Can Environmental Restorative Justice be implemented in the Portuguese Judicial System? An ERJ Systematic Literature Review

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Abstract

The crimes against the environment became even more concerning during the Covid 19 pandemic because there was a change in the pattern of environmental criminality. The illicit activities related to the emission of greenhouse gases or pollution were joined by other violent crimes under the scrutiny of the authorities worldwide, the crimes related to the trafficking and damage of the wildlife. The international law frameworks have been trying to tackle the issue of environmental criminality to preserve the sustainability of international agreements. However, the crimes that harm biodiversity are diverse and threaten the balance of several ecosystems adding to the previous problems caused by climate change. That topic also represents an issue at the national level; the Portuguese judicial system in the last years has only a few cases in which people were declared guilty and fined for environmental crimes (Gomes, 2021 in Observador). This phenomenon has been widely disseminated in the media in Portugal; nevertheless, it has seen no change during the last decade. Most of these crimes cannot find a proper defendant because it is also hard to find a victim that can represent the environment and its interests in thesetypes of crimes (Skinnider, 2011; Motupalli, 2017).

Due to that, this research points out that it is essential to collect examples of environmental restorative justice that had success in other countries which can inform the implementation of the same procedures in Portugal. This would be a way to prevent the risk andmitigate the damage caused to the environment by these types of crimes (Biffi & Pali, 2019).

Therefore, this article will dive deep into the literature on environmental restorative justice to understand if some of the cases presented in state of the art (Hübschle et al., 2021; Wyatt et al.,2022) can be useful to apply in the Portuguese judicial system.

Research Question: Can Environmental Restorative Justice implementation be helpful to the Portuguese Judicial System?

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Introduction

Environmental crimes are widespread and have become more concerning due to the climate change emergency. One can define "Environmental crime is every permanent or temporary act or process which has a negative influence on the environment, people's health or natural resources (...)" (Pečar, 1981, p. 40). This type of crime has an inherent problem due to thecommon offender status "the high status of those causing the most harm who (like other powerfuloffenders) frequently reject the proposition that criminal definitions should apply to them (...)" (Ruggiero & South, 2010, p. 246). Several papers approach environmental criminality from a transnational perspective looking at the jurisdictional framework of the International Criminal Court (Lambert, 2017; Prosperi & Terrosi, 2017; Durney, 2018). However, little literature approaches the crimes against the environment from a national perspective (Motupalli, 2018; Suleiman, Raimi and Sawyerr, 2019).

It is essential to discuss environmental crimes from a restorative perspective, as the offence can cause various types of harm to the victims (Skinnider, 2011). The environmental,economic and social risk caused by this type of crime has a cumulative effect and turns civil society into a fragile entity. That is why it is crucial to comprehend the victimisation of environmental crimes as a collective experience that can be shared and brought to justice by opting for an alternative conflict resolution mechanism. (Skinnider, 2011).

The decision-makers try to cope with this situation, and there is a legislative effort to draw the lines that define who is or is not a victim and an offender in these crimes (Costa, 2014, p. 12). The juridical definition of the victim and the offender is fundamental to the RJ process. Even in cases where both parties are collective entities, such as private companies, or are hard to categorise (Forti et al., 2018), it is essential to find suitable representation that can go through the RJ mechanisms. If there is a deficit in the resolution of environmental crimes in Portugal, the same can be said for the implementation of RJ.

Restorative Justice in Portugal

The positive results achieved by restorative justice methods in other countries can be an example to the Portuguese judiciary. Recently, the EU incentivised its member states to adopt Restorative Justice mechanisms, mainly by imposing the transposition of community legal guidelines.

In Portugal, following the Framework decision nº 2001/220/JAI, from the European Council on the 15th of March, concerning the victim status in penal processes, it was approved the law nº 21/2007 on the 12th of June. This legal milestone is considered the first step toward apenal mediation system for adults in Portugal. The political recognition of restorative justice as an "unfinished process" (Walgrave, 2008, p. 11) resulted in the approval of the European directive 2012/29/UE, of the European Parliament and Council, on the 25th of October. This directive established the minimum requirements regarding the victims' rights, support and protection and mentioned other restorative practices besides mediation. In Portugal, the law nº 130/2015, of the 4th of September, consummated the transposition of this directive into the national legislation, although it did not mention any restorative measures.

The RJ implementation in the European context has raised several obstacles, exposing the failure of the top-down approach characterised by state regulation. The RJ community ethics are more aligned with indigenous values, often characterised as bottom-up structures. Among the reasons for this failure are the cultural differences that do not allow the implementation of ERJ to the same degree in all countries. The difficulties in finding representation for the victim and the offender, which can represent their interests. There is a lack of information about the possibility of recurring alternative conflict resolution mechanisms and the lack of judiciary workers with professional training on ERJ.

In Portugal, the data available about the processes of penal mediation show an implementation deficit. After an initial favourable period, between 2008 and 2011, the number of processes reduced drastically, with no process of penal mediation registered in the last years.
Therefore, it is important to comprehend the reasons behind the implementation issues of thepublic policy of RJ.

The decree nº 68-C/2008, of 22nd of January, confirmed the official start of the penal mediation, through the creation of the Penal Mediation System, which began in four administrative areas and expanded to fifteen in 2010. The regime started by the law nº21/2007 established a practical application during the first years, following the dynamics of the pilot project celebrated years before, between the University of Porto and the Research and Penal Action department (DIAP) of Porto (Rodrigues & Santos, 2015). The initial developments of themediation processes between 2008 and 2009, made the judicial system believe it could compete with other disciplinary procedures (Reis, 2010; Rodrigues e Santos, 2015). However, from 2011,the number of mediation processes was reduced drastically, reaching values close to zero in 2017(Data from the General-Directorate of Justice Policy [DGPJ]. Available at: https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Mediacao.aspx). Based on the data mentioned above, the reduction of Restorative Justice processes has been visible since 2016.

The RJ failure in Portugal is rooted in two leading causes (Rodrigues e Santos, 2015): The former issue is related to the small number of crimes in which can be applied the model of mediation, the fact that the victim and the offender cannot start the process in an individual basis (Zambiasi & Klee, 2018); The difficulty to define the sanctions without falling into the category of "private sanctions of freedom and duties that harm the offender dignity" (Leite, 2008).

The latter, concerning the implementation, several loopholes were identified. The Public Ministery role does not comprehend enough education about penal mediation. The insufficientinformation of the community also contributes to the low numbers of RJ in Portugal.

Zambiasi and Klee (2018) give relevance to the intervenients voluntarily wanting to make part ofthe process, which turns the PM role into an "excessive subsidiarity of the proceeding, making it hard to apply it" (672). Nevertheless, Rodrigues and Santos (2015) refer to the difficulties of achieving consensus between the parts because they are both in a moment of conflict.

Silva (2021) evaluated the level of commitment of the PM with the implementation of Penal Mediation in Portugal, trying to explain the absence of RJ processes in the last years. The author collected answers about penal mediation from sixteen PM magistrates who showed a lack of knowledge and interest in alternative conflict resolution mechanisms. The PM did not have an

active intervention in converting the law in the book (Law nº 21/2007) to law in action (337), which can justify the bottleneck dynamic. This study also mentioned that the PM magistrates didnot think they were provided with enough education to incentivise the usage of RJ tools.

By analysing the RJ policy in Portugal, there are two institutions fundamental to the process: the General Directorate for Reintegration and Prison Services (DGPJ), which is concerned with juvenile delinquency and post-sentence intervention; and the Cabinet for the Alternative Resolution of Conflicts (GRAL), that it is part of the DGPJ, responsible for intervening in a stagewhere mediation works as an alternative to the conventional justice. The law nº 21/2007, in article 12º, establishes the admission criteria to the role of mediator, defining as a requirement thepossession of a penal mediation course recognised by the Justice Ministry. An inappropriate mediator selection and weak education could have contributed to the lack of credibility in the system of penal mediation. The reduced public investment in complementary formation is also one of the reasons behind the failure.

On the other hand, Gavrielides (2017) realised that one of the bottlenecks to the RJ implementation could be the inefficiency of spreading information about these conflict resolution mechanisms. In a disputed situation, the clarification of the process and education on the usage of mediation are essential. There is a need to promote restorative values to avoid the rejection of agreements between offenders and victims.

Bussu et al. (2016) compared the development of RJ programmes in several European countries. They found that cultural differences are one of the main reasons for the weak implementation of RJ in southern European countries. The authors reinforce the importance of adapting the mechanisms of conflict resolution to the legal and cultural disposition of the different countries. The coercive imposition of a one size fits all model of RJ "is not realistic" (p.483).

Methodology

As a methodological approach, this research study opted for a systematic literature review that might be able to find a connection between the developments of restorative environmental justice worldwide and the Portuguese bottlenecks to its implementation. A Systematic literature

review summarises the relevant knowledge in the field (Siddaway, Wood, & Hedges, 2019). The Systematic Literature Review in this study will be helpful to trace state of the art with "concerns regarding quality issues, such as bias, replicability, credibility (…)" (Pati & Lorusso, 2018, p. 15); by virtue of that, it is seen as laying the foundations of the ERJ discussion.

The literature was cross-examined and filtered by *topic* and *abstract* through the words 1) Restorative Justice; 2) Environment; 3) Climate Change; 4) Corporate; 5) Offender; 6) Victim; 7) Restorative Mediation; 8) Representation. The literature in the field is not vast, so the inclusion of words that seem outside the Restorative Justice frame allowed this study to look into other subfields that could present valuable outcomes. Due to time constraints, the Scopus database was elected as the most efficient for this case of systematic literature review. This first stage of the systemic literature review resulted in 720 articles, including duplicates. From this original database, the second research stage was to analyse the results further and read the abstracts of all the articles in the database.

Moreover, after a careful scan, the total of relevant articles amounted to 65. Furthermore,the research then proceeded to read all the remaining articles to isolate the ones that could complement our research with valid contributions to the research question. This is an efficient way of understanding the development of the Environment Restorative Justice discussion in the academic realm. Due to that, 27 articles made it to the final database once that approached directly the topic of environmental crimes and the competence of the alternative mechanisms to conflict resolution. Comparing the articles in that group of scientific literature produced the outcome of this study, which is further discussed in the following sections.

Results and Discussion

This systematic literature review found articles that could illustrate state of the art in restorative environmental justice. These twenty-seven studies can be aggregated in five different dimensions considering the trending topics in this scholarship: 1) Offenders' punishment, 2) Victims' Rights, 3) Corporations' Accountability, 4) Minorities and Environmental harm, and 5) Restorative Justice in different judicial configurations. The issue behind finding articles inside thescope of environmental restorative justice was to draw the thin line between what can apply

directly to cases of ERJ or what is just Restorative Justice. Moreover, the original search on the Web of Science database became unpractical to work due to constraints of time and difficulties in extracting, from such a variety of articles, the ones that most contributed to the field. Due to that, the research is limited to the Scopus findings.

Offenders' punishment

The majority of the cases approached in this dimension adopt a non-western framework. This creates an analysis issue once the differences between the legislative and judicial systems oblige an effort of abstraction to understand how this could fit inside a different legal background. Some crucial cases can illustrate this incompatibility. The first case (Ali et al., 2022)debates the crimes in Indonesia, highlighting that treatment of the offenders can be the best way to achieve recidivism in illicit against the environment. It does discuss the problems associated with the penalties to be given to offenders. It is interesting to reflect on how the criminals can notcompensate for the damage done in forestry, plantation and environmental management, (idem) which makes the restorative justice goals obsolete.

In another relevant piece of work, Coronel Piloso et al. (2020) found that the judges in Ecuador are still insufficiently prepared to deal with restorative Justice. The lack of judges' specialist in Restorative Justice in Ecuador creates a systemic issue of double fines. This happenswhen an agreement is reached between the offender and the victims, which is later not recognizedin court. The court will put the offender and victim through all the process again, under the framework of the judicial system, which will result in a second fine imposed on the offender.
These malfunctions of the system erose the credibility of Restorative Justice in Ecuador.

Concerning the UK case, the authors suggest that it would be beneficial to identify "providers of community benefits" (Nehme & Pedersen, 2022, p.95) if some damage is done to the environment where the community resides. This process ensures that it is not the offender thathas to compensate for the environment affected directly, but it can contribute to a solution in another case. This has a cumulative effect of having the offenders held accountable for the crimes

whilst their reparation can be allocated to where it is most needed for the region's environmental protection.

In Australia, there are two cases where Restorative Justice was used, although with little success; the authors Al-Alosi and Hamilton (2019) point out as a significant bottleneck the lackof formation of the judges. In New Zealand, there are no cases registered (idem). However, the authors suggested that it would be essential to have the offenders donate to pro-environment projects. The goal is to restore the pre-offence state of the territory quickly.

The work by Cochran et al. (2018) is one of the few quantitative works in environmental restorative Justice. The authors found environmental offenders likelier to get community-based sentences than incarceration through multimodal regression methods. While in the other crimes, incarceration is way more usual. Another significant output of this work was the difference in punishment inside the category of crimes against nature. The same is to say that the samples for ecological crimes had less severe penalties than the crimes against wildlife and animals.

Victims' Rights

There is a need to create conditions to involve the victims of environmental crimes in the restorative justice process. The first step is to define what constitutes the victim status:

"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights,through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights." (Dura & Belishta, 2013)

It becomes essential to understand the role of the victim. Once in the environmental crimes, it can be hard to find out whom the victims are directly affected by the offender's actions.Besides that, the victims must be willing to participate in the restorative process or delegate theirdefence to a public entity that can represent their interests. (Dorsey, 2009)

At an international level, there is also a need to offer sufficient protection to victims, evenin situations that put corporations as offenders against victims from a foreign country. That is why the mandatory presence of translators, legal counsels, family, and the respective communityhas been implemented in the restoration meetings (Schormair & Gerlach, 2020). In the case of large companies that commit a crime against the environment, it is also important to allocate the accountability of this crime to the correct department. Suppose the company mistreat the judicial process internally, allocating it to a non-specialized department or trying to postpone the required judicial procedures (idem). In that case, it can result in a violation of the victim's rights. Besides, the learning process can be seriously compromised if the offender does not recognize the consequences of their actions and the need to repair it.

The complexity of identifying the victims and facing them with pro-restorative justice offenders is one of the bottlenecks for RJ in these types of crimes.

Corporations Accountability

The discovery by White (2017) that the payment of fines is part of the business structureand must be seen as the natural cost of a corporation's activities, which promotes recidivism.
There are two groups in the public opinion realm regarding restorative Justice's role in environment-related situations. The ones favouring ERJ to cope with environmental crimes believe that the corporations have inherent accountability that will allow them to understand the damage caused to the victims. On the other hand, the more sceptical believe punishment is more effective than shaming when dealing with corporate environmental crime. Besides that, some authors point out that corporations can have predatory habits and can only be tackled with solid political restraints. Hence, restorative Justice does not work, in their opinion. If a corporation assumes its share of responsibility in a crime, this is almost certainly done out of coercion and notas a voluntary choice (idem).

It was interesting to comprehend that the size of the corporations' boards has implicationsfor participation in restorative justice conferences (Nadeem, 2021). The author stated that smallerboards are more prone to be part of restorative solutions, once they are more effective in processing information and making decisions. At the same time, independent directors can

represent a wider group of concerns for society and the environment. Despite that, an environmental committee inside a company's structure does not necessarily mean a stronger will to be part of a restorative justice procedure. Ultimately, the direction board has the decision- making power (tendentially harder in larger boards), so it comes to the choice of which stakeholders they stand for (idem). As seen before, the allocation of the decision to follow a restorative justice procedure to a department that does not have the tools to cope with it can bringconsequences to the victims and the offenders (Schormair & Gerlach, 2020).

In a research work dedicated to the dangers of mislocating brownfield initiatives and their impact on the population and industrial policy, it becomes evident that brownfields can be seen as an attempt to exploit local underprivileged populations (Dorsey, 2009, p). Therefore, in these sites, the community must work with the local government officials and the companies to hold them accountable for their share of responsibility. The restorative justice initiatives in these areas take different forms: "clean up and recycle thousands of acres of contaminated property, leading to job creation, pollution prevention, greenspace preservation, and community economic redevelopment." (Dorsey, 2009, [abstract]). Therefore, a concerted intervention is needed between all the public and private stakeholders operating in the area to reinvent these areas and explore their environmental potential.

The corporation's accountability in environmental crimes and the usage of restorative Justice totackle some of the harm done to the suffering communities is one of the topics that is gaining awareness by many scholars in the field.

Minorities and Environmental harm

The literature has unanimously found that minorities, underprivileged groups and indigenous suffer the most from environmental harm (Scheidel et al., 2018; Cima, 2022). In the United States of America, the probability of a polluting company being fined when close to a typical white middle-class neighbourhood is lower than those in poor areas of the cities (Wolf, 2012). Racism is a permanent issue of climate change and its risks. Not only in the US, where theAfrican American minorities are the ones most susceptible to environmental suffering but when we look at the international arena, the poorest countries (typically located in Africa and Asia) are

the ones more exposed to the risks of climate change (Cima, 2022). The floods in India and Pakistan or the toxic waste landfills in North Africa are some examples of an environmentaldisparity based on economic segregation.

As Catney et al. point out, "for people living in poverty in deprived areas, personal responsibility for carbon emissions may be the furthest thing from their minds" (2013, p.11); however, they will suffer from an unjust energy transition process. Once again, to avoid this inequality in access to new energy sources, the governments must respect the active citizenship of the community members and engage them in the decision-making process to mitigate disparities (Lacey-Barnacle, 2020). The case of the brownfield initiatives (Dorsey, 2009) approached in the section above illustrates the nefarious effects of an environmental protection movement that does not include all citizens.

To engage these communities in the environmental restorative justice movement is vital to provide information on the possibilities of following a restorative justice approach. In the work of Dilay, Diduck and Patel (2020), a particular concern of the population was visible with the lack of opportunities to be publicly heard in cases such as environmental damage or employment loss. These concerns are tightly related to the judicial phenomenon of companies winning their legal cases against communities of unprivileged citizens. Therefore, the citizens asked for more transparency and public hearings (idem).

Finally, the indigenous culture has a much more spiritual sense of Justice (Hallward et al., 2021). Due to that, these groups are much keener to be part of restorative circles when compared with state-centric justice solutions, typical of the western perspective. The environmentally friendly measures of the global north are implemented to protect human rights in dangerous zones due to climate change. However, the indigenous groups focus on the rights of nature per se;henceforth, it increases the gravity of a crime against the environment (idem).

Restorative Justice in different judicial configurations

In New South Wales, Australia, the case of Garret vs Williams became well known onceit was one of the country's pioneers in the restorative justice paradigm (Hamilton, 2015). It was

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the first case in which the Protection of the Environment Operations Act 1997 (NSW) regulated a dispute. This law allowed the court to order the offender to carry out activities that could help the community damaged by environmental crime. In this case, the outcome of the Restorative Justice conference included an apology by the offender, a donation to the local college for a native tree planting project, the payment for a barrier around the site and the reinforcement of the Climate Change Adaptation Resource Center (Hamilton, 2008). The environment protection and the awareness of the indigenous benefited from these actions; however, there were no further developments in the restorative justice framework in Australia. In the article by Hamilton (2015) , the authors defend that in the case of a lake that became so polluted that it was impossible to swim in it. The victims were given the option of attending the conference personally or forming acollective entity that could represent the general interest in an alternative mechanism of conflict resolution.

The Belgium judicial configuration approved the Environmental Prosecution Memorandum in May 2000, leading to a crime hierarchy (Billiet, Blondiau & Rousseau, 2014). Environmental crimes considered more dangerous (with heavier penalties) threaten public healthor damage the natural environment's intrinsic value. Billiet, Bondiau and Rousseau specify that Belgium does not have a specialized environmental court or prosecutors; this is a problem due to the growing legislation on environmental issues that do not have a competent court to solve its conflicts. Is there space for environmental restorative Justice in the European legal frameworks?

Cultivating a restorative culture in Europe is necessary so that justice professionals can be more prepared to deal with these types of cases (Bussu, Patrizi & Lepri, 2016). The communities must be informed about the possibility of using restorative Justice to start being empowered by this conflict resolution mechanism. Its sporadic implementation in southern European countries leaves it on the edge of being forgotten soon by their judiciary systems (idem).

Conclusion

Little literature can inform the debate about environmental restorative justice in Portugal. Nevertheless, this systematic literature review can draw some important lessons about the requirements for a successful implementation of Environmental Restorative Justice. Applying a

practical ERJ framework is crucial to guarantee that the offender does not go through a double punishment (in the ERJ conference and inside the judiciary system). A better articulation between the conventional judiciary system and the alternative conflict resolution mechanisms is necessaryto prevent double punishment. This includes a solid and continuous formation of judges, prosecutors and lawyers about the process of ERJ.

Besides, the victim's rights are essential to accomplish the goals of ERJ. The minorities and indigenous communities primarily affected by environmental crimes must be informed aboutthe possibility of using restorative justice to solve the case. It should be given the opportunity to the victims, after identifying who was impacted by the respective crime, to organize themselves in a representation entity that can help their case. There must also be aware of the disparities between punishments to corporations in poor and wealthy areas. Restorative justice can help to solve that inequality once the voluntary participation of both victims and offenders ideally produces the reinstatement of the pre offence state. When corporations commit a crime, allocating the case to the most appropriate department is essential. To send the case to a negligentdepartment can undermine the company's credibility and bring more frustration to the victims.

Finally, to consolidate environmental restorative justice in western countries is to promotea different judiciary culture that avoids punishment as the ultimate outcome. The goal is to repairthe harm as more countries adopt tight regulations on environmental matters. This transition callsfor creating judiciary structures that can mitigate environmental crimes, once recidivism reaches high levels when the offenders do not understand the impact provoked on the affected communities and the surrounding environment.

In a nutshell, the limitations of the research are related to the few articles written in this field that do not allow to draw of significant lessons of ERJ implementation that can be used in western countries. The lack of restorative tradition is the main explanatory factor for the small number of research in this area. However, it would be interesting to follow this research path bystudying the practical cases of ERJ inside the European Union that could be externalized to similar crimes in other EU countries.

Portugal still has a long way to go to solidify restorative justice as an effective mechanismof conflict resolution; although the climate change impact has been felt throughout the last years in the Portuguese territory, and the environmental crimes have sharpened the risks associated

with the environmental degradation. Due to that, it is essential to find strategies that can repair the harm done and increase the number of environmental crimes that go through judgement. If ERJ is the solution is not guaranteed; however, its ability to prevent recidivism has the potentialto mitigate the effects of crimes such as waste mismanagement, pollution and forest damage.

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