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Victimological Challenges and Restorative Justice in Present Basque Country*

Abstract

The consolidation of the end of ETA's terrorist activity has opened a new time for the Basque society. Nevertheless, the effects of victimization still require particular care from the public institutions, the efforts of which should be now focused on truth, and against oblivion and impunity. Obviously, due to its own features, extension and political meaning, the victimization generated by ETA has deserved the most important attention. Justice requires, however, facing torture and other serious breaches of human rights by other actors that have also taken place and whose victims have equally a full right to truth, justice and integral reparation.

Concerning the guarantees of non-repeat, delivery of weapons and dissolution appear as the main requirement concerning ETA's terrorism. In relation to torture and abuse of power, the approval by the Basque Parliament of an Act of prevention of torture and ill treatment and of integral reparation of the victims of abuse of power should deserve a thorough consideration.

Keywords: Victimology, Terrorism, Torture, Restorative Justice, Basque Country.

Abstract

Die Konsolidierung des Endes der terroristischen Aktivitäten der ETA hat für die baskische Gesellschaft eine neue Zeit eingeläutet. Dennoch erfordern die Folgen der Viktimisierungen noch immer die Aufmerksamkeit der öffentlichen Institutionen, diese Bemühungen sollten sich jetzt besonders auf die Wahrheitssuche beziehen und gegen das Vergessen und Straflosigkeit kämpfen. Dabei haben natürlich die Viktimisierungen durch die ETA wegen ihrer besonderen Natur, Reichweite und politischen Bedeutung die größte Aufmerksamkeit erfahren. Die Gerechtigkeit erfordert es allerdings auch, dass Folter und andere schwere Menschenrechtsverletzungen, die durch andere Akteure begangen wurden, betrachtet werden, deren Opfer ebenso einen Anspruch auf Wahrheit, Gerechtigkeit und Wiedergutmachung haben.

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Unter den Garantien der Nichtwiederholung erscheinen die Abgabe der Waffen und die Auflösung als die wichtigsten Erfordernisse mit Blick auf den ETA-Terrorismus. In Anbetracht der Folter und missbräuchlicher staatlicher Machtausübung verdient die Verabschiedung eines Gesetzes zur Verhütung von Folter und Misshandlung sowie zur vollständigen Wiedergutmachung für die Opfer von Machtmissbrauch durch das baskische Parlament sorgfältige Erwägung.

Schlagwörter: Viktimisierung, Terrorismus, Folter, Restorative Justice/Wiedergutmachung, Baskenland

The most relevant guides of transitional justice widely recognize the decisive contribution of the victimological approach in the processes of surmounting violence affecting democracies in conflict. In this light, as in many other fields, programs that seek to repair the victim's harm, while promoting the active responsibility of offenders and society, not only generate perceptions of "positive content" (Dünkel 1990, 115), but also constitute particularly useful tools of delivering justice. And thus, restorative programs, as modalities of a true victim-oriented justice (Beristain 2011, 141 ff.), have effectively contributed to the success of different experiences, even in situations dominated by strong pressure and (macro)political interests of putting an end to the conflict as soon as possible.

A. Central position of victims

According to international standards, public policies aimed at strengthening peace must immediately take into consideration the victimisation generated, and search for the integral reparation of unjust damages and sufferings. This requires a true and effective investigation of violations and a guarantee to victims of full access to justice.

Leaving aside the issue of the victims of the Civil War and Francoism (still in need of an effective policy of memory), two are the main collectives of victims in the present situation in the Basque Country:

- Victims of terrorism and
- Victims of torture and abuse of power generated in this context (either directly or tolerated) by public agents.

I. Terrorist victimisation

Due to its own characteristics, political significance and extent, public intervention focussed initially on the victimisation generated by ETA (De la Cuesta 2009, 23 ff.). Nevertheless, other important aspects and beneficiaries were progressively incorporated. In this sense, the Spanish Act n° 21/2011 and the Basque Country's Act n°4/2008 assure, nowadays, the recognition, assistance and repair not only of the ETA victims, but also the victimisation provoked by other groups, including extreme-right's terrorism – *Grupos Antiterroristas de Liberacion (GAL)*, *Batallón Vasco-español*

(BAV), etc. – as well as the victims of the March 11 attacks in Madrid. This normative set deserves a positive evaluation at the international and comparative level.

Leaving aside the controversies that the social prominence of victims of terrorism provokes in certain sectors, and other difficulties and technical problems that the enforcement of legal norms too often encounters, the main victimological challenges after ETA's decision of putting a final end to violence (October 2011) can be described as follows.¹

1. Truth

Clarification of truth constitutes an essential priority for victims who cannot stop asking why and how everything happened and where the disappeared relatives are. Victims' associations estimate that 326 deaths are still pending clarification.² The requirement is not only necessary for a judicial clarification, as part of the right to justice, but also and more specifically for knowing the reality of each particular case. This legitimate demand will not be easy to satisfy, since only victimizers (individually or in a collective way) are able to transmit the appropriate information. Therefore it appears as a necessity to establish and to open formal and informal ways and mechanisms in order to facilitate it.

2. Memory

Very much linked to the clarification of truth is the fight against oblivion, a core element in the victims' concern. The establishment of an adequate memory is a must in the contribution to the de-legitimization of violence and to the consolidation of a free life as a community. This task, necessarily a collective one, is not an easy one. There are too many historical examples of manipulation of memory by the power, of imposing, celebrating and commemorating official histories that do not correspond to the perception of large sectors of the general public. The temptation of abuse of the memory coming from other sectors, particularly those who support the legitimacy of the violence employed, is also high.

Construction of memory should be based on the recognition of historical complexity, procuring an inclusive and shared narrative. Inspired by the democratic principles of respect, pluralism and illegitimacy of violence, the construction of memory should move away not only from the epical perspectives that so often have inspired the policy of memory, but also from the strict criminological approach. In fact, in a true victimo-

1 On frustration and hope of the indirect victims of murder in the Basque Country, see equally *De la Cuesta Arzamendi* (ed.) 2014.

2 According to a recent report published by the Basque Government which establishes the total amount of killed victims as 927, these are the percentages of cases of murder still pending clarification: 23,20% (of the 849 committed by ETA), 24,39% (BVE), 37,03% (GAL) and 30% (Others) (*Fonseca et al.* 2014, 22 ff.).

logical sense, it should be focused on terrorist victimization, using the victims' perspective as a basis. This last perspective urges the reflection on the injustice of the specific violence suffered and on the exploitation of others' life and integrity in defense of a particular political project. Only then memory becomes an opportunity to "deliver justice" and to address the collective debt towards those who have most suffered (Elzo 2014, 278).

Several initiatives related to memory have until now found expression, such as the Memory Map or the Day of Memory, the Memorial of the Victims of Terrorism that the Spanish Central Administration is establishing in Vitoria, and the Basque Institute of Memory. On the other hand, Basque Act N° 4/2008 includes the right to memory among the rights shared by victims of terrorism and society. Nevertheless, this assumption requires further efforts in order to better define its content and consequences.

3. Impunity

The concern for impunity (Varona Martínez 2013, 215 ff.)³ is nourished by the experience of so many reconciliation and peace processes which have been closed with mass releases of prisoners and hardly acceptable or absolutely unacceptable pardons and amnesties.

Victims of terrorism have a right to effective judicial protection and a legitimate interest in the prosecution and punishment of the criminal offences. In society, and therefore also among the victims of terrorism, a retributive perspective of justice is widespread. According to this approach, doing justice is imposing harm on the offender in order to compensate the harm provoked by the offence. This understanding of justice, in line with the absolute theories of punishment, looks exclusively backwards and has found a particular reflection in several legal and jurisprudential developments concerning terrorism, aimed at assuring the integral enforcement of particularly long sentences in the harshest penitentiary conditions (classification, exclusion from benefits and access to parole etc.). A notable example of the latter was the so called "Parot Doctrine", a new jurisprudential line devoted to assure a longer stay in prison of con-

3 See also the documents approved by the Associations of Victims of Terrorism, http://www.fundacionvt.org/index.php?option=com_content&task=view&id=728.

victed terrorist,⁴ finally rejected by the European Court of Human Rights (ECtHR, *Rio Prada v. Spain*, October 21, 2014).⁵

Motivating punishment exclusively with retributive aims is not acceptable: these considerations, that presuppose culpability, must at least be dialectically combined with the requirements of general and special prevention, and the respect of the principles of legality, necessity and humanity (*De la Cuesta* 2009, 209).

The possibilities offered by new modalities of justice, such as restorative justice, should also be considered seriously (*De la Cuesta Arzamendi et al.* 2014). On the basis of a formal rejection of the harm and injustice provoked, restorative justice seeks effective individual and social reparation based upon closing the distance between victimizer and victim. The positive evaluation of multiple experiences reinforces the interest in this type of initiatives, progressively generating international standards in order to assure good practices (*Varona Martínez/Soletto Muñoz* 2014). Based upon voluntary participation and assuring as a general condition the formal and clear recognition of the injustice of the harm and suffering caused by the victimizer, restorative justice appears as a particularly appropriate tool in the present situation in the Basque Country, where the participation of the community can also play a relevant role in relation to the social and political dimension of the harm generated by terrorism.

Excursus: In order to prevent and reduce risks of secondary victimization, every initiative developed concerning prisoners should be treated in the light of the right to justice. Antiterrorist legislation, due to its harshness, is characterized everywhere by the intensification of the so-called tertiary victimization. Paradoxically, in certain conditions (admission of the activities and active cooperation with the authorities) dissociation from terrorism can lead in these cases to mitigation of the sentence and even to the remission of punishments in many legal systems. Even if Article 579.4 Penal Code still allows mitigation in case of dissociation, most of the possibilities offered by the Spanish legislation were restricted in 2003; the requirements for getting parole have been particularly demanding since then.

Certainly, ETA's decision of putting an end to violence, particularly if it is accompanied by the required surrender of weapons and dissolution, gives way to a new situation that cannot be ignored by those juridical operators who pay attention to the social reality of the time in which the law is to be applied (Article 3.1 Civil Code), neither by a penitentiary system constitutionally orientated to resocialization (Article

4 In fact in 2006 the Supreme Court (see Decision of February 28, 2006) broke with a tradition and established that in those cases where a convict had received accumulated punishments, all the temporary requirements concerning the penitentiary benefits were to be referred to each of the punishments imposed (to be executed consecutively) and not, as it was traditionally done, considering the general limits foreseen by Article 76 Penal Code. This last Article establishes that the general limits of execution of penal sentences (20, 25 or 30 years), will be raised to 40 years if the offender was convicted of at least two offences and two of these offences carry a term of imprisonment exceeding 20 years or if the offender was convicted of at least two terrorist offenses and one of these offenses carries a prison sentence exceeding 20 years.

5 For a complete review of the evolution of the Parot Doctrine, *Gimeno Beviá* 2014; *Ríos Martín/Sáez Rodríguez* 2014.

25.2 Spanish Constitution). In this sense, initiatives like the encounters with ETA prisoners developed in the Prison of Nanclares (*Pascual Rodríguez et al.* 2013) have been very positively evaluated from the restorative justice perspective and should merit a renewed support.

Following this trend, the Basque Government is presently working on the Project *Hitzeman, la "vía legal"*. Based on the respect for truth, memory and legality and assuming as fundamental principles consensus and progress, as well as compromise and generosity, the project gives to those prisoners who adhere to a formal agreement the opportunity of participating in one of the four established itineraries of contribution to peace, while attempting a specific moral reparation for victims by means of the recognition by the victimizer of his/her responsibility concerning the injustice generated, and a critical revision of the past.

II. Victims of human rights violations generated in the context

Whereas the legislative development concerning the victims of terrorism can be considered very relevant, the situation is very different in relation to victims of unjust and illegitimate violations of human rights generated in the context of politically motivated violence.⁶ Only one decree has been approved and has entered into force: the Basque Decree N° 107/2012, on the declaration and reparation of victims of unjust sufferings following the violation of their human rights that occurred between 1960 and 1978 in the context of the politically motivated violence in the Autonomous Community of the Basque Country (*Landa* 2014, 483 ff).

Thus, multiple reasons advocate for benefitting from the experience in the field of the victims of terrorism to extend to this group an adequate set of interventions devoted to the recognition of their rights to truth (and memory), justice and reparation. Furthermore, restorative justice contains interesting models of intervention related to victimizations in the field of torture and mistreatments: a number of restorative experiences and processes in absence of offenders (for example victim-offender groups where victims do not meet "their" victimizers, but others who committed the same type of crime) – in full respect of the international standards and with the support of very competent professionals – deserve to be mentioned in this respect.

In any case, there are important criminological and victimological differences that need to be underlined. In fact, an adequate approach of the struggle against abuse of power is not compatible with its restriction to the so-called terrorist or antiterrorist "context" (even if this context has certainly favored and aggravated it). Abuse of power

6 The Basque Government has already published three reports concerning this kind of victimization: Informe sobre Víctimas de Vulneraciones de Derechos Humanos derivadas de la Violencia de Motivación Política (2008); Víctimas de vulneraciones de derechos humanos y sufrimientos injustos producidos en el contexto de violencia de motivación política (2010) and *Carmena/Landa/Múgica/Uriarte* 2013.

is present in all societies, even in the more developed democracies. Therefore it is not reasonable to think that it will “evaporate” with ETA’s disappearance.

Besides and in a similar way to other violations of human rights consisting in abuse of power, victimization generated by (para)official instances in politically motivated contexts bears a high risk of concealment and impunity. This has very negative consequences regarding either the detection and proof of the facts or the recognition of the victim status; and these are usually fundamental requirements for any public intervention which consists in taking care, assistance and reparation. Experience shows that, in order to ascertain the truth, it is not reasonable to rely solely on the ordinary official positions. As a result, specialized boards, integrated by respectful individuals and established as independent organs, are suggested as the most effective way of facing this relevant issue.

Be that as it may, with regard to reparation, the level reached in the field of victims of terrorism constitutes a victimological model: every victim deserves “integral reparation”. And the lack of public interventions in favor of most of the victims of serious violations of human rights (*De la Cuesta Arzamendi et al.* 2012, 304 ff.) urges the adoption of efficient decisions. The presence of victimizers among these victims should not be an obstacle for this purpose, since there are also victimizers among ETA’s victims. Besides, the punishment of disqualification from civil rights sets already important limits in relation to convicted offenders.

Regarding memory, the final purpose of any intervention in this field should be to assure the principles and basis of life as a community, and to delegitimize and ban its utilization in political life. In this light, victims of terrorism certainly present a very particular value; but the victims of torture and other violations of human rights also remind of the illegitimacy of violations of human rights even in such an extreme context as the fight against terrorism. A shared and inclusive memory, aimed at the reinforcement of the democratic system against those who attack it from the outside and against those who, from the inside, do not respect it, should include both types of victimization, conferring to each one its own legal treatment in order to prevent and avoid any confusion.

Nevertheless, proximity in time of the suffered victimization, as well as the risk of feedback of the discourse of the “two types of violence”, advocate in favor of an utmost prudence, particularly concerning the organization of joint celebrations. In this sense, the participation of the victims and their representatives would be highly advisable in order to progressively define common areas of intervention. Encounters of victims of terrorism with victims of abuse of power, such as the one developed in Glenree,⁷ give appropriate opportunities in order to explore the possibilities in this field.

7 These encounters, promoted by the Basque Government began in December 2007 with the purpose of facilitating exchanges among victims of GAL and similar organizations (or even victims of torture and mistreatment) on the one side, and victims of ETA on the other side. They took place in Irish village of Glenree.
http://www.interior.ejgv.euskadi.net/r42-victimas/es/contenidos/informacion/informacion_documentos_interes/es_document/documento_glenree.html.

B. Guarantees of non-repeat

Solidarity with victims is not complete if it is not accompanied by a real effort in order to assure appropriate mechanisms and policies to prevent and avoid repetition. Concerning terrorist aggressions, this can be either a result of an efficient police and judicial intervention or the product of the decision of putting an end to violence adopted by the terrorist organization, voluntarily or as a consequence of the social and institutional rejection of violent aggressions.

Prevention and guarantees of non-repeat are also to be reinforced in relation to other violations of human rights. Legal reforms which, respectful of the civil and political freedom, assure incrimination and punishment of torture and other internationally prohibited mistreatment, appear in this sense as a first level of intervention. This level of intervention has to be completed by the establishment of efficient mechanisms of prosecution and investigation and by ensuring the respect of all guarantees in the penitentiary world where the principle of humanity should have particular importance (Dünkel *et al.* 2008).

In any case, the specific features of the phenomenon of abuse of power and the need of adequately facing the great risk of impunity advocate in favor of promoting further interventions in this respect, such as the approval, at least by the Basque Parliament, of an Act of prevention of torture and mistreatment and of integral reparation of the victims of abuse of power (De la Cuesta 2014, 515 ff.). Such a legal text would be the best way of manifesting the Basque Country's public commitment to human rights and rejection of any kind of abuse of power. The aforementioned legal text should be closely followed by a declaration of the principles and governing rules of the public intervention, and by the design of a specific institutional structure devoted to addressing most completely this abominable victimization and preventing such events in the future. Recognition of the victims' rights and the establishment of efficient mechanisms for ascertaining and recording the truth should also be a main objective of the Act: these mechanisms ought to be independent of the conviction of the offenders, due to the obstacles to investigation and the broad space of impunity frequently detected in relation to the behaviors of abuse of power.

In a legal text of this kind – where the main purpose would be learning from the experience of suffering to look forward, to the future –, the right place should be given to a set of norms which address victimization in the past, thus guaranteeing the recognition of and reparation for these victims in the broader framework of a parliamentary agreement and providing a particularly relevant visibility for this action.

C. Consolidation of a peace culture

In any complex and pluralistic society, peace cannot be equated with the absence of any conflict. On the contrary, since conflicts are a normal element of life in a community, a peaceful society exists where, together with the collective renounce to illegitimate violence as a way of solving conflicts, the respect of fundamental rights is nor-

mally guaranteed, and appropriate and efficient efforts are developed in order to prevent and give the necessary answer to their violation.

Owing to the essential nature of justice and freedom, the reconstruction of the social tissue affected by violence urges the adoption of important efforts of extension and reinforcement of democratic culture, and particularly, the promotion of the culture of human rights and human dignity, as the basic ethical substratum of any peaceful society. This is a task that requires the collective action of all the political agents and social and public institutions; an active participation of victims is also desirable in order to alleviate their suffering and avoid the risk of exclusion.

Bibliography

Beristain (2011) La religión genera violencia. Más genera paz y justicia victimal, in: Muñoz Conde/Lorenzo Salgado/Ferré Olivé (eds.) *Un derecho penal comprometido. Libro Homenaje al Profesor Dr. Gerardo Landrove Díaz*, 141 ff.

Carmena/Landa/Múgica/Uriarte (2013) Informe-base de vulneraciones de derechos humanos en el caso vasco (1960-2013)

De la Cuesta Efforts to put an end to E.T.A.'s terrorism: evolution, present situation and perspectives of future, *Annales Internationales de Criminologie* 47 (2009), 23 ff.

De la Cuesta (2014) A Basque Law on Prevention of Torture?, in: *Landa* (ed.), *Justizia trantsizionala: proposamenak Euskal Herriarentzat/Justice transitionnelle: propositions pour le Pays Basque/Justicia transicional: propuestas para el caso vasco/Transitional Justice: Proposals for the Basque Case*, Institut Universitaire Varenne, 511 ff.

De la Cuesta Arzamendi El principio de humanidad en Derecho Penal, *Eguzkilore* 23 (2009), 209 ff.

De la Cuesta Arzamendi/Fernández Díez/Pego Otero/Pérez Machío (2012) Impulso de la paz y de la memoria de las víctimas del terrorismo. Evaluación de las políticas de impulso de la paz y fortalecimiento de la memoria de las víctimas del terrorismo

De la Cuesta Arzamendi/Mayordomo Rodrigo/Pérez Machío/Varona Martínez (2014) Terrorismo e Impunidad. Significado y respuestas desde la justicia victimal, *Paracuellos del Jarama*.

De la Cuesta Arzamendi (ed.)/Varona Martínez/Mayordomo Rodrigo/Echeburua Odriozola/Orbegozo Oronoz/Pego Otero/Llera Ramon/Leonisio Calvo/García Rabadan/Olalde Altarejos (auth.) (2014) Víctimas del terrorismo residentes en la CAPV. Desazón y esperanza en víctimas indirectas de asesinatos, Año 2013

Dünkel (1990) La conciliación delincuente-víctima y la reparación de daños: desarrollos recientes del Derecho penal y la práctica del Derecho penal en el Derecho comparado, in: *Beristain/De la Cuesta* (eds.), *Victimología*, 113 ff.

Dünkel/Drenkhahn/Morgenstern (eds.) (2008) Humanisierung des Strafvollzugs – Konzepte und Praxismodelle

Elzo (2014) *Tras la losa de ETA. Por una sociedad vasca, justa y reconciliada*

Fonseca/Garro Carrera/Martín Pallín/Rodríguez Uribe (2014) Informe sobre la situación procesal de los atentados perpetrados por organizaciones terroristas con resultado de muerte entre 1960 y 2014. Caso vasco

Gimeno Beviá (2014) El TEDH pone fin a la Doctrina Parot, in: *Diritto Penale Contemporaneo*, 5 Giugno, <http://www.penalecontemporaneo.it>

Informe sobre Víctimas de Vulneraciones de Derechos Humanos derivadas de la Violencia de Motivación Política (2008)

Landa (2014) Decrees on Victims of Human Rights Violations: Decree 107/2012. Balance and Prospects for the future, in: *Landa* (ed.), *Justizia trantsizionala: proposamenak Euskal Herriarentzat/Justice transitionnelle: propositions pour le Pays Basque/Justicia transicional: propuestas para el caso vasco/Transitional Justice: Proposals for the Basque Case*, 483 ff.

Pascual Rodríguez/Olalde Altarejos/Lozano Espina/Segovia Bernabé/Ríos Martín/Santos Itoiz/Castilla Jiménez/Carrasco Aseguinolaza/Etxebarria Zarrabeitia (2013) *Los ojos del otro. Encuentros restaurativos entre víctimas y ex miembros de ETA*, 2nd ed.

Ríos Martín/Sáez Rodríguez (2014) Del origen al fin de la doctrina Parot, in: *InDret* 3.

Varona Martínez The meaning of impunity: what do victims, offenders and society think of restorative encounters in the context of ETA terrorism in Spain?, in: *Restorative Justice: An International Journal* (2013)1, 215 ff.

Varona Martínez/Soletto Muñoz (2014), *Restorative Justice in Terrorist Victimisations: Comparative Implications*, *Oñati socio-legal series*, vol. 4, 3 ff.

Víctimas de vulneraciones de derechos humanos y sufrimientos injustos producidos en el contexto de violencia de motivación política (2010)

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