which is regarded as one of the penal sanctions.

Where a person is sentenced to imprisonment for a term not exceeding six years for crimes committed through negligence, or for a term not exceeding four years for committing one or several premeditated crimes (except for very serious crimes), a court **may suspend the imposed sentence for a period ranging from one to three years. The sentence may be suspended where the court rules that there is a sufficient basis for believing that the purpose of the penalty will be achieved without the sentence actually being served** (Article 75 (1) of the Criminal Code of the Republic of Lithuania).

When suspending a sentence, a court shall impose on the convicted person one or more concerted penal sanctions mentioned above and (or) the following mandatory injunctions: 1) **to offer an apology to the victim**; 2) **to provide assistance to the victim during the latter's medical treatment**; 3) to undergo treatment for addiction, where the convicted person agrees therefor; 4) educate and take care of their minor children, to look after their health, to maintain them; 5) to take up employment, resume working or studying; 6) **to participate in programmes that address violent behaviour**; 7) not to leave the place of residence at specified times, if leaving home is not related to work or studies; 8) an obligation not to leave the territory of the city or district of residence without the permission of the supervising institution; 9) an obligation not to enter certain localities and to avoid contact with certain persons or groups of persons; 10) an obligation not to use psychoactive substances; 11) an obligation to avoid having, using or acquiring specific objects or carrying out specific activities (Article 75 (2) of the Criminal Code of the Republic of Lithuania).

The list of the mandatory injunctions is not exhaustive under Article 75 (3) of the Criminal Code of the Republic of Lithuania. A court, at the request of the convicted person, other participants in the criminal proceedings or **ex officio**, **may impose other mandatory injunctions that, in the court's opinion, might positively affect the behaviour of the convicted person.**

Also, according to Article 38 of the Criminal Code of the Republic of Lithuania, **a person who commits a misdemeanour, a negligent crime or a minor or less serious premeditated crime may be released by a court from criminal liability if they reconcile with the victim or a representative of a legal person or a state institution**, and there is a basis for believing that he will not commit new criminal acts. Thus, this particular measure is not available in case of a severe or very severe crime.

APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIMES

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Lithuanian Criminal Code (Seimas 2000) contains a combination of general and specific penalty-enhancement provisions for hate crimes, as well as a substantive offence. Article 129 (2)(13) (i.e. murder), Article 135(2)(13) (i.e. severe health impairment) and Article 138(2)(13) (i.e. non-severe health impairment) of the Criminal Code establish penalty enhancements if these particular offences are committed out of bias motivation on grounds of, inter alia, sexual orientation.

Article 170 of the Criminal Code prohibits incitement to hatred and violence based on, inter alia, sexual orientation (i.e. hate speech), while Article 60(12)(1) qualifies acts committed in order to express hatred on the grounds of, inter alia, sexual orientation as an aggravating circumstance within the framework of criminal proceedings (i.e. hate crimes). Taking into account that criminal offences based on the grounds of, inter alia, sexual orientation, are explicitly defined in the Lithuanian Criminal Code, the incitement to hatred and violence (i.e. prohibited hate speech) is considered as a specific form of hate crime in Lithuania.

While sexual orientation is a protected ground under Lithuanian criminal legislation, the same does not apply to the grounds of gender identity and (or) gender expression. Equally, the Lithuanian hate crime legislation does not cover intersex people, as it does not acknowledge sex characteristics or intersex status as grounds.

While current legislation certainly provides an option to apply restorative justice measures in hate crime/anti-LGBT hate crime cases, there are very few instances of such application.

However, in June 2020 there was a publicised case⁵ in Taurage where court ruled that a man who had been posting messages of a derogatory nature towards LGBT individuals and inciting anti-LGBT hatred on social media will have to work for 40 hours free of charge for six months in various institutions and NGOs that care for the disabled, elderly or other people in need. This provides a

5 <https://m.delfi.lt/lietuvoje/article.php?id=84592721>

positive prospect in terms of future applications of currently active restorative justice measures to achieve the objectives of the criminal justice system.

NATIONAL HURDLES

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Findings of interviews conducted by LGL in 2019 with the law enforcement representatives suggest that some of the most prominent problems include a prevailing lack of sufficient knowledge of the hate crime concept itself and its specifics among law enforcement professionals. Therefore, it complicates the successful application of existing regulations and consequently exploring the portions or current legislation of applying or developing further restorative justice measures, especially for hate crimes.

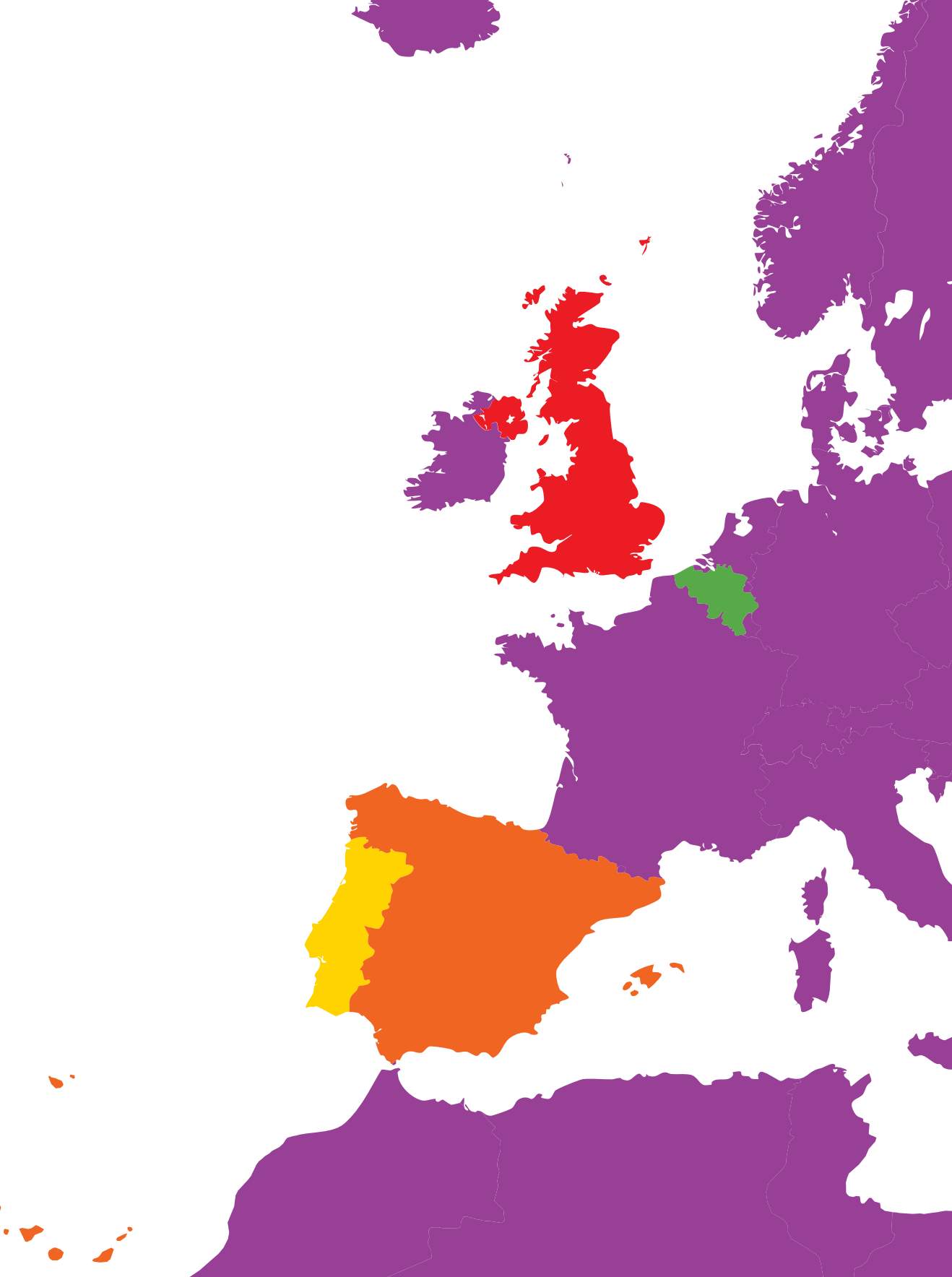
POLICY ADVICE

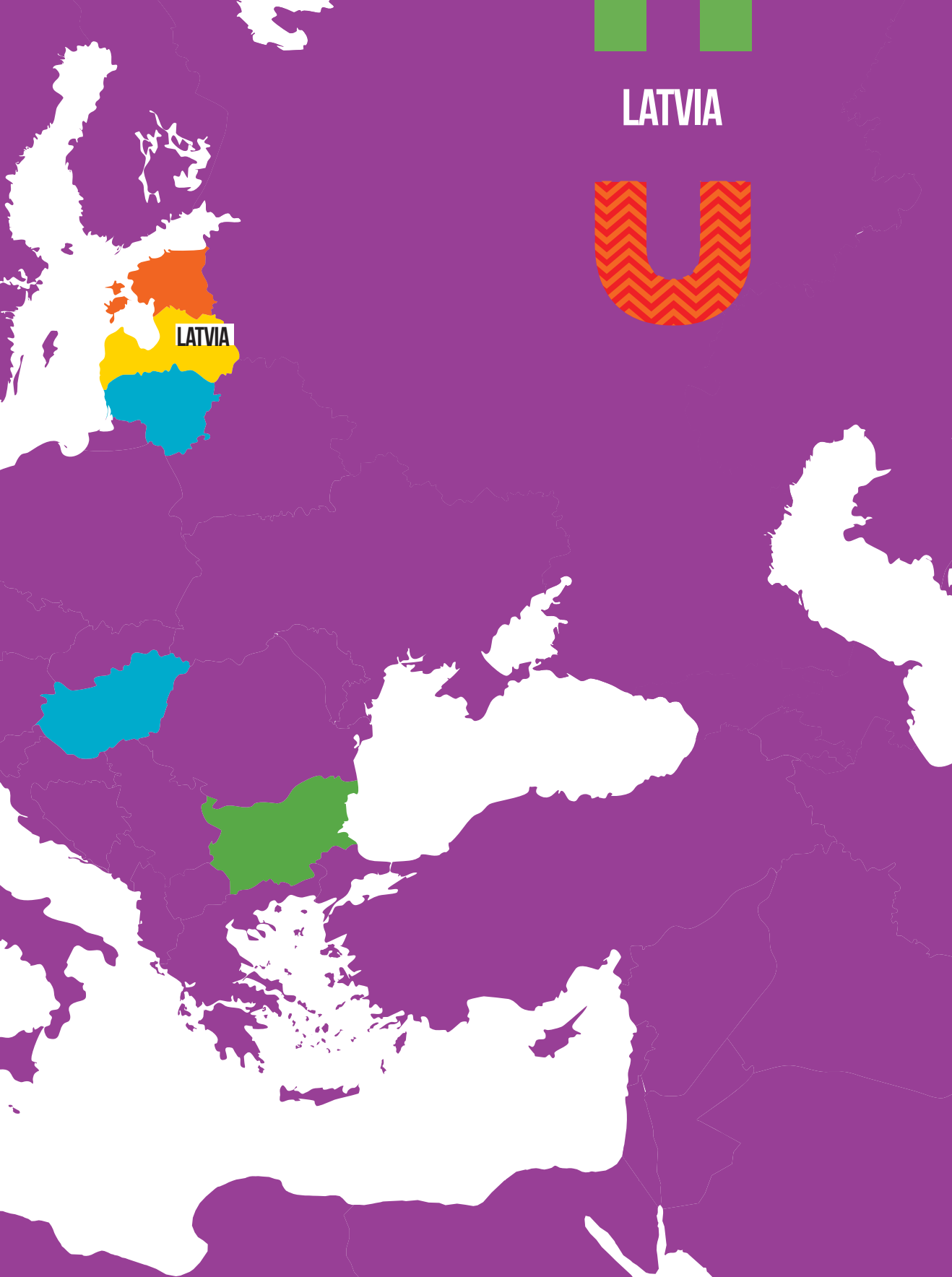
Considering the current penitentiary culture in Lithuania, which in many aspects is lacking sufficient progress and falls short of EU standards, the most apparent need is to incorporate larger scale trainings for law enforcement professionals into annual institutional training plans and policies, which also address participant motivation, in order to ensure better attendance.

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Such large-scale trainings with an intersectional approach, i.e. using the expertise of both legal and civil society professionals, should supplement the knowledge on both hate crime and hate speech specifics and increase both the sensitivity to the needs of hate crime victims and the impact of the hate crime itself.

It would also build on more general categories such as inclusiveness, as well as providing an alternative to the concept of punishment in criminal law based on good practices of effective restorative justice delivery and victim engagement in countries such as Belgium and Finland.





LATVIA



LATVIA

LATVIA

COUNTRY STATISTICS

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The latest research conducted in Latvia on public attitudes towards LGBT people was conducted in June 2020. Those interviewed were asked about their attitudes towards homosexual persons, as the majority associate the full spectrum of LGBT under the term homosexuality. The survey showed that 30.1 per cent of respondents consider that homosexual people and homosexual relationships should not be condoned (an increase of 3.4 per cent from 2018), while 27 per cent responded that homosexual people should not be condemned for engaging in homosexual relationships (an increase of 0.6 per cent from 2018). Meanwhile, 31.2 per cent consider that both homosexual people and their relationships should be condemned (decrease of 1.6 per cent from 2018). There is also a decrease of 2.3 per cent for those who find the questions difficult to answer (11.3 per cent in 2020/13.6 per cent in 2020).

The survey shows more specific data regarding the actions of respondents towards LGBT people or the reactions of respondents if they learned that a member of their family was homosexual. 14.3 per cent of respondents would support the family member, 30 per cent say that their relationships wouldn't change, 15.1 per cent would have less contact with the family member, 12.9 per cent would discuss the issue with someone and condemn, but 10.1 per cent will openly condemn and would act against the person (kick out of home, force to seek medical assistance, etc.).

Nevertheless, the same survey shows that 62 per cent of respondents don't know anyone from the LGBT spectrum, but 21.1 per cent say that they know a homosexual person, 4.8 per cent say that they know a bisexual person and 0.7 per cent know a trans person.

The Eurobarometer 2019 survey found that even though the social acceptance of LGBTI people in Latvia has slightly increased in the past four years, it continues to lag far behind the EU average. 72 per cent of those in the EU say there is nothing wrong with same-sex relationships, compared to only 25 per cent in Latvia. The support for same-sex marriage is 69 per cent in the EU, compared to 24

per cent in Latvia. Latvia scored a little better on attitudes towards legal gender recognition, with 41 per cent supportive versus the EU average of 59 per cent.

The terms hate crime and hate speech have been rarely applied in Latvia, especially towards hate crimes targeting LGBTI persons. Observations of the Association of LGBT and their friends MOZAIKA also show that law enforcement officials have very limited capacity to apply existing legal instruments into investigating hate crimes.

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The association of LGBT and their friends MOZAIKA stated that in 2019 a total of 29 anti-LGBT hate crimes were reported to Mozaika, of which the majority (17) targeted gay men. The crimes included sexual and physical assault, blackmail and arson. The victims did not report the cases to the police. The number of crimes signal an increase – in 2018, 22 cases were reported. Furthermore, over 500 anti-LGBT posts were removed by a social media platform in 2019. 20 of these were reported to the police, but criminal proceedings were only initiated in two cases.

Meanwhile, the term restorative justice is not new in Latvia. However, there is still almost no publicly available statistics on restorative justice, and there is no clear evidence of the use of restorative justice in dealing with hate crimes and their victims.

RESTORATIVE JUSTICE

NATIONAL DEFINITION

Currently, there is no common definition of what restorative justice is. Meanwhile, the Ministry of Justice of the Republic of Latvia states that there are several restorative justice approaches: Victim-Offender Mediation, Conferencing/Family group Conferencing, Peace Circles and other methods by involving the perpetrator.

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There is no clear and common definition of hate crime in Latvia, as it not stipulated in the Latvian legal or policy framework. Legal experts in Criminal Law see the term "hate crime" as a criminal offence stated in the Criminal Law: Section 71 (Genocide), Section 71.1. (Invitation to Genocide), Section 78 (Triggering of National, Ethnic and Racial Hatred), Section 149.1 (Violation of the Prohibition of Discrimination), Section 150 (Incitement of Social Hatred and Enmity) and any other crime which has racist, national, ethnic or religious hate motive (Criminal Law, Section 48, part 1, point 14).

LEGISLATION

The term "restorative justice" has been introduced in Criminal Law Section 35. Punishment and its Purpose, (2) The purpose of punishment is: 2) to restore justice in 2012 (comes into force in 2013). Currently (June 2020), the Latvian Parliament is debating to improve the system of criminal punishment to set probationary supervision as a basis for punishment and to improve the application of community service. It is expected that amendments to the Criminal Law will come into force in January 2022.

Criminal Procedure Law includes the provision of Settlement – Section 381. Actualisation of a Settlement. This section points out that settlement shall be voluntarily, with each party understanding the consequences and conditions. Also, an intermediary trained by the State Probation Service may facilitate the conciliation. The State Probation Service has a list of trained mediators available on its website.

Furthermore, State Probation Service Law in Section 13. The competence of the State Probation Service in Mediation stipulates that the State Probation Service in implementing mediation performs a

number of actions, such as conducting the training of the mediator; providing information to the individual conducting the process regarding the possibilities to implement mediation and the purpose of such a settlement; implement the process of mediation; inform the individual conducting the process regarding the results of the mediation; and shall provide information to the public, victims and probation clients regarding the possibilities of implementing mediation and the aims of such a settlement.

210 The most common methods of restorative justice are Victim-Offender Mediation and Conferencing/ Family group Conferencing, but none of these methods has been applied to hate crime victims. In fact, restorative justice approach is mostly considered in family mediation and juvenile justice.

NATIONAL HURDLES

Even though there has been significant research and work done on restorative justice, it is still not adequately being implemented in the criminal justice system. The restorative justice approach is difficult to apply towards hate crimes, as there is a lack of sufficient knowledge and understanding of the term. Furthermore, in the current situation existing criminal proceedings are not often targeted to an individual, rather the community at large. Meanwhile, community organisations cannot represent the community in any of the criminal proceedings; therefore, the mediation approach is impossible.

In general, Latvian law enforcement, probation service and other state officials, as well as mediation specialists, lack knowledge of the application of the existing provisions of the Criminal Law in regard to hate crimes. At the same time, restorative justice as a term is not widely understood in law enforcement. Meanwhile, judges receive extensive training in the implementation of restorative justice approaches.

There is also a lack of social trust towards restorative justice as an effective approach, even when crimes might be committed towards any of the vulnerable groups.

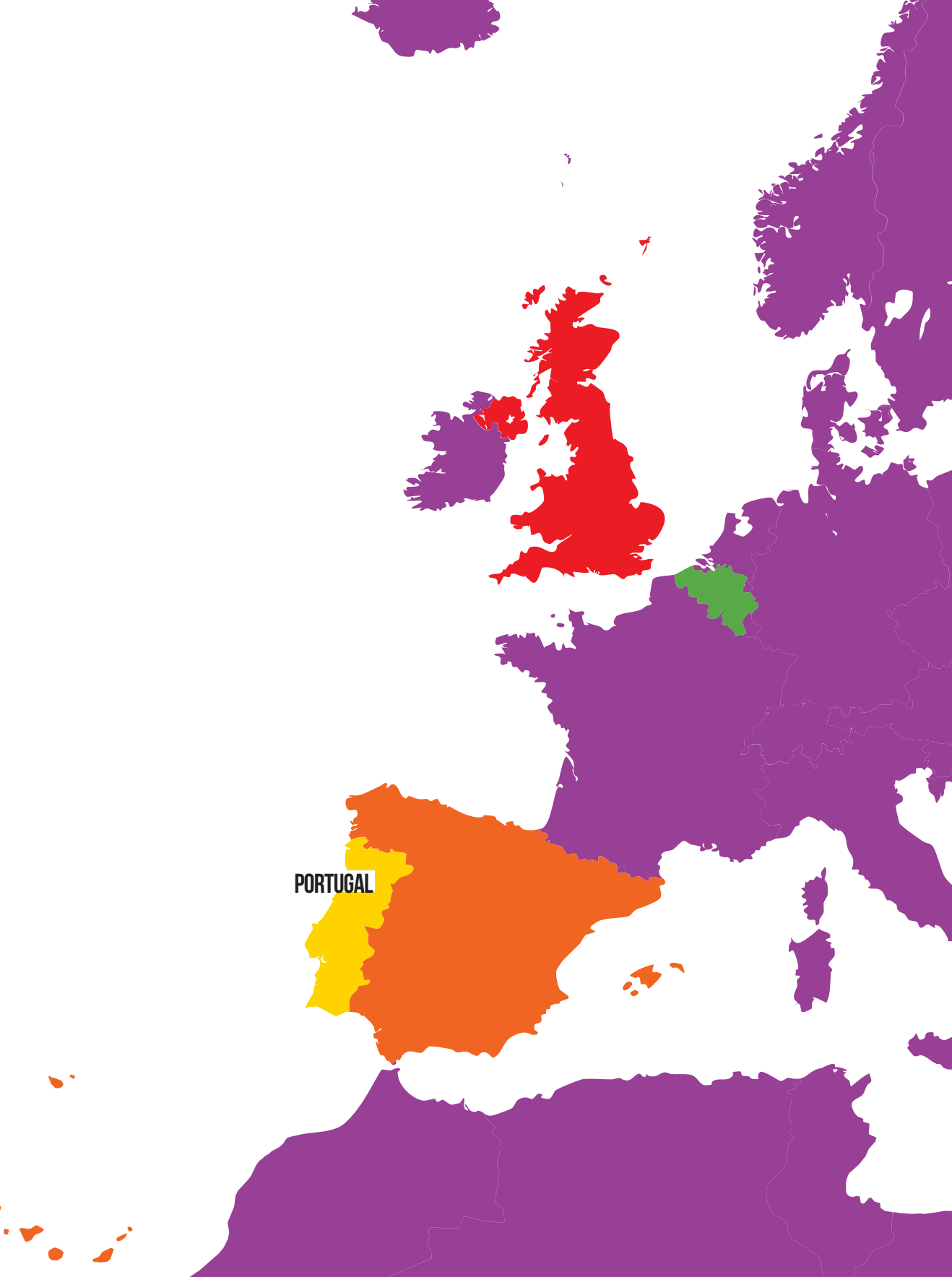
POLICY ADVICE

In order to apply the restorative justice approach in the area of hate crimes, the state needs to consider community organisations who would represent communities in certain cases.

The Latvian state should issue mandatory guidelines into investigating hate crimes. Currently, there are only recommendations, which are not widely used in practice.

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The state should also recognise the impact of hate crimes towards victims and the community. Therefore, it should cooperate with civil society organisations to raise awareness on hate crimes as well as encourage the reporting of hate crimes. This would require additional training for law enforcement officials, prosecutors and judges as well as for the probation services and mediators on how to investigate and approach hate crime victims.



PORTUGAL



PORTUGAL



PORTUGAL

COUNTRY STATISTICS

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On May 2020, the results of the 2nd LGBTI + Survey by the European Union Agency for Fundamental Rights¹ were announced, and it is important to highlight here some of the main conclusions concerning Portugal: with regard to the perception of discrimination, the numbers are within the European Union average, with 40% of the respondents admitting that they felt discriminated against at least in one of their everyday contexts, and 20% in the workplace; 30% say they have been the victim of some form of abuse in the past year, and 5% have suffered an attack in the past five years; on the other hand, although 28% of young people between 15 and 17 years of age hide their identity at school, 60% stated that someone has always supported, defended or protected their rights as LGBTI+.

On the other hand, on the Rainbow Europe Index Map, an annual initiative by ILGA Europe², Portugal is ranked 7th in terms of protecting the rights of LGBTI + people in the European panorama, with a rating of 66% for the third consecutive year, revealing that during this period there was no significant evolution in terms of recognition of rights for this population.

It is also worthy of mention that every year ILGA Portugal launches a report based on data collected on the Observatory on Discrimination against LGBTI+ people.³ The Observatory on Discrimination is an online reporting mechanism aimed to collect statistical information on discrimination and violence against LGBTI+ people in Portugal. Anyone – victim, witness, services, any interested person – can file an anonymous report and provide as much detail as wished. Launched in 2012, it is the only source of statistical information on hate crime and discrimination against LGBTI+ people in Portugal.

During 2019, the Observatory received a total of 171 complaints, in the form of confidential and anonymous questionnaires. All situations refer to occurrences resulting from prejudice, discrimination and violence based on sexual orientation, gender identity, gender expression or sexual characteristics of the victims.

1 The results of the study can be consulted here: <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>

2 The Rainbow Europe Index Map can be consulted here: <https://rainbow-europe.org/>

3 The reports can be consulted here: <http://ilga-portugal.pt/observatorio/>

RESTORATIVE JUSTICE

NATIONAL DEFINITION

In Portugal, the existent methods of restorative justice that are established in the law are criminal mediation and the provisional suspension of criminal proceedings.

216 Criminal mediation was introduced in the Portuguese domestic legislation by Law 21/2007⁴, on 12 June, in compliance with Article 10 of the Framework Decision No. 2001/220/JHA, of the Council of the European Union, on the status of the victim in criminal proceedings⁵, which requires Member States to promote mediation in the context of criminal proceedings.

According to this law, the Criminal Mediation System was created, and its oversight was given to the Alternative Dispute Resolution Office (GRAL).

During the experimental phase, the law was set to be implemented in four judicial districts: Aveiro, Oliveira do Bairro, Porto and Seixal, given their diverse realities and the need to observe how the process would work in distinct contexts, from the perspective of victims and offenders, and in order to contribute to technical improvements. As of the second half of 2009, the scope of application was extended and the law was also applied in Barreiro, Braga, Cascais, Coimbra, Loures, Moita, Montijo, Santa Maria da Feira, Setúbal, Vila Nova de Gaia, Alentejo Litoral, Baixo Vouga and Grande Lisboa Noroeste.

4 Can be consulted at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1459&tabela=leis&ficha=1&pagina=1

5 The Framework Decision is available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001F0220>

LEGISLATION

According to Law 21/2007, this is how the mediation system works:

Criminal mediation can be applied for offences against persons and property which are punishable by a fine or by a prison sentence for a period not exceeding 5 years, except in cases where the victim is under 16 years old, where there is more than one perpetrator or for sexual crimes or crimes against personal liberty, regardless of the prison sentence;

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This means it is only applicable to semi-public and private crimes, given that a complaint is necessary to start the legal procedure. In these types of crimes, the victim can withdraw the complaint and the mediation system may serve to justify such a withdrawal, if a consensus is met destined to satisfy the interests of the victim, the offender and society as a whole.

As an example, criminal mediation can be applied for crimes against physical integrity or those including negligence, threat, defamation, violation of the household or disturbance of private life, theft, abuse of trust, damage or fraud.

- The Public Prosecutor is the entity responsible for forwarding the case to mediation, at any moment of the investigation phase – if there is evidence that a crime took place and that it was perpetrated by the defendant, and if it is believed this may help the prevention of future crime. In doing so, the Public Prosecutor must notify the victim and the offender;
- Mediation can also be requested by the victim or the offender, in cases where it can be legally applied;
- Since mediation in Portugal is always a voluntary process, criminal mediation can only take place if the defendant and the victim agree, a solution that is in effect in all Public Mediation Systems promoted by the Ministry of Justice through GRAL.
- After the forwarding of the process to criminal mediation, a criminal mediator is appointed and the necessary contacts are made between the defendant, the victim and the mediator. The mediator informs the parties about the procedure, their rights and duties, and the nature, purpose and rules applicable to the mediation process.

- If no agreement arises from mediation within three months (which can be extended for two additional months at the request of the mediator in cases with a strong likelihood of reaching an agreement), the mediator will inform the Public Prosecutor and legal proceedings will resume;
- Reaching an agreement through mediation leads to a withdrawal of the complaint by the victim that is not opposed by the accused. If the agreement is not observed by the stipulated deadline, the victim can renew the complaint within a period of one month, and the investigation stage will be reopened;
- The agreement cannot include tasks the fulfilment of which lasts longer than 6 months;
- In mediation sessions, the victim and defendant must be present, and they can be accompanied by their lawyers;
- The mediation sessions are confidential and cannot be used as evidence during criminal proceedings;
- The mediation process is free for the victim and the defendant, regardless of the number or duration of the mediation sessions.

The criminal mediation system is truly innovative for victims in the Portuguese legal system because in a traditional criminal process the victim can hardly intervene as a victim. If the victim wishes to do so, they can be constituted an assistant, becoming a procedural subject accompanied by a lawyer, and thus having the possibility to intervene. Otherwise, the victim can only intervene as a witness, and not be able to influence the process, or ask for civil compensations. Therefore, mediation allows the victim to have a personal intervention space.

It should be noted that the referral of the process for mediation determines the suspension of the legally established deadlines for the prosecution and for the maximum duration of the investigation phase. The deadlines are suspended from the forwarding of the process to mediation until its return by the mediator to the Public Prosecutor or, as a result of the mediation agreement, until the date established for its compliance.

On the other hand, the provisional suspension of criminal proceedings, enshrined in Article 281 of the Criminal Procedure Code, has a bigger scope, but it is still limited to penalties that do not exceed five years of detention. In the provisional suspension of the proceedings, the process is included in the traditional criminal

system but there is a moment where there is an attempt to solve the conflict by imposing rules of conduct to the perpetrator in order to prevent the process continuing to a conviction. In order for this norm to be applied, both the defendant and assistant have to agree, as in the criminal mediation system there must be an absence of a previous conviction for a crime of the same nature, an absence of previous application of provisional suspension of proceedings for a crime of the same nature, and it must be expected that compliance with the injunctions and rules of conduct responds sufficiently to the prevention requirements that may be felt in this case.

The injunctions and rules of conduct may be to compensate the victim, give them adequate moral satisfaction, give to the State or to a private social solidarity institution a certain amount, or provide services of public interest, attend certain programmes or activities.

OTHER COUNTRY SPECIFIC ELEMENTS (E.G. EVOLUTION OF RJ)

In 1999, before the criminal mediation law was adopted, the institute of mediation in criminal matters for minors emerged in legislation with the Child Protection Act⁶. The Law explicitly provides for the use of victim offender mediation in cases where the offender is aged between 12 and 16 years old (these measures can be extended to offenders up to 21 years old). The law stipulates the use of mediation primarily in cases involving young offenders, since its aim is not retribution for the offence, but rather the education of young people. This law assumes a responsible, reparative and pedagogical character, which results in part from the practice of criminal mediation now contemplated in article 42.

The educational process occurs in two stages: the inquiry stage chaired by the Public Prosecutor seeks to establish the fact that the crime really took place, that the minor performed it and that there is a need to educate the minor. This stage ends with the filing of a request to open the judicial stage; the judicial stage presided by the judge verifies the judicial facts of the case and assesses the various judicial remedies, which can be imposed on the offender.

6 Can be consulted here: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=542&tabela=leis

Among the possible judicial remedies, special attention must be paid to those that directly target redressing the damages caused: compensation to the victim (an apology, financial compensation, activities which can restore the economic damage caused by the offender); economic provisions (for example, requiring the offender to participate in unpaid work to the benefit of the victim); community service (activities which serve the wider community).

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The use of mediation is at the discretion of the judiciary authority – the prosecutor or judge – even if it is first proposed by the minor, his/her parents or his/her legal representative. However, the General Directorate of Social Reintegration is the organ responsible for its implementation.

CORRESPONDENCE TO CRIMINAL JUSTICE

APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIMES

WHAT IS A HATE CRIME? (DEF + LEGISLATION)

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Hate crimes are not an autonomous criminal offence in Portugal but are recognised as aggravating penalties for the crimes of qualified murder and offence to physical integrity (Articles 132 and 145 of the Portuguese Criminal Code).

In addition to sexual orientation, the Criminal Code was amended in 2013 to also include gender identity as a covered ground for aggravating circumstances, thus enlarging the scope of protection in the case of hate crimes. The protected grounds are race, religion, politics, colour, ethnicity or national origin, sex, sexual orientation and gender identity.

In March 2018, the Criminal Code was again amended and the previously named "racial, religious and sexual discrimination" provision now refers to "discrimination and incitement to hatred and violence" (Article 240), hence better framing hate speech and enlarging the protected grounds to other personal characteristics, but maintaining sexual orientation and gender identity. The previous writing of this provision was widely criticised for its inapplicability and vague framing, which made it impossible to file successful complaints. The new wording, though still imperfect, is much more in line with the claims of civil society.

RESTORATIVE JUSTICE IN HATE CRIMES (EXISTING OR POTENTIAL)

As explained before, criminal mediation is reserved to certain type of crimes: semi-public and private crimes, and even within that typology, there are several restrictions.

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The crimes of qualified homicide, qualified offence to physical integrity – where hate is recognised as an aggravating circumstance – and incitement to hatred are public crimes, which means criminal mediation cannot be applied.

However, the provisional suspension of criminal proceedings could be applied to incitement to hatred or hate speech or to offence to physical integrity. Nonetheless, there are no statistics available on whether this mechanism was ever used for such crimes.

According to the interviews we conducted at another stage of the Speak Out Project, the respondents agree that it could be possible to apply the principles of restorative justice to hate crimes, but there would be many difficulties. Currently, mediation works as a substitution, according to the way the system is structured, and the conviction falls. In the possibility to extent the resources of restorative justice the Portuguese legal system has in dealing with hate crimes, it should always be used as a complementary model and never as a true substitution. We are talking about very serious crimes and the conviction should always be present. There is more room for these interventions in lighter crimes. Mediation in this case should have an educational and pedagogical role, in trying to understand what the origin of the behaviour was, so that perpetrators can understand why their actions were harmful and to reduce the risk of recurrence. The idea is that the victim can receive real benefits and can feel in some way restored, which most of the victims do not feel with simply the detention of the perpetrator. Since the approach should be complementary instead of substitutive, it should always be post sentential. It must be an integrative approach – a combination of efforts. The perpetrators need to be aware that the process will not change the sentence, so they do not engage in the mediation in a careless way. This way, the process will have a more relevant therapeutically effect on the perpetrator and, consequently on the change of behaviours.

The rules of conduct present in article 281 of the Criminal Procedure Code could also be applied as a complement to the detention penalty of hate crimes and have educational role. However, never as a substitution.

When it comes to anti-LGBTI hate crimes, there is a very common component of humiliation in the crimes. In this context, mediation can be an important restorative measure for the victim. It may be relevant to understand why the victim was targeted. The mediator should be specifically trained to deal with this type of questioning, especially if the motivation is related to an individual characteristic of the victim. In addition to criminal mediation, other restorative justice tools may be employed for hate crime cases against LGBTI people. Family group conferences, for example, in which relatives or close friends of the offending person participate in their sensitisation process, may be used as an alternative or complement to criminal mediation.

NATIONAL HURDLES

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The current system of mediation is stagnant. After some initial enthusiasm, where in the early years it worked, relatively promisingly, in relation to a significant number of cases, now it is not being put into practice. The last years for which there are statistical data are 2017 and 2018, and the number of cases forwarded to mediation during those years was very low. GRAL is precisely conducting a study on why mediation is not being used.

Between 2008 and 2011, in the first years, magistrates were trained to refer cases to mediation and the practice was emphasised. However, with the natural movement of the Public Prosecution's Office, with magistrates leaving and with the entrance of new staff, this system stopped working. At present, there are no cases of criminal mediation.

The Public Prosecutor has a key role in restorative justice, and the first step should be to point out the importance of this institute and the positive results achieved by using this solution. There must be stimulation within the Office and the magistrates, otherwise no cases will be forwarded to restorative justice.

Portugal has always been considered a modernist and progressive country, regarding the legal framework, and with humanistic principles, particularly in the Criminal Code. Portugal was the first country in Europe to abolish the death penalty, one of the first to end life imprisonments and it is one of the European Union countries with the lowest penalties. This means the Portuguese legislator believes in resocialisation. However, contrary to this progressive mentality, the conditions in practice are more traditional and conservative because society itself seems to be quite ambiguous when it comes to criminal matters. Society tends to react to this in a negative way, feeling that the perpetrator is given too many opportunities, and what is a good thing for the process of rehabilitation of and individual ends up having a bittersweet taste. There needs to be a change of mentalities for restorative justice to be correctly applied

in all its potential. Restorative justice is much more than a criminal proceeding – it is a kind of social catharsis. Criminal history does not end with a conviction or even with serving a penalty. In the end, we are talking about human beings and about the social tissue, which needs to be repaired.

In general, we can say that restorative justice has not yet penetrated in the Portuguese society. Victims of crimes and citizens are not aware of its existence, and those who are seem suspicious about this method.

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However, it must be noted that in the early years of application, 70% of the processes forwarded to criminal mediation reached an agreement, and the majority of people who used the services positively evaluated the functioning of the Criminal Mediation System.

EXPERIENCES AND GOOD PRACTICES

In addition to the criminal mediation system established in law, it is worth pointing out the adoption of other projects related to restorative justice, without the legal component.

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The Project Building Bridges⁷ is a European Restorative Justice project focusing on building bridges between offenders and victims of crime and is based on the fundamental concepts of the Sycamore Tree Project, a restorative justice programme developed and implemented by Prison Fellowship International. The project intended to implement a social and humanistic approach in response to crime, beyond a merely legal perspective, through the promotion of "Restorative Dialogues" between victims and offenders and considering the reconciliation of the parties.

Building Bridges was developed in 7 countries of the European Union, and in Portugal it was represented by Confiar⁸, a private social solidarity institution, which was set up to help prisoners, ex-prisoners and their respective families.

The municipality of Cascais was the one chosen to implement the project, specifically in the Prison Establishment of Linhó.

The idea behind this social intervention was to promote contact between victims and offenders who committed crimes identical to those suffered by the victims.

Communicating with offenders may help victims to move beyond the victimisation phase and not see themselves only as victims, and to find both the satisfaction they need and a sense of support. Offenders also benefit from the participation, as they have the chance to reflect on the impact that their criminal behaviour can have on the lives of other people, notably the victims, allowing for a change of mentality and later a change of attitude.

7 To learn more about this Project see: <http://restorative-justice.eu/bb/>

8 More information on Associação Confiar here: <https://www.confir-pf.pt/pt/>

The selection process of the victims was developed together with the Portuguese Association for Victim Support (APAV), given that the association is one of the founders of the European Forum for Restorative Justice[1] and has an historical connection with the debate and development of the concept in the European context.

Victims and offenders participated, with the help of a facilitator, in eight two-hour sessions over several weeks where they were able to present their views and experiences related to the crime.

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The project's results were released by Jorge Monteiro, Head of Units and Programmes and Projects Department – Directorate General of Reintegration and Prison Services, during the presentation of his panel at the Iberian Conference on Restorative Justice. The evaluation was separated into three dimensions: cultural, technical and scientific. In the first, it was observed that there was the beginning of a change from a cultural point of view, facilitated by the possibility of integrating victim, offender, prison community and society where before there was only a view of punishment and strict legal compliance. In the second dimension, the notions of rehabilitation and reintegration were promoted. Finally, there were indicators noting that this type of project stimulates change in the early adaptation structures of individuals, decreases the dysfunctional beliefs that legitimise human behaviour and operate cognitive restructuring, and points towards a decrease in the risk of violence and recurrence.

Given the positive results, the idea was to extend the project to different situations. This type of intervention can be carried out both in prisons and in neighbourhoods, or even in schools, in cases of bullying.

The Cascais municipality, ISCSP and Confiar created an observatory and competence centre in restorative justice to further deepen the concept and train more people in this area, with the idea of bringing restorative justice to the whole country.

SOURCES:

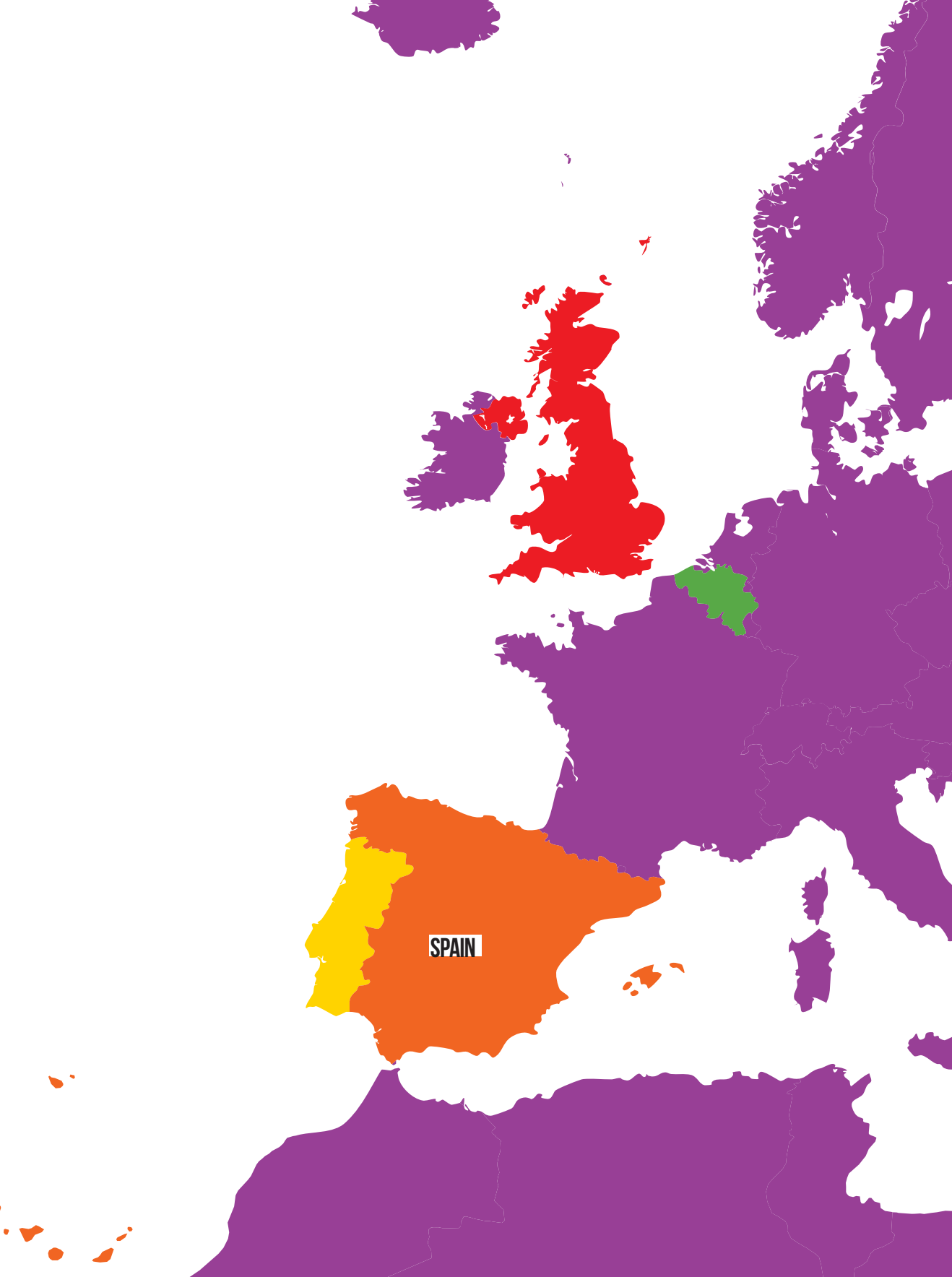
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SPAIN



SPAIN



SPAIN

COUNTRY STATISTICS

An investigation developed by the State Federation of Lesbians, Gays, Trans and Bisexuals revealed that between 60 and 80 per cent of hate crimes and discriminatory incidents go unreported.

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The study, which analyses 332 cases of the 629 registered by LGT-BI entities throughout 2017, concludes that the most prevalent violence is harassment and intimidation (57%) – which includes insults and the use of threatening or abusive language – followed by physical aggression (12%) although in half of the cases two or more incidents occur at the same time.

More than half (53%) of the victims were between 18 and 35 years old, but 12% were minors, which should set off alarms in the education system. 7% of the perpetrators are from the victim's family; 17% are from the immediate environment; 12% are neighbours; 36% are strangers; 7% are shop assistants and 4% are night porters.

RESTORATIVE JUSTICE

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Restorative justice programmes in Spain have been limited to the activity of “victim care offices” within ordinary criminal legislation. The concern for the situation and demands of victims during the criminal process has become the main driving force behind these programmes. These programmes have also found inspiration in the need to give a closer, immediate and effective response to the real demands of citizens, in responding to the crisis of the traditional system and to an adequate reintegration of the victimiser through alternatives to the traditional prison sentence.

In Spain, there is no legal framework that regulates restorative justice processes beyond the ordinary criminal framework. Rather, there have been imaginative techniques that have incorporated the results of the processes through the channels that the Penal Code and the Criminal Procedure Law leave open. The lack of regulation has been compensated for by the enthusiasm and imagination of those who have carried out restorative justice processes. This means that the results of these processes are not uniform throughout the Spanish territory.

A priori, restorative justice practices have been well received by some judicial sectors and legal operators (judges and prosecutors sensitive to this topic), and they have found sufficient support in carrying it out, contributing their results in determining the legal consequences of the crime.

However, as there is no uniformity in the criteria of the legal operators (especially judges and prosecutors) regarding how to introduce the effects of the restorative justice agreements in the legal system, there have been situations where the “principle of equality” has been violated. Also, some citizens were frustrated as they saw how their agreements, which seemed to have the approval of the judicial and prosecutor’s offices, were thrown back in oral trials. Even the admission of responsibility agreements was used to increase the public accusation.

It is necessary to provide restorative justice with its own legal framework that guarantees equal rights for all persons involved in the process everywhere in the Spanish territory.

NATIONAL CONTEXT

Restorative justice is a model of justice that focuses on harmful conflict situations. Everyone involved is expected to participate in order to make amends in the most appropriate way, without stigmatising consequences. The main characteristics of restorative justice are: i) taking responsibility for the consequences of the conflict, ii) "repairing" the damage done, iii) the participation of those who are directly and indirectly involved

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Relevant legislation:

- Spanish constitution
- Law 4/2015, 27 April, of The Statute of the Crime Victim
- Law 35/1995, 11 December, of help and assistance to victims of violent crimes and those against sexual freedom.
- Penal Code
- Criminal Procedure Law

Restorative justice processes can be applied, either in order to avoid a trial, or after the conviction of the person found guilty of the crime.

RESTORATIVE JUSTICE IN HATE CRIMES (EXISTING OR POTENTIAL)

Regarding hate crimes, the viability of restorative justice processes raises certain questions. The existing inequality between the victim and their perpetrator must be considered, as there is a risk that the situation of power imbalance that caused the criminal act will be reproduced. In hate crimes, a transformative model is advised: one which eliminates the prejudices that are the origin of these criminal offences. These factors must be considered when designing restorative strategies that are effective for both the victim and the offender, so that the process is effective for everyone involved.

In cases with/of criminal mediation, it is essential to assess the characteristics of each specific case to determine if mediation is possible.

Legal context:

SPANISH CONSTITUTION

- Equality as a superior value of the Legal System. Article 1
- Obligation of public powers to guarantee equality and non-discrimination. Article 9.2
- Dignity of the person and the right to? free development of their personality. Article 10
- 236 — Principle of equality. Article 14.

PENAL CODE

- Generic aggravating circumstances. Article 22.4.
- Threats aimed at frightening an ethnic, cultural or religious group, or a social or professional group, or any other group of people. Article 170.1
- Crimes against moral integrity. Article 173.
- Crime against discrimination in the workplace. Article 314l.
- Crime and inciting hate, violence or discrimination. Article 510.
- Crime of discriminatory denial of public benefits or services. Article 511
- Crime of benefits or services in the business field. Article 512 l
- Crime of unlawful association to commit a discriminatory crime. Article 515.4
- Crime against religious feelings. Article 524 of the Penal Code
- Crimes against humanity and genocide. Articles 607 and 607 bis.

RESTORATIVE JUSTICE IN LGBTI HATE CRIMES (EXISTING OR POTENTIAL)

LGTBI victims of hate crimes have characteristics that set them apart from other victims of hate crime, and these must be considered when addressing the restitution of damage. It is possible that the family and the community do not have enough preparation to face hate crimes against LGTBI people in their immediate environment. Furthermore, it is not uncommon for LGTBI people to experience a lack of family support in the event of an assault, as their families sometimes do not recognise, or accept, the sexual orientation or gender identity of their offspring.

In many cases, not being heterosexual means leaving a stable social position that facilitates access to resources, and having to abandon those forms of protection, shelter and institutional support.

In addition, the intersections that cross the lives of lesbian, gay, bisexual and trans* people must be considered: minority characteristics such as race, ethnicity, nationality, religion, disability, illness, gender/sex or social status to name a few. It is imperative that these multiple axes of discrimination are considered when analysing how these intersections affect the multiple discrimination that LGBTBI people may suffer and how they may hinder their healing. It is also necessary to study intersectionality from the point of view of the perpetrator, who may have committed the crime motivated by a prejudice towards sexual and/or gender non-normativity, as well as other reasons, such as racism, sexism or hatred of a specific religious denomination. This entire combination of prejudices will need to be addressed to ensure the success of the restorative process.

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NATIONAL HURDLES

Expert conclusions by Charo Alises, made based on reports from FELGTB and the Spanish Government:

- Lack of training for professionals who have to guarantee security and impart justice. This lack of training can lead to hate crimes not being detected and therefore investigations not being opened or being deficient.
- Lack of knowledge of the number of events reported

It is essential to have an adequate system to record hate or discriminatory crimes in order to know the real scale of the problem. From 2011, modifications were made to the Statistical Crime System that allowed all hate or discriminatory crimes to be computed. In 2014, a report by the Ministry for Home Affairs on the evolution, development, change and progress of hate crimes in Spain was produced for the first time.

- Unreported hate crimes

It is a fact that the hidden number of unreported hate crimes is very high. This greatly hinders the fight against these crimes and may leave the victims powerless.

The most common reasons why victims do not file (crime) reports are:

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- Fear of retaliation. It is a common denominator for victims of hate crime. The serious consequences of the crime that the victim has suffered can leave them fearing new attacks if they file a report.
- Normalisation of violence and discrimination. As people may have been victims of hate and discrimination all their lives, they may assimilate these violent behaviours as part of their daily lives.
- Mistrust of Institutions: The victims think that they will not be listened to, or that reporting will be futile. The way victims are treated is essential to building trust in order to encourage them to file a complaint.
- Lack of knowledge by the authorities of the reality for the victims. This lack of knowledge may lead to a failure to properly assess the circumstances surrounding the victim when addressing the reported events.
- Illegal or undocumented immigrants may fear being expelled from the country if they report.
- The victim thinks that their report will not be believed.
- Fear of losing privacy. There are LGBTI people who do not want to reveal their sexual orientation or gender identity when reporting.
- Lack of knowledge of their rights. Victims do not know where and how to report crimes.
- Offering insufficient legal actions. The offer of legal actions enables the victim to exercise their rights in criminal proceedings. This must be done in clear and understandable language for people who do not know the legal terms. If the victim does not understand the information transmitted to them, it is probable that they will not be able to exercise the corresponding legal actions.
- Improper referrals to the Municipal Consumer Office. The lack of knowledge about hate crimes of some legal operators involved in victim care sometimes results in them being incorrectly referred to the Municipal Consumer Office, instead of filing an appropriate criminal complaint.
- A tendency to consider the event as a minor crime. A lack of training or insufficient investigation means that not all the legal assets affected by the perpetration of the crime are valued, and for this reason, too often, acts constituting a hate crime are considered minor crimes with limited harm to the victim. This erroneous classification of the reported events also negatively affects the group to which the victim belongs to, as they can lose trust in the institutions.

EXPERIENCES AND GOOD PRACTICES

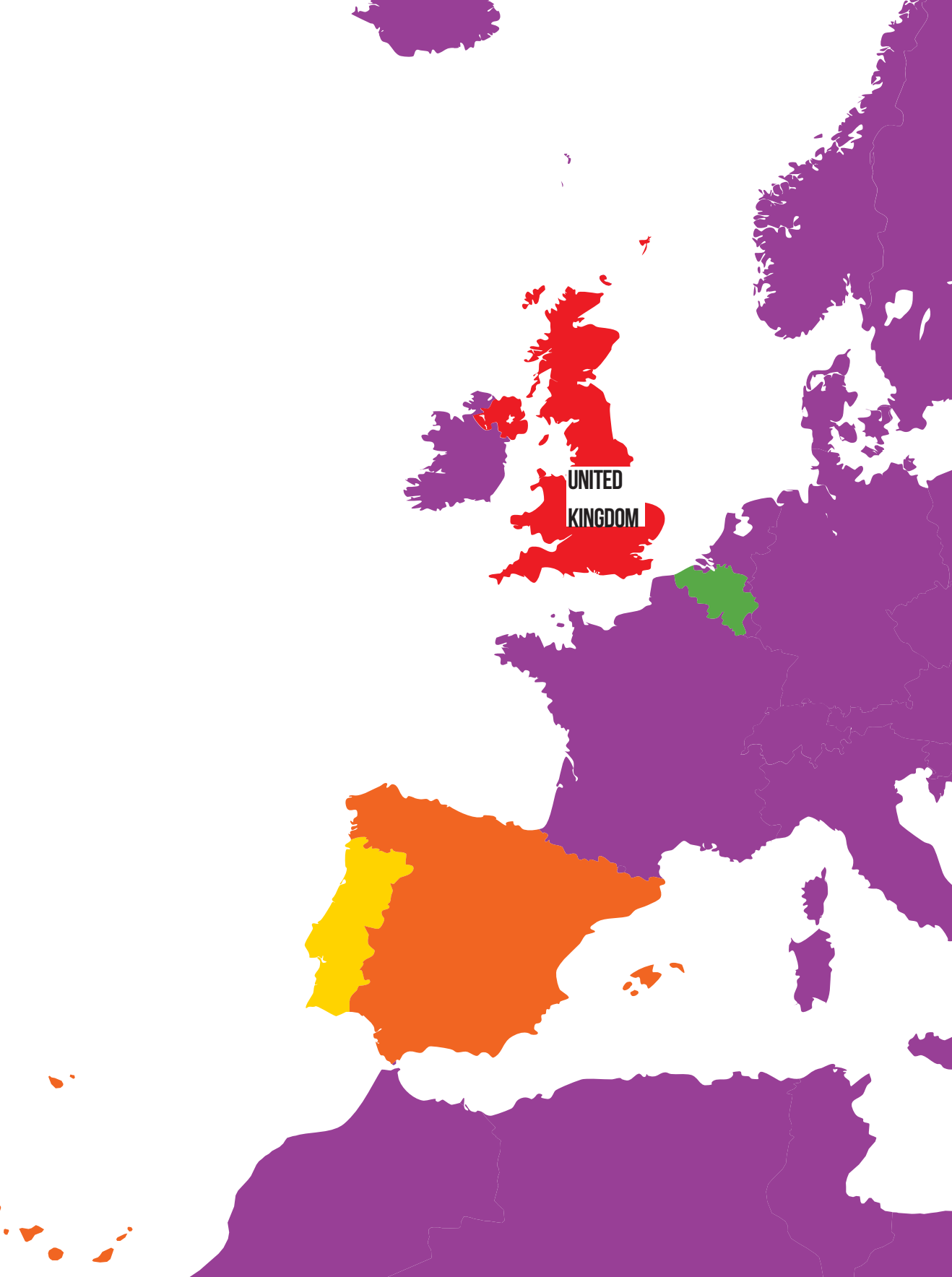
The restorative process in some cases where people were convicted of hate crimes due to LGBTIphobia has had a transformative effect and has succeeded in eradicating prejudice towards LGBTI people, by reducing the perpetrator's belief in the existing misconceptions about sexuality and gender diversity.

An initiative of the Spanish Interior Ministry was launched by working with those convicted to help them change their thought processes and recognise the damage they caused, and to redress the non-material harm they had caused to the victims.

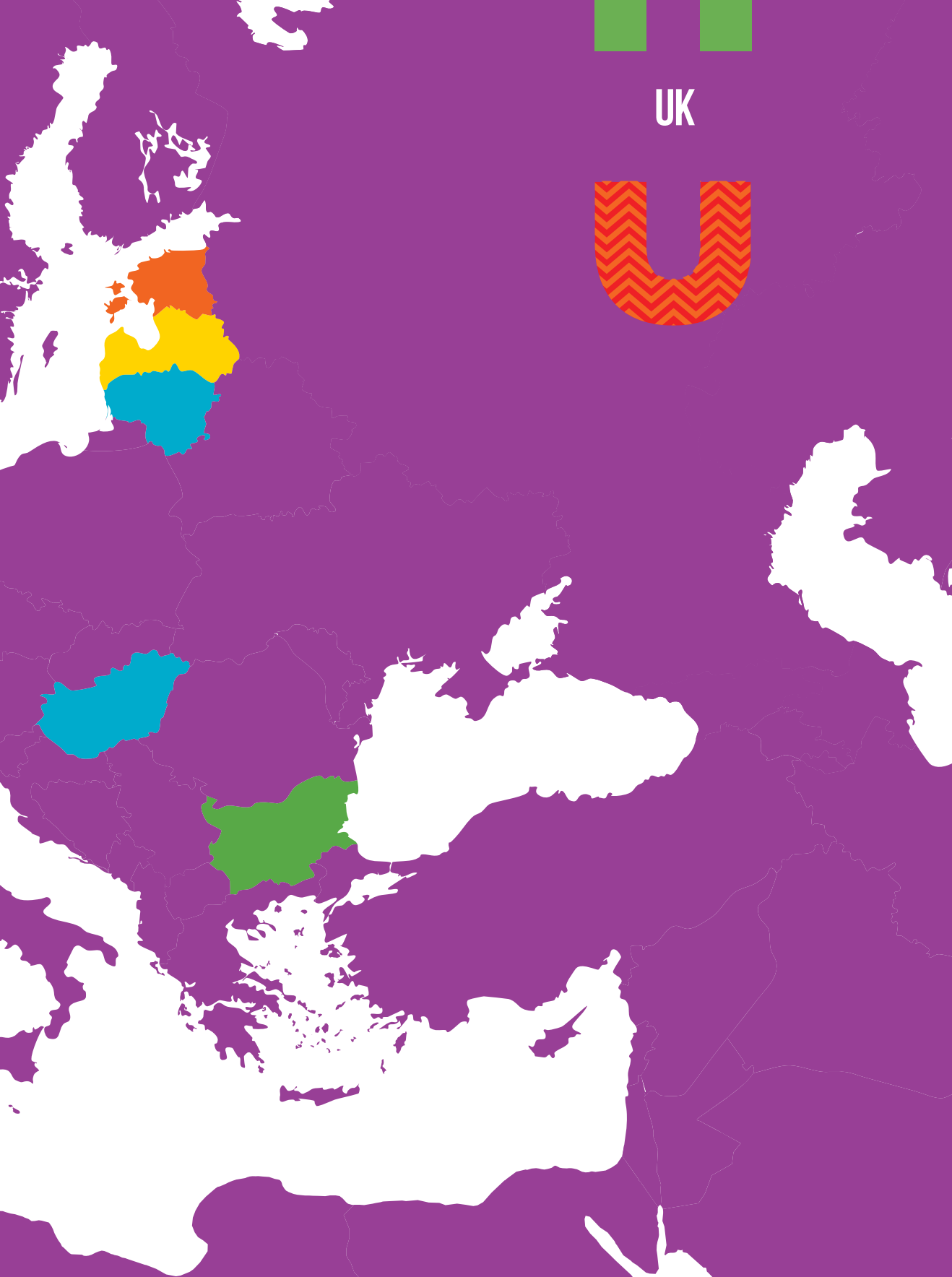
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POLICY ADVICE

Global legislation that considers the particularities of each process of victimisation, including all groups that the victim belongs to, is necessary. The intersections that each person has can make them the subject of multiple discriminations. These may affect the implementation of an effective restorative process, for the victim, for the perpetrator and for society.



UNITED
KINGDOM



UK



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With thanks to Cerys Bradley, Nick Antjoule and Billie Boyd

COUNTRY STATISTICS

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Anti-LGBT+ hate crime is on the rise in the UK. Recorded hate crime has risen significantly every year since 2013/14: in 2018/19, 14,491 sexual orientation hate crimes were recorded, an increase of 25% from the previous year, with 2,333 transphobic hate crimes, an increase of 37%⁹. Hate crime rates appear to have risen even further during the Covid-lockdown, with referrals to Gallop's LGBT+ hate crime service doubling in this period, and partner organisations across other hate crime strands also reporting increases.

The *National LGBT Survey 2018* found that 40% of LGBT+ people had experienced a hate crime incident in the last 12 months. Trans people were significantly more likely to report having experienced at least one incident (53%) than cisgender LGB+ people (38%). Queer trans people in particular were more likely to have experienced an incident – 66% compared to 46% of heterosexual trans respondents (46%).¹⁰

Research suggests that LGBT+ hate crime on average involves more serious injury than other types of hate crime¹¹, but it has very poor outcomes in terms of charging. The proportion of offences resulting in a charge or summons for LGBT+ hate crime is between

9 Home Office. 2019. *Hate crime, England and Wales, 2018/19* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839172/hate-crime-1819-hosb2419.pdf)

10 Government Equalities Office. 2018. *National LGBT Survey: Research report* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf)

11 Walters, Mark A. and Krasodomski-Jones, Alex. 2018. *Patterns Of Hate Crime Who, What, When and Where?* University of Sussex and Demos (<https://www.sussex.ac.uk/webteam/gateway/file.php?name=patternsofhatecrimereport--final.pdf&site=539>).

25%-50% lower than for other hate crime strands, across violence against the person, public order offences, and criminal damage and arson.¹²

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A poll conducted as part of the Call It Hate partnership found that whilst the majority of people in the UK are supportive of LGBT+ rights, a sizable minority still hold prejudicial views. 1 in 5 said that being LGBT+ was against their morals or beliefs, 1 in 10 believed that being LGBT+ could be "cured" and 1 in 10 that LGBT+ people were dangerous to other people.¹³ These prejudicial attitudes underpin the violence experienced by LGBT people, both directly driving violence, and creating a culture that is seen as to be expected.

Restorative Justice is one possible vehicle to address the harm caused to victims, which is especially important to explore in the context of LGBT+ victims who are not currently receiving the same level of redress via criminal justice avenues. It also has the potential to change the prejudicial attitudes driving anti-LGBT+ hate crime and reduce future harm.

12 Home Office. 2018. *Hate Crime, England and Wales, 2017/18*, p20 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748598/hate-crime-1718-hosb2018.pdf)

13 Stray, Melanie. 2019. *The Hate Crime Report*. Galop (www.galop.org.uk/wp-content/uploads/Hate-Crime-Report-2019.pdf)

RESTORATIVE JUSTICE

DEFINITION

Restorative justice aims to repair harm, and it can be beneficial for both victims and offenders. As the Ministry of Justice describes, it is a process which "brings those harmed by crime, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward".¹⁴

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Restorative justice practice is guided by six key principles: restoration – the process aims to address and repair harm; voluntarism – participation is based on fully informed consent; neutrality – the process is fair and unbiased towards all participants; safety – the process is a safe place for the expression of feelings and views about the harm caused; accessibility – the process is unpinned by equity and available to all those affected by conflict and harm; respect – the process respects the dignity of all participants and those affected by the harm caused.¹⁵

Mackie et al (2014) suggest that to be most effective the offender should acknowledge responsibility and be held accountable throughout the process, that the outcomes should be fair, realistic, achievable and credible, and that victim satisfaction is higher when the process involves face-to-face communication.¹⁶

¹⁴ Restorative Justice, Fourth Report of Session 2016-17. (2016) House of Commons Justice Committee.

¹⁵ <https://www.gov.uk/guidance/restorative-justice-and-restorative-practice>.

¹⁶ Youth Restorative Intervention Evaluation Final Report. (2014) Mackie, Cattell, Reeder and Webb.

NATIONAL CONTEXT

Restorative Justice is a diversionary process available to all victims under the Code of Practice for Victims of Crime.¹⁷ There are several different forms of restorative justice within the UK:

- Victim-offender conference – a meeting between the victim(s), offender(s) and supporter(s) either in person or via telephone/video conferencing;
- 246 — A community conference – a conference between the community affected and some/all of the offenders;
- “Shuttle restorative justice” – messages passed between victim(s) and offender(s) by a trained facilitator;
- Neighbourhood justice panel – a meeting between the victim(s) and offender(s) facilitated by trained community members;
- “Street restorative justice” – a meeting between victim(s)/other stakeholder(s) and offender(s) facilitated by the police at the time of the incident;
- Restorative justice courses – victim awareness or empathy programmes aimed at helping offenders understand the impact of their crimes on victims and the community, sometimes including a meeting between the offender and a surrogate or proxy victim;
- Solely victim-focused restorative approaches could also be explored, for example to bring together victims of similar crimes for facilitated restorative peer support.

The provision of restorative justice is not mandatory and depends on the completion of adequate training. In practice, many victims are not offered restorative justice and the majority of people do not know that it's an option.¹⁸ Between April 2010 and March 2018, victims were given the opportunity to meet the offender in just 7% of incidents.¹⁹

17 Code of Practice for Victims of Crime, chapter 2, part A, section 7.

18 Restorative Justice Council (2016) <https://restorativejustice.org.uk/blog/how-can-more-victims-access-restorative-justice>

19 Restorative justice, year ending March 2011 to year ending March 2018 Crime Survey for England and Wales (CSEW).

The Ministry of Justice committed to improving access to restorative justice for victims of crime in their Action Plan 2016-18, stating the aim to have equal access to RJ at all stages of the criminal justice system for all offences. The National Victim's Strategy pledged to require that Police and Crime Commissioners ensure restorative justice services are available, safe and accessible²⁰.

EVOLUTION OF RESTORATIVE JUSTICE IN THE UK

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Restorative justice, in the form of victim-offender mediation, was introduced in the UK criminal justice system in the 1980s. It was adopted from Canadian systems and has been influenced by restorative justice practices in Australia and New Zealand.²¹ RJ processes are most widely used with youth offenders. The Youth Justice Board has promoted RJ since 2001, and includes RJ regulating standards within its national standards for children in the youth justice system.

The emphasis on restorative justice in youth offence cases is reflected in existing legislation as well as in educational practices within schools.

Victim Personal Statements were first introduced in 2001, and Conditional Cautions in 2003. These practices help to partially integrate a restorative approach into the criminal justice system, as the victim is given space to express the harm caused and rehabilitative conditions can be placed on offenders.

There is strong resistance to using restorative justice in domestic abuse cases within the UK, and deep concern about the risk of further harm to the victim. Several key stakeholders, including the Association of Chief Police Officers, have spoken out against its use in this context. Whilst restorative justice may be appropriate in some hate crime contexts, more caution must be applied in assessing risk, including taking the power dynamics between victim and offender into account.

20 Making Restorative Justice happen for hate crime across the country. (2019) Ben Andrew.

21 The Development of Restorative Justice in the UK: A Personal Perspective. (2005) Les Davey. IIRP News

CORRESPONDENCE TO CRIMINAL JUSTICE

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Restorative Justice can take place at any stage of the criminal justice process in the UK and can be initiated by both the victim and offender. Currently, it is more commonly used before a case comes to court as part of a diversionary process, but it can also take place after conviction and it can form an integral part of any sentencing disposal, especially with children and young people.²²

Restorative justice can interact with the CJS at three different levels. It can be:

- Independent: a process that offers a complete alternative to the CJS and replaces any penal response to the crime;
- Relatively independent: a process that occurs alongside the CJS and has a bearing on the outcome, for example by reducing the sentence handed down;
- Dependent: a process that happens in addition to a CJS process, for example, the victim visiting the offender in prison.²³

The severity of the crime can be a key factor in whether restorative justice is offered, especially independent RJ. This is often thought of as more appropriate to low level offending where the public interest does not require a criminal justice outcome, or where prosecution is unlikely to be successful.

The integration of restorative justice into the CJS and the type of restorative justice available to a victim is a postcode lottery. For instance, some areas only offer restorative justice post-conviction.

²⁴When implemented successfully, restorative justice can complement the criminal justice system infrastructure well, as it has different aims to other elements of the CJS. Criminal penalties traditionally aim to punish specific incidents, rather than focusing on preventing reoffending. For some instances of hate crime, re-

²² <https://www.cps.gov.uk/legal-guidance/restorative-justice>.

²³ Restoring Relationships: Addressing Hate Crime Through Restorative Justice. (2007) Race on the Agenda

²⁴ Restorative Justice, Fourth Report of Session 2016-17. (2016) House of Commons Justice Committee

storative justice might be a better strategy, as it can help reduce the prejudice driving hate crime, especially for low risk hate crime offenders.

However, there are tensions between the two systems that sometimes pull in opposite directions. For example, in 2016, the House of Commons Justice Committee suggested that restorative justice is at odds with the Better Case Management strategy, which discourages adjournments and deferrals, key tools in creating space for early stage restorative justice.²⁵

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APPLICATION OF RESTORATIVE JUSTICE IN HATE CRIME CONTEXTS

WHAT IS A HATE CRIME?

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A hate crime is a criminal offence that is motivated by prejudice towards particular groups of people. They are “message crimes” intended to spread fear and feelings of vulnerability among targeted communities. They not only affect individuals directly, but the entire social group that the individual belongs to.

A key feature of the UK recording framework is “perception-based recording”. The Hate Crime Operational Guidance from the College of Policing defines hate crime as:

“Hate crime: Any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by hostility or prejudice against a person who is transgender or perceived to be transgender.”²⁶

The intention of the words “perceived by the victim” is to provide a victim-focused approach at the police recording stage in determining whether a bias element is present, so it can be considered during the investigative process. Other key elements in the UK recording model outlined above include the perpetrator's perception (correct or incorrect) that the victim belongs to an oppressed group, the facility to record non-criminal hate incidents, and recording process improvements made by authorities and NGOs.

26 Hate Crime Operational Guidance College of Policing, 2014. <http://library.college.police.uk/docs/college-of-policing/Hate-Crime-Operational-Guidance.pdf>

RESTORATIVE JUSTICE IN HATE CRIME

Hate crime often has severe and long-lasting impacts on victims. They target members of marginalised groups for being who they are, and aim to instil fear within communities. An empathic connection between the parties is key to the restorative process, as it has the potential to heal these broken social bonds between the victim, offender and wider community. When executed well, Restorative Justice provides the victim with a more active role in the justice process, helping them to understand more about the incident, empowering them to explain the impact that the incident had on them, challenging the prejudicial beliefs of the offender and expressing how they feel the harm could be repaired. This can reduce the long-lasting impacts of hate crime, such as on-going fear and anger. It also offers a route towards rehabilitation and the potential for real and lasting change in the prejudicial views and actions of the offender.

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However, there are also some serious potential risks, and if the restorative justice process is not handled well, it can result in secondary victimisation that actually increases the impact of the hate crime experienced. This can occur where the victim experiences re-victimisation during the process, for example through exposure to further prejudice from the offender or others involved in the process such as supporters for either party; through direct prejudice, victim-blaming, failure to challenge prejudicial attitudes, or a lack of understanding of LGBT+ issues by the restorative justice facilitator themselves; when the victim ends the process feeling powerless and let down; when the process inadvertently reinforces power differentials between the victim and offender, especially where there is an on-going relationship between them; or when the process escalates the situation and leaves the victim at risk of further harm.

There is limited data available on the effectiveness of Restorative Justice in a hate crime context, and there is no centralised record of restorative justice programmes for hate crime.

The most commonly cited example of successful practice is the Hate Crime Project run by Southwark Mediation Centre, which has been running since 2000.²⁷ This service uses restorative justice approaches to deal with hate crime and hate incidents referred by schools, housing associations, police, anti-social behaviour units and via the individuals themselves. Their approach involves in-

²⁷ <https://www.southwarkmediation.co.uk/projects/hate-crimes-project/>

clusive dialogue, mediation, exploration of the prejudice driving the conflict, and the creation and signing of a written agreement about future behaviour. Walters (2014)²⁸ evaluated this project in 2008–2011. In 11 out of 19 on-going hate crime cases, the incidents stopped directly after the mediation process, and a further six stopped after additional agencies such as schools, social services and housing agencies were introduced to the mediation process. 17 of 23 interviewees reported improved emotional well-being and reduced anger, anxiety and fear. Walters (2017)²⁹ summarises the key reasons for these improvements: the participants felt they could play an active part in their own conflict resolution; they felt able to explain to the offender and others the harm they had experienced and talk about what it is like for them to be “different” in the community; they felt supported by mediators who listened to their version of events; and the offender signed an agreement promising to desist from further hate incidents.

Walters (2014) also provides an example of a “restorative” justice process with low rates of satisfaction and levels of harm reparation. In 2008, Devon and Cornwall Police Service trained officers to use a new restorative disposal for “low level” hate crime offences. Of the 14 victims interviewed in the evaluation, 7 were dissatisfied with the outcome of their case, and only four felt that the restorative disposal had helped to repair the harms caused by the hate crime. The key reasons that the interventions were less successful were: the participants felt pressured by the police to agree to the intervention, and so it was not truly voluntary; participants felt that the apology from the offender was disingenuous, for example some were notes with no explanation as to why the crime had been committed; participants felt let down by the police; and only one victim was given an opportunity to talk directly with the offender about the harm caused by the offence and how he could repair the harm. Whether this programme can actually be considered “real” restorative justice is doubtful, as key elements of restorative practice were absent.³⁰

28 Walters, M.A. (2014). *Hate crime and restorative Justice: Exploring causes, repairing Harms*. Oxford, Oxford University Press.

29 *Preventing Hate Crime: Emerging Practices and Recommendations for the Improved Management of Criminal Justice Interventions*. Walters, Brown and Wiedlitzka 2017.

30 *ibid.*

Step Up Beat Hate is a Derbyshire campaign designed to increase awareness of the benefits of restorative justice for hate crime victims. The project, launched in March 2017, was funded by the Home Office's Hate Crime Community Project Fund, the PCC and Derbyshire County Councils.³¹ No independent empirical analysis of the success of the project has thus far been undertaken, but the joint agency approach and involvement of third sector organisations, and the anecdotal accounts of the process on the website, are certainly promising.³²

Finally, *Why Me?* has piloted a 2-year LGBT+ hate crime and Restorative Justice project across London, the findings of which are detailed elsewhere in this publication – please see “Using Restorative Justice in cases of LGBTI Hate Crime (England and Wales)” by Linda Millington.

NATIONAL HURDLES

The efficacy of a restorative justice approach relies on a skilful and knowledgeable facilitator. Training available varies greatly across the UK; for example, facilitators can receive 9 weeks in Northern Ireland compared to only 3 days training in England and Wales.³³ If the facilitator lacks knowledge and deep understanding of LGBT+ experiences, then LGBT+ victims are at risk of secondary victimisation within the restorative justice process.

In order for a victim to engage in restorative justice, they must know that it is an option in the first place. In our current CJS focused model, it is primarily down to the police officer or other CJS administrators to make the victim aware of this right. It is unlikely that RJ options will be taken up without a degree of trust and engagement with police and other services. LGBT+ communities often do not have trust in the police, and many have poor previous experiences that discourage future engagement. This mistrust is manifold for marginalised groups within the LGBT+ community, such as black, Asian and other ethnic minority groups, refugees

31 Campaign Launched to Tackle Hate Crime in Derbyshire. (2017) Restorative Justice <https://restorativejustice.org.uk/news/campaign-launched-tackle-hate-crime-derbyshire>

32 <http://www.stepupbeathate.com/find-out-about-restorative-justice/>

33 The Effectiveness of the Restorative Justice Landscape. (2016) Commons Select Committee <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/164/16406.htm>

and other migrants, trans and non-binary people, and disabled people. Community-led restorative justice programmes may be more appealing to LGBT+ communities and have higher engagement rates; the success of such projects has been demonstrated in the context of racist hate crime³⁴.

EXPERIENCES AND GOOD PRACTICES

GOOD PRACTICE EXAMPLE

Lucy, a trans woman, went to a bar with a few friends after work. Whilst she was enjoying the night, a stranger came up to her and started shouting transphobic slurs. The stranger head-butted Lucy in the face, and then left the bar. The security staff saw the attack but instead of offering help, decided to remove Lucy from the bar and tell her to go home. Lucy felt she had no support from the security staff and that she had been seen as a nuisance after being a victim of a transphobic attack.

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Lucy contacted the police and Gallop the next day. Lucy said she was not happy with how the security made her feel as if she was to blame, and wanted to have a discussion on why the security staff acted like they did. The case was referred to a Restorative Justice organisation. The bar and security staff involved agreed to undergo an RJ process and a restorative justice conference was held. Lucy learned about the bar's policies on violence and why the incident was handled this way, and the security staff agreed that they could have been more kind and would act differently in the future in this kind of incident. Lucy felt like she gained some closure on this matter while the criminal investigation is still ongoing.

This example shows how restorative justice can be useful to reduce the impact of secondary victimisation, for example where an anti-LGBT+ incident occurs and security staff, police, retail staff, housing agencies or any other kind of agency or authority figure acts in a way that compounds the negative impact on the victim. This both repairs some of the harm to the victim and can result in learning and a change in the individual's behaviour and agency's policies in the future.

Some important factors in the success of this case were:

- The facilitator was trained in LGBT+ hate crime before the conference, and undertook their own reading to understand the needs of the parties. Facilitators should seek support with understanding from appropriate sources, such as an LGBT+ organisation, and ensure that they do not "quiz" an LGBT+ person about their identity;

- the facilitator assessed the likelihood that the harmer would re-vocalise their prejudices in a meeting. It is important to also ensure that no supporters for either party will voice or reinforce these prejudicial views;
- the facilitator knew enough to recognise harmful statements, and felt confident to challenge transphobic language or attitudes if they did arise in the conference. They were able to ensure that the harm caused was not minimised, e.g. "I didn't mean to; I didn't know that was a slur";
- the facilitator checked in with the victim about which pronouns to use in the conference beforehand, and then ensured that they were used by all parties throughout. Facilitators should be aware that the client may or may not want the offender to know their sexual orientation or gender identity;
- all parties were given breaks when needed;
- all parties were aware of long-term specialist support.

BAD PRACTICE EXAMPLE

Sohail, a gay man, was living in supported accommodation. His neighbour was repeatedly homophobic to him over a period of six months and eventually Sohail reported the harassment to the police. The incidents were investigated and the police built a criminal case and were ready to charge the neighbour for the offences. Sohail felt bad about getting his neighbour into trouble with the police, even though he wanted the abuse to stop. He decided he would like to explore alternative remedies that would not involve criminal prosecution. The police didn't charge the offender.

Sohail sought support from his housing officer who connected him to a victim support organisation and RJ organisation. Sohail decided to proceed with RJ. The housing officer, thinking that the neighbour might not agree and trying to help, wrote a letter to the offender saying that if he didn't attend the conference, he would be evicted from his property. Sohail was worried about this, in case the offender would target him further if evicted.

Once the RJ facilitator discovered that the offender felt forced to participate because of the threat of eviction, they determined that it would not be appropriate for the conference to go for-

ward. The offender's participation was not truly voluntary, which was contrary to restorative justice principles and would have undermined the effectiveness of the process.

The process took time to get to this point, during which the criminal investigation was dropped because too much time had passed. Sohail was left no redress for the harm he had suffered, and the offender did not face any consequences for his actions. Sohail's experience left him at risk of future harassment and feeling that the system had failed him.

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This case illustrates that even with the best of intentions, incorrectly applied restorative justice can cause further harm to the victim. The key learning points from this case are:

- Police and other agencies should make sure to explain the impact that pursuing RJ may have on a criminal investigation, the timelines involved, and that in some cases pursuing both criminal and restorative justice simultaneously is possible.
- Restorative justice facilitation requires adequate training, and the involvement of an independent restorative justice agency is key. Non-restorative justice agencies should avoid attempting to undertake aspects of the process themselves, and only take the action requested by the restorative justice facilitator.
- Restorative justice must be voluntary for all parties involved.

POLICY ADVICE

RECOMMENDATIONS

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- Improved awareness of and access to restorative justice for victims of hate crime.
- Training for restorative justice professionals in working with people from marginalised communities, and training in race, faith, LGBT+ and disability hate crime.
- Training for criminal justice professionals about the restorative justice process and referral agencies.
- Further research into the effectiveness of Restorative Justice in the context of LGBT+ hate crimes.

When applying Restorative Justice in an LGBT+ hate crime context, practitioners should ensure that: Facilitators have very good knowledge and understanding of anti-LGBT+ prejudice, and are able to recognise and address harmful attitudes or statements by the participants.

- The process is truly voluntary for all participants.
- Thorough preparation takes place with the participants before any direct dialogue between the parties.
- The victim is asked about their pronouns beforehand, and the facilitator ensures that these are used throughout the process by all parties.
- The risk assessment undertaken including consideration of the likelihood that any party involved will voice prejudicial views, including any supporters present.
- The victim is prepared by the facilitator for the eventuality that the offender could demonstrate prejudice in the meeting, or deny the anti-LGBT+ element of the offence.
- Ground rules are outlined regarding expected language and behaviour during the meeting.
- The victim is made aware that pursuing restorative justice can impact an ongoing police investigation.
- Indirect meeting alternatives are considered where appropriate to reduce the risk of further harm to the victim.
- All parties are made aware of the specialist support available to them during and after the restorative justice process.

CONCLUSION TO THE HANDBOOK

A crime is more than breaking a law, it is an infringement of relationships between people. Restorative justice not only looks at the punishment – that's what criminal justice does – but also at the causes and consequences of a crime and what could facilitate recovery.

A hate crime's main characteristic is its discriminatory motive. Wherever possible, efforts should be made to address the prejudiced attitudes of a perpetrator towards the societal group they were targeting. This is where alternative sanctions can serve an educational purpose.

On top of that, hate crimes are often referred to as 'message crimes'. They carry a societal message of exclusion. The aggravated circumstance signals to society that prejudice-motivated hatred is not accepted. Mediation processes can be a powerful tool in this.

Non-profit organizations and governmental services should continue investigating whether restorative justice could be applied in cases of anti-LGBTI hate crimes, hate messages or discrimination. Provided certain conditions are fulfilled, victim-offender mediation can have a better long-term effect than a mere punishment or a monetary fine. Although a recovery-oriented approach will not always be possible, it should at least be presented as a viable option for the people involved.

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